



**The American Society of International Law  
Task Force on Terrorism**

## **The Myth of Preemptive Self-Defense**

**Mary Ellen O'Connell**

*Professor of Law, The Moritz College of Law  
and Associate of the Mershon Center for International  
Security and Public Policy, The Ohio State University*

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# The Myth of Preemptive Self-Defense

Mary Ellen O'Connell<sup>1</sup>

On September 11, 2001, the United States was attacked. Hijackers turned passenger planes into missiles and used them to destroy the World Trade Center and to damage the Pentagon. President Bush made clear the United States would respond forcefully against those responsible.<sup>2</sup> At least one high-ranking member of the Administration urged the use of force against any states known to have links to terrorist groups.<sup>3</sup> But in a move for which the Administration has received the greatest international praise with respect to any action following September 11, it waited. In the days following the attacks, it established that the perpetrators were all members of the al Qaeda terrorist organization, known to operate out of Afghanistan.<sup>4</sup> On October 4, the British government released a study showing the close ties between al Qaeda and Afghanistan's *de facto* government.<sup>5</sup> On October 7, 2001, Operation Enduring Freedom, a massive air operation, including some ground forces, was launched against Afghanistan. Both the United States and the United Kingdom notified the United Nations Security Council that Enduring Freedom was an exercise of individual and collective self-defense in compliance with the terms of United Nations Charter Article 51, which permits the use of force in self-defense against an armed attack.<sup>6</sup>

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<sup>1</sup> Professor of Law, The Moritz College of Law and Associate of the Mershon Center for International Security and Public Policy, The Ohio State University. With thanks for research assistance to Nathan DeDino (JD '03) and Mostafa Elostaz (JD '03).

<sup>2</sup> Serge Schmemmann, *U.S. Attacked, Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror, President Vows to Exact Punishment for "Evil,"* N.Y. TIMES, Sept. 12, 2001, at A1.

<sup>3</sup> Deputy Secretary of Defense Paul Wolfowitz argued for "ending" states that support terrorism. Brian Toohey, *Questions for Howard and Beazley on How to Wage War*, AUSTL. FIN. REV., Sept. 29, 2001, at 28.

<sup>4</sup> In 1999, the Security Council had demanded that the Taliban, Afghanistan's *de facto* rulers, hand over bin Laden to a country where he was under indictment. S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999). In Resolution 1333 (2000), the Council again demanded that Afghanistan hand over bin Laden, and further refined and strengthened the sanctions pending compliance. S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000).

<sup>5</sup> *British Release Evidence Against bin Laden*, [www.salon.com/news/.../2001/10/4/british\\_evidence/print.htm](http://www.salon.com/news/.../2001/10/4/british_evidence/print.htm) (last visited Oct. 5, 2001).

<sup>6</sup> *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946; *Letter dated 7 October 2001 from the Chargé*

In the immediate response to the first armed attack on United States territory since the adoption of the Charter,<sup>7</sup> the United States and the British thus complied with the rules of international law. But less restrained action has also been urged in the weeks and months following the launch of Enduring Freedom, including a proposal to invade Iraq.<sup>8</sup> One plan to take action against Iraq envisions a force of more than 200,000 troops to invade and take control of the country. Supporters argue that Iraq's leadership must be eliminated because the Ba'ath regime has continued the development of weapons of mass destruction, and might again use those weapons against an opponent, or supply the weapons to terrorist networks.<sup>9</sup> The invasion plan seeks to preempt any danger by eliminating the leaders who might authorize such attacks or assist others to do so.

This strategy is based on a conception of preemptive self-defense.<sup>10</sup> Preemptive self-defense, however, is clearly unlawful under international law. Armed action in self-defense is

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*d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947.*

<sup>7</sup> See Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, \_\_ U. PITT. L. REV. \_\_ (2002); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL'Y 559 (2002); Thomas M. Franck, *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001); Mary Ellen O'Connell, *Terrorism and Self-Defense*, JURIST, (Sept. 18, 2001), at [www.jurist.law.pitt.edu/forum](http://www.jurist.law.pitt.edu/forum); cf. Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995-98 (2001).

<sup>8</sup> In addition to the Deputy Secretary of Defense, several former Republican Administration officials have favored military action, especially against Iraq. Former Secretary of State Lawrence Eagleburger, said, "You have to kill some of these people; even if they were not directly involved, they need to be hit." See Toohey, *supra* note 3; see also Richard Perle, *Next Stop Iraq*, (Nov. 30, 2001), at <http://www.fpri.org/enotes/americanwar.20011130.perle.nextstopiraq.html>.

<sup>9</sup> Carla Anne Robbins & Jeanne Cummings, *New Doctrine: How Bush Decided that Iraq's Hussein Must Be Ousted, Chilling Warnings in October Sparked Internal Debate on Pre-emptive Strategy, A "Dirty Bomb" Scare in D.C.*, WALL ST. J., June 14, 2002, at A1.

<sup>10</sup> President Bush spoke of "preemption" in a speech on combating terrorism at West Point in May 2002. Mike Allen & Karen DeYoung, *Bush: U.S. Will Strike First at Enemies; In West Point Speech, President Lays Out Broader U.S. Policy*, WASH. POST, June 2, 2002, at A01; see also Robbins & Cummings, *supra* note 9. The term "preemptive self-defense" is used in this essay to refer to cases where a party uses force to quell any possibility of future attack by another state, even where there is no reason to believe that an attack is planned and where no prior attack has occurred. Some writers also call this "preventive" self-defense or "preventive" war. See YORAM DINSTEIN, *WAR AGGRESSION, AND SELF-DEFENSE* 168 (3d ed. 2001); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275 (1963). It is to be distinguished from "anticipatory" self-defense. The latter is a narrower doctrine that would authorize armed responses to attacks that are on the brink of launch, or where an enemy attack has *already* occurred and the victim learns more attacks are planned.

permitted only against armed attack. Some scholars have argued over the years that preemptive self-defense should be considered lawful, but the United States as a government has consistently supported the prohibition on such preemptive use of force. The United States has taken this position for compelling reasons of national security and in light of its national values. It is joined in this position by the vast majority of the international community. Thus, the reality is that the United States has no right to use force to prevent possible, as distinct from actual, armed attacks. The further reality is that the United States does not advance its security or its moral standing in the world by doing so.

## **I. The Law Against Preemptive Self-Defense**

After two world wars in the first half of the twentieth century, the United States was fully committed in 1945, along with its allies, to establishing a broad, legal prohibition on the use of force, as well as an institution to enforce that prohibition. The United Nations Charter, a binding treaty to which all but a few states of the world adhere, contains the prohibition on force in Article 2(4) and establishes the Security Council as the authority to take measures against “threats to the peace, breaches of the peace and acts of aggression.”

### **A. The General Prohibition on Force<sup>11</sup>**

The ban on the use of military force is established by Article 2(4) of the United Nations Charter, and is understood to have only certain explicit exceptions:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>12</sup>

Only two exceptions to this prohibition on force appear in the Charter. The Security Council may use force to keep the peace as provided in Chapter VII of the Charter. States have the right to use force in individual and collective self-defense under the terms of Article 51 of the Charter:

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<sup>11</sup> See generally on the use of force, DINSTEIN, *supra* note 10; CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000); STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 165 (1996); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT (1992); BELATCHEW ASRAT, PROHIBITION OF FORCE UNDER THE U.N. CHARTER, A STUDY OF ART. 2(4) (1991); THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 3 (A. Cassese ed., 1986); BROWNLIE, *supra* note 10.

<sup>12</sup> U.N. CHARTER art. 2, para. 4.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>13</sup>

Reading the Charter as a whole, it is evident that the prohibition on force was intended by the drafters to be very broad, admitting of only explicit exceptions. This conclusion is confirmed by the drafting history of the Charter.<sup>14</sup>

Nevertheless, a few scholars have argued over the years that Article 2(4) is not a general prohibition on force, but rather only a prohibition on force aimed at the territorial integrity and political independence of states or inconsistent with the purposes of the UN. Professor Anthony D'Amato, for example, used such an interpretation to justify Israel's 1981 strike against the Iraqi nuclear reactor at Osirik. Israel wished to prevent Iraq from developing nuclear weapons. The strike aimed at long-term Israeli security. In D'Amato's view, the Israeli attack did not compromise the territorial integrity or political independence of Iraq, nor was it inconsistent with the purposes of the UN<sup>15</sup> By this narrow view of sovereignty, D'Amato concludes that the strike did not violate the prohibition in Article 2(4). International reaction to the Israeli strike, however, was uniformly negative. The Security Council passed a unanimous resolution condemning it as a violation of the Charter.<sup>16</sup> That

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<sup>13</sup> U.N. CHARTER, art. 51. In the French version of the Charter, there is an even stronger emphasis on limiting the use of force to responses to serious enemy action. The term *agression armée* is used where "armed attack" appears in English.

<sup>14</sup> According to Professor Ian Brownlie, at the San Francisco conference to draft the Charter, "[t]here was a presumption against self-help and even action in self-defence within Article 51 was made subject to control by the Security Council." BROWNLIE, *supra* note 10, at 275 and references therein.

<sup>15</sup> Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983).

<sup>16</sup> S.C. Res. 487 (June 19, 1981). The resolution refers to Article 2(4) in the preamble just before operative paragraph one which condemns the strike as a violation of the Charter.

condemnation helped solidify the general understanding that Article 2(4) is a general prohibition on force.<sup>17</sup>

## B. The Exception of Self-Defense

Article 51 sets out the one clear exception to the general prohibition on the unilateral use of force. States may use force in self-defense against an armed attack. This reading is consistent with the plain words of the Article 51, with the drafting history, and official government positions. It is also consistent with authoritative interpretation of Article 51 by the International Court of Justice (ICJ). There are still questions concerning when an armed attack “begins” for purposes of the right of self-defense, but the Security Council and governments have clarified some issues since September 11. An attack must be underway or must have already occurred in order to trigger the right of unilateral self-defense. Any earlier response requires the approval of the Security Council. There is no self-appointed right to attack another state because of fear that the state is making plans or developing weapons usable in a hypothetical campaign.

### 1. Actual Armed Attack

The express terms of Article 51 refer to the right of self-defense *if an armed attack occurs*. The text has been interpreted by the International Court of Justice on several occasions.<sup>18</sup> The Court held in the *Nicaragua* case that the right of individual or collective self-defense is triggered only by acts grave enough to amount to an armed attack.<sup>19</sup> The Court relied in part on the UN General Assembly’s Definition of Aggression<sup>20</sup> to conclude that an

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<sup>17</sup> The US delegate at San Francisco stated in response to the Brazilian delegation on the scope of 2(4): “[T]he intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase ‘or in any other manner’ was designed to insure that there should be no loopholes.” 6 UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 334-35 (1945). See also BROWNLIE, *supra* note 10, at 275.

<sup>18</sup> See, e.g., Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*]. In the *Nicaragua* case, the Court interpreted the limits on the use of force under customary international law, rather than as a Charter provision, but found no difference in content between Article 51 and customary law. For analyses of this and other issues in the case, see T. D. Gill, *Litigation Strategy in the Nicaraguan Case at the International Court*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 197 (Yoram Dinstein & Mala Tabory eds., 1989).

<sup>19</sup> *Nicaragua*, at paras. 194-95, 211. See *infra* notes 31-34 and accompanying text for further discussion of when a state is responsible for the acts of groups or individuals, whether amounting to an armed attack or other wrong.

<sup>20</sup> See *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974); see also *Declaration on Principles of International Law Concerning*

“armed attack” triggering unilateral self-defense may include “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ ...an actual armed attack conducted by regular forces....”<sup>21</sup>

The Court was assessing the U.S. claim that its use of force against Nicaragua was a lawful act of collective self-defense of El Salvador. The U.S. argued that Nicaragua had used unlawful force in the first instance by providing weapons and supplies to El Salvador rebels. But the Court held that Nicaragua was not shown to be responsible for providing weapons and supplies to Salvadorean rebels, and further that even if it had done so, the supply of weapons was not the same as an armed attack.<sup>22</sup> Moreover, El Salvador had not reported to the Security Council, nor had it invited the US to assist in its self-defense.<sup>23</sup> With *Nicaragua* in mind, we may conclude that where a state is threatened by force not amounting to an armed attack, it must resort to measures less than armed self-defense,<sup>24</sup> or it must seek Security Council authorization to do more.

Further, states are limited by the principles of state responsibility, and the prohibition on armed reprisals. An armed reprisal is the use of force for revenge, punishment or general deterrence.<sup>25</sup> The UN General Assembly has resolved that armed reprisals are unlawful and that states have a duty to refrain from using them.<sup>26</sup> The right of self-defense is limited to the

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*Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970).

<sup>21</sup> *Nicaragua*, at paras. 194-95.

<sup>22</sup> It is not entirely clear whether the Court intended to say that providing weapons and other supplies could never amount to an armed attack, or only that the level of weapons and supplies proved in the particular case itself did not amount to an armed attack. *Id.* at paras. 195, 230.

<sup>23</sup> *Id.* at paras. 194-98, 233.

<sup>24</sup> *Id.*, at paras. 194-95, 210.

<sup>25</sup> Force for any of these purposes would be reprisals. In general, reprisals “seek to impose reparation for a harm done, to compel a satisfactory settlement of a dispute resulting from an illegal act by the other State, or to compel the delinquent State to abide by the law. Because of their nature, reprisals come after the event and when the harm has already been inflicted.” ALEXANDROV, *supra* note 11, at 17-18.

<sup>26</sup> The *Declaration on Friendly Relations* provides that “[s]tates have a duty to refrain from acts of reprisal involving the use of force.” *Supra* note 20. See also *Corfu Channel*, *supra* note 18, at 108-09.



right to use force to repel an attack in progress,<sup>27</sup> to prevent future enemy attacks following an initial attack, or to reverse the consequences of an enemy attack, such as ending an occupation.<sup>28</sup> The state acting in self-defense may seek the destruction of an attacking enemy force if that is necessary and proportional to its own defense. The right also includes taking the defense to the territory of the enemy attacker, if that is necessary and proportional.<sup>29</sup> The defensive use of force can be delayed, after an unlawful armed attack, depending on the circumstances. Taking a reasonable amount of time to organize the defense is permissible.<sup>30</sup>

Force can be used in self-defense only against a state legally responsible for the armed attack. It is generally not enough that the enemy attack originated from the territory of a state. Rather, legal responsibility follows if a state used its own agents to carry out the attack;<sup>31</sup> if it controlled or supported the attackers;<sup>32</sup> possibly where it failed to control the attacks;<sup>33</sup> or where it subsequently adopted the acts of the attackers as its own.<sup>34</sup>

Any use of force in self-defense must respect the principles of necessity and proportionality. Necessity restricts the use of military force to the attainment of legitimate

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<sup>27</sup> “Art. 51 clearly licenses *at least one kind* of resort to force by an individual member State: namely, the use of armed force to repel an armed attack.” Bert V.A. Röling, *The Ban on the Use of Force and the U.N. Charter*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE*, *supra* note 11, at 3.

<sup>28</sup> Note the example of Kuwait’s liberation following Iraq’s occupation in 1990, described in Mary Ellen O’Connell, *Enforcing the Prohibition on the Use of Force: The U.N.’s Response to Iraq’s Invasion of Kuwait*, 15 S. ILL. U. L.J. 453 (1991).

<sup>29</sup> Nicaragua, at paras. 35, 194.

<sup>30</sup> ASRAT, *supra* note 11, at 199.

<sup>31</sup> *See Responsibility of States for Internationally Wrongful Acts*, arts. 4-11, UN G.A. Res. 56/83 (2002); *Definition of Aggression*, *supra* note 20, at art. 3.

<sup>32</sup> *See Definition of Aggression*, *supra* note 20, at art. 3(g): “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.” *See also* Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T, para. 137 (May 7, 1997).

<sup>33</sup> Turkey and Iran have taken armed action against Kurdish irregulars in northern Iraq in an area beyond Iraq’s control. These actions were reported to the Security Council which did not dispute the claim of self-defense. Israel, Portugal, South Africa, and the United Kingdom have used force on a similar basis, too, but with more equivocal reactions.

<sup>34</sup> In the Iran Hostages Case, the International Court of Justice found that Iran was responsible for the hostage-taking at the United States Embassy because of the “failure on the part of the Iranian authorities to oppose the armed attack by militants” and “the almost immediate endorsement by those authorities of the situation thus created.” Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Rep. 3, 42.

military objectives.<sup>35</sup> Proportionality requires that possible civilian casualties must be weighed in the balance. If the loss of innocent life or destruction of civilian property is out-of-proportion to the importance of the objective, the attack must be abandoned.<sup>36</sup>

## 2. *Anticipatory Self-Defense*

The facts of the Nicaragua case did not invite the Court to consider the problem of when self-defense may actually begin.<sup>37</sup> Guerrilla attacks on the Salvadorean government were ongoing and the question was whether Nicaragua's shipment of weapons and supplies to the rebels amounted to an armed attack.<sup>38</sup> The Court had no reason, therefore, to enquire into when an armed attack begins. Nor has any other international court settled the matter. But based on the practice of states and perhaps on general principles of law, as well as simple logic, international lawyers generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming.<sup>39</sup> This is the standard in most domestic legal systems as well.

Thus, to a limited degree a state may "anticipate" self-defense in the sense described by Sir Humphrey Waldock: "where there is convincing evidence not merely of threats and potential danger but of *an attack being actually mounted*, then an armed attack may be said to

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<sup>35</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 41. The Court stated that both necessity and proportionality must be respected in any decision to use armed force.

<sup>36</sup> Proportionality prohibits force "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, para. 5, 1125 U.N.T.S. 3. "In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy." Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

In a case where a state has failed to control acts of terrorists, but is otherwise not legally responsible for their acts, a state can act in self-defense consistently with the principle of proportionality if it targets the terrorists, and not the government or military forces of the territorial state.

<sup>37</sup> Nicaragua, at para. 194; "[T]he issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised."

<sup>38</sup> Nicaragua, at paras. 195, 230.

<sup>39</sup> *But see* Randelzhofer, *Article 51* in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 675 (Bruno Simma et al. eds., 1995) [hereinafter Simma's commentary]. "There is no consensus in international legal doctrine over the point in time from which measures of self-defense against an armed attack may be taken."

have begun to occur, though it has not passed the frontier.”<sup>40</sup> Professor Dinstein prefers to label defense in these circumstances as “incipient self-defense,” rather than anticipatory.<sup>41</sup> Professor Dinstein argues, for example, that the United States could clearly have attacked the Japanese fleet during World War II while the Japanese were *en route* to Pearl Harbor. His case is persuasive, if the further requirement is added that the United States had clear and convincing intelligence that the Japanese fleet was under orders to attack. Commentators have defended Israel’s attack on Egypt in 1967 on the same logic. Israel stated that it had convincing intelligence that Egypt would attack and that Egyptian preparations were underway. We now know that the Israel acted on less than convincing evidence.<sup>42</sup> Thus, the 1967 Arab-Israeli war does not provide an actual example of lawful anticipatory self-defense.

Dinstein’s measure of when an armed attack has begun lacks positive state practice to support it, but it does fit the widely cited *Caroline* doctrine of 1842. The *Caroline* case represents the agreement of British and American officials at the time that the use of defensive force is permitted when the “[n]ecessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>43</sup> The formula represents common sense and fits the letter and spirit of the Charter when used to determine when an armed attack has begun. An attack must be in evidence. “[I]t is the attack that provides the decisive test.”<sup>44</sup>

It is also the case that a victim of an attack may use force based on clear and convincing evidence that the enemy is preparing to attack again. In other words, the victim need not wait for new attacks to be mounted. The defense must be carried out within a reasonable time from the initial attack in order to fit the characterization of defense during ongoing armed attacks.<sup>45</sup> If terrorists are planning a series of attacks in a terror campaign, the

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<sup>40</sup> C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 451, 498 (emphasis added); *quoted in* Dinstein, *supra* note 10, at 172.

<sup>41</sup> *Id.*

<sup>42</sup> *See Le general Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 19, 1968. *See also* John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel’s Arab Territories?* 2 DUKE J. COMP. & INT’L L. 195, 203-13 (1992); DINSTEIN, *supra* note 10, at 173.

<sup>43</sup> JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906); McCoubrey & White, *supra* note 11, at 91-96; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 150-52 (2d ed. 1991). *See also* the Osirik debate in the Security Council where the *Caroline* doctrine was cited with approval by Iraq. *Infra* note 71, at 17.

<sup>44</sup> Alexandrov, *supra* note 11, at 165.

<sup>45</sup> The UK used force against Yemen following rebel attacks from its territory on the colony of South Arabia in 1964. The use was condemned as a reprisal because of the delay and the

state may respond to prevent future attacks about which it has evidence.<sup>46</sup> In the absence of convincing evidence of future attacks, however, responsive force could amount to unlawful reprisals or punishment.<sup>47</sup> But the enemy's intention to continue means that even armed force in self-defense is lawful. The world response to September 11 confirms this.

The Security Council referred in two resolutions to the right to resort to self-defense in the face of the September 11 attacks.<sup>48</sup> NATO's nineteen members, too, found the attacks triggered the North Atlantic Treaty's provisions on collective self-defense.<sup>49</sup> The United States and United Kingdom took action against Afghanistan on the strength of evidence more attacks would be forthcoming.

In Operation Enduring Freedom mounted against Afghanistan, the allies have argued that the September 11 attacks were part of a series of attacks on the United States which began in 1993,<sup>50</sup> and that more attacks in the same series were planned. The United States has produced evidence tying bin Laden to the 1993 attack on the World Trade Center, the 1998 embassy bombings in Nairobi and Kenya, the attack on the USS Cole in Yemen in 2000, and the attacks on the Pentagon and the World Trade Center on September 11, 2001.<sup>51</sup> Almost immediately following September 11, the U.S. and several European states apprehended individuals who indicated that more attacks were planned.<sup>52</sup> The evidence was

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disproportionate use of force. UN SC Res. 188 (1964); *see also* Alexandrov, *supra* note 11, at 165-88; Jean Combacau, *The Exception of Self-Defense in U.N. Practice, in* LEGAL REGULATION OF THE USE OF FORCE, *supra* note 11, at 9, 27-28.

<sup>46</sup> *See* Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS (1989-IV), *revised and republished as* LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 142-62 (1990); DINSTEIN, *supra* note 10, at 220-26.

<sup>47</sup> Mary Ellen O'Connell, *Evidence of Terror*, 7 J. CONFLICT & SECURITY L. 19, 30 (2002).

<sup>48</sup> UN S.C. Res. 1368 (2001); UN S.C. Res. 1373 (2001).

<sup>49</sup> Keith B. Richburg, *Bin Laden's Culpability 'Clearer,' NATO Chief Says; Military Action Is Not Requested as U.S. Shares More Evidence*, WASH. POST, Sept. 27, 2001, at A14.

<sup>50</sup> For a full discussion of the legality of the post-September 11 responses, *see* Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, \_\_ U. PITT. L. REV. \_\_ (2002); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL'Y 559 (2002); Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001); Mary Ellen O'Connell, *Terrorism and Self-Defense*, JURIST, Sept. 18, 2001 (available at [www.jurist.law.pitt.edu/forum](http://www.jurist.law.pitt.edu/forum)); *cf.* Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995-98 (2001).

<sup>51</sup> John Kelly, *The Man Behind the Terror*, WASH. POST, Sept. 27, 2001, at C12.

<sup>52</sup> Peter Finn, *Germans Identify More Terror Suspects; Police Watch Five People Who May Have Provided Support to Sept. 11 Hijackers*, WASH. POST, Nov. 17, 2001, at A21.

presented to NATO members and was deemed “compelling.”<sup>53</sup> Thus, based on publicly available material, the United States and Britain appear to have had clear and convincing evidence that America faced ongoing attacks. Subsequent to the launch of Enduring Freedom, U.S. troops have found documentary evidence in Afghanistan confirming that more attacks in the series were indeed being planned.<sup>54</sup> As the allied operation continued in 2002, the main criticism has concerned the extent of collateral damage to civilians killed in aerial bombing.<sup>55</sup>

The Security Council action after September 11 can be cited to support anticipatory self-defense in cases where an armed attack has occurred and convincing evidence exists that more attacks are planned, though not yet underway. By contrast, international law continues to prohibit preemptive self-defense or even anticipatory self-defense, if that is understood to be different from responding to incipient attacks or ongoing campaigns. In other words, a state may not take military action against another state when an attack is only a hypothetical possibility, and not yet in progress—even in the case of weapons of mass destruction.

### 3. *Preemptive Self-Defense*

The United States is justifiably worried about states that possess weapons of mass destruction, especially when their rulers are of the ilk of Saddam Hussein. But mere possession of such weapons without more does not amount to an armed attack. To be sure, Iraq has been prohibited by the Security Council from any development of nuclear weapons, following its defeat in the Persian Gulf War. This prohibition is embodied in the 1991 resolution suspending the allied campaign against Iraq in Desert Storm.<sup>56</sup> But the violation of a disarmament requirement does not itself amount to an armed attack. As a more general matter, the International Court of Justice held in an advisory opinion that for ordinary states, the mere possession of nuclear weapons is not illegal in customary international law. As the Court held, “in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very

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<sup>53</sup> William Drozdiak and Rajiv Chandrasekaran, *NATO: U.S. Evidence on Bin Laden ‘Compelling’; Allies Give Unconditional Support for Retaliatory Strikes; Taliban Official Asks To See Proof*, WASH. POST, Oct. 3, 2001, WL 28361574.

<sup>54</sup> *Recovered al-Qaeda Documents Reveal Plans for Other Terror Attacks: Official*, AGENCE FR.-PRESSE, Feb. 1, 2002, WL 2/1/02 AGFRP.

<sup>55</sup> David Osborne, *UN Raps US Military, After Afghan Wedding ‘Cover Up’* INDEPENDENT, July 30, 2002, at 9.

<sup>56</sup> SC Res 687 (March 1991).

survival of a state would be at stake.”<sup>57</sup> The mere possession without even a threat of use does not amount to an unlawful armed attack.

When Israeli jets bombed the nuclear reactor under construction at Osirik, Iraq in 1981, the Security Council unanimously condemned the bombing, despite the threat that nuclear weapons in the hands of Saddam Hussein could pose for Israel. The Council found “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”<sup>58</sup> The American representative to the UN Security Council, Ambassador Jeanne Kirkpatrick, stated that the United States, too, understood Israel had violated the Charter, in particular because it had not exhausted peaceful alternatives before striking.<sup>59</sup> Many representatives were impressed by the testimony of the Director General of the International Atomic Energy Agency who testified that the IAEA had found no evidence of unlawful weapons development by the Iraqi government.<sup>60</sup> Not only did the IAEA find no diversion of nuclear material, but Israel put forward no evidence that an attack was imminent, let alone underway.<sup>61</sup>

Proponents of a broader right of anticipatory self-defense generally base their arguments on the word “inherent” in Article 51.<sup>62</sup> The argument is that Article 51, by pledging not to “impair the inherent right of self-defense,” left intact and unchanged the law of customary self-defense predating the adoption of the UN Charter. Professor Henkin relates that this theory emerged during the Suez Crisis to justify using force against Egypt after Nasser nationalized of the Canal.<sup>63</sup> The use of force in that situation was widely condemned,

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<sup>57</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 266 (July 8). The vote on this part of the decision was 7-7 with the president voting in favor to break the tie.

<sup>58</sup> SC Res. 487 (June 19, 1981); *see also* Dinstein, *supra* note 10, at 169 and W.T. Mallison & Sally Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?* 75 VAND. J. TRANSNAT’L L. 417 (1982).

<sup>59</sup> U.N. SCOR 36th Sess., 2288th mtg. at 14, U.N. Doc. S/PV.2288 and Corr.1 (1981).

<sup>60</sup> *Id.* at 3.

<sup>61</sup> Some writers have suggested that governments now approve of the Israeli attack, but provide no official statements to that effect. *See* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON J. INT’L L. 4, 17-18 (1999).

<sup>62</sup> Lee A. Casey & David B. Rivkin, Jr., “Anticipatory” *Self-Defense Against Terrorism is Legal* (Dec. 14, 2001), available at <http://www.wlf.org/upload/casey.pdf> Reisman, *supra* note 75; ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 186 (1993).

<sup>63</sup> Louis Henkin, *Use of Force: Law and U.S. Policy*, in *MIGHT V. RIGHT, INTERNATIONAL LAW AND THE USE OF FORCE* 45 (Louis Henkin et al. eds., 1989).

including by the Eisenhower Administration.<sup>64</sup> Some versions of the theory claim that pre-Charter customary law allowed the use of force in self-defense even absent an armed attack. A more conservative version claims that customary international law permitted anticipatory self-defense when an attack was imminent.<sup>65</sup>

The “inherent right” theory has numerous weaknesses, starting with its interpretation of customary international law before the adoption of the Charter. At the time of the *Caroline* case, cited in support, the use of force was generally lawful as an instrument of national policy.<sup>66</sup> The UN Charter was adopted for the very purpose of creating a far wider prohibition on force than existed under treaty or custom in 1945, let alone 1842. Even if earlier custom allowed preemptive self-defense, arguing that it persisted after 1945 for UN members requires privileging the word “inherent” over the plain terms of Article 2(4) and the words “armed attack” in Article 51. Indeed, it requires privileging one word over the whole structure and purpose of the UN Charter. The drafters specifically designed the Security Council to meet threats to the peace, preserving the right of a state to act unilaterally only in cases of armed attack. In cases lacking objective evidence of an armed attack, the Charter requires multilateral decision-making. Permitting preemptive self-defense at the sole discretion of a state is fundamentally at odds with the Charter’s design. It is an exception that would overthrow the prohibition on the use of force in Article 2(4) and thus the very purposes of the UN. The International Court of Justice in the Nicaragua Case rejected the right to use force in the absence of an armed attack, as have most governments.

Some writers promoting the “inherent right” theory argue that the parameters of the right of self-defense are unchangeable by Charter text and subsequent state practice. Indeed some principles of international law are unchangeable, even by subsequent agreement or practice. These are the so-called *jus cogens* principles. But no authority has ever identified a unilateral right of anticipatory self-defense as a *jus cogens* principle. The Charter’s expectation was that states would rely on the decision of the Security Council to deal with early concerns about international security. Indeed, the International Court of Justice has identified the Charter prohibition on the use of force, Article 2(4) as *jus cogens*, not self-defense.<sup>67</sup> The great weight of scholarly opinion rejects the inherent right theory.<sup>68</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634-36 (1984).

<sup>66</sup> *Id.*

<sup>67</sup> Nicaragua, para. 190.

Inevitably some writers question the viability of any rules on the use of force. They cite states' continuing breach of Charter rules and conclude that the Charter regime and its rules are no longer viable. Professor Thomas Franck declared that the Charter rules were dead in 1970.<sup>69</sup> Professor Combacau renewed the claim in the mid-1980's,<sup>70</sup> and Professor Glennon declared them dead again in 2002.<sup>71</sup> The rules, according to this argument, are not viable. Even as treaty rules, they have slipped into desuetude because they are so widely ignored. But Professor Henkin has responded to Professor Franck on this issue, using the logic of the World Court in the Nicaragua Case.<sup>72</sup> As the judges noted,

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>73</sup>

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<sup>68</sup> Henkin has said with regard to the inherent right theory that it is "unfounded, its reasoning is fallacious, its doctrine pernicious." LOUIS HENKIN, *HOW NATIONS BEHAVE* 141 (2d ed. 1979); *see also* DINSTEIN, *supra* note 10, at 167; GRAY, *supra* note 11, at 112; ALEXANDROV, *supra* note 11, at 165; Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 135 (1986); Combacau, *supra* note 45, at 27-8; Brownlie, *supra* note 10, at 275.

<sup>69</sup> Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970). *But see* Franck, *Terrorism and the Right of Self-Defense*, *supra* note 7, in which the Charter rules appear very much alive.

<sup>70</sup> Combacau, *supra* note 45, at 32.

<sup>71</sup> Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter* 25 HARV. J. L. & PUB. POL'Y 539, 546 (2002); *see also* Michael J. Glennon, *Pre-empting Terrorism; The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24.

<sup>72</sup> Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).

<sup>73</sup> Nicaragua, at para. 186.



As long as inconsistent state practice is treated as law violation and not as practice moving toward a new customary rule, the rules remain viable. If the international community continues to express support for the rules--another form of state practice--the rules remain. This is particularly pertinent with regard to the United States. The United States has not heretofore argued for new rules. It has not stated that the existing rules are out-moded, or that its practice is aiming at developing new law. Until the Kosovo intervention, the United States justified its uses of force in terms of the Charter.<sup>74</sup> And even after Kosovo, American officials have not sought a general rule-change.<sup>75</sup> Though proponents of invading Iraq have argued that deterrence is not sufficient against non-state actors, no one in the Bush Administration has publicly stated Charter law is dead or that the United States is not bound by international law. Indeed, some in the Administration have made clear they understand preemptive self-defense is not the law.<sup>76</sup>

## II. The Policy Against Preemptive Self-Defense

The United States has consistently rejected preemptive self-defense for reasons of sound policy. This is not a right that the United States wants others to have. Glennon has argued that circumstances have changed and that Washington should reconsider the law.<sup>77</sup> Yet as the examples of state practice show, international society and even the United States have found the standing rules adequate for dealing with the problem of terrorism, weapons of mass destruction and regimes such as that controlled by Saddam Hussein. Historically, the United States has argued against a right of preemptive self-defense because it has found the UN Charter rules to be in its interest as a matter of policy and prudence.

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<sup>74</sup> Even during the Reagan Administration, the use of force was justified in arguments framed under the Charter. In the Reagan doctrine, the President politically supported the use of force to install pro-democratic regimes, but the Administration's supporting legal reasons were far more conservative. See Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, in MIGHT V. RIGHT, INTERNATIONAL LAW AND THE USE OF FORCE *supra* note 77, at 19-20.

<sup>75</sup> See evidence regarding the official US position on humanitarian intervention, in Mary Ellen O'Connell, *Authority to Intervene*, INTERNATIONAL LEGAL CHALLENGES FOR THE TWENTY-FIRST CENTURY, PROCEEDINGS OF A JOINT MEETING OF THE AUSTRALIA AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW AND THE AMERICAN SOCIETY OF INTERNATIONAL LAW 303 (June 26-29, 2000); see also Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, 13 EUR. J. INT'L L. 1, 10, 15 (2002).

<sup>76</sup> Jason Burke & Ed Vulliamy, *War Clouds Gather as Hawks Lay Their Plans*, OBSERVER, July 14, 2002, at 14.

<sup>77</sup> Glennon, *The Fog of Law*, *supra* note 71.

Clear rules limiting force support U.S. security and American values. The United States played a leading role in the adoption of the UN Charter, and since that time, the United States has been careful to make only those legal arguments relative to the use of force that it could accept in the hands of other states.<sup>78</sup> Charter rules may restrain the United States from time-to-time, but the benefit of restraining others, too, has been worth the cost.<sup>79</sup> The United States can hardly wish to see an anarchic regime in which every state is entitled to initiate the use of force against its adversaries in preemptive self-defense.<sup>80</sup> Nor can the United States honor its fundamental values if it acts in disregard of prevailing legal principle. What Professor Henkin wrote in 1987, remains the case today:

It is not in the interest of the United States to reconstrue the law of the Charter so as to dilute and confuse its normative prohibitions. In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events. Extending the meaning of ‘armed attack’ and of ‘self-defense,’ multiplying exceptions to the prohibition on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order established in the wake of world war.<sup>81</sup>

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<sup>78</sup> During the Kosovo intervention, the Clinton Administration simply issued no official legal position. Once the conflict was over, the Administration took the position that humanitarian intervention, without more, was not lawful. See O’Connell, *Authority to Intervene*, *supra* note 75.

<sup>79</sup> Cf. Henry Kissinger, *Beyond Baghdad*, NEW YORK POST, Aug. 11, 2002, at 24, *also in* WASH. POST, Aug. 12, 2002 (“America’s special responsibility, as the most powerful nation in the world, is to work toward an international system that rests on more than military power—indeed, that strives to translate power into cooperation. Any other attitude will gradually isolate and exhaust us. . . . It is not in the American national interest to establish preemption as a universal principle available to every nation.”).

<sup>80</sup> *Id.* Even allowing armed self-defense when an attack is “imminent” is a problematic rule, because “imminence” could mean any one of several things—an hour, day, week, year, or decade.

<sup>81</sup> Henkin, *Use of Force: Law and U.S. Policy*, *supra* note 63, at 69.

The United States has consistently opposed any general rule permitting unilateral armed force to remove threatening or unfriendly regimes.<sup>82</sup> The Reagan Doctrine suggested in political argument that the United States should consider the use of force to install pro-democratic regimes. But Ambassador Jeane Kirkpatrick has pointed out that the Reagan administration never used the doctrine to justify its actual uses of force—it consistently invoked the Charter in its legal arguments.<sup>83</sup> President George Bush led the United States in the Gulf War coalition proclaiming, at the war’s end, a “new world order under the rule of law.” The exemplary conduct of that coalition war reinvigorated the Charter rules and the role of the Security Council.

The Clinton administration issued no legal justification for using force in Kosovo, but it also did not argue for changing the law or institutions of the Charter. Rather, State Department officials made clear as soon as hostilities ended that the United States did not support a general right of humanitarian intervention.<sup>84</sup> The United States has proceeded with business as usual at the Security Council.

The current Bush Administration began the war on terrorism after September 11, invoking Article 51, going to the Security Council and even to other governments around the world, building a consensus around the view that what it was doing was not only lawful, but righteous. It has supported other states’ right to do the same. The plan to invade Iraq is in stark contrast. The British promised to find evidence that Iraq was involved in past terrorist attacks or was planning future ones. By the summer of 2002, the British press reported that the Blair government was no longer looking:<sup>85</sup> “Tony Blair promised earlier this year that he planned shortly to publish a ‘damning dossier’ detailing Saddam Hussein’s nuclear capabilities and terrorist links. A number of MPs, shown an outline last March, were unimpressed. The plans have been quietly shelved.”<sup>86</sup> If the Bush Administration has convincing evidence of any serious threat to it from Iraq, it would stand a good chance of

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<sup>82</sup> Glennon argued during the Kosovo crisis that the law should be changed to accommodate NATO acting in the place of the Security Council. The US showed no interest in this move. The information provided by the press on the Iraqi invasion plan does not include a request for authorization from NATO. See Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFF. 2 (1999). Glennon does not argue in subsequent articles advocating a right of preemptive self-defense that NATO should play a role in authorizing those uses of force. See Glennon, *Fog of Law*, *supra* note 71.

<sup>83</sup> Kirkpatrick & Gerson, *supra* note 74.

<sup>84</sup> O’Connell, *Authority to Intervene*, *supra* note 75.

<sup>85</sup> *What Would We Be Fighting For?*, OBSERVER, July 14, 2002, at 28.

<sup>86</sup> *Id.*

getting Security Council authorization to use force.<sup>87</sup> The Administration gives no indication, however, that it has this evidence, or that it will go to the Council. Rather, amidst the multitude of press details on the invasion, the only indications of its legal basis have been brief references to preemptive self-defense.

At the 2002 West Point Commencement, the President indicated “that not only will the United States impose preemptive, unilateral military force when and where it chooses, but the nation will also punish those who engage in terror and aggression and will work to impose a universal moral clarity between good and evil.”<sup>88</sup> According to one journalist, “A senior Pentagon source close to [Secretary of Defense Donald Rumsfeld said] that ‘Iraq has given the United States every reason to attack under the UN charter, which allows pre-emptive action by nations facing an imminent threat, which Saddam clearly does.’”<sup>89</sup> This is a mischaracterization of the law, and no other justification has been suggested--neither Professor Dinstein’s argument that the Gulf War is still continuing,<sup>90</sup> the even less tenable argument that the Gulf War resolutions imply authority for an invasion,<sup>91</sup> or humanitarian intervention.<sup>92</sup> The United States and the United Kingdom have been bombing Iraqi radar

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<sup>87</sup> Dinstein argues that action against Iraq would be lawful, though not as self-defense. Yoram Dinstein, *Remarks*, 2002 PROC. ASIL (forthcoming). See also Ruth Wedgwood, Testimony before the Subcommittee on the Constitution, Senate Foreign Relations Committee, April 17, 2002.

<sup>88</sup> Allen & DeYoung, *supra* note 10.

<sup>89</sup> Burke & Vulliamy, *supra* note 76.

<sup>90</sup> Dinstein, *Remarks*, *supra* note 87.

<sup>91</sup> Implied authority has been invoked by the United States and the United Kingdom in using force in Iraq to establish the Kurdish protection zone in northern Iraq, in maintaining no-fly zones, and in relation to weapons inspectors. See John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?*, 35 TEX. INT’L L.J. 129 (2000); Jules Lobel & Michael Ratner, *Bypassing the Security Council, Ambiguous Authorization to Use Force, Cease-Fires, and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124 (1999); Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat or Use of Force Against Iraq’s Weapons of Mass Destruction*, 92 AM. J. INT’L L. 724, 724-26 (1998); Mary Ellen O’Connell, *Continuing Limits on U.N. Intervention in Civil Wars*, 67 IND. L.J. 903 (1992). Gray also notes that the United States and Britain have argued that Iraq is in “material breach” of the cease-fire resolutions, but this may not be a separate argument from implied authority. See Gray, *From Unity to Polarization*, *supra* note 75, at 9-13.

<sup>92</sup> The British have apparently argued that some of their uses of force against Iraq following the Gulf War are justified as humanitarian intervention. Gray, *From Unity to Polarization*, *supra* note 75, at 9-13.

sites since 1991 under the Gulf War resolutions. The bombing has been highly controversial.<sup>93</sup> There is no reason to believe that the resolutions authorize an invasion.<sup>94</sup>

Rather, if an official argument is given at all for an invasion of Iraq,<sup>95</sup> it is likely to be “preemptive self-defense.” Perhaps the Bush Administration will seek to avoid setting a dangerous precedent by taking the position that the US has a special legal status, in which it has rights not available to others. At the West Point Commencement in 2002, the President intimated that the United States can make choices unavailable to other states. Yet the United States is equal before the law with all other sovereign states.<sup>96</sup> If America creates a precedent through its practice, that precedent will be available, like a loaded gun, for other states to use as well. The preemptive use of military force would establish a precedent that the United States has worked against since 1945. Preemptive self-defense would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia, for North Korea to attack South Korea, and so on. Any state that believes another regime poses a possible future threat—regardless of the evidence—could cite the United States invasion of Iraq.

Preemptive self-defense not only undermines the restraint on when states may use force, it also undermines the restraints on *how* states may use force. Today states measure proportionality against attacks that have occurred or are planned. What measure can be used to assess proportionality against a possible attack? The state acting preemptively is making a subjective determination about future events and will need to make a subjective determination about how much force is needed for preemption. In the case of Iraq, the US plan calls for

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<sup>93</sup> See, e.g., the debate at the Security Council with regard to a major US/UK use of force in December 1998, Operation Desert Fox. U.N. SCOR 53d Sess., 3955th mtg., U.N. Doc. S/PV.3955, Dec. 16, 1998.

<sup>94</sup> During the Kosovo intervention, some commentators mentioned the doctrine of necessity as justifying the invasion. This has not been advanced as a justification for invading Iraq. The doctrine of necessity cannot justify violation of a *jus cogens* norm, like the prohibition on unilateral force. See Mary Ellen O’Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57 (2000).

<sup>95</sup> It may be that the Bush Administration will copy the Clinton Administration during the Kosovo intervention and give no official justification for using force. *Id.*

<sup>96</sup> “States enjoy an equal juridical status under international law . . . [T]he basic structure of international law [is] as a legal order of co-ordinated juxtaposed political entities, as distinguished from a *civitas maxima* or world State order . . . [G]eneral international law does not accord hegemonic powers a privileged legal authority over their spheres of political influence, whether in the form of a ‘police power’ or an adjudicative authority.” Helmut Steinberger, *Sovereignty*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397, 412 (Rudolf Bernhardt ed., 1984). See also United Nations Charter, Art. 2(1): “The Organization is based on the principle of the sovereign equality of all its Members.”

massive force to take over the whole country and eliminate its government. Presumably, most states claiming the right to use force preemptively will cite the Iraqi invasion to argue they have the right to do the same. Only by eliminating an unfriendly foreign regime entirely can a state defend itself from all possible future attacks. Even states responding to actual armed attack could use this precedent to justify disproportionate responses that seek to overthrow foreign regimes.

An invasion of Iraq would, on the present facts, do grave damage to the norms of restraint, in a highly equivocal situation that simply does not demand a revolutionary change of the rules. Iraq is already under United Nations trade sanctions. Violations of the economic sanctions have occurred, but Iraq's military has been seriously weakened.<sup>97</sup> Some former UN weapons inspectors who have spent significant time in Iraq doubt that it has developed nuclear weapons.<sup>98</sup> The State Department has confirmed that other states are far more helpful to terrorists.<sup>99</sup> Economic sanctions have served as a form of containment, and can and should continue, with improved enforcement. If Iraq later poses a threat to the United States, Washington can request the Security Council to authorize direct action. So far, the likeliest scenario for Iraq's use of weapons of mass destruction is against allied troops in an American and British military action.<sup>100</sup>

Invading Iraq in today's circumstances would be without legal justification. Such an invasion can only exacerbate anti-American sentiment in many places of the world. Restraint, consistent with universally agreed-upon principle, is a far surer way to stem anger and resentment against the United States. It is a far surer path to security.<sup>101</sup>

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<sup>97</sup> Stephen Fidler et al., *The Weapons Threat—Absence of Weapons Inspectors Helps Iraq Keep Its Secrets*, FIN. TIMES, July 9, 2002, WL 23846973.

<sup>98</sup> *Ritter Challenges US to Show Proof of Iraqi Links with Terror*, IRISH TIMES, July 17, 2002, WL 24079755.

<sup>99</sup> Richard Wolffe, *US Names Iran as Chief State Sponsor of Terror*, FIN. TIMES, May 22, 2002, at 1; Jonathan Wright, *US Issues Biggest Global Report on Terror*, SCOTSMAN, May 22, 2002, at 12; see also Ivan Eland, *What Should the United States Do About Saddam Hussein?*, 50 EMORY L.J. 833, 839-840 (2001).

<sup>100</sup> Eland, *supra* note 115, at 850.

<sup>101</sup> For similar views, see Anatole Kaletsky, *America Is Becoming Its Own Worst Enemy*, LONDON TIMES, Mar. 14, 2002, WL 4190063; Michael Howard, *What Is in a Name*, 81 FOREIGN AFF. 8 (2002); Philip Heymann, *Dealing with Terrorism, An Overview*, 26 INT'L SECURITY 24 (2001); Stephen M. Walt, *Beyond bin Laden, Reshaping U.S. Foreign Policy*, 26 INT'L SECURITY 56 (2001). *But see* Kenneth M. Pollack, *Next Stop Baghdad?*, 81 FOREIGN AFF. 32 (2002); Barry R. Posen, *The Struggle Against Terrorism, Grand Strategy, Strategy, and Tactics*, 26 INT'L SECURITY 39, 43 (2001); and Perle, *supra* note 8.

## **Conclusion**

The international law of self-defense supports the American use of force in Afghanistan. After the devastating attacks of September 11, the United States had the right to defend itself against continuing terrorist attacks mounted from Afghan territory. The United States has no right, however, to invade another state because of speculative concerns about that state's possible future actions. The current international order does not support a special status for the United States or a singular right to exempt itself from the law. To maintain a legal order that restrains other states and to uphold the rule of law, the United States should continue its conservative commitment to limits on the unilateral use of force, and reject a reckless doctrine of preemptive self-defense.



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The American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, DC 20008; Tel.: (202) 939-6000, Fax: (202) 797-7133, Email: [outreach@asil.org](mailto:outreach@asil.org), Web site: <http://www.asil.org>