

WALKING AN INTERNATIONAL LAW TIGHTROPE: USE OF MILITARY FORCE TO COUNTER TERRORISM—WILLING THE ENDS

*Jackson Nyamuya Maogoto**

The UN Charter reflects the drafters' singular focus on creating a political system to govern conflicts between states. It does not directly address the subtler modes in which terrorists began to operate in the post-World War II period. The drafters did not contemplate the existence of international terrorists nor their tenacity and access to technology. In view of the fact that terrorist groups appear to have reached a global sophistication, there is little doubt that international terrorism presents a threat with which traditional theories for the use of military force are inadequate to deal with, and were not contemplated when the UN Charter was drafted. This Article is premised on the theme that the right to self-defence is enrolled in a process of change. The focal point of state practice in the Article is the United States, which has long sought to artfully, through official policy, use of force as a counter-terrorism measure.

I. INTRODUCTION

The senseless mayhem of World War I—the destruction of economic structures, dissipation of financial resources, and undermining of political stability—wiped the gloss from the traditional notion of war as a rational political act. The war was disastrous to both its initiators and victims. Millions died pointlessly and whole regimes fell. The carnage forced modern industrial societies to question war as an instrument of national policy; where the benefits of conquest (a major incentive in previous centuries) seemed trivial by comparison with the costs of war—large scale death and destruction, political instability and economic turmoil for all involved—it seemed obvious that war was no longer a profitable enterprise.

* LL.B (Hons) (Moi), LL.M (Hons) (Cantab), Ph.D (Melb), GCertPPT(UoN). Senior Lecturer, School of Law, University of Newcastle (Australia). The author wishes to acknowledge the enlightening comments and suggestions of two anonymous referees. The author further acknowledges the excellent editorial work by the team at the *Brooklyn Journal of International Law* in the preparation of the Article. Any errors remain the author's.

In response to the destruction of World War I, the League of Nations formed as an international organization to usher in collective security and replace a centuries old militaristic balance of power, and was an ambitious move to curb sovereign military excesses and guarantee world peace. However, it was during the League's chequered existence that two issues of significance fell on the international agenda—terrorism and the limitation of the use of military force. With the formation of the League of Nations, and renewed efforts to prevent future violence, the freedom of states to resort to military force became more and more restricted, while the right of self-defence gained in significance, displacing the expansive right of self-preservation.

One of the League's most significant efforts was the creation and adoption of the International Treaty for the Renunciation of War as an Instrument of National Policy (the Kellogg-Briand Pact) in 1928.¹ The Pact prohibited war as an instrument of national policy and recognized the right of self-defence as a legal right, thus tacitly excluding other previously accepted forms of self-help as avenues legitimating the use of military force.²

1. Treaty Providing for the Renunciation of War as an Instrument of National Policy art. 1, *opened for signature* Aug. 27, 1928, 46 U.S.T. 2343, 94 L.N.T.S. 57 (entered into force July 24, 1929) [hereinafter Kellogg-Briand Pact]. By the time it entered into force, the Kellogg-Briand Pact had been signed and ratified/acceded to by a total of 59 States (including all the States (major and minor) that were subsequently to comprise the Axis Powers), almost all the States comprising the international community at that time.

2. Kellogg-Briand Pact states:

[P]ersuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty . . .

Have decided to conclude a Treaty;

Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Despite these efforts, the Kellogg-Briand Pact had its shortcomings. The prohibition of war, for instance, failed to be linked to a system of sanctions. Its preamble simply declared that a state violating the Pact “should be denied the benefits furnished by the Treaty.” An even more serious deficiency was the Pact’s failure to outlaw the use of force in general, as well as war. The Pact was eventually ratified by 62 states, and made an exception for self-defence, but failed to define it—with the result that the customary criteria set out in the *Caroline* case remained the only legal bases for the use of force in international affairs. Strong on principle but lacking an enforcement mechanism, the Pact was doomed to have little practical effect,³ and the League of Nations’ authority was challenged and whittled by a series of aggressive acts carried out by some of the then major powers (Japan, Italy and a resurgent Germany) during the mid- to late 1930s. The League’s utility was finally terminated by the outbreak of World War II in 1939.⁴

It was only after the destruction of World War II that the UN, the UN Charter, and the Nuremberg and Tokyo Tribunals were established.⁵ The

Id.

3. The pact never made a meaningful contribution to international order, although it was invoked in 1929 with some success, when China and the U.S.S.R. reached a tense moment over possession of the Chinese Eastern R.R. in Manchuria. Ultimately, however, the pact proved to be meaningless, especially with the practice of waging undeclared wars in the 1930s (e.g., the Japanese invasion of Manchuria in 1931, the Italian invasion of Ethiopia in 1935, and the German occupation of Austria in 1938). See generally ROBERT H. FERRELL, *PEACE IN THEIR TIME* 260 (Lewis P. Curtis ed., Yale Univ. Press 1952) (1968).

4. In 1945, six years after the start of World War II, the Axis Powers were on the verge of total defeat and one of the blackest pages in human history about to close. By May 1945, Hitler’s envisaged Thousand-Year Reich lay in ruins. By August, Japan was devastated, as the atomic bombs the United States dropped on Hiroshima and Nagasaki destroyed Japan’s receding hope of carrying on its war of conquest. World War II was the most cruel and devastating conflict in history. In terms of lives lost, geographical extent, and cities reduced to ashes, the struggle defies rational comprehension. Over 17 million combatants were killed, 27 million wounded and nearly 20 million captured or missing. Civilian populations were more affected by this war than any other in the past. JACKSON NYAMUYA MAOGOTO, *WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY* 83 (2004).

5. The final step in making the United Nations Charter (UN Charter) was taken at Yalta, in 1945, by the “Big Three” (the U.S., the U.K. and Russia) with victory in sight. All the Allied States, great and small, were invited to the United Nations Conference on International Organization, which met in San Francisco on April 25, 1945 to prepare the final instrument for the new international organization. LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, *CHARTER OF THE UNITED NATIONS* 4–8 (3d ed. 1969).

primary purpose of the new organization was “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”⁶

Until the adoption of the UN Charter, there had been no customary prohibition on the unilateral resort to force if circumstances warranted it, and in many instruments states reserved the right to resort to force. While customary international law had previously accepted reprisal, retaliation, and retribution as legitimate responses, the UN sought to impose limitations on the unilateral use of force in resolving international disputes. Under the UN Charter the right of self-defence was the only included exception to the prohibition of the use of force.⁷

Thus, the UN Charter introduced to international politics a radically new notion: a general prohibition of the unilateral resort to force by states,⁸ as encapsulated in its most authoritative form in Article 2(4). The UN Charter identified the structural defect of the international political system and created a network of institutions and procedures. Rather than standing by itself, Article 2(4) was part and parcel of a complex security system.⁹ Under the UN Charter, unilateral acts of force not characterized as self-defence, regardless of motive, were made illegal.¹⁰ Individual or collective self-defence became the cornerstone relating to use of force, and, since then, has been invoked with regard to almost every use of external military force.¹¹

6. See U.N. Charter art. 1, para. 1. The “Dumbarton Oaks Proposals” were taken as the basis for the discussions that were to lead to the UN Charter.

7. See U.N. Charter arts. 39–51.

8. Various legal instruments have reinforced the prohibition of the use of force since the adoption of the UN Charter. These include: Article 5 of the Pact of the Arab League, reaffirmed by the Inter-American Treaty of Reciprocal Assistance, signed in Rio de Janeiro on September 2, 1947; Charter of the Organization of American States (Bogota Charter), article 5 condemns aggression, article 15 forbids intervention, and article 18 cites no use of force except in self defence; the Five Principles of Peaceful Co-Existence (known as Pancha Sila), first formulated in April 29, 1954 between India and the PRC; the final communiqué of the Afro-Asian conference at Bandung of April 24, 1955 which gave approval to ten principles as the basis for promotion of world peace and cooperation. See http://en.wikipedia.org/wiki/Five_Principles_of_Peaceful_Coexistence; http://en.wikipedia.org/wiki/Bandung_Conference (last visited Feb. 17, 2006).

9. The Charter included provisions for collective and regional defence arrangements, and provisions on self defence.

10. See U.N. Charter arts. 2, 39–51.

11. See Jackson Maogoto, *New Frontiers, Old Problems: The War on Terror and the Notion of Anticipating the Enemy*, 51 NETH. INT'L L. REV. 1, 3 (2004).

However, during the Cold War, it was increasingly clear that terrorists were using technology to “exploit the vulnerabilities of modern societies.”¹² With citizens tending to live, work, and travel in close proximity providing concentrated targets, modern societies are particularly susceptible to large-scale attacks and weapons of mass destruction.¹³ This fact was not lost on perpetrators of terrorism, as witnessed by its growing capabilities and lethality throughout the Cold War era.¹⁴ The United States and Israel led the way in seeking to co-opt use of military force as a countermeasure against terrorism. The stance of the United States of “passive, reactive and patient defense” to terrorism in the early 1970s shifted to a “no compromise and very proactive approach” in the early 1980s, encapsulated in the “Reagan” and “Shultz Doctrines.”¹⁵ Subsequent U.S. presidents have relied on a similar tenet of swift, effective retribution to counter terrorism, often wrapping it up together with the right of anticipatory self-defence.

Though terrorism has always been high on the international agenda, it was the attacks on September 11, 2001 that brought the issue of terrorism and the international regime on the use of force into a new, urgent, and sustained debate. The magnitude of the September 11th attacks went beyond terrorism as it was known, and statements from various capitals around the world pointed to a need to develop new strategies to confront a new reality. The attacks had seemingly generated the momentum for the international legal system to formally co-opt military response to counter-terrorism within the regime of lawful force contained in the UN Charter.

The Bush administration prepared the ground for pre-emptive attacks by seeking to engage the accepted right of self-defence as a justification for military action against rogue states. Because of the new threats, the United States claimed, a proper understanding of the right of self-defence should now extend to authorizing pre-emptive attacks against potential aggressors, cutting them off before they would be able to launch strikes

12. *Id.* at 4.

13. JESSICA STERN, *THE ULTIMATE TERRORISTS* 4 (1999).

14. *Id.* at 6 (stating that between 1970 and 1995, on average, each year brought 206 more incidents and 441 more fatalities).

15. Shirleyce Manning, *The United States' Response to International Air Safety*, 61 J. AIR L. & COM. 505, 519 (1996); see Ronald D. Crelinsten & Alex P. Schmid, *Western Responses to Terrorism: A Twenty-Five Year Balance Sheet*, in *WESTERN RESPONSES TO TERRORISM* 307, 316 (Ronald D. Crelinsten & Alex P. Schmid eds., 1993).

that might be devastating in their scale and scope.¹⁶ This aggressive approach became a central tenet of the United States' strategic posture known as the "Bush Doctrine."¹⁷ Like the aggressive national policies before it, the "Bush Doctrine" seeks to "effectively clos[e] down dangerous regimes before they become imminent threats"¹⁸ and, thus, represents a usurpation of the Security Council's role in global affairs.

This Article commences with an overview of the UN Charter regime on the use of military force. It then proceeds to tackle its central theme—an examination of the genesis of the current U.S. policy of proactive action through military force to counter terrorism. Overall, the Article is premised on the theme that the right to self-defence is visibly enrolled in a process of change and evaluates this process within the uncertain and indeterminate framework of state practice and the legal regime articulated in the UN Charter. The focal point of state practice in the Article is the United States, which has long sought to articulate, through official policy, use of force as a counter-terrorism measure. Though a handful of states (especially Israel) have treaded this path, it is the United States that has sought to articulate it as part of government policy.

16. The U.S. government's position is encapsulated in the West Point Commencement Address on June 1, 2002 and officially articulated in the National Security Strategy, released in September 2002. See George W. Bush, West Point Commencement Address (June 1, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2006/06/200220601-3.html>) (announcing an expansive new policy of preemptive military action); THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002), <http://www.whitehouse.gov/nsc/nss/pdf> [hereinafter NATIONAL SECURITY STRATEGY].

17. The "Bush Doctrine" is the term that is now widely used by journalists, scholars and politicians alike to describe the pre-emption strategy championed by Paul Wolfowitz, Under-Secretary of Defense for Policy. See Frontline: The War Behind Closed Doors, Chronology: The Evolution of the Bush Doctrine, <http://www.pbs.org/wgbh/pages/frontline/shows/iraq/etc/cron.html> ("Wolfowitz's 'Defense Planning Guidance' draft argue[d] for a new military and political strategy in a post-Cold War world. Containment, it says, is a relic of the Cold War. America should talk loudly, carry a big stick, and use its military power to preempt the proliferation of weapons of mass destruction ('WMD')").

18. Anthony Dworkin, *Introduction, Iraq and the Bush Doctrine of Pre-Emptive Self-Defense*, CRIMES OF WAR PROJECT, June 1, 2004, <http://www.crimesofwar.org/expert/bush-intro.html> (last visited Jan. 27, 2006). See also Eyal Benvenisti, *Expert Analysis, Iraq and the Bush Doctrine of Pre-Emptive Self-Defense*, CRIMES OF WAR PROJECT, June 1, 2004, <http://www.crimesofwar.org/expert/bush-benvenisti.html> (last visited Jan. 27, 2006).

II. USE OF FORCE AND THE UN CHARTER

Despite a general prohibition of force, the UN Charter recognizes that force may be necessary to restore order, and that states are entitled to defend themselves against aggression.¹⁹ This right is “inherent,” and customary international law is the yardstick upon which the degree and manner of self-help should be measured.²⁰ In the face of the UN Security Council’s inability to control the spread of international terrorism, debate as to the status of previously accepted military responses under customary international law remains strong, and many states have urged for an expansion of the legitimate use of force under the Charter.

A. Article 2(4): Proscription of Force

Article 2(3) of the Charter provides that “[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”²¹ Article 2(4) elaborates on the need for peaceful resolution of disputes: “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.”²²

Article 2(4) is the provision on which present day *jus ad bellum* hinges.²³ The use of force in international relations proscribed in the

19. See U.N. Charter art. 51.

20. Article 51 of the UN Charter provides:

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

21. U.N. Charter art. 2, para. 3.

22. Article 2, paragraph 4 of the UN Charter provides: “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.” (emphasis added).

23. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (hereinafter *Nicaragua Case*) (noting that article 2(4) articulates the “principle of the prohibition of force” in international relations and avoids the term “war”).

article includes both war and other forcible measures short of war.²⁴ Its significance has been emphasized by international law scholars who label it “the cornerstone of this new regime”²⁵ that “promote[s] peace by prohibiting the use of force and protecting the sovereignty of the member states”²⁶ and “the heart of the United Nations Charter.”²⁷ Undoubtedly, the wording of Article 2(4) constitutes a considerable improvement when compared with Article I of the Kellogg-Briand Pact. In Article 2(4) the use of force in general is prohibited, rather than only war as in the Kellogg-Briand Pact. Furthermore, under the Charter, the prohibition is not confined to the actual use of force but extends to the mere threat of force.²⁸ Finally, the prohibition is, at least in theory, safeguarded by a system of collective sanctions against any offender.²⁹

The terms “territorial integrity” and “political independence” include most forms of armed force, and are not intended to restrict the scope of Article 2(4)’s prohibition of the use of force.³⁰ Rather, the two given modes of the use of force cover any possible kind of trans-frontier use of armed force. Thus, an incursion into the territory of another state constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of part of its territory or if the invading troops are meant to withdraw immediately after completing a temporary and limited operation. In other words, “integrity” has to be read as “inviolability,” proscribing any kind of forcible trespassing.³¹ Gaps that may possibly be left by these terms are filled by the remaining clause in Article 2(4), which outlaws the threat or use of force “in any other manner inconsistent with the purposes of the United Nations.”³²

24. See U.N. Charter, art. 2, para. 4.

25. Bartram S. Brown, *Special Project: Humanitarian Intervention at a Crossroads*, 41 WM & MARY L. REV. 1683, 1687–88 (2000).

26. Douglas Eisner, *Humanitarian Intervention in the Post-Cold War Era*, 11 B.U. INT'L L. J. 195, 197 (1993).

27. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

28. See U.N. Charter, art. 2, para. 4; Kellogg-Briand pact, *supra* note 1.

29. See U.N. Charter, arts. 39–51 (providing the Security Council with the right to decide where there is a “threat to the peace, breach of the peace, or act of aggression” and permitting necessary action to address such acts; furthermore, the Charter provides the rights of individual or collective self-defense).

30. *Id.*

31. Jackson Maogoto, *Rushing to Break the Law? The “Bush Doctrine” of Pre-emptive Strikes and the UN Charter on the Use of Force*, 7 U.W. SYDNEY L. REV. 1, 33–34 (2003).

32. U.N. Charter, art. 2, para. 4.

Notably, under Article 2(4) the prohibition of interstate force is not applicable to UN members only. The provision forbids use of force by UN members against any state. Recourse to force by non-member states is dealt with in Article 2(6).³³ Article 2(6) is a radical provision that seeks to bind even non-signatories to the UN Charter in contravention of Article 35 of the 1969 Vienna Convention on the Law of Treaties which states that an obligation inures on a third state only if it accepts obligation in writing.³⁴ However, as Article 38 of the Vienna Convention on the Law of Treaties sets forth, treaty norms may become binding on third states as rules of customary international law.³⁵ When conventional international law crystallizes as customary law, the norm which has its genesis in a treaty becomes binding on a third state.

The principle of prohibition of the threat or the use of force, well enshrined in Article 2(4) of the UN Charter, has been further elaborated by several consensual law-making decisions of the UN General Assembly including, in particular, the 1970 Declaration on Friendly Relations³⁶ and the 1974 Declaration on the Definition of Aggression.³⁷ The 1970 Declaration on Friendly Relations, besides restating Article 2(4) of the UN Charter,³⁸ emphasizes that such threat or use of force “shall never be employed as a means of settling international issues.”³⁹

B. Article 51: The State’s Right to Respond in Self-Defence

Having proscribed forcible self-help, the UN Charter nevertheless permits state actions that are reasonably necessary as self-defence in the face of an “armed attack.”⁴⁰ The starting point for any discussion on the

33. *Id.* at art. 2, para. 6.

34. Vienna Convention on the Law of Treaties art. 84, para. 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

35. *Id.* art. 38.

36. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

37. Definition of Aggression, G.A. Res. 3314 (XXIX), at 142–43, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974).

38. U.N. Charter art. 2, para. 4.

39. Declaration on Friendly Relations, *supra* note 36, at 123.

40. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 432–33 (1963). Professor Brownlie has categorised several Article 51 exceptions to the restrictions on the use of force. They are as follows:

1. acts of self-defence;

subject of self-defence is Article 51 of the UN Charter, which states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”⁴¹ Although the wording of the article appears clear—the right of self-defence is generated when an attack *occurs*, i.e., the attack must be occurring before the use of force is legitimate—practice has shown that the picture can be more complicated.

In particular, the use of the term “inherent” has polarized commentators and states.⁴² Though the Charter does not indicate what rights are “inherent,” the inclusion of this term was considered significant enough by the drafters of the Charter to warrant its inclusion when revising Article 51.⁴³ 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.⁴⁴ Despite the ongoing debate, a major question remains 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. 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 view that Article 51 is considerably broader than its terms.

2. acts of collective self-defence;

3. actions authorised by a competent international organ (e.g., the United Nations Security Council);

4. where treaties confer rights to intervene or where an ad hoc invitation or consent is given by the territorial sovereign;

5. actions to terminate trespass;

6. necessity arising from natural catastrophe; and

7. measures to protect the lives or property of a state’s nationals in a foreign territory.

41. U.N. Charter art. 51.

42. *See, e.g.*, MYERS S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 232–41(1961).

43. Maogoto, *Rushing to Break the Law*, *supra* note 31 at 25.

44. RUTH B. RUSSELL ASSISTED BY JEANNETTE E. MUTHER, A HISTORY OF THE UN CHARTER: THE ROLE OF THE UNITED STATES, 1940–1945 98–99 (1958).

1. The Restrictionist Approach

The Restrictionist approach cites the absolute prohibition of forcible self-help, as set out in Article 2(4), subject only to the limited exception contained in Article 51.⁴⁵ Under this reading, the exception permits recourse to self-defence only when faced with actual “armed attack,” and Article 51 does not contemplate anticipatory or pre-emptive actions by a state so threatened.⁴⁶ Rather, it requires a state to refrain from responding with like force unless actively involved in repelling an armed attack.⁴⁷ 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 51.⁴⁸ 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.⁴⁹ Furthermore, the International Court of Justice in the *Nicaragua Case* clearly stated that the right of self-defence under Article 51 only accrues in the event of an armed attack.⁵⁰ Also, it is a traditional requirement of self-defence that a triggering event justifying a military response has already occurred or at least be imminent.⁵¹

Restrictionists argue that by the time of the drafting of the UN Charter, “self-defence was understood to be justified only in case of an attack by the forces of a state.”⁵² Professor Brownlie notes that if Article 51 of the UN Charter is the authoritative definition of the right of self-defence and it is not qualified or supplemented by the customary law, then states are bound by the black-letter law of the Charter and have less extensive grounds to support armed force undertaken outside the framework of the UN Charter.⁵³

45. JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF THE UNITED NATIONS THEORIES OF AGGRESSION* 94–95 (Univ. Cal. Press.) (1958).

46. U.N. Charter art. 51.

47. STONE, *supra* note 45.

48. *See, e.g.*, YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 168 (3d ed., 2001). Dinstein concludes that the choice of words in Article 51 was deliberately restrictive and that the right to self-defence was limited to an armed attack.

49. *Id.* at 168. *See also* Michael Franklin Lohr, *Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism* 34 *NAVAL L. REV.* 1, 18 (1985).

50. In paragraph 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”. *Nicaragua Case*, *supra* note 23, at 103.

51. *See* HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 91–92 (1992).

52. BROWNLIE, *supra* note 40, at 280.

53. *Id.* at 279.

Though the Charter “may be regarded as objective or general international law,”⁵⁴ most recognized independent states have expressly accepted the principles and obligations of the Charter.⁵⁵ Furthermore, the “provisions of the Charter have had strong influence on state practice since 1945, and the terms of Article 51 or very similar terms, have appeared in several important multilateral treaties and draft instruments.”⁵⁶

2. The Counter-Restrictionist Approach

The Counter-Restrictionist approach adopts an expansionist view. Proponents interpret the Charter to recognize and include those rights of self-defence that existed under customary international law prior to its drafting.⁵⁷ Oliver Schachter concisely states this position thus:

On one reading [of Article 51] this means that self-defense is limited to cases of armed attack. An alternative reading holds that since the article is silent as to the right of self-defense 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-defense as it existed prior to the Charter.⁵⁸

54. *Id.* at 280.

55. *Id.* at 280.

56. *Id.* Thus, article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947 provided for individual or collective self-defence in case of an “armed attack”. Inter-American Treaty of Reciprocal Assistance, *opened for signature* Sept. 2, 1947, 62 U.S.T. 1681, 324 U.N.T.S. 21 (entered into force Dec. 3, 1948). Though articles 18 and 25 of the Bogotá Charter are primarily concerned with reaction to the use of force, the latter article refers ambiguously to “an act of aggression that is not an armed attack” and is concerned only with the application of “measures and procedures”, whilst the former merely refers to “the case of self-defence in accordance with existing treaties or in fulfilment thereof.” Charter of the Organization of American States arts. 18, 25, *opened for signature* Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119 (entered into force Dec. 13, 1951). The Draft Declaration on Rights and Duties of States, adopted by the International Law Commission in 1949, provides in Article 12 that “[e]very State has the right of individual or collective self-defence against armed attack.” International Law Commission, Draft Declaration on Rights and Duties of States art. 12, *available at* <http://www.un.org/law/ilc/texts/declar.htm> (last visited Jan. 17, 2006).

57. See Yehuda Z. Blum, *The Legality of State Response to Acts of Terrorism*, in *TERRORISM: HOW THE WEST CAN WIN* 133, 137–38 (Benjamin Netanyahu ed., 1986).

58. Schachter, *supra* note 27, at 1633–34.

Customary law traditionally recognized a limited right of pre-emptive self-defence according to the “*Caroline* criteria”:⁵⁹ the necessity of self-defence “must be instant, overwhelming, leaving no choice of means, and no moment of deliberation” and the action taken must not be “unreasonable or excessive.”⁶⁰ Martti Koskenniemi notes that the right of self-defence articulated in the UN Charter “should be read rationally against some useful purpose that the rule serves....”⁶¹ Koskenniemi argues that the purpose of Article 51 was “to protect the sovereignty and the independence of the state,”⁶² and that if a state feels its sovereignty and independence threatened by the actions of another country, it might be entitled to use force against that country, even if the country’s hostile actions had not yet risen to the level of an actual armed attack.⁶³ Counter-Restrictionist advocates hold the view that Article 2(4) left the right of self-defence unimpaired and that the right implicitly accepted was not confined to reaction to “armed attack” within Article 51 but permitted the protection of certain substantive rights:

Action undertaken for the purpose of, and limited to, the defense of a state’s political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force “against the territorial integrity or political independence” of any other state.⁶⁴

In line with Counter-Restrictionist proponents, it can be said that apart from the restrictive phrases in Article 2(4), Article 51 and Article 2(4) were not intended to, and do not restrict the right of member states to use force in self-defence as defined by customary international law. According to this position, Article 51 refers merely to “armed attack” because it was inserted for the particular purpose of clarifying the position of defence treaties which are concerned only with external

59. Michael Byers, *Iraq and the “Bush Doctrine” of Pre-Emptive Self-Defence*, CRIMES OF WAR PROJECT, Aug. 20, 2002, <http://www.crimesofwar.org/expert/bush-byers.html>.

60. *Id.*

61. Martti Koskenniemi, *Iraq and the “Bush Doctrine” of Pre-Emptive Self-Defence*, CRIMES OF WAR PROJECT, Aug. 20, 2002, <http://www.crimesofwar.org/expert/bush-koskenniemi.html>.

62. *Id.*

63. *See Id.*

64. D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 185–86 (1958).

attack.⁶⁵ Therefore, despite apparent specificity, the Charter leaves the broader customary right, which is always implicitly reserved, intact.

3. Anticipatory Self-Defence

Contrary to the permissive and expansive reading of the Charter by some scholars, international opinion on the impermissibility of anticipatory self-defence was never clearer than Israel's 1981 attack on Iraq.⁶⁶ Fearing that it might eventually be a target of Iraq's efforts to develop nuclear weaponry, Israel reduced Iraq's Osirak nuclear reactor to rubble.⁶⁷ Israel argued vehemently that the attack was justified based on the right of anticipatory self-defence.⁶⁸ The world was outraged and rose up in one voice to condemn the act.

The world was outraged by Israel's raid on June 7 1981. "Armed attack in such circumstances cannot be justified. It represents a grave breach of international law," Margaret Thatcher thundered. Jeane Kirkpatrick, the U.S. ambassador to the UN and as stern a lecturer as Britain's then prime minister, described it as "shocking" and compared it to the Soviet invasion of Afghanistan. American newspapers were as fulsome. "Israel's sneak attack . . . was an act of inexcusable and shortsighted aggression," said the *New York Times*. The *Los Angeles Times* called it "state-sponsored terrorism".

The greatest anger erupted at the UN. Israel claimed Saddam Hussein was trying to develop nuclear weapons and it was acting in self-defense, which is legal under Article 51 of the UN Charter. Other countries did not agree. They saw no evidence that Iraq's nuclear energy programme, then in its infancy and certified by the International Atomic Energy Agency as peaceful, could be described as military, aggressive or directed against a particular country. In any case, pre-

65. See Maogoto, *Rushing to Break the Law*, *supra* note 31, at 26.

66. The United Nations Security Council condemned the Israeli attack on the Iraqi nuclear reactor in a unanimous resolution adopted on June 19, 1981. S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981).

67. Judith Miller, *Was Iraq Planning to Make the Bomb? Debates by Experts Seems Inconclusive*, N.Y. TIMES, June 19, 1981, at A11.

68. Jehuda Blum, Israeli Delegate to the United Nations, Speech Before the Security Council (June 19, 1981), in *Excerpts from Speech by Israeli Delegate to UN*, N.Y. TIMES, June 20, 1981, at 15.

emptive action by one country against another country which offers no imminent threat is illegal.⁶⁹

The Security Council condemned Israel's bombing of the Osirak reactor and unanimously passed Resolution 487, strongly denouncing the Israeli action as illegal.⁷⁰ In addition to condemning the attack, the United States, under the authority of the Arms Control Act of 1968, suspended arms shipments to Israel on the grounds that those arms were to be used for defensive purposes only.⁷¹ Invoking the standards of customary international law in general, and the *Caroline* factors in particular, the international community's opposition to the bombing as self-defence was based on the fact that the Iraqi threats, as well as their construction of the reactor, did not amount to an "armed attack" on Israel.⁷²

Politicians, policymakers, and the world at large were unanimous in sensing that Israel's pre-emptive strike was taking the world down a slippery slope.⁷³ If pre-emption was accepted as legal, the fragile structure of international peace would be undermined. Any state could attack another under the pretext that it detected a threat, however distant. Notwithstanding the clear position taken by the Security Council and the international community, the parameters of a state's "inherent" right to defend against armed attack is far from settled.

C. Reprisals and the UN Charter

In the heyday of anticipatory self-defence, states dealt with each other on the basis of reciprocity.⁷⁴ There were no supranational institutions to

69. Jonathan Steele, *The Bush Doctrine Makes Nonsense of the UN Charter*, GUARDIAN (London), June 7, 2002, at para. 2–3, available at <http://www.guardian.co.uk/bush/story/0,7369,728870,00.html>.

70. S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981). This was especially compelling given that the U.S. was a party to the resolution. *See id.*

71. Arms Control and Disarmament Act, 22 U.S.C. 2572 (2000).

72. U.N. SCOR, 36th Sess., 2288th mtg. at parats. 115, 299, U.N. Doc. S/PV.2288 (June 19, 1981). It is notable that in this, as well as later Security Council condemnations of Israeli action, the premeditation evident in the military operation was considered an argument against accepting the offered justification of self-defence. For example the Security Council also condemned the 1985 attack by Israeli F-16s on the PLO Headquarters located in Tunisia, by a vote of 14–0, with the United States abstaining. S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985).

73. Paul Lewis, *The UN's Nuclear Cops Cover a Tough Bear*, N.Y. TIMES, June 28, 1981, at D3.

74. Reciprocity was fundamental to the international law regime on the use of war in its formative stages in the sense that rules were recognized to be binding legal obligations

make or enforce international law. States had the right to retaliate against states that failed to honor bilateral or multilateral arrangements through use of reprisals (retaliation by force) in ways that would otherwise have been considered illegal. "In the absence of a supranational authority, this form of self-help was a way for states to get compensation for their losses, punish their offenders, and deter future violations."⁷⁵

The purpose of international bodies such as the League of Nations and the United Nations was to limit this use of force, and to provide a forum for the resolution of conflict in international matters so as to prevent the need for war. The text of the UN Charter reflects this intent and represents a conventional rejection of the just war theories of retribution; to permit reprisals would thwart the very goal to which states have committed themselves by membership in the United Nations.⁷⁶

Many commentators believe retaliation and reprisals to be illegal under the UN Charter, citing the specific language of Articles 2 and 51.⁷⁷ Taken together, Articles 2 and 51 comprise a minimum order in the sense that they protect only the primary interest in freedom from aggression and the right of self-defence.⁷⁸ "The provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are

owing to the centrality of war as a legal sanction. In all instances that armed conflict arose, states routinely claimed legitimacy of armed measures on the enforcement of some international obligation or entitlement. The ever-present possibility of war and the measures taken by states to prepare for and carry out military security meant that that the apprehension of discord and hostility between the States championed self-interest. The relationship between the balance of power and the law of nations was intimately tied in with the balance of power system as a part of the law of nations. States could punish a state threatening the balance, and armed attack in whatever context triggered all the rights of self-preservation. International law was in essence primarily enforced through reciprocal entitlement violations (underpinned by military force)—if state A violated an entitlement of state B, state B was justified in violating an entitlement of state A. However, development of military technology exposed the danger of potential escalations of entitlement violations leading to international anarchy, hence the need to replace politics with legal principles as the yardstick for governing war or resort to war. See HEDLEY BULL, *THE ANARCHICAL SOCIETY* (2d ed. 1995).

75. Stéphanie Giry, *New World, Old Law: Would a Unilateral Strike Against Iraq Ever Have Been Legal?* LEGAL AFFAIRS Jan./ Feb. 2003, at 21.

76. See Guy B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self-Defence and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 286 (1987). 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. William V. O'Brien, *Reprisals, Deterrence, and Self-Defence in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 433 (1990).

77. Roberts, *supra* note 76, at 282.

78. MCDUGAL & FELICIANO, *supra* note 42, at 121–24.

universally regarded as prohibiting reprisals which involve the use of force.”⁷⁹ These authorities conclude that the UN Charter requires states to settle disputes peacefully under Article 2(3) and prohibits all forms of forcible self-help other than the exercise of self-defence within the meaning of Article 51.

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.⁸⁰ After several Yemeni attacks on the South Arabian Federation, the British commenced air attacks on Yemen in 1964.⁸¹ The United Kingdom Representative, after discussing the series of Yemeni attacks, stated:

It will also be abundantly plain that, contrary to what a number of speakers have said or implied, this action was not retaliation or a reprisal There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed “retaliation” or “reprisals;” the other, which is expressly contemplated and authorized by the Charter, is self-defence against armed attack . . . it is clear that the use of armed force to repel or prevent an attack—i.e. legitimate action of a defensive nature—may sometimes have to take the form of a counter-attack.⁸²

Despite the United Kingdom representative’s delicate attempt to cloak the reprisals in the acceptable language of self-defence, the Security Council refused to be hoodwinked, denounced the actions as reprisals, and “deplore[d]” the British action.⁸³ By a vote of nine to zero, with two abstentions, the Security Council determined that it “[c]ondemns reprisals as incompatible with the purposes and principles of the United Nations.”⁸⁴ The Council’s rationale was that the members of the United Nations contracted not to use force to achieve solutions to international controversies.⁸⁵ A reprisal, not considered as the use of force in self-

79. BROWNIE, *supra* note 40, at 281.

80. Lohr, *supra* note 49, at 32.

81. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 8 (1972).

82. U.N. SCOR, 19th Sess., 1109th mtg. at 7, U.N. Doc S/PV.1109 (Apr. 7, 1964).

83. S.C. Res. 188, para. 7, U.N. Doc S/RES/188 (Apr. 9, 1964).

84. Richard Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT’L L. 415, 429 (1969).

85. Myres S. McDougal & Florentino P. Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L. J. 1063, 1063-64 (1958).

defence, was, therefore, considered an illegal use of force.⁸⁶ Clearly the Security Council took the dominant restrictionist view in international law in rejecting the legitimacy of any reprisal or anticipatory self-defence.

“This de jure prohibition on reprisal found its way into documentary form in 1970”⁸⁷ when the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter was adopted.⁸⁸ The Declaration on Friendly Relations tenor was emphatic that members of the United Nations have legally renounced the use of peacetime reprisals.⁸⁹ The first principle provides that “[s]tates 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.”⁹⁰ One of the duties imposed under this principle is to refrain from acts of reprisal involving the use of force.⁹¹

On its face, the Declaration on Friendly Relations seems to flatly reject the use of reprisals under all circumstances. This assertion is borne out by subsequent condemnations of reprisals by the international community. In 1972, in reaction to constant terrorist attacks by Palestine Liberation Organization (PLO) elements based in neighboring Lebanon, it reminded and in the same breath warned Lebanon that it had an international legal obligation to prevent its territory from being used as a base for armed attacks against Israel by the PLO.⁹² A few weeks later on February 25, 1972, Israel sent forces, tanks, armored cars, heavy artillery, and air support into Lebanon to attack PLO bases.⁹³ In response, the Security Council issued Resolution 313. When debating Resolution 313, France denounced “these intolerable reprisals.”⁹⁴ The final Resolution did not mince words demanding “that Israel immediately

86. Falk, *supra* note 84, at 429.

87. See Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 13 (2003).

88. Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 489 (1999).

89. See Declaration on Friendly Relations, *supra* note 36, at 121–24.

90. *Id.* at 122.

91. *Id.* at 123.

92. O'Brien, *supra* note 76, at 426–27.

93. *Id.* at 427.

94. *Id.* at 436, n.87.

desist and refrain from any ground and air military action against Lebanon and forthwith withdraw all its military forces from Lebanese territory.”⁹⁵ Israel adopted a blasé attitude towards this Resolution and was soon back in Lebanon attacking PLO bases. The Security Council was once again seized of the matter. Belgium stated that “[t]he Belgian Government has never ceased to repudiate energetically the military reprisal actions undertaken by Israel against Lebanon.”⁹⁶ The final Resolution of June 26, 1972, denounced Israel’s actions as violating the UN Charter.⁹⁷

About a decade later, on December 27, 1985, simultaneous bombings of airline offices in Rome and Vienna left twenty innocent people dead, including five Americans, with over eighty people injured.⁹⁸ Four months later on April 5, 1986, a bomb explosion in a West German discotheque frequented by American servicemen killed two American servicemen and wounded 154 persons—50 to 60 were Americans.⁹⁹ In both instances, intelligence traced the perpetrators back to Libya. In the early hours of April 15, 1986, U.S. Air Force and Naval aircraft simultaneously bombed targets in Libya. Despite the positive reaction from the U.S. Congress,¹⁰⁰ both the Security Council and General Assembly condemned the U.S. attacks. While the Resolution to condemn the attack by the Security Council failed owing to vetoes by the United States, United Kingdom, and France, the vote in the General Assembly was successful.

However, the clear stance of the international community on the legality of reprisals wavered in the late 1980s. Beginning in July 1987, during the course of the Iran-Iraq War, the United States conducted escort operations of tankers in the Gulf. After months of volatility and gunboat diplomacy in the Persian Gulf, on April 14, 1988 Iranian submarine mines damaged a U.S. naval ship. Four days later, the United States retaliated with attacks that decimated two Iranian oil platforms.¹⁰¹

95. S.C. Res. 313, para. 1, U.N. Doc S/RES/313 (Feb. 28, 1972).

96. O’Brien, *supra* note 76, at 436 n.87.

97. *Id.* at 427–28.

98. Lary Rohter, *Airlines Say They had Warnings About Possible Move by Terrorists*, N.Y. TIMES, Dec. 31, 1985, at A1.

99. John Tagliabue, *2 Killed, 155 Hurt in Bomb Explosion at Club in Berlin*, N.Y. TIMES, Apr. 6, 1986, at A1.

100. Gerald M. Boyd, *Genesis of a Decision; How the President Approved Retaliatory Strikes*, N.Y. TIMES, Apr. 15, 1986, at A11.

101. David Hoffman & Lou Cannon, *U.S. Retaliates, Hits Iran Oil Platforms in Gulf*, WASH. POST, Apr. 18, 1988, at A1.

The next day, President Reagan stated that the United States' action was "to make certain the Iranians have no illusions about the cost of irresponsible behavior."¹⁰² The Reagan administration claimed the strike was in "retaliation"¹⁰³ for mine laying by Iran and that "any further mining by Iran would bring harsher military reprisals."¹⁰⁴ In this instance:

[t]here was no Security Council debate on these hostilities. In some cases, the U.S. forces clearly acted in self-defense. In other cases, as in the retaliatory strikes of October 19, 1987 and April 18, 1988, U.S. attacks were not immediate. These actions could easily be characterized as preventive, deterrent measures and, just as readily, as punitive measures.¹⁰⁵

The seeming indifference by the United Nations in this instance buttressed by other subsequent incidents, forms the basis of the view that the Charter does not prohibit reprisals entirely. In the late 1980s, the General Assembly and the Security Council appear to have adopted a policy inconsistent with their spoken opposition to reprisals.¹⁰⁶ The Council has generally not condemned acts of reprisal which it considered "reasonable," while voting to condemn actions considered excessive or disproportionate.¹⁰⁷ In so doing, the Council has appeared to indicate its tolerance of some proportional acts of reprisal. As one scholar observes:

There is, however, a contrary view that the Charter does not prohibit forcible self-help, i.e., reprisals entirely. An argument can be made that resorts to reprisals are both legal and desirable under the Charter. First, Security Council practice implies the recognition of the legitimacy of some type of reasonable reprisal. There is an inconsistency between the Security Council's alleged principle of the illegality of all armed reprisals and the Council's practice in not condemning a particular reprisal because it appeared reasonable. A practice of condemning only

102. John H. Cushman Jr., *U.S. Strikes 2 Iranian Oil Rigs and Hits 6 Warships in Battles Over Mining Sea Lanes in Gulf*, N.Y. TIMES, Apr. 19, 1988, at A10.

103. Major Phillip A. Seymour, *The Legitimacy of Peacetime Reprisal as a Tool against State-Sponsored Terrorism*, 39 NAVAL L. REV. 221, 224 (1990).

104. Hoffman & Cannon, *supra* note 101.

105. O'Brien, *supra* note 76, at 427.

106. Not all acts of reprisal result in Security Council condemnation. See Barry Levenfield, *Israel's Counter Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 7, 35 (1982).

107. *Id.*

unreasonable or disproportionate reprisals is, in effect, an affirmation of the right of states to resort to reasonable reprisals.¹⁰⁸

Therefore, under recent UN practices, the status of reprisals may be viewed as illegal *de jure* but accepted *de facto*, provided they meet the requirement of proportionality. The troubling question of whether any other forcible form of self-help outside of self-defence is permitted under the Charter thus persists.¹⁰⁹

Having canvassed the various avenues regarding the use of force, the author resists the temptation to move straight to the matter of the use of force and terrorism without addressing the controversial issue of humanitarian intervention. Though this does not strike a direct chord with the central theme of the Article, the most explicit form of unilateral action in the post-UN Charter era without UN authority has been premised in large part on the doctrine of humanitarian intervention. Vestiges of this doctrine have an increasing resonance in the plethora of justifications for the unilateral decision by the United States at the head of the “Coalition of the Willing” to invade Iraq in 2003 without explicit UN authority.¹¹⁰ It is therefore only appropriate that the doctrine of humanitarian intervention get mention.

D. Humanitarian Intervention and the UN Charter

It is significant that under the UN Charter, the third explicit exception to the general prohibition on the use of force, found in Chapter VIII of the Charter, permits actions undertaken by “regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security.”¹¹¹ Significantly, this is not a *carte blanche*, since regional alliances may undertake any action in this regard that is “consistent with the Purposes and Principles of the United Nations.”¹¹²

108. Lohr, *supra* note 49, at 32–33.

109. U.N. Charter art. 51.

110. Christopher Hobson notes:

With America’s primary claims for invading Iraq—weapons of mass destruction (WMDs) and links to terrorism—being largely discredited, bringing democracy to the country has increasingly become the central justification by President Bush and his supporters for overthrowing Saddam Hussein’s regime.

Christopher Hobson, *A Forward Strategy of Freedom in the Middle East: U.S. Democracy Promotion and the “War on Terror,”* 59 AUSTL. J. INT’L AFF. 39, 40 (2005).

111. U.N. Charter art. 52, para. 1.

112. *Id.*

In general, humanitarian intervention entails a unilateral or multilateral intervention by a foreign power in a third country in reaction to serious and systematic violations of human rights by the government. Prior to the twentieth century, a general custom and practice of humanitarian intervention existed.¹¹³ The legal doctrine finds scholarly support as early as the seventeenth century, when Hugo Grotius wrote that “where [tyrants] . . . provoke their own people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.”¹¹⁴ This historical doctrine is strengthened by an emerging notion of a duty to protect civilians that has its genesis in the horrors of post-World War II.

For almost the entire history of the UN, it has recognized that certain human rights violations are beyond the pale of state sovereignty and constitute a threat to peace and security. Consequently, proponents of humanitarian intervention argue that the UN has endorsed the notion that sovereignty is secondary in importance to the basic human right to life.¹¹⁵

However, the matter of humanitarian intervention in the post-UN Charter era was brought strongly to the fore with NATO's reaction to the ethnic cleansing in Kosovo by Serbian forces.¹¹⁶ On March 24, 1999,

113. See David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 258–59 (1992).

114. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 288 (A.C. Campbell trans., photo reprint 1979) (1901). John J. Merriam notes:

Proponents of intervention . . . cite the British, French, and Russian intervention in Greece (1827-1830), the Russian intervention in Turkey (1877-1878), and the Greek, Bulgarian, and Serb intervention in Macedonia (1903) as examples of humanitarian interventions that were regarded as legal operations.

John J. Merriam, *Kosovo and the Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT'L L. 111, 119 (2001).

115. *Id.* at 122.

116. It should of course be noted that there have been previous acts premised on some form of pseudo-humanitarian intervention, but this has been largely within the framework of UN authorisation. One need only recall the acts in relation to the first Gulf War and the no fly zone, Somalia, Bosnia and East Timor. Though these actions may sit uncomfortably within the UN regime on the use of force, they nonetheless found some sort of legitimacy via subsequent Security Council resolutions. For a concise overview of these military operations, see Jackson Maogoto, *People First, Nations Second: A New Role for the UN as an Assertive Human Rights Custodian*, AUSTL. INT'L L.J. 120, 133–38 (2000).

without the benefit of a UN Security Council resolution expressly authorizing military action, NATO began a seventy-eight day air campaign over the Former Republic of Yugoslavia (FRY).¹¹⁷ The Kosovo operation was preceded by months of diplomatic efforts to resolve the region's problems peacefully. The United Nations, OSCE, NATO, and the United States all participated in a multitude of diplomatic moves aimed at curbing the violence and reaching a political solution. "The legal debate over humanitarian intervention in Kosovo has been posed as a tension between two competing principles: respect for the 'territorial integrity' and 'political independence' of states and the guarantees for human rights"¹¹⁸

Opponents of humanitarian intervention argue that the use of force against a sovereign state violates the most imperative international legal norms, not to mention the UN Charter.¹¹⁹

The major argument against a legal doctrine of humanitarian intervention is that it would open the door to "pretextual" intervention . . . this legal doctrine is founded in the custom and practice of states, and because it is so controversial, there has never been a universally accepted standard established for regulating and evaluating humanitarian interventions. Whatever standard exists is only that which can be drawn from the past practice of intervening states, and as such is vague and malleable.¹²⁰

Proponents of the doctrine argue that despite the general prohibition on the use of force encapsulated in the UN Charter, a legal doctrine of humanitarian intervention survives, embodied in the custom and practice of state actors in the international arena.¹²¹ This argument is based in large part on the fact that the United Nations was formed to prevent the use of force as a means of settling disputes and to protect universal

117. The operation's objective was "to degrade and damage the military and security structure that President Milosevic (Yugoslav President) has used to depopulate and destroy the Albanian majority in Kosovo." William S. Cohen, Secretary of Defence, Prepared Statement to the Senate Armed Services Committee (Apr. 15, 1999) available at <http://www.defenselink.mil/specials/kosovo/>.

118. Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1752 (2000).

119. See Merriam, *supra* note 114, at 119–21.

120. *Id.* at 126.

121. See generally David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 (1992) (providing a comprehensive examination of the doctrine of humanitarian intervention).

human rights.¹²² “Some states have opted to use force as a means of last resort to prevent humanitarian tragedy, while at the same time seeking to establish a self-defense argument in order to avoid UN sanction.”¹²³ Traction for this argument can also be found in the observation that the UN Charter not only permits intervention on humanitarian grounds, it requires it in cases of gross and systemic human rights abuses.¹²⁴ Articles 55 and 56 of the UN Charter implore “[a]ll Members [to] pledge themselves to take joint action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all”¹²⁵

A key point that undermined NATO’s claims that the Kosovo action was a permissible use of force was the foggy and often incoherent grounds it provided as justification. Despite its seemingly humanitarian dimensions, the Kosovo action was not a textbook example of the doctrine, and was dressed up with other justifications at odds with the central ground of humanitarian intervention. Professor Julie Mertus notes:

NATO did not act only in the name of human rights. Instead, leaders of NATO countries offered a cafeteria of justifications for their actions. The Clinton Administration considered but refused to base its actions in Kosovo solely on humanitarian rights grounds. Instead, the Administration offered an array of justifications. Humanitarian concerns were rolled together with other factors: the need for regional stabilization, the stemming of refugee flows, and the need to protect NATO’s reputation.¹²⁶

Mertus goes on to note that “by failing to specify clearly the legal parameters of their actions, the NATO allies exposed themselves to criticism suggesting that NATO was not operating under any legal grounds at all.”¹²⁷ Mertus follows this concern by noting that by failing

122. See Steve G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, CAL. W. INT’L L.J. 117, 124 (1993).

123. Merriam, *supra* note 114, at 114.

124. See, e.g., Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229, 231–2 (John Norton Moore ed., 1974) (discussing several instances in which interventions occurred for humanitarian purposes).

125. U.N. Charter arts. 55, para. (c), 56.

126. Julie Mertus, *The Imprint of Kosovo on the Law of Humanitarian Intervention*, 6 ILSA J. INT’L & COMP. L. 527, 528 (2000).

127. See Mertus, *Reconsidering the Legality of Humanitarian Intervention*, *supra* note 118, at 1748–49.

to provide clear legal justifications for intervention on human rights grounds, human rights advocates opened themselves up to similar criticism that they were outside the law.

As this part of the Article has shown, the vagueness and confusion of conceptual elements and malleable past precedent clouds the UN Charter regime on the use of force. Having canvassed the various avenues regarding the use of force, the Article now turns to consider the use of military force as a counter-measure against terrorism in view of the fact that it is generally held to be inconsistent with the UN Charter regime on the use of force.

III. THE COLD WAR ERA: TERRORIST ACTION AND REACTION

During the Cold War Era, increased terrorist attacks focused attention on the capabilities of elite forces trained for anti-terrorist operations. The 1976 Israeli hostage rescue at Entebbe in the aftermath of the hijacking of Air France Flight 139 marked the opening salvo in the use of military force to counter terrorism.¹²⁹ About three years later, on November 4, 1979, a mob of Iranians seized the U.S. embassy in Tehran, taking a large group of employees hostage and sparking the Iranian hostage crisis. Five months later, the impotence of diplomatic efforts led the Carter administration to order a rescue effort by helicopter, but the mission was aborted.¹³⁰ In 1981, following the release of the Iranian Embassy hostages, Reagan warned that when the rules of international behavior are violated, the U.S. policy would be one of “swift and effective retribution.”¹³¹ The Reagan administration was sending initial indications that a hard line, conceivably involving the use of military force, would be taken with terrorists in the future.

Two years later on April 18, 1983, sixty-three people were killed and one hundred twenty were injured in a 400-pound suicide truck-bomb attack on the U.S. embassy in Beirut, Lebanon.¹³² Six months later, on

128. See Mertus, *Reconsidering the Legality of Humanitarian Intervention*, *supra* note 114, at 1748–49.

129. See generally YESHAYAHU BEN-PORAT, EITAN HABER & ZEEV SCHIFF, *ENTEBBE RESCUE* (Louis Williams trans., Delacorte Press 1977) (1976) (providing an overview of the Israeli hostage rescue in Entebbe).

130. See GARY SICK, *OCTOBER SURPRISE: AMERICA’S HOSTAGES IN IRAN AND THE ELECTION OF RONALD REAGAN* 19–20 (1991).

131. Richard Halloran, *Swift U.S. Retribution for Terrorists Called Doubtful*, N.Y. TIMES, Feb. 3, 1981, at B13.

132. U.S. Army, *Timeline of Terrorism*, <http://www.army.mil/terrorism/1989-1980/index.html> (last visited Jan. 27, 2006).

October 23, 1983, in another terrorist attack, a large Mercedes truck exploded with such terrific force that the headquarters of the First Battalion, Eighth Marine Regiment was instantly reduced to rubble with the loss of two hundred forty-two Americans.¹³³ The Islamic Jihad claimed responsibility for both attacks.¹³⁴ The bombings precipitated renewed debate over whether U.S. military forces were adequately prepared to deal with terrorism and whether the United States would use force either in anticipation of, or in response to, terrorism.

The Long Commission, in commenting upon the devastating attack on the U.S. Marine Headquarters in Beirut, concluded:

[S]tate sponsored terrorism is an important part of the spectrum of warfare and . . . adequate response to this increasing threat requires an active national policy which seeks to deter attack or reduce its effectiveness. The Commission further concludes that this policy needs to be supported by political and diplomatic actions and by a wide range of timely military response capabilities.¹³⁵

The Long Commission report proved to be a turning point for U.S. counter-terrorism policy. Despite definitional concerns, and fundamental issues concerning the kind of responses the United States could lawfully take within the rubric of international law, the United States had grown tired of attacks against its interests and citizens and soon formally embraced military force against terrorist violence. In opting to use force, the United States took the position that it was necessary to accept some risks to ensure that every terrorist success attracted the military might of the United States.¹³⁶ From the position of the United States, deterrence was premised on terrorists fearing a forceful response from the victim state.

A. New Frontiers on the Use of Force? Development of the Reagan and Shultz Doctrines

On April 3, 1984, President Reagan signed the National Security Decision Directive (NSDD), which assigned responsibility for developing strategies to counter terrorism and made clear that, while use of all the non-military options would be made, the United States was also

133. *Id.*

134. *Id.*

135. U.S. Dep't Defense., Report of the DoD Commission on Beirut International Airport Terrorist Act, October 23, 1983 129 (1983), available at <http://www.ibiblio.org/hyperwar/AMH/XX/MidEast/Lebanon-1982-1984/DOD-Report>.

136. Brian M. Jenkins, *The U.S. Response to Terrorism: A Policy Dilemma*, ARMED FORCES J., 39, 44 (1985).

prepared to respond within the parameters set by the law of armed conflict. Defense Department official Noel Koch explained that the NSDD “represent[ed] a quantum leap in countering terrorism, from the reactive mode to recognition that proactive steps [were] needed.”¹³⁷ Significantly, the document incorporated some key elements: the United States has a responsibility to take protective measures whenever evidence arises that terrorism is about to be committed against U.S. interests; and the threat of terrorism constitutes a form of aggression and justifies acts in lawful self-defence.¹³⁸ With this directive, the ground was formally laid for the “Reagan Doctrine” of swift, effective retribution.

The NSDD signaled that, as far as the executive branch was concerned, the debate over whether military force was inside or outside the range of counter-terrorism measures was over. Henceforth, the United States would use military force in both pre-emptive and retaliatory scenarios. Although then U.S. Secretary of State George Shultz had initially advocated only “an active defense” against terrorists,¹³⁹ growing frustration over the inability of the United States to effectively counter the accelerating frequency and violence of terrorist attacks prompted him to re-evaluate his views on the nature of appropriate responses to international terrorism, further expanding the controversial new U.S. policy. In a speech in October 1984 at the Park Avenue Synagogue in New York City, Shultz asserted that the United States must be ready to use military force to fight terrorism and retaliate even before all the facts are known.¹⁴⁰ This was the beginning of what later became known as the “Shultz Doctrine,” a corollary of the “Reagan Doctrine.” Shultz predicted that the increased terrorist attacks against strategic U.S. interests around the world in the years ahead would necessitate a willingness to combat it using military force.¹⁴¹ This signaled that an active policy of response by armed force to terrorist attacks would be followed by the United States. In the same speech, Shultz claimed a broad right on behalf of the United States to use force against terrorist threats abroad, including a policy of pre-emptive

137. Robert C. Toth, *Preemptive Anti-Terrorist Raids Allowed*, WASH. POST, Apr. 16, 1984, at A19.

138. Robert C. McFarlane, *Terrorism and the Future of Free Society*, Speech Delivered at the Defence Strategy Forum (Mar. 25, 1985), in 8 *TERRORISM* 315, 321 (Yonah Alexander ed., 1986).

139. *Shultz urges “Active” Drive on Terrorism*, N.Y. TIMES, June 25, 1984, at A3.

140. George Shultz, U.S. Sec’y of State, *Terrorism and the Modern World*, Address Before the Park Avenue Synagogue in New York City (Oct. 25, 1984), printed in DEP’T ST. BULL., Dec. 1984, at 12–17 [hereinafter Shultz, *Terrorism and the Modern World*].

141. *Id.* at 16.

strikes in foreign countries.¹⁴² Although arguably effective and temporarily satisfying, the important concern was whether a policy of armed response was wise in view of its probable violation of international law. The U.S. ran the risk of incurring the massive condemnation that would accompany a policy of systematic use of armed force against terrorist attacks and the possibility of being branded an international outlaw.¹⁴³

Even as the “Reagan” and “Shultz Doctrines” were forming, Israeli action was actively providing a practical manifestation of the tenet underlying these doctrines with regular military actions to counter terrorism outside its territory—in Lebanon, Syria, and Tunisia—throughout the 1980s. The U.S. position that “[a]s a matter of U.S. policy, retaliation against terrorist attacks is a legitimate response and an expression of self-defense”¹⁴⁴ was practically expressed in 1985 by Israel. On October 1, 1985, six F-15 Israel fighter-bombers unleashed a barrage of bombs on the headquarters of the PLO in a suburb of Tunis, the capital of Tunisia, responding to alleged terrorist attacks.¹⁴⁵ Israel Defense Minister Yitzhak Rabin seemed to echo Reagan and Shultz when he stated: “[w]e decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist activities.”¹⁴⁶ The UN Security Council was swift to vigorously

142. *Id.*

143. ERNEST EVANS, *CALLING A TRUCE TO TERROR* 122 (1979).

144. *U.S. Supports Attack, Jordan and Egypt Vow to Press for Peace*, N.Y. TIMES, Oct. 2, 1985, at A1. U.S. Ambassador Walters nevertheless supported the Israeli justification for the attack in spite of the abstention:

My Government could not support the draft resolution disproportionately placing all blame for this latest round of the rising spiral of violence in the Middle East onto only one set of shoulders, while not also holding at fault those responsible for the terrorist acts which provoked it We speak of a pattern of violence, but we must be clear: it is terrorism that is the cause of this pattern, not responses to terrorist attacks [W]e recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. This is an aspect of the inherent right of self-defence recognized in the United Nations Charter. We support this principle regardless of attacker, and regardless of victim.

U.N. SCOR, 40th Sess., 2615th mtg. at 46, U.N. Doc S/PV.2615 (Oct. 4, 1985).

145. The Israeli attack by six F-15 fighter-bombers apparently left 70 men, women and children dead and more than 100 Tunisians and Palestinians wounded. *See* Donald R. Morris, *Cycle of Terrorism Will Continue with Retaliatory Strikes*, HOUS. POST, Jan. 2, 1986, at 2B.

146. *Israel Calls Bombing a Warning to Terrorists*, N.Y. TIMES, Oct. 2, 1985, at A8.

condemn the act as a flagrant violation of the UN Charter, international law, and norms of conduct.¹⁴⁷ Three days after the attack, a single session of the Security Council produced Resolution 573 (with only one abstention by the United States), which condemned the Israeli attack; demanded that Israel “refrain from perpetrating such acts of aggression or from threatening to do so;” urged member states to “dissuade Israel from resorting to such acts;” and supported Tunisia’s right to reparations.¹⁴⁸

The international community in general condemned the Israeli Tunis raid as an act of aggression and a violation of Tunisia’s sovereignty and territorial integrity.¹⁴⁹ Israel’s argument of self-defence against terrorism was dismissed.¹⁵⁰ Israel’s attack and the U.S.’s subsequent support in the face of vitriolic condemnation by most countries was symptomatic of the revolution in policy that the United States was undertaking. The United States abstained from the string of condemnations that followed every Israeli action debated in the Security Council, and began to veto consideration of those resolutions, effectively ending discussion of the matter within the Security Council.¹⁵¹ This change in U.S. reaction was not just the result of a new, hawkish conservative administration; it was also a response to the targeting of U.S. citizens and interests by state-sponsored terrorists. U.S. Ambassador Vernon Walter’s explanation of the U.S. abstention in the Security Council Resolution condemning Israel’s bombing in Tunis is instructive:

147. A Resolution condemning the attacks was swiftly passed with a vote of fourteen votes to none, with the United States abstaining. S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985).

148. *Id.*

149. See Marian Nash Leich, *U.S. Practice*, 80 A.J.I.L 151, 165–67 (1986) (discussing resort to war and armed force).

150. U.N. Doc. S/PV.2615, *supra* note 144. See, e.g., remarks made by Ambassadors Ononaiye, Golob, Kusumaatmadja, Chamorro Mora, Wasiuddin, Shihabi, Zarif, and Le Kim Chung. *Id.*

151. The United States did not cast its first veto in favor of Israel until 1972. From 1967–72, the U.S. supported or abstained on 24 resolutions, most critical of Israel. From 1973–2003, the Security Council adopted approximately 100 resolutions on the Middle East, again, most critical of Israel with the U.S. vetoing a total of 37 resolutions. Mitchell Geoffrey Bard, *Myths & Facts Online: The United Nations* available at <http://www.jewishvirtuallibrary.org/jsource/myths/mf13.html> (last visited Jan. 15, 2006). For a detailed and comprehensive analysis of voting patterns in the Security Council on resolutions affecting and/or involving Israel, see MITCHELL GEOFFREY BARD, ET AL, MYTHS AND FACTS: A CONCISE RECORD OF THE ARAB-ISRAELI CONFLICT (1992); HARRIS SCHOENBERG, MANDATE FOR TERROR: THE UNITED NATIONS AND THE PLO (1989).

We . . . recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks. This is an aspect of the inherent right of self-defense recognized in the United Nations Charter.¹⁵² Two months after the Israeli counter-terrorist attacks, the U.S. frustration with the international regime on the use of force in countering terrorism was captured clearly by Secretary of State Shultz's outburst:

It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas. International law requires no such result.¹⁵³

With these words, Shultz laid down more building blocks for the "Shultz Doctrine" and its highly controversial position advocating the use of military force not only against terrorists, but also against states that support, train, or harbor terrorists.¹⁵⁴ This Doctrine was formally fleshed out on January 15, 1986, in the Secretary's speech on terrorism at the National Defense University.¹⁵⁵ In that speech, the Secretary added: "a nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists, or to rescue its citizens, when no other means is available."¹⁵⁶ This is so, the Secretary said, even though others have "asserted that military action to retaliate or pre-empt terrorism is contrary to international law."¹⁵⁷

Worldwide opposition to the new policy was swift in coming. Surprisingly, even some senior officials in the U.S. State Department expressed reservations.¹⁵⁸ U.S. Secretary of Defense Casper Weinberger, in charge of the machinery that would be tasked with affecting the doctrine, opposed responsive military strikes that needlessly "kill women

152. Press Release No. 106, Vernon Walters, U.S. Permanent Representative to the United Nations (Oct. 4, 1985), extract reprinted in 80 A.J.I.L. 166, 166-67.

153. George Shultz, U.S. Sec'y of State, *Low-Intensity Warfare: The Challenge of Ambiguity*, Address Before the Low-Intensity Warfare Conference (Jan. 15, 1986), in 25 INT'L LEGAL MATERIALS 204, 206 (1986). Bernard Gwertzman, *Shultz Supports Armed Reprisals*, N.Y. TIMES, Jan. 16, 1986, at A1.

154. See Don Oberdorfer, *Abraham Sofaer; State's Legal Adviser Deals with Policy, Then the Law*, WASH. POST, Mar. 10, 1986, at A13.

155. Gwertzman, *Shultz Supports Armed Reprisals*, *supra* note 153.

156. *Id.*

157. *Id.*

158. See, e.g., Bernard Gwertzman, *Shultz and Weinberger Disagree on Using Force Against Libyans*, N.Y. TIMES, Jan. 17, 1986, at A1.

and children.”¹⁵⁹ Additionally, Robert Oakley, Ambassador-at-Large for Counter Terrorism, opined that the President’s Commission on Terrorism had recommended that the United States not use military force to retaliate against states supporting terrorists.¹⁶⁰ International and domestic opposition in the United States was a result of a number of difficult issues raised by the doctrine, and the difficult questions raised by the U.S.’s new policy:

[I]s the responding coercion still a use of force in self-defense against an armed “attack?” Is the responding coercion primarily pre-emptive, retaliatory, or for the purpose of imposing sanctions against a violation of international law? And if among the latter, are any of these forms of responsive coercion ever permissible?¹⁶¹

The United States was determined not to back down, and a few weeks after Shultz had fleshed out his doctrine, the Vice President’s Task Force on Combating Terrorism found: “[t]errorism has become another means of conducting foreign affairs. Such terrorists are agents whose association the state can easily deny. Use of terrorism by the country entails few risks, and constitutes strong-arm, low-budget foreign policy.”¹⁶² This statement echoed the Reagan administration’s concerns over new and unconventional challenges to U.S. foreign policy in critical areas of the world.

Though it was evident that this threat of low-intensity conflict raised a host of new legal, political, military, and moral issues, it was not long before the U.S. demonstrated that it was not overly concerned with the questions that its new policy engendered and that the “Reagan” and “Shultz Doctrines” were not just hollow rhetoric. On April 5, 1986, Le Belle discotheque in West Germany, a spot popular with off-duty American servicemen, was bombed, leaving two Americans dead and over 154 persons injured.¹⁶³ U.S. intelligence indicated Libya sponsored this terrorist attack.¹⁶⁴ President Reagan responded to this threat by bombing military targets in Tripoli and Benghazi, Libya on April 14,

159. See *Task Force Supports U.S. Policy on Global Terrorism, Official Says*, HOUS. POST, Mar. 2, 1986, at 13A.

160. See *id.*

161. Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 716 (1986).

162. Public Report of the Vice President’s Task Force on Combating Terrorism, Feb. 1986 at 2, available at http://www.population-security.org/bush_and_terror.pdf.

163. *2d U.S. Soldier Dies from Bombing of Disco*, CHI. TRIB., June 8, 1986, at C8.

164. *U.S. Exercises Right of Self-Defence Against Libyan Terrorism*, 86 DEP’T ST. BULL. 1, 8 (June 1986).

1986.¹⁶⁵ The attack was met with condemnation.¹⁶⁶ Critics claimed the time lapse and proportionality of the attacks, as well as the choice of targets undermined the primary justification of self-defence.¹⁶⁷ As Major Phillip A. Seymour notes:

Although President Reagan cited self-defense under Article 51 of the UN Charter as the legal basis for the air strike, his explanation implicitly included retaliation (i.e., reprisal) as an additional justification In deciding to use military force against Libya, deterrence certainly was a major, if not the primary, consideration This interpretation is supported by then-Vice President George Bush's comments a month prior to the Libyan raid when he stated that American policy in combating terrorism would be one of a willingness to "retaliate."¹⁶⁸

The Tripoli bombing was far from a one off event; it was part of a crystallizing U.S. policy. This was despite the fact that international law relating to self-defence did not accord with the American viewpoint. The United States seemed determined to co-opt the use of military force against terrorism within the infirm concept of anticipatory self-defence.

Two years later after the air raid on Tripoli, on December 21, 1988, while cruising at an altitude of 31,000 feet, Pan American Flight 103 ("Flight 103") exploded in the skies over Lockerbie, Scotland.¹⁶⁹ Two hundred fifty-eight passengers and crew died in the explosion; another seventeen townspeople died on the ground as a result of the fiery debris.¹⁷⁰ President Reagan ordered an inquiry into the circumstances of the Flight 103 disaster and directed the preparation of a report intended to be "a comprehensive study and appraisal of practices and policy

165. Bernard Weintraub, *U.S. Calls Libya Raid a Success; "Choice is Theirs," Reagan Says; Moscow Cancels Scultz Talks*, N.Y. TIMES, Apr. 16, 1986, at A1.

166. See William F. Buckley, *Libya: Reactions*, NAT'L REV., May 23, 1986, at 54; George J. Church, *U.S. Bombers Strike at Libya's Author of Terrorism, Dividing Europe and Threatening a Rash of Retaliations*, TIME, Apr. 28, 1986, at 16; Steve Holland, *West Talked Tough, but Terrorists Weren't Listening; Attacks in 1986 Took a Bloody Toll Despite Threats and Raid on Libya*, SAN JOSE MERCURY NEWS (Cal.), Dec. 17, 1986, at 2A; William V. Shannon, *Thatcher's Reservations*, BOSTON GLOBE, June 10, 1987, at A21. See also Sir John Thompson, U.N. SCOR, 41st Sess., 2679th mtg., at 27, U.N. Doc. S/PV.2679 (1986) (Prime Minister Thatcher primarily concerned with proportionality).

167. See Kelly, *supra* note 87, at 17.

168. Seymour, *supra* note 103, at 223.

169. Russell Watson, *An Explosion in the Sky*, NEWSWEEK, Jan. 2, 1989, at 16.

170. *Id.* at 17.

options with respect to preventing terrorist acts involving aviation.”¹⁷¹ Among the recommendations of the President’s Commission were “active measures—pre-emptive or retaliatory, direct or covert—against a series of targets in countries well-known to have engaged in state-sponsored terrorism.”¹⁷² These recommendations reinforced the vitality of the “Reagan” and “Shultz Doctrines” as part of the U.S. policy of pre-emption. It was, however, not until the end of the Cold War that the United States had the opportunity to fully pursue this new national policy.

IV. POST-COLD WAR: PROACTIVE ACTION TO COUNTER TERRORISM

In 1993, following the discovery of an Iraqi plot to assassinate then U.S. President George Bush Sr. on a visit to Kuwait, the United States fired twenty-three cruise missiles at Iraqi intelligence targets within Iraq.¹⁷³ Though the attack came after those involved in the plot in Kuwait had been apprehended and then President Bush had completed his planned visit, the justification presented to Congress by the President was that the action was within the right of self-defence under Article 51.¹⁷⁴

The next significant case of American action to counter terrorism through military action came on August 7, 1998 when U.S. Embassies in Kenya and Tanzania were bombed, killing at least 252 (including 12 U.S. citizens) and injuring more than 5,000. Secretary of State Albright pledged to “use all means at our disposal to track down and punish” those responsible.¹⁷⁵ On August 20, 1998, the United States responded by launching seventy-nine Tomahawk cruise missiles from U.S. warships.¹⁷⁶ This attack was directed at an Osama bin Laden bankrolled Al Qaeda terrorist training camp in Afghanistan and a Sudanese pharmaceutical

171. Exec. Order No. 32,629, 54 Fed. Reg. 12,686 (Aug. 4, 1989).

172. Report of the President’s Commission on Aviation Security and Terrorism 125 (May 25, 1990).

173. Jack M. Beard, *Military Action against Terrorists Under International Law: America’s New War on Terror: The Case for Self-Defense under International Law*, 25 HARV. J.L. & PUB. POL’Y 559, 561 (2002).

174. Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 PUB. PAPERS 940 (June 28, 1993), available at <http://www.gpoaccess.gov/pubpapers/>.

175. Raphael F. Perl, *Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?* CRS REPORT TO CONGRESS, Sept. 1, 1998, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/crs19980901.pdf> (last visited January 30, 2005).

176. W. Michael Reisman, *Legal Responses to International Terrorism*, 22 HOUS. J. INT’L L. 3, 47 (1999).

plant¹⁷⁷ that the Clinton Administration suspected was producing chemical weapons components with bin Laden's funding.¹⁷⁸

The American justification for their military action was based on both reprisal and anticipatory self-defence.¹⁷⁹ In his address to the nation, then U.S. President Bill Clinton told the American people that the strikes against the "terrorist-related facilities in Afghanistan and Sudan" were necessary because of the "imminent threat they presented to [U.S.] national security."¹⁸⁰ Thus the Clinton Administration, like the Reagan Administration before it, justified its response to terrorist strikes by claiming self-defence. In a report sent to Congress, then President Clinton claimed that the strikes were justified under the "inherent right of self-defense consistent with Article 51 . . ." and at the same time were intended to "prevent and deter additional attacks . . ."¹⁸¹ Moreover,

177. Many critics later raised doubts about the quality of the evidence relied upon by the Clinton Administration in its decision to strike the Sudanese pharmaceutical plant. For a discussion of such doubts, see Sara N. Scheideman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 257-60 (2000).

178. See Maureen F. Brennan, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 LA. L. REV. 1195 (1999). It should be noted that Clinton's reasons for striking Afghanistan and Sudan (in an effort to reach bin Laden) are analogous to Reagan's reasons for attacking Libya (in an effort to reach Qadhafi). See O'Brien, *supra* note 76, at 463-65 (suggesting that the Reagan administration attacked Libya in 1986 as a reprisal for Qadhafi's suspected support of terrorist attacks on U.S. targets). As Brennan explains:

[Though a]dmitting that the bin Laden terrorist "network" was not sponsored by any state, Clinton outlined four reasons for the action: 1) overwhelming evidence showed bin Laden "played the key role in the embassy bombings"; 2) his network had been responsible for past terrorist attacks against Americans; 3) officials had "compelling information" that bin Laden was planning future attacks and 4) his organization was attempting to obtain chemical weapons. In a second statement, President Clinton carefully characterized the strikes as necessary to defend against the threat of "imminent" and "immediate" future attacks, and not as retribution or punishment.

See Brennan, *supra* at 1195-96.

179. Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 20, 1998), available at <http://www.gpoaccess.gov/pubpapers/>.

180. Address to the Nation on Military Action against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 20, 1998), available at <http://www.gpoaccess.gov/pubpapers/>.

181. Letter to Congressional Leaders Reporting on Military Action against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 21, 1998), available at <http://www.gpoaccess.gov/pubpapers/>.

President Clinton invoked the traditional *Caroline* requirements of imminence, necessity, and proportionality, claiming that all three had been met.¹⁸² Indeed, when Bill Richardson, then U.S. Ambassador to the United Nations, wrote the letter notifying the UN Security Council of the U.S. missile attacks on Afghanistan and Sudan, he clearly laid out the U.S. arguments in support of the attacks in the familiar language of self-defence.¹⁸³ Clinton's Secretary of Defense, William S. Cohen, went further by warning terrorist organizations that the United States would not limit itself to "passive defense" when faced with choosing either to "fight or fold in pathetic cowardice"¹⁸⁴

Many of the same critiques of the Reagan Administration's bombing of Libya in 1986 were lodged at the Clinton Administration's cruise missile attacks in Afghanistan and Sudan, and many observers concluded that the cruise missile attacks violated the rules of international law.¹⁸⁵ Indeed, one commentator suggested that the Clinton Administration foresaw this criticism: "The care with which . . . President [Clinton] and U.S. officials characterized the justification for the missile attacks

182. *See id.* at 1464.

183. Ambassador Richardson's letter to the President of the UN Security Council, dated August 20, 1998, stated in part:

These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin laden organization. That organization has issued a series of blatant warnings that 'strikes will continue from everywhere' against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.

Reisman, *supra* note 176, at 48–49 (quoting Letter from Bill Richardson, the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council of the United Nations, U.N. Doc. S/1998/780 (Aug. 20, 1998)).

184. Scheideman, *supra* note 177, at 250.

185. *See, e.g.,* Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 557 (1999) ("the August 20 missile strikes represent the assertion of imperial might and arrogance [by the United States] in opposition to international law").

show[ed] their concern that the actions of the United States could be perceived as a violation of international law.”¹⁸⁶

In characterizing the cruise missile strikes as “retaliation rather than legitimate self-defense,”¹⁸⁷ critics took issue with the fact that the targets of the attacks in both Afghanistan and Sudan had no direct link to any “imminent” attack against the United States.¹⁸⁸ Furthermore, it was unlikely that the destruction of the terrorist training camps in Afghanistan, and the leveling of the pharmaceutical plant in Sudan, met the proportionality requirement regulating uses of force in self-defence.¹⁸⁹ Thus, no matter how the Clinton Administration chose to justify the attacks—whether as retaliation or as self-defence—the equation simply did not add up to an acceptable use of force under international law.¹⁹⁰ Most notably,

this is the first time the U.S. has given such primary and public prominence to the *preemptive*, not just retaliatory, nature and motive of a military strike against a terrorist organization or network. This may be signaling a more proactive and global counter-terrorism policy, less constrained in targeting terrorists, their bases, or infrastructure.¹⁹¹

In a warning to terrorist groups who may seek weapons of mass destruction, President Clinton cited past efforts by the Al Qaeda terrorist network to acquire chemical and other dangerous weapons as one of the reasons for the U.S. attack. The Clinton Administration had not only declared war on terror, but had also laid down the framework which the George W. Bush Administration would take to the next level in the aftermath of the September 11th attacks.

A. September 11, 2001: Crossing the Rubicon?

In a coordinated operation, whose breadth and audacity stunned the world, terrorists believed to be part of the Al Qaeda network carried out the worst terrorist attack in modern times, targeting various symbols of

186. See Brennan, *supra* note 178, at 1197.

187. *Id.* at 1210.

188. *Id.* at 1209–10.

189. See Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan* 74 TUL. L. REV. 1067, 1095 (2000).

190. *Id.* at 1096. (“If the purpose of the strikes was retaliatory, it contravened conventional international law. If the strikes were motivated by self-defence, it appears that the necessary elements [an armed attack, necessity, immediacy, and proportionality] were not present.”).

191. Perl, *supra* note 175.

U.S. supremacy and leaving over 3,000 people dead.¹⁹² The day after the attacks, the UN Security Council tersely stated that “[t]he magnitude of [the] acts goes beyond terrorism as we have known it so far We therefore think that new definitions, terms and strategies have to be developed for the new realities.”¹⁹³ On the same day, the UN General Assembly, at its first plenary meeting of the year, adopted Resolution 56/1 without a vote, urgently calling for international cooperation to prevent and eradicate acts of terrorism and stressing that those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of such acts would be held accountable.¹⁹⁴

Nine days later, on September 20, 2001, President George W. Bush pledged: “Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”¹⁹⁵ The UN Security Council agreed with President Bush on the urgent need to fight terrorism.¹⁹⁶ In addition, every major regional organization, including the Arab League, agreed that the September 11th hijackings and attacks on the World Trade Center and Pentagon were acts of terrorism in violation of international law.¹⁹⁷

192. Four commercial aircraft were hijacked, two of them were flown into the twin towers of the World Trade Center in New York City, causing both buildings to collapse. A third aircraft crashed into the Pentagon building in Arlington, Virginia, which houses the headquarters of the U.S. Department of Defence and the U.S. armed forces. The fourth aircraft crashed near Somerset, Pennsylvania. See RAPHAEL PERL, CONG. RESEARCH SERV., ISSUE BRIEF FOR CONGRESS: TERRORISM, THE FUTURE, AND U.S. FOREIGN POLICY 1, 3 (Mar. 6, 2003), available at <http://www.cnie.org/nle/crsreports> (order code IB95112).

193. Valeriy Kuchinsky, Ukrainian Representative to the United Nations Security Council, U.N. SCOR, 56th Sess., 4370th mtg. at 3–4, U.N. Doc. S/PV.4370 (2001).

194. G.A. Res. 56/1, ¶ 4, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/56/49 (Sept. 12, 2001).

195. Address to a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001), available at <http://www.gpoaccess.gov/pubpapers/> [hereinafter Response].

196. S.C. Res. 1368, ¶ 4, 56th Sess., U.N. Doc. S/RES/1368 (Sept. 12, 2001).

197. The UN General Assembly condemned the attacks as illegal and criminal acts of terrorism. G.A. Res. 56/160, ¶ 3, U.N. GOAR, 56th Sess., 88th plen. mtg., Agenda Item 119b, U.N. Doc. A/RES/56/160 (Dec. 19, 2001). The Security Council condemned the attacks “as a threat to international peace and security.” S.C. Res. 1368, *supra* note 196. The Northern Atlantic Treaty Organization, European Union, Organization of American States, Association of South East Asian Nations, Organization of African Unity, and Arab League also agreed that the hijacking of American passenger airliners by al Qaeda terrorists was criminal. See e.g., Colin Powell, *A Long, Hard Campaign*, NEWSWEEK, Oct. 15, 2001, at 53.

UN Security Resolution 1368, passed a day after the September 11th attacks, unequivocally condemned the attacks, calling on all states to “work together urgently to bring to justice the perpetrators, organizers and sponsors”¹⁹⁸ of the attacks, and thus reaffirmed the inherent right of self-defence in accordance with Article 51 of the UN Charter.¹⁹⁹ The U.S. right of self-defence was often mentioned in the same breath as the terrorist attacks. “Given the circumstances, this affirmation was significant: it implied that the attacks triggered the right even if, at the time of adoption, the UN Security Council knew almost nothing about who or what had launched them.”²⁰⁰

The shift in the law of pre-emption was evident. The international response to retaliatory military strikes made by Israel against Tunisia in 1985 had been strongly condemnatory, despite Israel’s argument that Tunisia’s acts of harboring, supplying, and assisting non-state actors who they claimed committed terrorist acts in Israel should be sufficient to attribute the acts to the state.²⁰¹ Notwithstanding Israel’s claims of self-defence, in Resolution 573 the Security Council condemned the 1985 air attack on PLO headquarters as an “act of armed aggression . . . in flagrant violation of the Charter of the United Nations, international law and norms of conduct.”²⁰² The fact that Resolution 573 condemned Israel’s attack as contrary to the UN Charter implied that no justification based on self-defence was recognized. Subsequently, the claim of self-defence was also rejected by states as justification for the U.S. bombing of Tripoli and the 1993 bombing of the Iraqi Secret Service.²⁰³ The international response to the September 11th attack was an important departure from the reasoning in Resolution 573.

Amidst a swell of international support, the United States quickly identified the Al Qaeda terrorist network, with the support of the Taliban

198. S.C. Res. 1368, *supra* note 196, at ¶ 3.

199. *Id.* at preamble.

200. Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism since September 11th*, 35 CORNELL INT’L L. J. 475, 481 (2001).

201. Admittedly, the situation differs in exact factual circumstances from the September 11th attacks, but does reflect the general stance of the international community prior to that event. The Security Council was obviously faced with a situation that profoundly differs from the previous incidents where there were limited casualties.

202. S.C. Res. 573 U.N. Doc. S/RES/573 (Oct. 4, 1985). *See generally* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT’L L. 151, 165–67 (1986) (discussing the UN Security Council’s condemnation of Israel’s air attack).

203. Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT’L & COMP. L.Q. 401, 407 (2002).

government, as the perpetrators of the September 11th attacks.²⁰⁴ This was coupled with the recognition that the modern threat to U.S. power and security rises not from one particular organization, but from the growing threat of international terrorism, particularly terrorism that enjoys active or tacit state support.²⁰⁵ The Security Council's resolutions following the U.S. attacks on Afghanistan explicitly mention the right of individual and collective self-defence and do not contain any condemnation of the military strikes.²⁰⁶

“Operation Enduring Freedom” in Afghanistan signaled a renewed determination on the part of the United States to combat international terrorism and states that sponsor it; the operation laid fertile ground for debate on the strategic or legal approach that states should adopt in responding to such threats. Strategically, the U.S. military action was based on the “Reagan Doctrine” of swift and effective retribution against terrorist organizations that strike U.S. interests,²⁰⁷ as well as the “Shultz Doctrine” of active military engagement of terrorists and states that sponsor or support them. Though legally, the U.S. justified “Operation Enduring Freedom” under the established doctrine of self-defence,²⁰⁸ talk from Washington suggested pre-emptive self-defence.

Essentially, the United States 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. As the United States moved against Afghanistan, the highest levels of military, legal, and diplomatic policymakers in Washington began debating how the country should confront states that sponsor terrorism and proliferate weapons of mass destruction. The immediate focus of the debate was U.S. policy towards

204. See Response, *supra* note 195, at 1140 (“The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as Al Qaeda.”).

205. 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.” Response, *supra* note 195, at 1141–42.

206. See, e.g., S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452nd mtg., U.N. Doc. S/RES/1390 (2002); S.C. Res. 1401, U.N. SCOR, 57th Sess., 4501st mtg., U.N. Doc. S/RES/1401 (2002).

207. See Crelinsten & Schmid, *supra* note 15, at 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.

208. For a discussion of the international legal validity of U.S. military action “Operation Enduring Freedom” in Afghanistan, see Beard, *supra* note 173, at 559.

Iraq. Soon after the military action in Afghanistan, President Bush provoked heated reaction with his “Axis of Evil” speech²⁰⁹ and its strong overtones of the use of unilateral military action by the United States against countries that support terror, and an intimation of expanding the theatre of operations beyond Afghanistan without Security Council approval.²¹⁰

B. The “Bush Doctrine”

Though the genesis of the “Bush Doctrine” can be traced to the immediate aftermath of the September 11th attacks,²¹¹ it was five months after the “Axis of Evil” speech, on June 1, 2001, that President Bush delivered the fullest exposition of the doctrine in a speech at West Point.²¹² Warning that the United States faced “a threat with no precedent” through the proliferation of weapons of mass destruction and the emergence of global terrorism, President Bush stated that the traditional strategies of deterrence and containment were no longer sufficient.²¹³ Because of the new threats that the United States faced, 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 devastating strikes.²¹⁴ Under these circumstances, he concluded that “[i]f we wait for threats to fully materialize, we will have waited too long.”²¹⁵ 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.”²¹⁶ In the same address, he went on to tell future U.S. military officers at West Point that “[t]he 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.”²¹⁷ That doctrine carried an explicit warning for Iraq and other

209. George W. Bush, President of the United States, 2002 State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

210. *See id.*

211. Nine days after the attacks, U.S. President George Bush announced the new aggressive national policy towards terrorism. *See Response, supra* note 195, at 1141–42.

212. *See West Point Commencement Address, supra* note 16.

213. *See id.*

214. *See id.*

215. *Id.*

216. *Id.*

217. *Id.*

states that pursue weapons of mass destruction: if a hostile regime pursues the acquisition or development of chemical, biological, or nuclear weapons, the decisive use of pre-emptive military force is a legitimate response.

President Bush spent months building the case for war against Iraq, however his justifications were often confusing and long on rhetoric but short on substance. His primary argument, however, invoked a sweeping new foreign policy based on the right of the U.S. to pre-emptive self-defence, the need to punish Iraq for not complying with the Security Council resolutions to which it had agreed in exchange for an end to the Gulf War, and the need for massive retaliation.²¹⁸ President Bush seemed unsure of the exact contours of his doctrine, tying up pre-emptive strikes with retaliation (which the author avers falls under the rubric of peace time reprisal).

Deterrence—the *promise of massive retaliation against nations*—means nothing against shadowy terrorist networks with no nation or citizen to defend Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons or missiles or secretly provide them to terrorist allies *If we wait for threats to fully materialize, we will have waited for too long* In the world we have entered, the only path to safety is the path of action. And this nation will act.²¹⁹

Though the more modest argument of retaliation may have been the strongest, the U.S. response was increasingly articulated more firmly in favor of anticipatory self-defence. The National Security Strategy document, issued by President Bush in September 2002, asserted:

For centuries, international law recognized 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. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack

218. President George W. Bush, Remarks by the President in Address to the United Nations General Assembly (Sept. 12, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>); President George W. Bush, Press Conference of the President (Apr. 123, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/04/print/40040413-20.html>).

219. NATIONAL SECURITY STRATEGY, *supra* note 16, at 15 (emphasis added).

The U.S. 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 U.S. will, if necessary, act pre-emptively.²²⁰

The National Security Strategy document referred to the longstanding policy as an option, not a principle.²²¹ Interestingly though, the UN Charter, the centre point of the legal framework on the international use of force, was not mentioned, and no attempt was made to anchor the formal articulation of the option within the umbrella of the Charter.

Despite the United States' maneuverings while formulating a post-September 11th security strategy, it had Iraq firmly in its sights. The United States and its allies continued to put forward what even then was regarded by many as faulty intelligence,²²² in an attempt to link Iraq to the September 11th attacks.²²³ Before the war, despite international and

220. *See id.*

221. *Id.* at 15.

222. Dana Priest, *U.S. Not Claiming Iraqi Link to Terror*, WASH. POST, Sept. 10, 2002, at A1 (reporting that CIA analysts are unable to validate allegations that the Iraqi government has ties to Al Qaeda); Walter Pincus, *No Link Between Hijacker, Iraq Found, U.S. Says*, WASH. POST, May 1, 2002, at A9; KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* xxi–xxiii (2002); *see also* JOHN KAMPFNER, *BLAIR'S WARS* (2003); *No 10 Denies Straw Had War Doubts*, GUARDIAN (London), Sept. 15, 2003, available at http://www.guardian.co.uk/uk_news/story/0,3604,1042511,00.html; Matthew Tempest, *Hoon Regrets "Misunderstanding"*, GUARDIAN (London), Sept. 11, 2003, available at <http://politics.guardian.co.uk/iraq/story/0,12956,1039958,00.html> (alleging that documents used to bolster the United States' claims that Iraq presented a nuclear threat were crudely-forged documents relating to Iraqi attempts to buy uranium from Niger).

223. Secretary of State Colin Powell admitted that he was unaware of any "smoking gun" linking Iraq to the September 11th attacks. Notwithstanding Powell's admission, President Bush and other senior U.S. government officials continued to rally around questionable intelligence. They sheepishly admitted months later, after the war in Iraq was officially over, what most states suspected all along—there was no link between Iraq and the September 11th attacks. Bill Keller, *The World According to Colin Powell*, N. Y. TIMES MAG. Nov. 25, 2001, at 61. On September 17, 2003, President Bush stated that there was no evidence that Saddam Hussein was involved in the terrorist attacks of September 11, 2001, disputing an idea held by many Americans. This came a day after his hawkish Defence Secretary, Donald Rumsfeld, said he had not seen any evidence that Saddam was involved in the attacks. The National Security Adviser came out in support of the Bush and Rumsfeld sentiments, saying "[w]e have never claimed that Saddam

domestic skepticism, the hawkish Bush Administration had already decided that the tragic events of September 11th had altered the context of the United States-Iraq confrontation.²²⁴ The resulting U.S. shift to an aggressive Iraq policy forced it to advance rather dubious legal justifications for a full-scale invasion. Relying on the multifaceted “Bush Doctrine,” the policy advocates pre-emptive or preventive strikes against terrorists, states that support terrorists, and hostile states possessing weapons of mass destruction.

The U.S.’s new aggressive anti-terror campaign began with multilateral condemnation of terrorism. The United States and the United Kingdom successfully encouraged the UN Security Council to pass Resolution 1441,²²⁵ which gave Iraq a final opportunity to comply with its disarmament obligations through weapons inspections. Impatient with the slow pace of the UN weapon’s inspection process, the United States soon assumed evidence of Iraqi involvement with terrorist activity and that Iraqi capacity for weapons of mass destruction persisted.²²⁶

The U.S. national security officials were adamant in their commitment to act fast and to act alone and increasingly balked at UN control over the use of force against rogue states that present perceived security threats.²²⁷ The end-game of this debate was cemented by President Bush when he announced that “the policy of [the U.S.] government is the removal of Saddam [Hussein].”²²⁸ This announcement effectively cut off all future multilateral activities with the UN.

Possibly, in light of the dubious intelligence linking Iraq to the September 11th attacks, the United States cited Iraq’s capacity to use

Hussein had either direction or control of 9/11.” Greg Miller, *No Proof Connects Iraq to 9/11, Bush Says*, L.A. TIMES, Sept. 18, 2003, available at <http://www.globalpolicy.org/security/issues/iraq/justify/2003/0918proof.htm>.

224. POLLACK, *supra* note 222, at xxi–xxiii.

225. S.C. Res. 1441, 1, 13, U.N. Doc. S/Res/1441 (Nov. 8, 2002). The UN Security Council unanimously passed Resolution 1441. The resolution declares 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 non-compliance.

226. Much debate abounds about the credibility of the U.S. 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.

227. See generally NATIONAL SECURITY STRATEGY, *supra* note 16.

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

weapons of mass destruction as an additional justification for self-defensive anticipatory intervention against Iraq.²²⁹ Self-defence, it was suggested, also fueled the need for internal “regime change” in Iraq and U.S. support of such change.²³⁰ In March 2003, without waiting for the UN Security Council to declare Iraq in breach of Resolution 1441 and, thus, a threat to international peace and security for which the Council could explicitly authorize military intervention,²³¹ the United States and its allies proceeded with military action against Iraq premised on pre-emptive or anticipatory self-defence. The technologically superior U.S. army waged a highly-organized, technical “shock and awe” campaign that impressed an otherwise angry international community, and drove Saddam Hussein out of power.²³² The war against Iraq was to be the defining moment in the evolution of the “Bush Doctrine,” marking a growing coherence and confidence in the strategy of “offensive defense.”

Despite the United States’ focus on pre-emptive intervention, the action against Iraq and the United States’ subsequent occupation was undertaken against a background of vehement opposition from a large section of the international community, including some major powers.²³³ If Afghanistan had set the stage for the evolution of anticipatory self-defence, the over breadth of the U.S. action in Iraq dismantled it.

The regime on force does not support the operationalisation of pre-emptive self-defence against Iraq as it did in Afghanistan, and the circumstances surrounding U.S. intervention in Iraq differ fundamentally from those in Afghanistan. The United States did not conclusively prove

229. Traditionally, anticipatory or pre-emptive self-defence has not been favoured under international law. See Byers, *supra* note 203, at 410. However, the notion of pre-emptive “counter-proliferation” forms an important part of the new U.S. national security strategy. See NATIONAL SECURITY STRATEGY, *supra* note 16.

230. 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*, N.Y. TIMES, Sept. 26, 2002, at A14; Julia Preston & Eric Schmitt, *Threats and Responses: The UN Diplomacy; U.S.-French Split on Iraq Deepens*, N.Y. 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).

231. See U.N. Charter arts. 39, 42. A plain reading of Resolution 1441, suggests that there would be another UN 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.

232. Maogoto, *Rushing to Break the Law*, *supra* note 31 at 17.

233. *Id.* at 11.

that Al Qaeda maintained Iraqi training bases or that it received financial, logistic, or military support from the Iraqi government.²³⁴ The strategic and legal calculus for action in Iraq did not compare favorably to that which motivated U.S. action in Afghanistan in late 2001. Unlike the questionable connection between Iraq and the September 11th attacks, there were clear ties between the terrorists involved in the U.S. attacks and the government of Afghanistan.²³⁵

Not surprisingly, military action against Iraq has split the international community and inflamed the world's major powers, as it raises both policy and legal matters. Considering that the use of armed force can only be justified under the international law regime 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 as supporters and sponsors of terrorist activities, but have not physically engaged in an act of aggression against the United States?²³⁶ 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. However, the aggressive "Bush Doctrine" is disturbing because an old problem in contemporary international law (anticipatory self-defence) is being touted as a newly appropriate vehicle in the war against international terrorism, despite the prevailing view in the international community that the "armed attack" requirement in Article 51 of the UN Charter superseded any pre-existing right of anticipatory action.

The old truism that "international law is not a suicide pact," may be forceful in "an age of uniquely destructive weaponry,"²³⁷ however, "strategically, there is little precedent for a major U.S. military offensive against a state that has not proximately used force against [the United States]."²³⁸ While a number of legitimate justifications might permit the use of force, the international legal system does not currently provide a legal outlet for such force.²³⁹ "An international law doctrine, under which

234. *Id.* at 9.

235. *Id.* at 11.

236. See generally Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror,"* 4S CHOLAR 209 (2001-02).

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

238. Maogoto, *New Frontiers, Old Problems: The War on Terror*, *supra* note 11, at 14.

239. *Id.*

the [United States] could execute the military campaign it successfully launched against Iraq, does not currently exist. That lacuna was seemingly plugged with the 'Bush Doctrine,' that advocates pre-emptive strikes against rogue states and/or entities involved in terrorism."²⁴⁰ The Doctrine's reliance on the premise of pre-emptive self-defence resurrects the idea of a "right of self-preservation" that fell into disuse in the early part of the twentieth century with the prohibition of war and the legal demarcation of the limits of the right to self-defence outlined in the UN Charter.²⁴¹

C. Reflections on the Use of Force as a Counter-Terrorism Measure in Light of the UN Charter

1. Armed Attack and Self-Defence

Contrary to the intentions of the authors of the UN Charter, the system of collective security has been of little practical significance, and state aggression continues to be determined by the unilateral use of force by states.²⁴² Commentators argue that, because the customary right of self-defence includes action beyond armed attack, military force may be legally available as an option against terrorists, even if an armed attack has not occurred.

[a]lthough Article 51 refers to the right of self-defense "if an armed attack occurs," the United Kingdom and the United States have consistently maintained that the right of self-defense also applies when an armed attack has not yet taken place but is imminent. This view of self-defense can be traced back to the famous Caroline incident of 1837.²⁴³

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.²⁴⁴ The sentiments of these commentators are also reflected by some major states.²⁴⁵ In support of such an expansive

240. *Id.*

241. *See id.*

242. *See* Schachter, *The Right of States to Use Armed Force*, *supra* note 27, at 1620.

243. Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaeda and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 12 (2003).

244. *See* James P. Terry, *Countering State-Sponsored Terrorism: A Law-Policy Analysis*, 36 NAVAL L. REV. 159, 170-71 (1986); Schachter, *supra* note 27, at 1633-34.

245. *See* Maogoto, *New Frontiers, Old Problems: The War on Terror*, *supra* note 11, at 30-32 ("... Israel and the U.S. have been particularly notorious in seeking to rely upon the concept of anticipatory self-defence on numerous occasions ...").

interpretation of “armed attack,” certain international legal scholars “believe that state sponsorship and support of international terrorists constitutes a use of force contemplated by Article 2(4).”²⁴⁶ This is not an entirely idle argument considering that the scope and content of the prohibition of the use of force in contemporary international law cannot be determined by an interpretation of Article 2(4) alone. Rather, the provision must be read in context with Articles 39, 51, and 53. These articles contain a number of terms that, though related to one another, differ considerably in their meaning. Thus notions such as “use or threat of force,” “threat to the peace,” “breach of the peace,” “act of aggression,” “armed attack” and “aggressive policy” are used but do not receive any further explanation in the Charter.²⁴⁷ Neither legal writing nor state practice has clarified these terms beyond doubt. Nor have attempts within the framework of the United Nations led to a satisfactory interpretation. Therefore, there is still no sound basis for redefining the Charter’s prohibition of the use of force.

State practice (albeit restricted to only a few states, notably the United States and Israel) seems to support the view that terrorist bombings may constitute an armed attack justifying self-defence under Article 51. For example, the United States justified its cruise missile attack against Sudan and Afghanistan following the 1998 terrorist bombings of the U.S. embassies in Tanzania and Kenya as an exercise of self-defence.²⁴⁸ The United States has considered terrorist bombings to be armed attacks for some time and has accordingly justified several U.S. military actions against states that have supported terrorists.²⁴⁹

It is significant that the Security Council characterized the terrorist acts as “armed attacks.”

In the aftermath of the events of September 11, 2001, it is also necessary to ask whether the concept of “armed attack” in Article 51 of the Charter is capable of including a terrorist attack There is, however, no a priori reason why the term should be so confined. There

246. See RICHARD ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* 113 (1989).

247. See U.N. Charter art. 2, para. 4, arts. 39, 51, 53.

248. See Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter*, 43 *HARV. INT’L L.J.* 41, 49–50 (2002).

249. Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 46 (1989); see also Letter Dated April 14, 1986 From Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc S/17990 (1986).

is no doubt that terrorist acts by a state can constitute an armed attack and thereby justify a military response. The UN General Assembly included certain types of terrorist activity committed by states in its definition of aggression in 1974. Similarly, the International Court of Justice, in its judgment in the *Nicaragua* case in 1986, considered that covert military action by a state could be classified as an armed attack if it was of sufficient gravity. The level of violence employed on September 11, 2001 undoubtedly reached that level of gravity.²⁵⁰

This view was expressly affirmed by other international bodies including NATO and the OAS.²⁵¹ This characterization may lead one to conclude that:

The international reaction to the events of September 11, 2001 confirms the commonsense view that the concept of armed attack is not limited to state acts. The UN Security Council, in its resolutions 1368 and 1373 (2001), adopted in the immediate aftermath of the attacks, expressly recognized the right of self-defense in terms that could only mean it considered that terrorist attacks constituted armed attacks for the purposes of Article 51 of the Charter, since it was already likely, when these resolutions were adopted, that the attacks were the work of a terrorist organization rather than a state.²⁵²

By recognizing the “inherent right of individual or collective self-defence” in the preambles of Resolution 1368 and Resolution 1373, the Security Council acknowledged that self-defence motivated the military strikes against the Taliban in 2001.²⁵³

Nothing in the language of Article 39 or the rest of the Charter suggests that only threats emanating from states can fall within its scope. In recent years, the Security Council has had no hesitation in treating acts

250. Greenwood, *supra* note 243, at 16–17.

251. North Atlantic Council, Statement on Collective Self Defense (Sept. 12, 2001), *available at* http://usinfo.state.gov/is/international_security/terrorism/sept_11/sept_11_archive/statement_by_north_atlantic_council_on_collective_self-defense.html (last visited Jan. 27, 2006). The Foreign Ministers of the Organization of American States, meeting in consultation, likewise invoked the 1947 Inter-American Treaty of Reciprocal Assistance in declaring that “these terrorist attacks against the United States of America are attacks against all American States.” Terrorist Threat to the Americas, OAS RC.24/Res.1/01 ¶ 1, OEA/Ser.F/II.24 (Sept. 21, 2001), *available at* <http://www.oas.org/OASpage/crisis/rc.24e.htm> (last visited Jan. 27, 2006).

252. Greenwood, *supra* note 243, at 17.

253. See S.C. Res. 1368, *supra* note 196; G.A. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (“reaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368”).

of international terrorism, whether or not “state-sponsored,” as threats to the peace for the purposes of Chapter VII of the Charter. Thus, even before September 11, 2001, the Council had characterized as a threat to international peace and security Libyan support for terrorism²⁵⁴

The main question is how the events of September 11th affect the interpretation of the “armed attack” requirement under the UN Charter. Despite the assertion above, in the author’s view, the Security Council’s statement implies that the difficult question of whether the terrorist attacks constituted “armed attacks” depends on interpretation. As this author has noted,

Resolution 1368 is ambiguous on the issue. In its preamble, Resolution 1368 “recogni[s]es the inherent right of individual or collective self-defense in accordance with the Charter,” but in the operative part of the resolution describes the attacks as “terrorist attacks” (not armed attacks) that “represent a threat to international peace and security.” In summary, Resolution 1368 the resolution [sic] does not explicitly recognise that the right of self-defense applies in relation to any parties as a consequence of the September 11 attacks.²⁵⁵

Even if the right of self-defence extends beyond the “armed attack” of Article 51, serious hurdles must be overcome before a traditional theory of self-defence 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.²⁵⁶ Some argue that even if the right of self-defence extends beyond the “armed attack” requirement of Article 51, the UN Charter would not permit the use of force to punish an aggressor

254. Greenwood, *supra* note 243, at 19.

255. Jackson Maogoto, *War on the Enemy: Self-Defense and State-Sponsored Terrorism* 4 MELB. J. INT’L L. 406, 434 (2003). By “recognizing the inherent right of individual or collective self-defense in accordance with the Charter,” the preambular paragraph of Resolution 1368 appeared to imply that the terrorist acts in New York, Washington, and Pennsylvania represented an “armed attack” within the meaning of Article 51 of the UN Charter. A similar preambular paragraph was also included in Resolution 1373. Resolution 1373, *supra* note 253.

256. Terry, *supra* note 244, at 171. In his article, Terry makes the point that, given the rapid delivery capabilities of terrorist organisations, it is unrealistic to require that a state wait until an attack is imminent before responding. 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, *supra* note 76, at 450–51.

after a threat had passed, nor permit the use of force to deter a less than imminent threat.²⁵⁷ In any case,

if past terrorist actions by a group are too remote in time, the response by force is likely to be characterized as an illegal reprisal. It appears that if a right to use force in self-defense 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-defense, will almost never exist in the context of terrorist attacks. The traditional requirements for self-defense are simply too restrictive to reasonably respond to the threat posed by international terrorism.²⁵⁸

2. Pre-emptive Self-Defence

Under customary international law, the right of self-defence was judged by the standard first set out in the 1837 case of the *Caroline*, which established the right of a state to take necessary and proportional actions in anticipation of a hostile threat.²⁵⁹ Based on the *Caroline* incident, anticipatory self-defence must be “necessary,” “proportional,” and take place “immediately.”²⁶⁰ As noted elsewhere in this Article, Article 51 of the UN Charter is generally taken as an authoritative definition of the right of self-defence. However, scholars and states alike have continued to debate whether the enactment of Article 51 subsumed customary international law and extinguished the concept of anticipatory self-defence, or whether it simply codified a right that continues to exist

257. Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 162 (2000).

258. *Id.* at 165–66.

259. 2 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW 409–14 (1906). The “affair of the *Caroline*” involves a U.S. ship (“*Caroline*”) being used by U.S. citizens to transport reinforcements to Canadian territory in support of insurgents battling Great Britain’s rule. *Id.* at 409. A small British force crossed into U.S. territory and destroyed the *Caroline*. *Id.* at 409–10. Great Britain defended its action on the grounds that it was a necessary act of self-defence. *Id.* at 410. The case is illustrative of a state’s right to undertake necessary actions in “anticipatory” self-defence of an impending, though not necessarily imminent, hostile attack. Another case on point is the *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), which has been cited for the proposition that the International Court of Justice recognised a residual right to reprisal remaining in the international legal order, the Charter of the United Nations notwithstanding. Roda Mushkat, *Is War Ever Justifiable? A Comparative Survey*, 9 LOY. L.A. INT’L & COMP. L. REV. 227, 252 (1987).

260. See Roberto Ago, *Addendum to the 8th Report on State Responsibility* (pt.1 concluded), [1980] 2 Y.B. Int’l L. Comm’n 13, 68–9, U.N. Doc. A/CN.4/318/ADD.5–7 (describing requirements frequently viewed as essential conditions for admissibility of self-defence pleas).

with all its attendant doctrines under customary international law. The answer is in the interpretation.

Proponents of the continuing customary right to pre-emptive self-defence have cited the impracticability of applying a literal interpretation of Article 51 in an age of advanced weapons, delivery systems, and heightened worldwide terrorist activity.²⁶¹ Adherents argue the absurdity of requiring a state to refrain from taking action on its own behalf when an opposing state is preparing to launch an attack.²⁶² Given the devastating potential of modern weapons and the swiftness of delivery to their intended targets, denying a state the right to act in advance of a pending attack effectively denies any defence at all. The same rationale applies to states threatened with impending terrorist attacks on their citizenry or property.

Some scholars have noted that it cannot be supposed that the inviolability of territory is so sacrosanct as to mean that a state may harbor 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.²⁶³ Further supporting this position is that there is no literal requirement under Article 51 that a foreign government itself directly undertake the attack to which a state responds. Thus, the harboring of terrorists may give rise to legitimate, legal justification for anticipatory military intervention. Any such claim, however, is still fundamentally one of self-defence, and still restricted by threshold requirements, including imminence, necessity, and proportionality.²⁶⁴

Some scholars have gone as far as to argue that a right of truly anticipatory self-defence has emerged outside of Article 51, based not on pre-existing customary law, but on the availability of weapons capable of

261. Maogoto, *Rushing to Break the Law*, *supra* note 31 at 30–31.

262. See generally Mark B. Baker, *Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25 (1987).

263. BOWETT, *supra* note 64, at 191–92; see also ERICKSON, *supra* note 245, at 109.

264. See Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 147 (1999). Some scholars would further limit the right of anticipatory self-defence, adding, *inter alia*, last resort, reasonableness, and a requirement of reporting to the UN Security Council. See also ERICKSON, *supra* note 245, at 145–50.

mass destruction.²⁶⁵ Thomas Franck 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-defense to the aftermath of an armed attack. Inevitably, first strike capabilities begat a doctrine of "anticipatory self-defense"²⁶⁶

Other scholars opine that in a nuclear age, there are potentially devastating consequences for prohibiting self-defence unless an armed attack has already occurred, leading states to prefer the interpretation permitting anticipatory self-defence.²⁶⁷ Christopher Greenwood argues further that,

this view accords better with state practice and with the realities of modern military conditions than with the more restrictive interpretation of Article 51, which would confine the right of self-defense to cases in which an armed attack had already occurred²⁶⁸

Greenwood goes on to undertake a critical analysis of "Operation Enduring Freedom" against the benchmarks of "necessity," "proportionality" and "imminence." He notes that,

[t]he pre-emptive action that the United States and its allies took against Al Qaeda in Afghanistan was . . . a lawful exercise of the right of self-defense. It would, however, be a mistake to assume that self-defense would cover every military action that the United States or an ally might want to take against Al-Qaeda (or other terrorist groups) in other countries. The use of force in Afghanistan fell within the concept of self-defense because the threat from Al-Qaeda was imminent and because Afghanistan was quite openly affording sanctuary to large numbers of Al-Qaeda personnel. These considerations will not necessarily be present in every case.²⁶⁹

There are, of course, debates as to whether "Operation Enduring Freedom" met the benchmark of proportionality. The U.S. case is not helped by calls for "regime change" in relation to rogue states which the United States is keen to put out of business, especially when they seek to

265. BOWETT, *supra* note 64, at 191–92; *see also* ERICKSON, *supra* note 246, at 142–43.

266. Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U.J.L. & POL'Y 51, 57–58 (2001).

267. Greenwood, *supra* note 243, at 15.

268. *Id.*

269. *Id.* at 25.

develop or acquire weapons of mass destruction. Assuming for the moment that the U.S.-led operation in Afghanistan simply altered the balance of power in the civil war, when we juxtapose “Operation Enduring Freedom” against “Operation Iraqi Freedom,” significant legal questions are left open. As Michael J. Kelly notes,

[u]nilaterally, the United States articulated its right to act preemptively to eliminate the threat posed by a potentially nuclear-armed Iraq. However, because the existence of an imminent threat could not be established, when the president brought the old anticipatory self-defense doctrine back to life, he eliminated that threshold and replaced it with the showing of only an “emerging” threat.²⁷⁰

Kelly further avers that, in the absence of a link between Iraq and Al Qaeda, the United States sought a doctrine that would legitimize an attack on Baghdad.²⁷¹ Considering that

a plain reading of Article 51 disallows striking Iraq absent an armed attack, the Bush Administration is required to return to the legal history books and pull out another disused doctrine to justify any unilateral military action it may take. The one that seems to fit best, albeit imperfectly, is the doctrine of anticipatory self-defense.²⁷²

Notwithstanding the allure of a policy of anticipatory self-defence, there is little basis for such an extension of the UN Charter’s right to self-defence. In justifying its attacks on Iraq, the United States relied on the concept of anticipatory self-defence, while seeking to dilute the Charter’s prohibition with customary international law. UN Charter aside, there is no basis in international law to support the doctrine of “pre-emption” encompassing a right to respond to threats that might materialize at some time in the future. The test is clear—imminence, which connotes immediacy, is required to trigger self-defensive actions. A broad right of anticipatory self-defence premised on a new standard of “emerging threat” would introduce dangerous uncertainties relating to the determination of potential threats justifying pre-emptive action. With this determination being state-based, the probability of opportunistic interventions justified as anticipatory self-defence will rise. After all, the reality is that only states with the military muscle will be able to make use of this avenue and unilateral action will inevitably be colored by national interest considerations. The development of such a right will

270. Kelly, *supra* note 87, at 2.

271. *Id.* at 22.

272. *Id.*

likely prompt potential targets into striking first—to use rather than lose their biological, chemical, and nuclear weapons.

3. Reprisals

With regard to reprisals, the text of the UN Charter represents a conventional rejection of the just-war theories of retribution abandoned in the seventeenth century.²⁷³ The purpose of the United Nations is to limit the use of force in international matters and to provide a forum for the resolution of conflict so as to prevent the need for war. In the history of the United Nations, there have been authoritative condemnations of both pre-emptive and retaliatory reprisal actions.²⁷⁴ It seems safe to conclude that both are widely expected to be inconsistent with the purposes of the United Nations and are, therefore, proscribed under Article 2(4) of the UN Charter.

Previous military actions by the United States against terrorist-supporting states elicited varying responses from the international community and the United Nations. In the case of the 1986 raid on Libya, the United States was largely condemned.²⁷⁵ The UN General Assembly adopted a resolution condemning the United States for the attack by a vote of 79 to 28, with 33 abstentions.²⁷⁶ The UN Secretary General, Javier Perez de Cuellar, stated that the U.S. action violated international law.²⁷⁷ Though a UN Security Council resolution echoing the General Assembly's sentiment was vetoed by the United States, the United Kingdom, and France, France did call the air strikes "reprisals

273. Article 2(3) of the UN Charter states: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. Charter art. 2, para. 3. Article 2(4) of the UN Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4.

274. See, e.g., S.C. Res. 188, ¶2, U.N. Doc. S/RES/188 (Apr. 9, 1964); S.C. Res. 316, ¶2, U.N. Doc. S/RES/316 (June 26, 1972). See also Richard Falk, *The Decline of Normative Restraint in International Relations*, 10 YALE J. INT'L L. 263, 266–67 (1985). See generally Geoffrey M. Levitt, *International Law and the U.S. Government's Response to Terrorism*, 8 WHITTIER L. REV. 755 (1986).

275. Maogoto, *New Frontiers, Old Problems: The War on Terror*, *supra* note 11, at 34.

276. G.A. Res. 41/38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/Res/41/38 (Nov. 20, 1986).

277. Michael Ratner & Jules Lobel, *Bombing Baghdad, Revisited: Lawful Self-Defense or Unlawful Reprisal?* CONN. L. TRIB., July 19, 1993, at 24.

that itself revives the chain of violence.”²⁷⁸ In contrast, the United States’ 1993 cruise missile attack on Baghdad in response to the foiled Iraqi assassination attempt on former President Bush was met with support or tacit acquiescence.²⁷⁹ In response to the U.S. presentation before the UN Security Council, the representatives of other member states either expressed support for the U.S. action or refrained from criticizing it; only China questioned the attack.²⁸⁰ The General Assembly took no action.

Five years after the cruise missile attacks on Baghdad, world reaction to the 1998 U.S. strikes against terrorist targets in Afghanistan and Sudan was mixed. Western European nations supported the U.S. actions to varying degrees, while Russian President Boris Yeltsin declared he was “outraged” by the “indecent” behavior of the United States.²⁸¹ China issued an ambiguous statement condemning terrorism, and Japan said it “understood [America’s] resolute attitude towards terrorism.”²⁸²

The aforementioned incidents were wrapped up in the rhetoric of self-defence and retaliation, leading to the observation that, although the prevailing view is that reprisals are illegal, states may still engage in them.

For example, the 1986 bombing of Libya is cited as a peacetime reprisal and not an act of self-defense. Therefore, while writers state emphatically that reprisals are illegal, state practice continues to resort to them on occasion, cloaking them in terms of self-defense while remaining careful to comply with *Naulilaa* criteria.²⁸³

V. CONCLUSION

The international community has long been uneasy with the use of military action as a counter-measure against terrorism. In 1986, when the United States bombed Libya in response to a terrorist act, President Reagan called the action “pre-emptive” on the ground that there was

278. Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT’L L. 182, 187 (1987).

279. See Stephen Robinson, *UN Support for Raid on Baghdad*, DAILY TELEGRAPH (London), June 28, 1993, at 1; Craig R. Whitney, *European Allies Are Giving Strong Backing to U.S. Raid: Arab Governments Critical*, N.Y. TIMES, June 28, 1993, at A7.

280. Stanley Meisler, *UN Reaction Mild as U.S. Explains Raid*, L.A. TIMES, June 28, 1993, at A1.

281. Phil Reeves, *Outraged Yeltsin Denounces “Indecent” U.S. Behavior*, INDEPENDENT (London), Aug. 22, 1998, at 2.

282. See *id.*

283. Kelly, *supra* note 87, at 13.

already a pattern of Libyan terrorist actions.²⁸⁴ The justification did not go over well with the international community. Roughly a decade later, in 1998, after terrorist attacks on U.S. embassies in Kenya and Tanzania, the United States fired cruise missiles on Sudan and Afghanistan.²⁸⁵ President Clinton argued that there was compelling evidence that the Al Qaeda terrorist network was planning to mount further attacks against Americans, and he was thereafter entitled to act.²⁸⁶ Apart from a few western governments, which approved or kept quiet, most states condemned the Clinton air strikes.²⁸⁷ Conversely, the 2001 U.S. bombing of Afghanistan was widely supported by the international community. But in 2003, when the United States launched military action against Iraq, it did so against a background of protests from a large section of the international community, “squandering away the legal and moral capital it had gained in the action against Afghanistan.”²⁸⁸

The attacks of September 11th, the response by the United States, and the international community’s approval of the military action in Afghanistan represent a new paradigm in international law relating to the use of force. Previously, acts of terrorism were seen as criminal acts, carried out by private, non-governmental entities.²⁸⁹ In contrast, the September 11th attacks were regarded as an act of war.²⁹⁰ This effectively marked a turning point in the long-standing premise in international law that force, aggression, and armed attacks are instruments of relations between states.²⁹¹ Terrorism was no longer merely a serious threat to peace and stability to be combated through domestic and international penal mechanisms; use of force was now seen as an attractive and satisfying counter-measure in managing terrorism. However, subsequent U.S. military action in Iraq was shrouded in confusing legal justifications and questionable, even faulty evidence.

284. *Reagan: We Have Done What We Had to Do*, WASH. POST, Apr. 15, 1986, at A23.

285. Beard, *supra* note 173, at 562.

286. See Arthur Brice, *Terror Suspect Says Now It’s War, U.S. Ready, Says Official: “We’re Going to be on the Offence as Well as Defence”*, ATLANTA J. CONST., Aug. 22, 1998, at A1.

287. Maogoto, *New Frontiers, Old Problems: The War on Terror*, *supra* note 11, at 32.

288. Maogoto, *Rushing to Break the Law*, *supra* note 31 at 14.

289. Maogoto, *War on the Enemy: Self-Defence and State-Sponsored Terrorism*, *supra* note 255, at 431.

290. *Id.* at 431, 433.

291. Davis Brown, *Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT’L & COMP. L. 1, 2 (2003).

This has raised skepticism among scholars and the international community that self-defence was used and misused, thus preventing the evolution of any meaningful state practice.

As a result of the United States' aggressive policy, certain discarded pre-UN Charter doctrines are being revived in one form or the other, notably the concept of pre-emptive or anticipatory self-defence. Some critics have warned against the inherent dangers of resurrecting such pre-Charter doctrines, noting that:

One of the very reasons the world community decided to do away with them was to reduce legal justifications for, and thus the possibility of, unilateral military action. The pre-Charter doctrines were used erratically and unreliably prior to 1945. Now, if these doctrines are returned to service by the world's superpower and are allowed to pass into customary practice once again, we will find ourselves in a time warp back to 1945—a period of fear, uncertainty and suspicion; a period of global dominance by a handful of nations; a period defined by the geopolitics of raw power and militaristic influence; a period of instability devoid of collective security. Even more disturbingly, some of the re-articulated rules have been watered down to allow more latitude in unilateral action.²⁹²

However in a spirited defence of pre-emptive action, other scholars assert that: “[w]aiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safe-guarding the well-being of their citizenry.”²⁹³ However, these critics are missing the central point—when military action is undertaken, things get real—real bombs, real missiles, real deaths. Unilateral state sponsored military action must not be based on mere apprehension backed by dubious or unclear intelligence. Once the military action is over it cannot be unmade by commissions of inquiries or concessions that perhaps a few facts were overstated. UN Secretary General Kofi Annan, in remarks regarding anticipatory self-defence during the opening of the 58th session of the UN General Assembly in September 2003, summed up the dilemma thus:

Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defense. But until now it has been understood that

292. Kelly, *supra* note 87, at 3.

293. Michael J. 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, 552 (2002).

when States go beyond that, and decide to use force to deal with broader threats to international peace and security, they need the unique legitimacy provided by the United Nations.²⁹⁴

Annan concluded that in light of the reality of weapons of mass destruction “[w]e have come to a fork in the road. This may be a moment no less decisive than 1945 itself, when the United Nations was founded.”²⁹⁵

The UN Charter seems to present a neat and tidy regime on the use of force. Nonetheless it reflects the drafters’ singular focus on creating a political system to govern conflicts between states and does not directly address the subtler modes in which terrorists began to operate in the post-World War II period.²⁹⁶ The drafters did not contemplate the existence of international terrorists nor “fully anticipate the existence, tenacity and technology of modern day terrorism.”²⁹⁷ In view of the fact that terrorist groups appear to have reached a global sophistication, there is little doubt that international terrorism presents a threat with which traditional theories for the use of military force are inadequate to deal, and were unanticipated when the UN Charter was drafted.²⁹⁸ The international community has no option but to develop new strategies within the rubric of international law to deal with terrorism and the reality that international law seems to restrict the use of military force to actions in self-defence.

294. Press Release, General Assembly, Adoption of Policy of Pre-Emption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary-General Tells General Assembly, U.N. Doc. SG/SM/8891/GA/10157 (Sept. 23, 2003), available at <http://www.un.org/News/Press/docs/2003/sgsm8891.doc.htm>.

295. *Id.*

296. See Albert R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC’Y INT’L L. PROC. 297, 307 (1987) (“The self-defense provisions of the UN Charter, crafted in 1945 with a view to the kinds of open, conventional aggression that triggered World War II, does not address directly the subtler modes of international violence characteristic of the 1980s.”).

297. Baker, *supra* note 262, at 25.

298. *Id.*; see also Wallace F. Warriner, *The Unilateral Use of Coercion under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 64–70 (1988).