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## Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law

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### Cover Page Footnote

Assistant Professor of Law, Creighton University. B.A., J.D., Indiana University; LL.M. Georgetown University. Professor Kelly is co-author of *Equal Justice in the Balance; Assessing America's Legal Responses to the Emerging Terrorist Threat* (University of Michigan Press 2003). Many thanks to Kate Blanchard, J.D. 2003, an outstanding research assistant, for her diligent efforts in the preparation of this article.

# TIME WARP TO 1945 — RESURRECTION OF THE REPRISAL AND ANTICIPATORY SELF-DEFENSE DOCTRINES IN INTERNATIONAL LAW

MICHAEL J. KELLY\*

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.

John Stuart Mill, *On Liberty* (1859)

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## I. INTRODUCTION

Prior to 1945, the laws and customs of warfare were a commonly understood set of principles and doctrines that governed use of force among states of equivalent and disparate power, be they nation-states, empires, colonial powers or kingdoms. Some of these rules had been reduced to writing in military field manuals, domestic articulations like the Leiber Code, and multilateral treaties like the early Hague Conventions.<sup>1</sup> Others were defined and clarified in decisions by judicial tribunals like the Permanent International Court of Justice. Still others remained in the murky netherworld

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1. See WILLIAM W. BISHOP JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 962-967 (3d ed. 1971).

of customary international law – subject to individual state interpretation.

But while these laws of war helped guide countries in their conduct of hostilities with one another down through the centuries, they did little to actually prevent warfare in the first place. So it was, after experiencing the devastation and destructive force of “total warfare” wrought by the belligerents of World War II, the Allied Powers decided to bind the ability of states to wage aggressive war. The Charter of the United Nations, signed in 1946, is a collective security arrangement that prohibits war in general and limits the ability of states to use force except in the case of self-defense to repel an armed attack.

During the ensuing five decades, aggressive military engagements continued to erupt on a smaller scale. Old customary law war doctrines allowing forcible reprisal, in response to a prior wrong, and preemptive strikes, justified by anticipatory self-defense, were occasionally argued by individual states as rationales for continued military action, but were universally and uniformly condemned by the international community. Thus, they never passed back into customary norms.

However, after the September 11th, 2001 terrorist attacks on the United States that destroyed the World Trade Center and damaged the Pentagon, the American approach to use of force began to change. President Bush, although legally allowed to attack Af-ghanistan under the U.N. Charter by acting in self-defense, was careful to match his responsive form also to the requirements of customary reprisal doctrine. After suffering an injury from Af-ghanistan’s breach of international law during peacetime, an ultimatum was issued that was not complied with, the Taliban regime was toppled, and the Al Qaeda terrorist network disrupted as a necessary and proportional response to the prior injury.

In the case of Iraq, after the threat of Saddam acquiring nuclear weapons was analyzed as realistic, the Bush administration decided that it had to disarm him. Two avenues were open: the multi-lateral approach through the U.N. system; and the unilateral approach. The president pursued both simultaneously. Multi-laterally, the Security Council restarted its weapons inspection program with reserved authority to act militarily if Baghdad failed to disarm. Unilaterally, the United States articulated its right to act preemptively to eliminate the threat posed by a potentially nuclear-armed Iraq. However, because the existence of an imminent threat could not be established, when the president brought the old anticipatory self-defense doctrine back to life, he

eliminated that threshold and replaced it with the showing of only an “emerging” threat.

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

## II. THE REPRISAL DOCTRINE

Generally speaking, a reprisal is “an action that a state undertakes to redress an injury suffered during time of peace.”<sup>2</sup> Reprisals can be broken up into several categories, including forcible reprisals and belligerent reprisals. Forcible reprisals have been defined (post-Charter) as “a quick, limited, forcible response by one state against a prior action by another state that did not rise to the level of an armed attack.”<sup>3</sup> In the case of belligerent reprisals, hostilities are presumed to exist, and the laws of armed conflict, *jus in bello*, govern hostilities.<sup>4</sup> Belligerent reprisals occur “where a party to a conflict resorts to what is normally an unlawful act in response to another belligerent’s unlawful violation of the laws of armed conflict.”<sup>5</sup> The objective of a belligerent reprisal is to “use coercion to bring both parties back to an even playing field governed by the laws of armed conflict.”<sup>6</sup> Belligerent reprisals will not be discussed further in the context of this article.

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2. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 17 (1993).

3. *Id.* at 42.

4. Paula B. McCarron & Cynthia A. Holt, *A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal*, 25 FLETCHER F. WORLD AFF. 203, 220 (2001).

5. *Id.*

6. *Id.*

### A. *Historic Evolution*

Reprisals are as old as international law, if not older. The concept of reprisal was born in notions of equity – if one was wronged by another’s illegal action, then the wronged individual was vested with a right of redress (forcible if necessary) against the wrongdoer that would, itself, normally be considered illegal.<sup>7</sup> Indeed, before states acquired the formal right of reprisal as a tool of foreign policy under international law, it existed as a right of individuals during the Middle Ages. “Letter[s] of Marque and Reprisal” could be obtained from the king to secure satisfaction beyond the bounds of the law.<sup>8</sup> But even at its inception, as a private right, individuals were restrained in carrying out reprisals against others by the rule of proportionality.<sup>9</sup> Thus, the amount of property a wronged individual could seize from the wrongdoer was determined by the original injury, and could not exceed its satisfaction.<sup>10</sup>

By the 17th and 18th centuries, as the Westphalian system of nation-states and accompanying ideas of state sovereignty were securing themselves, reprisals were allowed beyond the national frontiers against individuals of offending states.<sup>11</sup> Indeed, in 1789, the American Constitution vested the power “to grant letters of marque and reprisal” in Congress under Article I, Section 8.<sup>12</sup> In this regard, Yale’s President Woolsey states in his 1877 treatise on international law that “[e]very authority in those times, which could make war, could grant letters of reprisals. But when power began to be more centralized, the sovereign gave to magistrates, governors ...and [the] courts, the right of issuing them, until at length this right was reserved for the central government alone.”<sup>13</sup> Woolsey also traces the usage of both general (public) and special (private) reprisals back to the Greek period:

The Greeks here present to us two forms of reprisals, the one where the state gives authority to all, or in a public way attempts to obtain justice by force, which is called *general*, and the other, where power is given to the injured party to right himself by his own

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7. Major Philip A. Seymour USMC, *The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism*, 39 NAVAL L. REV. 221, 225 (1990).

8. *Id.*

9. *Id.*

10. *Id.*

11. See Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1041-1044 (1986).

12. U.S. CONST. art. I, § 8.

13. THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 118, at 184 (6th ed. 1892).

means, or *special* reprisals. The latter has now fallen into disuse, and would be regarded as an act of hostility....<sup>14</sup>

Because nascent state police power failed to extend much beyond national borders, rules of proportionality and restraint gradually faded. Disruption of trade and seizure of ships and cargo, bordering on piracy, occurred more often.<sup>15</sup> Predictably, as more private reprisals led to more public warfare involving the state, governments increasingly took control of this doctrine, and it eventually became a recognized right that could only be exercised by the state.<sup>16</sup>

Thus, the distinction between general (public) and special (private) reprisals was such that states gradually stopped allowing private reprisals altogether. Ambassador Wheaton records the status of reprisals in his 1866 treatise on international law this way:

Reprisals are also either *general* or *special*. They are *general*, when a state which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war.... *Special* reprisals are, where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation.

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14. *Id.* at 183.

15. Seymour, *supra* note 7, at 225-226.

16. *Id.*; Woolsey provides a 13th Century example of how private reprisals can quickly escalate into public wars:

In 1292, two sailors, a Norman and an Englishman, having come to blows at Bayonne, the latter stabbed the former, and was not brought before the courts of justice. The Normans applied to Philip the Fair for redress, who answered by bidding them to take their own revenge. They put to sea, seized the first English ship they met, and hung up several of the crew at the masthead. The English retaliated without applying to their government, and things arose to such a pitch, that two hundred Norman vessels scoured the English seas, hanging all the sailors they caught, while the English, in greater force, destroyed a large part of the Norman ships, and 15,000 men. It was now that the governments interposed, and came at length into a war which stripped the English of nearly all Aquitaine, until it was restored in 1303.

WOOLSEY, *supra* note 13, § 118, at 183-84.

Reprisals are to be granted only in the case of a clear and open denial of justice. The right of granting them is vested in the sovereign or supreme power of the state.... Thus, in England, the statute of 4 Hen. V, cap. 7, declares, 'That if any subjects of the realm are oppressed in time of peace by any foreigners, the king will grant *marque* in due form to all that feel themselves grieved;' which form is specially pointed out, and directed to be observed in the statute. So also, in France, the celebrated marine ordinance of Louis XIV of 1681, prescribed the forms to be observed for obtaining special letters of *marque* by French subjects against those of other nations. But these special reprisals in time of peace have almost entirely fallen into disuse.<sup>17</sup>

Thus, as the "private reprisal" faded from usage, the "public reprisal" began its career as a component of customary international law.<sup>18</sup> This career evolved over decades, and the doctrine of reprisal was redefined time and again by states, judicial bodies, and international legal scholars. The ability of this doctrine to emerge in ancient Greece, survive the Roman period (in which it was not recognized), re-emerge in medieval Europe, vest itself in the sovereign power of the King, then transform itself into a state power as nation-states replaced monarchies, and continue guiding international legal practice up into the twentieth century is surely a testament to its grounding in immutable notions of justice and equity and its ability to control uses of force short of war. Nevertheless, as the world eschewed warfare altogether after World War II, it was once again relegated to the dustbin of history – although perhaps not forever.

### *1. The Rules of Reprisal*

Legal definitions for reprisal and its components are somewhat slippery, yet necessary for understanding how the rules work. Reprisals have generally been regarded by international law as "injurious acts by a state against an aggressor state to compel the aggressor to consent to a settlement of a conflict it has created by its own international delinquency."<sup>19</sup> International delinquency, in

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17. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 2, at 210-211 (Leonard W. Levy ed., De Capo Press 1972) (1836).

18. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 45 (1963).

19. EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND*



turn, has been defined as “non-compliance with treaty obligations, violation of the dignity of a foreign state, violation of foreign territorial supremacy, or any other internationally illegal act.”<sup>20</sup> It is vital to emphasize here the transformative nature of reprisal doctrine. While acts that constitute reprisals would normally be illegal, they *become* legal because of the aggressor’s previous illegal act.<sup>21</sup> Moreover, reprisals contain a distinctly punitive purpose and are frequently viewed as justified sanctions.<sup>22</sup>

Reprisals can be distinguished from both self-defense and retorsions. A retorsion is used to coerce a state to suspend a legal act, and differs markedly from reprisal in that retorsion uses legal means to accomplish the coercion.<sup>23</sup> Reprisals, on the other hand, use what would be illegal acts to coerce another state to cease an illegal act.<sup>24</sup> Self-defense is also very different from reprisal, although both are forms of self-help.<sup>25</sup> “While the essence of self-defense is the use of armed force directly to ward off a physical danger threatening a state, a reprisal action is essentially aimed at applying coercion with a view to inducing another state to change its unlawful policy.”<sup>26</sup>

At the turn of the century, a reprisal could be legal if it followed certain rules.<sup>27</sup> According to international legal scholars, “reprisals were admissible for all international delinquencies.”<sup>28</sup> The rules were as follows:

- (1) The occasion for the reprisal must be a previous act contrary to international law;
- (2) the reprisal must be preceded by an unsatisfied demand;
- (3) if the initial demand for redress is satisfied, no further demands may be made;

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MATERIAL FIELDS OF APPLICATION 130 (1992).

20. See LASSA OPPENHEIM, II INTERNATIONAL LAW 35 (1906).

21. KWAKWA, *supra* note 19, at 130.

22. *See id.* at 131.

23. *Id.* at 130.

24. *Id.*

25. *Id.* at 131.

26. *Id.* at 130-31.

27. ANTHONY D’AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 41 (2d ed. 1995).

28. KWAKWA, *supra* note 19, at 131.

(4) the reprisal must be proportionate to the offense.<sup>29</sup>

These rules, except for the third one, were supported and re-articulated by the tribunal in the *Naulilaa* arbitration decision.<sup>30</sup> In addition, the *Naulilaa* decision added a fifth criteria that only a state can attempt a reprisal<sup>31</sup> and set forth a good overview of the reprisal doctrine as it had developed up until the First World War:

Reprisals are an act of self-help on the part of the injured states, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State.... They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation...or the return to legality in avoidance of new offenses.<sup>32</sup>

This case grew out of Portugal's neutrality during World War I. In October of that year, German officials entered Portuguese Angola to secure the purchase of supplies.<sup>33</sup> Misunderstandings ensued, a Portuguese man fired a weapon, and three Germans wound up dead.<sup>34</sup> German troops, in alleged reprisals, destroyed forts and posts in Angola.<sup>35</sup> In 1928, the Arbitral Tribunal found the reprisals illegal because the Portuguese act was a misunderstanding that was not violative of international law, the German government did not make any demand on the Portuguese government prior to the reprisals, the reprisals actually consisted of six separate acts, and they were not proportionate to the prior offending act.<sup>36</sup>

After the opinion in *Naulilaa*, reprisals under customary international law were delineated as generally comprising these elements:

29. D'AMATO, *supra* note 27, at 42.

30. Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 489 (1999); See *Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa* [hereinafter *Naulilaa*], 8 TRIB. ARB. MIXTES 409 (Port.-Ger. 1928), translated and discussed in BISHOP, *supra* note 1, at 903-04.

31. Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 158 (2001).

32. *Id.* at 156 (quoting *Naulilaa*, 8 TRIB. ARB. MIXTES at 422-25).

33. D'AMATO, *supra* note 27, at 42.

34. *Id.*

35. *Id.*

36. *Id.*

- A. Prior Illegal Act (violation of international law) – The “offending state must have committed an act contrary to international law.”<sup>37</sup>
- B. Unsatisfied Demand – Reprisals should only be used after the injured state has attempted to resolve the matter (made demands) with the offending state and the attempt has failed.<sup>38</sup>
- C. Proportionate Response
  - 1. Traditional view – “[R]eprisals should be proportionate to the initial violation of international law.”<sup>39</sup>
  - 2. Some commentators argue that “reprisal must be sufficient but not excessive in forcing compliance with international law, not necessarily proportionate to the initial violation.”<sup>40</sup>

## 2. Usage up to 1945

Although not always categorized as reprisals, many incidents are now viewed as having that character. For instance, the United States bombardment of Greytown (Nicaragua) in 1853 and the British occupation of Corinto (Nicaragua) in 1895 have both been viewed as having the “character of reprisals.”<sup>41</sup> The Greytown incident was over tariffs and control of a transit route. The Corinto incident occurred after the British demand for redress for injuries to the British vice-consul and other British subjects by Nicaraguan authorities was not met. In 1850, the British blockaded Greece to get compensation for Don Pacifico, whose house had been looted. Brownlie states that the British blockade of Greece in 1850 “must be regarded as a reprisal, although it did not satisfy the conditions for resort to reprisal, or as an anomalous and unlawful attempt to coerce the Greek government into acceptance of British demands.”<sup>42</sup>

There were transitional problems with reprisals prior to the formation of the U.N. Charter in 1945 stemming from the Covenant

37. Scharf, *supra* note 30, at 489.

38. *Id.*

39. Mitchell, *supra* note 31, at 160; Scharf, *supra* note 30, at 489.

40. *Id.* (discussing M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 682 (1961)).

41. BROWNIE, *supra* note 18, at 291.

42. *Id.*

of the League of Nations and the Kellogg-Briand Pact. The Covenant of the League of Nations allowed resort to war as "a mode of self-help and execution where there was no other means of enforcing legal rights."<sup>43</sup> Article 15, in fact, allowed war when peaceful settlement had failed.<sup>44</sup> This "resort to war formula," coupled with the fact that some states were not members of the League, led a number of writers "to regard hostile measures short of 'war' in the formal sense, and, in particular, reprisals, as [continuing] legal modes of redress."<sup>45</sup> Thus, under the Covenant, "whenever there could be a lawful war there could be a lawful reprisal also."<sup>46</sup> The Kellogg-Briand Pact did not help clear up any of the confusion surrounding reprisals because it used the term "war"<sup>47</sup> and failed to "impose any [meaningful] restrictions on the use of force short of war."<sup>48</sup>

This led to counter trends in reprisal usage. A number of treaties during this period began to restrict a state's ability to resort to reprisal. For Instance, The Locarno Pact prohibited invasion, attack, and acts of aggression, and the Second Hague Convention of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts only allowed armed force under certain conditions.<sup>49</sup> Simultaneously, other incidents that occurred in the years preceding World War II and the U.N. Charter have been viewed as having the character of reprisals, including the United States landing at Vera Cruz and the Corfu incident.<sup>50</sup>

In 1914, a Mexican squad arrested two American seamen and a paymaster of the U.S.S. *Dolphin*; they were arrested at Tampico without cause.<sup>51</sup> After their release, the head of Mexico's government, General Huerta, made a personal apology.<sup>52</sup> However, the United States admiral in that area wanted the Mexicans to salute the United States flag in a special ceremony; General Huerta accepted this conciliation on the reciprocal condition that the United States fire a "like salute."<sup>53</sup> The United States declined and President Wilson got a joint congressional resolution to use military force "to enforce his demand for unequivocal amends for certain

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43. *Id.* at 217.

44. *Id.*

45. *Id.* at 219.

46. *Id.* at 220.

47. BROWNLIE, *supra* note 18, at 222.

48. AREND & BECK, *supra* note 2, at 23.

49. BROWNLIE, *supra* note 18, at 222-23.

50. D'Amato, *supra* note 27, at 42-43.

51. *Id.* at 42.

52. *Id.*

53. *Id.*

affronts and indignities.”<sup>54</sup> After he obtained the resolution that denied “any purpose to make war upon Mexico,” U.S. Marines landed at Vera Cruz and seized the customhouses.<sup>55</sup> The Army took over for the Marines and proceeded to occupy the economically strategic area for the next several months.<sup>56</sup>

Likewise, the Corfu incident is often viewed as “the most recent ‘classic’ case of a reprisal.”<sup>57</sup> In 1923, the Italian representative and three of his assistants on the commission marking out the frontier between Albania and Greece were shot by Greek bandits.<sup>58</sup> Mussolini had a fleet bombard Corfu – the attack killed many civilians.<sup>59</sup> The Italians then occupied Corfu and insisted on indemnity.<sup>60</sup> Greece paid 50,000,000 lire to Italy.<sup>61</sup> The incident then went to the League of Nations’ Council, which referred specific questions to a committee.<sup>62</sup> The Committee of Jurists stated that under the Covenant of the League of Nations:

Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.<sup>63</sup>

The Council adopted this statement, even though some of the individual members replied with statements indicating positions that would limit reprisals. For instance, M. Branting of Sweden accepted the above reply after stating that in his government’s view “the use of armed force is not compatible with the Covenant [of the League of Nations] in the circumstances indicated ....”<sup>64</sup>

54. See *id.* at 43 (quoting Joint Resolution Justifying the employment by the President of the armed forces of the United States, Pub. Res. No. 22, 38 Stat. 770 (1914)).

55. D’Amato, *supra* note 27, at 43.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. D’Amato, *supra* note 27, at 43.

62. BROWNLIE, *supra* note 18, at 221.

63. *Id.* (quoting LEAGUE OF NATIONS O.J. 524 (1924)).

64. *Id.* (quoting LEAGUE OF NATIONS O.J. 526 (1924)).

### B. Dormancy of Reprisal under the U.N. Charter?

Sweden's view permeated the multilateral meetings underway in San Francisco during 1945 to establish a system of collective security that would curtail the ability of individual states to wage aggressive war.<sup>65</sup> Weary from two global conflicts comprising ten years of the past three decades, the nations participating in the conference negotiating the U.N. Charter sought to secure international peace and security above all other considerations.<sup>66</sup> Indeed, that underlying purpose resonates throughout the entire document. Thus, it seemed unnecessary to specifically issue a death sentence on the old reprisal doctrine; since subsequent treaties, like the Charter, take precedence over conflicting customary rules.

The U.N. Charter was, therefore, seen to legally outlaw reprisals. Article 2(3) requires states to "settle their international disputes by peaceful means,"<sup>67</sup> and Article 2(4) bars the "threat or use of force against another state."<sup>68</sup> Article 33(2) then gives the Security Council the power to call upon states to settle disputes peacefully.<sup>69</sup> Article 51 contains an exception to Article 2 for self-defense, allowing that "nothing in the present Charter shall impair the inherent right of individual...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."<sup>70</sup>

International law scholar Ian Brownlie noted this illegality: "The provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force."<sup>71</sup> In fact, in 1974, Acting U.S. Secretary of State Kenneth Rush "stated that the United States believes that 'for reasons of the abuse to which the doctrine of reprisal particularly lends itself, we think it desirable to endeavor to maintain the distinction between lawful self-defense and unlawful reprisal.'"<sup>72</sup>

65. AREND & BECK, *supra* note 2, at 177.

66. *Id.* See generally Asbjorn Eide, *Outlawing the Use of Force: The Efforts by the United Nations, in THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 99 (1987).

67. D'AMATO, *supra* note 27, at 41 (quoting U.N. CHARTER).

68. Michael Ratner & Jules Lobel, *Bombing Baghdad, Revisited; Lawful Self-Defense or Unlawful Reprisal?*, CONN. L. TRIB., July 19, 1993, at 24; U.N. CHARTER art. 2(3), 2(4).

69. D'AMATO, *supra* note 27, at 41.

70. Mitchell, *supra* note 31, at 158.

71. BROWNLIE, *supra* note 18, at 281.

72. Ratner & Lobel, *supra* note 68.

This *de jure* prohibition on reprisal found its way into documentary form in 1970. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the U.N. Charter provided that "states have a duty to refrain from acts of reprisal involving the use of force."<sup>73</sup> With the customary right of reprisal thus outlawed by subsequent treaties, the continued relevancy of the rules set forth in the *Naulilaa* case may be called into question. However, the rules remain important because, just as common law does not die in American or British jurisprudence when confronted with a conflicting statute, merely lying dormant during the statute's life and resurrected when that statute is repealed, customary law may become dormant when faced with conflicting treaties. It has the potential to resume operation once the particular treaty regime fails or is terminated. Professor D'Amato also notes that "these rules may be said to add a special dose of legal obligation to the nation which decides to violate the law in the first instance by resorting to reprisals."<sup>74</sup>

Although the general view is that reprisals are illegal,<sup>75</sup> that does not mean that states have not engaged in them. Professor Kwaka observes that "recent trends in state practice indicate a continued resort to reprisals in peace-time, euphemistically referred to as 'counter-measures.'"<sup>76</sup> For example, the 1986 bombing of Libya is cited as a peacetime reprisal and not an act of self-defense.<sup>77</sup> Therefore, while writers state emphatically that reprisals are illegal, state practice continues to resort to them on occasion, cloaking them in terms of self-defense while remaining careful to comply with *Naulilaa* criteria. And after all, "[i]nternational law is made and applied more through the practice of states, than in legal scholarly opinions and writings."<sup>78</sup>

Following are some examples of reprisals undertaken after adoption of the Charter during the Cold War period. Each of these was condemned by the world community:

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73. Scharf, *supra* note 30, at 489.

74. D'AMATO, *supra* note 27, at 41.

75. KWAKWA, *supra* note 19, at 132; see also Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1 (1972). Bowett states that few propositions in international law have had more support than the idea that the use of force through reprisal is illegal under the U.N. Charter. *Id.*

76. KWAKWA, *supra* note 19, at 132.

77. *Id.*

78. *Id.*

- 1964 — British Air Attacks in Yemen

After Yemen attacked the South Arabian Federation several times, the British commenced air attacks on Yemen in 1964.<sup>79</sup> The United Kingdom Representative, after discussing the series of Yemeni attacks, stated:

It will also be abundantly plain that, contrary to what a number of speakers have said or implied, this action was not a retaliation or a reprisal.... There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed 'retaliation' or 'reprisals;' the other, which is expressly contemplated and authorized by the Charter, is self-defence against armed attack...it is clear that the use of armed force to repel or prevent an attack — i.e. legitimate action of a defensive nature — may sometimes have to take the form of a counter-attack.<sup>80</sup>

However, the Security Council denounced reprisals and "deplore[d]" the British action.<sup>81</sup>

- 1972 — Israeli Raids against Lebanon

Israel, suffering from seemingly constant terrorist attacks, reminded neighboring Lebanon that it had an international legal "obligation to prevent its territory from being used as a base for armed attacks against Israel."<sup>82</sup> Israel warned that if Lebanon did not prevent its territory from being used by terrorists to strike Israel, it would be necessary for Israel to attack the Palestine Liberation Organization (PLO) in Lebanon.<sup>83</sup> On February 25, 1972, Israel sent forces, tanks, armored cars, heavy artillery, and air support into Lebanon to attack PLO bases.<sup>84</sup> The operation continued until February 28, 1972.<sup>85</sup> In response, the Security

79. Bowett, *supra* note 75, at 8.

80. *Id.* (quoting U.N. SCOR, 19th Sess., 1109th mtg. at 4, U.N. Doc. S/PV.1109 (1964)).

81. *Id.* (quoting S.C. Res. 188, U.N. SCOR, 19th Sess., 1111th mtg. at 10, U.N. Doc. S/INF/19/Rev.1 (1964)).

82. William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 426 (1990).

83. *See id.* at 427.

84. *Id.*

85. *Id.*



Council issued Resolution 313 on February 28, which demanded "that Israel immediately desist and refrain from any ground and air military action against Lebanon and forthwith withdraw all its military forces from Lebanese territory."<sup>86</sup> By June of 1972, however, Israel was back in Lebanon attacking PLO bases in response to terrorist attacks and bombing the town of Deir el Ashair.<sup>87</sup>

Security Council Resolution 316 of June 26, 1972, denounced Israel's actions as violating the U.N. Charter.<sup>88</sup> Israel continued to claim that its actions were self-defense and intended to deter future terrorist attacks.<sup>89</sup> However, there was some reaction in the international community that defined Israel's attacks as reprisals. For instance, when debating Resolution 313, France denounced "these intolerable reprisals"<sup>90</sup> and, when debating Resolution 316, Belgium stated that "[t]he Belgian Government has never ceased to repudiate energetically the military reprisal actions undertaken by Israel against Lebanon ...."<sup>91</sup>

- 1985 — Israeli Raid on Tunis

On September 25, 1985, Israel conducted a raid on the Lebanese bases of PLO member Abu Musa after Palestinian terrorists killed three Israelis in Cyprus.<sup>92</sup> On October 1, Israel attacked Arafat's headquarters in Borj Cedria, which is a suburb of Tunis; this action also involved an attack against the headquarters of "Force 17," which was believed to be behind the Cyprus incident and others.<sup>93</sup> Yitzhak Rabin, Israel's defense minister, said, "[w]e decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist activities."<sup>94</sup> Security Council Resolution 573 censured the Israeli attack and demanded that Israel cease and desist.<sup>95</sup> Both Third World and Communist States also criticized the action.<sup>96</sup>

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86. S.C. Res. 313, U.N. SCOR, 27th Sess., 1644th mtg. at 13, U.N. Doc. S/INF/28 (1972)

87. O'Brien, *supra* note 82, at 427-28.

88. *Id.*

89. *Id.* at 433-34.

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

91. *Id.*

92. *Id.* at 460.

93. O'Brien, *supra* note 82, at 460.

94. *Id.* (quoting *Israel Calls Bombing a Warning to Terrorists*, N.Y. TIMES, Oct. 2, 1985, at A8.)

95. *Id.*

96. *Id.* at 461.

- 1986 — U.S. Air Strike Against Libya

On December 27, 1985, airline offices in Rome and Vienna were bombed; the attack killed five Americans, fifteen other people, and injured another eighty.<sup>97</sup> The attacks were traced back to Libya.<sup>98</sup> One week later, President Reagan sent a United States carrier group into the Mediterranean.<sup>99</sup> Two weeks after Libyan fighter planes “reportedly flew within 200 feet of a U.S. Navy surveillance plane over the Mediterranean Sea” on January 13, 1986, the Navy started an exercise in the Gulf of Sidra.<sup>100</sup>

In March 1986, after the U. S. Department of Defense stated that a naval exercise designed to “gather intelligence, assert the right of innocent passage, and the right to sail in international waters,” would take place in the Gulf of Sidra during the week of March 23.<sup>101</sup> On March 24, Libya fired six missiles at United States planes over twelve miles away from the Libyan coastline.<sup>102</sup> The Navy then attacked four Libyan patrol boats and two missile sites.<sup>103</sup>

On April 5, 1986, two Americans and one Turkish woman were killed when a disco in Berlin was bombed. Moreover, 154 people, 50 to 60 Americans, were injured.<sup>104</sup> United States officials stated that the attack looked like part of a “pattern of indiscriminate violence” against United States citizens by Libya.<sup>105</sup> About a week later, officials in Reagan’s administration claimed that there was “incontrovertible evidence” that Libya was connected to the Berlin bombing.<sup>106</sup>

Ten days later, the U.S. Air Force bombed targets at the Tripoli Military Air Field, Tarabulus (Aziziyah) Barracks, and Sidi Balal Training Camp.<sup>107</sup> On that same day, the U.S. Navy bombed targets at the Benina Military Air Field and Benghazi Military Barracks.<sup>108</sup> As a result of the United States action, 37 people, including Omar

97. Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT’L L. 177, 182 (1987).

98. *Id.*

99. *Id.*

100. *Id.* at 183.

101. *Id.* at 184.

102. *Id.*

103. Intoccia, *supra* note 97, at 184-85.

104. *Id.* at 185.

105. *Id.* at 183 (quoting Gerald M. Boyd, *U.S. Sees Methods of Libya Attacks*, N.Y. TIMES, Apr. 6, 1986, at A1).

106. *Id.* at 184 (citing Bernard Weinraub, *Officials Say U.S. Warned of Bomb, Minutes Too Late*, N.Y. TIMES, Apr. 11, 1986, at A1).

107. *Id.* at 179.

108. *Id.*

Qadhafi's stepdaughter, died, and 93 people, including two of Qadhafi's sons, were wounded. Two Americans on an American aircraft were also killed.<sup>109</sup> Before any military action, the United States did first impose both diplomatic and economic sanctions against Libya.<sup>110</sup>

Both the U.N. General Assembly and the U.N. Secretary-General (Javier Perez de Cuellar) stated that the United States action violated international law.<sup>111</sup> When a Security Council resolution echoed that condemnation, the United States, the United Kingdom, and France vetoed it.<sup>112</sup> In addition, Arab nations and the Organization of Petroleum Exporting Countries censured the action.<sup>113</sup> Greece called the air strike "set[ting] dynamite to peace," and Italy stated that it was "provoking explosive reactions of fanaticism...."<sup>114</sup> While France vetoed the Security Council resolution along with the United States and the United Kingdom, it did call the air strikes "reprisals that itself revives the chain of violence."<sup>115</sup> Still other members of the international community denounced the raid, including foreign ministers of the Movement of Non-Aligned Nations, while Vietnam suspended talks on American MIAs after citing the United States action in Libya.<sup>116</sup>

The United States likened the mounting attacks by Libya to an armed attack.<sup>117</sup> While United States' officials claimed that the action was actually self-defense, they still argued that self-defense could involve more than warding off an armed attack.<sup>118</sup> The White House stated:

In light of this reprehensible act of violence and clear evidence that Libya is planning future attacks, the United States has chosen to exercise its right of self-defense. It is our hope that action will *preempt* and *discourage* Libyan attacks against innocent civilians in the *future*.<sup>119</sup>

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109. Intoccia, *supra* note 97, at 179.

110. Seymour, *supra* note 7, at 239.

111. Ratner & Lobel, *supra* note 68.

112. *Id.*

113. Intoccia, *supra* note 97, at 187.

114. *Id.* (quoting Robert A. Manning, *Little Fallout for NATO Expected; In Western Europe, Strains Among Friends*, U.S. NEWS & WORLD REP., Apr. 28, 1986, at 24-25).

115. *Id.*

116. *Id.* at 189.

117. See AREND & BECK, *supra* note 2, at 43.

118. *Id.*

119. Statement by the Principal Deputy Press Secretary Speakes on the United States Air Strike Against Libya, PUB. PAPERS 468 (Apr. 14, 1986) (emphasis added).

This attitude is more indicative of retaliation and reprisal. President Reagan, for instance, stated that the air strikes would cause Qadhafi to "alter his criminal behavior."<sup>120</sup> Reagan further stated, "I warned that there should be no place on Earth where terrorists can rest and train and practice their deadly skills. I mean it. I said that we would act with others, if possible, and alone if necessary to insure that terrorists have no sanctuary anywhere."<sup>121</sup> A month before the United States action in Libya, Vice President George Bush said that, in combating terrorism, there would be a willingness in United States policy to "retaliate."<sup>122</sup> Therefore, although the United States officially used self-defense as justification for its action, reprisal was probably also a justification.<sup>123</sup>

- 1988 — U.S. Destruction of Iranian Oil Platforms

Iran resumed laying mines in international waters in the Persian Gulf in 1988; as a result, the U.S.S. *Samuel B. Roberts* was damaged.<sup>124</sup> In response, on April 18, 1988, United States warships decimated two Iranian oil platforms.<sup>125</sup> The next day, President Reagan stated that the United States action was "to make certain the Iranians have no illusions about the cost of irresponsible behavior"<sup>126</sup> and that it was supposed "to deter Iranian aggression, not provoke it."<sup>127</sup> Once again, self-defense was used to justify the United States action. However, statements by the Reagan administration claimed the strike was in "retaliation"<sup>128</sup> for the minelaying and that "any further mining by Iran would bring harsher military reprisals."<sup>129</sup>

That same year, after Pan American Flight 103 was destroyed "in apparent retaliation for the accidental shoot-down of the Iran airbus by the guided missile cruiser U.S.S. *Vincennes*," President Reagan ordered that a report be prepared on aviation and terrorist

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120. AREND & BECK, *supra* note 2, at 43 (quoting Address to the Nation on the United States Air Strike Against Libya, PUB. PAPERS 469 (Apr. 14, 1986)).

121. Intoccia, *supra* note 97, at 191.

122. *Id.*

123. *See id.* at 191-92.

124. Seymour, *supra* note 7, at 223.

125. *Id.*

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

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

128. Seymour, *supra* note 7, at 224.

129. *Id.* (quoting David Hoffman & Lou Cannon, *U.S. Retaliates, Hits Iran Oil Platforms in Gulf*, Washington Post, Apr. 18, 1988, at A1).

prevention.<sup>130</sup> The President's Commission included these recommendations: (1) "state sponsors of terrorism should be made to pay a price for their actions;" (2) that "active measures are needed to counter more effectively the terrorist threat;" and (3) that "[t]he United States should ensure that all government resources are prepared for active measures – *preemptive* or *retaliatory*, direct or covert – against a series of targets in countries well-known to have engaged in state-sponsored terrorism."<sup>131</sup>

### C. Resurrection of Reprisal Doctrine

In 1990, two authors advanced the argument that Israel's repeated use of the reprisal doctrine against terrorists should in effect be legitimized by adoption as American policy. Major Philip A. Seymour of the U.S. Marine Corps suggested that the reprisal doctrine's employment against terrorists and not states would save it from general condemnation as would strict compliance with the proportionality rule.<sup>132</sup> Drawing on prior work by Tel Aviv University's Professor Yoram Dinstein, Georgetown Professor William V. O'Brien goes a step further and proposes bringing this doctrine back into play as part of a re-written and expanded self-defense doctrine, against terrorist organizations only, but with new operational rules grafted onto the ones that exist in customary law:

A realistic and fair *jus ad bellum* law governing counterterror attacks on terrorist positions in sanctuary States would recognize that such measures [forcible reprisals] are a legitimate form of self-defense. This right of self-defense extends to the protection of a State's nationals abroad, including protection against hijacking. Despite Security Council practice and the opinions of the majority of publicists, the reprisal/self-defense distinction and the judgment that reprisals are legally impermissible should be abandoned.<sup>133</sup>

O'Brien goes on to argue that "[a] more sensible approach would be to assimilate armed reprisals into the right of legitimate self-defense."<sup>134</sup> Noting that, "[i]n counterterror operations, defensive

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130. *Id.* at 221.

131. PRESIDENT'S COMMISSION ON AVIATION SECURITY AND TERRORISM, REPORT TO THE PRESIDENT 125 (1990) (emphasis added).

132. See generally Seymour, *supra* note 7, at 224-225.

133. O'Brien, *supra* note 82, at 475.

134. *Id.* at 476.

reprisals are indispensable," he further suggests that "[r]equirements for reasonable, legally permissible counterterror measures of legitimate self-defense should be as follows:

- (1) The purpose of the counterterror measures should be to deter and render more difficult further terrorist attacks.
- (2) Counterterror measures should be proportionate to the purposes of counterterror deterrence and defense, viewed in the total context of hostilities as well as the broader political-military strategic context.
- (3) Discrimination in counterterror measures should be maximized by target selection and Rules of Engagement governing operations.
- (4) Counterterror measures must not be influenced by demands for vengeance but should conform strictly to the functional necessities of their purpose.<sup>135</sup>

Although no express statement issued from the White House after September 11, 2001, announced the inclusion of reprisal in American foreign military engagement policy, the actions undertaken by the Bush Administration in response to Afghanistan carefully complied with all of the rules of reprisal even though they were legally allowed under Article 51 of the Charter as self-defense alone.<sup>136</sup> Indeed, the suggestions put forward by Major Seymour

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135. *Id.* at 477.

136. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 47 (Winter 2002). Professor Murphy asserts that even though the blow against the United States on Sept. 11, 2001, fell from a terrorist organization, the "armed attack" standard of Article 51 was met for six reasons: "First, the scale of the incidents was akin to that of a military attack." *Id.* "Second, the United States immediately perceived the incidents as akin to that of a military attack." *Id.* (emphasis added). "Third, the U.S. interpretation...was largely accepted by other nations." *Id.* at 48. "Fourth, there is no need to view the September 11 incidents as presenting a binary choice between being regarded either as a criminal act or as ... an armed attack. In fact, the incidents can properly be characterized as *both*...." *Id.* at 49. "Fifth, there is some prior state practice supporting the view that terrorist bombings can constitute an armed attack triggering a right of self-defense." *Id.* (citing, as an example, the 1998 American cruise missiles sent against Sudan and Afghanistan in response to the al Qaeda bombing of American embassies in Kenya and Tanzania). Sixth, Article 51 does not require "the exercise of self-defense to turn on whether an armed attack was committed directly by another state." *Id.* at 50.

and Professor O'Brien appear to have gained currency in the government's pattern of reaction to the terrorist attacks inflicted by al Qaeda.

Clearly, the United States suffered a grievous peacetime injury as a result of Afghanistan's violation of international law (harboring al Qaeda, supporting their *jihād* against America, and serving as an accomplice in mass murder). President Bush's ultimatum to the Taliban regime that followed on September 24th encompassed all the criteria that Afghanistan had to meet in order to avoid a military reprisal:

[T]onight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens.... Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist.... Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation.... The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.<sup>137</sup>

Upon Kabul's non-compliance with the peaceful terms of redress, the American-led coalition invasion of Afghanistan, and resulting disruption of the al Qaeda terrorist network, toppling of the Taliban fundamentalist regime, and pursuit of Osama bin Laden and Mullah Omar were proportional and necessary responses to the original illegal act – destruction of the World Trade Center, damaging of the Pentagon, killing of over 3,000 civilians and hijacking/destruction of four passenger airliners.

Thus, the argument for return of the reprisal doctrine, at least in the context of responding to terrorist attacks, has found a mooring in the current administration. Arguably, President Bush's linkage of states to the terrorists they harbor in almost a legal agency relationship means that he is not actively resurrecting the reprisal doctrine against states *a priori*. On this line of reasoning, states are only on the receiving end of reprisals *through* the

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137. Address Before a Joint Session of the Congress on the U. S. Response to the Terrorist Attacks of September 11th, PUB. PAPERS (Sept. 20, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/#>.

terrorists, who are the actual targets of the reprisals. True, this may be a distinction without a meaningful difference, but it nevertheless may provide the United States some cover in its military actions and also limit the usage of the doctrine by other countries to states involved in terrorism. Thus, states not directly involved in terrorism may escape reprisal.

This raises the question of how America can propose to invade Iraq – a country controlled by a brutal regime to be sure, but one that is not overly involved in the international terrorism business. And, absent a significant link to al Qaeda, another doctrine must be used to legitimize a United States attack on Baghdad. If a plain reading of Article 51 disallows striking Iraq absent an armed attack, the Bush Administration is required to return to the legal history books and pull out another disused doctrine to justify any unilateral military action it may take. The one that seems to fit best, albeit imperfectly, is the doctrine of anticipatory self-defense.

### III. THE ANTICIPATORY SELF-DEFENSE DOCTRINE

Anticipatory self-defense was a species of self-help available to states in their relations with one another, coexistent with reprisal and traditional self-defense in pre-Charter customary international law.<sup>138</sup> It is based on the precept that if a state is about to be invaded, it may attack the invading force before the actual invasion has begun in order to stave off the imminent attack or otherwise ameliorate the effects of it.<sup>139</sup> Unlike its doctrinal cousin, traditional self-defense, the state under imminent threat of attack is not required to absorb the first blow before responding with military force.<sup>140</sup>

#### A. *Historic Evolution*

Like reprisal, the concept of self-defense as an equitable response to a prior wrong is “one of the oldest legitimate reasons for states to resort to force.”<sup>141</sup> Aristotle, Aquinas, and the framers of the Kellogg-Briand Pact all recognized the right of self-defense.<sup>142</sup> In customary practice, this concept was rather expansive and could take several forms; before adoption of the U.N. Charter, a state could use self-defense “not only in response to an actual armed

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138. See BROWNLIE, *supra* note 18, at 257-258; AREND & BECK, *supra* note 2, at 72.

139. AREND & BECK, *supra* note 2, at 72.

140. *Id.*

141. *Id.*

142. *Id.*



attack, but also in anticipation of an imminent armed attack.”<sup>143</sup> The example usually cited for this latter principle is the *Caroline* case of 1847, discussed in the next section, which set out essential criteria for when anticipatory self-defense could be undertaken. Woolsey acknowledged the premise for a legitimate preemptive strike in his treatise of 1877: “[a] wronged nation, or one fearing sudden wrong, may be the first to attack, and that is perhaps its best defense.”<sup>144</sup>

Self-defense, both individual and collective, is recognized under Article 51 of the U.N. Charter.<sup>145</sup> However, it is questionable whether Article 51 recognizes any right of anticipatory self-defense. Article 51 states that “[n]othing in the present Charter shall impair the *inherent* right of individual or collective self-defence *if an armed attack occurs* against a Member.”<sup>146</sup> This could mean that the right of self-defense can only be exercised once an armed attack actually happens, thus limiting customary international law.<sup>147</sup> The other interpretation centers around the word “inherent” that is used to describe self-defense; this interpretation would be that the framers of the U.N. Charter did not intend to limit customary international law but “merely desired to list one situation in which a state could clearly exercise that right.”<sup>148</sup>

There are basically, then, two schools of thought on the right of anticipatory self-defense.<sup>149</sup> “Restrictionists” follow the first view of Article 51 being a limit on customary international law.<sup>150</sup> “Counter-restrictionists” either argue that Article 51 is not a limit on customary international law, that it actually incorporates customary law as it existed in 1945, or that their reading of Article 51, combined with post-1945 developments like the failure of collective security and the development of nuclear weapons and inter-continental ballistic missiles, show that the right of anticipatory self-defense exists as a practical matter.<sup>151</sup>

The International Court of Justice has never addressed the question of anticipatory self-defense expressly,<sup>152</sup> even in the *Nicaragua* case.<sup>153</sup> While one of the dissenting judges in the

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143. *Id.*

144. WOOLSEY, *supra* note 13, §117, at 179.

145. AREND & BECK, *supra* note 2, at 72.

146. U.N. CHARTER art. 51 (emphasis added).

147. *See* AREND & BECK, *supra* note 2, at 72.

148. *Id.* at 73.

149. *Id.*

150. *Id.*

151. *Id.*

152. AREND & BECK, *supra* note 2, at 73.

153. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter the *Nicaragua* case].

*Nicaragua* case expressed support for a right of anticipatory self-defense under Article 51, the Court “noted that since ‘the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised...the Court expresses no view on that issue.’”<sup>154</sup> Even though the debate seems far from settled, states continue to invoke Article 51 to justify their actions even when the situation seems to be one of anticipatory self-defense.<sup>155</sup>

The Security Council’s role under Article 51 is important.<sup>156</sup> States not only are supposed to report actions taken in employing the right of self-defense, such a right is only temporary, lasting “until the Security Council takes measures ‘necessary to maintain international peace and security.’”<sup>157</sup> However, even though Article 51 assigned the Security Council such a role, few of that body’s resolutions have expressly referred to the article.<sup>158</sup> States usually do comply with Article 51’s reporting requirement, apparently heeding the International Court of Justice’s statement in the *Nicaragua* case that “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.”<sup>159</sup>

While necessity and proportionality are not expressly required by the U.N. Charter, these principles are a part of customary international law. Both the *Nicaragua* case and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* “reaffirmed that necessity and proportionality are limits on all self-defence, individual and collective.”<sup>160</sup> While discussion of necessity and proportionality is almost always a factual inquiry particular to a certain incident, agreement has been reached on two points: self-defense (1) cannot be retaliatory in nature; and (2) must be designed to stop and ward off an attack.<sup>161</sup>

### 1. *The Rules of Preemption*

The evolution of anticipatory self-defense into a working customary law doctrine prescribing use of force short of war and proscribing certain conduct under its justification, like the reprisal doctrine, is accompanied by a fairly well-articulated set of rules for

154. *Id.* (quoting the *Nicaragua* case at 343).

155. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 87 (Malcolm Evans & Phoebe Okowa eds., 2000).

156. *See id.* at 88.

157. *Id.* (quoting U.N. CHARTER art. 51.)

158. *Id.* at 89.

159. *Id.* at 90 (quoting the *Nicaragua* case at para 200).

160. *Id.* at 106 (citing Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8)).

161. See GRAY, *supra* note 155, at 106.

usage. As noted above, the case of the *Caroline* from the mid-19th Century provides the classic articulation of when preemptive military action may be taken. The *Caroline* case stemmed from events that took place between unauthorized American supporters of Canadian rebels and British forces in 1847.<sup>162</sup> Towards the end of the rebellion against Britain, Canadian rebels and their American supporters, around 1,000 people, took over Navy Island to use as a base for raids on the Canadian shore.<sup>163</sup> The *Caroline*, which shipped arms and supplies to the group, was docked at Fort Schlosser in New York when the British boarded it at nighttime and started shooting at the crew.<sup>164</sup> The crew was unable to defend itself and abandoned the ship.<sup>165</sup> Two of the Americans in the crew were killed and two others were temporarily taken prisoner.<sup>166</sup> The British soldiers then set the steamer on fire and sent the *Caroline* over Niagara Falls.<sup>167</sup>

Eventually, Daniel Webster, the Secretary of State at that time, and Lord Ashburton, the British Foreign Minister at that time, corresponded through diplomatic notes.<sup>168</sup> Webster wrote that the British were responsible and in violation of the law of nations unless they could show:

[A] necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supporting the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.<sup>169</sup>

Lord Ashburton accepted these criteria of necessity and proportionality arguing that the facts of the *Caroline* case fit these standards.<sup>170</sup> The criteria the *Caroline* case established were applied to anticipatory self-defense.<sup>171</sup> Thus, before the U.N. Charter,

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162. D'AMATO, *supra* note 27, at 33.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 33-34.

168. D'AMATO, *supra* note 27, at 34-35.

169. *Id.* at 34 (quoting Daniel Webster).

170. *Id.* at 35.

171. AREND & BECK, *supra* note 2, at 72.

customary international law acknowledged that anticipatory self-defense could be used if both necessity and proportionality had been met.<sup>172</sup> While these criteria are not precise, a state first must show that it was necessary to use anticipatory self-defense because of an impending attack, i.e. that the "attack was truly imminent and there were essentially no other reasonably peaceful means available to prevent such attack."<sup>173</sup> The state also has to show that the self-defense was proportionate to the impending attack.<sup>174</sup>

## 2. Usage up to 1945

Despite establishment of the doctrine in formal terms a century and a half ago, use of the anticipatory self-defense doctrine was rare prior to adoption of the U.N. Charter.<sup>175</sup> Transient examples include the Soviet Union's reliance on it for short military actions against Outer Mongolia in 1921 and against Manchuria in 1929.<sup>176</sup> Interestingly, it was raised as a defense by both the Germans and the Japanese before the International Military Tribunals following World War II.<sup>177</sup>

Germany argued that its 1941 attack on the Soviet Union "was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end."<sup>178</sup> The Nuremberg Tribunal dismissed that contention for lack of evidence.<sup>179</sup> Likewise, Japan argued that its invasion of the Dutch East Indies (Indonesia) that same year was in response to a declaration of war by the Netherlands' government in exile.<sup>180</sup> The International Military Tribunal for the Far East, acknowledging Tokyo's premeditated plans to attack the Dutch colonial possessions, rejected the anticipatory self-defense assertion, stating:

The fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war on the 8th December and thus officially recognised the existence of a state of war which had been begun by Japan cannot change that war from a

172. *Id.*

173. *Id.*

174. *See id.*

175. *See* BROWNLIE, *supra* note 18, at 260-61.

176. *See id.* at 257 n.6.

177. *Id.* at 258.

178. *Id.* (quoting International Military Tribunal, Judgment, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER - 1 OCTOBER 1946: OFFICIAL DOCUMENTS 171, 215 (1947)).

179. *Id.*

180. *Id.*

war of aggression on the part of Japan into something other than that.<sup>181</sup>

Japan's December 7, 1941, attack on Pearl Harbor, largely sinking the American Pacific Fleet, has also been regarded, though not asserted as such by the Japanese, as a preemptive strike.<sup>182</sup> It has been regarded by others as a preventive war, also illegal under the U.N. Charter. As the New York Times' David Sanger reports:

[For some,] Iraq looks less like a preemptive strike and more like a preventive war. And there the classic example is one the White House is unlikely to cite with approval: Dec. 7, 1941. Every schoolchild in Japan is taught that the United States-led embargo on Japan was slowly killing the country's economy and undermining its ability to defend itself. That's why Japan has kept a museum celebrating the heroes of Pearl Harbor.

The logic goes something like this, says Graham Allison of Harvard's Kennedy School of Government. 'I may some day have a war with you, and right now I'm strong, and you're not. So I'm going to have the war now. That, of course, was Japan's thinking, and in candid moments some Japanese scholars say – off the record – that the country's big mistake was waiting too long.' But Mr. Allison notes that historically, preventive war has been regarded as illegitimate, because if countries act simply because rivals are getting relatively stronger, you end up having a lot of wars.<sup>183</sup>

A senior fellow at the Council on Foreign Relations, Max Boot argues that it is time to blur the artificial distinction between anticipatory self-defense and preventive war on a disturbingly outcome-determinative basis.<sup>184</sup> According to Boot, it is precisely *because* England's preemptive/preventive attack in 1587 on Philip

181. *Id.* (quoting United States v. Araki, Judgment of the International Military Tribunal for the Far East (Nov. 4-12, 1948), reprinted in 1 *The Tokyo Judgment: The International Military Tribunal for the Far East*, 29 April 1946-12 November 1948, at 382 (B.V.A. Röling & C.F. Rüter eds., 1977)).

182. See generally ROBERT SMITH THOMPSON, *A TIME FOR WAR: FRANKLIN DELANO ROOSEVELT AND THE PATH TO PEARL HARBOR* 381, 400 (1991).

183. David E. Sanger, *Beating Them to the Prewar*, N.Y. TIMES, Sept. 28, 2002, at B7.

184. See Max Boot, *Who Says We Never Strike First?*, N.Y. TIMES, Oct. 4, 2002, at A27.

II's Spanish fleet at Cadiz helped Sir Francis Drake defeat the Armada the following year that such actions are justified.<sup>185</sup> Of course, this argument distorts the legal doctrine and stretches into the realm of political realism. The inherent weakness in Boot's assertion is that it hearkens back to a time of trial by combat, a time the world has since renounced. Moreover, outcome cannot always be predicted, and after-the-fact justification is no way to prosecute hostilities in what the international community has endeavored to mold into a more predictable field of foreign relations.

### B. Dormancy of Preemption under the U.N. Charter?

Like reprisal, anticipatory self-defense was arguably outlawed in 1945 by adoption of the U.N. Charter.<sup>186</sup> Traditional self-defense in response to an armed attack was the only form of self-help that made it into the Charter.<sup>187</sup> The collective security apparatus of Chapters VI and VII under the aegis of the Security Council were designed to be the methods of international response to states breaking the rules against armed aggression.<sup>188</sup> However, old habits are hard to break.

During the Cold War period, although preemptive military strikes were reduced considerably, they continued to occur as the political dynamic of the Security Council (veto stasis between communist and non-communist permanent members) kept that body in a deep freeze.<sup>189</sup> With the U.N. unable to act on many instances of military aggression, individual powers resorted to the actions that were necessary to keep the peace, legal or not, while trying to justify them on varying legal grounds in the process. Some examples follow.

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185. *Id.* Boot also cites other examples:

In 1756, as Austria, Russia and France plotted to crush Prussia, Frederick the Great did not wait to be attacked. He struck first, invading Saxony and Bohemia, and eventually winning important victories against his far more numerous foes.

In 1967, as Arab armies gathered on Israel's borders, Prime Minister Levi Eshkol did not wait to be attacked. Israeli forces struck first and defeated their enemies in just six days.

186. See U.N. CHARTER arts. 33, 51.

187. See *id.*

188. See generally U.N. CHARTER chs. VI., VII.

189. AREND & BECK, *supra* note 2, at 75.

- The Cuban Missile Crisis

In 1962, it came to President Kennedy's attention that the Soviet Union was putting together delivery systems for ballistic missiles in Cuba. Kennedy, who stated that this was "a deliberately provocative and unjustified change in the status quo," ordered a naval blockade (a "quarantine") so that the Soviet Union could not transport the material to Cuba.<sup>190</sup> When President Kennedy addressed the United States, he stated that he was acting "in defense of our own security and of the entire Western Hemisphere."<sup>191</sup>

A blockade is a violation of Article 2(4) of the U.N. Charter under international law unless it falls within an exception.<sup>192</sup> In 1962, the official justification for the United States' action centered on the authorization by the Organization of American States; however, the question of the right of anticipatory self-defense was debated in legal circles.<sup>193</sup> When the Security Council considered the Crisis, "there was no specific rejection of the concept of anticipatory self-defense. Instead, there seemed to be an underlying acceptance by most members of the Council that in certain circumstances the preemptive use of force could be justified."<sup>194</sup> While the Security Council certainly did not sanction anticipatory self-defense, neither did the discussions reject the concept.<sup>195</sup> This, combined with the fact that states that opposed the United States' actions during the Crisis failed to denounce the action, suggests that the doctrine of anticipatory self-defense had some acceptance.<sup>196</sup>

- The 1967 Six-Day War

On June 5, 1967, Israel attacked the United Arab Republic (UAR), a short-lived pan-Arabic political merger between Egypt and Syria, as well as simultaneously attacking Jordan and Iraq. Defeat of the Arab nations was quick.<sup>197</sup> Israel's justification for the attack was that actions by the United Arab Republic and its neighbors showed that an invasion of Israel was impending. While Israel pressed the "anticipatory nature" of its action, other states (Syria, Morocco, and the Soviet Union) put more emphasis on the idea that

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190. *Id.* at 74-75.

191. *Id.* at 75.

192. *Id.*

193. *Id.*

194. AREND & BECK, *supra* note 2, at 75.

195. *Id.* at 76.

196. *Id.*

197. *Id.*

Israel was the first to use force and that the first use of force was illegal.<sup>198</sup> Thus, these states did not seem to care about the intent behind military action and the distinction between aggression and defense – just that the state who used force first was the aggressor.<sup>199</sup> Even states sympathetic to Israel (the United States and Britain) abstained from debating anticipatory self-defense.<sup>200</sup>

- The 1981 Israeli Bombing of the Osarik Reactor

In June 1981, the Israeli Air Force decimated an Iraqi nuclear reactor by Baghdad.<sup>201</sup> When the Security Council addressed the matter, the Iraqi Foreign Minister, Saadoun Hammadi, denounced Israel's action as an "act of aggression."<sup>202</sup> Ambassador Blum from Israel stated, "Israel was exercising its inherent and natural right of self-defense, as understood in general international law and well within the meaning of Article 51 of the United Nations Charter."<sup>203</sup> Blum proceeded to cite several legal scholars, including Bowett, for the principle that anticipatory self-defense is acceptable; he further justified Israel's actions by stating that only when diplomatic channels failed did Israel resort to force.<sup>204</sup>

Despite Mr. Blum's statements, every delegate thereafter condemned Israel's action.<sup>205</sup> However, several of the delegates did talk about anticipatory self-defense; many of these delegates sided with the restrictionist school of thought, including Syria, Guyana, Pakistan, Spain, and Yugoslavia.<sup>206</sup> For example, when discussing preemptive strikes, the delegate for Syria said:

[It was] a concept that has been refuted time and again in the Definition of Aggression...and [has been] dismissed as unacceptable, since it usurps the powers of the Security Council as set forth in Article 39 of the Charter and curtails the Council's authority.<sup>207</sup>

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198. AREND & BECK, *supra* note 2, at 76-77.

199. *Id.* at 77.

200. *Id.* See also Matt Donnelly, *Hitting Back? The United States' Policy of Pre-Emptive Self-Defense Could Rewrite the Rules of Military Engagement*, ABC News, Aug. 28, 2002, available at <http://abcnews.go.com/sections/world/DailyNews/preempt020828.html>.

201. AREND & BECK, *supra* note 2, at 77.

202. *Id.* at 77-78.

203. *Id.* at 78.

204. *Id.*

205. *Id.*

206. *Id.*

207. AREND & BECK, *supra* note 2, at 78.



However, several other delegates instead sided with the counter-restrictionist school of thought.<sup>208</sup> The basic argument for anticipatory self-defense was that it was permissible if an imminent threat could be shown and other ways to approach the threat had been exhausted.<sup>209</sup> This approach was supported by delegates from Sierra Leone, Britain, Uganda, Niger, and Malaysia.<sup>210</sup> Sierra Leone's representative, Mr. Koroma, for instance, stated that "the plea of self-defence is untenable where no armed attack has taken place *or is imminent*."<sup>211</sup> Still other states condemned Israel without debating anticipatory self-defense, including Ambassador Kirkpatrick from the United States.<sup>212</sup> In summary, there seemed to be more support for the counter-restrictionist arguments than in previous discussions.<sup>213</sup>

### C. Resurrection of Anticipatory Self-Defense Doctrine

Clearly, there is still a division concerning the right of anticipatory self-defense. However, "many states...take the counter-restrictionist view and support the proposition that in certain circumstances it may be lawful to use force in advance of an actual armed attack."<sup>214</sup> While the concept of anticipatory self-defense might have its supporters, rarely does a state invoke the right of anticipatory self-defense.<sup>215</sup> Not only do states usually instead rely on traditional self-defense, "they prefer to take a wide view of armed attack rather than openly claim anticipatory self-defence."<sup>216</sup>

Since there is no established endorsement or rejection, "it would seem to be impossible to prove the existence of an authoritative and controlling norm prohibiting the use of force for preemptive self-defense."<sup>217</sup> Nevertheless, that is not the last word. The fact that states rarely use anticipatory self-defense as a justification shows a certain reluctance:

This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force. States

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208. *Id.*

209. *Id.*

210. *Id.* at 78-79.

211. *Id.* at 78-79.

212. *See id.* at 79.

213. AREND & BECK, *supra* note 2, at 79.

214. *Id.*

215. GRAY, *supra* note 155, at 112.

216. *Id.*

217. AREND & BECK, *supra* note 2, at 79.

take care to try to secure the widest possible support; they do not invoke a doctrine that they know will be unacceptable to the vast majority of states."<sup>218</sup>

However, in the post-9/11 world, the American government has made it an official policy to return this doctrine to service; the Bush Administration's National Security Strategy, released to Congress in September 2002, stated this in no uncertain terms:

[T]he United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means....

The greater the threat, the greater the risk is of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt *emerging* threats, nor should nations use

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218. GRAY, *supra* note 155, at 112.

preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.<sup>219</sup>

How exactly is this new "emerging threat" standard to be quantified? The National Security Strategy is silent on that point and no policy clarifications have been forthcoming from the government. Clearly, the trigger is a lower threshold of evidence that would be required to establish existence of an imminent threat. It perhaps might be a commitment beyond some "point of no return" to carry forth an aggressive act.<sup>220</sup> A report by ABC News correspondent Matt Donnelly encapsulates the conundrum:

Critics warn that the evidence the United States needs to attack – the point of no return – has not been clearly defined, and has no precedent. Would the United States wait to invade until there was proof Iraq had built a chemical, biological or nuclear weapon? Or would Bush send in troops as soon as Iraq had all the components?<sup>221</sup>

George Washington University Law School Professor Sean Murphy appreciates the unpredictable long-term consequences of returning this old doctrine into service: "The standards for invasion now are pretty cut-and-dry: If you're attacked, you can respond.... But if you make anticipatory self-defense the standard, you open an enormous Pandora's box."<sup>222</sup> Who else can use it once the United States brings it back into play? If there are no clear guidelines and a high threshold for its employment, then each state is free to interpret when a threat has sufficiently "emerged" to justify military preemption. Almost any country could conceivably avail itself of the doctrine's legitimizing effect against "emerging threats" in neighboring states under this watered-down trigger mechanism.<sup>223</sup>

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219. The National Security Strategy of the United States, at 15 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nssall.html> (emphasis added).

220. Donnelly, *supra* note 200.

221. *Id.*

222. *Id.*

223. Michael J. Kelly, *Bush's Pre-emptive Strategy is a Recipe for Chaos*, HOUSTON CHRON., Sept. 24, 2002, at 20A:

Without establishing a high threshold demanding clear and convincing evidence of an imminent threat, chaos could ensue. If America invades

Secretary of Defense Donald Rumsfeld, however, is willing to take that risk now that weapons of mass destruction are on the table. In a September 2002 interview, Secretary Rumsfeld noted that it is the object which now justifies the preventive action to be taken, not necessarily the underlying legal rationale:

Q: What is the concept of the preemptive strike that seems to be coming into play here? How do you foresee it looking beyond Iraq [inaudible]? How do you foresee it being used around the world in the future? How does this set a precedent?

Rumsfeld: I think what one has to do is...recognize that we're in a new security environment in the 21st Century. It is different than the 20th Century. It's different because then we were dealing essentially with conventional capabilities. Today we're dealing ...with weapons of mass destruction, biological weapons, chemical weapons, in the hands of people who are quite different than was the standoff between the United States and the Soviet Union.

That different circumstance it seems to me forces us to think about the meaning of war. How does one defend itself against a terrorist? Do you absorb the attack and then decide to do something about it? What about the historic concept of anticipatory self-defense? When one sees a threat developing to do something to deal with that? Preventive action.

Think of John F. Kennedy in the Cuban Missile Crisis. He didn't sit there and let Soviets put missiles in Cuba and fire a nuclear missile at the United States; he decided to engage in preemptive

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Iraq on its own, outside the U.N. system, on the basis of pre-emptive self-defense against an emerging threat suddenly...each nation could use a different yardstick to measure the immediacy and gravity of a threat to its national security.

In other words, the pre-1945 system of warfare and reprisal would be resurrected. Does the Bush Administration realize its proposed action could transport us back to a time of aggressive war? The world outlawed such action at the Nuremberg Trials. German, and later Japanese, commanders and leaders were hanged for it. A value judgment was made that world order was best achieved by constraining the military options of individual states. Were we wrong after World War II?

action, preventative action, anticipatory self-defense, self-defense, call it what you wish. And he went out and blockaded them. Called it a quarantine but blockaded them and put the world into a very tense, dangerous ... circumstance[.]. And prevailed because he did take preventive action.

So I don't think that it's a new thing as such. I think what's new is that we could afford, countries could afford...the historical blow with conventional capabilities. Lose hundreds or thousands of people. Today the question people are debating properly is how do you feel about absorbing a blow that is from a weapon of mass destruction and it's not 100 people or 1,000 people but it's tens of thousands of people? What is the responsible course of action for our country, for our people? That's the issue that is front and center for the American people and indeed for the people of the world.<sup>224</sup>

Professor Michael J. Glennon, a National Security Law expert at the University of California - Davis, supports Secretary Rumsfeld's view: "Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safe-guarding the well-being of their citizenry."<sup>225</sup> Professor Glennon's realpolitik analysis that leads him to this conclusion is that, because the collective security apparatus of the U.N. Charter has failed, the legal prohibitions on use of force contained in that charter should no longer continue to restrict state action in the *de jure* sense (noting they have already been abandoned in the *de facto* sense).<sup>226</sup>

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224. John Shirek, NBC Affiliate - WXIA Channel 11, *Atlanta Georgia Interview with Secretary of Defense Donald H. Rumsfeld*, Sept. 27, 2002, available at [http://www.defenselink.mil/news/Sep2002/t09302002\\_t927wxia.html](http://www.defenselink.mil/news/Sep2002/t09302002_t927wxia.html).

225. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 552 (2002)

226. *Id.* at 540-41:

The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system. The decaying *de jure* catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.

## IV. CONCLUSION

The almost sixty-year slumber of reprisal and anticipatory self-defense as actionable doctrines justifying and defining the parameters for international use of military force may be over. As creatures of customary law, their use by states was curtailed with adoption of the United Nations Charter in 1945. The only place they could plausibly continue to lurk was within the ill-defined self-defense clause of the U.N. Charter, which arguably enshrined the concept in its "inherent" form as it stood when the Charter entered into force.

On that basis, states termed the reprisals and preemptive strikes they continued to engage in after 1945 as "self-defense" actions permitted by Article 51, while simultaneously adhering to the traditional rules for carrying out those actions required by customary law. Thus, while the old doctrines were prohibited *de jure*, they remained *de facto* foreign relations and national security tools. Now, with the implied resurrection of reprisal against terrorists and the express resurrection of anticipatory self-defense against both terrorists and states by the Bush Administration in its conduct of the post 9/11 War on Terror, the prospect of their return to *de jure* usage is a real possibility. It is a possibility that this author is more comfortable with in the context of reprisal against terrorist organizations than in the context of preemptive strike capability.

Nevertheless, left unchallenged, the American interpretation of Article 51 that broadens the permissiveness of unilateral or multi-lateral military engagements to include such actions on their own merits (and not as shadowy aspects of traditional self-defense) may carry the day. If the world does not condemn this interpretation, states act in accordance with it, and state practice congeals in support of it, then there is a real risk of the customary rules (as altered by the United States) finding their way legally into the U.N. Charter.

This would amount to a significant regression in the progress made after the end of the Cold War toward stability through collective security. The dangers of returning to pre-1945 rules of engage-

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The upshot is that the Charter's use-of-force regime has all but collapsed. This includes, most prominently, the restraints of the general rule banning use of force among states, set out in Article 2(4). The same must be said...with respect to the supposed restraints of Article 51 limiting the use of force in self-defense. Therefore, I suggest that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere.

ment with nuclear weapons are manifold. Legal constraints, and therefore political and moral constraints, on use of force by new nuclear powers such as India, Pakistan, North Korea and Israel would be swept away. Countries with emerging nuclear arsenals, such as Iran, would be doubly encouraged to proceed quickly in acquiring those weapons. Non-proliferation goals will evaporate more than they already have as non-nuclear states near nuclear ones are forced to “go nuclear” themselves in order to achieve the only deterrence that can bring security in a world devoid of military restraints.

Moreover, under the new, looser threshold of identifying “emerging” threats before preemptively striking a neighbor instead of imminent ones, almost any threat can be defined as emerging in some stage or another. Unfortunately, this is true whether it involves terrorists in Kashmir or Lebanon potentially striking at targets in India or Israel, increased missile armament in Taiwan aggravating China, renewed drug trade in Afghanistan infiltrating Iran, or the occupation of uninhabited nominally Spanish islets in the Strait of Gibraltar by Moroccan forces.

Is this really the kind of world in which we want to live? Is it going to be a safer one for our children and grandchildren? Is it going to provide more stability? The answer is “no” to all of the above. The United States is the sole superpower today. However, America cannot propose to articulate one set of rules defining military engagement for itself and another set for the rest of the world. Nations are fed up with Washington’s hypocrisy in this regard. They will most assuredly follow America’s lead for the short-term benefits it may provide, ignoring — as the Bush Administration now does — the long-term problems it will certainly create.

Secretary General Kofi Anan specifically identified the core problems surrounding anticipatory self-defense in his remarks opening the 58th session of the U.N. General Assembly in September 2003. In so doing, he placed the recurrence of this practice squarely before that body as an issue for consideration:

Since this Organization was founded, States have generally sought to deal with threats to the peace through containment and deterrence, by a system based on collective security and the United Nations Charter.

Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence. But until now it has been understood that when States go beyond that, and decide to use force

to deal with broader threats to international peace and security, they need the unique legitimacy provided by the United Nations.

Now, some say this understanding is no longer tenable, since an "armed attack" with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group.

Rather than wait for that to happen, they argue, States have the right and obligation to use force preemptively, even on the territory of other States, and even while weapons systems that might be used to attack them are still being developed.

According to this argument, States are not obliged to wait until there is agreement in the Security Council. Instead, they reserve the right to act unilaterally, or in ad hoc coalitions.

This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years.

My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.

But it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action.

We must show that those concerns can, and will, be addressed effectively through collective action.

Excellencies, we have come to a fork in the road. This may be a moment no less decisive than 1945 itself, when the United Nations was founded.<sup>227</sup>

Whether either body of the U.N. can muster the political will necessary to address this issue is an open question. Nevertheless,

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227. *Adoption of Policy of Preemption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary-General Tells General Assembly*, U.N. Doc. SG/SM/8891-GA/10157 (2003) available at <http://www.un.org/News> (last visited Sept. 29, 2003).



with the Secretary-General's backing, there is at least room for hope.

