

# RUSHING TO BREAK THE LAW? “THE BUSH DOCTRINE” OF PRE-EMPTIVE STRIKES AND THE UN CHARTER REGIME ON THE USE OF FORCE

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[Self defence is to be permitted not only after an attack has already been suffered, but also in advance, where “... the deed may be anticipated.” Hugo Grotius, international law scholar (1625)]<sup>1</sup>

[ “The safest plan is to prevent evil,” and that to do so a nation may even “anticipate the other’s design ...” Emmerich de Vattel, international law scholar (1758).] <sup>2</sup>

[“We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.” George W Bush Jr., US President (2002)]<sup>3</sup>

## I. Introduction

The right of self-defence by forestalling an attack is not new. It was well established in classical international law. In 1625, Hugo Grotius, whom John Bassett Moore calls “the most illustrious of the great philosophical jurists,” and who is universally recognised as the Father of International Law,<sup>4</sup> in his seminal work *The Law of War and Peace*, indicated that self defence is to be permitted not only after an attack has already been suffered, but also in advance, where “... the deed may be anticipated.”<sup>5</sup> Or as he said a bit later on in the text: “It be lawful to kill him who is preparing to kill ...”<sup>6</sup> About a century and a quarter later, another famous publicist Emmerich de Vattel in his famous text of 1758 known as *The Law of Nations*, affirmed that “The safest plan is to prevent evil,” and that to do so a nation may even “anticipate the other’s design ...”<sup>7</sup>

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<sup>1</sup> Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* Bk. I, ch. I, § II (1646), reprinted in 2 *The Classics Of International Law* 172 (James Brown Scott ed. & Francis W. Kelsey trans., 1925) Bk II.

<sup>2</sup> Emmerich De Vattel, *The Law of Nations, Or, Principles of The Law Of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (J Chitty, Trans, 7<sup>th</sup> ed, 1849).

<sup>3</sup> Commencement address by President George Bush at the West Point Military Academy graduation, June 1, 2002, announcing an expansive new policy of pre-emptive military action. The speech can be accessed at the Whitehouse website <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>> (visited Aug. 2003).

<sup>4</sup> See *Lassa Oppenheim, International Law: A Treatise (Peace)* 171 (1<sup>st</sup> ed., 1905) Vol I.

<sup>5</sup> Grotius, n 1.

<sup>6</sup> Grotius, n 1

<sup>7</sup> Vattel, n 2.

During its heydays, anticipatory self-defence was intertwined with the right of self-preservation but this right fell into disrepute in the early part of the 20<sup>th</sup> century with the imposition of international legal restraints on the right to wage war hiving off the sub-category of anticipatory self-defence in favour of the more determinate right of self-defence. After lying mostly dormant for decades but certainly outside the sphere of the UN Charter regime on the use of force, the notion of anticipatory self-defence made a dramatic and forceful comeback in the aftermath of the September 11, 2001 terrorist attacks. US President George Bush Jr., in the aftermath of the attacks strongly articulated a right to anticipate the enemy through pre-emptive attacks as a corollary to the recognised right of self-defence. The so-called “Bush Doctrine” marked a turning point in the long-standing premise in international law articulated in the UN Charter that use of military force in self-defence can only be in response to an armed attacks not in anticipation of one.

The old truism, that international law is not a suicide pact, is forceful in “an age of uniquely destructive weaponry.”<sup>8</sup> Nevertheless strategically, there is little precedent for a major US military offensive against a state that has not proximately used force against US interests. The so-called “Bush Doctrine” articulates a new rule of international law that seeks to bring to life the doctrine of anticipatory self-defence as an appropriate means through which to combat terrorism (including states that actively support terrorism or that are themselves terror states in the sense of acquiring and stockpiling weapons of mass destruction).

The genesis of the “Bush Doctrine” can be traced to the immediate aftermath of the September 11 attacks. Nine days after the attacks, US President George Bush announced that: “[f]rom this day forward, any nation that continues to harbour or support terrorism will be

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<sup>8</sup> Louis R. Beres, “The Permissibility of State-Sponsored Assassination During Peace and War”, (1992) 5 Temple International and Comparative Law Journal 231, 239.

considered by the United States as a hostile regime.”<sup>9</sup> Nine months later the fullest exposition of the doctrine was given by President Bush in a speech at West Point on June 1.<sup>10</sup> Warning that the United States faced “a threat with no precedent” through the proliferation of weapons of mass destruction (WMD) and the emergence of global terrorism, Bush stated that the traditional strategies of deterrence and containment were no longer sufficient. Because of the new threats that the United States faces, he claimed that a proper understanding of the right of self-defence would now extend to authorizing pre-emptive attacks against potential aggressors, cutting them off before they are able to launch strikes against the US that might be devastating in their scale and scope. Under these circumstances, he concluded, “If we wait for threats to fully materialize, we will have waited too long.”

Expounding on the strategic aspect of the doctrine, President Bush stated that there was a need to “... take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.”<sup>11</sup> In the same address, he went on to tell the future US military officers at West Point that “The military must be ready to strike at a moment’s notice in any dark corner of the world. All nations that decide for aggression and terror will pay a price.”<sup>12</sup> That doctrine carried an explicit warning for Iraq and other states that pursue weapons of mass destruction: if a hostile regime also pursues the acquisition or development of chemical, biological or nuclear weapons, the decisive use of anticipatory military force to end that regime is a legitimate response. The war against Iraq is the defining moment in the evolution of the “Bush Doctrine” marking a growing coherence and confidence in the strategy of “offensive defence”. The “Bush Doctrine” has understandably divided the international community because it appears to privilege the “national interests” of the United States over

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<sup>9</sup> See President George W. Bush, Address to a Joint Session of Congress and the American People, in 37 Weekly Comp Pres. Doc. 1347 (Sept. 20, 2001).

<sup>10</sup> Westpoint Commencement Speech, n 3.

<sup>11</sup> Westpoint Commencement Speech, n 3.

<sup>12</sup> Westpoint Commencement Speech, n 3.

the sovereignty of other states—a strong echo of the right of self-preservation and its corollary, anticipatory self-defence.

The issues that the Article tackles are obviously complex and lengthy, however the Article has as its modest goal the exploration of the general arguments that the use of force to counter terrorism raises under the UN Charter regime on the use of force. In Part II, the Article gives an overview of the UN and terrorism noting the ambivalence in addressing the issue that has contributed to the confusion over a precise definition in large part reflective of the basic disagreement over the elements of terrorism itself. Part II then adopts a definition for the purposes of this Article. In Part III, the Article addresses the dramatic post-September 11 developments which witnessed the use of lethal military force in Afghanistan and Iraq in the name of countering terrorism. The Part begins with a general overview before carrying out a more detailed and specific enquiry into the legal and factual issues of both military campaigns.

Part IV of the Article turns to the core of the discussion—the use of military force as a countermeasure against terrorism. The premise of post-September 11 is that terrorist groups shall not receive a shield from the territorial integrity of a state which is unwilling to put an end to terrorist activity or colludes to enhance terrorist capabilities. The Part delves into the recognised and permissible uses of force in self-help-self-defence and reprisals. These concepts engender considerable confusion considering that in the context of force in counter-terrorism, the terms are often used imprecisely; actions may be labelled “reprisals” or “retaliation” when, in fact, the proper characterization could appear to be self-defence and vice versa. This discussion seeks to delineate the basic principles of these concepts and thus prevent an undue muddle when the Article tackles the important matter of self-defence as

enshrined in the UN Charter and whether anticipatory-self-defence is permitted under the UN Charter.

## **II. Terrorism and the UN: An Ambivalent Relationship**

The UN came into being at a time when the seeds for the dissolution of imperial and colonial possessions had been sown. In its early years, there were numerous national liberation struggles. Many acts of terror-violence occurred in the context of armed conflicts, specifically in the context of decolonisation and wars of national liberation.<sup>13</sup> Ideological and geopolitical differences between states regarding the permissibility of violence in various political contexts ensured that no broad generic approach would be taken and obscured the fact that numerous states resort to clearly impermissible violence when convenient to or desirable for state objectives.

Ideological and political quagmires laid down fertile ground for a dichotomy of terrorism to come into being. The international community increasingly targeted manifestations of individual and small group acts of terror-violence sidestepping the political volatile issue of state/ insurgent sponsored and orchestrated terror-violence. Individual and small group acts of terror attracted international attention and gained prominence in the 1960s with the hijacking of several commercial airliners and again in 1972 at the Munich Olympic Games with the kidnapping and assassination of nine Israeli athletes by Black September terrorists.<sup>14</sup> On the

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<sup>13</sup> Richard R. Baxter, "The Geneva Conventions and Wars of National Liberation, in *International Terrorism and Political Crimes*" in M Cherif Bassiouni, ed. *International Terrorism and Political Crimes* (1975) 120; Jiri Toman, "Terrorism and the Regulation of Armed Conflicts, in *International Terrorism and Political Crimes*" in M Cherif Bassiouni, ed. *International Terrorism and Political Crimes* (1975); Donald M. Snow, *Distant Thunder: Patterns of Conflict in the Developing World* (2<sup>nd</sup> ed. 1997).

<sup>14</sup> Cindy C. Combs, "Terrorism in the Twenty-First Century" 168 (Charlyce Jones Owen et al. eds., 2<sup>nd</sup> ed. 2000).

other hand, terror orchestrated by states or insurgents slipped out of the international legal agenda into the interstices of politico-diplomatic chicanery.<sup>15</sup>

In the 1960s and 1970s, focus on terrorism increasingly targeted ideologically motivated individuals and small groups, almost to the exclusion of state-sponsored terror-violence. International and national concerns chose to side step the politically prickly issue of state-sponsored.<sup>16</sup> Attacks by individuals and small groups soon came to comprise the category of “terrorists.”<sup>17</sup> The imbalance of attention given by the international community to acts of terror-violence committed by individuals and small groups as opposed to states “can be attributed to the asymmetry between the power of states and the powerlessness of individuals who oppose the state irrespective of their legal or moral claim of legitimacy.”<sup>18</sup> In order to mobilize consensus, the international community adopted a piecemeal approach to combating terrorism, choosing to target very specific acts of terrorism, occurring in specific situations, circumstances or places and generally providing for extradition and prosecution regimes.

The 1970’s and 1980’s were decades rife with politically motivated violence such as hijacking and hostage taking, the international community sought to regulate the political

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<sup>15</sup> Not surprising. It was the height of the Cold War and the two superpowers engaged in wars of proxy were busy supporting or laying fertile ground for terror-violence albeit under the accepted guise of supporting national liberation movements and furthering the right of self-determination. The Soviet KGB ran more than a dozen terrorist training camps around the world. In the 1970s, the notorious School of the Americas (run by the United States military) offered formal military training to Latin American leaders and groups engaged in legitimate struggles for self-determination. Many of its students went on to form brutal dictatorships whose mainstay was through a fabric of terror and fear knitted in their respective countries. See e.g. Combs, n 14.

<sup>16</sup> M. Cherif Bassiouni, “A Policy-Oriented Inquiry into the Different Forms and Manifestations of International Terrorism” in M. Cherif Bassiouni ed. *Legal Responses to International Terrorism: U.S. Procedural Aspects XV* (1988); W.T. Mallison Jr. and S.V. Mallison, “The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values” (1973) 18 *Howard Law Journal* 1.

<sup>17</sup> Though there are no reliable statistics, a number of official and non-official publications provide estimates. The most reliable source is the U.S. Department of State’s annual report assessing international terrorism. For the latest of these reports, see Office of Counterterrorism, Department of State, “Patterns of Global Terrorism 1998” (1999) (Appendix C).

<sup>18</sup> M Cherif Bassiouni, “Assessing ‘Terrorism’ into the New Millennium” (2000) *DePaul Business Law Journal* 1, 5-6.

violence through multilateral conventions. With a large segment of international society vulnerable to random and unexpected terrorist threats, in the wake of repeated attacks on international civil aviation<sup>19</sup> the international community reacted with a series of international conventions adopted between 1969-1988.<sup>20</sup> A rash of assassinations and kidnappings of diplomats from the 1960s to the 1990s brought about the adoption of several multilateral conventions.<sup>21</sup> Similarly a rapid increase in the kidnappings of civilian hostages for ransom, mostly business persons and their families brought about the adoption of a specialised United Nations Convention in 1979.<sup>22</sup>

United Nations efforts reflected the international community's disapproval of terrorism.<sup>23</sup> In 1971, the United Nations General Assembly passed the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The declaration affirmed the duty of all states "to refrain from organizing, instigating, assisting or participating in ... terrorist acts in another State."<sup>24</sup> Similarly, a 1986 General Assembly Resolution entitled, in part, Measures to

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<sup>19</sup> Alona Evans, "Aircraft Hijacking: Its Cause and Cure" (1969) 63 *American Journal of International Law* 695.

<sup>20</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature Sept. 14, 1963, 704 UNTS 219; Convention for the Suppression of Unlawful Seizure of Aircraft (hereinafter Hague Convention), opened for signature Dec. 16, 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (hereinafter Montreal Convention), opened for signature, Sept. 23, 1971, 974 UNTS 177; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, ICAO Doc. 9518; reprinted in 27 ILM 627.

<sup>21</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, opened for signature Dec. 14, 1973, 1035 UNTS 167; Convention on the Safety of United Nations and Associated Personnel, GA Res 59, UN GAOR, 49th Sess., UN Doc A/49/59 (1994). See also, Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, OAS Doc. A/6/Doc. 88 rev. 1, corr.1 (Feb. 2, 1971), reprinted in 10 ILM 255.

<sup>22</sup> International Convention Against the Taking of Hostages, UN GA Res. 34/154 (XXXIV), UN GAOR, 34 Sess., Supp No 46 at 245, UN Doc A/34/146 (1979) reprinted in 18 ILM 1456.

<sup>23</sup> The legal effect of General Assembly declarations and resolutions remains a matter of some debate. Nevertheless, few question the persuasive nature of the declarations as evidence of international norms.

<sup>24</sup> 1979 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, GA Res 2625, UN GAOR, 25th Sess., Supp No 28, UN Doc A/8028 (1970) 123.

Prevent International Terrorism,<sup>25</sup> “ unequivocally condemned as criminal, all acts, methods and practices of terrorism wherever and by whomever committed ...”<sup>26</sup>

However, these resolutions and declarations while important have one key plank missing-an accepted definition of terrorism and/or terrorist acts. Thus they provide scant insight into the essential characteristics of terrorist violence. These declarations are similar to existing multilateral antiterrorist conventions in that they reflect a pragmatic, ad hoc approach that criminalises specific practices without reference to the underlying political objectives of the offenders. A seemingly insurmountable obstacle to international consensus as to an acceptable definition of terrorism is mainly due to the “politically charged nature of terrorist activity,” and the related question of whether definitions of terrorism can or should encompass national liberation movements.<sup>27</sup>

Various definitions of terrorism refer to unlawful force as opposed to lawful force. However, the problem arises on the fundamental aspect of the definitions-the distinction between unlawful and lawful force. Furthermore, in choosing to avoid defining terrorism conclusively, the UN has either used it in a more general sense or selected specific acts as constituting terrorist activity.<sup>28</sup> In sum most definitions in academic literature and international instruments generally require two elements: actual or threatened violence against civilians or persons not actively taking part in hostilities and the implicit or explicit purpose of the act being to intimidate or compel a population, government or organisation into some course of

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<sup>25</sup> Measures to Prevent International Terrorism, GA Res 61, UN GAOR, 40th Sess., Supp No 53, at 301, UN Doc A/40/53 (1986).

<sup>26</sup> Id. at 302. Measures to Prevent International Terrorism, GA Res 61, UN GAOR, 40th Sess., Supp No 53, at 301, UN Doc A/40/53 (1986).

<sup>27</sup> Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) 192-93, 201; see also Louis Rene Beres, “The Meaning of Terrorism: Jurisprudential and Definitional Clarifications” (1995) 28 *Vanderbilt Journal of Transnational Law* 239, 248; W. Michael Reisman, “International Legal Responses to Terrorism” (1999) *Houston Journal of International Law* 3, 9-13.

<sup>28</sup> Jeffrey Addicott, “Legal and Policy Implications for a New Era: The ‘War On Terror’ ” (2002) 4 *Scholar: St Mary’s Law Review on Minority Issues* 209, 213–14 (citations omitted).

action.<sup>29</sup> This broad definition is supported by a proposed convention drafted by the International Law Association, which defines an international terrorist offence as

*any serious act of violence or threat thereof by an individual whether acting alone or in association with other persons, organisations, places, transportation or communications systems or against members of the general public for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organisations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States.*<sup>30</sup>

It is the above definition which this Article will adopt as its working definition. In the next part, the Article tackles the dramatic military campaigns in Afghanistan and Iraq that witnessed the use of lethal force going beyond the neutralisation of terrorist groups/collusion with terrorist groups to include the toppling of the ruling regimes in both nations. This action by the US led coalitions against new threats from terrorist groups and rogue states is at the very heart of the debate on the use of force today.

### **III. Jumping the Gun: Afghanistan, Iraq and Beyond?**

Though terrorism has always been high on the international agenda, it was the September 11, 2001 attacks that brought the issue of terrorism and the international regime on the use of force into a new, urgent and sustained debate. With the US at the forefront, the emergence of terrorism as a global threat was forcing states of the world to adopt a new view of sovereignty-if a governing body cannot stop terrorists victimizing others from its territory, or if it offers safe havens and finance-then the government of the victim will reach across borders to do the necessary stopping. The strategy quickly crystallised into the so-called

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<sup>29</sup> See, eg, Harry Henderson, *Global Terrorism: The Complete Reference Guide* (2001) 1–30; David Long, *The Anatomy of Terrorism* (1990) 1–13; Ken Booth and Tim Dunne, “Worlds in Collision” in Ken Booth and Tim Dunne (eds), *Worlds in Collision: Terror and the Future of Global Order* (2002) 8.

<sup>30</sup> International Law Association, *Draft Single Convention on the Legal Control of International Terrorism as contained in International Law Association, Report of the Fifty-Ninth Conference*, art 1(j), 497–504 (1982).

“Bush Doctrine” of hot pre-emption or anticipatory self-defence.<sup>31</sup> Its first example was not long in coming.

After the September 11 attacks, the United States quickly identified the Al Qaeda terrorist network with the support of the Taliban government, as the perpetrators of the September 11, 2001 terrorist attacks.<sup>32</sup> This was coupled with a recognition that the modern threat to US power and security rises not from one particular organisation, but from the growing threat of international terrorism, particularly terrorism that enjoys active or tacit state support.<sup>33</sup> “Operation Enduring Freedom” in Afghanistan signalled a renewed determination on the part of the United States to combat international terrorism and states that sponsor it, but the operation laid fertile ground for debate on the strategic or legal approach that States should adopt in responding to such threats. Strategically, the US military action against terrorism was based on the Reagan-era doctrine of “swift and effective retribution” against terrorist organisations that strike US interests.<sup>34</sup> Though legally, the United States (with the support of the Security Council) justified “Operation Enduring Freedom” under the established doctrine of self-defence,<sup>35</sup> talk from Washington was articulating pre-emptive self-defence. Essentially, the US did not consider military action against Afghanistan as a formal war against the state but pre-emption of further attacks by terrorists based in that State.

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<sup>31</sup> See the discussion in the Introduction of this Article relating to the doctrine.

<sup>32</sup> See President George W. Bush, Address to a Joint Session of Congress and the American People, n 10 (“The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al [sic] Qaeda.”).

<sup>33</sup> 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 harbour or support terrorism will be regarded by the United States as a hostile regime.” President George W. Bush, Address to a Joint Session of Congress and the American People, n 9.

<sup>34</sup> Ronald Crelinsten & Alex P. Schmid eds., *Western Responses To Terrorism: A Twenty-Five Year Balance Sheet* (1992) 307, 316. The policy described by Crelinsten and Schmid has clearly been continued by Reagan’s successors. This is evident in Clinton’s air strikes against Iraq for the attempted assassination of George H.W. Bush and his strikes against Sudan and Afghanistan following the Embassy Bombings in Tanzania and Kenya.

<sup>35</sup> For a discussion of the international legal validity of U.S. military action “Operation Enduring Freedom” in Afghanistan, see Jack Beard, “America’s New War on Terror: The Case for Self-Defence Under International Law” (2002) 25 *Harvard Journal of Law and Policy* 559, 559.

Even as the US moved against Afghanistan, the highest levels of military, legal, and diplomatic policymakers in Washington began debating how the United States should confront states that sponsor terrorism and proliferate weapons of mass destruction. The immediate focus of that debate cantered on US policy towards Iraq. The end game of this debate was cemented by President George Bush when he announced that “the policy of [his] government is the removal of Saddam [Hussein].”<sup>36</sup> However, the circumstances surrounding US intervention in Iraq differ fundamentally from those in Afghanistan. The United States has not conclusively proven that Al Qaeda maintained Iraqi training bases or that it received financial, logistic or military support from the Iraqi Government. The strategic and legal calculus for action in Iraq does not compare to that which motivated US action in Afghanistan in late 2001. What was different with the military action in Afghanistan as opposed to the military action in Iraq, was that the September 11 attacks drew favourable response to the use of force with America’s right of self-defence being mentioned in the same breath as terrorist attacks but it is worth noting that the Security Council avoided speaking of “armed attack” as required by Article 51 of the UN Charter using instead the notion of “terrorist attack” without expressly linking this notion to Article 51 which is mentioned in a separate paragraph.<sup>37</sup>

Soon after the military action in Afghanistan, the “Axis of Evil” speech provoked an allergic reaction with its strong overtones of unilateral military action by the US against countries that support terror and an intimation of expansion of the scope of military operations beyond Afghanistan without indication that such an expanded theatre of operations would depend on Security Council approval.<sup>38</sup> Iraq was particularly prominent on the list of places where

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<sup>36</sup> “Allies Discuss Terrorism and the Middle East: Bush and Blair on Policy” New York Times, Apr. 7, 2002, at A14.

<sup>37</sup> SC Res 1368, UN Doc S/RES/1368 (2001).

<sup>38</sup> “The President’s State of the Union Address” Jan. 29, 2002. This can be accessed at the Whitehouse website <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>> (visited Aug. 2003)

military intervention was envisioned.<sup>39</sup> In the case of Iraq, the United States and United Kingdom successfully encouraged the UN Security Council to pass Resolution 1441,<sup>40</sup> which gave Iraq a final opportunity to comply with its disarmament obligations through weapons inspections. Chafing impatiently at the slow pace of the UN weapon's inspection process, soon, the US assumed evidence of Iraqi involvement with terrorist activity and of persisting Iraqi capacity for weapons of mass destruction.<sup>41</sup> The US position quickly crystallised as one of armed intervention justifiable on the basis of pre-emptive or anticipatory self-defence, and hence providing a green light to proceed independently of Security Council approval.<sup>42</sup> US national security strategy was adamant in its commitment not to hesitate to act alone, and increasingly chafed at UN control over the use of force against rogue states that present perceived security threats.<sup>43</sup>

Regardless of the existence of Iraqi connections to the September 11 attacks, the United States, citing Iraq's capacity to use weapons of mass destruction, asserted that self-defence

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<sup>39</sup> Thom Shanker & David E. Sanger, "U.S. Envisions Blueprint on Iraq Including Big Invasion Next Year" *New York Times*, Apr. 28, 2002, at A1 (reporting that direct military involvement is being considered after the Bush Administration concluded that a coup in Iraq would be unlikely to succeed); Patrick E. Tyler, U.S. Again Placing Focus on Ousting Hussein, *New York Times*, Dec. 18, 2001, at A1 (reporting that "[t]he option of taking the war against terrorism to Iraq and Saddam Hussein has gained significant ground in recent weeks"). The use of force against Iraq in the event of non-compliance with weapons inspections received support from some, but not all, U.S. allies. See Julia Preston & Eric Schmitt, "U.S.-French Split on Iraq Deepens" *New York Times*, Oct. 15, 2002, at A1 (discussing French opposition to U.S. action in Iraq); U.S. Offers a Deal for UN Resolution on Iraq, *New York Times* (Oct. 17, 2002), at <http://www.nytimes.com> (reporting that two dozen nations refused to endorse military force if Iraq fails to comply with weapons inspections).

<sup>40</sup> SC Res 1441, UN SCOR, 57th Sess., 4644th mtg., UN Doc S/Res/1441 (2002). The UN Security Council unanimously passed Resolution 1441. The resolution declared Iraq to be in material breach of its obligations under past UN mandates. It also informs Iraq it will face "serious consequences" if it fails to cooperate. It is questionable whether it authorises a member-state to unilaterally take action in the event of further noncompliance.

<sup>41</sup> Much debate abounds about the credibility of the US evidence regarding Iraq's links to Al Qaeda. The issue of the possession of weapons of mass destruction, the quantity and nature is yet another controversy. Admittedly it is difficult to conclude one way or the other but what stands out is the fact that the international community remained divided over the matter right up to the day of military action.

<sup>42</sup> See Oliver Moore, "U.S. Troops Going Cave-to-Cave in Tora Bora" *Globe and Mail* (Toronto) (Dec. 18, 2001), at <<http://www.globeandmail.com>> ("Asked whether the United States might need a new resolution from the United Nations Security Council to strike suspected terrorist targets outside Afghanistan, [Defence Secretary Rumsfeld] said: 'Nothing is needed by way of additional authorization. Every country has the right to self-defence.'"); Steven R. Weisman, "U.S and France Near Deal on Iraq Attack" *New York Times*, Oct. 30, 2002, at A1 ("American officials made clear that the United States would reserve the right to lead a military action against Iraq if Iraq continued to block inspections, even if the Security Council did not give its approval.").

<sup>43</sup> Bush's National Security Strategy, A.P. Newswires, Sept. 20, 2002, available at Westlaw, Newswires.

could legitimise anticipatory intervention against Iraq.<sup>44</sup> Self-defence, it was suggested, also fuels the need for internal “regime change” in Iraq and US support of such change.<sup>45</sup> Without waiting for the UN Security Council to declare Iraq in breach of resolution 1441 thus a threat to international peace and security for which the Council could then explicitly authorize military intervention,<sup>46</sup> the US and its Allies proceeded with military action against Iraq premised on pre-emptive or anticipatory self-defence.

Military action against Iraq has, not surprisingly split the international community and inflamed the world’s major powers since it raises much debate both as a policy matter and as a legal matter. Considering that the use of armed force can only be justified under international law when used in self-defence, can the United States go beyond the rhetoric and actually carry the War on Terror to those rogue nations who are identified so closely as supporters and sponsors of terrorist activities, but have not actually physically engaged in an act of aggression against the United States?<sup>47</sup> The convergence of international terrorism and weapons of mass destruction presents a grave threat to international peace, security, and prosperity by threatening the survival of entire nations. This threat multiplies exponentially when governments foster and encourage these dual scourges. What is disturbing about the US stance is the fact that an old problem in contemporary international law-anticipatory self-

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<sup>44</sup> Traditionally, anticipatory or pre-emptive self-defence has not been favoured under international law. See Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, (2002) 51 *International and Comparative Law Quarterly* 410, 402. However, the notion of pre-emptive “counter-proliferation” forms an important part of the new U.S. national security strategy. See Bush’s National Security Strategy, A.P. Newswires, Sept. 20, 2002, available at Westlaw, Newswires.

<sup>45</sup> The United States affirmed it would provide “lethal assistance” in the form of military training and arms to Iraqi opposition volunteers and Kurdish fighters in Iraq. Patrick E. Tyler, “U.S. and Britain Drafting Resolution to Impose Deadline on Iraq” *New York Times*, Sept. 26, 2002, at A14; Julia Preston & Eric Schmitt, “U.S.-French Split on Iraq Deepens” *New York Times*, Oct. 15, 2002, at A1 (reporting that the CIA had begun covert operations in the Kurdish area of northern Iraq with a view to fomenting an uprising in Iraq).

<sup>46</sup> UN Charter arts. 39, 42. A plain reading of Resolution 1441, n 41, suggests another Security Council meeting in the event of an Iraqi breach, at least to discuss the inspectors’ report, at which point the use of force could be authorised. On the other hand, the use of fuzzy and ambiguous language could be read as supporting the notion that the Security Council is allowing individual states greater interpretive latitude in deciding when force can be used.

<sup>47</sup> Addicott, n 28.

defence is being touted as an appropriate vehicle in the war against international terrorism yet the view is that the “armed attack” requirement in Article 51 of the UN Charter superseded any pre-existing right of anticipatory action.

## *Anchoring the Afghanistan and Iraqi*

### *A. Afghanistan*

The United States connected the Taliban regime to Al Qaeda on the grounds that it harboured Osama bin Laden and his organisation, refused to deliver bin Laden to requesting states and that the Taliban increased their responsibility for Al Qaeda’s actions after the fact by endorsing the September 11 attacks.<sup>48</sup> Before the United States even attacked Afghanistan, the UN Security Council affirmed that the September 11 attacks gave rise to a right of self-defence.<sup>49</sup> Passed by the Council the day after the attacks, Resolution 1368 condemned the attacks and recognised “the inherent right of individual or collective self- defence in accordance with the Charter.”<sup>50</sup> Resolution 1373, passed seventeen days later reaffirmed the right of self-defence in the context of the September 11 attacks and went on to reaffirm “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”<sup>51</sup> Thus, the United States enjoyed strong support from the Security Council before it had to articulate the actual case for its actions in Afghanistan and despite the possibility that existing restrictions on the right of self-defence precluded a lawful exercise of that right under the circumstances.<sup>52</sup>

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<sup>48</sup> Byers, n 45 at 408-09.

<sup>49</sup> SC Res 1368, UN Doc S/RES/1368 (2001); SC Res 1373, UN Doc S/RES/1373 (2001).

<sup>50</sup> SC Res 1368, n 49.

<sup>51</sup> SC Res 1373, n 49.

<sup>52</sup> Michael J. Glennon, “The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter” (2002) 25 Harvard Journal of Law and Public Policy 539, 542-44.

Operation Enduring Freedom commenced on October 7, 2001 with a mix of air strikes from land-based bombers, carrier-based jetfighters and cruise missiles. The initial military objectives of Operation Enduring Freedom, included the destruction of terrorist training camps and infrastructure within Afghanistan, the capture of Al Qaeda leaders, and the cessation of terrorist activities in Afghanistan.<sup>53</sup> US Secretary of Defence Donald Rumsfeld stated that US objectives included to make clear to Taliban leaders that the harbouring of terrorists is unacceptable, to acquire intelligence on Al Qaeda and Taliban resources and to prevent the use of Afghanistan as a safe haven for terrorists.<sup>54</sup>

By October 20, 2001 US and Coalition forces had destroyed virtually all Taliban air defences. By mid-March 2002, the Taliban had been removed from power and the Al Qaeda network in Afghanistan had been destroyed. Operations in Afghanistan involved significant contributions from the international community. By 2002 the coalition had grown to more than 68 nations, with 27 nations having representatives at the United States Central Command (CENTCOM) headquarters.

Wide support for the US action as well as the fact that the action was given firm footing by Security Council resolutions led many to believe that the UN Charter regime on the use of force was visibly enrolled in change. Professor Frederic L. Kirgis observes:

The United States [] relied on its right of self-defence in using military force to respond to the September 11 attacks. Other governments have not challenged the right of the United States to do so ... Because customary international law is often developed through a process of official assertions and acquiescences, the absence of challenge to the US asserted right of self-defence could be taken to

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<sup>53</sup> As articulated by President George W. Bush in his Sept 20 Address to a Joint Session of Congress and his Oct. 7<sup>th</sup> address to country. The text of both speeches can be accessed at the US government information website <http://usinfo.state.gov>. (visited Dec. 2003)

<sup>54</sup> In an Oct. 7<sup>th</sup> Department of Defence Briefing. The document can be accessed at The text of both speeches can be accessed at the US government information website <http://usinfo.state.gov>. (visited Dec. 2003)

indicate acquiescence in an expansion of the right to include defence against governments that harbour or support organised terrorist groups that commit armed attacks in other countries.<sup>55</sup>

The view by Professor Kirgis was shared by a number of commentators who noted the international community's wide support for US actions post-September 11,<sup>56</sup> including the observation that states' acceptance of US actions would in effect, condone the use of anticipatory self-defence to fight international terrorism. Despite these positives, the US military's targeting and toppling of the ruling Taliban who had harboured Al Qaeda raised many questions about whether the United States responded proportionately to the September 11 attacks. As Michael C Bonafede observes: "The right to self-defence under international law is not a blank cheque to destroy one's enemy; indeed, self-defence is limited by the requirements of an armed attack, necessity, immediacy, and proportionality."<sup>57</sup> The sticking point though is that there has never been any authoritative definition of what is and what is not a proportional state response to a terrorist attack.<sup>58</sup> Nonetheless, self-defence seems to

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<sup>55</sup> Frederic L. Kirgis, "The American Society of International Law (ASIL) Insights: Israel's Intensified Military Campaign Against Terrorism" at <<http://www.asil.org/insights/insigh78.htm>> (visited Dec. 2001)

<sup>56</sup> See e.g. Judith Miller, Remarks at the Cornell International Law Journal Symposium on Terrorism: Implications of the Response to September 11, 2001 (Feb. 14, 2002) ("The unity in the international community regarding the legal basis for U.S. action has been quite remarkable.... [T]he overall international agreement is that the U.S. had a proper legal basis for taking self-defensive actions... in response to the deliberate attack[s]... in New York and Washington, D.C."); Furthermore, Professor Beard states:

The European Union ..., along with its member states individually, pledged to support U.S. action against terrorism. Similar views and various offers of support were made by America's Pacific allies, including Australia, New Zealand, Japan, the Philippines, and South Korea. In addition..., numerous states throughout Eastern Europe, Africa, and Asia expressed their support for the U.S. military response to the September 11 terrorist attacks.

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While public opinion in the Arab and Muslim world opposed the U.S. action against Afghanistan, several Arab states such as Bahrain, Egypt, and Jordan expressed support for the U.S. anti-terror campaign. Other Arab states also made significant contributions to U.S. military efforts, including Pakistan..., Saudi Arabia..., and Persian Gulf states such as Oman and Kuwait...

Beard, n 35 at 569-70 (citations omitted).

<sup>57</sup> Michael C Bonafede, "Here, There and Everywhere: Assessing the proportionality Doctrine and the US Uses of Force in Response to Terrorism After the September 11 Attacks" (2002) 88 Cornell Law Review 155, 185.

<sup>58</sup> See Yoram Dinstein, *War, Aggression and Self-Defence* (3rd ed. 2001) 184 ("[Proportionality] is frequently depicted as 'of the essence of self- defence', although it is not always easy to establish what proportionality entails.... [As such,] the principle of proportionality must be applied with some degree of flexibility." (citations omitted)); Judith Gail Gardam, "Proportionality and Force in International Law" (1993) 87 American journal of International Law 391, 405 ("Proportionality is a complex concept to apply to particular cases and there will inevitably be differences of opinion." (citation omitted)).

imply that the mechanism only lasts as long as it takes the victim of the attack to address the immediate threat to that self-preservation. Michael C Bonafede laments:

... in the wake of the deadliest terrorist strikes in US history, the Bush Administration is filling this void with its own rules and ideas about what is proportional and appropriate. According to the Bush Administration, the United States--like no other nation in the modern era--has a clear and justified mandate to use whatever means it deems necessary to combat and defeat all forms of international terrorism.<sup>59</sup>

In any case, “[I]f the Bush Administration is correct—that the only way to address and defeat international terrorism is to engage it wherever it is found—then that mission is far beyond the scope of any response to an attack that any nation has ever attempted during peacetime.”<sup>60</sup> A significant number of international legal observers would most likely conclude that the US response which went beyond Al Qaeda to encompass toppling the Taliban and secure regime change violates the doctrine of proportionality. The conclusion could be reached even if one applied an expanded view of the current international rules regulating the right to self-defence. It should be noted that the action premised on the Bush Doctrine also based the right of self-defence against terrorism in part on principles of state responsibility.<sup>61</sup> This issue is beyond the scope of the Article and will not be addressed.

The emerging alteration of the right of self-defence in a post-September 11 world was however soon put to a more severe test when the US administration buoyed by the support it had enjoyed in Operation Enduring Freedom emphasised the need for pre-emptive strikes and sought to extend its military adventures. Iraq was soon in its sights, however unlike Al Qaeda and the Taliban in Afghanistan, Iraq did not bear responsibility for a recent terrorist attack against the United States.<sup>62</sup> The absence of such an attack limited the application of any new rule of international law to Iraq. The US however chose to sweep aside this significant

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<sup>59</sup> Bonafede, n 57 at 159.

<sup>60</sup> Bonafede, n 57 at 186.

<sup>61</sup> Byers, n 44 at 408 n.38

<sup>62</sup> Kenneth M. Pollack, *The Threatening Storm: The Case for Invading Iraq* (2002) 157.

difference and would soon be squandering away the legal and moral capital it had gained in the action against Afghanistan when it invaded Iraq on a mish-mash of justifications that were generally met with international scepticism.

## ***B. Iraq***

The terrorist attacks on September 11 and the United States' military response in Afghanistan against the Al Qaeda terrorist organisation and the Taliban militia that harboured it, led to a sharper focus on the Iraq problem. In the pre-September 11 environment, the Saddam Hussein regime in Iraq was regarded as a source of irritation and annoyance and did not feature prominently on the list of US responses to terrorism. Iraq was seen as a standard state-to-state threat than as a state sponsor of terrorism.<sup>63</sup> However, the magnitude of the threat of the September 11 attacks altered the equation dramatically. The possibility of collusion between a rogue, troublesome nation with potential access to WMD and terrorists was sufficient to send pulses racing in Washington. Iraq was soon identified as another prime target for an armed attack by the United States.<sup>64</sup> As President Bush said in his January 2002 State of the Union address:

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.<sup>65</sup>

The result was the Bush Administration's obsession with depicting Iraq as both a traditional threat and a major terrorist threat. In the words of Patrick McLain:

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<sup>63</sup> Paul Pillar, *Terrorism and U.S. Foreign Policy* (2001) 160.

<sup>64</sup> See William M. Arkin, "Should Iraq be Next?" *Washington Post* (Dec. 3, 2001), available at <http://www.washingtonpost.com/wp-dyn/nation/columns/dotmil> (last visited Oct. 1, 2002).

<sup>65</sup> George W. Bush, State of the Union Address (Jan. 29, 2002), 38 *Weekly Comp. Pres. Doc.* 125, 135 (Feb. 4, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/iraq/20020129-11.html>.

The resulting US shift to an aggressive Iraq policy [] forced the US to advance legal justifications for a full-scale invasion of Iraq; justifications that place great strain on the coherence of the general prohibition on the use of force. To justify its policy toward Iraq and other hostile states, the Bush Administration [] developed a new, multifaceted strategic doctrine, known as the “Bush Doctrine,” that advocates pre-emptive or preventive strikes against terrorists, states that support terrorists, and hostile states possessing WMD.<sup>66</sup>

About six months after routing Al Qaeda fighters and toppling the Taliban from power, on September 12, 2002, President Bush challenged the United Nations to address the threat posed by Iraq as highlighted by its continuing defiance of the Security Council.<sup>67</sup> President Bush sought to portray the War on Terror as a broad campaign against all terrorist groups of global reach and states that support or harbour them, not just those responsible for the September 11 attack.<sup>68</sup> About seven weeks later, on November 8, the Security Council unanimously approved Resolution 1441 to address “the threat Iraq’s non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security.”<sup>69</sup> The resolution “deplor[ed]” the absence of international inspections in Iraq since December 1998 and Iraq’s continued failure to renounce international terrorism and cease the repression of its civilian population, and gave Iraq “a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council.”<sup>70</sup> It reminded Iraq that the Security Council has repeatedly warned that “serious consequences” would result from the continued violation of its obligations.<sup>71</sup>

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<sup>66</sup> Patrick McLain, “Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq” (2003) *Duke Journal of Comparative and International Law* 233, 236.

<sup>67</sup> George W. Bush, UN General Assembly in New York City Address (Sept. 12, 2002), 38 *Weekly Comp. Pres. Doc.* 1529 (Sept. 16, 2002), available at < <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>> (visited Aug. 2003).

<sup>68</sup> President Bush, Address to the United Nations General Assembly, n 67. See also Wendy Ross, “Bush Says Iraq Must Permit Weapons Inspections” (Nov. 26, 2001) (reporting President Bush’s White House press conference on Nov. 26, 2001), at <http://usinfo.state.gov/topical/pol/terror/01112608.htm> (visited Dec. 2002).

<sup>69</sup> See SC Res. 1441, n 40 at 1.

<sup>70</sup> See SC Res. 1441, n 40 at 3.

<sup>71</sup> See SC Res. 1441, n 40, at 5

The United States maintained a hardline voicing repeatedly that unilateral action remained an option despite the passage of Resolution 1441 by the Security Council.<sup>72</sup> Despite the United States choosing to channel its Iraq policy through the Security Council it was increasingly clear that international law was not going to stand in the way of US policy.<sup>73</sup> This hardline stand by the US is not surprising considering that one of the pillars of the “Bush Doctrine” was that the possession of WMD by unaccountable, unfriendly, despotic governments was itself a threat that must be countered. In his haste to force the hand of the Security Council, the US President deliberately blurred the distinction between the threat posed directly by Iraq and the threat posed by terrorists that might or might not strike at the United States.<sup>74</sup> The Bush Administration sought to draw a link to Iraq’s involvement in terrorism and links with Al Qaeda in order to make their possible collusion a compelling threat requiring pre-emptive US action:

We know that Iraq and al Qaeda have had high-level contacts that go back a decade. Some al Qaeda leaders who fled Afghanistan went to Iraq... We’ve learned that Iraq has trained al Qaeda members in bomb making and poisons and deadly gases. And we know that after September the 11th, Saddam Hussein’s regime gleefully celebrated the terrorist attacks on America.<sup>75</sup>

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<sup>72</sup> See President George W. Bush, Remarks by the President on the United Nations Security Council Resolution (Nov. 8, 2002), available at <[http:// www.whitehouse.gov/news/releases/2002/11/20021108-1.html](http://www.whitehouse.gov/news/releases/2002/11/20021108-1.html)> (visited Dec. 2002) (“The United States has agreed to discuss any material breach with the Security Council, but without jeopardizing our freedom of action to defend our country. If Iraq fails to fully comply, the United States and other nations will disarm Saddam Hussein.”); Statement by U.S. Ambassador John Negroponte, UN Press Release SC/7564 (Nov. 8, 2002), available at <[http:// www.un.org/News/Press/archives.htm](http://www.un.org/News/Press/archives.htm)> (visited Aug. 2003) (“The resolution contained, he said, no ‘hidden triggers’ and no ‘automaticity’ with the use of force. The procedure to be followed was laid out in the resolution. And one way or another, Iraq would be disarmed. If the Security Council failed to act decisively in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security.”).

<sup>73</sup> See Michael Hirsh, “Bush and the World” *Foreign Policy*, Sept./Oct. 2002, at 20 (“Bush, to judge by his actions, appears to believe in a kind of unilateral civilization... the United Nations is an afterthought, treaties are not considered binding”).

<sup>74</sup> “Terror cells and outlaw regimes building weapons of mass destruction are different faces of the same evil. Our security requires that we confront both.” See President George W. Bush, Remarks by the President on Iraq in Cincinnati, Ohio (Oct. 7, 2002), available at [http:// www.whitehouse.gov/news/releases/2002/10/20021007-8.html](http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html) (visited Oct. 2002)

<sup>75</sup> See Remarks by the President on Iraq in Cincinnati, n 74.

After months of impatience, dodgy intelligence dossiers and large doses of international disapproval, on March 19, 2003, at the head of an ad hoc force from the “coalition of the willing” the US invaded Iraq. The forces rapidly advanced through the desert racing towards Baghdad in a military campaign dominated by smart weaponry. Even the sullen international community was impressed as the Iraq armed forces were quickly subdued and the regime of Saddam Hussein toppled. On May 1, 2003, an overconfident President Bush announced that major combat operations in Iraq had ended but as time was to show the headaches were just beginning for the Coalition.

Relating to the legality of the US led military action, John Yoo argues that:

International law permitted the use of force against Iraq on two independent grounds. First, the Security Council authorised military action against Iraq to implement the terms of the cease-fire that suspended the hostilities of the 1991 Gulf war. Due to Iraq’s material breaches of the cease-fire, established principles of international law-both treaty and armistice law-permitted the United States to suspend its terms and to use of force to compel Iraqi compliance. Such a use of force was consistent with US practice both with regard to Iraq and with regard to treaties and cease-fires. Second, international law permitted the use of force against Iraq in anticipatory self-defence because of the threat posed by an Iraq armed with WMD and in potential cooperation with international terrorist organisations.<sup>76</sup>

But the factual and legal grounds are not as straightforward as Yoo’s assertion seems to suggest. To begin with it should be noted that the military action in Iraq led many other leading nations (primarily France, Germany, and Russia) and many international scholars to argue that international law did not justify the war in Iraq. This argument is not without merit. The justifications for the Iraq war however pose a legal minefield considering that the factual and legal setting leading up to the Iraq war were rather complicated since two independent sources of law provided the United States and its allies with authority to use force in Iraq: UN Security Council resolutions and the right to self-defence.

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<sup>76</sup> John Yoo, “International law and the War in Iraq” (2003) *American Journal of International Law* 563, 575.

### *Security Council Resolutions*

Justifications for the Iraq war were partly based on the events of 1990 in the aftermath of the Iraqi invasion of Kuwait. It is to be remembered that Resolution 678 authorised member states “to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”<sup>77</sup>

One of the most significant subsequent resolutions was Resolution 687. Pursuant to Resolution 678, the United States could use force not only to enforce Resolution 687’s cease-fire, but also to restore “international peace and security” to the region.

In Resolution 1441, the Security Council unanimously found that Iraq was in material breach of these earlier resolutions and that its continuing development of WMD programs, its support for terrorism, and its repression of the civilian population presented an ongoing threat to international peace and security. Resolution 1441’s finding that Iraq was in material breach offered the United States and its allies just the legal loophole they needed—a termination of the cease-fire created by Resolution 687 and the justification for any resumption of the use of force as authorised by Resolution 678.<sup>78</sup>

Although Iraq responded to Resolution 1441 by permitting the resumption of inspections, its efforts were seen as largely insincere and half-hearted. Iraq submitted a declaration on December 7, 2002, but the declaration was incomplete, inaccurate, and composed mostly of recycled information. Iraq’s declaration clearly failed to address any of the outstanding disarmament questions that previous disarmament inspectors had publicly documented. The

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<sup>77</sup> SC Res. 678, Nov. 29, 1990, para. 2.

<sup>78</sup> In the multilateral context, it is well-established that a material breach of a treaty by one of the parties entitles a party “specially affected” by the breach to suspend the operation of the treaty in whole or in part vis-à-vis the defaulting state. See Vienna Convention on the Law of Treaties, art. 60(2)(b), opened for signature May 23, 1969, 1155 UNTS 331.

reports submitted by UNMOVIC to the Council confirmed these shortcomings.<sup>79</sup> Iraq's submission of a declaration that did not comply with Resolution 1441 was seen as a further material breach of its obligations. In the face of this apparent non-compliance and inspire of calls for Iraq to be given more time, the United States led an ad hoc "coalition of the willing" that invaded Iraq.

Though at the outbreak of the 2003 conflict Iraq was reluctantly complying with its disarmament obligations, the international community was largely opposed to any military action pending compelling evidence on Iraq's possession of WMDs the primary US reason for seeking to launch a military campaign. The largely sceptical international community is perhaps being proven right. At the time of this writing, seven months after the conclusion of the war in Iraq, coalition forces continue to search for WMD sites, sites which the world was led to believe the Coalition forces would have no trouble unearthing. In any case the economy of truth regarding both Iraqi WMDs and its active support of Al Qaeda is enough to show that the US was spoiling for a fight whatever the facts or lack of them.

### *Self-Defence*

Customary international law has long recognised that no requirement exists for states to "absorb the first hit." The doctrine of anticipatory or pre-emptive self-defence, as developed historically, is applicable only when there is a clear and imminent danger of attack. The key issue concerns the elapsed time between the state-sponsored terrorist attack and the identification of the state responsible. Admittedly, there must be some temporal relationship

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<sup>79</sup> On February 28, 2003, UNMOVIC Executive Chairman Dr. Hans Blix stated that the declaration contained "little new significant information ... relating to proscribed weapons systems." Annex of the Twelfth Quarterly Report of the Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission in Accordance with Paragraph 12 of Security Council Resolution 1284, para. 7, available at <<http://www.un.org/depts/unmovic/documents/2003-232.pdf>> (visited Mar 2003). On January 27, 2003, Dr. Blix stated that the Iraqi declaration did not contain "any new evidence that would eliminate" the "many open disarmament issues." Update on Inspection to the UN Security Council (Jan. 27, 2003), at 3. On March 7, 2003, Dr. Blix repeated his conclusion that, "It was a disappointment that Iraq's declaration of 7 December did not bring new documentary evidence." Oral Introduction of the Twelfth Quarterly Report of UNMOVIC, at 2.

between a terrorist act and the lawful defensive response. Nevertheless, it would be unreasonable to preclude the victim of terrorism from redress, based upon a doctrinaire determination that the threat is no longer imminent, when the terrorist state's own actions preclude immediate identification. The means used for pre-emptive response must be strictly limited to those required for the elimination of the danger, and must be reasonably proportional to that objective. But Charter law seems to expressly preclude the concept. Self-defence can only be in response to an armed attack, not a threatened attack.

In the aftermath of the September 11 attacks and the general support and cooperation that the US received in the military campaign against the Taliban regime in Afghanistan, the US began to capitalize on this goodwill arguing that it was legally justified in exercising a right of anticipatory self-defence to attack hostile "rogue" states and states that harbour terrorists even if the United States had not been attacked. No doubt the UN Charter is not a suicide pact. In any case, the International Court of Justice considered this proposition in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake."<sup>80</sup> The September 11 terrorist attacks influenced the United States to fast track its mindset. No longer was terrorism merely a sporadic series of pinpricks, but in view of the possibility of WMDs ending up in the hands of terrorists from rogues states, terrorism could inflict catastrophic destruction<sup>81</sup> and thus posed a threat to the security and survival of the US. The National Security Strategy document released about five months before the Iraqi invasion stated in part:

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<sup>80</sup> 1996 I.C.J. 226, P 96 (July 8).

<sup>81</sup> See President Bush, Address to the United Nations General Assembly, n 67 ("[I]f an emboldened regime were to supply [weapons of mass destruction] to terrorist allies, then the attacks of September 11th would be a prelude to far greater horrors.").

For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. ...We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.

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The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction--and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.<sup>82</sup>

It can be said that in the Nicaragua case, the International Court of Justice identified the need to supplement the Charter provisions with customary international law<sup>83</sup> the problem though is whether anticipatory self-defence is recognised considering that the UN Charter discounts the notion. But the matter is not that simple in view of the split between the "restrictionist" and "counter- restrictionist" views of anticipatory self-defence which will be discussed in the next section. The next section will undertake an analysis of the general rubric on the use of force and in particular its relation to post-September 11 military action. It is arguable that the right to self-defence is visibly enrolled in a process of change. Many of the strict requirements of Nicaragua in the definition of the notion of armed attack appear to have been overturned or opened to challenge. However there are serious risks in broadening the ambit of permissible uses of force since this will lead to uncertainty and indeterminacy of the limits of unilateral use of force.

#### **IV. Use of Force in Self-help**

The medieval theory of *helium iustum* had been developed by theologians and during its existence sat uneasily as a valid rule of public international law. The theory lost its (virtual) war-preventing effects then it was recognised that recourse to war could be just for either side.

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<sup>82</sup> The National Security Strategy of the United States of America, n 43.

<sup>83</sup> Nicaragua v United States of America, 1986 ICJ 14 at 176 (June 27); Christine Gray, *International Law and the Use of Force* (2000). Id. at 154.

The birth of the modern international system was accompanied by the redefinition of the just war theory as self-defence by Dutch publicist Hugo Grotius. Accepted use of military force in the post-Westphalia world was premised on self-defence or reprisal. Generally speaking, Professor Derek Bowett notes that self-defence and reprisals are forms of the same generic remedy, self-help.<sup>84</sup> However he points out the critical difference in function: the true function of self-help is to impose remedial or repressive measures in order to enforce legal rights rather than preserve or restore the status quo as is characteristic of self-defence.<sup>85</sup> In a concise analysis of the basic tenets of these two forms of self-help, Lieutenant Commander M Lohr notes the following three common preconditions:

- (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 under 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.<sup>86</sup>

The difference between the two forms of self-help lies in their purpose. The use of force in self-defence is permissible for the purpose of protecting the security of the state and its essential rights, in particular the rights of territorial integrity and political independence, upon which that security depends. In contrast, reprisals are punitive in character; they seek to impose retribution for the harm done, or to compel a satisfactory settlement of a dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future. But coming after the event, and when the harm has already been inflicted, reprisals cannot be characterised as a means of protection.

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<sup>84</sup> D. Bowett, "Reprisals Involving Recourse to Armed Force" (1972) 66 *American Journal of International Law* 1, 3 (1972).

<sup>85</sup> Bowett, n 84.

<sup>86</sup> Michael F Lohr, "Legal Analysis of US Responses to State-Sponsored International Terrorism" (1985) *Naval Law Review* 1, 13.

Reprisals are not an isolated notion; they are but one aspect of the broader subject matter constituting both peacetime and belligerent reprisals. “The simple idea of retaliation is as old as the customs underlying the *lex talionis*.”<sup>87</sup> Reprisals are injurious acts of self-help undertaken by one state against another, the latter having committed an international wrong. ‘Reprisals would normally be illegal acts under international law but for the commission of a prior offence which temporarily suspends the operation of international law between states until the objective of the reprisal is accomplished.

Given that US officials have spoken alternately of use of military force in counter-terrorism actions in terms of self-defence and reprisal/retaliation, the Article turns to consider the basic concepts underlying these two forms of self-help. The case of self-defence is in general clear-cut since international law recognises the right of a state to resort to force when responding to the threat or use of force. The case for a legitimate exercise of self-defence can most clearly be justified in law in response to an armed attack. It is the use of reprisals that is most problematic considering it is fluid and on uncertain legal ground in the face of inconsistent state pronouncements and practice in relation to it. Customary law does not condone the use of force purely for purposes of retaliation or deterrence but states (notably Israel and the US) have not been averse to play fast-and-loose with the concept weaving it in with self-defence meaning that often it is hard on paper to draw bright line distinctions though in reality it might be otherwise.

### ***A. Reprisals***

Reprisal may be defined as an otherwise illegal act of self-help to coerce an action (e.g., cessation of the offending action) or obtain redress (reparation) for a prior wrong under

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<sup>87</sup> E. Colbert, *Retaliation In International Law* (1948) 10 n.1.

international law. Retaliation (retribution) differs from reprisal in that its sole purpose is to inflict punishment on the offender for a past wrong. Coercion is not its intent; and it seeks nothing beyond the satisfaction of imposing a measured response for some prior transgression.

The origin of modern international law concerning reprisals may be found in the medieval practice of private reprisals. These were acts of retaliation authorised by the sovereign upon the issuance of “letters of marque and reprisal” to redress wrongs committed by the citizens of one state against those of another. When a subject of one feudal state considered himself wronged by a subject of another state, he was entitled to raise his grievance before his own sovereign. Upon a satisfactory showing that a wrong had been committed against him by the other party and that he had unsuccessfully sought redress in the territory of the wrongdoer, his own sovereign could issue a “Letter of Marque and Reprisal.” This letter empowered the wronged party to carry out a reprisal action against any citizen of the offending state.

The advent of the nation-state during the Middle Ages and the expansion of commercial contacts across national boundaries resulted in the use of private reprisals as a means of affecting foreign policy. States authorised citizens to carry out private acts of reprisal against citizens of other states to coerce these states into particular courses of action. In the late Middle Ages, the development of the nation state and the sophistication of international relations, saw the assumption of private reprisal by the state as a tool of foreign policy. With this development, the field of private reprisals proper became entangled with that of public reprisals.

Gradually, the scope of public reprisals expanded as more and more specific actions were removed from the general concept of war and brought under the concept of reprisals. In the 19th Century, peacetime reprisals came to include such measures of minor coercion, as pacific blockade and military occupation. As the concept of public reprisals extended in scope, norms limiting their legitimate use began to evolve. Major aspects of the limits to reprisals were to await the advent of the 20<sup>th</sup> Century when the matter was subjected to the crucible of international law in the Naulilaa Case, perhaps the most frequently cited instance of armed reprisal.<sup>88</sup>

The text of the UN Charter represents a conventional rejection of the just war theories of retribution. Article 2, paragraph 3 of the Charter requires states to settle disputes peacefully. Reprisals are illegal under international law because they are punitive, rather than legitimate, actions of self-defence. It would be difficult to conform acts of reprisal with the overriding dictate in the Charter that all disputes must be settled by peaceful means. Indeed, the use of reprisals represents a regression to the just war theory, which was abandoned in the seventeenth century. The purpose of international bodies such as the League of Nations and the United Nations was to limit the use of force in international matters and to provide a forum for the resolution of conflict in international matters so as to prevent the need for war. To permit reprisals would thwart the very goal to which states have committed themselves by membership in to the UN<sup>89</sup>

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<sup>88</sup> Naulilaa Case (Port. v. Ger.) 2 R. Int'l Arb. Awards 1011 (1928).

<sup>89</sup> See Guy B. Roberts, "Self-Help in Combating State-Sponsored Terrorism: Self-Defence and Peacetime Reprisals" (1987) Case Western Reserve Law Review 243, 286. In the case of Israel, however, the United States has sometimes insisted, before condemning a reprisal by Israel, that the terrorist act that prompted the reprisal also be condemned. See William O'Brien, "Reprisals, Deterrence, and Self-Defence in Counterterrorism Operations" 30 Virginia Journal of International Law 421, 433.

Many commentators believe retaliation and reprisals to be illegal under the UN Charter, citing the language of articles 2 and 51.<sup>90</sup> The UN Security Council has similarly condemned reprisals as “incompatible with the purpose and principles of the United Nations.”<sup>91</sup> The Council’s rationale has been that reprisals are illegal because member states foreswore the use of force in resolving international disputes and because reprisal does not fall within the Council’s understanding of “self-defence.” As such, the Council, and many legal authorities, have adopted a “restrictive” interpretation of the Charter.

The Security Council expressed its view of the status of reprisals in 1964 when it censured Great Britain for carrying out a reprisal against the Yemeni town of Harib in retaliation for alleged Yemeni support of the anti-colonial struggle in Aden. By a vote of 9-0, with two abstentions, the Security Council determined that it “[c]ondemns reprisals as incompatible with the purposes and principles of the United Nations.”<sup>92</sup> The Council’s rationale was that the members of the United Nations contracted not to use force to achieve solutions to international controversies.<sup>93</sup> A reprisal, not considered as the use of force in self-defence, was therefore considered an illegal use of force

### ***B. Self-Defence Under the UN Charter***

The prohibition of the use of force embodied in Article 2(4) of the UN Charter not only proscribes war, but any use or threat of force in general. Apart from the, now obsolete, clauses concerning the former enemy states, the UN Charter contains only two exceptions to the prohibition of force, namely Security Council enforcement actions pursuant to Chapter VII,

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<sup>90</sup> Roberts, n 89 at 282.

<sup>91</sup> See Ian Brownlie, *International Law and the Use of Force by States* (1963) 281.

<sup>92</sup> R Falk, “The Beirut Raid and the International Law of Retaliation” (1969) 63 *American Journal of International Law* 415, 429 and n. 37.

<sup>93</sup> McDougal & Feliciano, “Legal Regulation of the Right to International Coercion” (1958) 68 *Yale Law Journal* 1063-64.

and the right to individual and collective self-defence laid down in Article 51.

*Article 51: The State's Right to Respond in Self-Defence*

Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence...."<sup>94</sup> While the Charter does not indicate what rights are "inherent," the inclusion of this term was considered significant by the drafters of the Charter. The initial draft of article 51 made no mention of this "inherent right," but it was changed to make the definition of self-defence acknowledge that right.<sup>95</sup>

Two schools of thought have developed with regard to the scope of Article 51—those who take the literal, or restrictive, approach and those who take the expansive view that Article 51 is considerably broader than its terms. Depending on which position one takes, self-defence may be viewed either as a responsive act to a current attack or as an anticipatory act to an imminent threat of attack. As with retaliation, self-defence is conceptually similar to reprisal in several ways. Both may be employed to meet a reasonably foreseeable threat. The action taken in each case must be both "necessary" and "proportional." But, unlike self-defence, reprisals have an additional requirement that action be taken to change the opponents' behaviour or obtain specific redress. The true nature of reprisal is best understood when viewed from a historical perspective

The restrictionist approach cites the absolute prohibition of resort to forcible self-help as set out in article 2, paragraph 4, subject only to the limited exception contained in article 51. This exception permits recourse to self-defence only when faced with actual "armed attack." The article does not contemplate anticipatory or pre-emptive actions by a state so threatened.

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<sup>94</sup> UN Charter art. 51

<sup>95</sup> R. Russell, *A History of the UN Charter* (1958) 698, 699.

Rather, it requires a state to refrain from responding with like force unless actively involved in repelling an armed attack.<sup>96</sup>

The counter-restrictionist approach essentially advocates an expansionist interpretation. Proponents of this approach have interpreted Article 51 to mean that the Charter recognises and includes those rights of self-defence that existed under customary international law prior to the drafting of the UN Charter.<sup>97</sup> Under customary international law, the right of self-defence was judged by the standard first set out in the 1837 case of *The Caroline*<sup>98</sup> which established the right of a state to take necessary and proportional actions in anticipation of a hostile threat. This case will be discussed in greater length below. In any case, they cite the impracticability of applying a literal interpretation of article 51 in an age of advanced weapons and delivery systems and heightened terrorist activity throughout the world. Adherents argue the absurdity of requiring a state to refrain from taking action in its own behalf when an opposing state is preparing to launch an attack.<sup>99</sup>

### *The Notion of Armed Attack*

A major question is whether the right of self-defence under Article 51 is limited to cases of armed attack or whether there are other instances in which self-defence may be available under Article 51. A number of commentators argue that the right to use force in self-defence under Article 51 is not limited to cases of armed attack.<sup>100</sup> As Professor G M Travaglio observes,

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<sup>96</sup> J. Stone, *Aggression and World Order* (1958) 94-95.

<sup>97</sup> Blum, *The Legality of State Response to Acts of Terrorism, in Terrorism: How the West Can Win* (1986) 137.

<sup>98</sup> 2 J. Moore, *Digest of International Law* (1906) 409-14.

<sup>99</sup> See also M Baker, "Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)" (1987) 10 *Houston Journal of International Law* 25.

<sup>100</sup> See, e.g., Myres McDougal and Florentino P. Feliciano, *Conditions and the Expectation of Necessity, in Law and Minimum World Public Order* (1961) 234-35.

[t]hese commentators generally argue that the intention of the drafters of the United Nations Charter was to incorporate into Article 51 all of the rights of self-defence that existed in customary international law at the time of the Charter. In addition, the International Court of Justice in the *Nicaragua Case*, indicated that the right of self-defence in Article 51 simply recognised a pre-existing right of customary international law.<sup>101</sup>

Because the customary right of self-defence, so the argument goes, includes instances in addition to an armed attack, military force may be legally available as an option against terrorists even if an armed attack has not occurred. This view holds that the presence of an armed attack is one of the bases for the exercise of the right of self-defence under Article 51, but not the exclusive basis.<sup>102</sup> Professor Oliver Schachter concisely states this position thus:

On one reading [of Article 51] this means that self-defence is limited to cases of armed attack. An alternative reading holds that since the article is silent as to the right of self-defence under customary law (which goes beyond cases of armed attack) it should not be construed by implication to eliminate that right ... It is therefore not implausible to interpret article 51 as leaving unimpaired the right of self-defence as it existed prior to the Charter.<sup>103</sup>

A significant number of writers argue that an armed attack is the exclusive circumstance in which the use of armed force is sanctioned under Article 51.<sup>104</sup> In fact, one commentator has gone so far as to state that “the leading opinion among scholars” is that the right of self-defence in Article 51 does not extend beyond armed attack.<sup>105</sup> Furthermore, the International Court of Justice in *Nicaragua Case* clearly stated that the right of self-defence under Article 51 only accrues in the event of an armed attack.<sup>106</sup> Also, it is a traditional requirement of self-

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<sup>101</sup> Gregory M. Travalio, *Terrorism, International Law, and The Use of Military Force* (2000) 18 *Wisconsin International Law Journal* 145.

<sup>102</sup> See James Terry, *Countering State-Sponsored Terrorism: A Law-Policy Analysis*, (1986) 36 *Naval Law Review* 159, 170; Oscar Schachter, *International Law; the Right of States to Use Armed Force*, (1984) 82 *Michigan Law Review* 1620, 1633-34.

<sup>103</sup> Schachter, n 103 at 1633-34.

<sup>104</sup> See, e.g., Yoram Dinstein, *War, Aggression, And Self-Defence* 183 (2<sup>nd</sup> ed. 1994) (choice of words in Article 51 is deliberately restrictive; right of self-defence is limited to armed attack).

<sup>105</sup> Dinstein, n 104. at 186. See Lohr, n 86 at 18 (referring to Phillip Jessup, *A Modern Law Of Nations* (1948) 166 and Lassa Oppenheim, *International Law* (H. Lauterpact 7th ed.) 156).

<sup>106</sup> In para. 195 of its opinion, the Court said that the exercise of the right of self-defence by a state under Article 51 “is subject to the state concerned having been the victim of an armed attack.” 1986 I.C.J. at 103.

defence that a triggering event justifying a military response have already occurred or at least be imminent.<sup>107</sup>

If the right of self-defence extends beyond the “armed attack” of Article 51, there are, at the very least, serious hurdles that must be overcome before self-defence, as traditionally understood, can be used to justify attacks against terrorists or terrorist facilities located in another state. If the anticipated action by terrorists is not sufficiently imminent, the right to use force is not available for purposes of deterrence.<sup>108</sup> Professor G. M. Travalio notes that:

.... if past terrorist actions by a group are too remote in time, the response by force is likely to be characterised as an illegal reprisal. It appears that if a right to use force in self-defence exists apart from an armed attack, it is a right that presents a very narrow window of opportunity. In fact, this window of opportunity, under the traditional criteria for self-defence, will almost never exist in the context of terrorist attacks. The traditional requirements for self-defence are simply too restrictive to reasonably respond to the threat posed by international terrorism.<sup>109</sup>

Perhaps that is why the US saw the use of military action to remove the threat of chemical, biological and nuclear proliferation in Iraq as a strategic imperative arguing rather strongly that the risk of inaction in the face of such a threat is intolerable. In any case the decision to attack was done over the loud objections of other major powers and many international scholars who were worried by the effect of failure by the US to secure a Security Council mandate.

### *Anticipatory Self-Defence*

Where it is understood as “anticipatory self-defence,” the customary right to pre-empt has its modern origins in what is known as the Caroline incident. The Caroline case of 1837

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<sup>107</sup> See Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* (1992) 91-92.

<sup>108</sup> See Terry, n 103 at 171 (1986). In this article Lt. Col. Terry makes the point that given the rapid delivery capabilities of terrorist organizations, it is unrealistic to require that a state wait until an attack is imminent before responding. See *id.* The Israelis used similar arguments to justify their attack on the Iraqi nuclear facility at Osirak and these arguments were rejected by the United Nations and the world community. See O’Brien, n 89 at 450-451.

<sup>109</sup> Travalio, n 102 at 165-166.

established the modern fundamental Anglo-American concept of self-defence.<sup>110</sup> Here, during the unsuccessful rebellion of 1837 in Upper Canada against British rule, it was established that the serious threat of armed attack may justify militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then US Secretary of State Daniel Webster outlined a framework for self-defence which did not require a prior attack. Military response to a threat was judged permissible so long as the danger posed was “*instant, overwhelming, leaving no choice of means and no moment of deliberation.*”<sup>111</sup>

The customary right of self-defence involved the assumption that the force used must be proportionate to the threat. The formula used, by Webster in relation to the Caroline incident has attracted writers by virtue of his insistence that self-defence must involve “nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”<sup>112</sup> The Webster correspondence in reality merely stated a right of self-defence which had a more limited application than the vague right of self-preservation and the broad and political concept of self-defence found in nineteenth century thought and practice. Evidently the legal concept of self-defence comprehended proportionality as a special requirement in the law of nations representing an attempt to create the necessary distinction between self-defence and self-help in reaction to an historical tendency to confuse them.

There can be little doubt that the right of self-preservation and the doctrine of necessity comprehended anticipatory action. The Caroline doctrine permitted preventive action in a

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<sup>110</sup> Byard Q. Clemmons & Gary D. Brown, Rethinking International Self-Defence: The United Nations’ Emerging Role, (1998) 45 Naval Law Review 217, 220.

<sup>111</sup> *Id.* at 221 (internal quotations omitted) (quoting Myres S. McDougal & Florentino P. Feliciano, *Law And Minimum World Public Order* (1961) 217).

<sup>112</sup> Caroline Incident, n 99.

context in which self-defence was equated with self-preservation. The particular fault of this seeming customary rule was that it provided no clear guidance as to the determination of cases in which anticipatory acts of force may be justified. Despite the Webster formula, the Caroline case was primarily verbal lacking any well-established state practice to prop it up firmly. The Caroline doctrine was very much in tune with the general thinking of the 19<sup>th</sup> century as reflected in the works of leading jurists of the day some of whose positions have been mentioned above. The acceptance of the notion of anticipatory self-defence carried over into the 20th century.

It was during the era of the League that the concept of aggression (as an unlawful use of force)<sup>113</sup> appeared as the right of self-preservation fell into disrepute.<sup>114</sup> The legal developments of the period of the League had the result that, while the right of self-preservation no longer existed in its classical form, some of its content was preserved. This residual right was referred to as that of self-defence or legitimate defence. It was understood that this right of legitimate defence was subject to objective and legal determination and that it was confined to reaction to immediate danger to the physical integrity of the state itself. Attempts by governments to reserve the right of determining the existence of a necessity for self-defence including pre-emptive strikes did not meet with success. The acceptance of the existence of a right to self-defence which was essentially a legally defined right was not in fact accompanied by any precise definition of the content of the right.

Despite significant advances in the League era in embedding self-defence in international law, its more problematic aspect-anticipatory self-defence still appeared to be a doctrine that was

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<sup>113</sup> Ian Brownlie, *International Law and the Use of Force By States* (1963) 351-352.

<sup>114</sup> Aggression was synonymous with an armed attack, the unlawful use of force, which justified action in self-defence. The assertion that the right of self-defence justified preventive action in the face of potential threats to the interests of states was seen as a relic of the vague and obsolete right of self-preservation or the doctrine of self-help which the war had helped credit.

far from dead. The outbreak of the Second World War witnessed claims and counterclaims by warring states surfacing based primarily on an exercise of self-defence and frequently an exercise of anticipatory self-defence. The issue of anticipatory self-defence arose at the trials before the international military tribunals at Nuremberg and Tokyo set up to prosecute among other crimes-the crime of aggression.<sup>115</sup>

Amidst the backdrop of the Nuremberg and Tokyo trials, in 1945, a new world order was seemingly inaugurated by the coming into force of the UN Charter. In addition to the two restrictions of necessity and proportionality recognised under customary law in relation to self-defence, three new restrictions were introduced: a state could act in self-defence only if subject to an “armed attack”, acts of self- defence had to be reported immediately to the Council, and the right to respond ended as soon as the Council took action.

#### *Does the UN Charter Permit Anticipatory Self-Defence?*

The split between the “restrictionist” and “counter- restrictionist” views of anticipatory self-defence presents plenty of headaches. The restrictionists adhere to the argument that “inherent right” doesn’t modify self-defence in any meaningful way, requiring some incursion beyond national borders before the right is activated.<sup>116</sup> The counter-restrictionists argue that “inherent right” is used to preserve the meaning of “self-defence” as it existed prior to the founding of the United Nations.<sup>117</sup>

Significantly the matter is whether there is recognition of the right to counter the imminent threat of unlawful coercion as well as an actual attack within the UN Charter framework. This

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<sup>115</sup> *Trial Of Major War Criminals* (HMSO), Part 18 p. 160 (Horn); Part 19 pp 134-5 (Exner).

<sup>116</sup> See Sean M. Condon, “Justification for Unilateral Action in Response to the Iraqi threat: A Critical Analysis of Operation Desert Fox” 161 *Military Law Review* 115, 151-155, nn 215-22. See also, Dinstein, *supra* note 35, at 202 (drawing the distinction between imminence and immediacy).

<sup>117</sup> See Condon, n 116 at 160.

comprehensive conception of permissible or defensive coercion, honouring appropriate response to threats of an imminent nature may be grounded within the ambit of customary international law. However, the precise contours of the co-existence of customary law and Charter law is still a topic of significant debate despite the forceful pronouncements of the ICJ in the *Nicaragua Case* that alluded to a separate existence.

In addressing a state's right to resort to "anticipatory" self-defence in response to the destruction of the *Caroline* by the British, then Secretary of State Daniel Webster qualified a state's right to take "anticipatory" action by requiring a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation."<sup>118</sup> Given the sophistication of today's weaponry and the vast destructive capabilities of the weapons, Webster's qualifying language would seem to have been rendered impractical by modern technology. Many legal scholars share this opinion.<sup>119</sup> If one accepts the principle that states enjoy the "inherent" right to defend themselves from armed attacks not yet in progress, the question arises, "How far in advance of such an attack may a state employ such an active, or anticipatory defence?" Arguably, self-defence actions may be taken both in anticipation of a

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<sup>118</sup> 2 J. Moore, *Digest of International Law* (1906) 412.

<sup>119</sup> Professor McDougal has explained:

Even the highly restrictive language of Secretary of State Webster in the *Caroline* case, specifying a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation," did not require "actual armed attack," and the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists. The requirement of proportionality, in further expression of the policy minimizing coercion, stipulates that the responding use of the military instrument by the target state be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defence under the established conditions of necessity.

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It has indeed been an accepted principle that a target state may make a first, provisional decision that the conditions of necessity are such as to require it immediately to employ the military instrument for preservation of its territorial integrity and political independence. Given the continuing ineffectiveness of the general community organization to act quickly and certainly for the protection of states, no other principle could be either acceptable to states or conducive to minimum order.

McDougal & Feliciano, n 100 at 230.

given threat and in immediate response to actions directed at the vital interests of the target state.<sup>120</sup>

On the other hand, a significant number of scholars argue that the United Nations Charter precludes any right of anticipatory self-defence.<sup>121</sup> This argument relies on a restrictive reading of Article 51 of the UN Charter. These writers assert that this language, at least by implication, precludes the use of force in anticipation of an attack or other event triggering the right of self-defence.<sup>122</sup> The bases for the argument is that, once recognised, a right to anticipatory self-defence is potentially very difficult to define or limit, and bad faith or an error in judgment could easily lead to unnecessary conflict.<sup>123</sup> It is contended that the right to respond with force in self-defence, even to a triggering act that has already occurred, is temporally limited. As the Caroline incident indicates, the customary right of self-defence appears to require immediate action. Otherwise, there is a strong argument that the use of force is nothing more than a reprisal, which, while permitted under limited circumstances by customary international law, is widely agreed to have been outlawed by the United Nations Charter. In the same vein, these legal scholars argue that the right of anticipatory self-defence expressed by the Caroline incident was overridden by the specific language of the United Nations Charter. In this view, Article 51 fashions a new and more restrictive statement on self-defence, one that relies on the literal qualification of a prior “armed attack.” This narrowly technical interpretation perhaps seems to ignore that international law cannot compel any state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. Strategic circumstances and the consequences of strategic surprise have

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<sup>120</sup> Stone, n 96 at 245.

<sup>121</sup> See, e.g., Dinstein, n 104 at 184- 187; Richard Erickson, *Legitimate Use Of Force Against State Sponsored Terrorism* (1989) 136-138 and authorities cited therein.

<sup>122</sup> Whether or not this triggering event must be an “armed attack” is discussed in the prior section of this article. Even if one does not limit the right of self-defence to “armed attacks,” the language of the United Nations Charter, Article 51 still reasonably suggests that a triggering event must actually have occurred, not merely be anticipated.

<sup>123</sup> See Baker, n 99 at 36 (1987).

changed a great deal since the Caroline incident. Today, in an age of chemical/biological/nuclear weaponry, the time available to a vulnerable state could be notably very short.

It is contended that the “armed attack” requirement in Article 51 of the UN Charter seems to supersede any pre-existing right of anticipatory action. Despite this position, Israel and the US have been particularly notorious in seeking to rely upon the concept of anticipatory self-defence on numerous occasions, with a generally negative response from the international community. As early as 1956, Israel sought to justify its military action across the United Nations armistice line against the feyadeen on this basis. Both the United States and the United Nations rejected this argument.<sup>124</sup> The anticipatory self-defence argument met with a somewhat better reception in 1967 when the Israelis attacked Egypt and Syria in anticipation of an all-out attack by the Arab states on Israel. Israel justified the strikes that initiated the 1967 Six-Day War on the basis that Egypt’s blocking of the Straits of Tiran was a prior act of aggression. Significantly, both the Security Council and the General Assembly refused to condemn Israel for its 1967 pre-emptive attacks against certain Arab states, thereby signifying implicit approval by the United Nations of Israel’s lawful resort to anticipatory self-defence. But the permissive international reaction was an exception since most states have refrained from claiming pre-emptive self-defence. International opinion on this issue was never clearer than when Israel attacked an Iraqi nuclear reactor at Osirak in 1981 leaving it in a pile of ruins. Israel argued vehemently that the attack was justified based on the right of anticipatory self-defence. The world was outraged and rose up in one voice to condemn the act.<sup>125</sup>

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<sup>124</sup> See Erickson, n 121 at 143.

<sup>125</sup> The United Nations Security Council condemned the Israeli attack on the Iraqi nuclear reactor in a unanimous resolution adopted June 19, 1981. The Security Council also condemned, by a vote of 14-0, with the United States abstaining, the 1985 attack by Israeli F-16s on the PLO Headquarters located in Tunisia. For an excellent discussion of the history of United Nations’ responses to various Israeli anti-terrorist campaigns in Lebanon, see O’ Brien, n 90 at 462-63. The United States appears to have accepted at least a limited doctrine of anticipatory

As a matter of principle and policy, anticipatory self-defence is open to certain objections. It involves a determination of the certainty of attack which is extremely difficult to make and necessitates an attempt to ascertain the intention of a government. This process may lead to a serious conflict if there is a mistaken assessment of a situation. Furthermore even if a state is preparing an attack it still has a *locus poenitentiae* prior to launching its forces against the territory of the intended victim. Nor is the state which considers itself to be the object of military preparations forced to remain supine but may take all necessary precaution before commencing attack. Another consideration which is usually ignored is the effect of the proportionality rule on the problem. It is possible that in a very limited number of situations force might be a reaction proportionate to the danger where there is unequivocal evidence of an intention to launch a devastating attack almost immediately. However, in the great majority of cases to commit a state to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregards the requirement of proportionality. To permit anticipatory action may well be to accept a right which is wider than that of self-defence and akin to that of self-preservation. It is true that states must be accorded the right to decide on defensive necessity in the first instance but in making this *ex parte* decision they should be inhibited by a rule which is related to facts which have objective characteristics and not to mere estimates of intention.<sup>126</sup>

## **V. Conclusion**

The basic problem is that self-defence is justified only when there has been an armed attack.

The nature of weapons of mass destruction is such that the international community could not

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self-defence. Its 1986 attack on Libya was, in part, justified on the basis of deterring future acts of terrorism by Libya. See Statement of Ambassadors Okun and Walters before the UN Security Council, April 14-15, 1986, reprinted in (1986) 80 American Journal of International Law 632-33.

<sup>126</sup> Brownlie, n 91 at 260.

wait to be the victim of state-sponsored chemical, biological or nuclear terrorism otherwise then the notion of self-defence loses any practical meaning. In favourable response to this assertion, it can be said that the Webster formula confined justifiable anticipatory self-defence to circumstances “in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>127</sup> This recognised standard setting out a method of evaluating claims of self-defence when an armed attack has not yet occurred is however restrictive in relation to weapons of mass destruction.<sup>128</sup> Though in view of the facts of the Caroline incident and the requirements of the Caroline case only a very narrow category of acts of anticipatory self-defence could be permissible, nonetheless, the restrictive nature of the doctrines of immediacy, necessity and proportionality limits flexibility in crafting a military responses to potential terrorist threats.

Some scholars believe that a right of truly anticipatory self-defence has emerged outside of Article 51 in light of the availability of weapons of mass destruction.<sup>129</sup> Thomas Frank accounts for the emergence of a viable doctrine of anticipatory self-defence through, “the transformation of weaponry to instruments of overwhelming and instant destruction. These [weapons] brought into question the conditionality of Article 51, which limits states’ exercise of the right of self-defence to the aftermath of an armed attack. Inevitably, first-strike capabilities begat a doctrine of “anticipatory self-defence.”<sup>130</sup>

Truly anticipatory self-defence would permit the use of force “[i]f a state has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its

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<sup>127</sup> See *Destruction of the Caroline*, 2 Moore, *A Digest Of International Law* § 412 (1906) Such standards, it should be noted, apply to anticipatory self-defence and not more traditional self-defence against an armed attack. Beard, n 35 at 585-86.

<sup>128</sup> See Erickson, n 121 at 109, 11.

<sup>129</sup> Derek Bowett, *Self-Defence In International Law* (1958) 191-92; see also Erickson, n 121 at 142-43.

<sup>130</sup> Thomas M. Frank, *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?* (2001) 5 Washington University Journal of Law and Policy 57-58.

willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike.”<sup>131</sup> 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.<sup>132</sup> Supporting this position further is the argument that there is no requirement under the literal letter of Article 51 that a foreign government itself directly undertake the attack to which a state responds.

The “Bush Doctrine” of preventive self-defence threatens to upset the international regime on the use of force. Should the doctrine form the basis of new state practice, there will be injurious consequences for world public order that would the existing system transformed from its tenuous rule of law-based framework to a balance of power system. Once the door to pre-emptive strikes is open, it can hardly be closed again. No one will be able to prevent say China, Pakistan, or India advancing similar claims. Afterall the international system is based on the equality of all states and we cannot have one standard for the world’s sole superpower and a different one for everyone else.

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<sup>131</sup> See Michael Glennon, “Self-defence and Incoherence in the UN Charter” (2002) 25 *Harvard Journal of Law and Public Policy* 552.

<sup>132</sup> Bowett, n 129 at 191-92; see also Erickson, n 121 at 54.