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UNITED STATES' USE OF THE DOCTRINE OF ANTICIPATORY SELF-DEFENSE IN IRAQI CONFLICTS

Donald Nungesser*

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I. INTRODUCTION

This article examines the implications of the United States' bombing of Iraq in 1993 on the United States' war against Iraq ("Iraqi War") in 2003. Although there are a variety of implications, this article specifically focuses on the doctrine of anticipatory self-defense. After the 1993 bombings occurred, there was

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a considerable amount of articles written about how the United States had broadened the doctrine of anticipatory self-defense by justifying the bombings under this doctrine. However, the effect of the bombings on future United States' military actions has not been explored.

In March 2003, the United States declared war against Iraq. The United States justified the war based on Iraq's suspected development of nuclear and biological weapons and its suspected involvement with terrorist organizations. Based on this information, the United States believed that it would be attacked by Iraq or that Iraq would support an attack against it in the future. The United States' war against Iraq, therefore, was based on the doctrine of anticipatory self-defense.

This article attempts to determine if the United States' bombings of Iraq in 1993 broadened the doctrine of anticipatory self-defense to the extent that the United States had a basis under international law for its war against Iraq in 2003. Section I summarizes the law of self-defense and anticipatory self-defense by examining two areas of international law: customary international law and Article 51 of the United Nations Charter.¹ This summary establishes the framework under which both President Clinton's 1993 bombing of Iraq and the Iraqi War will be analyzed. Section II discusses President Clinton's actions against Iraq. This section begins with an introduction of the factual background of the 1993 bombings on Iraq and then examines the scholarly analysis of the bombings. The section focuses on President Clinton's justifications for the attack and determines whether his attack was permitted under the legal framework established in Section I. Section III examines President George W. Bush's perspective on anticipatory self-defense as outlined in his State of the Union Address in 2003 and his congressional documents. This section examines President Bush's involvement with the United Nations ("U.N."). Section IV discusses the implications of President Clinton's 1993 bombing of Iraq on the 2003 Iraqi War by focusing on three areas: international support, the United Nations, and the scope of the strikes. Section V draws some conclusions as to those implications.

¹ U.N. CHARTER art. 51.

II. THE DOCTRINES OF SELF-DEFENSE AND ANTICIPATORY SELF-DEFENSE

A. *Self-Defense in Customary International Law*

The doctrine of self-defense must be explored before the doctrine of anticipatory self-defense can be understood. The concept of self-defense in international law began with proponents of natural law theory. Natural law theory suggests that self-defense was an inherent right and was an integral part of defining war.² Some scholars suggest that Article 51 of the United Nations Charter reflects this natural right by using the term "inherent right."³

The early notions of natural law theorists aided in the development of the theory that a country's right to self-defense is a necessary component of its power in the world.⁴ This theory holds that law cannot govern the right to self-defense when there is a grave threat to the power of a state or its way of life.⁵ What constitutes a threat is determined by the state that perceives the threat. The United States has supported this theory in the past. Upon signing the Kellogg-Briand Treaty of Renunciation of War in 1928, the United States declared that a state "alone is competent to decide whether circumstances require recourse to war as self-defense."⁶

Contrary to both natural law theorists and power theorists, other scholars argue that a country's right to self-defense is not above the law and should be regulated to some extent. For example, Hersch Lauterpacht, a historian, believes that the initial decision of whether to use force based on self-defense should be made by the states.⁷ However, unlike power theorists, Lauterpacht believes that the state's right to self-defense is relative,

² Maureen F. Brennan, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 LA. L. REV. 1195, 1197 (1999). A state's preservation of itself was a natural right that could not be controlled by positive law. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 135 (Boston 1991).

³ SCHACHTER, *supra* note 2, at 135.

⁴ *Id.* at 136.

⁵ *Id.*

⁶ SCHACHTER, *supra* note 2, at 136 quoting J. Miller, *The Peace Pact of Paris*, 213, 214 (1928) (quoting U.S. note of June 23, 1928).

⁷ SCHACHTER, *supra* note 2, at 136.

not absolute.⁸ In other words, this right is "regulated to the extent that it is the business of the courts to determine whether, how far, and for how long, there was a necessity to have resource to it."⁹ According to Lauterpacht's theory, an objective judicial body makes the final determinations as to the legality of a state's actions, rather than the subjective judgment of a state.¹⁰

The tension between these opposing theories exists not only in academia, but also in the international judicial bodies. Lauterpacht's theory received support in the Judgment of the International Military Tribunal in Nuremberg in 1946.¹¹ The German Nazi leaders argued, "Germany had acted in self-defense and that every state must be the judge of whether, in a given case, it has the right of self-defense."¹² The Nuremberg Tribunal rejected that argument, holding that, "whether actions taken under the claim of self-defense were in fact aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to be enforced."¹³

However, in the 1980s, the United States began to formally express its adherence to the power theory of self-defense.¹⁴ In *Nicaragua v. United States*,¹⁵ the United States argued that it alone was in a position to determine the necessity of the defense measures it had taken against Nicaragua.¹⁶ Although the International Court ruled against the United States on other issues, the United States' argument began to establish the basis for its rejection of the Court's jurisdiction. The United States believed it had a right to refuse to submit claims to the International Court based on national security concerns.¹⁷ "The United States position has been interpreted as rejecting any external

⁸ *Id.* at 137.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ SCHACHTER, *supra* note 2, at 137 (quoting Judgment of the International Military Tribunal at Nuremberg, 1946. *Trial of German Major War Criminals Before the International Military Tribunal*, 208 (1947)).

¹⁴ SCHACHTER, *supra* note 2, at 137.

¹⁵ *Military and Paramilitary Activities (Nicar. v. U. S.)*, 1986 I.C.J. 14 (June 27).

¹⁶ SCHACHTER, *supra* note 2, at 136.

¹⁷ *Id.* at 137-38.

authority to judge the legitimacy of American defense measures, a position that would contradict the idea of self-defense as a right defined by law."¹⁸

Regardless of whether the determination is made by a state or a judicial body, there are three elements to the doctrine of self-defense that exist in customary international law: necessity, immediacy, and proportionality.¹⁹ The necessity and immediacy requirements are less controversial than the requirement of proportionality.²⁰ The principle of necessity requires a country to explore the peaceful resolutions to a threat before relying on the use of military force.²¹ No other practical alternative to counterforce may exist.²² The principle of immediacy involves the requirement that the defensive acts must be immediately subsequent to the armed attack.²³ However, this requirement often receives liberal treatment. For example, in the Falkland Islands Conflict in 1982, a month went by before British forces counterattacked.²⁴

Many scholars consider the element of proportionality as the single most important limitation of a state's right to self-defense.²⁵ "Self-defensive measures must be proportionate to the seriousness and scope of the attack. Since retaliation and punitive actions are not permitted, the actions are restricted to those necessary to repulse an attack."²⁶ Accordingly, the main effects of proportionality are to inhibit an escalation of the conflict and to discourage reprisals, *i.e.*, a country's response after an attack that is punitive in nature.²⁷

The measurement of what defensive measures constitute a proportionate attack has led to controversy. Some scholars believe that the measurement of proportionality cannot be judged simply by comparing body counts.²⁸ However, as the number of

¹⁸ *Id.* at 138.

¹⁹ UNITED NATIONS: LAW, POLICIES AND PRACTICE 1167 (Rudiger Wolfrum ed., 1995).

²⁰ *Id.*

²¹ *Id.* at 1168.

²² *Id.*

²³ *Id.* at 1167.

²⁴ See Wolfrum, *supra* note 19.

²⁵ *Id.* at 1168.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

injuries and deaths to non-combatants increase in a defensive measure, there is often a claim afterwards that a defensive measure was disproportionate.²⁹ This is especially relevant when considering self-defense actions against terrorists. Since many terrorist bases have been located in the middle of cities, the areas surrounding the bases often contain non-combatants.³⁰ Countries that engage in aerial bombing are often confronted with the claim that the attacks would be disproportionate to the terrorist attack because of the probability of non-combatant injuries and deaths.³¹

B. *Anticipatory Self-Defense*

Self-defense is a response to an attack, whereas anticipatory self-defense comes before an attack and is designed to mitigate harm.³² Emmerich de Vattel, a philosopher, formulated a doctrine that represents the prevailing view of most early scholars:

A nation has a right to resist an injurious attempt, and to make use of force . . . against whoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.³³

The writings of scholars were transformed into legal doctrine with an incident in 1837 that has become known as The Caroline Case.³⁴ This involved an attack by British soldiers on an American ship, the Caroline, which was being used to transport supplies to a rebellion in Canada against Britain.³⁵ When the British government claimed self-defense, Secretary of State, Daniel Webster, sent a *diplomatic communiqu  * to the British that laid out the parameters of anticipatory self-defense: "necessity of self defense, instant, overwhelming, leaving no choice of

²⁹ SCHACHTER, *supra* note 2, at 154.

³⁰ Wolfrum, *supra* note 19, at 154.

³¹ *Id.*

³² Roger K. Smith, *The Legality of Coercive Arms Control*, 19 YALE J. INT'L. L. 455, 477 (1994).

³³ Brennan, *supra* note 2, at 1195, 1197.

³⁴ Smith, *supra* note 32, at 479.

³⁵ *Id.*

means, and no moment for deliberation.”³⁶ From this statement, scholars have proposed that necessity, immediacy, and proportionality be the basic requirements for the doctrine of anticipatory self-defense.

The existence of these elements in customary international law is undisputed. The controversy arises when the following question is posed: Does Article 51 of the United Nations Charter³⁷ differ from customary international law? In other words, does Article 51 incorporate the custom of anticipatory self-defense? Article 51 provides that, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs* against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”³⁸ The basic issues surrounding this text are:

[W]hether the drafters of the Charter intended to limit the pre-existing right to only cases of armed attack; whether the armed attack may be interpreted in some instances as threats of imminent attack; or whether the Charter merely sets out to state the rule concerning a particular case, but does not purport to limit all cases of self-defense.³⁹

Scholars are split on these issues and their positions are generally characterized in one of two ways. First, some scholars narrowly interpret Article 51 due to two provisions of the United Nations (“U.N.”) Charter that prohibit the use of aggressive force and ensure the peaceful resolution of disputes.⁴⁰ Article 2(3) states that, “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace, security, and justice, are not endangered.”⁴¹ Article 2(4) provides: “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with purposes of the

³⁶ Brennan, *supra* note 2, at 1205.

³⁷ U.N. CHARTER art. 51, *supra* note 1.

³⁸ *Id.* (emphasis added).

³⁹ Brennan, *supra* note 2, at 1199.

⁴⁰ *Id.*

⁴¹ U.N. CHARTER art. 2, para. 3.

United Nations.”⁴² From these provisions, scholars suggest the overall goal of the Charter is the restriction on the use of force. Furthermore, these scholars look to the plain language of Article 51. They suggest that anticipatory self-defense no longer exists under Article 51 because of the clause “*if an armed attack occurs*.”⁴³ In their view, the anticipation of a threat, regardless of the necessity, imminence, or proportionality, cannot be justified because Article 51 requires that an armed attack needs to occur in order to justify a military response based on self-defense.⁴⁴

Second, some scholars offer a broad interpretation of Article 51 and argue that it does not restrict the pre-existing elements of anticipatory self-defense, but rather preserves them.⁴⁵ In support of their argument they make three points. First, they assert that the negotiating history, or the Charter’s *travaux préparatoires*, incorporate the entire customary law of self-defense.⁴⁶ Second, they assert that since the Security Council has approved of certain countries’ anticipatory actions, then the U.N. interprets Article 51 to incorporate the customary elements.⁴⁷ For example, the Security Council’s response to the 1967 Arab-Israeli War, the 1981 Israeli raid on Tuwaitha, and the 1962 Cuban Missile Crisis, suggests that some forms of anticipatory self-defense are allowed under the Charter.⁴⁸ The U.N.’s response to these situations may have established that provocative weapons systems had to actually be deployed by a country in order for the attacking country to justify anticipatory self-defense.⁴⁹ Third, they argue that the Charter is “pre-atomic” and that a narrow interpretation would not reflect the realities of the advanced weapons used in war.⁵⁰

The International Court of Justice in *Nicaragua v. United States* examined the relationship between the Charter and cus-

⁴² U.N. CHARTER art. 2, *supra* note 1, para. 4.

⁴³ U.N. CHARTER art. 51, *supra* note 1.

⁴⁴ Smith, *supra* note 32, at 481.

⁴⁵ *Id.*

⁴⁶ Thomas K. Plofchan, *Article 51: Limits on Self-defense?*, 13 MICH. J. INT’L L. 336, 343-50 (1992).

⁴⁷ Smith, *supra* note 32, at 492-94.

⁴⁸ *Id.* at 481-92.

⁴⁹ *Id.*

⁵⁰ Brennan, *supra* note 2, at 1205.

tomary international law.⁵¹ The Court addressed the United States' claim of self-defense in an action brought by Nicaragua in response to the United States' support of rebel forces.⁵² The United States maintained that the customary right and the Charter right of self-defense were identical, but that the court should not base its ruling on customary law since both parties in the action were parties to the Charter.⁵³ The Court disagreed by holding that, "the Charter does not supervene custom, but exists alongside the customary law, and [the Court] believed the two sources were not substantively identical."⁵⁴ The Court decided the case on the basis of customary international law and held that the United States' actions were illegal when it engaged in direct attacks against Nicaragua and trained, armed, supported, and financed Nicaraguan rebel forces.⁵⁵

III. THE UNITED STATES' BOMBING OF IRAQ IN 1993

A. *Factual Background*

In 1993, the United States fired twenty-three tomahawk missiles on Iraqi military outposts.⁵⁶ The Clinton administration stated that the attack was in response to an Iraqi plot, supported by Saddam Hussein, the Iraqi dictator, to assassinate former President George Bush while he visited Kuwait. Secret Service, Federal Bureau of Investigation ("FBI"), and Central Intelligence Agency ("CIA") went to Kuwait to collect evidence on the assassination plot.⁵⁷ The administration concluded that an assassination plot existed based on intelligence reports and

⁵¹ Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 15.

⁵² *Id.*

⁵³ Brennan, *supra* note 2, at 1199.

⁵⁴ *Id.*

⁵⁵ Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 15.

⁵⁶ Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT'L L.J. 207 (2001); see Thomas L. Friedman, *Raid on Bagdad: An Assessment: The Missile's Message*, N.Y. TIMES, June 28, 1993, at A1, available at LEXIS, The New York Times, June 28, 1993; see also Douglas Jehl, *U.S. Convinced Iraqi Saboteurs Plotted to Kill Bush*, N.Y. TIMES, May 8, 1993, at A5 available at LEXIS, The New York Times, May 8, 1993; Barbara Vobejda, *Clinton awaits probe of Bush Death Plot*, WASH. POST, May 9, 1993, at A14.

⁵⁷ Alan Surchin, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L L. 457, 459-61 (1995).

on a trial in Kuwait, which convicted the Iraqi assassins for the conspiracy to assassinate George Bush.⁵⁸ Critics of the attack claimed the administration's evidence was weak and circumstantial.⁵⁹

In support of the attack, President Clinton told Congress that the United States had an inherent right of self-defense as recognized in Article 51.⁶⁰ Madeleine Albright, Secretary of State, further supported this right at an emergency meeting of the Security Council of the United Nations.⁶¹ Although Ms. Albright did not ask the Council for formal approval of the attack, she argued that member states might regard an attack against a former leader as an attack against the state itself and react accordingly.⁶² Thus, she concluded that an attempted attack on a former President was as an attack on the United States, which gave the United States the right to respond directly under Article 51.⁶³

"The majority of Security Council members accepted the United States' position that the raid was a justified act of self-defense."⁶⁴ "Many members cited the evidence presented to them as a reason for their support."⁶⁵ These members viewed the attack, "as either a necessary response to terrorism or as an unavoidable result of a threatened assassination."⁶⁶ For example, the British Prime Minister viewed the attack as a justified act of self-defense because of the "intolerable situation created by a threat against former President Bush's life."⁶⁷ Belgian Foreign Affairs Minister Willy Claes cited Article 51 when maintaining, "retaliatory measures were justified since the U.S. government had sufficient evidence to implicate Iraq in the assassination plot."⁶⁸ German Chancellor Helmut Kohl labeled

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Hendrickson, *supra* note 56, at 213.

⁶¹ Surchin, *supra* note 57, at 465.

⁶² *Id.* at 459-61.

⁶³ *Id.*

⁶⁴ Hendrickson, *supra* note 56, at 214.

⁶⁵ Surchin, *supra* note 57, at 465-70.

⁶⁶ *Id.* at 465.

⁶⁷ *Id.* at 467 (citing Chris Moncrief, *Major Gives Full Backing for Attack on Baghdad*, F.B.I.S., June 28, 1993, at 9).

⁶⁸ *Id.* at 468 (citing William Claes, *Baghdad Attack "Clear Signal" to Serbia*, F.B.I.S., July 2, 1993, at 10).

the action as a "justified reaction to a detestable attempted act of terrorism."⁶⁹ However, other foreign countries were critical of the United States' assertion of a unilateral right.⁷⁰ These countries asserted that the Clinton administration could have sought Security Council approval prior to the bombing rather than pursuing an unilateral action.⁷¹

B. *Scholarly Analysis of the 1993 Bombings*

Critics of the attack have analyzed the 1993 bombings in relation to the elements of anticipatory self-defense found in customary international law and have drawn two main conclusions. First, the attack was unnecessary because, "no American intelligence information shared with the public suggested that another attack was being planned."⁷² Furthermore, since the United States did not attempt to resolve the situation peacefully, the attack was an unnecessary resolution to the problem.⁷³ Second, the attack was not immediate since the plot emerged in April 1993 and the bombing did not occur until June 1993.⁷⁴ Moreover, they suggest that the attack was a reprisal for the assassination plot rather than anticipatory self-defense.⁷⁵ Although some scholars argue that there is a place in international law for reasonable reprisals, this justification was not presented by the United States to the Security Council.⁷⁶ Therefore, any chance for the Security Council to analyze the merits of reasonable reprisals was lost when the United States took unilateral action against Iraq.

Critics also look to the language of Article 51 where it states, "*if an armed attack occurs.*"⁷⁷ They argue that since the plot was discovered well before its execution, no armed attack

⁶⁹ *Id.* (citing Helmut Kohl, *U.S. Attack on Baghdad Justified*, F.B.I.S., July 2, 1993, at 11).

⁷⁰ Hendrickson, *supra* note 56, at 207, 214.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99, 113 (1994).

⁷⁴ Surchin, *supra* note 57, at 474-75.

⁷⁵ Baker, *supra* note 73, at 115.

⁷⁶ Surchin, *supra* note 57, at 487-93.

⁷⁷ U.N. Charter, *supra* note 1.

actually occurred.⁷⁸ They further argue that the plot was not an armed attack by Iraq, but by terrorists who had some association with Iraq. Therefore, they conclude that Iraq should not have been bombed.⁷⁹

Proponents of the bombing offer a different analysis of the elements of anticipatory self-defense. Proponents assert that when the assassination plot is placed in the context of the overall international relations between Iraq and the United States, the bombing was necessary.⁸⁰ They assert that the assassination attempt occurred in the wake of the Gulf War, and that since the War's end, Iraq had continually interfered with U.N. inspectors, threatened allied no-fly zones, and threatened force against its own population.⁸¹ The proponents suggest that when the assassination plot is viewed in this context, future assassination attempts were a realistic threat, and peaceful negotiations were useless.⁸²

Some scholars conclude that an absolute requirement of immediacy in the modern world is unrealistic because it would limit the involvement of the political branches.⁸³ Thus, they believe President Clinton's delay was justifiable. With respect to proportionality, proponents argue that the Clinton administration structured the attack as a low-intensity bombing focused on military outposts. These scholars suggest that the low-intensity of the bombing indicated that the attack was meant as a deterrent, rather than a reprisal or punishment.⁸⁴

Proponents analyze the language of Article 51 to assert that in modern day warfare, terrorist attacks should be considered armed attacks.⁸⁵ They contend that when the United Nations Charter was drafted, the focus was on the traditional concept of warfare, that is, a country's military force's need to invade another country's territory.⁸⁶ They suggest that the fo-

⁷⁸ Hendrickson, *supra* note 56, at 214.

⁷⁹ *Id.* at 214.

⁸⁰ Lieutenant Commander Winthrop, *Attack on the Iraqi Intelligence Service Headquarters*, 1993 ARMY LAW. 45 (1993).

⁸¹ *Id.*

⁸² Surchin, *supra* note 57, at 474.

⁸³ *Id.*

⁸⁴ Winthrop, *supra* note 79, at 45, 47.

⁸⁵ Brennan, *supra* note 2, at 1203-05.

⁸⁶ *Id.*

cus on traditional territorial invasions obscures alternative forms of aggression that trigger the right to self-defense, such as terrorist attacks.⁸⁷ Proponents argue that the Security Council should start to realize that modern day warfare includes terrorist attacks as armed attacks.⁸⁸ However, even proponents of the 1993 bombing concede that since President Clinton acted unilaterally, the United States lost an opportunity to push the Security Council to adopt this expansive definition.⁸⁹

Although the Security Council did not have an opportunity to judge the attack, the international community did. Stuart Baker, an internationally recognized scholar, characterized the international approval of the attacks as a signal of a theoretical shift in the interpretation of anticipatory self-defense.⁹⁰ Mr. Baker compared the international disapproval of the Reagan administration's decision in 1986 to bomb Libya with the 1993 bombings of Iraq.⁹¹ He suggested that there were significant factual similarities between the two bombings. He specifically pointed to the fact that neither Libya nor Iraq was engaged in a current, on-going armed attack against the United States.⁹² He explains the difference in the international reaction by arguing that in 1986, the international community had a restrictive view on anticipatory self-defense, whereas in 1993, the international community had a very expansive definition of anticipatory self-defense.⁹³ Mr. Baker contemplated the effects of this expansive definition when he stated:

Whether future legal historians will remember the 1993 Iraq air strikes as the moment when the world decided to take a stand against terrorism, or as the moment when the international law fatally loosened its grip on the wild forces of international instability, will be determined in the years to come."⁹⁴

⁸⁷ *Id.*

⁸⁸ Surchin, *supra* note 57, at 487-89.

⁸⁹ *Id.* at 475-76.

⁹⁰ Baker, *supra* note 73, at 99, 115.

⁹¹ *Id.* at 111-13.

⁹² *Id.* at 111-12.

⁹³ *Id.* at 110-13.

⁹⁴ *Id.* at 116.

IV. THE IRAQI WAR

A. *President George Bush's Perspective on Anticipatory Self-Defense*

In response to the 9/11 terrorist attacks on the World Trade Centers, the Bush administration declared a War on Terrorism.⁹⁵ In doing so, President Bush wrote that, "[o]ur immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction or their precursors."⁹⁶ In achieving this goal, the Bush administration depends on the right of anticipatory self-defense:

While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country . . .⁹⁷

Moreover, it is important to note that the Bush administration recognizes the debate on whether terrorist attacks should be considered armed attacks:

Legal scholars and international jurists often conditioned the *legitimacy of preemption on the existence of an imminent threat* – most often a visible mobilization of armies, navies, and air forces preparing to attack. *We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.* Rogue states and terrorists do not seek to attack us using conventional means . . . Instead they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning . . . To forestall or prevent such hostile acts by our adversaries, *the United States will, if necessary, act preemptively.*⁹⁸

⁹⁵ See Todd S. Purdum, *After the Attacks: The White House; Bush Warns of a Wrathful, Shadowy and Inventive War*, N.Y. TIMES, Sept. 17, 2001, at A1; see also David Sanger, *Bush orders Heavy Bombers near Afghans; Demands Bin Laden now, not Negotiations*, N.Y. TIMES, Sept. 20, 2001, at A1.

⁹⁶ President's Letter to Congress on the National Security Strategy of the United States of America, 6 (Sept. 14, 2002), <http://www.whitehouse.gov/nsc/print/nssall.html>.

⁹⁷ *Id.*

⁹⁸ *Id.* (emphasis added).

President Bush began applying the right of anticipatory self-defense to Iraq when he stated in his State of the Union Address that Iraq was one of the countries that made up the "axis of evil."⁹⁹ As to the threat posed by Iraq, he stated that, "Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax, nerve gas, and nuclear weapons for over a decade."¹⁰⁰ He also intimated that the United States would act unilaterally by stating, "I will not wait on events while danger gathers. I will not stand by as peril draws closer and closer."¹⁰¹

In the wake of the 9/11 terrorist attacks, the idea that Iraq could present a threat seemed realistic. However, in the summer of 2002, when the Bush administration began to more seriously consider preemptive strikes against Iraq, the once imminent threat posed by Iraq seemed distant to the international community.¹⁰² In an attempt to build support for the preemptive strikes, Bush made two speeches in which he specifically discussed why Iraq was a threat.¹⁰³ In both speeches, President Bush outlined the Iraqi threats: (1) continued repression and violation of human rights; (2) failure to return or account for prisoners of war; (3) continued state support for terrorism; (4) stockpiling and developing weapons of mass destruction, that is, biological and chemical weapons and nuclear long-range missiles; (5) violating economic sanctions; (6) evasion of U.N. inspection demands; and (7) violation of several U.N. resolutions.¹⁰⁴

President Bush's focus on Iraq culminated in two important resolutions. The first was a joint congressional resolution enti-

⁹⁹ President's State of the Union Address (Jan. 29, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> [last visited Jan. 2004]; See Karen DeYoung, *Bush Lays Down a Marker for 3 'Evil' States*, WASH. POST, Jan. 30, 2002, at A1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See David Sanger, *Bush asks Leaders in 3 Key Nations for Iraq Support*, N.Y. TIMES, Sept. 7, 2002, at A1.

¹⁰³ See President Bush's Speech on the Use of Force (Oct. 8, 2002), <http://www.cnn.com/2002/ALLPOLITICS/10/07/bush.transcript/index.html> [last visited Jan., 2004]; See also President Bush's Iraq Speech to the United Nations (Sept. 12, 2002), <http://www.cbsnews.com/stories/2002/09/12/national/printable521781.shtml>.

¹⁰⁴ *Id.*

tled, "Authorization for the Use of Military Force Against Iraq."¹⁰⁵ This resolution gave President Bush the following authority:

The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to – (1) defend the national security of the United States against the continuing threat posed Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.¹⁰⁶

The second was an U.N. resolution entitled, "Resolution 1441."¹⁰⁷ This resolution stated that Iraq was in material breach of its obligations to the U.N. because of Iraq's failure to comply with previous resolutions.¹⁰⁸ The resolution decided that Iraq needed to provide the United Nations Monitoring, Verification, and Inspection Commission ("UNMOVIC"), and the International Atomic Energy Agency ("IAEA"), with "immediate, unimpeded, unconditional, and unrestricted access" to relevant Iraqi facilities and officials.¹⁰⁹ Along with this unfettered access, Iraq needed to provide UNMOVIC and IAEA with a declaration that described "all aspects of its programs to develop chemical, biological, and nuclear weapons. . . ."¹¹⁰ Based on the above information, UNMOVIC and IAEA were requested to provide reports to the Security Council as to Iraq's cooperation, truthfulness, and the status of Iraq's weaponry.¹¹¹ From these reports, the Security Council was required "to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."¹¹² Finally, the most controversial clause of the resolution provided, "the Council has repeatedly warned Iraq that it will face *serious consequences* as a result of its continued violations of its obligations."¹¹³

¹⁰⁵ H.R.J. Res. 114, 107th Cong., "Authorization for Use of Military Force Against Iraq Resolution of 2002" (2002) (enacted).

¹⁰⁶ *Id.*

¹⁰⁷ U.N. SCOR, 36th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

¹⁰⁸ *Id.* at 1-3.

¹⁰⁹ *Id.* at 3.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 4-5.

¹¹² See U.N. SCOR, *supra* note 107.

¹¹³ *Id.* at 5. (emphasis added).

In the months that followed these resolutions, President Bush gave another State of the Union Address.¹¹⁴ When he focused on Iraq, he began emphasizing the fact that the United States had been cooperating with the Security Council in the drafting of Resolution 1441.¹¹⁵ In the same vein, he stated that the Iraqi government, specifically Saddam Hussein, had not complied with the resolution, by hiding his weaponry and not allowing UNMOVIC and IAEA to interview Iraqi scientists.¹¹⁶ Finally, he catalogued the evidence against Iraq:

[B]iological weapons sufficient to produce over 25,000 liters of anthrax . . . materials sufficient to produce more than 38,000 liters of botulinum toxin . . . materials to produce as much as 500 tons of sarin, mustard and XIV nerve agent . . . 30,000 munitions capable of delivering chemical agents . . . several mobile biological weapons labs . . . an advanced nuclear weapons development program. . . .¹¹⁷

V. ANALYSIS: THE IMPLICATIONS OF THE 1993 BOMBINGS ON THE IRAQI WAR

In examining the implications of the United States' 1993 bombings on the 2003 Iraqi War, three areas will be examined: international support, the United Nations, and the threat posed by Iraq.

A. *International Support*

As stated above, some scholars feared that the international community's liberal interpretation of anticipatory self-defense in 1993 would cause the international community to give deference to the United States in future attacks against Iraq.¹¹⁸ However, the liberal interpretation that President Clinton enjoyed has not carried over to President Bush. The international community currently supports a narrow interpretation.¹¹⁹ On the other hand, President Bush prescribes to a broad interpre-

¹¹⁴ President's State of the Union Address (Jan. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/01/print/20030128-19.html> [last visited Jan. 2004].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Baker, *supra* note 73, at 99, 115.

¹¹⁹ Sanger, *supra* note 102, at A1.

tation of anticipatory self-defense. This is evident from his State of Union Address on January 28, 2003:

Some have said we must not act until the *threat is imminent*. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.¹²⁰

The international community's narrow interpretation was evident from the beginning of the Iraqi conflict. Some countries stressed that the United States should not have taken unilateral action against Iraq.¹²¹ These countries asserted that the United States should act against Iraq only with Security Council approval.¹²² The manifestation of the international community's insistence of Security Council approval was the debate involving the Security Council Resolution 1441.

From the outset, the U.N. understood that the Security Council members needed to cooperate with each other in order to develop an effective resolution.¹²³ As Kofi Annan, the Secretary General of the United Nations, stated in his opening remarks to Security Council, "Unity of the Security Council is essential, for without unity, the message going out from the Council will not reach Iraq with full force and will not achieve its full objective. . . ." ¹²⁴ The unity that Kofi Annan sought was among the five permanent members of the Security Council, which are the United States, Britain, France, China, and Russia.¹²⁵

However, a debate developed between the United States and France that lasted for over five weeks.¹²⁶ The United

¹²⁰ President's State of the Union Address, *supra* note 114. (emphasis added).

¹²¹ Foreign Desk, *In the Council: Pleas for Unity and a Debate on Resuming Arms Inspections*, N.Y. TIMES, Oct. 17, 2002, at A18, available at LEXIS, The New York Times, October 17, 2002.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Julia Preston, *U.S. Said to Offer France Final Compromise to End Iraq Resolution Impasse*, N.Y. TIMES, Oct. 18, 2002, at A10, available at LEXIS, The New York Times, October 18, 2002.

¹²⁶ See Steven Weisman, *Threats and Responses: Towards a Resolution; U.S. and France Near Compromise on Action on Iraq*, N.Y. TIMES, Oct. 30, 2002, at A1, available at LEXIS, The New York Times, October 30, 2002; see also Julia Preston, *U.S. Revises Iraq Resolution, but an Accord still Eludes it*, N.Y. TIMES, Oct. 22,

States wanted “a single resolution that would give it authority to launch a military attack” against Iraq if it violated the resolution.¹²⁷ The United States believed that along with the current Iraqi threat, all of Iraq’s previous violations of Security Council resolutions provided justification for a military attack.¹²⁸ On the other hand, France insisted on a resolution that would not authorize a military attack by the United States.¹²⁹ France wanted the resolution to require the United States to ask for Security Council approval before attacking Iraq.¹³⁰ France threatened to veto any resolution that provided the United States with such unilateral authorization.¹³¹ Russia, China, and numerous countries in the Middle East supported the French position, whereas Britain supported the United States.¹³²

The long debate ended with Resolution 1441 containing two statements. As stated above, Resolution 1441 required the Security Council to review the reports of UNMOVIC and IAEA in order to determine whether Iraq had complied.¹³³ The resolution also threatened “serious consequences” if Iraq failed to

2002, at A1, *available at* LEXIS, The New York Times, October 22, 2002; Foreign Desk, *Draft of a U.S. – British Resolution on Iraq and Inspectors*, N.Y. TIMES, Oct. 23, 2002, at A10 *available at* LEXIS, The New York Times, October 23, 2002.

¹²⁷ Julia Preston, *Bush Garners Little Support at U.N. for an Attack on Iraq*, N.Y. TIMES, Oct. 17, 2002, at A10, *available at* LEXIS, The New York Times, October 17, 2002.

¹²⁸ Julia Preston, *Bush’s Step Toward U.N. is Met by Warm Welcome; Council Seems Ready to Act*, N.Y. TIMES, Sept. 13, 2002, at A11, *available at* LEXIS, The New York Times, September 13, 2002.

¹²⁹ See Julia Preston, *U.S. and France Closer to Deal on Terms for Iraq*, N.Y. TIMES, Oct. 19, 2002, at A8, *available at* LEXIS, The New York Times, October 19, 2002 [hereinafter *Closer to Deal*]; see also Elaine Sciolino, *France is Set to Offer the U.N. a Separate Resolution on Iraq*, N.Y. TIMES, Oct. 27, 2002, at A8 *available at* LEXIS, The New York Times, October 27, 2002; Steven Weisman, *U.S. and France Near Compromise on Action on Iraq*, N.Y. TIMES, Oct. 30, 2002, at A1, *available at* LEXIS, The New York Times, October 30, 2002.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See Preston, *supra* note 129, at A8; see also Julia Preston, *Shift Toward the U.S. Stand on Iraq is Noted in Council*, N.Y. TIMES, Nov. 1, 2002, at A20, *available at* LEXIS, The New York Times, November 1, 2002; Foreign Desk, *supra* note 126, at A10.

¹³³ U.N. SCOR, 36th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002) [hereinafter *Resolution 1441*] *available at* <http://216.239.57.100/search?q=cache:ykj1. . .iraqres.pdf@esolution+14418h1=en8ie=UTF->

comply.¹³⁴ The meaning of these two statements was debatable. From the French perspective, the above statements did not authorize the United States to use military force.¹³⁵ Rather, the Security Council would evaluate the inspection reports and determine the appropriate consequences.¹³⁶ From the American perspective, the phrase, "serious consequences," meant that it could attack Iraq.¹³⁷

There are many factors that may have influenced the international community's narrow interpretation, especially in France and Germany. First, many reports have focused on France and Germany's economic interests in both the European Union and the Middle East.¹³⁸ With regard to the former interest, both countries want to assure that they have important roles in the European Union.¹³⁹ As such, they want their own perspectives on Europe's foreign relations to have a strong influence.¹⁴⁰ Their roles in the U.N. are the perfect platform by which to achieve this goal.¹⁴¹ The latter interests relate to the oil supplies in Iraq and other Middle Eastern countries.¹⁴² France has invested a significant amount of money in making inroads into the Middle East's dominance over oil.¹⁴³ Therefore, France does not want to offend the Middle Eastern countries by supporting the United States in its military attacks on Iraq.¹⁴⁴

¹³⁴ *Id.*

¹³⁵ See Colum Lynch, *U.S. Presses U.N. to Back Tough New Iraq Resolution*, WASH. POST, Nov. 7, 2002, at A18, available at LEXIS, The Washington Post, November 7, 2002; see also Colum Lynch, *Security Council Resolution Tells Iraq it Must Disarm; Baghdad order to admit Inspectors or face Consequences*, WASH. POST, Nov. 10, 2002, at A26, available at LEXIS, The Washington Post, November 10, 2002.

¹³⁶ See *id.*

¹³⁷ See Karen DeYoung and Colum Lynch, *U.S., France Agree on Iraq; Resolution Vote May Come Today*, WASH. POST, Nov. 8, 2002, at A1.

¹³⁸ John Tagliabue, *French and German Leaders Jointly Oppose Iraqi War Moves*, N.Y. TIMES, Jan. 23, 2003, at A1, available at LEXIS, The New York Times, January 23, 2003.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See John Tagliabue, *Threats and Responses: Commerce, Europeans Strike to Tighten Trade Ties with Iraq*, N.Y. TIMES, Sept. 19, 2002.

¹⁴⁴ See *id.*

Since France and Germany have become strong trade partners in recent years, Germany supports the French position.¹⁴⁵

Second, a United States attack on Iraq may be seen as only one part of its larger war on terrorism. Some countries may be looking at the bigger picture, rather than focusing on the merits of the United States' right to anticipatory self-defense. This reaction is understandable since President Bush is the first American president to explicitly declare a global war on terrorism. Although President Clinton's attacks were arguably part of a larger war against terrorism, he never stressed this point in his public comments on the bombing. Many countries may fear the global reach of the War on Terrorism. Through supporting the United States in the Iraqi War, the scope of the War on Terrorism may become too extensive. Finally, countries may feel vulnerable to terrorist attacks.¹⁴⁶ Not only was the world's superpower, the United States, bombed by terrorists, but there have been threats of terrorist attacks throughout Europe and Asia.¹⁴⁷

B. *The United Nations*

President Bush stressed two countervailing points in justifying the Iraqi War: the United States needed the support of the United Nations and the United States had the right to attack Iraq.¹⁴⁸ Unlike President Clinton, President Bush sought the approval of the Security Council before taking action against Iraq. However, President Clinton's actions were not unique. Many American presidents and other countries have acted unilaterally against other countries without the approval of the Security Council.¹⁴⁹ These unilateral actions were often the result of a country's belief that it had an inherent right to defend itself against threats.¹⁵⁰ Even though there is merit to these theories, countries adhering to these theories cause a negative effect. The negative effect of these actions is that the Security

¹⁴⁵ See Tagliabue, *supra* note 138.

¹⁴⁶ See generally Warren Hoge, *Blair Sees Iraq Weakening as France Resists Early War*, N.Y. TIMES, Jan. 23, 2003, at A1, available at LEXIS, The New York Times, January 23, 2003.

¹⁴⁷ See *id.*

¹⁴⁸ See Preston, *supra* note 129, at A10.

¹⁴⁹ SCHACHTER, *supra* note 3, at 139.

¹⁵⁰ See *id.* at 137.

Council is not given a chance to proactively assess the doctrine of anticipatory self-defense in the modern world. While the Council may conduct a *post hoc* analysis of a country's unilateral actions, the value of this analysis is greatly diminished since the Council acts as an observer rather than as a participant.¹⁵¹ In *post hoc* analysis, the Council comments with approval or disapproval on a country's actions. It does not actively participate in the initial decision as to whether anticipatory self-defense measures should be taken by a particular country. Therefore, many important legal and policy considerations are being addressed and determined by the involved parties, rather than an independent body such as the Security Council.¹⁵²

Since the Security Council is accustomed to *post hoc* analysis in this arena, it is understandable that confusion and fighting arose when its members were asked by President Bush to act proactively and draft a resolution with regard to Iraq. Although the Council has drafted numerous weapons inspection resolutions in the past, the consequences of the current resolution and its effects on the doctrine of anticipatory self-defense were unusual. The struggle between France and the United States, involving the language of the resolution, was not only a result of two countries' political agendas. Essentially, members of the Council were being asked to draft a resolution that would allow the United States to engage in anticipatory self-defense. In other words, the Security Council had to draft a resolution that would essentially define Iraq's non-compliance as an imminent threat to the United States. This imminent threat would then provide a justification for attacking Iraq.

Finally, President Clinton and other former presidents did not establish a political framework from which President Bush could build. The only framework established was that of unilateral action, which provoked some of President Bush's cabinet members, such as Vice President Richard Cheney and Secretary of Defense Donald Rumsfeld, to seriously doubt the ability of United Nations to develop effective resolutions.¹⁵³ Other mem-

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See BOB WOODWARD, *BUSH AT WAR* (Simon and Schuster 2002); see also Walter Pincus, *Iraq Inspector Girds for a Test and Spotlight*, WASH. POST, Nov. 9, 2002, at A18; Karen DeYoung, *Rhetorical Weave on Iraq; Statement on Arms Hunt*

bers of his cabinet, such as Secretary of the State Colin Powell, pushed for U.N. involvement.¹⁵⁴ This internal strife hindered President Bush's negotiations with the U.N.

C. *The Threat posed by Iraq*

President Clinton's 1993 bombing of Iraq was an example of low-intensity warfare.¹⁵⁵ As stated above, this bombing was greeted by approval from the international community. Although the international community was not explicit in their reasons for support, they may have believed that the United States' response was proportionate to the threat posed by Iraq. The threat may have been conceived as an assassination plot on an American President by a terrorist organization within Iraq that was supported by Saddam Hussein. This possible conception of the threat is precise and definite; meaning, it is easy to identify the cause of the danger and the target. As a result, an anticipatory self-defense measure that was also precise and definite would be deemed proportional. Therefore, the international community accepted the United States' aerial bombings of military bases and suspected terrorist bases.

The definiteness and preciseness that defined the 1993 bombings was not found in the Iraqi War. The United States attempted to convince others that Iraq had nuclear and biological weapons. However, the evidence that Iraq had weapons has been met with controversy.¹⁵⁶

Pursuant to Resolution 1441, UNMOVIC and IAEA inspected various suspected weapon locations in Iraq throughout

Reflect Fissures in Administration, WASH. POST, Dec. 5, 2002, at A25 available at LEXIS, The Washington Post, December 5, 2002.

¹⁵⁴ Karen DeYoung, *For Powell, A Long Path to a Victory; Pragmatism, Persistence led to 15-0 U.N. Vote*, WASH. POST, Nov. 10, 2002, at A1 available at LEXIS, The Washington Post, November 10, 2002; see E.J. Dionne Jr., *The Herky-Jerky Approach*, WASH. POST, Nov. 15, 2002, at A33 available at LEXIS, The Washington Post, November 15, 2002.

¹⁵⁵ Winthrop, *supra* note 79, at 47.

¹⁵⁶ See generally Neil MacFarquhar, *Iraq says U.N. Teams have found no Weapons*, N.Y. TIMES, Jan. 3, 2003, at A10 (col. 6) available at LEXIS, The New York Times, January 3, 2003; see Foreign Desk, *Report on Nuclear Quest: 'Clarification' is needed*, N.Y. TIMES, Jan. 10, 2003, at A10 (col. 5) available at LEXIS, The New York Times, January 10, 2003; see also Michael R. Gordon, *Agency Challenges Evidence against Iraq Cited by Bush*, N.Y. TIMES, Jan. 10, 2003, at A10 (col. 1).

2002 and 2003.¹⁵⁷ The controversy began in January 2003, when Hans Blix, the Chief on the U.N. inspectors, stated in a briefing to the Security Council that they had not located any evidence that would suggest that Iraq has been producing nuclear and biological weapons.¹⁵⁸ In the words of Hans Blix, the inspectors have not yet located the "smoking gun."¹⁵⁹ Yet, this briefing was only preliminary to the report that UNMOVIC and IAEA needed to submit to the Security Council on January 27, 2003.¹⁶⁰ However, the long awaited report did not provide much closure.¹⁶¹ According to Mohamed El Baradei, the Director General of IAEA, "[n]o prohibited nuclear activities have been identified during the inspections."¹⁶² He further stated that although there has been much focus on Iraq's acquisition of aluminum tubes, there is no evidence that Iraq has used the tubes for nuclear weapons.¹⁶³ He also addressed "dual use" materials, which can "be used in nuclear weapons production but also have other legitimate uses."¹⁶⁴ He stated that the findings, with regard to the materials, have been inconclusive.¹⁶⁵ Moreover, he stated, "[w]e have to date found no evidence that Iraq has revived its nuclear weapons program since its elimination of the program in [the] 1990s."¹⁶⁶

The United States' response to the lack of evidence was varied. At times, the Bush Administration focused on the fact that Iraq resisted and interfered with the inspectors and that Iraq's written declaration on its weaponry was misleading and incomplete.¹⁶⁷ In support of this assertion, the United States

¹⁵⁷ U.N. SCOR, 36th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002).

¹⁵⁸ See Foreign Desk, *Word on Gas and Germs: No 'Smoking Gun' Found*, N.Y. TIMES, Jan. 10, 2003, at A10, available at LEXIS, The New York Times, January 10, 2003; see Editorial Desk, *The Iraq Dossier*, N.Y. TIMES, Jan. 10, 2003, at A22, available at LEXIS, The New York Times, January 10, 2003.

¹⁵⁹ See *id.*

¹⁶⁰ See U.N. SCOR, 36th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002).

¹⁶¹ See News Services, *No 'Genuine Acceptance' of Disarmament, Blix Says*, WASH. POST, Jan. 27, 2003, at A14.

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ News Services, *No 'Genuine Acceptance' of Disarmament, Blix Says*, WASH. POST, Jan. 27, 2003, at A14.

¹⁶⁶ *Id.*

¹⁶⁷ See Richard W. Stevenson & James Dao, *Bush says Iraqis are Still Resisting Demand to Disarm*, N.Y. TIMES, Jan. 22, 2003, at A1, available at LEXIS,

placed great emphasis on Hans Blix's report, which was also submitted on January 27, 2003.¹⁶⁸ His report criticized Iraq, "[Iraq] appears not to have come to a genuine acceptance - not even today - of the disarmament. . . ."¹⁶⁹ He stressed the fact that Iraq's declaration, pursuant to Resolution 1441, was misleading and contained many discrepancies on the amount of its weaponry.¹⁷⁰ Furthermore, he stated that Iraq did not allow UNMOVIC and IAEA to interview key government officials.¹⁷¹

At other times, the Bush Administration presented its own evidence that Iraq had the capacity to produce biological and nuclear weapons.¹⁷² As stated above, President Bush cited the United States' evidence of Iraqi weaponry in his State of the Union Address.¹⁷³ Furthermore, Colin Powell addressed the Security Council on February 5, 2003.¹⁷⁴ In this 2003 address, he cited intelligence reports (taped conversations and satellite footage), which revealed the following: (1) Iraq has deceived UNMOVIC and IAEA; (2) Iraq has made efforts to develop mobile weaponry labs; (3) Iraq's efforts to develop both nuclear and biological weapons; and (4) Iraq's link to Osama bin Laden, a terrorist leader.¹⁷⁵

France, Russia, and China did not find the UNMOVIC and IAEA or Colin Powell's presentation as a basis on which the United States should preemptively attack Iraq.¹⁷⁶ Their main

The New York Times, January 22, 2003; see also Michael Gordon, *To U.S., Onus is on Hussein*, N.Y. TIMES, Jan. 24, 2003, at A1, available at LEXIS, The New York Times, January 24, 2003; Julia Preston, *Inspectors set terms for Talks with Baghdad*, N.Y. TIMES, Feb. 1, 2003, at A1, available at LEXIS, The New York Times, February 1, 2003.

¹⁶⁸ News Services, *supra* note 161, at A14.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *id.*

¹⁷² Foreign Desk, *Powell's Address, Presenting "Deeply Troubling" Evidence on Iraq*, N.Y. TIMES, Feb. 6, 2003, at A1, available at LEXIS, The New York Times, February 6, 2003.

¹⁷³ President's State of the Union Address, *supra* note 114.

¹⁷⁴ Secretary of the State Colin Powell's Address to the United Nations Security Council (Feb. 5, 2003) available at <http://www.state.gov/secretary/rm/2003117300.htm>.

¹⁷⁵ Michael Gordon, *Powell's Case Against Iraq: Piling up the Evidence*, N.Y. TIMES, Feb. 6, 2003, at A10, available at LEXIS, The New York Times, February 6, 2003.

¹⁷⁶ See Dominique De Villepin's Address to the United Nations Security Council (Feb. 5, 2003) available at LEXIS, The New York Times, February 5, 2003; see

emphasis was on providing UNMOVIC and IAEA with more time to conduct their inspections.¹⁷⁷ The United States and Britain responded by urging the Security Council to pass a resolution that would allow for a military attack.¹⁷⁸

Although the Security Council did not pass such a resolution, the United States declared war on Iraq on March 19, 2003.¹⁷⁹ In the months following the United States' occupation of Iraq, the United States' pre-war evidence on Iraq's supposed nuclear and biological weapons was seriously questioned.¹⁸⁰ To date, the United States has not discovered any weapons of mass destruction or biological weapons in Iraq, nor has the United States presented evidence on Iraq's links to Al Qaeda.¹⁸¹ As a result, the Senate Select Committee on Intelligence has been conducting an investigation of the Bush Administration's handling of pre-war intelligence on Iraq since June 2003.¹⁸² The Committee has been examining, "the quantity and quality of U.S. intelligence on Iraqi weapons of mass destruction programs, ties to terrorist groups, Saddam Hussein's threat to stability and security in the region. . . ."¹⁸³

Specifically, the Committee and the media have questioned the legitimacy of certain statements in President Bush's State of the Union Address of January 28, 2003.¹⁸⁴ In his State of the

also Igor Sergeevich Ivanov's Address to the United Nations Security Council (Feb. 5, 2003) available at LEXIS, The New York Times, February 5, 2003; Chinese Foreign Minister Tang Jiaxuan's Address to the United Nations Security Council (Feb. 5, 2003) available at LEXIS, The New York Times, February 5, 2003.

¹⁷⁷ *Id.*

¹⁷⁸ Richard W. Stevenson & James Dao, *U.S. and Britain Press for Resolution on Iraq*, N.Y. TIMES, Feb. 4, 2003, at A1, available at LEXIS, The New York Times, February 4, 2003.

¹⁷⁹ David E. Sanger & John F. Burns, *Threat and Responses: The White House; Bush Orders Start of War of Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1, available at LEXIS, The New York Times, March 20, 2003.

¹⁸⁰ James Risen et al., *After the War: Weapons Intelligence, In Sketchy Data, Trying to Gauge Iraq Threat*, N.Y. TIMES, July 20, 2003, at A1, available at LEXIS, The New York Times, July 20, 2003.

¹⁸¹ *Id.*

¹⁸² James Risen, *After the War: Oversight; Senate Panel strikes Deal on Inquiry into Iraq Arms Intelligence*, N.Y. TIMES, June 21, 2003, at A8, available at LEXIS, The New York Times, June 21, 2003.

¹⁸³ *Id.*

¹⁸⁴ See James Risen, *Bush Aides now say Claim on Uranium was Accurate*, N.Y. TIMES, July 14, 2003, at A7, available at LEXIS, The New York Times, July 14, 2003.

Union Address, President Bush stated, "the British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."¹⁸⁵ In March 2003, the IAEA reported that, "the documents that formed the basis of this statement were forgeries." At first the Bush administration acknowledged the inaccuracy of this statement.¹⁸⁶ However, Senior Bush officials defended the statement and blamed the CIA and the British government for their failure to provide President Bush with accurate information.¹⁸⁷ Although the Committee has not issued a final report, there is some indication that the Committee will be critical of the Bush Administration and CIA's gathering and presentation of pre-war intelligence.¹⁸⁸

VI. CONCLUSION

The United States' bombing of Iraq in 1993 has not broadened the doctrine of anticipatory self-defense to the extent that the United States had a basis under international law for its war against Iraq. The international community's negative reaction to the Iraqi War is an indication that international customary law still requires a country's act of anticipatory self-defense to contain the elements of necessity, immediacy, and proportionality. For example, the U.N. and various European and Middle Eastern countries implicitly questioned the necessity of the Iraqi War when they insisted on additional U.N. resolutions and inspections. Furthermore, the international community, as well as the United States Senate still adheres to the concept that a threat must be imminent in order to justify anticipatory self-defense.

There is another indication that the 1993 bombings have not radically changed the concept of anticipatory self-defense. The debate that occurred between the United States and France in the months preceding the war is analogous to the debates that occurred during the Nuremberg Trials and *Nicaragua v.*

¹⁸⁵ *Id.*

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ James Risen & Douglas Jehl, *After the War: Intelligence; Expert said to Tell Legislators He Was Pressed to Distort Some Evidence*, N.Y. TIMES, June 25, 2003, at A11, available at LEXIS, The New Times, June 25, 2003

United States. Even though the participants have changed, the actual debate has not changed much. The United States adheres to the idea that it has an inherent right to determine its anticipatory self-defense measures, whereas France believes that the United States should be constrained by international law.

Finally, the United States acted unilaterally when it bombed Iraq in 1993. President Clinton did not engage the international community, the U.N., nor the United States government in a constructive dialogue about the doctrine of anticipatory self-defense. As a result, President Bush could not rely on a prior framework for negotiating with the U.N. President Bush wanted the Security Council to pass a resolution that allowed the United States to attack Iraq if it did not comply. This demand was met with a great deal of confusion, and fighting arose among members of the Security Council and among President Bush's cabinet members. In the end, the United States acted unilaterally against Iraq without the authority of international law and without establishing a negotiating framework for future presidents.