

## XIV

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### Using Force Lawfully in the 21st Century

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#### *Introduction*

**W**ar is not a law-free zone. There have always been rules governing when a State can legitimately use armed force. In one familiar ancient example, in the 12th century BC the Mycenaean Greeks most likely sacked the city of Troy because it was rich and vulnerable. As summer 2004 moviegoers saw, however, by 800 BC the poet Homer felt compelled to clean up the story with a justificatory act of Trojan perfidy—the kidnapping of a Spartan queen by a Trojan prince. Accordingly, a more respectable *casus belli*, rooted in revenge, love and passion, was provided in *The Iliad*<sup>1</sup> for what otherwise would have been blatant Greek aggression. Thus, even in the Age of Heroes, when armed combat was glorified and gods were believed to fight side-by-side with men, unalloyed aggression was viewed as morally questionable. The perceived need for some legal justification for unleashing the dogs of war has remained a constant ever since.

At the beginning of the 17th century, Hugo Grotius noted that, although “[t]he grounds of war are as numerous as those of suits at law . . . . Three justifiable causes for war are generally cited: defense, recovery of property, and punishment.”<sup>2</sup> There is little doubt that the *casus belli* regularly invoked by States over the subsequent 350 years fell into one or more of these categories. To be sure, given the broad nature of such concepts as “defense” or “punishment,” the potential for their abuse or bad faith application has been quite obvious. Only a hopelessly unimaginative

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statesman would have been unable to articulate some plausible sounding basis for his belligerent aims, whatever they might be.

Not surprisingly, while some leaders took full advantage of the considerable elasticity inherent in the traditional resort-to-force legal and ethical strictures, dubbed *jus ad bellum*, others have sought to leash the dogs of war by devising ever more rigid and proscriptive rules. Indeed, the efforts to ban armed conflict altogether (of which the 1928 Kellogg-Briand Pact<sup>3</sup> is perhaps the best-known example), or at least substantially constrain the use of violence, are as old as, or in some instances, even older, than war itself. The search for legal limitations has intensified in the 20th century, as the carnage of mechanized warfare and the horrendous casualties suffered during the two World Wars have substantially diminished combat's erstwhile heroic luster.

These regulatory efforts featured most prominently a no-first use concept, whereby force could be used only in response to an attack, rather than as an instrument of aggression. However, given the fact that waiting to absorb an attack by an enemy before responding can be a risky strategy, most statesmen and generals have sought to protect the option of using force first, albeit in anticipation of the enemy's attack. This anticipatory self-defense doctrine has been a hardy perennial in international law.<sup>4</sup>

### *Anticipatory Defense's Historical Record*

#### **Burning the *Caroline***

The 1837 *Caroline* incident,<sup>5</sup> involving the British destruction of an American ship in US territorial waters, buttressed the modern international law doctrine of "anticipatory self-defense." In accepting the British explanation that the *Caroline* was destroyed in "self-defense," anticipating that she would again be used to assist the Canadian insurgents, American Secretary of State Daniel Webster acknowledged in 1841 the doctrine's validity, although he attempted to limit its application to the most extreme circumstances—where the need is "instant, overwhelming, and leaving no choice of means and no moment for deliberation"<sup>6</sup>—leading many subsequent commentators to conclude that the doctrine could be invoked only when the threat was imminent.<sup>7</sup>

Of course, robust anticipatory self-defense had been a well-accepted rule, firmly grounded in all-important State practice, for centuries before the *Caroline* went crashing over Niagara Falls. Indeed, Webster's rather restrictive wording of this rule was driven largely by the US desire to limit the circumstances in which Britain or any other European power could claim a legitimate basis for using force on American soil. In a sense, the *Caroline* doctrine was meant to provide

some additional legal scaffolding for the Monroe Doctrine, promulgated in 1823. Significantly, neither the practice nor the writings by the various international law authorities evidenced much regard for the notion of instantaneity invoked by Webster; indeed, many an attenuated or distant threat were judged to be a sufficient *casus belli*.

In 1587, for example, England's Queen Elizabeth I sent a fleet, commanded by Sir Francis Drake, to attack Spanish and Portuguese harbors—primarily Cadiz—in an effort to prevent, or at least to delay, the arrival of the “Invincible Armada.” Forty years later, Grotius endorsed the practice as lawful in his monumental treatise, *The Law of War and Peace*, noting that self-defense was permissible, both upon being attacked and also before, where “the deed may be anticipated.”<sup>8</sup> Writing over one hundred years later, another of modern international law's founding fathers, Emmerich de Vattel, also asserted in *The Law of Nations* that a country “may even anticipate the other's [aggressive] design, being careful however, not to act upon vague and doubtful suspicions.”<sup>9</sup> Over the next three centuries, anticipatory self-defense was regularly employed, whether openly or by implication.

By the 20th century, a robust self-defense prerogative was firmly rooted in international law. For example, in 1939 Britain and France acted in anticipatory self-defense, warning Germany that the democracies would consider an attack on Poland to be a *casus belli*, and going to war when that attack occurred. Germany's armed forces were not, of course, at that time menacing either Britain or France and the only legal right either State would have had to threaten Hitler—since Poland was not British or French territory—must have been based in their rights to anticipate future attacks. In fact, it is this same fundamental rule that justifies the Atlantic Alliance's “collective security” scheme—where more than two dozen States pledged armed support if the territory of any one were attacked—and the United Nations Charter's approval of “collective” self-defense.

### **Anticipatory Defense Today**

Preemptive use of force has always been an implicit component of American strategy, and during the Cold War the United States resolutely refused to adopt a declaratory no-first use position with respect to nuclear weapons. More recently, in a June 1, 2002, West Point speech, President Bush articulated a traditional policy justification for the anticipatory self-defense doctrine, noting that “we must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge” and that “if we wait for threats to fully materialize, we will have waited too long.”<sup>10</sup> These themes were further elaborated in the National Security Strategy of the United States (NSS),<sup>11</sup> issued by the Bush Administration in September of 2002.

Despite anticipatory self-defense's venerable pedigree, the Bush Administration's critics claimed that the NSS went too far by not limiting preemption to circumstances involving imminent threats, by giving preemption such a pride of place, and thereby alienating many friends and allies. This criticism is misplaced. American declaratory strategy has always been meant to serve a variety of purposes, including deterring enemies and reassuring friends. Most of the time both of these goals can be accomplished simultaneously. Whenever faced, however, with an unusually acute threat from groups or regimes difficult or impossible to deter—the situation the United States faces today—the deterrence imperatives may reasonably prevail. Thus, emphasizing the vigor of the American preemption strategy is meant to enhance, to the greatest extent possible, the quality of US deterrence.

### **Europe's Angst**

For all its ample legacy, however, anticipatory self-defense remains controversial. It is attacked for a variety of reasons, ranging from the more idealistic, albeit not necessarily prudent, desire to abolish war, or at least to limit the circumstances in which force can be used, to the belief that the application of the anticipatory self-defense doctrine inherently leads to abuses and causes instabilities, to the desire to limit American freedom of action. Indeed, many European officials assert that, absent a UN Security Council authorization, force can be used only to repel an armed attack on a State's territory—after it has been initiated. This was certainly the position articulated with considerable vigor during the Iraq-related debates by such countries as France, Germany and Russia.

What explains Europe's embrace of the restrictive view of self-defense? To begin with, the European criticisms on this subject are often laced with a heavy dose of anti-Americanism, since it is the United States that is currently viewed as the most obvious beneficiary of the anticipatory self-defense option.<sup>12</sup> Anti-Americanism aside, Europe's defense analysts appear to be more concerned with the possibility that the States' embracing the anticipatory defense strategy will overreact and strike first without sufficient provocation, rather than with the danger that a delayed response to a weapons of mass destruction (WMD)-wielding foe would prove disastrous.

Meanwhile, the more academically inclined pundits, who used to describe the Soviet nuclear buildup as a reaction to the United States-initiated arms race, now argue that the key to maintaining international stability and peace is to keep as high of a threshold as possible against the use of force and that allowing States to attack, based upon suspicions or intelligence warnings, would make the use of force a more frequent occurrence. Their common underlying assumption is that

misperceptions, mistakes and hair-trigger military deployments, geared towards preemption, are destabilizing and the main cause of wars.

These criticisms, however, even in their more refined versions, are fundamentally misplaced. The strategy, which would require States to wait until the smokestacks of an enemy fleet rose over the horizon and the first broadside was fired before responding, was hopelessly unrealistic even when the UN Charter was adopted in 1945. Particularly in the post-September 11 environment, when advance warnings may be calculated in seconds rather than days or weeks, or may not come at all, the consequences of allowing an enemy to get in the first blow may well be catastrophic. As President Bush has pointed out, even the most robust deterrence “means nothing against shadow terrorist networks with no nation or citizens to defend,” and containment is not possible “when unbalanced dictators with weapons of mass destruction can deliver those weapons surreptitiously to our shores or secretly provide them to terrorist allies.”<sup>13</sup>

In fact, far from being inconsistent with deterrence, a preemption strategy essentially broadens the range of conduct to be deterred to encompass not just the use of force—as was the case with the traditional deterrence model—but also efforts to acquire prohibited weapons (or even the efforts to pursue a strategy that appears to flirt with WMD development and acquisition) or render aid to terrorist groups. As such, preemption both buttresses and extends deterrence.

### **Distant Threats**

Additional criticisms of the Administration’s recasting of the anticipatory self-defense strategy come from those who claim that, even under the traditional centuries-old view of that doctrine, to justify response the threat had to be imminent. This argument, however, does not hold water. First of all, although Webster’s *Caroline* letter indeed formulated the anticipatory self-defense doctrine in terms that stressed the instantaneousness of the threat, leaving no opportunity for deliberation, this was not the formulation used by many of the earlier leading international law experts. Moreover, centuries of State practice in this area featured preemption against both immediate and more long-term threats.

In any case, the concept of an imminent threat is not synonymous with a short-lead time threat. A threat can be strategically imminent, albeit years away from full fruition. In today’s world, for example, a rogue regime or a pan-national terrorist group that is committed to our destruction and is seeking to acquire weapons of mass destruction, while undertaking in the interim more conventional attacks, poses a strategically imminent threat to the United States fully sufficient to justify the preemptive use of force. With regard to al Qaeda, in particular, this was the threat situation that we have been facing for a number of years now.

Moreover, given the nature of the al Qaeda-style attacks, the only way to preempt successfully against such groups is to do so months, and even years, in advance of these attacks being launched. This is because the way the enemy is preparing and carrying out such attacks makes near-term preemption by the United States inherently ineffective. For example, even if the United States had toppled the Taliban regime in the summer of 2001, or succeeded in eliminating bin Laden himself during that time period, it would not have necessarily prevented the September 11 attacks. Most of the perpetrators had already infiltrated the United States, and they could have proceeded without additional help or instructions from their superiors.

To be sure, to the extent that preemption is being contemplated in response to a long-term strategic threat, it is reasonable to hold that the threat involved must be extremely serious in nature. (Conversely, an immediate and certain threat, e.g., *Caroline*-style gun running, even if not particularly grave in nature, potentially justifies a preemptive response.) To proceed otherwise would admittedly render the anticipatory self-defense doctrine infinitely elastic, eroding all limitations on the use of force.

#### **Intelligence Mistakes Revisited**

Another oft-invoked anti-preemption argument builds upon the Bush Administration's failure to find WMD stockpiles in Iraq, claiming that it underscores the inherent unreliability of all weapons programs intelligence and mitigates against trying to use force to forestall attenuated, long-term threats. This claim has some merit; prosecuting a robust preemption strategy may well lead to some erroneous uses of force. On balance, however, given the threats faced, erring on the side of being too cautious may not be a wise strategy. This is especially the case when dealing with Saddam Hussein and other regimes that have engaged in aberrant and unpredictable conduct.

Even more fundamentally, the fact that Saddam apparently eschewed, following the end of the first Gulf War, retaining and enhancing actual WMD stocks did not render his regime harmless. Iraq retained active WMD development programs and engaged in an elaborate strategic cat-and-mouse game, denying any WMD-related ambitions, while behaving as if it already had substantial weapon stockpiles.<sup>14</sup> Moreover, since Saddam himself was in the best position to determine when he would require a particular set of weapons, and producing sufficient quantities of chemical and biological agents and weaponizing them could have been done in a relatively short time, this just-in-time deployment strategy was perfectly viable. In any case, from beginning to end, the burden was on Saddam Hussein to prove that he had fully disarmed—not on the anti-Saddam coalition to prove that he retained

weapons stockpiles or research programs. The broader point, repeatedly made by the Bush Administration during the months leading up to the war, was that rogue regimes, instead of playing hide-and-seek games, were supposed to put forward various confidence-building measures capable of reassuring the international community that they were fully and irreversibly disarmed.

The real danger in today's world comes from rogue regimes and terrorist organizations that care not a whit about international law. As a result, the requirements of deterrence have become far more onerous, with many of our foes believing that the United States, in bin Laden's famous words, is "a weak horse."<sup>15</sup> In this situation, for the United States to accept the proposition that the anticipatory self-defense doctrine is no longer valid and that, aside from responding to an armed attack on one's territory, all uses of force require the blessing of the UN Security Council, would be nothing short of suicidal. More generally, adopting this model would create an unprecedented dissonance between the policy imperatives and the legal rules. This is a strain that the law cannot bear. It would lead to the eventual demise of all legal restrictions on the use of force.

#### *What about the UN Charter?*

##### **Stassen's Revenge**

Not surprisingly, since the policy arguments about the benefits of narrowing the circumstances in which law-abiding States can use force are ultimately unpersuasive, its proponents have also sought to use the law as a trump card. They claim that the anticipatory self-defense doctrine, however venerable or consonant with *real politik* imperatives, did not survive the adoption of the United Nations Charter, a portion of which—Article 2—requires all members of the United Nations to "refrain in their international relations from the threat or use of force." The proponents of this restrictive view argue that, absent the Security Council's blessing, the Charter limits the lawful use of force to circumstances, set forth in Article 51, in which an armed attack already has taken place and, even then, only pending action by the Security Council. This assertion, however, relies on an implausible reading of Article 51 and of other UN Charter provisions. Even more fundamentally, it also reflects an erroneous, albeit widely held view, that the UN Charter has superceded and vitiated the entire pre-existing body of customary and treaty-based international law.

In fact, the Charter, upon which many of the Bush Administration's critics rely, neither abrogated the pre-existing body of international law nor abolished the anticipatory self-defense doctrine. To be sure, the goal of at least some of the individuals involved in the negotiations leading up to the United Nation's establishment was

to outlaw war and to limit the right of self-defense so far as to require a State to absorb an aggressor's first strike. Indeed, this appears to have been the position of Harold Stassen, who served on the American delegation and suggested that the right of self-defense was so narrowly crafted that the United States could not attack an enemy fleet steaming towards the Jersey shore.<sup>16</sup>

Yet, whatever Governor Stassen's purposes, when the Charter is read as a whole, its limitations on the use of force are far more modest. Article 2 of the Charter actually prohibits the use of force in only three circumstances: (1) to seize territory; (2) to impose a colonial-style government; and (3) in a manner "inconsistent with the Purposes of the United Nations." Thus, the use of military force that does not involve territorial expansion, or does not threaten a member State's independence, is not forbidden so long as it is not otherwise inconsistent with the United Nation's purposes. The first among these "purposes" is the maintenance of "international peace and security,"<sup>17</sup> a goal which, while worthy and laudable, is inherently ambiguous. For example, fierce debates have raged over whether a given use of force, be it against Slobodan Milosevic or Saddam Hussein, advances or retards "international peace and security." Meanwhile, the fact that Article 2 refers to "international peace and security" and not just peace also suggests that war avoidance, at all costs, was not the policy goal advanced by the Charter's drafters.

The notion that the Charter, taken as a whole, allows the unilateral use of force only in response to an armed aggression is also belied by the actual language of Article 51. If this restrictive interpretation was correct, Article 51 would have granted to the UN members the carefully defined self-defense rights.<sup>18</sup> Yet, Article 51 conveys no such authority; instead, it merely acknowledges the continued vitality of the pre-Charter's "inherent right of individual or collective self-defence," rooted in customary international law. It also employs a rather casual language, indicating that "the inherent right of individual or collective self-defence [attaches] if an armed attack occurs"; the term "armed attack" is not defined and there is no indication that this inherent right arises *only* if an armed attack takes place.<sup>19</sup>

This level of precision is perfectly acceptable if one construes Article 51 as an illustrative example of a much broader set of self-defense-related powers that are available to all sovereign States. It is, however, manifestly deficient if that article provides the only legally permissible avenue for using force, short of obtaining a Security Council authorization.<sup>20</sup> Moreover, a restrictive reading of Article 51, as the exclusive venue for using force, essentially renders Article 2's broad and rather permissive language regarding the use of force entirely superfluous. It is, of course, the common principle of statutory or treaty interpretation that any construction that vitiates some of the provisions is disfavored. By contrast, viewing Article 2 as the Charter's main provision for assessing the legitimacy of the use of force, with



the Article 51 being a rather narrow “safe harbor”<sup>21</sup>—if the use of force fits into the Article 51-compliant set of circumstances, there no is need to perform the broader “all facts and circumstance”-type analysis envisioned by Article 2—is both consistent with the relevant statutory language and gives meaning to both of the Articles.

Moreover, given the nature of the UN system, which features veto authority by the permanent members of the Security Council, and gives even non-permanent members an opportunity to block the Council from exercising its Chapter VII powers, it was predictable that a Security Council deadlock would be a common state of affairs. Indeed, it is significant that throughout its entire operating history, both during the Cold War and thereafter, the Council has *never* acted in the way that the proponents of the restrictive reading of the Charter expected it to act; while the Council has determined on several occasions that a breach of the peace or a threat to the peace existed, it has never engaged in enforcement measures, involving the mandatory use of military force.<sup>22</sup> It is, therefore, implausible to believe that the Charter’s drafters, aside from a few pacifists like Harold Stassen, would have vested that body with an exclusive authority to use force. When one considers that the Charter’s drafters were only too aware of the extent to which the obsession with the Kellogg-Briand Pact and the policy of appeasing Hitler had paved the way for World War II, this interpretation is even more incomprehensible.

#### **Anticipatory-Defense “Lite”**

Some international law scholars also espouse the view that, while a broad version of anticipatory self-defense has been blocked by the Charter’s adoption, a more modest version of this doctrine has survived. Professor Dinstein, who is one of the leading proponents of this claim, has even coined the term “interceptive”<sup>23</sup> self-defense. This right is evidently triggered by an armed attack that is “imminent” and “unavoidable,” but that has not yet reached its intended victim.<sup>24</sup> In fleshing out this concept of interceptive self-defense, Dinstein has used such examples as the Japanese attack on Pearl Harbor and the 1967 Arab-Israeli War. Thus, he argues that if the United States were to have destroyed Admiral Yamamoto’s carrier battle groups as they were steaming towards Pearl Harbor, the United States would have been engaged in interceptive self-defense. When it comes to the 1967 War, given a wide range of hostile measures taken by Egypt—ejection of the UN observers from the Gaza Strip and Sinai, the closure of the Straits of Tiran, military mobilization and movement of forces, accompanied by shrill anti-Israeli rhetoric—in Dinstein’s view Israel’s early use of force was another example of interceptive self-defense. From the policy perspective, Dinstein’s somewhat elastic formulation is certainly

preferable to the most rigid formulation of Article 51, which would require the “victim” actively to absorb a first strike.

It is, however, not a particularly useful analytical tool for determining, on a prospective basis, the legality of any particular use of force. The reason for this is quite simple; unless one adopts a rather crude Marxist interpretation of historical events, in which certain events become inevitable because of the underlying workings of history, nothing is truly unavoidable and inevitable. Thus, unless one awaits until the attack has been physically launched (in which case, the doctrine becomes virtually indistinguishable from the traditional narrow reading of Article 51)—i.e., the missiles are in the air—one never knows in advance when an attack is unavoidable. History is replete with examples of crises building up to a crescendo, when the use of force seemed imminent, only to dissipate because of last-minute diplomatic interventions. Indeed, before the “lights went out,” in Lord Gray’s famous formulation, in 1914, there were several instances when European war was avoided at the last minute. Examples include the 1909 Austrian Annexation of Bosnia-Herzegovina, the 1911 “Agadir Crisis,” and the 1912–13 Balkan wars. When one looks at the Pearl Harbor example, it is certainly conceivable, albeit highly unlikely, that the Japanese government could have issued last-minute recall orders to Admiral Yamamoto. The same is true when one comes to the 1967 situation; an adroit US-Soviet diplomacy could have prevented it.<sup>25</sup>

However, the single greatest weakness of this anticipatory defense “lite” doctrine is that it is not based upon the Charter’s actual language. Article 51’s language uses the word “occurs,” rather than “launched or commenced,” in describing the triggering circumstances. Yet, to justify Dinstein’s “interceptive” concept, the word “occurs” would have to be stretched to the point where it loses any discernable meaning. Once this is done, “occurs” may just as well be construed to mean the birth of a future aggressor or the early hatching of an aggressive plan. The bottom line is that anticipatory self-defense “lite” is less supportable by the Charter’s language, than either the permissive or restrictive interpretations of Articles 2 and 51.

### **Assault on National Interest**

In parsing the UN Charter and assessing the legal merits of the various arguments relating to the legitimacy of the anticipatory self-defense doctrine, it is also significant that the arguments used by the Administration’s critics are internally inconsistent. For example, in trying to figure out whether a given use of force violates Article 2, one must ascertain whether the action at issue would promote the purposes of the United Nations. In this regard, it is certainly reasonable to argue that removing from power a man like Saddam Hussein—who for decades clearly

sought to acquire nuclear weapons; developed, deployed and used both chemical and biological weapons on his own people and his neighbors; viewed himself as a modern day Saladin; and defied Security Council resolutions for well over a decade—was entirely consistent with the UN Charter.

It is also possible to opine, of course, that the strategy of regime change in Iraq was not likely to promote international security. Indeed, some scholars argue precisely that, while also claiming that some other uses of force, which they happen to favor, like NATO's use of force against Milosevic's Serbia, were more consonant with United Nation's purposes. However, whatever one thinks about the analytical merits of the argument that Milosevic posed a greater threat to international peace and security than did Saddam Hussein, or that the Kosovars were oppressed (and thereby deserving of a rescue) more than the Iraqi Shiites and Kurds, the very elastic nature of these claims renders them utterly unsuitable as legal arguments.

It is also disingenuous to argue that, as a matter of law, humanitarian intervention to aid the residents of another country that are being brutalized by their rulers is legal under the UN Charter, presumably because it is always consistent with the Charter's laudable goals, but a national interest-driven intervention is somehow not similarly legitimate.<sup>26</sup> Leaving aside the issue of the rather idiosyncratic reading of the Charter, which, on its face, does not legitimize humanitarian interventions, it is not obvious why this humanitarian intervention principle only applies to the protection of foreign nationals, rather than a State's own citizens. In a post-September 11 world, US actions to destroy terrorist organizations and their sponsors are the clear equivalent of a humanitarian intervention in defense of American citizens.

### **Collective Action**

Then there are scholars who, perhaps realizing the utter un-workability of a pure restrictive interpretation of the UN Charter, try to read into it some modified version of the Security Council's primacy in the use-of-force area. They do this by extolling the legal legitimacy of collective actions, even if these do not command the support of the entire Security Council. From a policy perspective, an approach which postulates that force can be legitimately used even though one or two States have blocked the Security Council from acting is perhaps more manageable than requiring a Security Council's blessing; the only problem is that there is not the slightest support in the UN Charter or any other international legal document for this theory.

There are also commentators who purport to discover in the UN Charter provisions that bless regional actions, while leaving nation States acting "unilaterally" entirely to the mercies of Article 51. However, those provisions (found in Chapter

VIII of the UN Charter), do not permit a regional organization, such as the Organization of American States (OAS) or NATO, to operate as the Security Council's surrogate. Indeed, for example, the imprimatur of regional organizations, while perhaps valuable as a diplomatic tool, is of little legal value. During the Cuban Missile Crisis, for example, the foundation of both the right of the United States, and the OAS, to take action against the Soviet Union and Cuba was their inherent right of individual and collective self defense, including the right of anticipatory self-defense. As a matter of international law, a group of States has no more inherent right to use force than any one of its nation-State members. The champions of Chapter VIII of the Charter also do not seem to realize the inherent frailty of their approach: all one has to do to qualify, in an otherwise restrictive regulatory environment, for a broad anticipatory self-defense option, is to create a cooperative regional organization. This can be accomplished in a fortnight.

#### **The Actual Practice of States**

Moreover, the notion that anticipatory self-defense is barred by the UN Charter has not been supported by the actual practice of States in the years since the United Nations was established. That, in the final reckoning, is the critical point. Anyone attempting to determine what international law, whether customary or conventional, truly provides on any particular point would do well to heed the Marquise de Merteuil's maxim in *Les Liaisons Dangereuses*<sup>27</sup>; don't listen to what people tell you, watch what they do. Here, the evidence is overwhelming that the traditional law of anticipatory self-defense has survived the adoption of the UN Charter. As Michael Glennon notes, since 1945 two-thirds of the members of the United Nations have fought 291 inter-State conflicts in which over 22 million people have been killed.<sup>28</sup>

Among the more important post-Charter instances of "anticipatory" self-defense must be counted the 1956 "Suez Crisis," where France, Britain and Israel launched military operations against Egypt based on Nasser's seizure of the Suez Canal. The affair was a political disaster for the governments involved, but it is highly significant that Britain and France, both charter members of the United Nations and permanent members of the Security Council, claimed that the Israeli-Egyptian military clash, which took place in a close proximity to the Suez Canal, was a threat to the world's economy and therefore adequate to justify armed action. Needless to say, this was a very broad formulation of a classical anticipatory self-defense argument, perhaps even broader than the argument used by the Japanese Prime Minister Tojo, who justified Japan's attack on Pearl Harbor by the claim that American economic sanctions were strangling imperial Japan.

In 1967, Israel acted preemptively against Egypt, Syria and Jordan, rather than await the attack of their massing forces. Israel was neither condemned nor sanctioned by the UN for this action. Similarly, Israel attacked and destroyed an Iraqi nuclear power facility in 1981, again citing “self-defense” as justification. Although, this time, Israel’s action was condemned in the Security Council, no action was taken to address this supposed “aggression.” Recalling the Marquise’s maxim, whatever the verbiage used, this strongly suggests a fundamental recognition that Israel acted in accordance with its rights under international law to anticipate, and foil, attacks before they are launched.

Israel, of course, has not been alone in exercising the right of anticipatory self-defense. In 1986, President Reagan ordered attacks against terrorist targets in Libya to prevent their use against US interests. In 1982, Britain claimed a 150-mile exclusion zone around the Falkland Islands as a preventative measure, and in 1983, Sweden asserted the right to use armed force against any foreign submarine sailing within 12 miles of her territorial sea. In 1989, the George H. W. Bush Administration used force to oust Panama’s strongman Manuel Noriega, arguing that he posed a threat to the safety of the American service members present in Panama and their families. All of these actions can be justified only by a right of anticipatory self-defense.

Yet, perhaps the most important modern example of anticipatory self-defense—before Operation Iraqi Freedom—came during the Cuban Missile Crisis caused by the Soviet efforts to install ballistic missiles armed with nuclear warheads in Cuba. Although there were absolutely no indications that the Soviets intended to launch these missiles against the United States, immediately or in even the distant future, the Kennedy Administration claimed that the purpose of the Soviet deployments—“to provide a nuclear strike capability against the Western Hemisphere”—was sufficient justification for the imposition of a naval “quarantine.”<sup>29</sup> Although the US threat assessment was also shaped by a perception that Soviet leader Khrushchev had engaged in nuclear saber rattling, threatened the United States in Berlin and elsewhere, and may have been irrational and impulsive, President Kennedy’s bottom-line conclusion was clearly that, in a nuclear age, a precipitous effort by an avowed American foe to change the strategic balance of power was enough of a threat to American security to justify the resort to an anticipatory self-defense doctrine.

To argue that all of these uses of force have been illegal under the UN Charter, as some proponents of the restrictive interpretation of the Charter have done, (or even that most of them were illegal has been done by those who advocate anticipatory defense “lite” or allow its use only when invoked by regional organizations) constitutes both a rejection of the validity of State practice—traditionally, the most

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reliable and authoritative way to establish international legal norms—and a particular dogmatic approach to the Charter’s interpretation. Significantly, the fact that States involved have consistently claimed that their actions have been consistent with the UN Charter is neither hypocritical nor an effort to re-write the Charter through subsequent practice; rather, it is a proof of their embrace of the permissive interpretation of the Charter.

### *Conclusion*

Overall, the UN Charter, far from being a comprehensive legal edifice barring all uses of force, except for the Article 51-compliant situations and various forms of collective action, is actually a far more modest document. It basically reaffirms a long-standing rule, which was not always honored, but nevertheless, frequently announced, against an aggressive use of force, sets forth a safe harbor rule for the use of force in response to an armed attack against one’s territory or the territory of one’s allies, while not inhibiting a broader range of defensive uses of force, including in anticipation of an attack.

Although a nuclear Armageddon is far less likely today, the actual use of weapons of mass destruction, nuclear, chemical, and biological, has become a very real and immediate threat. The principal danger is not that one State will attack another with these weapons, but that non-State actors, such as al Qaeda, who are by definition beyond deterrence, will obtain and use WMDs. This is because, for the first time ever, modern technology has enabled private individuals, aided and abetted by failed States, to create military-style forces capable of projecting power across the globe. That, of course, is precisely what al-Qaeda achieved on September 11; it projected power. Traditional deterrence works poorly in this novel strategic environment.

This means that the traditional rules of international law, which permit States to anticipate threats and to act before an attack actually is initiated, are far more important than in the past. Unfortunately, while these rules have not been vitiated by the UN Charter and have been reflected in ample State practice, both prior to and post-1945, they have been subjected to strident legal and policy attacks by many States, international organizations and most international law experts. Given the importance of legal and ethical considerations in American policy-making, the United States must continue to defend the validity of these traditional rules. Only with these rules in place can the United States hope to protect its citizens from attack, maintain international stability, and defeat rogue States and terrorist groups that pose a grave threat to the entire civilized world.

*Notes*

1. HOMER, *THE ILIAD* (Robert Fagles trans., Penguin Books 1998) (8th century BC).
2. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 72 (Francis W. Kelsey, trans., 1925) (1625).
3. General Treaty for Renunciation of War as an Instrument of National Policy (Aug. 27, 1928), 94 L.N.T.S. 57.
4. To be sure, some scholars have questioned the relevance of the historical practice in this area, not only with regard to the anticipatory self-defense doctrine, but even as far as the self-defense concept as a whole is concerned. For example, Yoram Dinstein argues that “[u]p to the point of the prohibition of war, to most intents and purposes, ‘self-defence was not a legal concept but merely a political excuse for the use of force’. Only when the universal liberty to go to war was eliminated, could self-defence emerge as a right of signal importance in international law.” YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 160–61 (3d ed. 2001), quoting E. Jimenez de Arechaga, *International Law in the Past Third of a Century*, 59-I RECUEIL DES COURS 1, 96 (1978). This view, however, ignores the fact that legal and ethical restrictions on the use of force did not emerge in the 20th century; indeed, for centuries, there have been various forms and types of restrictions, some, but not all, of which were driven by religious imperatives—e.g., efforts to ban the waging of war by Christian States against other Christian States. The fact that they were often breached did not render them any more irrelevant than the frequently-ignored modern proscriptions. As far as anticipatory self-defense is concerned, the fact that the doctrine arose and was practiced during the time when the overall doctrinal attitudes toward the use of force were more permissive than the ones we encounter today is not particularly dispositive. Indeed, the fact that the doctrine was refined at the time when armed aggression was a more usual instrument of statecraft, makes it even more significant in the current, more restrictive legal environment.
5. For a description of the *Caroline* incident, see KENNETH R. STEVENS, *BORDER DIPLOMACY: THE CAROLINE AND MCLEOD AFFAIRS IN ANGLO-AMERICAN-CANADIAN RELATIONS, 1837–1842*, at 121 (1989).
6. Daniel Webster, Secretary of State, Letter to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), reprinted in JOHN BASSETT MOORE, *2 A DIGEST OF INTERNATIONAL LAW* 412 (1906).
7. Some commentators have also argued that the *Caroline* incident is miscast as a poster child for the anticipatory self-defense doctrine, because the ship was used to re-supply the Canadian insurgents prior to its destruction and hence, could have been considered to engage in continuous armed operations against Britain. This claim is, of course, debatable. *Caroline’s* operations would have had to be continuous, rather than intermittent, and the relevant historical record does not evidence such a pattern. In any case, regardless of the actual facts on the ground, what makes the *Caroline* case significant in the development of the customary international law is that both the United States and Britain chose to apply the anticipatory defense paradigm in setting up the legal framework for handling the incident.
8. GROTIUS, *supra* note 2, at 173.
9. EMMERICH DE VATTTEL, *3 THE LAW OF NATIONS* 130 (Charles G. Fenwick ed., 1983) (1758).
10. President’s Commencement Address of June 1, 2002 at the United States Military Academy in West Point, New York, 38 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 945 (June 10, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.
11. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES* (Sept. 2002), reprinted in *2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 947.

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12. Actually, as noted by George Orwell long before the Bush Administration came into office, pacifism has often been driven by a hefty dose of anti-Americanism. Writing in 1945, Orwell bemoaned the existence of

[I]ntellectual pacifists, whose real though unacknowledged motive appears to be hatred of Western democracy and admiration for totalitarianism. Pacifist propaganda usually boils down to saying that one side is as bad as the other, but if one looks closely at the writing of the younger intellectual pacifists, one finds that they do not by any means express impartial disapproval, but are directed almost entirely against Britain and the United States . . . .

George Orwell, *Notes on Nationalism* (1945), reprinted in GEORGE ORWELL: ESSAYS 878 (John Carey ed., 2002).

13. *Supra* note 10.

14. For a discussion of this issue, including the comparison of how Saddam's strategic deception policy was, in some key respects, similar to the missile bluff strategy pursued by the late Nikita Khrushchev, see David B. Rivkin, Jr. & Lee A. Casey, *Saddam, Nikita and Virtual Weapons of Mass Destruction: A Question of Threat Perception and Intelligence Assessment*, IN THE NATIONAL INTEREST, June 12, 2003, at <http://www.inthenationalinterest.com/Articles/Vol2Issue23/Vol2iss23RivkinCasey.html>.

15. See e.g., *Text: Bin Laden Discusses Attacks on Tape*, at [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/binladentext\\_121301.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/binladentext_121301.html).

16. *Minutes of the Thirty-Eighth Meeting of the United States Delegation, Held at San Francisco, Monday, May 14, 1945, 9:05 a.m.*, in 1 FOREIGN RELATIONS OF THE UNITED STATES 707, 709 (1945).

17. U.N. CHARTER art. 1, para. 1.

18. It is also worth noting that Article 51 refers only to an armed attack "against a member of the United Nations." When the Charter was ratified and for decades thereafter, a number of States chose not to join the UN. To construe Article 51 as the exclusive all-purpose rule for using force, that has supplemented the traditional customary law norms, would mean such States would have no self-defense rights at all.

19. The full text of Article 51 is as follows:

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

20. Article 51's language aside, its rather accidental legislative history also does not support the claim that the Charter's drafters conceived of it as an important substantive right-creating provision. In this regard, Andru Wall notes that

Article 51 was not in the original drafts because the drafters believed the customary international law right of self-defense was incorporated without alteration into the Charter. The US delegation in San Francisco proposed Article 51 to ensure that the obligations of collective self-defense against armed attacks arising from the Chapultepec Act were incorporated into the Charter. While self-defense was uniformly accepted as a customary right of States, collective self-defense was an emerging right.



Andru Wall, *International Law and the Bush Doctrine*, 33 ISRAEL YEARBOOK ON HUMAN RIGHTS 199, 200–201 (2003).

In a remarkable historical parallel, this view of a robust self-defense prerogative—as something that is so firmly entrenched in international law that it did not even require an explicit reaffirmation—was also expressed by Secretary of State Kellogg. Kellogg stated at the time when the 1928 Kellogg-Briand Pact (the very high point of the efforts to limit the use of force by States) was being negotiated “that there was no need to state it expressly in the terms of the pact; even the adoption of texts that seem inconsistent with exercise of the right, he said, do not preclude reliance upon it.” Telegram from Frank B. Kellogg, Secretary of State, to the US Ambassador in France, (Apr. 23, 1928) in 1 FOREIGN RELATIONS OF THE UNITED STATES 34, 36–37 (1928), *quoted in* Michael J. Glennon, *Military Action Against Terrorist Under International Law: The Fog of Law, Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 539 n.62 (2002).

21. The view that Article 51 is meant to be merely an illustrative safe harbor has been criticized by the advocates of the restrictive reading of the Charter. For example, Yoram Dinstein notes in this regard

What is the point in stating the obvious (i.e. that an armed attack gives rise to the right of self-defence), while omitting a reference to the ambiguous conditions of preventive war? Preventive war in self-defence (if legitimate under the Charter) would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater.

DINSTEIN, *supra* note 4, at 168. This question, however, can be easily answered by pointing out that the whole idea of a safe harbor in the law is to delineate precisely those circumstances that can be easily dealt with. Thus, the whole purpose of Article 51 is to indicate that, whenever one uses force after he has been the victim of an armed attack, he is always legally in the right, and no further analysis of the circumstances is necessary. By contrast, precisely because the application of anticipatory self-defense can be, and has been, used as a pretext for aggression that a more complex, all facts and circumstances-type analysis, under Article 2, is called for. This interpretation is certainly supported by the fact that the framers of the Charter were quite familiar with the arguments used by both the Nazi and Japanese leadership (which were subsequently replayed during the Nuremberg and Tokyo war crimes trials) that they were engaged in anticipatory self-defense. Looking to the future, leaders of a State that has used force in a manner consistent with Article 51 could feel safe from prosecution; even if that State had lost the war and they were subject to a war crimes prosecution.

22. At the time the Council adopted the Korean War Resolution (SC Res. 82 (June 25, 1950), *reprinted in* 5 RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 4 (1950)) and the Gulf War Resolution (SC Res. 678 (Nov. 29, 1990), *reprinted in* 29 INTERNATIONAL LEGAL MATERIALS 1565 (1990)), which many regard as its strongest actions, all it did was to recommend that member States render assistance to South Korea and Kuwait. Since both of these countries were victims of armed aggression, and countries coming to their aid were acting squarely within the ambit of Article 51, the Security Council’s blessing of these actions was primarily of a rhetorical and diplomatic value; it did not alter the legal landscape.

23. See Professor Dinstein’s article, *The Gulf War: 1990–2004 (And Still Counting)*, which is Chapter XV in this volume, at 337.

24. DINSTEIN, *supra*, note 4, at 172.

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25. Ironically, and quite inconsistently with the Dinstein's anticipatory defense "lite," it is often easier to predict, based upon an analysis of the long-term trends, what is eventually going to happen, rather than what will happen tomorrow. Thus, the quality of strategic threat forecasts is often better than the assessment of tactical threats. Accordingly, anticipatory self-defense against medium- and long-term threats may well make more sense and be more reliable than the interceptive self-defense, geared for dealing with unavoidable and imminent attacks.
26. Unfortunately, only a few proponents of the legality of humanitarian intervention espouse the view that the Charter is similarly permissive when it comes to national security-driven interventions. For a notable exception to this idiosyncratic reading of the Charter, see Lee Feinstein & Ann-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFFAIRS 136, Jan.–Feb 2004.
27. PIERRE AMBROISE FRANCOIS CHODERLOS DE LACLOS, *LES LIAISONS DANGEREUSES* (1782).
28. Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFFAIRS, May/June 2003, at 16 and Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WEEKLY STANDARD, Jan. 28, 2002, at 24.
29. John F. Kennedy, President of the United States, *Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba* (Oct 22, 1962), Public Papers of the Presidents of the United States: PRESIDENT JOHN F. KENNEDY: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT: JANUARY 1 TO DECEMBER 31, 1962, at 806, 806–07 (1963), available at <http://usgovinfo.about.com/library/weekly/aa102100b.htm>.