Doctrine or Doctrinaire—
The First Strike Doctrine and Preemptive Self-Defense Under International Law

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In response to the post-9/11 security landscape, the Bush Administration proposed the "Bush Doctrine," whose the central tenet is preemptive action, undertaken unilaterally, if necessary, against "hostile states" and terrorist groups alleged to be developing weapons of mass destruction. This Article develops a coherent statement of the Bush Doctrine and then reviews the legal and political predicates to the war against Iraq, considered the Bush Doctrine's first test case. Following this discussion, the Article examines the idea of preemptive self-defense in international law. It next considers whether the U.S.-led war against Iraq satisfied the standard for preemptive self-defense under international law. A meritorious claim of preemptive self-defense requires establishing an imminent threat that precludes the target of the threat from utilizing UN mechanisms. This Article argues that such a threat has yet to be established in the case of Iraq. While in theory the Bush Doctrine purports to provide security and spread the rule of law, in practice it may have the opposite effect.

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> [W]here it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower his slower assailant. And for defense it is not required that one receive the first blow, or merely avoid and parry those aimed at him.[1]
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> It is safest to prevent the evil, when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honourable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.[2]

The September 11, 2001 (9/11), attacks on the World Trade Center and the Pentagon transformed America's view of the world. In response to these unprecedented terrorist attacks, the Bush Administration devised the Bush Doctrine, a new military strategy intended to reduce the risk of

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1. 2 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTALEGEM NATURALEM LIBRI DUO [TWO BOOKS ON THE DUTY OF MAN AND CITIZENS ACCORDING TO NATURAL LAW] 32 (Frank Gardner Moore trans., 1927).

2. EMERICH de VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 154 (G.G. & J. Robinson eds., 1797).

future terrorist threats.[3] Where the U.S. Cold War military strategy focused almost solely on threats posed by the Soviet Union and relied on deterrence,[4] the post-9/11 strategy focuses on threats from smaller (state and nonstate) actors and relies on preemptive strikes against terrorists' and hostile states suspected of developing nuclear, biological, and chemical weapons.[5] The easily identifiable and containable Cold War threats stand in stark contrast to the amorphous, and often hidden, dangers posed by al-Qaeda and other terrorist groups.[6] Post-9/11 threats render feckless Cold War strategies of deterrence and containment.[7]

Predicated on anticipatory self-defense, the Bush Doctrine purports to respond to the radically altered security landscape of the twenty-first century by authorizing the use of preemptive strikes against those suspected of planning or aiding terrorist strikes on American targets.[8] The Bush Administration contends that the struggle for peace and human progress, including the rule of law, compels such preemptive strikes.[9] As evidenced by the Administration's position on Iraq, the Bush Doctrine will not necessarily require persuasive evidence to justify launching such strikes.[10] Preemptive strikes should, and will, be undertaken multi-laterally, with the imprimatur of the United Nations, or unilaterally if multilateral support is not forthcoming.[11]

How does this strategy correspond with international law and the Administration's own long-term political and strategic goals? This Article examines the Bush Doctrine against the backdrop of the right to self-defense. While the Bush Doctrine seeks to promote the rule of law, its unilateralist disposition threatens to undermine the effectiveness of the UN system, and with that system, the very rules of law that the Administration purports to cultivate. The Article first examines the development of the Bush Doctrine in response to the 9/11 attacks, with

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3. *See* NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES, 1-2, 5-7, 13-16 (2002), *available at* http://www.whitehouse.gov/nsc/nss.html [hereinafter NATIONAL SECURITY STRATEGY]; John Lewis Gaddis, *A Grand Strategy*, FOREIGN POL'Y, Nov./Dec. 2002, at 50, 53-54.

4. *See* NATIONAL SECURITY STRATEGY, *supra* note 3, at 13, 29; President George W. Bush, West Point Graduation Speech (June 1, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html [hereinafter West Point Speech]; Gaddis, *supra* note 3, at 51.

5. NATIONAL SECURITY STRATEGY, *supra* note 3, at 6, 14.

6. *Id.* at 15; Gaddis, *supra* note 3, at 51.

7. Gaddis, *supra* note 3, at 51; NATIONAL SECURITY STRATEGY, *supra* note 3, at 15.

8. NATIONAL SECURITY STRATEGY, *supra* note 3, at 15-16.

9. *Id.*

10. *See* Gaddis, *supra* note 3, at 54.

11. NATIONAL SECURITY STRATEGY, *supra* note 3, at 6.

reference to the war in Iraq, which the Administration justified on preemption grounds.[12] The Article next discusses the right to anticipatory self-defense under international law and places the Bush Doctrine in this context. This Article finds that not only does the Bush Doctrine fail to comport with the law of self-defense, but it could also undermine the Administration's long-term goals, including the promotion of the rule of law.

I. THE BUSH DOCTRINE

The 9/11 attacks signaled America's entry into an era of new threats and new enemies. During the Cold War, U.S. defense policy focused on the threat posed by the Soviet Union.[13] As the 9/11 attacks graphically demonstrated, however, great powers, such as China, or formerly the Soviet Union, no longer pose the only, or even the greatest, threat to U.S. security.[14] As President George W. Bush told the graduating class of 2002 at West Point:

> Enemies in the past needed great armies and great industrial capabilities to endanger the American people and our nation. The attacks of September the 11th required a few hundred thousand dollars in the hands of a few dozen evil and deluded men. All of the chaos and suffering they caused came at much less than the cost of a single tank.[15]

Carried out by al-Qaeda, an international group of terrorists loosely organized and funded by the wealthy Saudi exile, Osama bin Laden,[16] the 9/11 attacks brought destruction on two American cities and claimed more than 3000 lives in New York, Washington, D.C., and Pennsylvania.[17] The 9/11 attacks destroyed the twin towers of the World Trade Center fundamentally altering both the New York skyline and the American perception of the world.

Post-9/11 threats differ significantly from those faced by the United States during the Cold War. The Cold War logic of containment assumed that hostile regimes could be left to reform on their own initiative, as

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12. *See, e.g.*, President George W. Bush, Remarks at Cincinnati Museum Center—Cincinnati Union Terminal (Oct. 7, 2002), *available at* http://www.whitehouse/gov/news/releases/2002/10/20021007-8.html [hereinafter Museum Remarks].

13. *See generally* HENRY KISSINGER, DIPLOMACY 423-45 (1994).

14. *See* West Point Speech, *supra* note 4.

15. *Id.*

16. Steven Lee Myers, *Bin Laden Plot Reported Against U.S. Sites in the Galt*, N.Y. TIMES, Dec. 16, 1998, at A3.

17. President George W. Bush, Patriot Day, 2003, A Proclamation (Sept. 11, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/09/200309-04-7.html.

ultimately borne out by the former Soviet Union.[18] Deterrence depended on a rational adversary, with weapons of mass destruction perceived by both sides as weapons of last resort.[19] The 9/11 attacks, by contrast, demonstrated the immediacy of the threats posed by terrorists and their supporters, and the willingness and capability of terrorists to wage previously unthinkable attacks. Whether deterrence can be an effective option against either terrorists or rogue states is unclear.

In response to the 9/11 attacks, the United States launched a military attack on Afghanistan's Taliban government, which was believed to have been harboring Osama bin Laden.[20] The Taliban regime quickly toppled, but bin Laden still remains at large.[21] President Bush has emphasized that the war on terror will not stop with Afghanistan, but will extend to any state that supports terrorism.[22] Further, such strikes will not be limited to reprisals or self-defense, but may include preemptive strikes as part of a new U.S. strategy focusing on anticipatory self-defense.[23] In the words of Condoleezza Rice, President Bush's National Security Advisor, the strategy of preemptive strikes necessarily involves some degree of uncertainty, but in the case of Iraq, a test case for the Bush Doctrine, "[w]e don't want the smoking gun to be a mushroom cloud."[24] In other words, under the Bush Doctrine, the potential danger of a hostile state developing nuclear weapons, even where that development is not imminent, alone compels a preemptive strike, regardless of whether there is solid evidence to justify the validity of the perceived danger. Such preemptive strikes play a key role in the Administration's approach to meeting the terrorist threat.

The Bush Doctrine, as recently expounded in the White House's National Security Strategy, emphasizes military action against other governments that harbor and support terrorists or that develop nuclear, chemical, or biological weapons that could be used in terrorist attacks on the United States.[25] The military component of the National Security Strategy consists of several key tenets:

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18. *See* KISSINGER, *supra* note 13, at 446-72.

19. NATIONAL SECURITY STRATEGY, *supra* note 3, at 15; Gaddis, *supra* note 3, at 52.

20. Norimitsu Onishi & James Dao, *Taliban Leaders May Be Escaping, U.S. Officials Say*, N.Y. TIMES, Jan. 4, 2002, at A1.

21. *Id.*

22. NATIONAL SECURITY STRATEGY, *supra* note 3, at 5.

23. *Id.* at 15.

24. Todd S. Purdum, *Bush Officials Say Time Has Come for Action on Iraq*, N.Y. TIMES, Sept. 9, 2002, at A1.

25. NATIONAL SECURITY STRATEGY, *supra* note 3, at 6.

1. The focus of American security policy is no longer exclusively on great powers but on smaller powers supporting terrorists or developing weapons of mass destruction;[26]
2. Preemptive strikes will be used to prevent harm to the United States or American citizens;[27] and
3. The United States will, if necessary, act alone without the support of the international community.[28]

Justifying its proposal of preemptive strikes against hostile powers, the Administration contends 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."[29] Ultimately, the Bush Administration argues, uncertainty and a lack of solid evidence should not preclude preemptive action where a serious threat to America's security is deemed to exist.[30]

In addition to its military aspects, the Administration's assault on international terrorism involves waging a so-called "war of ideas" that includes the criminalization of terrorism, support for moderate Muslim governments, the promotion of freedom, and efforts to diminish the conditions that spawn terrorism.[31] Together, the military and ideological aspects of the National Security Strategy are designed to reduce the terrorist threat to the United States by reducing the capacity of terrorists, or rogue states, to strike American targets and by addressing the underlying causes of terrorism.

II. IRAQ

The Administration's war with the Iraqi regime of Saddam Hussein represents a political and legal test case for the Bush Doctrine. In outlining the threat posed by Iraq, President Bush focused on Iraq's alleged development of nuclear, chemical, and biological weapons, as well as on Saddam Hussein himself, characterizing him as a "murderous tyrant."[32] Bush argued that these threats justified a preventive war against Iraq.[33] Despite vigorous diplomatic efforts, however, the United States

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 15.
30. *Id.* at 15-16.
31. *Id.* at 6.
32. Museum Remarks, *supra* note 12.
33. *Id.*

failed to raise sufficient support in the UN Security Council to pass a second resolution authorizing the use of force against Iraq.[34] The lack of international support, however, did not deter the United States from waging war against Iraq. This case, therefore, demonstrates the Administration's unwavering commitment to the use of preemptive strikes, even where support from the United Nations or other U.S. allies is lacking.

The root of the Administration's opposition to the Iraqi regime lies in the aftermath of the first Gulf War. Following Iraq's invasion of Kuwait, the United States led a UN authorized coalition to repel the invading Iraqi forces from Kuwait.[35] Before long, the allied forces overwhelmed the Iraqi forces and drove them out of Kuwait, forcing Saddam Hussein to surrender. UN Security Council Resolution 687, which embodied the terms of the ceasefire, required that Iraq destroy, remove, or render harmless any weapons of mass destruction in its possession and that Iraq agree not to create new ones.[36] This resolution obligated Iraq to respect Kuwait's borders and further provided that

> Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:
> (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;
> (b) All ballistic missiles with a range greater than 150 kilometres and related major parts, and repair and production facilities.[37]

Resolution 687 also required Iraq to submit to the Secretary-General a complete report of these weapons and related items.[38] To verify Iraq's compliance with these provisions, the United Nations created the United Nations Special Commission (UNSCOM).[39]

Almost from the beginning of UNSCOM, however, weapons inspectors encountered difficulties in gaining access to suspected

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34. Draft Resolution S/2003/215, *available at* http://www.un.org/news/dn/iraq/res_iraq_24feb03_en.pdf (last visited Feb. 3, 2004) [hereinafter Draft Resolution].

35. 1990 U.N.Y.B. 204-05, U.N. Sales No. E.98.I.16. After Iraq failed to comply with Security Council demands to withdraw from Kuwait, the Security Council invoked its Chapter VII authority to authorize UN members to use "all necessary means" to expel Iraq from Kuwait. S.C. Res. 678, U.N. SCOR 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990), *reprinted in* 1990 U.N.Y.B. 204.

36. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

37. *Id.* at 5.

38. *Id.*

39. *Id.*

weapons sites.[40] Iraq's intransigence culminated in 1998, when UNSCOM inspectors withdrew from Iraq completely, alleging that Iraqi obstruction prevented them from carrying out their mission.[41] Iraq claimed that the inspectors were nothing more than American spies masquerading as weapons inspectors.[42] Before withdrawing, the inspectors had destroyed or dismantled Iraqi missiles and chemical weapons.[43] Efforts to jump-start inspections prior to the 9/11 attacks met with no success.[44] While the UN Security Council authorized the resumption of inspections in 1999, weapons inspections did not actually resume until November 2002, a little more than a year after the terrorist attacks on the United States.[45]

The 9/11 attacks increased American concern about Iraq's alleged weapons program. While there exists no evidence to suggest that Iraq participated in the planning or execution of the 9/11 attacks on the United States,[46] the Bush Administration included Iraq, along with Iran and North Korea, in its so-called "Axis of Evil."[47] In a speech to the UN General Assembly on the struggle against terrorists, President Bush expressed fear that terrorists would acquire weapons of mass destruction from an "outlaw regime" like that of Saddam Hussein in Iraq.[48] In his speech, Bush made several demands on Iraq, including that it destroy its weapons of mass destruction, end its support for terrorism, respect the human rights of its citizens, and account for missing Gulf War personnel.[49]

In November 2002, weapons inspectors returned to Iraq as part of a new operation, the United Nations Monitoring, Verification, and

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40. Hans Blix, The Security Council, 27 January 2003: An Update on Inspections (Jan. 27, 2003), *available at* http://www.un.org/apps/news/infocusnewsiraq.asp?NewsID=35485ID=6 [hereinafter Blix Statement].

41. Barbara Crossette, *In New Challenge to the U.N., Iraq Halts Arms Monitoring*, N.Y. TIMES, Nov. 1, 1998, at A1.

42. *Id.*

43. Blix Statement, *supra* note 40.

44. *Id.*

45. *Id.*

46. Glenn Kessler, *Powell: Case "Compelling" Without "Smoking Gun"*, WASH. POST, Feb. 4, 2003, at A18.

47. President George W. Bush, State of the Union Address (Jan. 29, 2002), transcript *available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html.

48. President George W. Bush, Remarks at the United Nations General Assembly (Sept. 12, 2002), transcript *available at* http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html.

49. *Id.*

Inspection Commission (UNMOVIC).[50] Security Council Resolution 1441, passed on November 8, 2002, sought to afford Iraq a final opportunity to cure its material breach of earlier obligations arising from Resolution 687 and subsequent resolutions.[51] The Security Council found that Iraq was in material breach of its obligations to disarm and to cooperate with UNSCOM inspectors.[52] Incorporating previous resolutions that spelled out the terms ending the Gulf War, Resolution 1441 required Iraq to cooperate with weapons inspectors and the International Atomic Energy Agency (IAEA) by providing inspectors with documentation of its weapons programs and allowing inspectors unfettered access, and it warned of "serious consequences" in the event of noncooperation.[53] Although the resolution stopped short of spelling out consequences,[54] the Bush Administration chose to equate them with invading Iraq and ultimately overthrowing Saddam Hussein's regime.

Key allies opposed the Bush Administration's construction of Security Council Resolution 1441 as authorizing an invasion of Iraq.[55] France, Germany, China, and Russia all stated that any invasion of Iraq required an additional Security Council resolution that would explicitly authorize the use of force.[56] This interpretation seemed plausible because Resolution 1441 neither specifically referred to the use of military force nor authorized member states to use "all necessary means."[57] Other resolutions that authorized the use of force, such as Resolution 678 (which allowed the initial military action against Iraq in 1990), made specific reference to the use of force, which is the most extreme tool at the disposal of the Security Council.[58] In a concession to that opinion, the United States circulated a second resolution which would have explicitly authorized the use of force against Iraq.[59] This draft resolution stated that Iraq had failed to take advantage of its final opportunity under Resolution 1441 and, in the preamble, alleged that Iraq's failure to disarm

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50. The Security Council created UNMOVIC in 1999. S.C. Res. 1284, U.N. SCOR, 54th Sess., 4804th mtg., U.N. Doc. S/RES/1284 (1999).

51. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/Res/1441 (2002).

52. *Id.* pmbl.

53. *Id.* ¶¶ 5, 13.

54. *Id.* ¶ 13.

55. Elaine Sciolino, *Discord; France to Veto Resolution on Iraq War, Chirac Says*, N.Y. TIMES, Mar. 11, 2003, at A10.

56. *Id.*

57. S.C. Res. 1441, *supra* note 51.

58. S.C. Res. 678, *supra* note 35.

59. Felicity Barringer, *U.N. Split Widens as Allies Dismiss Deadline on Iraq*, N.Y. TIMES, Mar. 8, 2003, at A1.

posed a threat to international peace and security.[60] Had the Security Council found a threat to international peace and security, it could have authorized the use of force under its Chapter VII authority.[61] But, France, China, and Russia, all permanent members of the Security Council with the right to veto any resolution, opposed the American invasion of Iraq, making Security Council support for such a resolution impossible.[62]

In his February report to the Security Council, chief UN weapons inspector, Hans Blix, stated that Iraq had cooperated "rather well" with the inspection process.[63] Distinguishing between process and substance, Blix noted that Iraq had allowed access to weapons inspectors, but that its declaration of weapons required by Resolution 1441 consisted mostly of previously submitted documents and failed to address some of the open questions about the disarmament process.[64] These questions included accounting for weapons that Iraq was known to have possessed, the destruction of which had not yet been established.[65] In addition, UNMOVIC inspectors found some empty chemical rocket warheads, which Blix acknowledged could be the "tip of a submerged iceberg."[66] Blix advocated further inspections to verify Iraq's claims that it did not possess any proscribed weapons materials, including securing the testimony of those having relevant knowledge about the existence of weapons or documents.[67]

The United States maintained that Iraq did not cooperate with weapons inspectors and that it continued to clandestinely produce proscribed weapons of mass destruction.[68] President Bush continues to claim that the United States possesses evidence of Iraq's weapons production,[69] but the Administration has failed to offer evidence of a "smoking gun."[70] In his February 5, 2003, presentation to the UN Security Council, Secretary of State Colin Powell presented evidence gathered from surveillance of Iraq as well as information from human sources, arguing that Iraq had been hiding weapons from UNMOVIC

60. Draft Resolution, *supra* note 34.
61. U.N. CHARTER arts. 39, 42.
62. Sciolino, *supra* note 55, at A10; Barringer, *supra* note 59, at A1.
63. Blix Statement, *supra* note 40.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. Museum Remarks, *supra* note 12.
69. *Id.*
70. Kessler, *supra* note 46, at A18.

inspectors, and describing Iraqi conduct as a "web of lies."[71] The conduct, he argued, constituted a material breach of Resolution 1441, and the danger posed by Saddam Hussein's past conduct required the immediate disarmament of Iraq.[72]

Ultimately, the United States and the United Kingdom proceeded to invade Iraq without a resolution explicitly authorizing the use of force, and over the opposition of key allies.[73] The war began with an assault on a location in Southern Baghdad believed to be housing Saddam Hussein.[74] Coalition forces quickly toppled Saddam Hussein's government.[75] Only days later, coalition forces captured Hussein's hometown of Tikrit, considered to be the last stronghold of the Hussein regime.[76] Saddam Hussein himself was captured by American forces on December 13, 2003, near Tikrit.[77]

Unlike the search for Saddam Hussein, the hunt for weapons of mass destruction has yielded no results. The Bush Administration maintained prior to the war that the Hussein regime was developing weapons of mass destruction, despite the paucity of evidence to support this claim.[78] Despite extensive searches, several suspected weapons sites in Iraq have yielded no proof that Iraq was manufacturing weapons of mass destruction as the Bush Administration alleged.[79] To date, no evidence of weapons of mass destruction has been found in Iraq. David Kay, former chief weapons inspector in Iraq, stated that in his assessment, "we were all wrong."[80] Kay concluded that by the time the United States invaded Iraq, the Hussein regime no longer possessed any

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71. Colin Powell, Remarks to UN Security Council (Feb. 5, 2003), transcript *available at* http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html.

72. *Id.*

73. The United States, however, was not without allies. It waged war in Iraq with the support of such nations as Australia, Italy, Japan, Spain, and the United Kingdom, along with several lesser powers such as Albania, Ethiopia, Nicaragua, and the Philippines. Dan Balz & Mike Allen, *U.S. Names 30 Countries Supporting War Effort*, WASH. POST, Mar. 19, 2003, at A1.

74. Rajiv Chandrasekaran & Thomas E. Ricks, *Iraqi Leader Defiant in TV Address After Attack*, WASH. POST, Mar. 20, 2003, at A1.

75. Rajiv Chandrasekaran & Peter Baker, *Morning Raid Hits Palaces, Other Targets*, WASH. POST, Apr. 7. 2003, at A1.

76. Rajiv Chandrasekaran, *Mission Shifts to Restoring Order, Finding Militiamen*, WASH. POST, Apr. 15, 2003, at A1.

77. Susan Sachs, *Hussein Caught in Makeshift Hide-Out; Bush Says 'Dark Era' for Iraqis Is Over*, N.Y. TIMES, Dec. 15, 2003, at A1.

78. Mike Allen, *President: 'Truth' on Arms Will Be Found: New Caution Expressed in Claims About Iraq*, WASH. POST, June 6, 2003, at A21.

79. *Id.*

80. Richard W. Stevenson & Thom Shanker, *Ex-Arms Monitor Urges an Inquiry on Iraq Threat*, N.Y. TIMES, Jan. 29, 2004, at A1.

stockpiles of weapons of mass destruction and, furthermore, American intelligence, on which the invasion was premised, was out of date.[81]

Despite the lack of evidence, President Bush continues to insist that the invasion of Iraq was justified because Saddam Hussein's regime was capable of producing such weapons and could have put them into the hands of terrorists.[82] However, the Administration's failure to proffer evidence of weapons of mass destruction decimates the Bush Administration's political case for war. Moreover, the discovery of such weapons or their manufacture would do little to bolster the Administration's claims that its invasion of Iraq was legally justified as anticipatory self-defense.

III. SELF-DEFENSE AND INTERNATIONAL LAW

Self-defense under international law derives primarily from three sources: the UN Charter, customary international law, and state practice as evidence of custom.[83] Accordingly, we analyze the doctrine of anticipatory self-defense as embodied in these three sources. Necessity, proportionality, and imminence are the three requirements for anticipatory self-defense.[84] This Article concludes that the Bush Doctrine of preemption does not satisfy the criteria for legitimate preemptive self-defense.

By way of a historical backdrop, we first examine the conceptual genesis of the self-defense doctrine, by reviewing the law of self-defense prior to the establishment of the United Nations. Specifically, we analyze *The Caroline*[85] case, generally regarded as authoritative and binding precedent for the doctrine of anticipatory self-defense.[86] We then turn to article 51 of the UN Charter, which acknowledges that member states have the "inherent right" to act in self-defense, either in an individual or collective capacity, and the customary international law practiced by states.[87] Next, we review the decision in *Nicaragua v. United States*, the

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81. *Id.*; *see also* David Kay, Statement to Senate Armed Services Committee (Jan. 28, 2004), *transcript available at* http://www.cnn.com/2004/us/01/28/kay.transcript/.

82. Richard W. Stevenson, *President Offers Defense on Iraq and the Economy*, N.Y. TIMES, Feb. 9, 2004, at A1.

83. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATE 257 (1968).

84. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 198 (1984).

85. *See generally* R.Y. Jennings, The Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82 (1938) (discussing the facts and legal implications for self-defense arising due to *The Caroline* case).

86. *Polebaum*, *supra* note 84, at 190.

87. U.N. CHARTER art. 51.

first and only occasion in which the International Court of Justice interpreted the meaning of article 51.[88] Following this discussion, we examine the most recent instances in which the United States has invoked article 51 and employed self-defense to justify its preemptive strikes. Finally, we conclude with a critical analysis of the Bush Doctrine of preemption.

IV. DOCTRINAL GENESIS

A. The Caroline *Case of 1837*

The notion of self-defense is deeply embedded in the history of American foreign affairs as well as in international law.[89] Arguably, the most significant development of self-defense in American foreign affairs took place in 1837, when Canadian insurrectionists rebelled against their British colonial overseers.[90] At the time, the U.S. administration remained officially neutral about the rebellion.[91] Some American sympathizers, however, provided unauthorized assistance to their anti-colonial neighbors by using the American steamboat, *The Caroline*, to transfer military supplies to the rebels.[92] Upon learning of the situation, a British officer ordered his soldiers to board *The Caroline* one night, while she was moored at Fort Schlosser in New York, and destroy her.[93] The British troops set fire to *The Caroline*, overturned her, and sent her tumbling down Niagara Falls.[94] The British justified the act on self-defense grounds, claiming that the U.S. government could not protect them from raids across the border.[95]

The diplomatic exchange that ensued between the United States and Britain concerning the matter provided the traditional formulation of the doctrine of self-defense, incorporating anticipatory measures. The Secretary of State, Daniel Webster, responded to the British action by

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

89. Oscar Schacter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 260-62 (1989). The conceptual origins of anticipatory self-defense date back to ancient Athens and Rome. *See* Polebaum, *supra* note 84, at 188-89 (citing pronouncements by Plato and Cicero recognizing the need to forestall imminent or future attack).

90. Jane A. Meyer, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L.J. 391, 395 (1993).

91. *Id.*

92. Jennings, *supra* note 85, at 83.

93. *Id.* at 83-84.

94. *Id.* at 84.

95. 2 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW § 217, at 410 (1906).

writing the British Ambassador, Henry S. Fox.[96] Aware of *The Caroline*'s involvement in assisting the rebels, Webster did not challenge Britain's right to self-defense; instead, he objected to the "necessity" of the British military action.[97] Webster asserted that self-defense may be exercised only when the "necessity of that self-defense is instant and overwhelming, and leaving no choice of means, and no moment for deliberation."[98] He also requested that Ambassador Fox justify how Britain's actions were not "unreasonable or excessive."[99]

What principles may we extract from Webster's written correspondence? Webster impliedly acknowledged Britain's right to anticipatory self-defense; he never questioned that right in principle.[100] One can assume, therefore, that anticipatory self-defense was deemed a proper response even before the predicate attack actually occurred, so long as the state acted in a justifiable and unquestionably necessary manner.[101] Webster's statement concerning when anticipatory self-defense may be properly exercised remains the standard limitation for self-defense in customary international law.[102]

B. The Kellogg-Briand Pact

The Caroline case of 1837 established the modern fundamental Anglo-American concept of self-defense.[103] The United States reaffirmed that the right to self-defense was "inherent" and "implicit in every treaty" ninety-one years later in 1928 when it joined the Kellogg-Briand Pact, which outlawed war among the United States, France, and thirteen other countries.[104] Similar reservations predicated on self-defense were also attached to the treaty by the other signatories to the Kellogg-Briand Pact.[105] Thus, by the time the United States entered negotiations to replace the League of Nations with a new international

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96. Meyer, *supra* note 90, at 395.
97. *Id.*
98. *Id.* (citing BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1222 (1991)).
99. *Id.*
100. *Id.*
101. *Id.*
102. BROWNLIE, *supra* note 83, at 261.
103. *See* Meyer, *supra* note 90, at 394-95 ("[T]his entire debate may be uniquely American and British.").
104. BROWNLIE, *supra* note 83, at 236; *see* Meyer, *supra* note 90, at 396.
105. BROWNLIE, *supra* note 83, at 235.

organization during World War II, self-defense had already become an accepted principle of international law.[106]

C. The Preparatory Talks Leading to the UN Charter

The preparatory talks for the UN also illuminate the evolution the right to self-defense. At the 1944 meetings at Dumbarton Oaks, the world's major powers gathered to develop an early draft for the charter of the new UN.[107]

The Dumbarton Oaks draft, however, did not include a provision for self-defense, for the right to self-defense was never questioned.[108] By 1945, there was a growing concern with that omission, and when representatives of the future member states gathered in San Francisco to revise the final draft of the UN Charter, the general sentiment was in favor of including a self-defense provision.[109] The negotiations culminated in article 51 of the UN Charter, which states:

> 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.[110]

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106. For a discussion of the League of Nations, see ROBERT E. RIGGS & JACK C. PLANO, THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND WORLD POLITICS 10-11 (1994).

107. *See id.* at 12.

108. *See* Thomas K. Plofchan, Jr., *Article 51: Limits on Self-Defense*, 13 MICH. J. INT'L L. 336, 348 (1992).

109. *Id.* at 348-49.

110. U.N. CHARTER art. 51. Created to protect the legal status of the Act of Chapultepec and signed by the states of North and South America, and the Pact of the Arab League, article 51 preserved the legality of mutual defense alliances. BROWNLIE, *supra* note 83, at 270. Article 51 is the only way states can use force legitimately when the United Nations fails to act, which often may happen as the result of a veto by a permanent member of the Security Council.

In arguably the most definitive statement on self-defense and its construction at the time. Colombian Foreign Minister Lleras-Camargo maintained that regional organizations have the right to take defensive measures without prior Security Council approval. He noted:

> In the case of the American states, an aggression against one American state constitutes an aggression against all the other American states and all of them exercise their right of legitimate defense by giving support to the state attacked, in order to repel such aggression. *This is what is meant by the right of collective self-defense*.

This may explain why the word "inherent" is used in the Charter, suggesting its long-standing presence in international law.[111]

V. THE UN CHARTER REGIME

To appreciate its scope, article 51 must be construed in light of the overall U.N. Charter framework. Known as the *jus contra bellum*, or the law against war,[112] the Charter's "primary legal restraint" on the use of force is found in article 2.[113] Article 2, paragraph 4, provides as follows: "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."[114] Article 2, paragraph 4, therefore, prohibits the use of military force.[115] This prohibition is qualified by article 51 of the Charter, which provides an exception to the proscription of article 2(4): force can be used in self-defense in the event an "armed attack occurs against a Member of the United Nations."[116] This exception is not without limits, however. Member states exercising the right to self-defense must immediately report their actions to the Security Council.[117] Moreover, the United Nations intended the article 51 exception as a temporary measure until the Security Council could convene and act to address the threat to international peace and security.[118] Under the UN Charter regime, therefore, self-defense is the only legally recognized justification for the use of force abroad in the absence of a Security Council resolution authorizing the use of force.

Id.; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, *in* 41 AM. J. INT'L L. 872, 873 (1947). All of the Latin American states backed this interpretation. *Id.* at 873. These sentiments were reiterated in response to a proposal from the Canadian government, which called for an amendment requiring prior Security Council approval before a state or regional organization could undertake any self-defense measures. 1946-47 U.N.Y.B. 27-28, U.N. Sales No. 1947.I.18. The proposal failed, largely due to France, which maintained that since the right to self-defense was so inherent in international law, no need existed for states to write it into the Charter. Meyer, *supra* note 90, at 399.

111. Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 31-32 (1987).

112. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 403 (1993).

113. Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 714 (1986).

114. U.N. CHARTER art. 2, para. 4.

115. *Id.*

116. *Id.* art. 51.

117. *Id.*

118. *Id.*

VI. *NICARAGUA V. UNITED STATES*

Article 51's first test in court came when the International Court of Justice (ICJ) decided *Nicaragua v. United States*.[119] On April 9, 1984, Nicaragua brought a dispute with the United States before the ICJ.[120] Nicaragua argued that the mining by the United States of the harbors around Nicaragua, inter alia, violated international law with respect to the unauthorized use of force against Nicaragua.[121] The United States accused Nicaragua of supporting cross-border military attacks on Costa Rica and Honduras, and of providing military aid to rebel factions in El Salvador.[122] The United States maintained that Nicaragua's actions in providing weapons and other support to rebels seeking to overthrow the Salvadorian government constituted an "armed attack."[123] The United States argued, therefore, that by supporting the Nicaraguan "contras" and mining the surrounding harbors, it was acting under article 51, which permitted the right to "collective self-defense."[124]

The ICJ's decision was instructive, for it provided the first and, to date, the only judicial interpretation of article 51. Although the ICJ reiterated that the right to self-defense was "inherent," it ruled that since no armed attack by Nicaragua had occurred against the United States, the appeal to article 51 was untenable.[125] The ICJ wrote: "[t]he exercise of the right of collective self-defence presupposes that an armed attack has occurred."[126] The court defined an "armed attack" as a state's direct sending of troops into another state,[127] which clearly was not the case with respect to the United States.[128] According to the ICJ, "while the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other

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119. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). Note that under article 59 of the Statute of the ICJ, decisions of the Court are not binding. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 59. Under article 38, however, judicial decisions in general constitute a "subsidiary means for the determination of rules of law." *Id.* art. 38. All UN members are *ipso facto* parties to the Statute. *See* U.N. CHARTER art. 93, para. 1.

120. Military and Paramilitary Activities, 1986 I.C.J. at 16.

121. *Id.* at 21-22.

122. *Id.* at 72; DAVID P. FORSYTHE, THE POLITICS OF INTERNATIONAL LAW, U.S. FOREIGN POLICY RECONSIDERED 38, 39 (1990).

123. Military and Paramilitary Activities, 1986 I.C.J. at 72-73.

124. FORSYTHE, *supra* note 122, at 39.

125. Military and Paramilitary Activities, 19986 I.C.J. at 127.

126. *Id.* at 120.

127. *Id.* at 103.

128. *Id.* at 127.

support to such bands cannot be equated with armed attack."[129] Elaborating further, the court said, "[a]ssistance to rebels in the form of the provision of weapons or logistical or other support" does not constitute an armed attack; active, not passive, support—an actual "sending . . . of armed bands, groups, irregulars or mercenaries, . . . or . . . substantial involvement therein"—is necessary to meet the armed attack requirement.[130]

The court also observed that in the absence of a call from a state under siege, which El Salvador had not made at the time, other states have no authority under customary international law to assert the right of collective self-defense.[131] The ICJ determined that no previous de facto standard existed to support the United States' claims.[132]

The ICJ decision has been extensively analyzed and debated. The many interpretations, notwithstanding, it is difficult not to conclude that the ICJ articulated a rather stringent interpretation of self-defense.[133] Moreover, implicit in the court's ruling is that anticipatory self-defense, that is, military action to forestall a potential future attack, would not qualify as self-defense under article 51. In short, *Nicaragua v. United States* reaffirmed a limited right to self-defense.

VII. MODERN PRINCIPLES OF SELF-DEFENSE DERIVED FROM CUSTOMARY INTERNATIONAL LAW

As explained, under the UN Charter and *Nicaragua v. United States*, self-defense is the only permissible justification for the unilateral use of force abroad.[134] The ICJ has stated that the two elements of self-defense are necessity and proportionality.[135] These prerequisites are uniformly accepted and represent both customary and conventional international law.[136]

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129. *Id.* at 126-27.

130. *Id.* at 103-04.

131. *Id.* at 120.

132. *Id.*

133. Harold G. Maier, *Appraisals of the ICJ Decision:* Nicaragua v. U.S. Merits, 81 AM. J. INT'L L. 77, 77-183 (1987) (a series of short commentaries on the decision).

134. *See* Commander Byard Q. Clemmons & Major Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 226 (1998).

135. *See* Military and Paramilitary Activities, 1986 I.C.J. at 103.

136. *See* Major 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, 58 (1988). The prerequisites are:

Furthermore, according to the text of article 51, the only permissible precedent to the use of force in self-defense is an armed attack.[137] Contemporary international law analysis of the use of force, therefore, consists of defining armed attack, necessity, and proportionality. In the case of anticipatory self-defense, legal scholars have attached an additional requirement to the use of self-defense: imminency.[138]

A. Armed Attack

Self-defense under article 51 is a justifiable act of force undertaken by a state that is the victim of an armed attack or by the allies of an attacked state acting in its defense.[139] All armed attacks are uses of force, but not all uses of force are armed attacks. According to the ICJ, "[s]tates do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.'"[140] Armed attack includes not just an action by regular armed forces across international borders, but also "[a]n actual or threatened violation of substantive rights of the claimant state[,]"[141] or an attack on nationals abroad. Although article 51 of the UN Charter refers to an armed attack on the territorial integrity of the state, nations have practiced a broader interpretation of the "inherent" right of self-defense in circumstances where "military personnel, citizens, commerce, and property" have been attacked abroad.[142]

B. Necessity and Proportionality

The two elements of necessity and proportionality defy bright-line distinctions. At the very least, before force can be used in self-defense, a

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> (1) an actual or threatened violation of substantive rights of the claimant state; (2) an actual necessity to resort to force by the claimant state; and (3) reasonable and proportionate measures of coercion taken by the claimant state to stop or prevent the violation of the rights, limited by the actual necessity of the occasion.

Id.; Paust, *supra* note 113, at 715-16 (stating that article 51 of the UN Charter permits the use of reasonably necessary proportionate force when a state or its nationals are under armed attack).

137. U.N. CHARTER art. 51.

138. *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635, 1637 (1984) (stating that self-defense requires necessity and proportionality as well as the additional requirement of imminency when considering the case of anticipatory self-defense).

139. U.N. CHARTER art. 51.

140. Military and Paramilitary Activities, 1986 I.C.J. at 110.

141. Warriner, *supra* note 136, at 58.

142. Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 96 (1989).

state must show that the action is necessary to protect its citizens or territory.[143] The imprecise nature of the concept makes it vulnerable to exploitation. It should hardly be a surprise, then, that states have done so over time.[144] Ultimately, as with many matters of law, reasonableness determines the validity of proportionality and necessity.[145]

1. Necessity

Necessity, as the preceding element of the attack, has not been defined under international law.[146] Nevertheless, the juxtaposition of the precepts of *The Caroline* incident with the UN Charter affords illumination. Under the standard of *The Caroline* incident, the threat must be so instant and overwhelming as to leave no other choice.[147] The UN Charter requires states to seek peaceful resolution of conflicts before resorting to the use of force.[148] This prescription suggests that these peaceful attempts at resolution must fail before the necessity of force arises.[149] Put differently, necessity in self-defense means that the use of force must be absolutely necessary to repel the threat and that "peaceful measures have been found wanting or . . . clearly would be futile."[150]

2. Proportionality

Although there is consensus as to the general contours of proportionality, in *The Caroline* case the use of force was permitted only to the extent necessary to thwart the threat presented.[151] One scholarly work has defined proportionality to be action that is "reasonably necessary promptly to secure the permissible objectives of self-defense" and that "compel[s] the opposing participant to terminate the condition which necessitates responsive coercion."[152]

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143. *See* Clemmons & Brown, *supra* note 134, at 221.
144. *See id.* at 221-23.
145. Warriner, *supra* note 136, at 59.
146. *Id.* at 58.
147. *See* Clemmons & Brown, *supra* note 134, at 220-21.
148. U.N. CHARTER art. 2, para. 4.
149. *See* Oscar Schachter, *International Law in Theory and Practice*, *in* 13 DEVELOPMENTS IN INTERNATIONAL LAW 152 (1991) (interpreting the necessity requirement to say force is the only available means of self-defense, with other peaceful means not being effective).
150. *Id.*
151. BROWNLIE, *supra* note 83, at 261.
152. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 242 (1961).

In modern practice, the impact on civilian noncombatants and the strategic nature of targets are two factors customarily used to evaluate proportionality.[153] Some scholars find that proportionality under article 51 refers to the targets, means, and methods of the acting state.[154] Targets that are selected based on their capacity to undermine the military strength of the aggressive state typically are acceptable, although civilian casualties may invalidate the claim of proportionality.[155] Another formulation construes proportionality as requiring the response to be proportional to the armed attack and timed to respond immediately or to anticipate an imminent threat.[156] In sum, proportionality prohibits the use of force in self-defense from disproportionately exceeding the manner or the aim of the necessity that originally provoked the use of force.[157]

C. Varying Interpretations of Article 51

Article 51 of the UN Charter has been subject varying interpretations and controversy among scholars. The essence of the controversy surrounds the meaning of the phrase "if an armed attack occurs."[158] Simply put, does the phrase limit the right of self-defense such that it could properly be exercised only if such an attack occurs?

Broadly speaking, the disputants of the question may be grouped into two camps: the strict constructionists and the liberal constructionists.[159] The strict constructionists argue that article 51 contains the entire right of self-defense and is limited by the phrase "if an armed attack occurs."[160] Proponents of this view argue that article 51 should be construed independently of previous customary international law.[161] They admit that an actual armed attack is only one form of aggression, but argue that it is the *only* form of aggression affording a

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153. Gardam, *supra* note 112, at 406.

154. *Id.* at 407.

155. *Id.* at 405-06.

156. Maureen F. Brennan, Comment, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 LA. L. REV. 1195, 1202 (1999).

157. Schachter, *supra* note 149, at 153.

158. U.N. CHARTER art. 51.

159. The two camps, or interpretive approaches, are also referred to as "the restrictive view" and "the liberal view," with the subscribers to each approach known as "restrictionists" and "counter-restrictionists," respectively. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE, BEYOND THE UN CHARTER PARADIGM 73 (1993).

160. SUBHAS C. KHARE, USE OF FORCE UNDER U.N. CHARTER 83-85 (1985)

161. *Id.*

victim state the right to act in self-defense.[162] Textual analysis supports this view, as the right preserved and deemed to be unimpaired is qualified by the words, "if an armed attack occurs," meaning that the "unimpaired customary right is safeguarded only in the situation of armed attack."[163]

By contrast, the liberal constructionists (or counter-restrictionists) posit that the UN Charter is to be construed in light of customary international law, under which, assuming the requirements of necessity, proportionality, and imminency are met, the right of self-defense allows the unilateral use of force in anticipation of an armed attack.[164] The counter-restrictionists argue that the drafters of the UN Charter employed the phrase "inherent right" to preserve the right to self-defense as it existed in 1945.[165] The counter-restrictionists would preserve the right of anticipatory self-defense under an alternative interpretation of article 51, which focuses on the word "inherent."[166] To the counter-restrictionists, the word modifies "self-defense," and therefore the drafters did not mean to restrict the customary right of self-defense; rather, they intended to list one situation under which a state may resort to self-defense.[167] Furthermore, under this view, states may act in self-defense in cases of

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162. *See id.* at 83; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 165-66 (3d ed. 2001) (stating that article 51's choice of words is deliberately restrictive and that the article confines self-defense to responding to an armed attack); Sofaer, *supra* note 142, at 93 (discussing how some writers view the language of article 51 as limiting the use of force only to defend against an armed attack against a member state's territory); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 161 ("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."). The ICJ's opinion in *Nicaragua v. United States* employed this rationale. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 104 (June 27) (concluding that the limited intervention involved could not justify resort to self-defense because customary law only allows the use of force in response to an "armed attack," which does not include "assistance to rebels in the form of the provision of weapons or logistical or other support"). The UN Security Council has also adopted the restrictive view, declining to approve of actions that were not in specific response to an armed attack. *See* James J. McHugh, *Forcible Self-Help in International Law*, *in* 62 U.S. NAVAL C. INT'L L. STUD.: The USE OF FORCE, HUMAN RIGHTS, AND GENERAL INTERNATIONAL LEGAL ISSUES 150 (Richard B. Lillich & John Norton Moore eds., 1980) (citing Security Council denunciation of British actions against Yemen in 1964 in which the British claimed they were defending the South Arabian Federation).

163. KHARE, *supra* note 160, at 84-85.

164. *Id.* at 85.

165. AREND & BECK, *supra* note 159, at 72-73.

166. *Id.*

167. *Id.*

armed attacks as well as threats of imminent attacks and to safeguard other rights.[168]

D. Anticipatory Self-Defense

While scholars may disagree on the meaning of the phrase, "if an armed attack occurs," they all agree that states have a right to self-defense in response to an armed attack. No such agreement, however, exists concerning anticipatory self-defense. Debate in this area is a natural outflow of the more general debate between the restrictionists and the counter-restrictionists highlighted above.

The doctrine of anticipatory self-defense constitutes a significant element of the liberal view.[169] Some scholars have argued that states should have a right to anticipatory self-defense when an attack is imminent under *The Caroline* standard.[170] Under *The Caroline* case, it will be recalled, the triggering event justifying a military response must have already occurred, or at least be imminent.[171] Daniel Webster's description of the characteristics of proper deployment of self-defense has been widely quoted as establishing, while simultaneously severely restricting, the right to use self-defense in anticipation of an event that would otherwise trigger the right of self-defense.[172] Thus, it is generally accepted that the right of self-defense does not permit the use of force to

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168. These other rights include the right of political independence, territorial integrity, protection of lives and property of nationals, and economic rights. KHARE, *supra* note 160, at 85 n.47 (citing D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 24 (1958)). For a classic formulation of the liberal view, see MCDOUGAL & FELICIANO, *supra* note 152, at 232-41; *see also* JULIUS STONE, AGGRESSION AND WORLD ORDER, A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 44 (1958).

169. *See* DINSTEIN, *supra* note 162, at 182 (2d ed. 1994) (stating that the customary right of self-defense allowed for preventive measures taken in anticipation of an armed attack).

170. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972); MYRES MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 234-40 (1994) (assuming a high degree of imminence). Some observers like Oscar Schachter have also expressed that "it is not clear that article 51 was intended to eliminate the customary law right of self-defense and it should not be given that effect. But we should avoid interpreting the customary law as if it broadly authorized preemptive strikes and anticipatory defense in response to threats." Schachter, *supra* note 138, at 1634. Yoram Dinstein argues for an expansive conception of an imminent threat as part of his understanding of "interceptive self-defense." *See* DINSTEIN, *supra* note 162, at 172. Dinstein argues that there can be legitimate acts of self-defense before the enemy has fired a shot, but that the key is the presence of an irreversible course of action by the enemy. *Id.* at 169-70. According to Dinstein, if a state responds to an attack after it has begun, but before the invasion force reaches the border, the response is consistent with article 51. *See id.* (arguing that an armed attack may begin before the force is actually used).

171. *See* Meyer, *supra* note 90, at 394.

172. *Id.* at 395.

punish an aggressor in order to deter a less than imminent threat.[173] A representative statement of the limited nature of this right of "anticipatory self-defense" has been articulated by Professor Oscar Schachter:

> It is important that the right of self-defense should not freely allow the use of force in anticipation of an attack or in response to a threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential. . . .[174]

Opponents of anticipatory self-defense, by contrast, maintain that such a view undermines the whole system prohibiting the use of force under the Charter, and that article 51 is a narrower exception than what existed in international law prior to the UN Charter.[175] They suggest that the drafters of the Charter intended to narrow the customary right of self-defense.[176] The critics' main problem with anticipatory self-defense is that it permits threatened states to make their own decisions as to how imminent a threat is or how likely the enemy is to carry out an attack; thus, according to this view, anticipatory self-defense can erode the whole notion of a prohibition on the use of force.[177] Moreover, critics argue that because a right to anticipatory self-defense can be difficult to

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173. HILAIRE MCCOUBREY & NIGEL WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 91-92 (1992).

174. Schachter, *supra* note 138, at 1634; *see also* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 564-65 (1999) (arguing that Osama bin Laden's plans for attacks against American nationals and diplomatic property were sufficiently imminent to justify use of force under the demanding *Caroline* standard). Others have argued that the right of anticipatory self-defense should be even further limited; for example, to situations involving missiles or perhaps weapons of mass destruction. *See also* JOSEPH MODESTE SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1459-63 (3d ed. 1988).

175. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 141 (2d ed. 1979). Henkin does concede that if the reason for a reading of the Charter to permit anticipatory self-defense is the hypothetical case of a country which learns certainly and unimpeachably that another is about to destroy it, responsible reading of the Charter and responsible concern for international order would limit the new reading to that extreme case. *Id.* at 143. For representative arguments against anticipatory self-defense, see DINSTEIN, *supra* note 162, at 165-69. *See also* Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored Terrorism* 100-03 (1989) (monograph published by U.S. Air War College) (discussing a state's duty of due diligence to preventing wrongs against another nation with which it is at peace).

176. BROWNLIE, *supra* note 83, at 278-79.

177. *See* HENKIN, *supra* note 175, at 295.

define or limit, bad faith or an error in judgment could easily lead to unnecessary conflict.[178]

The practice of states reflects a similar ambivalence towards anticipatory self-defense. This is not entirely surprising, for it stands to reason that states, ever so jealous of their sovereignty, prefer to limit the scope of the right of self-defense and to prevent unwarranted acts of anticipatory self-defense. The U.S. stance on anticipatory self-defense, both rhetorically as well as in practice, illustrates this ambivalence.

VIII. RECENT U.S. INVOCATION OF ARTICLE 51 AND ANTICIPATORY SELF-DEFENSE

At one point, the United States had declared that it would not engage in a policy of striking targets that might present a future threat to the United States.[179] Recently, however, that position has changed dramatically, especially since the 9/11 attacks.

Prior to the invasion of Iraq, the United States employed article 51 to justify a preemptive attack on August 21, 1998, when the United States fired 75 to 100 Tomahawk cruise missiles on the alleged terrorist outposts of bin Laden in Sudan and Afghanistan.[180] The attack came in response to two bombs that had ripped through the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, claiming several hundred lives and injuring approximately 5000 others.[181] Based on American intelligence information, the United States had identified bin Laden (or individuals sponsored by him) as the perpetrator(s) of the attacks and swiftly responded.[182]

After the U.S. response, President Clinton addressed the nation.[183] In his address, President Clinton noted that: (1) bin Laden had been

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178. *See* Mark Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 45-46 (1987) (discussing and then rejecting this argument).

179. *See* Sofaer, *supra* note 142, at 109 (indicating U.S. support for the UN's condemnation of Israel's 1981 bombing of an Iraqi nuclear reactor).

180. Art Pine, *U.S Targets Heart of Terror*, L.A. TIMES, Aug. 21, 1998, at A1. In Afghanistan, the U.S. missiles targeted seven of Osama bin Laden's compounds, one of which housed key supporters who allegedly were plotting further attacks against western targets. *Id.* In Sudan, the target was a plant allegedly engaged in the manufacture of chemical agents. *Id.*

181. Steven Lee Myers, *Bin Laden Plot Reported Against U.S. Sites in the Gulf*, N.Y. TIMES, Dec. 16, 1998, at A3.

182. *Id.*

183. *See* Remarks in Martha's Vineyard, Massachusetts, *on Military Action Against Terrorist Sites in Afghanistan and Sudan*, 2 PUB. PAPERS 1460 (Aug. 20, 1998) [hereinafter Martha's Vineyard Remarks].

responsible for the strikes on the American embassies, (2) bin Laden's group had previously attacked Americans abroad, (3) the United States had "compelling information" that bin Laden was planning an additional attack on Americans, and (4) bin Laden was seeking to acquire weapons of mass destruction.[184] In a letter to congressional leaders the following day, President Clinton articulated a more formal justification of his use of force, stating:

> The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.[185]

Viewed in its essentials, the U.S. bombings constituted a unilateral use of force against the territorial integrity of two sovereign states—clearly a prima facie violation of conventional and customary international law as enumerated in the UN Charter.[186] As discussed, the only exception to the proscription against armed attack recognized by international law is self-defense. The critical question presented by the actions of the United States, therefore, is whether the concept of self-defense can be expanded to include anticipatory and retaliatory attacks against nonstate actors in neutral territory. Did the U.S. action meet the international legal requirements of self-defense? The elements of self-defense are necessity (including imminence) and proportionality precipitated by an armed attack. To assess the legality of the U.S. action, we need to treat each of these elements in turn as they relate to the bombing raids in Afghanistan and Sudan.

A. Armed Attack

The August 7, 1998, embassy bombings can be characterized as an "armed attack" against the United States under international law.[187] The attacks were carried out against embassies, which international law treats as inviolable property of their home states.[188] Also, international law

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184. *Id.*

185. Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464 (Aug. 21, 1998).

186. *See* U.N. CHARTER art. 2, para 4.

187. Martha's Vineyard Remarks, *supra* note 183.

188. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 466 (1986).

recognizes armed attacks on civilian citizens abroad by terrorists as attacks on the state itself.[189] One can reasonably conclude, therefore, that an "armed attack" against the United States occurred in Kenya and Tanzania, which fulfilled the specific requirements of article 51 and *Nicaragua v. United States*.[190]

B. Necessity

An anticipatory action to a suspected armed attack must still be tempered by necessity.[191] In 1998, indicators had emerged that bin Laden intended to bring further attacks on civilians.[192] The existence of a threat of further attacks on American targets was present.[193] It is unclear, however, how imminent this threat was. One element of imminence is preparedness on the side of the opponent.[194] The target of the attack in Afghanistan was a meeting of the lieutenants of bin Laden's organization.[195] Presumably, these people had gathered to plan future attacks.[196]

Although there may have been some evidence that this was their purpose, merely opposing a state has never been considered a threat to that state. The mere probability of future attacks, combined with an enmity for the targeted state, does not trigger a legitimate claim of self-defense.[197] Another element of necessity is a failure to resolve the matter

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189. Sofaer, *supra* note 142, at 96.

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

191. Schachter, *supra* note 149, at 152.

192. Myers, *supra* note 181.

193. *Id.*

194. *See generally* Bowett, *supra* note 170 (detailing the importance of imminence in anticipatory self-defense).

195. James Risen, *Bin Laden Was Target of Afghan Raid, U.S. Confirms*, N.Y. TIMES, Nov. 14, 1998, at A3.

196. *Id.*

197. This norm of customary international law emerged principally out of the international community's response to Israel's bombing of Iraq in 1981, in which Israel attacked a partially completed nuclear reactor with F-16s, completely destroying it. *See* Clemmons & Brown, *supra* note 134, at 228. Israel initially attempted to rally international condemnation and action against the construction of the nuclear reactor, but failed to do so. A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II 288 (1997). Israel justified the attack on grounds that Iraq was a hostile neighbor who opposed Israel's existence and the reactor could have been used to produce weapons that could be launched against Israel. *See id.* With the support of the United States, the UN Security Council condemned the attack. *Id.* Support for the resolution was predicated on different grounds. *See id.* Many states argued for a strict restrictionist interpretation of article 51, condemning the Israeli action as sheer aggression. *See* AREND & BECK, *supra* note 159, at 78. Many states condemned the Israeli action, arguing, in accord with a counter-restrictionist view of article 51, that if the action had met the requirements of *The Caroline* case, it would have been justified under international law. *Id.* at 78-79. These states

through peaceful channels.[198] It is difficult to assess this condition when the aggressor is a nonstate actor not a party to any UN protocols, conventions, or treaties. An analogous method of assessment, however, can be found in the criminal context. Did the threatened state take efforts to apprehend the attacker or debilitate the attacker through intelligence channels? In this case, the United States did not make such efforts.

The attack on Sudan is equally, if not more, disquieting. A pharmaceutical plant was targeted because it allegedly was engaged in the manufacture of biological weapons.[199] Again, as with the Israeli bombing of Iraq, a mere potential threat in the form of physical plants is not sufficient under international law to justify an act of self-defense. The evidence gathered in support of the attack has since been criticized.[200] It is not clear that the plant posed any greater threat to the United States than any other chemical plants located throughout the world.[201] There is no indication that the United States sought peaceful means to address whatever threat the plant posed. There is no published evidence that an attack by the plant was imminent. Independent research has concluded that there was no evidence found to indicate that the plant was being utilized for any kind of preparations for future attacks against American targets.[202]

C. Proportionality

Proportionality is traditionally viewed as that force necessary to forestall the immediate threat.[203] The precise impact of the American bombing of Afghanistan is unclear. Assuming, however, that the

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faulted the Israeli attack for its lack of an imminent threat. *Id.* The Security Council ultimately determined that in the absence of a launched attack, there was no need to destroy the reactor. *See* Clemmons & Brown, *supra* note 134, at 229. It should be noted, though, that the United States ultimately blocked inclusion of the word "aggression" in the drafting of the Security Council Resolution. *See* S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., U.N. DOC. S/RES/487 (1981).

198. Schachter, *supra* note 149, at 152.

199. *See* Editorial, *Dubious Decisions on the Sudan*, N.Y. TIMES, Sept. 23, 1998, at A28.

200. *Id.*

201. *Id.* ("[T]he Central Intelligence Agency had recently concluded that reports that had appeared to document a clear link between the Sudanese Government and terrorist activities were fabricated and unreliable.").

202. On September 18, 1998, National Security Advisor Sandy Berger said that the CIA had found the presence of emta, an element of the nerve gas VX, in soil samples from the plant. *See A Case of Mistaken Identity?*, THE ECONOMIST, Aug. 27, 1998, at 43 (reporting that the foreign diplomats, journalists, and others invited by the Sudanese to inspect the rubble left after the attack on the plant have found nothing to support U.S. allegations).

203. *See* Clemmons & Brown, *supra* note 134, at 219.

bombing killed every person present, it is not clear that this attack was proportionate to the threat. If the members of the meeting were not active terrorists, but merely sympathizers of bin Laden, then the other element of proportionality, impact on noncombatants, militates against the validity of the United States' bombing.[204]

Similarly, in Sudan, assuming that the plant actually was engaged in chemical weapons manufacturing, it is not clear that the threat required its complete destruction. The United States admitted that this was a so-called "dual use" facility, which could be converted to military use, but which typically operates for civilian purposes.[205] It must be assumed that such a shift requires some preparation. The time used for preparation would also provide the potentially targeted states with time to diffuse the threat. A more proportionate response might have been achieved through an inspection by UN weapons inspectors or by negotiations through diplomatic channels with Sudanese officials. As *The Caroline* case demonstrates, the question in assessing proportionality blends with that of necessity. The action taken in response to the threat must be the only option available in the circumstances.[206] Given the uncertain nature of the threat posed by the Sudanese plant, bombing with cruise missiles may not have been the only option available to the United States.

IX. ASSESSING THE LEGALITY OF THE BUSH DOCTRINE OF PREEMPTION

Does the Bush Doctrine of preemption comport with the law of self-defense? The answer appears to be no, regardless of which approach—restrictionist or liberal—is applied.

Under a restrictive view of article 51, for example, an armed attack against the United States must have occurred in order for the United States to justify self-defense.[207] To assess the lawfulness of any preemptive action, two questions must be answered. First, is there a right to act (*jus ad bellum*). Second, if the answer to the first question is yes, is the preemptive action necessary and proportional; that is, can the weapons to be deployed in the action discriminate between combatants and civilians.[208] Like any other unilateral action, necessity, in this

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204. Gardam, *supra* note 112, at 406.

205. *See Clouds of Doubt*, *at* http://www.whtt.org/articles/98092ib.htm (last visited Nov. 8, 2003).

206. Clemmons & Brown, *supra* note 134, at 241.

207. *See* Arend & Beck, *supra* note 159, at 73.

208. *See* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 19 (1999); *see also* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 405-07 (1993) (stating that the impact on civilian combatants and

context, would include the absence of a plausible and timely international institutional alternative. Under a strict reading of the rule concerning self-defense, the Bush Doctrine satisfies neither criterion for legality.

The text of article 51 explicitly requires an "armed attack" as a pre-condition to the use of defensive force.[209] The intent of the Charter's framers was to make acceptable uses of force readily distinguishable from unacceptable uses of force.[210] Drawing the line at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainty.[211]

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the strategic nature of targets constitute two factors customarily used to evaluate the proportionality element of self-defense).

209. U.N. CHARTER art. 51.

210. Bowett, *supra* note 170, at 4.

211. Oddly enough, it was the United States that insisted on inserting the conditional phrase "if an armed attack occurs against a member state." *See* Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorisation?*, 4 SINGAPORE J. INT'L & COMP. L. 362, 368 (2000). The responses to this insistence varied:

> Green Hackworth, the State Department's legal adviser, was alarmed that this 'greatly qualified the right of self-defense,' but Governor Harold Stassen, deputy head of delegation at San Francisco, refused to yield, insisting 'that this was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred.'

Id. (quoting Minutes of the Forty-Eighth Meeting (Executive Session) of the United States Delegation, Held at San Francisco, May 20, 1945, 1 FOREIGN RELATIONS OF THE UNITED STATES, 1945, at 818). When another member of the U.S. delegation "posed a question as to our freedom under this provision in case a fleet had started from abroad against an American republic but had not yet attacked," Stassen replied, "[W]e could not under this provision attack the fleet but we could send a fleet of our own and be ready in case an attack came." *Id.* (quoting Minutes of the Thirty-Eighth Meeting (Executive Session) of the United States Delegation, Held at San Francisco, May 14, 1945, 1 FOREIGN RELATIONS OF THE UNITED STATES, 1945, 707 at 709). It is noteworthy that during the first three decades after the Charter's ratification, the United States did not challenge the proposition that article 51 permits use of force only in response to an actual armed attack. *See, e.g.*, *The President's Proposal on the Middle East: Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. On Armed Services*, 85th Cong. 6-7, 27-28 (1957) (statement of U.S. Secretary of State John Foster Dulles). During the Cuban Missile Crisis, American officials declined to rely on article 51, claiming instead that the quarantine was justified under article 52. *See* Abraham Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T ST. BULL., Nov. 19, 1962, at 763-65. In supporting the UN Security Council resolution that condemned Israel's 1981 raid on an Iraqi reactor, however, the U.S. representative did not address the scope of self-defense under article 51 or the claim of Israel that it acted in self-defense. *See* U.N. SCOR, 36th Sess., 2288th mtg. at 3-5, U.N. Doc. S/PV. 2288 (1981). In recent years, however, the United States has come to implicitly question that proposition. In 1986, the United States attacked Libya in response to the bombing of a Berlin night club in which two American servicemen were killed. *See Seeking the Smoking Fuse*, TIME, Apr. 21, 1986, at 22. The United States argued that its "preemptive" action was justified under article 51. *See Address of U.S. Representative Vernon Walters Before the UN Security Council*, U.N. SCOR, 41st Sess., 2674th mtg. at 13-18, U.N. Doc. S/PV.2674 (1986). President Ronald Reagan, in an address to the nation, said the "preemptive action" was "fully consistent with Article 51 of the United

In the case of Iraq, evidence of an armed attack by Iraq on America or American targets was not present.[212] It is not clear how imminent this threat was: there was no evidence that Iraq was engaged in any kind of preparations for future attacks against American targets.[213] Presumably, Iraq planned to undertake future attacks against the United States. There was no evidence of this purpose, and even if there were any, merely opposing a state has never been considered a viable threat to that state. The international response to Israel's bombing of Iraq indicates that a mere probability of future attacks, combined with hostility towards the targeted state, will not give rise to a legitimate claim of self-defense.

The U.S. justification for the preemptive attack was the alleged manufacture by Iraq of nuclear, chemical, and biological weapons.[214] Again, as with the Israeli bombing of Iraq, the mere potential of a threat from physical plants was insufficient under international law to justify an act of self-defense. A state may legitimately engage in preemptive strikes when the threat is immediate. In the case of Iraq, the imminence

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Nations Charter." *Address to the Nation on the United States Air Strike Against Libya*, 1 PUB. PAPERS 468, 469 (Apr. 14, 1986). Only the veto of the United States, however, joined by Britain and France, prevented the Security Council from adopting a resolution that would have condemned the American response as a violation of the UN Charter. *See* Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 921-22 (1986). Nine Council members voted for the measure. *See U.S. Rebukes Thailand over U.N. Libya Vote*, N.Y. TIMES, Apr. 23, 1986, at A7.

212. Bennett Roch & John C. Henry, *Bush: 'We Cannot Wait for Final Proof'*, HOUS. CHRON., Oct. 8, 2002, at A1. President Bush argued that although there was not conclusive evidence that Iraq was developing nuclear weapons, confronting Saddam Hussein was in America's best interest because of the potential danger posed. Invoking the September 11, 2001, attacks on the United States, Bush contended that America could not wait for Hussein to develop nuclear weapons before taking action. In addition, the twelfth quarterly report filed by UNMOVIC indicated that weapons inspections had revealed no undeclared weapons of mass destruction. S.C. Res. 232, 58th Sess., 4714th Mtg., U.N. Doc. S/2003/232 (2003). The report further indicated that Iraq was destroying under UNMOVIC supervision, "small known quantities" of mustard gas and proscribed missiles that could have been used as delivery systems for weapons of mass destruction. *Id.* para. 14. The search for weapons of mass destruction after the American-led invasion of Iraq has failed to uncover evidence that the Hussein regime was producing atomic, chemical, or biological weapons. Julian Borger et al., *The Hunt for Weapons of Mass Destruction Yields—Nothing*, THE GUARDIAN, Sept. 25, 2003, at A1.

213. The evidence of a threat to the United States consisted of statements regarding Saddam Hussein's past behavior and speculation. President Bush described Saddam as a "murderous tyrant," drawing on evidence of Saddam Hussein's invasion of Kuwait and human rights abuses against the Iraqi people. Museum Remarks, *supra* note 12. Condoleezza Rice, President Bush's National Security Advisor, warned that while the Administration did not have conclusive proof, such evidence could be a "mushroom cloud." Purdum, *supra* note 24. At no point did the Bush Administration allege with specificity any plans on the part of the Hussein regime to launch an imminent attack on the United States.

214. President George W. Bush, Address at United Nations General Assembly (Sept. 23, 2003), *available at* http://www.whitehouse/gov/news/releases2003/09/iraq/20030923-4.html.

of the threat was unclear. Regardless, the United States had recourse to the UN Security Council, which could have chosen to authorize the use of force if it had found that Iraq posed a threat to regional or international peace.[215] The United States exercised this option by addressing the Security Council on multiple occasions and lobbying Security Council members individually. The inability of the United States to persuade other Security Council members that Iraq posed such a threat to international peace cannot substitute for the imminency requirement. The questionable quality of the evidence presented only underscores the need for the restraint of necessity on armed attacks.

Nor was the proportionality requirement as articulated in *Nicaragua v. United States* met.[216] The principle of proportionality necessarily prohibits action broader than the action undertaken in the *Nicaragua* case in response to a provocation that is less substantial than the provocation posed in the *Nicaragua* case.[217] Specifically, the U.S. action against Nicaragua (attacks on its ports and oil installations) necessarily constituted a disproportionate response to Nicaragua's action against El Salvador (the provision of arms and assistance to anti-government rebels).[218] It follows then that an even graver action against Iraq (invasion and the overthrow of the government) necessarily constituted an even more disproportionate response to its lesser offense. The evidence, therefore, argues against a forcible response in self-defense consistent with the restrictive view of article 51.

One arrives at the same conclusion if one were to employ the liberal view of article 51, which encompasses the right of self-defense as it exists under customary international law.[219] Under this approach, states can take actions in anticipation of an imminent attack.[220] But there was no evidence of an imminent attack from Iraq. The timing element mandates that a response occur close in time to an imminent threat or an attack.[221] Here, the period between the United States' determination that an attack was imminent and its action to stop it involved a long time. The fundamental principle is that extended delays are prohibited; otherwise, the use of force may be more in the nature of a reprisal, which

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215. U.N. CHARTER art. 1.
216. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
217. *See id.*
218. *See id.*
219. KHARE, *supra* note 160, at 84-85.
220. *Id.*
221. *Id.*; Military and Paramilitary Activities, 1986 I.C.J. at 14.

is prohibited under international law.[222] The extended delay would thus mean that the responding state did not meet all the requirements of legitimate self-defense.

X. CONCLUSION

The Bush Doctrine does not survive the proper application of the contemporary construction of article 51 of the UN Charter and the legal articulation set forth in *Nicaragua v. United States*. As specified in article 51, no "armed attack" actually occurred against the United States. For the U.S. position to have come within the precincts of international law, the Administration not only must have established that Iraq had developed weapons of mass destruction (which it has failed to prove), but also needed to provide compelling evidence that terrorist groups linked to Iraq were both willing and able to launch an imminent attack on the United States. This showing was not, and to date still has not been, made.[223] Suspicion cannot substitute for proof, and the inability to persuade other members of the Security Council cannot stand in for imminent danger that does not appear to exist.

This is not to endorse the notion that international law requires a state to idly stand by and accept an armed attack before defending itself. That would render international law a suicide pact, especially in an international system such as ours where states continue to coexist within the decentralized dynamics of Westphalian law.[224]

Rather, anticipatory self-defense should be approached with caution. The justification is difficult to support because the elements of necessity, proportionality, and imminence are not easily demonstrated. Determining the necessity of force in such circumstances requires the threatened party to ascertain the intentions of the attacker, which is an inexact process at best. Furthermore, in the absence of an initial attack, it is difficult to assess the proportionality of the response to the threat posed by a future attack.

The Bush Doctrine potentially undermines norms developed and internalized over the decades, as well as the Administration's own

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222. KHARE, *supra* note 160, at 84-85.

223. Douglas Jehl & Judith Miller, *The Struggle for Iraq: The Weapons; Draft Report Said to Cite No Success in Iraq Arms Hunt*, N.Y. TIMES, Sept. 25, 2003, at A1.

224. The Peace of Westphalia ended the Thirty Years War in 1648 and facilitated the emergence of the modern state system. KISSINGER, *supra* note 13, at 21. After the Peace, which marked the end of the medieval Holy Roman Empire, power and sovereignty were no longer concentrated in the hands of the Hapsburg emperor, but were localized among the imperial princes. *Id.* at 65.

ostensible purposes. To combat the threat of international terrorism, the Bush Administration proposes to support the rule of law both within and among states.[225] The unilateral, preemptive use of force without the authorization of the Security Council, however, would devastate the progress made toward the rule of law. The UN Charter system created clear restrictions on the use of force. The United States, by seeking Security Council approval for the use of force against Iraq, implicitly acknowledged these restrictions. But, the United States' decision to launch a unilateral, preemptive attack on Iraq absent Security Council approval, risked undermining the legitimacy of the Charter system and potentially weakening the global rule of law.

Not only is the Bush Doctrine jurisprudentially suspect, it is also strategically questionable. The Bush Doctrine's expansion of the scope of anticipatory self-defense risks setting a dangerous precedent, which can easily be manipulated. It ignores state practice and reciprocity, a cardinal principle of international law.[226] Are we prepared to accord China, India, Pakistan, or even North Korea the right to invoke a loose, unsubstantiated notion of "preemptive self-defense?" To fashion a doctrine out of preemption encourages a perception of superpower arrogance and unilateralism. The danger of unilateralism is that it usurps the process of interpretation: a country that unilaterally interprets a legal norm—in this case, that of anticipatory self-defense—and acts upon that interpretation without any efforts at persuasion would reaffirm the law of power, rather than the power of law.[227]

Even if construed broadly, the notion of anticipatory self-defense is still too narrow to support an attack on Iraq. Based on evidence proffered to date, the threat to the United States from Iraq was neither specific nor clearly established nor shown to be imminent. Preemption begets preemption, which might inevitably lead to chaos. This exposes

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225. NATIONAL SECURITY STRATEGY, *supra* note 3, at 15.

226. Kessler, *supra* note 70.

227. As Professor Schachter observed some years ago,

> The right of self-defense, "inherent" though it may be, cannot be autonomous. To consider it as above or outside the law renders it more probable that force will be used unilaterally and abusively. No state or people can face that prospect with equanimity in the present world. . . . [S]elf-defense must be regarded as limited and not only legitimated by law. . . . The political will that is necessary depends on understanding both the danger of unbridled force and the necessity of legal and institutional control. . . . It is through such concrete measures that international law may in time strengthen the national security of all states.

Schachter, *supra* note 149, at 277.

the danger of a doctrine of preemption. The corrosive effect of the Bush Doctrine, if taken to its logical extension, would defeat the purpose of creating a world free of terror and uncertainty.