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ARTICLES

THE BUSH DOCTRINE AND THE
EMERGING NORM OF ANTICIPATORY
SELF-DEFENSE IN CUSTOMARY
INTERNATIONAL LAW

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I. INTRODUCTION

Deep divisions exist among states over whether there is any legal basis whatsoever for attacking Iraq in *Operation Iraqi Freedom*. On the eve of the campaign, Secretary General Kofi Annan said, "If the action is to take place without the support of the Council, its legitimacy will be questioned and the support for it will be diminished."¹

In his 2002 State of the Union address, President Bush said, "From this day forward, any nation that continues to harbor or support terrorism will be considered by the United States as a hostile regime." Concerned about the connection between nuclear weapons, rogue states, and terrorists, the President released his National Security Strategy in fall 2002. President Bush said, "America will act against such emerging threats before they are fully formed."² He later announced that "the policy of [the U.S.] government is the removal of Saddam [Hussein]."³ Following the Azores summit meeting with the leaders of the United Kingdom and Spain in March 2003, President Bush said to reporters:

On this very day 15 years ago, Saddam Hussein launched a chemical weapons attack on the Iraqi village of Halabja. With a single order, the Iraqi regime killed thousands of men and women and children without mercy or without shame. Saddam Hussein has proven he is capable of any crime. We must not permit his crimes to reach across the world. Saddam Hussein has a history of mass murder. He possesses the weapons of mass murder. He agrees—

¹ Felicity Barringer, *Eclipsed by Events, U.N. Officials Wonder About the Past and Ponder the Future*, N.Y. TIMES, Mar. 18, 2003, at A19.

² Thomas Powers, *The Man Who Would Be President of Iraq*, N.Y. TIMES, Mar. 16, 2003, at Week in Review, 1, 7.

³ *Allies Discuss Terrorism and the Middle East: Bush and Blair on Policy*, N.Y. TIMES, Apr. 7, 2002, at A14.

he agreed to disarm Iraq of these weapons as a condition for ending the Gulf War over a decade ago. The United Nations Security Council Resolution 1441 has declared Iraq in material breach of its longstanding obligations; demanded once again Iraq's full and immediate disarmament; and promised serious consequences if the regime refused to comply. The resolution was passed unanimously, and its logic is inescapable. The Iraqi regime will disarm itself or the Iraqi regime will be disarmed by force. And the regime has not disarmed itself.⁴

President Bush's intention to remove Saddam Hussein in *Operation Iraqi Freedom* should come as no surprise. Hussein has been a source of continued concern to the United States since his invasion of Kuwait in 1990.⁵ Hussein has fostered terrorism in sophisticated training camps and maintains relationships with some of the most deadly international terrorist organizations in the world.⁶ He has repeatedly terrorized his own people and the international community since he seized power in Iraq two decades ago. He has engaged in genocide against his own people and has committed various transgressions, ranging from the near total suppression of political freedoms, to arbitrary arrest and detention, disappearance, torture and execution of those who disagree with his policies.⁷ For example, he had his soldiers engage in the mass murder of thousands of Kurds by lining them up and shooting them.⁸

In 1980, Iraq became the first state known to deploy chemical weapons in the seventy years since the end of World War I.⁹ Iraq unleashed mustard agents on the Iranians through artillery, helicopter, and airplane bombardments.¹⁰ From 1987 to

⁴ *Excerpts from Joint News Conference: 'Tomorrow Is a Moment of Truth,'* N.Y. TIMES, Mar. 17, 2003, at A12 [hereinafter *Excerpts*].

⁵ See Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism*, *Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 153 (2002).

⁶ See Posteraro, *supra* note 5, at 212.

⁷ See generally *Human Rights Watch Policy on Iraq*, HUMAN RIGHTS WATCH, at <http://www.hrw.org/campaigns/iraq/hrwpolicy.htm> (for a very useful overview of the abysmal record of human rights violations committed by Saddam Hussein). Human Rights Watch is an organization that monitors human rights violations around the world; Middle East Watch is a subsidiary division or committee of Human Rights Watch.

⁸ See Posteraro, *supra* note 5, at 159.

⁹ See *id.* at 157.

¹⁰ See *id.* 11 See *id.* at 158-59.

1988, Hussein bombarded the Kurds with chemical weapons, including sarin and VX, killing 200,000 and leaving nearly four million people permanently blind, sterilized, disfigured, or unnaturally prone to develop cancer and respiratory diseases.¹¹ In December 1990, prior to the commencement of Operation Desert Storm, Iraq used the diplomatic pause of last-round Security Council negotiations to load twenty-five warheads and 166 aerial bombs with biological warfare agents.¹² On the eve of *Operation Iraqi Freedom*, the Iraqi regime summarily executed, without trial, dozens of prisoners who had been detained as "spies" at Abu Ghraib, one of the largest and most feared jails in Iraq.¹³

There is compelling evidence that Saddam Hussein has acquired quantities of bomb-grade uranium, has created a working nuclear weapon, and has the ability to fashion so-called "dirty bombs."¹⁴ For some time, there has been compelling evidence that Iraq has supported terrorist operations that target the United States.¹⁵ In a report in 2002, the Central Intelligence Agency said that Iraq had not accounted for 15,000 artillery rockets.¹⁶ In the past, these rockets had been the preferred means for delivering nerve agents.¹⁷ Iraq also has not accounted for about 550 artillery shells filled with mustard agent.¹⁸ Hussein's bloody legacy, his disregard for the lives of his own citizens, his pursuit of weapons of mass destruction, and his support for international terrorism, clearly underscore the concern that, to use the words of President Bush, "[w]e must not permit his crimes to reach across the world."¹⁹

¹¹

¹² See *Report of the Secretary-General on the status of the implementation of the Special Commission's plan for the ongoing monitoring and verification of Iraq's compliance with relevant parts of section C of Security Council resolution 687*, U.N. Doc. S/1995/864 (1991), at 29, para. 75(w).

¹³ Ian Fisher, *As Hussein Faded, Prisoners Were Executed*, N.Y. TIMES, Apr. 28, 2003, at A1.

¹⁴ Posteraro, *supra* note 5, at 173-74.

¹⁵ See Posteraro, *supra* note 5, at 180.

¹⁶ See Bernard Weinraub, *A Nation at War: In the Field Intelligence; Army Reports Iraq is Moving Toxic Arms To Its Troops*, N.Y. TIMES, Mar. 28, 2003, at B6.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ *Excerpts*, *supra* note 4, at A12.

In President's Bush report to Congress justifying *Operation Iraqi Freedom*, emphasis was laid on Iraq's link to terrorists:

Both because Iraq harbors terrorists and because Iraq could share weapons of mass destruction with terrorists who seek them for use against the United States, the use of force to bring Iraq into compliance with its obligations under U.N.S.C. resolutions would be a significant contribution to the war on terrorists of global reach. A change in the current Iraqi regime would eliminate an important source of support for international terrorist activities. It would likely also assist efforts to disrupt terrorist networks and capture terrorists around the globe. United States government personnel operating in Iraq may discover information through Iraqi government documents and interviews with detained Iraqi officials that would identify individuals currently in the United States and abroad who are linked to terrorist organizations.²⁰

Secretary of Defense, Donald H. Rumsfeld added, "Our goal is to defend the American people, and to eliminate Iraq's weapons of mass destruction, and to liberate the Iraqi people."²¹ President Bush also suggested that humanitarian intervention to liberate the Iraqi people from a tyrannical regime was a further justification for *Operation Iraqi Freedom*, when he said, "We are coming with a mighty force to end the reign of your oppressors."²² A New York Times article referred to the Bush Doctrine as a "new doctrine" of "preventive war."²³

²⁰ David E. Sanger & John F. Burns, *U.S. Begins Attack With Strike at Baghdad After Deadline For Hussein To Go Runs Out*, N.Y. TIMES, Mar. 20, 2003, at A1, A18.

²¹ Thom Shanker & Eric Schmitt, *Rumsfeld Says Iraq Is Collapsing, Lists 8 Objectives of War*, N.Y. TIMES, Mar. 22, 2003, at B2.

²² Adam Nagourney & David Sanger, *A Nation at War: Political Debate; Bush Defends Progress of War and is Cheered*, N.Y. TIMES, Apr. 1, 2003, at B1, B3. Sometimes it is not entirely clear what motivates a government's action. If a government explains its motivation, as occurred with respect to *Operation Iraqi Freedom*, "it is still impossible to tell whether the explanation is accurate." Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 520 (1990); see ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 34-39 (1971) [hereinafter D'AMATO].

Moreover, "[i]nternational lawyers may appropriately evaluate the actions states undertake on the basis of customary international law irrespective of verbal rationales proffered by the states themselves." D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. at 520.

²³ David E. Sanger, *Threats and Responses: News Analysis; a New Doctrine for War*, N.Y. TIMES, Mar. 18, 2003, at A1.

In this Article, I will argue that international law is in the throws of a paradigm shift.²⁴ A new legal norm of anticipatory offensive intervention has emerged as a valid doctrine. This type of intervention justifies action to literally attack and replace tyrannical regimes that foster international terrorism, endeavour to, or actually develop and maintain biological, chemical, or nuclear weapons.²⁵ In order to gain widespread acceptance, the doctrine of anticipatory self-defense needs to provide constraints to make clear that no nation has *carte blanche* authority to deploy military force against a state that it suspects of fostering international terrorism and of developing weapons of mass destruction.²⁶

²⁴ See Posteraro, *supra* note 5, at 155-56. Scientists move from one "paradigm" or theoretical framework, to another based on social and psychological factors, as well as experimental factors, as discussed in THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* (1962). Even with scientific theories, their acceptance in society has much to do with ephemeral factors such as politics, personal influence and historical chances. A paradigm shift occurs in science when a scientific hypothesis no longer can be reconciled with observed phenomena or withstand interpretations of experimental results. If a general principle conflicts with particular experimental results, then either the hypothesis should be modified to explain those results or the mode of experimentation should be changed to ensure that the results will support the hypothesis. When this is no longer possible, that is, when a hypothesis or theory cannot be justified because there is simply overwhelming contrary data, then the principle should be rejected. The conflicting data, in turn, which at first may be regarded as a breach of, or an exception to, an existing hypothesis, may well become the basis for a new hypothesis. Similarly, in the context of customary international law, when a norm is no longer observed, or if it subjected to a significant number of exceptions or its breach justified on certain rationalizations, it may be time to consider that the exceptions to the old norm are becoming the seed of a new norm. *See id.*

²⁵ *See* Posteraro, *supra* note 5, at 155.

²⁶ Christopher Clarke Posteraro has suggested a 6-pronged protocol: (1) preference for multilateral action; (2) existence of compelling evidence; (3) attempted peaceful resolution; (4) proportionality; (5) non-conquest; and (6) reasonableness. *See* Posteraro, *supra* note 5, at 205-207. Under this suggested protocol, "there should be a strong preference for multilateral action. . . ." *Id.* at 205.

This suggested protocol is somewhat akin to earlier protocols suggested as part of the generic remedy of self-defense. For example, the following three-part protocol was advanced by Derek Bowett:

- (1) The target state must be guilty of a prior international delinquency against the claimant state.
- (2) An attempt by the claimant state to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances.
- (3) The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target state.

When science enters a new domain, it becomes necessary for the language of rights to likewise undergo a paradigm shift or else explain its theory consistent with technological advance.²⁷ The unilateral force by a state or a "coalition of the willing," without authorization from the U.N. Security Council, is likely to be tolerated if there is compelling evidence that such first-use was justified by the severe threat of another state's indirect aggression.²⁸ To prove this, an examination of the current and emerging norms in customary international law pertaining to the doctrine of anticipatory self-defense, or preventive war, as a means of thwarting an ongoing or imminent terrorist threat that converges with a tyrannical regime that develops weapons of mass destruction must be made. To understand the complexity of the problem, the content, methodology, and evolution of customary international law must be addressed first. Customary international law is constantly evolving; the seeds of a new state practice can become the substance of tomorrow's new custom.

The background of autonomous use of force under the U.N. Charter necessitates a reference to the set of norms embodied in Article 51 of the U.N. Charter that pertains to the right of self-defense. The constraint on self-defense in Article 51 of the U.N. Charter was never intended to supplant the inherent right of states to deploy force in a variety of contexts pertaining to anticipatory self-defense under customary international law. In order to make this assumption, the following should be discussed: the evolving set of norms embodied in customary international law pertaining to the inherent right of self-defense, an overview of international precedents, and reactions in the world community to specific cases of anticipatory self-defense.

By and large, the community of states has acquiesced or tolerated past cases of anticipatory self-defense. The justification for the doctrine of anticipatory self-defense in the context of *Operation Iraqi Freedom* has its strengths and weaknesses. An

Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972).

²⁷ See Posteraro, *supra* note 5, at 155.

²⁸ Thomas Franck, *The Institute for Global Legal Studies Inaugural Colloquium: The UN And The Protection Of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 54 (2001).

analysis of the principle of proportionality in the context of self-defense is necessary to show that customary international law recognizes that self-defense need not always be "proportionate," and that retribution and reprisals are appropriate responses in certain cases.²⁹ Inevitably, there is a question whether proportionality can accommodate the goal of regime-change of a rogue state. The use of force for humanitarian intervention, with its concomitant objective of affecting a regime-change, has become part of customary international law even in the absence of Security Council authorization, and therefore justifies the objective of *Operation Iraqi Freedom*: ousting the Iraqi regime. In conclusion, a model showing how anticipatory self-defense can be deployed with sufficient constraints so as to allay fears of abuse will be provided.

A concrete international law doctrine under which the United States could execute its campaign against Iraq does not currently exist.³⁰ The Bush Doctrine of anticipatory self-defense, or preventive war, must be analyzed in view of geopolitical realities in a post-September 11th world. A state that actively supports terrorists within its borders, or that simply acquiesces and tolerates their encampments, poses a grave threat to the security of other states. The focal point of concern should be state support of terrorist cells, training camps, and any other type of support, whether brief or extended. An added concern pertains to rogue states or tyrannical regimes that develop weapons of mass destruction, however advanced or nascent their development, however small or large it's stockpiling. In such cases, under the Bush Doctrine, there is reasonable justification to be concerned and to take remedial steps to ensure that the situation is reversed.

II. THE CONTENT, METHODOLOGY, AND EVOLUTION OF CUSTOMARY INTERNATIONAL LAW

There is little precedent for a major U.S. military offensive against a state that has not directly used force against U.S. in-

²⁹ Michael C. Bonafede, *Here, There, And Everywhere: Assessing The Proportionality Doctrine And The U.S. Uses Of Force In Response To Terrorism After The September 11 Attacks*, 88 CORNELL L. REV. 155, 162 (2002).

³⁰ See Posteraro, *supra* note 5, at 155.

terests.³¹ The doctrine of anticipatory self-defense in the case of *Operation Iraqi Freedom* has been criticized as a violation of international law by states and legal commentators alike.³² Many think that the Bush Doctrine is dangerous because they view it as a first step on a slippery slope for new attacks of preventive war against other regimes, such as North Korea or Iran.³³ On the other hand, current international law governing the use of force does not adequately address the threat posed by rogue states such as Iraq that foster international terrorism and pursue the development of weapons of mass destruction.³⁴ While the United States justified *Operation Enduring Freedom* against the Taliban in Afghanistan based on customary norms related to self-defense in response to an "armed attack," with little or no dissent from other states,³⁵ the nature of the threat

³¹ See *id.*

³² See Sanger, *supra* note 22, at A1; David E. Sanger, *A Nation At War: Policy; Viewing The War As A Lesson To The World*, N.Y. TIMES, Apr. 6, 2003, at B1 [hereinafter *Viewing The War As A Lesson To The World*].

³³ See *Viewing The War As A Lesson To The World*, *supra* note 31, at B1.

³⁴ See generally Michael J. Glennon, *The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 548-52 (Spr. 2002).

³⁵ Glennon, *supra* note 34, at 546. The United States' use of military force against the Taliban and Al Qaeda in Afghanistan was not entirely free from criticism. Some have argued that effecting a regime-change of the Taliban in Afghanistan was a "disproportionate" use of force. See *id.*

As an example of another criticism, a group of German international lawyers at a conference claimed that the use of force was illegal based on the following claims:

(1) It violates the Article 2(4) of the U.N. Charter, which prohibits the use of force except when authorized by the Security Council under Chapter VII.

(2) Self-defense is not lawful after an armed attack has ended; that is, after September 11, 2001.

(3) Self-defense can be exercised only against an attack by a state. Al Qaeda is not a state government.

(4) Self-defense may be exercised only against an actual attacker. The Taliban were not the attacker.

(5) Self-defense may be exercised only "until the Security Council has taken measures necessary to maintain international peace and security." Since the Council took such measures in Resolution 1373 of September 28, 2001, the right of self-defense had been superseded.

(6) The right of self-defense arises only upon proof that it is directed towards the actual attacker. The United States failed to provide such evidence.

See Symposium, *The United States and International Law—The Effects of U.S. Predominance on the Foundations of International Law*, Gottingen (Oct. 25-27, 2001) (cited in Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001)).

in Iraq differs fundamentally from the circumstances in Afghanistan.³⁶ In Iraq, there was no armed attack against the United States or evidence of a terrorist plot. There has been no evidence that decisively links Iraq to either the September 11th attacks or subsequent terrorism, such as the anthrax threat of fall 2001.³⁷ It is inconclusive whether Al Qaeda maintained training camps in Iraq or whether Iraq provided it with financial, logistical, or military support in contrast to the overwhelming evidence of such circumstances in Afghanistan.³⁸ The United States never sought to justify its attack on Iraq as a direct extension of its ongoing war in Afghanistan to uproot Al Qaeda combatants. However, the attack on Iraq is not *sui generis*³⁹ in the annals of international law, and it carries with it an aura of legitimacy based on precedents that quite plausibly have become part of customary international law.⁴⁰

Customary international law consists of international rules that are not based on treaties or other explicit consent of states.⁴¹ Today, customary international law is, together with treaty law, one of the two central sources of international law.⁴² Article 38 of the Statute of the International Court of Justice ranks "international custom, as evidence of a general practice accepted as law," as a notch lower in authoritativeness than treaty law.⁴³ Treaties, however, despite their considerable number, leave many international topics untouched, and most treaties are narrow in scope or are only supported by a few states.⁴⁴ Thus, in fields not touched upon by treaties, customary international law becomes an important, if not singular, source of international law.

³⁶ See Posteraro, *supra* note 5, at 154.

³⁷ See *id.* at 164.

³⁸ But see R. James Woolsey, *The Iraq Connection: Blood Baath*, NEW REPUBLIC, Sept. 24, 2001, at 20; Jeffrey Goldberg, *The Great Terror*, THE NEW YORKER, Mar. 25, 2002, at 52, 69 ("There's been a relationship between the Mukhabarat [Iraqi intelligence] and the people of Al Qaeda since 1992. . .").

³⁹ See Janadas Devan, *Iraq's not Vietnam, but US has its hands full*, THE STRAITS TIMES (Singapore), July 18, 2003.

⁴⁰ See generally Posteraro, *supra* note 5, at 179-184.

⁴¹ See 1945 I.C.J. STAT., art. 38(1)(b), as annexed to the Charter of the United Nations, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (signed at San Francisco, June 26, 1945; entered into force October 24, 1945).

⁴² See *id.*

⁴³ *Id.* art. 38(1)(a) & (b).

⁴⁴ See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 42 (1993).

Customary international law may sometimes be more widely applicable to states than are rules arising from international agreements. Because so much is left unregulated by treaty, customary international law may sometimes have more widespread application than treaty law. The U.S. Supreme Court has said that a rule of customary international law is often presumed to be a "universal law of society."⁴⁵ Several questions arise from the Court's conclusion: What is the content of customary international law? How does a new international custom sustain the momentum necessary to establish a paradigm shift? How many states must practice or endorse a new norm before it becomes customary international law? How is it possible to distinguish between a state practice that violates customary international law and a state practice that replaces old with new customary international law?

As to the content of customary international law, Grotius, the founder of international law in the modern era, suggested that "[t]he proof for the law of nations is similar to that for unwritten municipal law; it is found in unbroken custom and the testimony of those who are skilled in it."⁴⁶ According to another classic commentator in the field, Vattel, the "customary law of nations" consists of "certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law."⁴⁷ One of the traditional criteria advanced for determining the content of customary international law is "concordant practice by a number of States with reference to a type of situation falling within the domain of international relations. . . ."⁴⁸ Justice Robert H. Jackson, American Chief of Counsel for the prosecution of major war criminals in the *ad hoc* International Military Tribunal of Nuremberg, said:

International law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. *But every cus-*

⁴⁵ United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820).

⁴⁶ H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 44, § 14 (Kelsey trans., 1925).

⁴⁷ E. DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS XV (1797).

⁴⁸ International Law Commission, 1950 Y.B. INT'L L. 26.

tom has its origin in some single act, and every agreement has to be initiated by the action of some state. . . . [W]e cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. [I]nnovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. . . . Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct.⁴⁹

Much of the law of nations has its roots in custom.⁵⁰ Custom must have a beginning; and customary usages of States concerning national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time. "International law was not crystallized in the seventeenth century, but is a living and expanding code."⁵¹ The Statute of the International Court of Justice refers to custom as "evidence of a general practice accepted as law."⁵² Custom itself generally is said to have two components: state practice and a psychological component known as *opinio juris*.⁵³ State practice involves the general and consistent practices by states, while *opinio juris* is defined as a kind of "state of mind" on the part of states that a certain form of conduct is permissible, required, or mandated by international law.⁵⁴ *Opinio juris* refers to statements and declarations by states that articulate the legality of practices in question.⁵⁵ The element of *opinio juris* is referred to in the Restatement (Third) of the Foreign Relations Law⁵⁶ of the United States as "a sense of legal obliga-

⁴⁹ Report of June 7, 1945, from Justice Robert H. Jackson, Chief of Counsel for the United States for the prosecution of Axis War Criminals, *reprinted in* 39 AM. J. INT'L L. (Supp.) 178, 187 (1945). (Emphasis added).

⁵⁰ See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 774 (2001).

⁵¹ Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 398, n. 6 (quoting from the author's book, *WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT* 14 (1944)) (citation omitted).

⁵² 1945 I.C.J. STAT., art. 38(1)(b).

⁵³ See Roberts, *supra* note 50, at 757.

⁵⁴ See MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 29 (1982).

⁵⁵ See Roberts, *supra* note 50, at 757.

⁵⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (American Law Institute 1987).

tion.”⁵⁷ The notion of *opinio juris* explains how a state practice tips in a certain way to become established as a rule of law because, as the International Court has held, “[t]he states concerned . . . feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.”⁵⁸ We can ascertain whether a state or a group of states regards a particular principle, such as anticipatory self-defense, along the lines of the Bush Doctrine, to be something rising to a legal right, by formal state expressions of *opinio juris*.⁵⁹ Clearly, the United States has enunciated the doctrine as a formal expression of law via press releases, statements of the President, diplomatic correspondence, opinions expressed by official legal and policy advisers to the President, policy statements, and in the conduct of foreign relations. In addition, the voting patterns of the United States in the U.N. Security Council and policy statements made on behalf of the United States in the Security Council are formal state expressions of *opinio juris* on the practice at issue.⁶⁰

Some think that General Assembly resolutions and recommendations of international non-government organizations are evidence of the content of customary international law.⁶¹ Resolutions and recommendations can be useful evidence of the concurrent attitudes by a number of states on a given legal topic. Resolutions and recommendations of international organizations may be regarded as a sort of “soft” international law—“rules which are neither strictly binding nor completely void of any legal significance,”⁶² but which may some day solidify into customary international law. The fact that the General Assembly or the Security Council may be silent on a certain matter may indicate that there is a lack of consensus on a given matter by a majority of states represented therein.

How much a custom must change, or how long a change of custom needs to persist, or how many states need to join the “bandwagon,” before a new custom may be said to become cus-

⁵⁷ *Id.* § 102(2).

⁵⁸ North Sea Continental Shelf, 1969 I.C.J. Reports 3, 44.

⁵⁹ See Roberts, *supra* note 50, at 782.

⁶⁰ See Roberts, *supra* note 50, at 785-87.

⁶¹ See JANIS, *supra* note 44, at 50 (1993).

⁶² BERNHARDT, CUSTOMARY INTERNATIONAL LAW, 7 ENCY. PUB. INTL. L. 61, 62 (1984).

tomary international law is a question not susceptible to precise analysis:

Customs can generally change and harden over time because custom is a fluid source of law. The content of custom is not fixed; it can develop and change in light of new circumstances. The formation and modification of custom is an uncertain process because international law lacks an authoritative guide as to the amount, duration, frequency, and repetition of state practice required to develop or change a custom.⁶³

Custom lacks clear rules of change, rather it develops through a "slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and hence obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed."⁶⁴ Once a given state practice becomes customary, it rises to legitimacy and legality. In order for a particular act of state to enter the domain of customary international law, it will need to become "authoritative state practice."⁶⁵ In order for a particular norm to enter the domain of authoritative state practice, it must first be practiced by a state. There is always a first move in a paradigm shift. Once a paradigm shift is made, all others can follow in its wake and endorse the new state practice.

What exactly causes a norm to lose its quality as law? The onset of a new approach in state practice is open to interpretation, either as a breach of past custom or as a new state practice may signal the start of a new trend. "For example, NATO's intervention in Kosovo could be interpreted as a breach of an existing customary prohibition on intervention or as the seed for a new custom allowing humanitarian intervention."⁶⁶ A customary rule loses its normative quality because it is widely ignored, particularly over a significant period of time in a variety of contexts. This is a necessary, but not sufficient condition to suggest that the practice no longer has sufficient international consensus. The fact that a majority of states ignore a norm of

⁶³ Roberts, *supra* note 50, at 784.

⁶⁴ H.L.A. HART, *THE CONCEPT OF LAW* 90 (1961).

⁶⁵ ANTHONY CLARK AREND, *Towards an Understanding of International Legal Rules*, INTERNATIONAL RULES 300 (Robert J. Beck et al. ed., 1996) (emphasis omitted).

⁶⁶ Roberts, *supra* note 50, at 776.

customary international law does not necessarily imply that the rule is no longer customary. For example, it is clearly part of customary international law that torture is prohibited. No state denies the existence of this norm, and it is widely recognized as customary international law in national courts.⁶⁷ But it is well known from reports of Amnesty International that a significant majority of states systematically engage in torture.⁶⁸ Does this non-compliance have sufficient relevance to overturn the prevailing prohibition of torture under customary international law? The answer is that new norms require both practice and *opinio juris* before they can become new norms of customary international law.⁶⁹ The reason why the prohibition against torture continues is that even though it is widely abused, its normative status continues to exist because of *opinio juris*.⁷⁰ No state that engages in torture believes that the international law prohibition against torture is wrong or that they are not bound by the prohibition.⁷¹ A new norm cannot emerge without both practice and *opinio juris*, and an old practice does not cease without the majority of states engaging in both contrary practice and withdrawing their *opinio juris*.⁷²

A shift in customary international law can occur quickly, "particularly if the rule was uncertain or still developing Customs can develop or change in light of the recognition of new moral considerations in international law."⁷³ According to some commentators, even "a single precedent could be sufficient to create international custom."⁷⁴ For example, it has been pointed out that the principle of national sovereignty over airspace arose as a norm of customary international law "at the

⁶⁷ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 878 (2d Cir. 1980).

⁶⁸ For an excellent discussion of the prohibition of torture under international law and the empirical evidence that shows the widespread evidence of the use of torture by state governments; see Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 86, 88-90 (2001).

⁶⁹ See Roberts, *supra* note 50, at 762-63.

⁷⁰ See *id.* at 769.

⁷¹ See *id.* at 764-65.

⁷² See *id.* at 762-63.

⁷³ *Id.* at 785.

⁷⁴ D'AMATO, *supra* note 22, at 58 (quoting Gilberto Amado).

moment the 1914 war broke out.”⁷⁵ The advent of aircraft was a sudden and new phenomenon, bringing to focus the topic of airspace that states had never undertaken with earnest before. Another example pertains to the establishing of new norms in the Nuremberg Tribunal, for example, “[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”⁷⁶ This and other “Nuremberg Principles” became principles of customary international law at the moment they were announced.⁷⁷ The fact that we live in a post-September

⁷⁵ *Id.* (quoting James L. Brierly). There had been an earlier effort to deal with aerial warfare by banning the launching of projectiles from balloons in the Hague Convention of 1899.

⁷⁶ Resolution affirming the Principles of International Law Recognized by the Charter of the Tribunal, and the spelling out of these principles by the International Law Commission of 1950, Res. 9(1) 1946.

⁷⁷ According to one commentator, one of the objectives of the Nuremberg Trials was to lay down the rule of individual accountability:

Henceforth, no matter how exalted your position, whether you were captains, kings, presidents, prime ministers, secretaries of parties, heads of parlor bureaus, military chieftains, bankers industrialists, no matter how exalted, Justice Jackson [American Chief of Counsel of the Nuremberg Trials] said, ‘We will give you short shrift, a long rope, and into your hands, we will pass the poisoned chalice.’ . . . In other words, if war comes, . . . [n]o longer does exalted status confer immunity.

Thomas F. Lambert, Jr., *Recalling the War Crimes Trials of World War II*, 149 MIL. L. REV. 15, 16-17 (1995). According to another commentator,

In neither the Tokyo nor the Nuremberg Trials was it sufficient for the defence to show that the acts of responsible officers or of government ministers and officials were protected as “acts of state.” The twin principles of individual criminal responsibility and of universal jurisdiction in the prosecution and punishment of war criminals were firmly established.

R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 33 (1995). Yet another commentator has this to say:

Nuremberg was a historical landmark in other respects as well. It marked the start of the international human rights movement because it was the first international adjudication of human rights. Its effect in this respect is felt throughout the world in the United Nations Genocide Convention, the United Nations Universal Bill of Rights, American Convention on Human Rights, and above all, the European Convention on Human Rights and Fundamental Freedoms.

Henry T. King, Jr., *The Nuremberg Context From the Eyes of a Participant*, 149 MIL. L. REV. 37, 46 (1995). A further comment by another commentator is this:

The judges at Nuremberg were concerned that the proceedings be seen as the enforcement of legal norms, not simply a process of the victors punishing the vanquished. . . . The defendants argued that the old legal system

11th world compels "the recognition of new moral considerations in international law."⁷⁸ Today, the formation of a new custom occurs faster than ever before, "every event of international importance is universally and immediately known."⁷⁹

According to Anthony D'Amato, the action of a state in breach of customary international law can be viewed as a seed for new law because the state acts both as a legislator of international law and as the subject of the law it creates.⁸⁰ "What is now an exception to, or a breach of, an accepted rule may later become integral to the explanation of a new general rule."⁸¹ D'Amato also asserts:

When a state violates an existing rule of customary international law, it undoubtedly is "guilty" of an illegal act, but the illegal act itself becomes a disconfirmatory instance of the underlying rule. The next state will find it somewhat easier to disobey the rule, until eventually a new line of conduct will replace the original rule by a new rule.⁸²

As such, customary international law is "entirely phenomenological; it does not 'exist' apart from the way representatives of states perceive it."⁸³

Another point concerning customary international law involves acquiescence of a custom by other states.⁸⁴ Whether a

protected them against punishment, an argument that had proven effective in the war crimes trials held at the end of World War I. Although that argument may seem nonsensical to us today, it was not a trivial argument in its time. . . . We need not re-examine that claim today. But we should be cautious against assuming that what is true today has always been true. The decision at Nuremberg built on and confirmed the growing changes in international law, but it represented a turning point for individual responsibility and for international law. . . . The rejection of the "superior orders" defense is of necessity based on the presumption of an applicable legal order outside of and beyond the nation state. This, in itself is the most important sign of transformation of the paradigm that was being made.

Fred L. Morrison, *The Significance of Nuremberg for Modern International Law*, 149 MIL. L. REV. 207, 212 (1995)

⁷⁸ Roberts, *supra* note 50, at 785.

⁷⁹ D'AMATO, *supra* note 22, at 58 (quoting Mateesco).

⁸⁰ See D'AMATO, *supra* note 22, at 97-98.

⁸¹ Roberts, *supra* note 50, at 784.

⁸² D'AMATO, *supra* note 22, at 97.

⁸³ *Id.* at 34 (citing HUSSERL, IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY (1931)).

⁸⁴ See Roberts, *supra* note 50, at 767.

“seed” for new law actually produces a shift in customary international law depends in part upon the reactions of other states.⁸⁵ Whether acts of states occur in the past, or these states claim that they are entitled to act in a particular way, can be evidence of a rule of customary international law.⁸⁶ For example, states can indicate whether they concur with, or protest the legality of the doctrine of anticipatory self-defense, as in the case of *Operation Iraqi Freedom*. The acts of anticipatory self-defense pursuant to the Bush Doctrine may modify existing customary international law if other states emulate the action or acquiesce in its legality. Are other states protesting, or to what extent are states acquiescing, or even actively endorsing the nascent rule? How many states must endorse anticipatory self-defense under the circumstances of *Operation Iraqi Freedom* in order for the practice to become a customary norm? There is no litmus test.

The types of assistance may measure the degree of acquiescence or outright support by states of Operation Iraqi Freedom. Making its territory or air space available for the military operations of other states is an affirmative stand on the underlying justness of the action. Serious international responsibilities attach to a state's permitting its territory and air space to be used by the military forces of other states. The U.N. General Assembly's "Definition of Aggression" Resolution provides that "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State" qualifies as an "act of aggression" in violation of Article 2(4), providing that all states "refrain . . . from the threat or use of force."⁸⁷ Some states, including Germany and France, have allowed overhead flight rights for allied warplanes heading for Iraq even as they have assailed the war itself.⁸⁸ If a state offers its air space to the U.S. and coalition forces, it ought to be convinced that military operations are supported by a bona fide *jus*

⁸⁵ *Id.* at 784.

⁸⁶ See AKEHURST, *supra* note 54, at 29.

⁸⁷ U.N. CHARTER art. 2(4).

⁸⁸ See Alan Cowell, *France Holds Out a Tentative Olive Branch, With Thorns, to the U.S.*, N.Y. TIMES, Mar. 28, 2003, at B10.

ad bellum principle, or its offering of airspace may be deemed an illegal "act of aggression" by the Security Council.⁸⁹

At any rate, the fact that some states, such as France, Germany, and Russia voiced their objection to the use of force in *Operation Iraqi Freedom*, may be a forceful detraction from the quantum of acquiescence.⁹⁰ But there was no draft resolution condemning the coalition's use of force against Iraq in the Security Council, and no state requested a meeting of the General Assembly to condemn the intervention. Foreign Minister Dominique de Villepin of France said in an address at the International Institute for Strategic Studies in London,

We do not oppose the use of force. We are only warning against the risks of pre-emptive strikes as a doctrine. What examples are we setting for other countries? How legitimate would we feel such an action to be? What are our limits to the use of such might? In endorsing this doctrine we risk introducing the principle of constant instability and uncertainty.⁹¹

This statement seems to be an endorsement of the use of force in *Operation Iraqi Freedom*, with the caveat that there ought to be constraints to prevent the Bush Doctrine from becoming a slippery slope.

Another issue on the question of acquiescence by other states is whether acquiescence by a number of states can be inferred by their silence. "If some states claim that something is law and other states do not challenge that claim, a new rule will come into being, even though all the states concerned may realise [sic] that it is a departure from pre-existing rules."⁹² In many instances, states do not take active steps, such as a note of protest, with respect to the actions of another state, either because it would be ineffective, undiplomatic, or impolite.⁹³ Other states may have no need to pronounce an opinion in the

⁸⁹ Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense, and Other Responses*, 11 CARDOZO J. INT'L & COMP. L 1, 22 (2003).

⁹⁰ See Judy Keen & Dave Moniz, *Realities Push Bush Back to U.N.*, USA TODAY, Sept. 4, 2003, at 9A.

⁹¹ Alan Cowell, *A Nation at War: Overture from Paris; France Holds Out a Tentative Olive Branch, With Thorns, to the U.S.*, N.Y. TIMES, Mar. 28, 2003, at B10.

⁹² AKEHURST, *supra* note 54, at 30.

⁹³ See *id.* at 29.

matter because it involves a matter that does not affect its own interests in any significant way.⁹⁴

The *Lotus* case is illustrative of the effect of silence by a state on the content of customary international law.⁹⁵ The facts of that case were as follows: a French merchant ship collided with a Turkish merchant ship on the high seas, allegedly on account of negligence by an officer on the French ship, Lieutenant Demons.⁹⁶ Several people on the Turkish ship drowned.⁹⁷ France had jurisdiction to try Lieutenant Demons for manslaughter, but the question was whether Turkey also had jurisdiction to try him.⁹⁸ Turkey argued that a permissive rule of international law allowed it to try him.⁹⁹ France argued that, to the contrary, there was a rule that imposed a constraint on Turkey's ability to try him.¹⁰⁰ The Permanent Court of International Justice sided with Turkey for the following reasons: (a) although there were only a few cases in which states in Turkey's position had instituted prosecutions, the other states concerned in those cases had not protested against the prosecutions; and (b) although most states in Turkey's position had refrained from instituting prosecutions, there was no evidence that they had done so out of a sense of legal obligation.¹⁰¹ The point of this case for the present discussion is this: there are numerous instances where states refrained from engaging in acts of preventive war or acts of anticipatory self-defense along the lines of the Bush Doctrine. However, in order to ascertain whether these acts of restraint constitute evidence of customary international law, we would need to know whether these states restrained themselves out of a sense of legal obligation, or because of other factors.

Another point concerning customary international law is the impact of hegemony on custom. The political reality of the world is that powerful states often establish a hegemonic and decisive influence in determining the content and application of

⁹⁴ See *id.*

⁹⁵ See *id.* at 30.

⁹⁶ See *id.*

⁹⁷ See AKEHURST, *supra* note 54, at 30.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See AKEHURST, *supra* note 54, at 30.

custom.¹⁰² That is, participation by the major powers in a particular custom “will be regarded as more significant by the international community than would be participation by small states.”¹⁰³

[T]he share of states in the evolution of international law is not, and even cannot be, the same. . . . [Factors such as] power, wealth and sheer size . . . determine the role played in the evolution of international customs. It is well known from the history of the 19th century that the great powers of the European Concert exercised in relation to the remaining states of Europe a hegemony which was not only political. On the initiative of those powers, and under their authority, legal principles arose which were afterwards accepted, more or less freely, by the whole of international society.¹⁰⁴

This geopolitical reality suggests that, if custom is based primarily on actions, then only states with the ability to act can legitimately acquiesce or reject particular customs.¹⁰⁵ This seems to belie the egalitarian notion within the United Nations regarding the legal equality of all states as a principle of international relations.¹⁰⁶ But equality among states is something of a legal fiction; there are extreme variations in de facto power and influence of states. Even with the participation in the United Nations of many developing nations,

[p]ractice being the nucleus of custom, those states are the most important which have the greatest share and interests [in evolving practices]—that is, in most cases the great powers. . . . Such acceptance on the part of the great powers frequently has a decisive effect, because the other states, for this or that reason, pay more heed to the opinion of those powers than to that of minor states.¹⁰⁷

Most likely, the only superpower, the United States, is capable of anticipatory intervention in a situation such as *Operation Iraqi Freedom*. The United States is one of a handful of

¹⁰² See Roberts, *supra* note 50, at 768.

¹⁰³ D'AMATO, *supra* note 22, at 65.

¹⁰⁴ KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 78 (1993).

¹⁰⁵ MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES 37 (1999).

¹⁰⁶ See D'Amato, *supra* note 22, at 65.

¹⁰⁷ WOLFKE, *supra* note 104, at 78-79.

states that are able to form a custom that will become a legal principle to be generally accepted by other states.

Furthermore, "[r]ecent state practice may carry proportionately greater weight than past practice in determining the status of custom."¹⁰⁸ Thus, the fact that the doctrine of anticipatory self-defense as expressed by the Bush Doctrine is a "recent" state practice, there may be "greater weight" in restating the content of customary international law than the "past practices" related to self-defense as recognized in the U.N. Charter.¹⁰⁹

III. BACKGROUND OF AUTONOMOUS USE OF FORCE AND U.N. CHARTER LAW

One of the noble assumptions behind the United Nations' Charter was that it would protect states from needing to engage in self-help in connection with international security threats with collective security protocols. The United Nations' Charter is guided by the overriding principle in Article 2(4): "All 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 other manner inconsistent with the purposes of the United Nations."¹¹⁰ This rule is accepted as universally applicable, even to the states that are not members of the United Nations, because it has become part of customary international law.¹¹¹ This sweeping prohibition is to some extent balanced by the authorization in Article 39 for the Security Council "to determine the existence of any threat to the peace, breach of the peace, or act of aggression."¹¹² Following World War II, the drafters did not find it necessary to define what was meant by Article 39's terms, "threat to the peace, breach of the

¹⁰⁸ Roberts, *supra* note 50, at 785.

¹⁰⁹ *Id.*

¹¹⁰ U.N. CHARTER art. 2(4). The clause, "[o]r in any other manner inconsistent with the purposes of the United Nations," is widely regarded as implying that *any* breach of international peace, whether or not it goes against "the territorial integrity or political independence" of a state, contravenes the purposes of the United Nations Charter (particularly the overriding purpose of Article 1 "to maintain international peace and security". See AKEHURST, *supra* note 54, at 220 (1984) (emphasis added).

¹¹¹ See AKEHURST, *supra* note 54, at 219.

¹¹² U.N. CHARTER, art. 39.

peace, or act of aggression.”¹¹³ Germany’s acts of aggression in the invasion of Czechoslovakia and Poland were egregious enough that the world community, or at least the victors of World War II, felt that aggression and breaches of peace were ascertainable by various military commissions.¹¹⁴ The Nuremberg Tribunal, the Tokyo Major War Crimes Tribunal, and eventually, the Security Council evaluated breaches of peace and aggression.¹¹⁵

There was a consensus that the level of aggression or breach of peace which rises to the purview of Article 39 would be left to a case-by-case interpretation by the Security Council.¹¹⁶ Article 42 empowers the Security Council to “make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”¹¹⁷ Article 25 further requires all member nations “to accept and carry out” those decisions.¹¹⁸ Article 42 authorizes the Security Council, if milder measures fail, to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”¹¹⁹ To that end, Article 43 calls upon all members “to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”¹²⁰ The drafting committee of the Charter “assumed that states readily would enter into agreements with the Security Council to commit available specified forces for service when needed.”¹²¹ This provision of Article 43,

¹¹³ *Id.*

¹¹⁴ See Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 76 (2001).

¹¹⁵ See Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, MIL. L. REV. 1, 45-46 (1996).

¹¹⁶ See Memorandum by the Under Secretary of State (Stettinius), to the Secretary of State (Sept. 1, 1944), in 1 FOREIGN REL. U.S. 1944, 761, 762 (1966).

¹¹⁷ U.N. CHARTER art. 42.

¹¹⁸ *Id.* art. 25.

¹¹⁹ U.N. CHARTER, art. 42.

¹²⁰ *Id.* art. 43, para. 1.

¹²¹ Franck, *supra* note 28, at 52.

however chivalrous in purpose, has never been implemented.¹²² That is, member states have never entered into the arrangements necessary to give the Security Council an effective standby by collective armed force.¹²³ Instead, in the cases where the Security Council has voted to declare Article 39 breaches of peace,¹²⁴ the Council has called upon national contingents in what has come to be called a "coalition of the willing."¹²⁵

The efficacy of the Security Council in fulfilling the security needs of states is also thwarted by procedural deficiencies and constraints.¹²⁶ The Security Council, comprising of only fifteen states, with each of the five permanent members having the power of veto, it cannot be expected to make speedy and objective decisions as to when collective security measures are necessary.¹²⁷

¹²² See *id.* at 53.

¹²³ See *id.* at 54.

¹²⁴ The Security Council has had occasion to call for ad hoc collective forces, despite the absence of Article 43 forces of its own, on several occasions: The Korean War in 1950, *Operation Desert Storm* after Iraq's invasion of Kuwait in 1990, the expanded peace and security mandate regarding Somalia in 1992, the calling for a multinational force to facilitate the departure from Haiti of the military leadership that had overthrown the democratically elected government, and the ad hoc "coalition of the willing" together with NATO's air and naval command mandated in the former Yugoslavia and for the defense of Bosnian "safe areas" in 1992. See Franck, *supra* note 28, at 54-56.

¹²⁵ Franck, *supra* note 28, at 54.

¹²⁶ See Shashi Tharoor, *If The U.N. Were Being Created Today*, N.Y. TIMES, Mar. 15, 2003, at B9.

¹²⁷ It has been pointed out that the U.N. Charter is extremely difficult to amend. Amendments require a vote of two-thirds of the members of the General Assembly, plus ratification by the legislatures of two-thirds of the members (which would mean 128 parliaments today), including all five of the permanent members of the Security Council. See Shashi Tharoor, *If the U.N. Were Being Created Today*, N.Y. TIMES, Mar. 15, 2003, at A17. The Charter also contains obsolete references to "enemy states," which pertain to the Axis powers of Japan and Germany that were defeated in World War II; bygone institutions such as the Trusteeship Council, which continues as one of the United Nations' "principal organs," even though there are practically no trust territories left after persistent decolonization; unimplemented provisions such as the articles in Chapter VII calling upon member states to conclude agreements with the United Nations to provide land, sea and air forces on call to enforce the peace; and bodies that never performed their intended mission, such as the military staff committee created in Article 47 to provide "strategic direction" to the Security Council's nonexistent armed forces. See *id.*

IV. NOTION OF SELF-DEFENSE BASED ON IMPLIED AUTHORIZATION OF SECURITY COUNCIL RESOLUTIONS

It is noteworthy that the United States did seek to justify *Operation Iraqi Freedom* based on "implied authorization" from extant U.N. Security Council Resolutions. This tactic has been advanced in the past in connection with enforcement of the "no-fly" zones and other skirmishes with Iraqi forces, but has been met with skepticism, to say the least.¹²⁸ The Security Council

¹²⁸ Christine Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, 13 EUR. J. INT'L L. 1, 12-13 (2002). A separate legal justification for the patrolling of no-fly zones was to prevent a grave humanitarian crisis. *See id.* at 9. Much criticism has been directed by Security Council members, claiming that these actions in the no-fly zone are illegitimate despite claims of humanitarian justification. *See id.* at 10.

"Implied authorization" of the Security Council was also advanced to justify President Clinton's air strikes against Iraq for the attempted assassination of George H.W. Bush in 1993, and his strikes against Sudan and Afghanistan following the Embassy Bombings in Tanzania and Kenya in 1998, which has caused a certain degree of polarization among states. *See Gray, supra*, at 8-15. For instance, NATO member states claimed an implied Security Council authorization for their use of force in Kosovo, even in the absence of any express authority in a resolution. *See id.* And the Security Council defeated resoundingly a vote of censure of NATO's intervention in Kosovo. *See U.N. SCOR*, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (1999). The U.S.A., the UK and France justified actions in the ongoing clashes with Iraq over the no-fly zones and to protect the Kurds in northern Iraq in April 1991 based on implied authorization pursuant to Resolution 688, which demanded that Iraq end the repression of its civilian population and allow access to international humanitarian organizations but in itself did not authorize the use of force. *See Christine Gray, supra*, at 9. Allied forces claimed the use of force was "consistent with," "supportive of," "in implementation of" and "pursuant to" Resolution 688. *See id.*

The doctrine of implied Security Council authorization was also invoked in actions against Iraq for non-cooperation with U.N. weapons inspectors under Resolution 687 ceasefire regime. In December 1998, in order to retaliate against Iraq, the U.S. and UK forces launched a major operation lasting four days, involving more missiles than used in the entire 1991 conflict. *See id.* at 11. The basis for implied Security Council authorization was Security Council Resolutions 1154 and 1205 even though they had not made express provision for the use of force. Resolution 1154 said that Iraq must, under Resolution 687, accord immediate and unrestricted access to UNSCOM and IAEA inspectors and that any violation would have "the severest consequences for Iraq." *See id.* Resolution 1205 condemned the decision of Iraq to stop cooperation with UNSCOM and demanded that Iraq rescind its decision. *See id.* at 12. The UK argued that Resolution 1205 had impliedly revived the authority to use force given in Resolution 678 (the cease-fire resolution of 1990), which provided that Member States could employ all necessary means to secure compliance with the Council's resolutions and restore international peace and security in the area. That is, the argument was that Resolution 687 made it a condition of Resolution 678, the cease fire resolution, that Iraq de-

imposed sanctions against Iraq following the Gulf War of 1990-91, implementing a Ceasefire Resolution (Resolution 678).¹²⁹ That Resolution was supplemented by Resolution 687, which required Iraq to cooperate with weapons inspections mandated under Resolution 678.¹³⁰ Commenting on a January 1993 strike against an Iraqi missile site in the no-fly zones, the U.N. Secretary-General seemed to endorse the notion of implied authorization by saying that the strike by allied forces was justified because Iraq was in material breach of the ceasefire resolution because it failed to cooperate with the weapons inspections required under Resolution 687.¹³¹ However, the Secretary-General has not subsequently revived this justification for subsequent coalition attacks in the no-fly zones.¹³² Moreover, critics claim that individual states do not have the right to declare Iraq in material breach of the Ceasefire Resolution, a power that properly lies with the Security Council alone.¹³³

It is for the Security Council to determine not only the existence of a breach of the ceasefire, but also the consequences of such a breach in cases where there is a binding ceasefire imposed by the Security Council. Moreover, it seems doubtful whether any breach of Resolution 687 [providing for cooperation with weapons inspectors] not itself involving the use of force can justify the USA and UK in turning to force in response. Those who support this doctrine of material breach seem impatient of disagreement in the Security Council; they revive Cold War arguments that when the Security Council is unable to act because of a permanent member then the USA and the UK can go ahead to use force, if there has been a breach of a prior resolution passed under Chapter VII, even in the absence of express authorization. But this has dangers for the Security Council's right to consider further action; it also discounts statements in debates that it is for the Security

stroy its weapons of mass destruction and agree to a monitoring of its obligations to destroy such weapons. By flagrantly failing to cooperate with weapons inspectors, Iraq had violated Resolution 687, impliedly reviving the authority to use force stated in Resolution 678. However, in the Security Council debates following the operation only Japan endorsed this interpretation. *See id.* Russia outright claimed that the resolutions provided no grounds whatsoever for such action. *See id.*

¹²⁹ *See* Gray, *supra* note 128, at 2.

¹³⁰ *See id.* at 6-7.

¹³¹ *See id.* at 7.

¹³² *See id.*

¹³³ *See id.*

Council to take further action. This undermines the authority of the Security Council and ignores the careful negotiations between states attempting to reach agreement on controversial issues.¹³⁴

In fall 2002, the Security Council unanimously passed Security Council Resolution 1441, which required Iraq to report and account for its weapons of mass destruction, and warning of "serious consequences" for non-compliance.¹³⁵ Clearly, Resolution 1441 does not authorize the use of force to effect Iraq's compliance. The Security Council was unable to come to a consensus over whether Iraq had committed a "material breach" of Resolution 1441 after numerous reports of weapons inspectors, allegations, denials, and arguments to allow further time for inspectors to carry out their work.¹³⁶ Resolution 1441, however, contains no provisions for the use of force; that would have to be addressed by a subsequent Resolution declaring Iraq in material breach of 1441. It would have been impolitic and unwise for coalition forces to pin their justification of *Operation Iraqi Freedom* on an implied authorization of the use of force from Resolution 1441. The strongest case, made in connection with Iraq's breach of the Ceasefire Resolution, was its failure to cooperate with the weapons inspections required under Resolution 687. Ironically, this logic failed to garner Security Council support. Then again, it appears that the legal justification proffered by the United Kingdom was predicated on implied authorization from Security Council resolutions.¹³⁷

¹³⁴ See Gray, *supra* note 128, at 7.

¹³⁵ U.N. SC Res. 1441, 57th Sess., 4644th mtg. at 5, U.N. Doc. S/Res/1441 (2002); Roy Eccleston, *Madman Saddam Had To Go: Bush—Iraq: Counting The Cost*, THE WEEKEND AUSTRALIAN (Washington), Oct. 11, 2003, at 17.

¹³⁶ Foreign Affairs Minister S. Jayakumar, Remarks at the Annual U.N. Meeting (Oct. 1, 2003), in THE SINGAPORE TIMES, Oct. 2003.

¹³⁷ According to the Attorney General of the United Kingdom, in an answer to a Parliamentary question, the legal basis for the use of force in Iraq is as follows:

Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security:

1. In Resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
2. In Resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore inter-

Similarly, Ruth Wedgwood argues that Security Council Resolution 687, the cease-fire that formally ended the Gulf War, was expressly linked to Iraq's "unconditional[] accept[ance]" of two conditions: to eliminate weapons of mass destruction and to allow verification by weapons inspectors.¹³⁸ In 1997-98, Iraq defied these cease-fire terms, therefore Wedgwood argues that this defiance allowed the United States to deem the cease-fire in suspension and engage in military operations to enforce its conditions.¹³⁹ Iraq's defiance consisted of: shutting down inspections, making claims that the U.N. Special Commission on Iraq (UNSCOM, established by Security Council Resolution 687 to monitor compliance) was an American espionage agency, and that weapons inspection teams had a disproportionate number of Americans and British.¹⁴⁰ Iraq also threatened the safety of the Special Commission's high-altitude surveillance plane, and challenged its right to examine sixty-eight "presidential and

national peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under resolution 678.

3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.

4. In Resolution 1441 the Security Council determined that Iraq has been and remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.

5. The Security Council in Resolution 1441 gave Iraq "a final opportunity to comply with its disarmament obligations" and warned Iraq of the 'serious consequences' if it did not.

6. The Security Council also decided in resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of resolution 1441, that would constitute a further material breach.

7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach.

8. Thus, the authority to use force under resolution 678 has revived and so continues today.

9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.

Legal basis for use of force against Iraq - statement by Attorney General, BRIT. INST. INT'L & COMP. L., 65-66, Issue No. 6, Bulletin of Legal Developments (2003).

¹³⁸ Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 726 (1998); U.N. SCOR, Res. 687, (Apr. 3, 1991), 30 I.L.M. 847 (1991).

¹³⁹ See *id.* at 726.

¹⁴⁰ See *id.* at 725.

sovereign sites.”¹⁴¹ These facts were exacerbated by reports by UNSCOM to the Security Council that, while some progress had been made in dismantling Iraq’s nuclear weapons program, there was an ongoing concern about Iraq’s biological and chemical weapons programs, including the production of deadly VX nerve gas.¹⁴² Iraq’s biological and chemical weapons program had been concealed until mid-1995, when UNSCOM uncovered Iraq’s importation of thirty-nine tons of biological “growth media.”¹⁴³ Iraq, for its part, claimed that its biological and chemical weapons program had terminated in 1991, but refused to provide UNSCOM with any documentation of the destruction of virulent agents such as anthrax, botulinum and aflatoxin.¹⁴⁴ In addition, seventeen tons of growth media were unaccounted for, as well as six hundred tons of VX precursor.¹⁴⁵

The United States began a significant build-up of air and sea forces in the Persian Gulf and announced its willingness to use military force in the event Iraq continued to flout the U.N. inspection regime. In February 1998, Secretary-General Kofi Annan met with officials in Baghdad and obtained a renewed promise by Iraq to permit weapons inspections to proceed.¹⁴⁶

Wedgwood makes the point that the United States was entitled to threaten the use of military force to gain Iraqi compliance because of the conditional nature of the 1991 ceasefire, coupled with the prior practice under the UNSCOM regime, in which military force was deployed in 1993 to deter Iraqi interference with inspections.¹⁴⁷ She argues that Iraq’s defiance of the cease-fire terms of resolution 678 allowed the United States to deem the cease-fire in suspension and to resume military operations to enforce its conditions.¹⁴⁸ She also counters the argument that the United States lacks “standing” to enforce breaches of the cease-fire resolution because the ad hoc coalition

¹⁴¹ *Id.* at 725.

¹⁴² *Report of the Secretary-General on the activities of the Special Commission established by the Secretary-General pursuant to paragraph 9(b)(i) of Resolution 687*, U.N. Doc. S/1997/774 (1991).

¹⁴³ Wedgwood, *supra* note 138, at 725.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See The Deal on Iraq: How Accord Will Work: Special Group Is Set Up*, N.Y. TIMES, Feb. 24, 1998, at A10.

¹⁴⁷ *See* Wedgwood, *supra* note 138, at 725.

¹⁴⁸ *See id.* at 726.

of the willing, led by the United States, had been "authorize[d]" to "use all necessary means" to remove Iraq from Kuwait and, as well, to "restore international peace and security in the area."¹⁴⁹ She says,

It is not unreasonable to regard the terms of such a cease-fire as self-executing, just as the violation of a newly settled boundary line or demilitarized zone would entitle a neighboring state to act upon a violation. Iraq could hardly cloak itself in the cease-fire's benefits while flagrantly violating one of its principal conditions.¹⁵⁰

Moreover, an earlier crisis erupted in January 1993 when Iraq notified UNSCOM that it could no longer use the Habaniyah airfield, and thereby prevented short-notice inspections.¹⁵¹ The President of the Security Council stated that the action was an "unacceptable and material breach of the relevant provisions of Resolution 687 (1991), which established the cease-fire and provided the conditions essential to the restoration of peace and security in the region."¹⁵² He further stated that Iraq was warned that "serious consequences" would flow from its "continued defiance."¹⁵³ On January 13, 1993, the United States, joined by the United Kingdom and France, conducted air raids on sites in Iraq without any Council vote for a new resolution authorizing the use of force.¹⁵⁴ As Professor Wedgwood points out, "The claim that a new Council resolution was a prerequisite to the threat or use of force in the 1997-1998 confrontation is difficult to square with the precedent of Janu-

¹⁴⁹ U.N. SCOR, Res. 678, para. 2 (Nov. 29, 1990), 29 I.L.M. 1565 (1990) (Security Council "[a]uthorizes Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) [demanding withdrawal of Iraqi forces from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area.").

¹⁵⁰ Wedgwood, *supra* note 138, at 725-26. Prof. Wedgwood also points out that The Security Council itself found Iraq to be in "flagrant violation" of its obligations, and the Council's President warned that "serious consequences" would result in Iraq's refusal to allow inspections, and cited the regime's "clear violation of relevant resolutions." *See id.*

¹⁵¹ *See id.* at 725.

¹⁵² Statement by the President of the Security Council concerning United Nations flights into Iraqi territory, UN Doc. S/25081 (1993).

¹⁵³ *Note by the President of the Security Council*, U.N. SCOR, UN Doc. S/25091 (1993).

¹⁵⁴ *See Wedgwood, supra* note 138, at 727.

ary 1993.”¹⁵⁵ After Iraq had agreed to continued compliance with the inspection regime following the 1997-1998 crisis, Secretary-General Kofi Annan was asked on a news program whether any future use of military force would require a new Security Council resolution.¹⁵⁶ He said, “If the U.S. had to strike, I think some sort of consultations with other members would be required.”¹⁵⁷ But he did not deny that any future unilateral strike by the United States to respond to further instances of Iraqi non-compliance would be impliedly authorized by extant Security Council resolutions.¹⁵⁸

Notwithstanding the compelling legal arguments in favor of reliance on implied authorization of Security Council resolutions, the United States sought to justify the use of force in *Operation Iraqi Freedom* based solely on the doctrine of anticipatory self-defense, or preventive war, with the purpose of disarming the regime of weapons of mass destruction, and eradicating terrorist cells that are sponsored or tolerated by the state.¹⁵⁹ A secondary justification appears to be humanitarian intervention with the purpose of liberating the Iraqi people from a brutal dictator, who, as mentioned above, has been responsible for genocide, other crimes against humanity, and war

¹⁵⁵ *Id.* at 728.

¹⁵⁶ See *This Week: Remarks of Secretary-General Kofi Annan* (ABC television broadcast, Mar. 8, 1998).

¹⁵⁷ *Id.*

¹⁵⁸ See generally *id.*

¹⁵⁹ Although the President did not hinge the justification for *Operation Iraqi Freedom* on Congressional authorization, such authorization could plausibly be pegged on the Joint Resolution of Congress, Pub. L. 107-40 § 2(a) (Sept. 18, 2001), stating:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(Emphasis added). Under this Resolution one might argue that the attack on Iraq was impliedly authorized by the Joint Resolution of Congress “in order to prevent any future acts of international terrorism” by Iraq, based on its being a nation that the President has determined harbored terrorist organizations or persons, even though Iraq might not have been implicated in the September 11, 2001 terrorist attacks.

crimes, particularly for its use of chemical weapons in the war with Iran.¹⁶⁰

Understandably, the United States and Britain lost patience with the Security Council's efforts to prolong weapons inspections.¹⁶¹ The fact that Iraq possessed various weapons of mass destruction in the past concerned these two nations.¹⁶² If the evidence of weapons of mass destruction appears unfounded, there are two possibilities: these weapons are still in Iraq, albeit concealed, or they were destroyed, leaving only administrative documents that account for their disposition as evidence.

V. SELF-DEFENSE UNDER ARTICLE 51 OF THE U.N. CHARTER AND THE INHERENT RIGHT OF SELF-DEFENSE UNDER CUSTOMARY INTERNATIONAL LAW

Article 51 of the U.N. Charter provides:

Nothing 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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁶³

The right of self-defense, as envisioned by the drafters, was textually limited to the then-existing concept of "armed attack."¹⁶⁴ Moreover, the drafters contemplated that states sub-

¹⁶⁰ See Christopher C. Joyner and Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 U.S.A.F.A. J. LEGAL STUD. 27, 40-43 (1999/2000).

¹⁶¹ See Julian Coman, *The blunt response of Britain's UN Ambassador to a call from the PM signalled just how bad things had got at the Security Council*, SUNDAY TELEGRAPH (London), Mar. 16, 2003, at 2.

¹⁶² See *id.*

¹⁶³ U.N. CHARTER, art. 51 (Emphasis added).

¹⁶⁴ Franck, *supra* note 28, at 57. During the drafting of the United Nations Charter, Governor Harold Stassen, deputy head of delegation at San Francisco, insisted that a greatly limited right of self-defense "was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred." *Minutes of the Forty-Eighth Meeting (Executive Session) of the United*

ject to attack would defend themselves until such time that the U.N. would deploy Article 43 forces to combat the aggression.¹⁶⁵ But as noted above, Article 43 security forces have never been established.

There is an apparent contradiction in Article 51. On one hand, the article states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense," while this "inherent right" is immediately qualified in the same sentence by the words, "if an armed attack occurs"¹⁶⁶ This may suggest that Members forfeited whatever inherent rights of self-defense that may exist under customary international law. Numerous commentators have pointed out that customary international law pertaining to the inherent right of self-defense contains no "armed attack" constraint.¹⁶⁷ This inconsistency suggests that Members of the United Nations have less right to defend themselves than do non-members. However, it is generally agreed that Article 51 does not supersede or abrogate notions of self-defense under customary international law.¹⁶⁸ D. W. Bowett spoke to this point:

It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter. . . . As we have seen, the view of Committee I at San Francisco was that this prohibition left the right of self-defence unimpaired; in the words of the rapporteur 'the use of arms in

States Delegation, Held at San Francisco, Sunday, May 20, 1945, 12 Noon, in 1 FOREIGN RELATIONS OF THE UNITED STATES 1945, 813, 818 (1967). When another member of the delegation, Mr. Gates, "posed a question as to our freedom under this provision in case a fleet had started from abroad against an American republic, but had not yet attacked," Governor Stassen said that "we could not under this provision attack the fleet but we could send a fleet of our own and be ready in case an attack came." *Id.* at 707, 709.

¹⁶⁵ See Franck, *supra* note 28, at 57

¹⁶⁶ U.N. CHARTER, art. 51.

¹⁶⁷ Abraham D. Sofaer, *U.S. Acted Legally in Foreign Raids*, *NEWSDAY* (New York), Oct. 19, 1998, at A29. Sofaer, a former State Department Legal Advisor, opined: "Self-defense allows a proportionate response to every use of force, not just 'armed attacks.'" *Id.*; see also D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 188 (1958) (noting that, with respect to customary international law before the U.N. Charter was enacted: "[I]t is quite certain that under the general law the right was not limited to cases of armed attack."). *Id.*

¹⁶⁸ See BOWETT, *supra* note 167, at 188.

legitimate self-defence remains admitted and unimpaired.' . . . The history of Art. 51 suggests nothing of an additional obligation; the *travaux préparatoires*, to which we may legitimately resort in the case of ambiguity, suggest only that the articles should safeguard the right of self-defence, not restrict it.¹⁶⁹

Moreover, one of the drafters of the treaty for the Renunciation of War (the Briand-Kellogg Pact or "Pact of Paris"), signed in Paris on August 27, 1928, said:

That right [of self-defense] is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times *and regardless of treaty provisions* to defend its territory from attack or invasion and *it alone is competent to decide* whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action.¹⁷⁰

The "inherent right" of self-defense in Article 51 refers to the broad right of self-defense that existed under customary international law before the U.N. Charter was established, and which presumably evolves as customary international law evolves.¹⁷¹ Because of modern developments in warfare, international legal scholars interpret Article 51 more expansively than a literal reading of its text might allow. Consequently, a state need not wait until the actual occurrence of an armed attack prior to asserting an Article 51 right to defend itself.¹⁷² For example, scholars have opined that the mere presence of state sponsorship and support of international terrorists could constitute the use or threat of force prohibited by Article 2(4), which would justify self-defense either under a reasonable construction of "armed attack" or under the more elastic international norm that allows for anticipatory self-defense.¹⁷³

This view conflicts with the term "armed attack" as defined by the International Court of Justice in *Nicaragua v. United*

¹⁶⁹ *Id.*

¹⁷⁰ TREATY FOR THE RENUNCIATION OF WAR 57 (Dept. of State Publication 468 (1933)) (emphasis added).

¹⁷¹ U.N. CHARTER, art. 51.

¹⁷² See generally LOUIS HENKIN, ET AL, RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 40-47 (1991).

¹⁷³ RICHARD ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 109, 113 (1989).

States of America.¹⁷⁴ *Nicaragua* addressed whether Nicaragua's provision of weapons and other support to rebels seeking to overthrow the Salvadorian government constituted an "armed attack."¹⁷⁵ The Court said: "[W]hile the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with an armed attack."¹⁷⁶ The Court concluded that an armed attack does not exist merely in virtue of "assistance to rebels in the form of the provision of weapons or logistical or other support."¹⁷⁷ Only active support such as an actual "sending" of "armed bands, groups, irregulars or mercenaries," or "substantial involvement therein" would constitute an "armed attack" under Article 51.¹⁷⁸ Under this view, it is not entirely clear whether *any* attack in response to a terrorist attack (including the United States' and allied use of force in *Operation Enduring Freedom* in Afghanistan following the September 11th terrorist attacks) would be lawful. Moreover, any strict construction of Article 51 would make promoting military action against Iraq difficult in the absence of an overt military offensive against the United States or its allies.

Under the Court's formulation, the use of force against the Taliban regime in Afghanistan following the September 11 terrorist attacks was unlawful. For that matter, if the government of Afghanistan had directly provided the terrorists with airplane

¹⁷⁴ Military and Paramilitary Activities (*Nicaragua v. U.S.*), 1986 I.C.J. 14 (June 27). Decisions of the Court are not binding, according to Article 59 of the Statute of the I.C.J. 1945 I.C.J. STAT., art. 59. However, judicial decisions in general represent "subsidiary means for the determination of rules of law" under Article 38 thereof. 1945 I.C.J. STAT., art. 38. All member states of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice. See U.N. CHARTER, art. 93, para. 1.

¹⁷⁵ Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14, 119.

¹⁷⁶ *Id.* at 126-27.

¹⁷⁷ *Id.* at 103-04.

¹⁷⁸ *Id.* The position of the International Court of Justice was already taken to be the case by other commentators. For example, in 1963, Ian Brownlie stated:

Since the phrase "armed attack" strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of "armed attack."

IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 278 (1963).

tickets, funds for flight lessons, and the box cutters used to hijack the aircraft that crashed into the World Trade Center and the Pentagon, or if the Afghan government had provided the anthrax spores used to contaminate the American postal system, such support still would not constitute an armed attack, and the use of force against the Afghan government would therefore not have been permitted. Indeed, the entire approach of the United States in fighting terrorism—refusing to distinguish between terrorists and those who harbor them, which has come to be called the “Bush Doctrine”—is outlawed by this precept to the extent that it precludes any use of force against states that only passively provide a safe harbor for terrorists and avoid substantial involvement in the terrorists’ activities.¹⁷⁹

Nicaragua did not explicitly address the issue of anticipatory self-defense, with the Court stating that since “the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised . . . the Court expresses no view on that issue.”¹⁸⁰ The Court also noted, in strictly construing “armed attack,” that whether states might establish an exception to the general principle of non-intervention will depend in part on whether they “justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.”¹⁸¹ “Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.”¹⁸² In a dissenting opinion, Judge Schwebel expressed support for the view that under Article 51, self-defense was not limited to a situation “if, and only if, an armed attack occurs.”¹⁸³

Nicaragua may be criticized because the Court interpreted “inherent” to mean a right that is based in customary international law that remained extant after the U.N. Charter was adopted while it failed to consider the actual practices of states in order to ascertain whether a more expansive right of self-defense under customary international law in fact exists in addition to the more inelastic version of self-defense stated in

¹⁷⁹ Glennon, *supra* note 34, at 543-44.

¹⁸⁰ *Nicar. v. U.S.*, 1986 I.C.J. at 103.

¹⁸¹ *Id.* at 109.

¹⁸² *Id.*

¹⁸³ *Id.* at 358 (Dissenting Opinion of Judge Schwebel).

Article 51.¹⁸⁴ The Court simply failed to consider the underlying geopolitical realities, and hence did a disservice to the jurisprudence of international law. The fact is that

[s]o many states have used force with such regularity in so wide a variety of situations that it can no longer said that any customary norm of state practice constrains the use of force. Had the Court approached the issue with a modicum of intellectual honesty, it would have rested its opinion on other doctrines of customary international law that counseled abstention in dealing with the gap in the law that the Court strove so mightily to ignore.¹⁸⁵

A restrictionist view of Article 51 holds that anticipatory self-defense is unlawful under Article 51.¹⁸⁶ This ignores the reality that terrorist organizations have global reach, something that was unknown when Article 51 was drafted.¹⁸⁷ It is impossible to predict when a rogue state that sponsors terrorism and develops weapons of mass destruction will actually strike. In certain situations the use of force against safe-harbor states may be the only means available to eliminate the threat of terrorist strikes. Since the ability of terrorists to inflict harm depends on the indifference or active sponsorship of a host government that could curtail that ability simply by withdrawing its hospitality, it belies common sense to say it is unlawful for the aggrieved state to take preventive actions. In addition, today there are more ominous types of "attack" that are not so much "armed" as they are covert, surrogate strands of warfare, and military aggression waged indirectly, subversively, or by covert foreign intervention.¹⁸⁸ While the notion of "armed attack" in 1945 must have taken into consideration the availability of atomic bombs and the German-made V-1 and V-2 supersonic ballistic missiles, the drafters of the U.N. Charter

¹⁸⁴ See *id.*

¹⁸⁵ Glennon, *supra* note 34, at 554-55.

¹⁸⁶ See, e.g., BROWNIE, *supra* note 178, at 278 ("[T]he view that Article 51 does not permit anticipatory self-defense is correct and . . . arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence."); see also, PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1952) ("Under the Charter, alarming military preparations by a neighbouring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.").

¹⁸⁷ See BROWNIE, *supra* note 178, at 278.

¹⁸⁸ Franck, *supra* note 28, at 57.

"did not fully anticipate the existence, tenacity and technology of modern day terrorism."¹⁸⁹

Also, concepts of self-defense that may have prevailed in 1945 may not be commensurate with the globalization of trade, the changing subject matter of international law, and the diminished importance of state boundaries.¹⁹⁰ Furthermore, "modern methods of intelligence collection, such as satellite imagery and communication intercepts, now make it unnecessary to sit out an actual armed attack to await convincing proof of a state's hostile intent."¹⁹¹ "[T]he advent of weapons of mass destruction and their availability to international terrorists, the first blow can be devastating - far more devastating than the pinprick attacks on which the old rules [i.e., Article 51] were premised."¹⁹² Finally, "the danger of catalytic war erupting from the use of preemptive force has lessened with the end of the Cold War. It made sense to hew to Article 51 during the Cuban Missile Crisis. . . . It makes less sense today, when safe-haven states and terrorist organizations are not themselves possessed of preemptive capabilities."¹⁹³ The doctrine of self-defense should not be construed by looking to the past, but rather to the present. In light of our current reality, it seems preposterous to suggest that a state should idly stand by until the actual physical manifestations of an armed attack occur. It would mean that the planning, organization, and logistical preparation of an attack by military planners of an enemy state would not yet justify military intervention.¹⁹⁴

¹⁸⁹ Beck & Arend, *supra* note 160, at 214.

¹⁹⁰ See Roberts, *supra* note 50, at 777. International law now views the intra-state actions of states (not just interstate interactions), to be an important concern, particularly with regards to human rights obligations that apply to a government's treatment of its own citizens. See *id.*

¹⁹¹ Michael Glennon, *Preempting Terrorism; the Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 25.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ I think it is well worth noting that in municipal law, the Government need not await the actual commission of criminal acts before apprehending criminals. Conspiracy to commit crimes, that is, while the assailants are in the planning stages of executing a plot, is a staple of the common law. A conspiracy is an agreement by two or more persons to commit an unlawful act. See W. LAFAYE & A. SCOTT, CRIMINAL LAW 453 (1972). The crime of conspiracy is completed, and may be prosecuted, before any overt action occurs beyond the formation of the agreement. See Thomas Church, Jr., *Conspiracy Doctrine and Speech Offenses: A Re-*

The United States did not press a case for anticipatory self-defense in *Operation Enduring Freedom* because an armed, terrorist attack had already occurred on September 11, albeit not by another state, but by terrorists who were deemed by compelling evidence to have been actively sponsored by the Taliban regime.¹⁹⁵ The use of force in *Operation Iraqi Freedom*, however, has been advanced as a permissible case of anticipatory self-defense. Today, it is unrealistic to expect a state to forestall protecting its national security by waiting until there has been an armed attack or an act of chemical, biological, or nuclear terrorism. The long-held strategy of containing enemies appears to be insufficient to eradicate the threat of rogue states. As President Bush said on the eve of *Operation Iraqi Freedom*, "In the 20th century, some chose to appease murderous dictators whose threats were allowed to grow into genocide and global war. In this century, when evil men plot chemical, biological

examination of Yates v. United States from the Perspective of United States v. Spoke, 60 CORNELL L. REV. 569, 572 (Apr. 1975). An "overt act" refers to any legal or illegal act in furtherance of the conspiracy. Conspiracy as a crime is thought to justify prosecution prior to an overt act because the *joint* illegal intent of two or more individuals is significantly more dangerous than a similar intent on the part of an individual. *Id.*; see also LAFAYE & SCOTT, *supra*, at 459-60.

When two agree to carry [a plot] into effect, the very plot is an act in itself. . . . The agreement is an advancement of the intention which each has conceived in his mind; the mind proceeds from a secret intention to the overt act of mutual consultation and agreement.

State v. Carbone, 10 N.J. 329, 336-37 (1952).

In the famous Supreme Court case, *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction for advocating overthrow of the government before any overt acts were undertaken in furtherance of goal), the Supreme Court articulated the "clear and present danger" test in an effort to determine when in time the authorities may step in and stop imminent lawless action from taking place. How "imminent" must the lawless action be? How overt must the acts of the conspirators be? The "clear and present danger test" is satisfied without *any* overt act in furtherance of a conspiracy based on the notion that preventing the spread of dangerous speech may be essential to national security:

Obviously, ["clear and present danger"] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.

Id. at 509.

¹⁹⁵ See Michael J. Glennon, *supra* note 34, at 548.

and nuclear terror, a policy of appeasement could bring destruction of a kind never before seen on this earth."¹⁹⁶

VI. PRECEDENTS AND REACTIONS IN THE U.N. TO ANTICIPATORY SELF-DEFENSE

Instances of anticipatory self-defense have elicited varying responses in the past from the international community and the United Nations, with some cases having been tacitly allowed by the U.N.¹⁹⁷ For example, when Israel conducted a "preventive" attack on Egypt in 1956, the U.N. did not criticize the action, but in fact authorized the stationing of U.N. peacekeepers in the Sinai region.¹⁹⁸ The U.N. "apportioned no blame for the outbreak of fighting and specifically refused to condemn the exercise of self-defense by Israel."¹⁹⁹

When the United States imposed a naval quarantine on Cuba to compel the removal of Soviet missiles that were perceived to pose a threat to American security, the doctrine of anticipatory-self defense prevailed.²⁰⁰ The Cuban Missile Crisis occurred in October 1962, and, as is widely known, information disclosed by President John F. Kennedy indicated that the Soviets were assembling delivery systems for intermediate range ballistic missiles in Cuba.²⁰¹ Regarding this development as "a deliberately provocative and unjustified change in the status quo,"²⁰² Kennedy ordered a naval blockade, which he termed a "quarantine," to prevent the transport of missiles and related materiel to Cuba.²⁰³ Under an accepted norm of international law, a blockade, whether termed quarantine or not, constitutes a violation of Article 2(4).²⁰⁴ As such, it could only be considered permissible if it could be demonstrated that it fell into an

¹⁹⁶ Carla Anne Robbins, *Ceasing Diplomacy, U.S. Nears War*, WALL ST. J., Mar. 18, 2003, at A1.

¹⁹⁷ See Franck, *supra* note 28, at 59.

¹⁹⁸ *Id.*

¹⁹⁹ MALCOLM N. SHAW, INTERNATIONAL LAW 429 (1977).

²⁰⁰ See Franck, *supra* note 28, at 59.

²⁰¹ See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 74 (1993).

²⁰² Address by President Kennedy, *reprinted in* ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 153 (1968).

²⁰³ *Id.*

²⁰⁴ See *id.*

exception to the Article 2(4) prohibition.²⁰⁵ At the time, the question of anticipatory self-defense was widely discussed in legal scholarship.²⁰⁶ During the course of debates on the matter in the U.N. Security Council, members differed as to whether the missiles in question were defensive or offensive, but no one rejected the concept of anticipatory self-defense.²⁰⁷ There seemed to be a consensus that in certain situations the preemptive use of force could be justified.²⁰⁸

When a U.S. aircraft attacked bases in Libya in 1986, allegedly used for terrorist attacks on its citizens abroad, the doctrine of self-defense under Article 51 was invoked, and a resolution condemning the U.S. action was introduced in the Security Council, but was vetoed by the United States, France, and the United Kingdom.²⁰⁹ However, the U.N. General Assembly adopted a resolution condemning the attack of the United States by a vote of seventy-nine to twenty-eight, with thirty-three abstentions.²¹⁰ There was widespread criticism of the Libya raid, in part due to Cold War politics. In addition, critics based legitimate concern over the following: what evidence existed to link the West Berlin discotheque bombing to terrorist activities in Libya, what legal basis existed for an armed response against a state for the actions of terrorists under Article 51, how could an "armed attack" exist in the isolated murder of American servicemen abroad, and related arguments that U.S. actions were retaliatory in nature, unnecessary and disproportionate.²¹¹ Often enough, international criticism

²⁰⁵ See *id.*

²⁰⁶ See, e.g., Christol & Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba*, 57 AM. J. INT'L L. 525 (1963); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963); Myres S. McDougall, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963).

²⁰⁷ See Wright, *supra* note 207, at 602.

²⁰⁸ See AREND & BECK, *supra* note 201, at 75.

²⁰⁹ See U.N. SCOR, 41st Sess., 2682d mtg. at 43, U.N. Doc. S/PV.2682 (1986). Australia and Denmark also voted against the resolution, and Venezuela abstained. *Id.*

²¹⁰ G.A. Res. 41/38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/41/53 (1986).

²¹¹ O'Brien, *infra* note 275, at 464-65. Members of the U.N. Security Council criticized the U.S. raid on Libya for, among other things, not being in response to an "armed attack," and not being based on substantiated Libyan involvement in terrorist activities. See *id.* The raid was also criticized as being in the nature of

of particular moves, as occurred in the wake of the United States attack on Libya in 1986, changes over the course of time. In the Libya incident, "as in others, an elongation of the time horizon yields a different picture of international responses. After the immediate reaction to the raid and the regional and national condemnations, Western European nations began to adopt economic and diplomatic sanctions against Libya."²¹²

In 1993, when the United States launched a cruise missile attack on Iraq's Intelligence Service in Baghdad, in response to a failed assassination attempt against former President Bush, causing a number of civilian deaths and destroying much of the complex, again justifying the move under Article 51, most states either supported the move or did not object to it, although most of the Arab world expressed regret regarding the attack.²¹³ Only China questioned the attack.²¹⁴ The General Assembly took no action.

In 1998, when the United States launched retaliatory cruise missile strikes against Osama bin-Laden's training camps in Afghanistan and a Sudanese pharmaceutical plant that the United States had identified as a "chemical weapons facility," following terrorist bombings of the U.S. embassies in Tanzania and Kenya, it justified this move as an Article 51 exercise of self-defense in response to an armed attack.²¹⁵ World reaction was mixed, with the most intense criticism directed on

reprisal rather than straightforward self-defense. See also Francis A. Boyle, *Military Responses to Terrorism*, 81 PROC. AM. SOC'Y INT'L L. 288, 294 (1987) ("The April 14 devastation wreaked upon Tripoli and Benghazi by the Reagan Administration was a classic case of what international law professors call actions of military retaliation and reprisal.")

²¹² W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. INT'L L. 3, 34 (1999).

²¹³ See Stephen Robinson, *UN Support for Raid on Baghdad*, DAILY TELEGRAPH (London), June 28, 1993, at 1 ("Countries in the United Nations Security Council including Britain and France queued up last night to support America's missile attack on Iraqi intelligence headquarters in Baghdad. There was a widespread feeling at the council's emergency meeting in New York that yesterday's predawn raid . . . was justified following evidence that Iraq had been deeply involved in an attempt to assassinate former President Bush."); Craig R. Whitney, *European Allies Are Giving Strong Backing to U.S. Raid*, N.Y. TIMES, June 28, 1993, at A7 ("Russia said the action was justifiable self-defense in accordance with the United Nations Charter. . . .")

²¹⁴ See Robinson, *supra* note 213, at 1.

²¹⁵ Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 41, 49-50 (2002).

the Sudan attack.²¹⁶ Western European states supported the U.S. actions to varying degrees, while Russian President Boris Yeltsin said that he was "outraged" by the "indecent" behavior of the United States.²¹⁷ Japan issued a statement saying it "understood American's resolute attitude towards terrorism."²¹⁸ "Most Arab and Muslim Governments remained silent or equivocal about their views on the missile strikes."²¹⁹ The U.N. Security Council discussed the matter briefly, and deferred requests to send an international team of inspectors to the bombed plant in Khartoum to search for evidence of chemical weapons after the United States had declined a request from Sudan to produce such evidence.²²⁰ No action was taken either by the Security Council or the General Assembly.²²¹

Turkey has moved forces to occupy areas in Iraq used by Turkish Kurds to fight for their independence, and Russia has threatened to attack Afghanistani bases that support Chechen rebels- again with little or no comment at the U.N..²²² There have been numerous instances of Israeli occupation and outright destruction of PLO base areas in the ongoing conflict in the Gaza strip, often enough with little discussion at the U.N., suggesting that the doctrine of anticipatory self-defense has become firmly entrenched in customary international law.²²³ On the other hand, in June 1981, the Israeli Air Force destroyed an Iraqi nuclear reactor near Baghdad, basing its action on anticipatory self-defense.²²⁴ In the Security Council, Israel's ambassador argued that Israel had attempted to use diplomatic channels to solve the problem, but these efforts proved ineffective, so that the only recourse was the use of force.²²⁵ Israel was

²¹⁶ See Phil Reeves, *Outraged Yeltsin Denounces "Indecent" US Behaviour*, INDEPENDENT (London), Aug. 22, 1998, at 2.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Douglas Jehl, *U.S. Raids Provoke Fury in Muslim World*, N.Y. TIMES, Aug. 22, 1998, at A6.

²²⁰ See Barbara Crossette, Judith Miller, Steven Lee Myers & Tim Weiner, *U.S. Says Iraq Aided Production Of Chemical Weapons in Sudan*, N.Y. TIMES, Aug. 25, 1998, at A1; see also Franck, *supra* note 28, at 61.

²²¹ See Crossette, Miller, Meyers, & Weiner, *supra* note 220, at A1.

²²² See Franck, *supra* note 28, at 61.

²²³ See *id.*

²²⁴ See AREND & BECK, *supra* note 201, at 77-78.

²²⁵ See *id.* at 77-78.

roundly condemned for the attack, and even those who supported the idea of anticipatory self-defense seemed to suggest that the threat of an armed attack by Iraq was not shown to be imminent, and therefore self-defense was not justified.²²⁶

The United States and the United Kingdom have invoked the doctrine of anticipatory self-defense in the no-fly zones in Iraq to permit response not only to actual attacks on their aircraft, but to cover the locking-on of Iraqi radar onto U.S. and UK planes.²²⁷ There has been no substantive objection from the international community.²²⁸

After terrorists attacked the United States on September 11, 2001, the international community agreed that even under a restrictionist reading of Article 51, self-defense on the part of the United States was justified.²²⁹ The U.N. Security Council, for the first time in its history, approved a resolution explicitly invoking and reaffirming the inherent right of a nation's self-defense in response to the terrorist attacks.²³⁰ The Security Council implicitly described the September 11 terrorist attacks as an "armed attack" under Article 51.²³¹

The United States affirmed its inherent right of self-defense under customary international law in a letter that the United States Government sent to the U.N. Security Council on

²²⁶ See *id.* at 78-79.

²²⁷ See Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159, 207-08 (2003).

²²⁸ See *id.* at 214.

²²⁹ See Posteraro, *supra* note 5, at 177-78.

²³⁰ U.N. SCOR, 56th Sess., 4370th mtg. at 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Furthermore, Security Council Resolution 1368, which stated that the terrorist attacks of September 11, 2001, constituted "a threat to international peace and security," made it clear that the responsibility for terrorism of "sponsors of these terrorist attacks" included those "supporting or harbouring the perpetrators." *Id.* The Taliban would seem to clearly fit the description of "sponsors" of the terrorist attacks of September 11, 2001. This is supported by Draft articles on state responsibility prepared by the International Law Commission that make it clear that a state is responsible for the consequences of allowing its territory to be used to injure another state. See International Law Commission, *State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, General Principles, pt. 1, Arts. 9, 11, 21, & pt. 2, Arts. 40, 49, 52, U.N. Doc. A/CN.4/L.602/Revs.1, 2 (2001).

²³¹ Jack M. Beard, *America's New War on Terror: The Case for Self-defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 568 (2002).

October 7, 2001, stating that it had "initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001."²³² The U.S. Government further stated, "Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States."²³³ This assertion was predicated on the belief that the September 11th terrorist attacks were not isolated acts. They were part of an ongoing terrorist campaign waged over a period of years, orchestrated by the Al Qaeda leadership against the United States, including the 1993 attack on U.S. military personnel in Somalia, the 1998 bombings of U.S. embassies in Kenya and Tanzania, unsuccessful attempted bombings in Jordan and Los Angeles in 1999, and the attack on the USS Cole in 2000 that killed seventeen crew members and injured forty others.²³⁴ Al Qaeda and Taliban leaders have persisted in their vow to destroy America.²³⁵ Clearly, in these instances, the U.N. has responded benevolently or at least by silent acquiescence, when anticipatory force has been used to prevent a demonstrably imminent and potentially overwhelming threat to a state's security, as in the Cuban Missile Crisis.

Thus, there appears to be no shortage of instances in which the observance of Article 51's constraint on the use of force has collapsed in actual practice.²³⁶ Article 51's limitation on the use of force in self-defense has become increasingly ignored and is therefore "no longer regarded as obligatory by states."²³⁷ As

²³² Letter from the Permanent Representative of the United States of America, to the United Nations, Addressed to the President of the Security Council (Oct. 7, 2001), U.N. SCOR, 56th Sess., at 1, U.N. Doc.S/2001/946 (2001).

²³³ *Id.*

²³⁴ See Beard, *supra* note 231, at 587, n.95 (2002).

²³⁵ See *id.* at 588.

²³⁶ See Glennon, *supra* note 34, at 542.

²³⁷ *Id.* at 540. Another commentator has this to say about the evolution of customary international law:

Where error has been detected as society has advanced, the customary law has been gently modified; it has been modified by the same power to which it owed its existence, and by which alone it can be modified—the expressed or tacit consent of nations; and by this it may still further be altered, when improvements shall be suggested by the greater progress of human society.

MANNING, COMMENTARIES ON THE LAWS OF NATIONS 82 (Amos ed., 1875).

mentioned above, once an international rule is no longer observed by a significant number of states, its standing as part of customary international law is called into question. That is when a paradigm shift occurs in science as well as in politics.

As Michael Glennon observes:

The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system. The decaying *de jure* catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.²³⁸

VII. JUSTIFICATION FOR THE DOCTRINE OF ANTICIPATORY SELF-DEFENSE

The doctrine of anticipatory self-defense is nothing new, but is being deployed in a new world with new types of threats. The doctrine appears to have gotten its initial imprimatur in the words of then-Secretary of State Daniel Webster from the *Caroline* case.²³⁹ Webster claimed that to justify anticipatory self-defense a state must demonstrate that "the necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation."²⁴⁰ He added a further caveat, which has come to be known as the proportionality test, that the state must do "nothing unreasonable or excessive,

²³⁸ Glennon, *supra* note 34, at 540.

²³⁹ See JAMES BASSETT MOORE, *Destruction of the Caroline*, 2 A DIGEST OF INTERNATIONAL LAW § 217 (1906). The *Caroline* incident occurred during a Canadian insurrection against the Crown in 1837, when a British officer authorized an armed band of marauders to cross into the United States to burn the *Caroline*, a U.S. ship docked in port, and cut it loose, sending it crashing over Niagara Falls. The officer believed that the ship was going to be used to provide support for the insurrection. It is generally agreed that the British action was improper. Lord Ashburton sent Webster a letter of apology for the incident. See RICHARD ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* 142 (1989).

²⁴⁰ ERICKSON, *supra* note 173, at 412.

since the act, justified by the necessity of self-defense must be kept clearly within it.”²⁴¹

Anticipatory self-defense has a very narrow range in which it can be legitimately deployed because it is restricted by the requirements of immediacy, necessity, and proportionality. The idea here is that the necessity of the use of force in the context of anticipatory self-defense requires “immediacy,” *i.e.*, an imminent threat with a corresponding immediate or closely temporal response.²⁴² The immediacy requirement contemplates that the response be temporally close to the threat of an armed attack.²⁴³ The immediacy requirement takes into consideration the amount of time between the threat of an attack and the military response thereto.²⁴⁴ Thus, necessity and immediacy are interrelated. The necessity of asserting self-defense depends on the immediacy of the threatened attack.

This begs the question, how close in time must the threatened attack be to the response in order to be considered immediate? It is difficult to fit the immediacy requirement into the nebulous mold of terrorist cells, terrorist plots, and rogue regimes that are harboring terrorists and/or developing weapons of mass destruction. There are distinct issues involved in analyzing cases such as these: the tyrannical nature of the regime, the evidence of past acts in violation of international law involving genocide and deployment of chemical and biological weapons, the harboring of terrorists, the sponsoring of terrorists, and the development of weapons of mass destruction by a tyrannical state. There is no algorithm to aid in distinguishing between those instances where facts become as sufficiently grave and immediate as to justify anticipatory self-defense, and those that do not.

²⁴¹ MOORE, *supra* note 239, at 2, § 217.

²⁴² For example, Francis A. Boyle claimed that “this provision of the Charter [Article 51] made it quite clear that self-defense could only be exercised in the event of an actual or perhaps at least imminent ‘armed attack’ against the state itself. By definition, this would not include military retaliation and reprisal since they occur after the fact.” Francis A. Boyle, *Military Responses to Terrorism*, 81 PROC. AM. SOC’Y INT’L L. 288, 294 (1987).

²⁴³ See Robert J. Beck & Anthony Clark Arend, “Don’t Tread on U.S.,” *International and Forcible State Response to Terrorism*, 12 WIS. INT’L L.J. 153, 213 (1994).

²⁴⁴ See Mark Baker, *Terrorism and the Inherent Right of Self-defense (A Call to Amend the United Nations Charter)* 10 Hous. J. INT’L L. 25, 34 (1987).

In connection with *Operation Iraqi Freedom*, critics may question whether the United States was left without a choice of means, or without a moment for deliberation before launching its attack against Iraq, as a strict application of *Caroline* would require.²⁴⁵ *Operation Iraqi Freedom* was preceded by a deliberate and careful build-up of military, diplomatic, and strategic maneuvers that suggests that the necessity of the anticipatory self-defense was not "instant."²⁴⁶ Arguably, in view of the danger of weapons of mass destruction in the hands of a rogue state, the necessity may well have been "overwhelming," and in light of the evaporated diplomatic opportunities, the necessity may well have left "no choice of means."²⁴⁷ The immediacy requirement might rest on a claim that there was an ongoing Iraqi threat to U.S. interests, rather than a recollection of prior acts of terrorism or sponsorship of terrorism.²⁴⁸ If a threat is ongoing, then it is a threat in the present moment, suggesting that the necessity of a response is satisfied by the immediacy of the threat. It might be further argued that, despite this ongoing immediate threat, diplomatic efforts were undertaken.

In the interim, coalition forces engaged in a policy of "containment" of the threat by enforcing "no-fly" zones, monitoring Iraqi military and control centers by satellites and drones, and proceeding with weapons inspections pursuant to Security Council Resolution 1441.²⁴⁹ However, given that the threat was not subsiding, and the Security Council was unwilling to pass an enforcement resolution in connection with Resolution 1441, particularly in the face of France's unwavering threat to veto such a move despite what the United States and the United Kingdom regarded as straightforward evidence of material breach, I think that diplomatic efforts had come to an end and the necessity for action was plain.²⁵⁰ Even so, the doctrine of anticipatory self-defense may be insufficient to legitimize U.S. intervention in *Operation Iraqi Freedom*, in light of the additional objective of affecting a regime-change. (But see discus-

²⁴⁵ See *id.* at 45.

²⁴⁶ *Id.* at 34.

²⁴⁷ *Id.* at 32.

²⁴⁸ But cf. Baker, *supra* note 244, at 34.

²⁴⁹ Posteraro, *supra* note 5, at 163.

²⁵⁰ See Richard W. Stevenson, *Bush Gives Hussein 48 Hours, and Vows to Act*, N.Y. TIMES, Mar. 18, 2003, at A1.

sion below.) It is important to consider the totality of the circumstances, referencing the prior acts which brought about the present conflict, past acts of the target state, the nature of the antagonism, the context of the relationship between the two states, and the accumulation of events. The United States and the United Kingdom were unable to convince the Security Council that there was sufficient evidence to declare Iraq in material breach of Resolution 1441.²⁵¹ Evidence is inherently an awkward problem, for reasonable people will differ as to what quantum of evidence reaches a given threshold of authoritativeness.

In 1998, President Clinton authorized the strike of terrorist-related facilities in Afghanistan and Sudan because of the threat they posed to our national security.²⁵² He justified the targeting on what he characterized as "convincing" evidence of their involvement in attacks of United States embassies in Kenya and Tanzania, which caused the deaths of some twelve Americans and nearly three hundred Kenyans and Tanzanians.²⁵³ He added that the strike was further justified because there was "compelling information" that terrorists were planning additional terrorist attacks against U.S. citizens and others.²⁵⁴ It is well worth noting that President Clinton did not share this "compelling information." The evidentiary support for this and other instances of American use of force against states supporting terrorists has been a topic of criticism. Some critics have argued that the United States has shown "consistent disregard of evidentiary showings" in such cases and that it has effectively taken the stance that its factual assertions ought to be considered unreviewable.²⁵⁵ In the 1986 Libya bombing, the Reagan Administration declined to fully disclose what it deemed to be compelling evidence gleaned from intercepted

²⁵¹ See Brown, *supra* note 227, at 219.

²⁵² See Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460, 1460 (Aug. 20, 1998).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 548, 553 (1999).

communications between Tripoli and the Libyan Embassy in East Berlin.²⁵⁶

A similar evidentiary criticism was raised regarding the alleged plot to kill former President Bush that resulted in the 1993 cruise missile attack on the Iraqi Intelligence Service Complex.²⁵⁷ Commentators criticized the U.S. Government for failing to disclose relevant facts and for its statements unilaterally characterizing those facts.²⁵⁸ No such criticism was voiced against the U.S. Government after the terrorist attacks of September 11, perhaps because officials made presentations of relevant sensitive and classified information to a number of foreign governments and subjected this evidence to considerable scrutiny.²⁵⁹

Often enough the deliberations of the Security Council are affected profoundly, if not decisively, by the quality of information presented. Thus, the overwhelming evidence presented during the Cuban Missile Crisis, and the immediacy of the threat, may be contrasted to the less clear, and proximately more distant evidence presented to the Security Council regarding the enforcement of violations of Resolution 1441. I would suggest that in any case in which a state asserts military action based on anticipatory self-defense, there needs to be a credible pronouncement by military leaders of the existence of compelling evidence that a rogue state is actually supporting interna-

²⁵⁶ Bob Woodward & Patrick E. Tyler, *Libyan Cables Intercepted and Decoded*, WASH. POST, Apr. 15, 1986, at A1. Eleven years after the incident, during the trial of persons who were employed by or affiliated with the Libyan embassy in East Berlin for complicity in the discotheque bombing, decoded transcripts were released indicating that Libyan authorities had ordered the raid and that Libyan operatives in Berlin had confirmed the successful attack. On November 13, 2001, four people, including one Libyan diplomat and a Libyan Embassy worker, were convicted of the bombing, after prosecutors had argued that Libya was guilty of "state-sponsored terrorism." Steven Erlanger, *4 Guilty in 1986 Disco Bombing Linked to Libya, in West Berlin*, N.Y. TIMES, Nov. 14, 2001, at A5.

²⁵⁷ See Seymour Hersh, *A Case Not Closed*, THE NEW YORKER, Nov. 1, 1993, at 80.

²⁵⁸ See Lobel, *supra*, note 255, at 547.

²⁵⁹ See Beard, *supra* note 231, at 576. Following the United States' briefing of the North Atlantic Council, the Secretary General of NATO, Lord Robertson, said: "The facts are clear and compelling. The information presented points conclusively to an Al-Qaida role in the 11 September attacks." Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

tional terrorism and/or is in possession or in active pursuit of weapons of mass destruction.

The doctrine of anticipatory self-defense, as suggested by the *Caroline* case, contemplates "leaving no choice of means, and no moment for deliberation."²⁶⁰ That suggests a requirement to seek diplomatic solutions whenever possible, and to give fair warning to the offending state before striking. That is precisely what is already called for under Article 2(3) of the U.N. Charter, which requires all members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."²⁶¹

How long diplomacy should continue depends in part on the imminence and seriousness of the threat, and whether reasonable prospects that diplomacy will result in a satisfactory solution exist. The difficulty with anticipatory self-defense is that a state can seldom be absolutely certain about the other state's intentions. In the case of *Operation Iraqi Freedom*, the facts that preceded the military deployment cannot be taken in isolation, but must be considered in light of the surrounding circumstances, both in the circumstances of international terrorism and in the light of the past practices of Saddam Hussein. The threat from such a regime is exacerbated when the regime has a demonstrable history of acts of international aggression,²⁶² against Iran in the 1980s, Kuwait in 1990, and a history of failing to live up to its agreements. While the possession of nuclear weapons has been accepted by the international community, the international community has an entirely different attitude when weapons of mass destruction fall into the hands of perfidious regimes such as Iraq that engage in state-sponsored terrorism, fail to respect human rights, and even indicate a

²⁶⁰ MOORE, *supra* note 239, at 412.

²⁶¹ U.N. CHARTER, art. 2, para. 3.

²⁶² See Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 15 n.21 (2001). While the term, "aggression," has a long and controversial history, most notably in the Nuremberg Trial and in the consideration of crimes authorized for prosecution under the International Criminal Courts, I think we can consider aggression in a common sense application that everyone can agree upon. *Id.*

willingness to deploy weapons of mass destruction against its own peoples.²⁶³

While international law invariably calls upon states to always first appeal to diplomatic solutions in dealing with the possibility of declaring war, the more imminent and dangerous the perceived threat, the swifter an end to diplomacy there must be because of the dire cost of incessant delay. Diplomatic deliberations cannot go on endlessly. "The seriousness of the threat and the profound cost of prolonged delay make reliance on a doctrine of exhaustion of peaceful alternatives too burdensome to contemplate."²⁶⁴ Should diplomatic appeals fail, there should be a strong preference for persuading allies to join us and avoid unilateral action. But failing that, unilateral action against terrorist states is far better than the danger of prolonged inertia. Of course, there is always a preference against unilateral action. Michael Glennon has noted that "[h]istory is not without examples of exploitative alliances, but the greater abuses by far occur when states act unilaterally. The need to persuade allies to join in intervention makes it less likely that the intervention will be for ulterior motives."²⁶⁵

The *Caroline*²⁶⁶ doctrine, while addressing anticipatory self-defense, is applied in cases that involve self-defense in response to direct armed attacks under Article 51.²⁶⁷ Customary international law provides that a state's response to an armed attack under Article 51 be immediate, necessary, and proportionate to the attack, just as in the case of a threatened attack. The *Caroline* requirements in the context of Article 51 self-defense have been described in many ways by many commentators. During discussions of the General Assembly in 1965, the delegate from Mexico described these requirements as follows:

For the use of force in self defense to be permissible under the Charter, such force must . . . be immediately subsequent to and proportional to the armed attack to which it was an answer. If excessively delayed or excessively severe it ceased to be self-de-

²⁶³ See generally RICHARD BUTLER, *THE GREATEST THREAT* 11, 18 (1999).

²⁶⁴ Posteraro, *supra* note 5, at 206.

²⁶⁵ MICHAEL GLENNON, *LIMITS OF LAW AND PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 198-99 (2001).

²⁶⁶ See *People v. Mclead*, 25 U.S. (1 Pet.) 483, 505 (1841).

²⁶⁷ See Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, BROOK. J. INT'L L. 493, 496 (1990).

fense and became a reprisal which was an action inconsistent with the purposes of the United Nations.²⁶⁸

The notion of necessity and immediacy in the context of self-defense under an Article 51 armed attack is entirely different than in a case of anticipatory self-defense in response to a threatened attack. According to the doctrine of anticipatory self-defense, the necessity for a military response is directly correlated to the imminence of the threat.²⁶⁹ If an enemy's missile has been launched against a target state's territory and is therefore on its way, there is no time for diplomacy, and the necessity for self-defensive action by way of deploying an anti-ballistic missile is clear under the *Caroline* doctrine. The state need only demonstrate that an attack was truly imminent, and that there was essentially no other reasonably peaceful means available to prevent such attack.

As evidenced in the above-quoted commentary on self-defense in the context of an Article 51 armed attack, there is a conflation of the "immediacy" requirement of *Caroline*.²⁷⁰ Regarding an armed attack, the above passage applies the notion of immediacy to the period of time *following* an armed attack rather than the period between the threat of attack and the anticipated accomplishment thereof, as contemplated by the *Caroline* case.²⁷¹

More to the point, the very notion of self-defense is a misnomer if used as a *response* to an armed attack. Once an attack occurs, a response no longer qualifies a self-defense in that the damage has already been done. When a claimant state's attack on a target state follows an actual armed attack, this after the fact response, even if immediate, takes on the form of a studied, premeditated attack that no longer serves the purpose, strictly speaking, of self-defense.²⁷² Such a response no longer qualifies as self-defense, but rather as retaliation, reprisal, or prevention of an anticipated further attack. In fact, this fairly describes the Reagan-era doctrine of "swift and effective retribution"

²⁶⁸ G.A. Res. 886, U.N. GAOR, 20th Sess., Supp. No. 42, U.N. Doc. A/C.6/886 (1965).

²⁶⁹ See Posteraro, *supra* note 5, at 180-81.

²⁷⁰ Posteraro, *supra* note 5, at 181.

²⁷¹ *Id.*

²⁷² See *id.*

against terrorist organizations that strike U.S. interests.²⁷³ The policy of swift retribution has become a plausible part of customary international law, as evidenced by its use in President Clinton's air strikes against Iraq for the attempted assassination of George H.W. Bush in 1993, and his strikes against Sudan and Afghanistan following the Embassy Bombings in Tanzania and Kenya in 1998.²⁷⁴ But it is implausible to suggest that "swift retribution" is the same thing as self-defense.

The only coherent sense of self-defense is in the context of engagement. For example, if someone approaches me with a knife, I will need to deflect the blow *prior* to getting hurt in order to engage in self-defense. The right of self-defense entitles me to attack someone who is attacking me, in order to fend off his aggression. On the other hand, if he strikes and flees, my subsequent attack is not an act of self-defense, but is retaliation. It is a contradiction to characterize a post-attack response as self-defense. Indeed, under the criminal law, I would likely be charged with assault for such a response. Thus, under this analysis, Article 51 is not really a protocol pertaining to self-defense, but pertains to the permissibility of retaliatory strikes in response to an armed attack.

Also problematic, self-defense requires mobilization of considerable resources, personnel, detailed coordination, and planning for various contingencies. Therefore, it is logistically implausible to launch an immediate self-defense strike except in cases where the parties already have daggers drawn in the battlefield arena. A strict interpretation of the immediacy requirement in the context of both a threatened and an armed attack would seem to be, particularly in the context of terrorist threats, somewhat hamstringing. Such a requirement

could prohibit almost all 'after the fact' acts of self-defense except those that are immediately necessary to repel an attack or prevent being overwhelmed. Such a strict and self-defeating version of necessity expansively based on the *Caroline* test does not appear to be consistent with the right of self-defense under customary international law and has been vigorously opposed by a

²⁷³ WESTERN RESPONSES TO TERRORISM: A TWENTY-FIVE YEAR BALANCE SHEET 307, 316 (Ronald Crelinsten & Alex P. Schmid eds., 1992).

²⁷⁴ See Bonafede, *supra* note 29, at 179, 184.

number of writers, particularly in the context of fighting terrorism.²⁷⁵

VIII. THE PRINCIPLE OF PROPORTIONALITY

Proportionality has come to be a fundamental *jus belli* (law of war) principle of customary international law, and holds that when a state engages in acts of warfare (whether offensive or defensive), its use of force must be limited to force that is proportionate to the opponent's attack.²⁷⁶ That is, the response must be proportionate to the attack, rather than punitive or retaliatory in scope. While proportionality is not mentioned in the text of Article 51, the concept has been regarded as part of the notion of self-defense.²⁷⁷ Stated as early as the *Caroline* case, a state must do "nothing unreasonable or excessive, since the act, justified by the necessity of self-defense must be kept clearly within it."²⁷⁸ The United States, recognizing this to be the case, indicated in its report to the U.N. Security Council its response to the 1993 cruise missile attack on the Iraqi Intelligence Service complex.²⁷⁹ When a certain quantum of military damage is exceeded, a state's response may be deemed a reprisal rather than a proportionate response, and accordingly illegal under both the U.N. Charter and customary international

²⁷⁵ Beard, *supra* note 231, at 586; see also William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 471 (1990) (arguing that in an era of terrorism, the "interpretation of necessity is very different from that in a singular incident along the U.S.-Canadian border in 1837").

²⁷⁶ See *Nicar. v. United States*, 1986 I.C.J. at 176 (June 27) in which the International Court of Justice noted that it is well established customary international law that self-defense warrants "only measures which are proportional to the armed attack and necessary to respond to it."

²⁷⁷ See *id.* The International Court of Justice stated in the *Nicaragua* case that the pre-existing requirements of proportionality govern the defensive use of force under Article 51. See *id.* at 94.

²⁷⁸ MOORE, *supra* note 239, at 2, § 217.

²⁷⁹ See U.N. SCOR, 53d Sess., 780th mtg. at 1, U.N. Doc. S/1998/780 (1998). "The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality." Letter from the Permanent Representatives of the United States of America, to the United Nations, Addressed to the President of the Security Council (Aug. 20, 1998). *Id.*

law.²⁸⁰ As mentioned above, it is my opinion that *any* after-the-fact response to an armed attack ought to be properly characterized as a reprisal in the first instance. At any rate, the proportionality test applies regardless of whether one characterizes the deployment as offensive or defensive.

In 1970, the General Assembly declared, "[S]tates have a duty to refrain from acts of reprisal involving the use of force."²⁸¹ The Security Council has condemned the disproportionate use of force as reprisals.²⁸² The Security Council has condemned Israel for attacking the Beirut International Airport on December 28, 1968, in response to an attack by two members of an Arab extremist group known as the Popular Front for the Liberation of Palestine ("PLO").²⁸³ Two PLO members had attacked an El Al passenger aircraft at the Athens airport two days earlier, killing one passenger.²⁸⁴ Israel's attack resulted in the destruction of thirteen aircraft totalling approximately \$43.8 million in damages, but no loss of life.²⁸⁵ Rather than exercise their right to self-defense, the Israelis argued that it was "their right to retaliate against Lebanon for their complicity with the Athens incident."²⁸⁶ Three days after the retaliation, the Security Council voted unanimously on a resolution that condemned Israel's actions, stating the attack was "premeditated and of a larger scale and carefully planned nature."²⁸⁷

Some consider the allied force bombings necessary to expel Iraq from its invasion of Kuwait during the 1990-91 Gulf War as disproportionate.²⁸⁸ Many thought that President Clinton's action, in the 1993 Afghanistan-Sudan attack, was somewhat

²⁸⁰ See Bowett, *supra* note 26, at 1 ("Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal.").

²⁸¹ BROWNIE, *supra* note 178, at 38.

²⁸² See *id.*

²⁸³ See Baker, *supra* note 244, at 34.

²⁸⁴ See *id.*

²⁸⁵ See Baker, *supra* note 244, at 34.

²⁸⁶ *Id.* at 35.

²⁸⁷ *Id.*

²⁸⁸ See, e.g., Judith Gail Gardam, *Proportionality and Force in International War*, 87 AM. J. INT'L L. 391, 405 (1993) ("It appears that more was done than was proportionate to expelling Iraq from Kuwait.").

disproportionate and unreasonable.²⁸⁹ The counterargument was that the action was taken to eradicate the terrorist cells, to deter future terrorist incidents, and to punish past attacks.²⁹⁰ In addition, the President justified military action on the territory of two foreign nations because their sovereigns had “harbor[ed]” and “support[ed]” terrorist groups for years, despite warnings from the United States.²⁹¹

In *Operation Enduring Freedom*, the United States sought to justify its attack on Afghanistan based on the premise that the Taliban regime harboured terrorists that attacked the United States on September 11, 2001. It has been argued that the invasion and overthrow of the Taliban regime was disproportionate to the “armed attack” if indeed the terrorist attacks constituted an armed attack in the first instance, under Article 51.²⁹²

Evidently, the Security Council has taken the position that reprisals are disproportionate and unlawful in connection with the assertion of self-defense under Article 51. However, despite the position taken by the United Nations, the proportionality test itself has undergone a significant shift in actual state practice, suffering from a “credibility gap.”²⁹³ We no longer live in an age in which “[t]he difference between the right of self-defense and the right of retaliation is quite obvious to any first year student at any law school or any institution of legal studies.”²⁹⁴ Moreover, a strictly proportionate act of self-defense is nothing more than illusory in terms of whether it can compel a satisfactory settlement of the dispute provoked by the target state. Clearly, in order for self-defense to be meaningful, it must be *effective*. Reprisals and punitive measures are justified in certain cases rather than tit-for-tat military moves because an act of reprisal offers a more secure form of protection for the

²⁸⁹ See Robert J. Delahunty and John C. Yoo, The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them, 25 HARV. J.L. & PUB. POL’Y 488, 510 (Spr. 2002).

²⁹⁰ See *id.* at 509.

²⁹¹ See *id.*

²⁹² See Glennon, *supra* note 34, at 546.

²⁹³ See Bowett, *supra* note 26, at 1.

²⁹⁴ Statement by the Soviet representative in the U.N. Security Council in the course of the debate on the Gulf of Tonkin incidents in 1964. U.N. SCOR, 19th Sess., 1141st mtg., at paras. 82-83.

future by acting as a deterrent against further acts of aggression. Some scholars assert that armed reprisals can be legitimate if in the nature of "defensive retaliation," to prevent future attacks.²⁹⁵ Under this formulation, "[a]rmed reprisals do not qualify as legitimate self-defense if they are impelled by purely punitive, non-defensive, motives. . . . [A]rmed reprisals must be future-oriented, and not limited to a desire to punish past transgressions."²⁹⁶ In a similar vein, the U.S. Army *Law of Land Warfare* provides the following definition of reprisals:

Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.²⁹⁷

In the context of terrorist attacks, and the response thereto, it is difficult to ascertain a dividing line between reprisals legitimately related to self-defense, and those that are "purely punitive."²⁹⁸ Retaliatory measures are sometimes justified within the context of proportionality when the aim is to respond to and deter terrorist attacks. One commentator suggests, "If proportionality consists of a reasonable relation of means to ends, it would not be disproportionate if in some cases the retaliatory force exceeded the original attack to serve its deterrent aim."²⁹⁹

Even those who argue for a restrictionist right of self-defense under Article 51 concede that once an armed attack has occurred, it is consistent with necessity and proportionality for the aggrieved state "both to repel the armed attack and to take the war to the aggressor State in order effectively to terminate

²⁹⁵ YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 208 (1988).

²⁹⁶ DINSTEIN, *supra* note 295, at 208.

²⁹⁷ Dept. of the Army, Washington, 25, D.C., 18 July 1956, Field Manual No. 27-10, Ch. 8, § I, Para. 497(a).

²⁹⁸ Guy Roberts, *Military Responses to Terrorism*, 81 PROC. AM. SOC'Y INT'L L. 318, 318 (1987).

²⁹⁹ Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 Hous. J. INT'L L. 309, 315 (1989). *See also*, Roberts, *supra* note 50, at 318 (arguing that some military reprisals cannot be distinguished from legitimate acts of self-defense).

the attack *and prevent a recurrence*.”³⁰⁰ As long ago as 50 years a commentator on international law had remarked:

It cannot be supposed that the inviolability of territory is so sacrosanct as to mean that a state may harbour within its territory the most blatant preparation for an assault upon another state's independence with impunity; the inviolability of territory is subject to the use of that territory in a manner which does not involve a threat to the rights of other states.³⁰¹

More recently, another commentator has spoken for an anticipatory self-defense doctrine as follows: “If a state has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike.”³⁰²

Clearly, a restrictionist view of Article 51's notion of self-defense is no longer viable. The doctrine of anticipatory self-defense takes on a heightened urgency when terrorists within a state plot to conduct operations against another state. Still, critics may well claim that the doctrine of anticipatory self-defense does not adequately fit the circumstances of *Operation Iraqi Freedom*. While Iraq had already demonstrated its capacity to inflict substantial harm on other states, it is not clear (at least from evidence available to the public at the present time) that it had indicated its willingness or intention to inflict harm upon the United States or its allies, and that it was simply waiting for the right opportunity to strike. A more compelling case might be made if there had been more convincing evidence that terrorist cells in Iraq, supported by the regime, were planning terrorist operations against the United States and its allies, and waiting for an opportunity to strike.

IX. PROPORTIONALITY AND THE GOAL OF REGIME-CHANGE

Even under an expansive view of anticipatory self-defense, we are still faced with the hurdle of justifying a regime-change concomitant with anticipatory self-defense. When a state seeks

³⁰⁰ Henkin, *supra* note 172, at 39-40 (emphasis added).

³⁰¹ BOWETT, *supra* note 167, at 54.

³⁰² Michael Glennon, *Self-defense and Incoherence in the U.N. Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 552 (2002).

to justify an attack based on the doctrine of anticipatory self-defense, the doctrine of proportionality perseveres. This challenges the military campaign where victory is spelled out by a regime-change through the use of force. Such an objective would seem to be disproportionate. As one commentator put it, "[p]roportionality likely does not support the invocation of the doctrine of self-defense for interventions where the explicit purpose is the ouster of a threatening regime."³⁰³ Under this view, proportionality would, quite plausibly, never allow overthrowing a government regime even if it is the active sponsor of terrorists within its borders.³⁰⁴

A strict application of the proportionality principle in the context of anticipatory self-defense would, at best, permit attacking the opponent's military and command elements and facilities and material used in connection with developing and stockpiling weapons of mass destruction, but it may be stretching the doctrine to include removing the sovereign himself. Unless a tyrant such as Saddam Hussein is removed, merely driving out his terrorist cells and disarming him from weapons of mass destruction may only contain rather than eliminate the threat. Thus, factoring in a regime-change would seem to be a component that needs to be given serious consideration in a newly emerging paradigm shift involving anticipatory self-defense. As Michael J. Glennon comments, "[f]aced with weapons of mass destruction, very little in the way of military response is actually disproportionate," against a brutal regime that harbours terrorists.³⁰⁵ A first strike of nuclear weapons, on the other hand, surely would be illicit.³⁰⁶ While the mission in attacking a rogue state is not to conquer and divide it, at the same time, "[a]bsolutely pure motives cannot be reasonably required" in such cases, for "[t]he overthrow of a ruling regime will frequently be a necessary goal . . ."³⁰⁷ Clearly, this is the case in Iraq, where despite previous efforts to destroy the regime's weapons of mass destruction, the arsenal of weapons simply grew back, and there was no evidence that Saddam Hussein

³⁰³ See Posteraro, *supra* note 5, at 181.

³⁰⁴ See Glennon, *supra* note 34, at 546.

³⁰⁵ *Id.*

³⁰⁶ See *id.*

³⁰⁷ *Id.*

was willing to relinquish his weapons or his desire to harbour and cultivate terrorists.

Effecting a regime-change takes on the broader purpose of a humanitarian mission in cases such as *Operation Iraqi Freedom*, in which the people are being liberated from a tyrannical regime that has violated fundamental human rights and committed acts of genocide and other crimes against humanity.³⁰⁸ Thomas Franck has argued that it is proper to use force to promote democratic self-determination in support of the notion that certain regimes are illegitimate, by engaging in gross violations of human rights, or wielding power in total disregard of constitutional processes.³⁰⁹ Utilizing force to affect a regime-change is an exception to Article 2(4) rather than a form of self-defense. Franck believes that

[w]hen the most basic of [civil and political rights] have been found to have been violated—and *only* then—an enunciated international consensus might now be ready to form around the proposition that the use of some levels of force by states could be justified to secure democratic entitlements for peoples unable to secure them for themselves.³¹⁰

The most recent precedent for a regime-change for the sake of promoting democratic self-determination was *Operation Enduring Freedom*, in which coalition forces sought out and affected a regime-change to end the stranglehold of the Taliban in Afghanistan.³¹¹ Another recent example was the invasion of Panama by the United States on the grounds that the government of Manuel Noriega was illegitimate, and that this illegitimacy gave rise to a unilateral right to invade the country.³¹² Another example was the limited humanitarian intervention in

³⁰⁸ It is quite plausible, however, that, in the context of *Operation Iraqi Freedom*, the purpose of effecting a regime-change is associated more with the anticipatory self-defense justification than with the purpose of humanitarian intervention.

³⁰⁹ See AREND & BECK, *supra* note 201, at 192.

³¹⁰ *Id.* at 192 (1993) (quoting Thomas Franck, "Secret Warfare: Policy Options for a Modern Legal and Institutional Context," Paper presented to the Conference on Policy Alternatives to Deal with Secret Warfare: International Law, U.S. INSTITUTE OF PEACE, Mar. 16-17, 1990, at 18). See also, Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

³¹¹ See Posteraro, *supra* note 5, at 154.

³¹² See AREND & BECK, *supra* note 201, at 193.

Grenada in 1983 to free the people "from the tyranny of the thugs who had machine-gunned their way into power."³¹³ Yet another example was the unanimous resolution of the U.N. General Assembly in 1991, demanding that its member states take "action to bring about the diplomatic isolation of those who hold power illegally in Haiti" and "suspend their economic, financial, and commercial ties" with the country until democratic rule is restored.³¹⁴

Many commentators think that tyrannies are illegitimate, given the modern evolution of human rights law.³¹⁵ Anthony D'Amato remarked as follows:

I argue that human rights law demands intervention against tyranny. I do not argue that intervention is justified to establish democracy, aristocracy, socialism, communism or any other form of government. But if any of these forms of government become in the Aristotelian sense corrupted, resulting in tyranny against their population—and I regard "tyranny" as occurring when those who have monopolistic control of the weapons and instruments of suppression in a country turn those weapons and instruments against their own people—I believe that intervention from outside is not only legally justified but morally required.³¹⁶

D'Amato adds, "The U.S. interventions in Panama and, previously, in Grenada are milestones along the path to a new nonstatist conception of international law that changes previous noninterventions formulas. . . ."³¹⁷ He further points out that "[a] glance at the Preamble to the U.N. Charter reveals its affirmation of 'faith in fundamental human rights,' 'social progress,' and 'economic and social advancement of all peoples'; there is no mention of national autonomy."³¹⁸

³¹³ Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 523 (1990).

³¹⁴ *Support to the Democratic Government of Haiti*, OEA/Ser.F/V.1/MRE/RES.1/91, corr. 1, paras. 5, 6 (1991).

³¹⁵ See D'Amato, *supra* note 22, at 519.

³¹⁶ *Id.*

³¹⁷ *Id.* at 517.

³¹⁸ D'Amato, *supra* note 22, at 518. This additional passage of D'Amato is well worth quoting:

We are better off with rules of international law that at least point us to important factual and contextual considerations than we are with rules that point us only to an endless series of subrules, explanatory rules and learned commentary regarding the interpretation of all those rules—com-

I would suggest that the permissibility, if not the obligation, to deploy offensive military action in order to affect humanitarian intervention, discussed below, appears to have become a part of customary international law. This doctrine can justify the use of force to affect a regime-change when a dictator evinces an ongoing pattern of behavior that involves international crimes such as genocide, the killing of citizens without due process, and other crimes against humanity.

X. HUMANITARIAN INTERVENTION AND CUSTOMARY INTERNATIONAL LAW

Humanitarian intervention involves coercive military action for the purpose of protecting people who are subjected to crimes against humanity.³¹⁹ The United Kingdom Foreign Sec-

mentary that then itself must be interpreted. The important factual and contextual considerations in the present case, I submit, are whether the people of Panama were helpless under a tyrannical rule and deserved, in morality and in law, aid from an outside power to remove the unlawful government that was brutalizing them. The factual situation of the people of Panama cannot be found in consulting textbooks on the legality and exceptions regarding the use of force in international law.

Id. at 521-22.

³¹⁹ The general criteria of crimes against humanity have been defined by the International Law Commission of the United Nations in its Draft Code of Crimes against the Peace and Security of Mankind. See Robert Rosenstock, *The Forty-eighth Session of the International Law Commission*, 91 AM. J. INT'L L. 365, 367 (1997). The Code recognizes that a crime against humanity can be committed in time of war or peace. Article 18, "Crimes against humanity," provides:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- (a) murder;
- (b) extermination;
- (c) torture;
- (d) enslavement;
- (e) persecution on political, racial, religious or ethnic grounds;
- (f) institutionalize discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) arbitrary deportation of persons;
- (h) arbitrary imprisonment;
- (i) forced disappearance of persons;
- (j) rape, enforced prostitution and other forms of sexual abuse;
- (k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

retary described the doctrine of humanitarian intervention as being newly emergent customary international law that allows armed force to be used

as a last resort to avert overwhelming humanitarian catastrophe that a government has shown it is unwilling or unable to prevent or is actively promoting; it must be objectively clear that there is no practicable alternative to the use of force to save lives; the use of force should be proportionate to the humanitarian purpose and likely to achieve its objectives; any use of force should be collective.³²⁰

Formerly, it was widely acknowledged that the U.N. Charter regards unilateral humanitarian intervention as a violation of state sovereignty and a violation of the use of force prohibited by Article 2(4).³²¹ On the other hand, some argue that humanitarian intervention does not violate Article 2(4) because it is not a use of force against the "territorial integrity" or "political independence" of any state.³²² Since the interventions in Somalia, Rwanda and Kosovo, the majority of the international community has recognized the tragedy of ignoring widespread, acute human suffering, and the legitimacy of coercive humanitarian intervention, particularly when the U.N. Security Council fails to act.³²³ The United Nations failed to allow its troops stationed

See Rosenstock, *supra* note 319, at 367, n.12.

³²⁰ Gray, *supra* note 128, at 10.

³²¹ Article 2(4) states: "All 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 other manner inconsistent with the purposes of the United Nations." U.N. CHARTER art. 2(4)

³²² See John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 154 (1984).

³²³ See, e.g., T.M. Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1 (2002); W. Moorman, *Humanitarian Intervention and International Law in the Case of Kosovo*, 36 NEW ENG. L. REV. 775 (2002); D.H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597 (2002); C. Poltak, *Humanitarian Intervention: A Contemporary Interpretation of the Charter of the United Nations*, 60 U. TORONTO FAC. L. REV. 1 (2002); M. Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401 (2002); M. Koskenniemi, *'The Lady doth protest too much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002); D. Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L.J. 129 (2001); NATO's Bombing of Kosovo Under International Law: Symposium, 25 FORDHAM INT'L L.J. 95 (2001); A.M. Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANS-NAT'L L. 225 (2001); A.D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L

in Rwanda to intervene in order to stop the 1994 mass murder of 800,000 Tutsi people.³²⁴ If a "coalition of the willing" had not intervened in defense of the Tutsi population, but instead awaited Security Council authorization, many more innocent lives would have been lost in the genocide that was taking place.³²⁵ Seeking permission for humanitarian intervention from the Security Council, in view of its failure in the past to recognize this as a principle that justifies the deployment of force, would appear to be a futile and unavailing gesture.

States that promote humanitarian intervention are not inclined to act within the U.N. system, but instead seek action through regional coalitions, such as Haiti in 1994 and Kosovo in 1999.³²⁶ This approach emphasizes "the legitimacy (not legality) of the action under both the spirit of the U.N. Charter and basic notions of state responsibility to prevent human atrocities."³²⁷ If Kosovo is to serve as an example of justifiable humanitarian intervention without seeking U.N. Security Council approval, that claim may be bolstered by the fact that Secretary-General Kofi Annan gave his implicit blessing to the NATO air campaign, citing it as an example of force that was necessary for the restoration of peace.³²⁸

L. 1 (2000); J.D. Wilets, *Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection*, 6 ILSA J. INT'L & COMP. L. 645 (2000); B.S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000); I. Arias, *Humanitarian Intervention: Could the Security Council Kill the United States?*, 23 FORDHAM INT'L L.J. 1005 (2000); G.H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42 (2000); R.A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847 (1999); W.M. Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999); T.M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999); O. Bring, *After Kosovo: NATO Should Formulate a Doctrine on Humanitarian Intervention?*, 10 J. LEGAL STUD. (USAFA) 61 (1999/2000); C.C. Joyner, et al., *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 J. LEGAL STUD. (USAFA) 27 (1999/2000); G.A. Symes, *Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq*, 2 MICH. J. INT'L L. 581 (1998); J. Currie, *NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?*, 36 CAN. Y.B. INT'L L. 303 (1998); M.L. Burton, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO. L.J. 417 (1996).

³²⁴ See Posteraro, *supra* note 5, at 195.

³²⁵ See *id.* at 186.

³²⁶ See Posteraro, *supra* note 5, at 195.

³²⁷ *Id.*

³²⁸ See Posteraro, *supra* note 5, at 195.

The doctrine of humanitarian intervention has become an authoritative norm of international law based in state practice and *opinio juris*.³²⁹ Since the interventions in Somalia, Rwanda and Kosovo, the majority of the international community has recognized the tragedy of ignoring widespread, acute human suffering, and the legitimacy of coercive humanitarian intervention despite the U.N. Security Council's failure to act.³³⁰

Moreover, the old argument that humanitarian intervention is an affront to sovereignty appears to have lost prominence as well. The notion of state sovereignty has undergone a paradigm shift in modern times. Sovereignty was classically defined as the "[s]upremacy of authority or rule . . . [r]oyal rank, power, or authority . . . [t]otal independence and self government"³³¹ However, the recent report of the International Commission on Intervention and State Sovereignty ("ICISS") describes a shift "from sovereignty as control to sovereignty as responsibility in both internal functions and external duties."³³² This marks a positive shift in the concept of sovereignty, which has previously been characterized as the right of a state to exercise supreme power over its territory and citizens free from outside interference. The ICISS concluded that "[w]here a population is suffering serious harm . . . and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."³³³ This suggests that the doctrine of humanitarian intervention is

³²⁹ See Joyner & Arend, *supra* note 160, at 39. A two-part test has been suggested for the purpose of analyzing whether a putative norm of international law has become a binding customary rule of international law:

First, any rule of international law must be authoritative: states must regard the norm as legitimate and they must consider it binding law. In the traditional parlance of international law, the norm must reflect *opinio juris*. Second, the prospective legal norm must *control* state behavior: through their practice, states must actually comply with the requirements of the rule. Neither 100% compliance nor 100% perception of authority is required. . . . However, a general perception of authority, and regular, widespread compliance are necessary [for a rule to be binding].

Beck & Arend, *supra* note 243, at 156-58 (1994) (citations omitted) (emphasis in original).

³³⁰ See Posteraro, *supra* note 5, at 196.

³³¹ WEBSTER'S II NEW COLLEGE DICTIONARY (1995).

³³² *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, ch. 2.14 (2001), available at http://www.idrc.ca/books/960and961/02_Protect.html.

³³³ *Id.* Synopsis (1).

not merely permissive, but is an affirmative duty on the parts of other states. The ICISS Report recognizes both the responsibility of every state to protect its citizens and the responsibility of the international community to act to protect citizens whose states have failed to provide protection.³³⁴ This concept of a duty to protect a population suffering harm under the auspices of a state regime conflicts with the traditional and outmoded custom of non-intervention. Under the new view, the duties of sovereigns are as important as the rights of sovereigns. "It is not a significant stretch of this logic to conclude that states, therefore, must also have a responsibility to protect their own citizens from other states who threaten them."³³⁵

David Luban suggests that, "clearly, aggression violates a state's rights only when the state possesses these rights."³³⁶ He adds: "According to contract theory this entails that the state has been legitimized by the consent of its citizens. An illegitimate state, that is, one governing without the consent of the governed is, therefore, morally, if not legally estopped from asserting a right against aggression."³³⁷ He further says that "an illegitimate and tyrannical state cannot derive sovereign rights against aggression from the rights of its own oppressed citizens, when it itself is denying them those same rights."³³⁸ We should consider which the greater evil is: the continuation of a tyrannical and murderous regime, or an intervention to defend socially basic human rights.

Luban's theory challenges the controversial thesis of Michael Walzer, who believes that states which oppress their people may be considered legitimate in international law as long as they do not fall under what he calls the "rules of disregard."³³⁹ Walzer claims that intervention is wrong, even when a state's political institutions or practices violate whatever moral standards are appropriate to them, when a state is "actu-

³³⁴ See Posteraro, *supra* note 5, at 201.

³³⁵ Posteraro, *supra* note 5, at 201.

³³⁶ David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 169 (1980).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ See Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209 (1980).

ally illegitimate.”³⁴⁰ An illegitimate state may be “presumptively legitimate,” where there is “a certain ‘fit’ between the community and its government,” such that the state may be regarded as “a people governed in accordance with its own traditions.”³⁴¹ As long as there is such a “fit,” foreigners must refrain from intervening because this is “simply the respect that foreigners owe to a historic community and its internal life.”³⁴² Walzer further claims that “the history, culture, and religion of the community may be such that authoritarian regimes come, as it were, *naturally*, reflecting a widely shared world view of life.”³⁴³ Moreover, other states are not positioned to judge accurately whether “fit” is present; they will lack the necessary historical and political understanding.³⁴⁴ Although hard to believe, some people may want their tyranny; there may be a “fit” between government and people. Under this view, other governments must respect even a tyrannical regime if the dictator is, at least, the result of a domestic political process with a distinctive culture and history. We must allow that local culture and history to determine its own political and social forces.

In the case of Iraq, the lack of “fit” between the government and the people was readily apparent.³⁴⁵ This was not ordinary oppression. Rather, millions of people behaved cautiously, fearing that any irregularity would bring the police. There were thousands of political imprisonments, hundreds of tortures, and forced relocation of vast segments of the population.³⁴⁶ Evidently, citizens tolerated the regime because they were afraid. The systematic scale of deprivation of basic human rights appears to have risen to the level of crimes against humanity.³⁴⁷ When murders, tortures, and imprisonments go unchecked, and their perpetrators are treated as if they are legitimate leaders, the common humanity of all of us is tarnished. If we fail to intervene in cases like this, if we acknowledge rights but turn our

³⁴⁰ *Id.* at 214.

³⁴¹ *Id.* at 212.

³⁴² *Id.*

³⁴³ *Id.* at 225 (emphasis added).

³⁴⁴ Walzer, *supra* note 339, at 212.

³⁴⁵ *Id.*

³⁴⁶ See Posteraro, *supra* note 5, at 156-58.

³⁴⁷ See *id.* at 156.

backs on their enforcement, we fail to take human rights seriously; instead, we raise politics above moral theory.

We do not live in a Machiavellian world in which international politics is best understood as an autonomous realm of power in which the actions of nations are neither motivated by ethical considerations nor subject to ethical judgment. In order to meet what appears to be a permissive, if not obligatory duty of states under this emergent norm of customary international law, it may well be crucial to effect a regime-change in states that are subjected to humanitarian crises such as genocide and other crimes against humanity. Thus, the portion of the objective of *Operation Iraqi Freedom* to affect a regime-change, under the circumstances of the tyrannical regime of Saddam Hussein, appears to be supportable by the doctrine of humanitarian intervention. The United States removed a tyrannical regime as it had done in Grenada in 1983 and Panama in 1989. Moreover, the United States set an important example that should give pause to regimes in other countries such as North Korea or Cuba; where ruling dictators keep themselves secure against popular uprising by the application of summary brutality and imprisonment of political dissidents. They can no longer feel impervious from foreign humanitarian intervention.

If the international community refuses to intervene in cases of pervasive human rights abuses such as genocide and ethnic cleansing by sticking doggedly to the old paradigm of non-intervention, and the world community fails to create a moral consensus among them, then their lack of action is tantamount to an endorsement of the abuses. It is clear today that all leaders of the world have certain deontological constraints on how they treat their citizens. Thus, the international community has the moral responsibility to stop instances of human rights abuses from occurring, through diplomatic and political means if possible, and by military means if necessary.

XI. CONCLUSION

The U.N. Charter, even interpreted elastically, does not support the Bush Doctrine of anticipatory self-defense in *Operation Iraqi Freedom*, for any of its three enunciated purposes: to disarm the regime from harboring weapons of mass destruction,

to eradicate terrorist cells that are sponsored or tolerated by the state, or to effect a regime-change.

Yet nations have the inherent right to protect citizens from preventable harm, both within and without state borders. The modern threat to world peace stems not from one particular organization, but from the convergence of weapons of mass destruction, rogue states, and international terrorism.³⁴⁸ Clearly, the United States is the object of ill will on the part of terrorists who subscribe to radical forms of religious fanaticism, as evidenced by the terrorist plot that resulted in the attacks of September 11th. The danger of terrorism and rogue regimes is a threat to the whole world.

We need rules suited to the new threats of the 21st Century. Iraqi weapons posed too serious a threat to await the outcome of protracted negotiation and compromise. While the United Nations has been a forum in which the propriety of international responses to terrorism has been debated, its attempts to curb terrorism have been "patchy and often ineffective."³⁴⁹ By considering the real threat of weapons of mass destruction and continued Iraqi support of international terrorism, the United States could not afford to be constrained by the politics of the U.N. Security Council.³⁵⁰ The veto power in the Security Council was too great an obstacle to reduce the proliferation of such weapons.³⁵¹ In reality, some members of the U.N. Security Council use the veto power to further their economic interests. Iraq has cultivated cunning liaisons with France, Russia, and China.³⁵² These relationships complicated U.N. attempts to strengthen weapons inspections.³⁵³

For many years, scholars have observed that the U.N. Charter system is no longer effective to vouchsafe international

³⁴⁸ See President George W. Bush, *Address to a Joint Session of Congress and the American People*, 37 WKLY. COMP. PRES. DOC. 1347 (Sept. 20, 2001) (The war on terror "will not end until every terrorist group of global reach has been found, stopped and defeated. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.").

³⁴⁹ Anne-Marie Slaughter, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 11 (2002).

³⁵⁰ See Posteraro, *supra* note 5, at 208.

³⁵¹ See *id.*

³⁵² See *id.* at 186.

³⁵³ See *id.* at 208.

peace and security.³⁵⁴ Since 1945, the U.N. Security Council has rarely authorized the use of military force, and no standing U.N. military has ever been established.³⁵⁵ States that have been the victim of threats to their peace and security have not been able to rely on the U.N. Security Council to intervene on their behalf.³⁵⁶

The U.N. Charter's policy of non-intervention in international relations, based on the principle of Article 2(4) that states must refrain from the threat or use of force against the territory and independence of other states, has been violated countless times since its inception in 1945.³⁵⁷ Moreover, the U.N.'s stance against humanitarian intervention has failed to become part of customary international law.³⁵⁸ Clearly, states have chosen to reject the strict limitations on self-defense in Article 51 in favor of a more permissive norm that allows recourse to force in a variety of circumstances. It allows recourse not only in response to an armed attack or a threatened attack, but response to threatened or actual attacks by terrorists, a disproportionate response of taking retaliatory measures, and to effect regime-changes in cases where a tyrannical leader threatens world peace.³⁵⁹

A new paradigm of international law on the use of force is supportable and valid, given the dramatic shift of international relations since the U.N. Charter was established in 1945. We live in "an age of uniquely destructive weaponry."³⁶⁰ In the face of the threat of rogue states that sponsor terrorists or develop weapons of mass destruction, the duty of states to confront this danger is a strategic and moral imperative which international law should embrace.

In other fields of public policy, such as medicine, the idea of a preventive principle is extensively advocated, and, in many situations there is a strong preference for preventive action over mere remedial steps. The advantage of an ounce of prevention

³⁵⁴ See *id.* at 203.

³⁵⁵ See Posteraro, *supra* note 5, at 203.

³⁵⁶ See *Id.*

³⁵⁷ See *Id.*

³⁵⁸ See *id.* at 196.

³⁵⁹ See *id.* at 181.

³⁶⁰ Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMP. INT'L & COMP. L.J. 231, 239 (1992).

is proverbial. Preventive medicine, for example, has tremendous support and has enjoyed tremendous development in recent years.

Laws must bear some relation to practice or they cannot regulate conduct effectively. Laws that impose unrealistic standards are likely to be violated and ultimately forgotten. The Bush Doctrine does not seek to defend itself by appealing to Article 51 itself. It seeks to show that Article 51 is no longer an authoritative rule, and thereby not weakening that rule, but complementing it by carving out an exception to the principle of non-intervention. Military intervention in *Operation Iraqi Freedom* was not so much a strategic option as it was a strategic mandate. Inaction or containment, bearing in mind Hussein's threat, could have resulted in irreversible damage.

Critics of the doctrine of anticipatory self-defense, or preventive war, warn that it runs the risk of offering states carte blanche authority to use military might against hypothetical threats or mere suspicion.³⁶¹ These critics argue that, before all other avenues are exhausted, "[e]very unfriendly or unsavory government trying to develop unconventional weapons that could conceivably fall into terrorist hands is now, in effect, a declared enemy of the United States and a potential target of an eventual American attack."³⁶² Critics may also argue that the doctrine of anticipatory self-defense is open to abuse, likely to result in selective and self-interested action, or as pretence for other aims such as conquest.³⁶³ These objections may be coun-

³⁶¹ See Posteraro, *supra* note 5, at 202.

³⁶² Editorial, N.Y. TIMES, Mar. 20, 2003, at A20.

³⁶³ Statements by Administration Officials have been proffered to allay such fears. Aides to President Bush claim they do not intend to make Iraq the first of a series of preventive wars. They claim that diplomacy can work to persuade North Korea to give up its nuclear weapons programs, that intensive inspections can work to eliminate nuclear stockpiles in Iran, and that threats and incentives can work to prevent Syria from engaging in state sponsored terrorism and from fostering a guerrilla movement in Iraq. See David E. Sanger, *Viewing the War as a Lesson to the World*, N.Y. TIMES, Apr. 6, 2003, B1. Secretary of State Colin L. Powell said, "I think it's a bit of an overstatement to say that now this one's pocketed, on to the next place." *Id.* at B11. A senior advisor of Mr. Powell's said that Mr. Powell had cautioned the administration against any public talk of a "domino effect" arising from *Operation Iraqi Freedom*. See *id.* The advisor said that Mr. Powell's view "is that we've made enough enemies in the past five months, and we don't need to go looking for another fight." *Id.* President Bush's national security advisor, Condoleezza Rice, deflected criticism that *Operation Iraqi Freedom* is a

tered by clearly identifying the conditions for intervention so as to ensure that there are safeguards against the slippery slope of abuse. I would suggest the following model to govern anticipatory self-defense to cover cases of rogue states that sponsor or harbor terrorists or which develop weapons of mass destruction:

1. The injury feared should consist of a tyrannical regime that harbors or develops weapons of mass destruction and/or passively or actively harbors, sponsors or tolerates terrorist cells within its borders. There is compelling evidence (a standard greater than a preponderance of evidence and lower than the "beyond a reasonable doubt" standard) that the leader of the regime has committed crimes against humanity.

2. Diplomatic efforts will have failed to reach a swift solution, and the leader of the regime has refused to take meaningful steps to remove the threats stated in ¶1.

3. The injury feared must be highly probable, if not certain, to occur in the absence of preventive action, and the imminence of the threat must be close in time or ongoing.

4. The probable damage to be done by any preventive action should be markedly less than the anticipated injury.

5. Fair warning should be given to the regime of the imminence of military action so as to allow for a voluntary last ditch effort of the leadership to step down.

6. The principle of proportionality in this context implies that adequate control should be taken to prevent the military action from becoming excessive, but at the same time the principle of proportionality, together with the doctrine of humanitarian intervention, should allow for deploying military force in order to disarm the regime, disable the regime's weapons of mass destruction, and effect a regime-change.

From a procedural perspective, collective action by the Security Council would be preferable to unilateral intervention. Failing that, a "coalition of the willing" would be preferable to unilateral action, because unilateral action tends to elicit the acrimonious cries of imperialism, hegemony, and similar unde-

first step to new conflict, in saying, "You don't treat every case with the identical remedy," and that "there are lots of ways" of dealing with rogue states that harbor terrorists or develop weapons of mass destruction. She added, "In North Korea, we're dealing with the issue in one particular way; with Iran, we're dealing with it in other ways." *Id.*

sirable practices that detract from international support.³⁶⁴ On the other hand, some believe that the world's sole superpower "should be unashamed, unapologetic, uncompromising American constitutional hegemonists."³⁶⁵

The world's lone superpower may need to engage in unilateral anticipatory self-defense in exceptional circumstances where there is compelling evidence of state sponsorship of terrorism or the development of weapons of mass destruction by a tyrannical regime. Such circumstances include when peaceful avenues for settling the dispute have been exhausted, the veto power has rendered the Security Council incapable of taking or authorizing coercive action, the action is undertaken with the support of other states for air space and territorial rights, and when there is at least non-opposition of the majority of other states.

It may take time before the Bush Doctrine receives the sort of "long-term, sustained acceptance . . . throughout the community of nations" that permits this state practice to truly be a rule that is recognized as customary international law.³⁶⁶ If the doctrine of anticipatory self-defense comes to be a part of customary international law, it would supplement or supersede the literal text of Article 51.³⁶⁷ I believe that anticipatory self-defense under the Bush Doctrine, in the circumstances of *Operation Iraqi Freedom*, already has entered the domain of customary international law. Whether that is true will depend on future experience in the practices of states and *opinio juris*.

We should not forget the memorable words of John Wyant, the World War II era American Ambassador to the Court of St. James. He said, "What we're learning in this conflict is that the next time we must not wait until the sun is gleaming on their bayonets."³⁶⁸ We may finally be witnessing, to use the words of

³⁶⁴ Franck, *supra* note 28, at 57.

³⁶⁵ John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANS-NAT'L L. & CONTEMP. PROBS. 1, 48 (2000). A passage by Charles Krauthammer in *Time* captures this "unapologetic" view of hegemony: "America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will." *TIME*, Mar. 5, 2001, at 42.

³⁶⁶ Glennon, *supra* note 34, at 193.

³⁶⁷ See Franck, *supra* note 28, at 58.

³⁶⁸ Lambert, *supra* note 77, at 18.

Woodrow Wilson in his address to Congress declaring war in 1917, "the beginning of an age in which it will be insisted that the same standards of conduct and of responsibility for wrong shall be observed among nations and their governments that are observed among the individual citizens of individual states."³⁶⁹

³⁶⁹ Quoted by HANS J. MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* 180 (Univ. of Chic. Press, 1946).