

National Self-Defense, International Law, and Weapons of Mass Destruction

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The most publicized element of *The National Security Strategy of the United States of America* (the “*Strategy*”), promulgated in September 2002 by the Bush administration,¹ is its emphasis on the option to use preemptive military strikes to address threats to the United States before they fully materialize. This is set in the context of terrorist organizations, such as al Qaeda, or so-called rogue states, such as Iraq or North Korea, acquiring and threatening to use weapons of mass destruction—in other words, chemical, biological, or nuclear weapons. The terms “preemptive attack,” “preventive war,” and “anticipatory self-defense” will be used interchangeably in this Article. Arguably, the term anticipatory self-defense could imply action against a truly imminent, alleged threat, while preventive war could be addressed to a threat that is yet to fully mature, with preemptive attack somewhere in between. Even though the three terms are somewhat different, the lines between them are not clear, and they all involve aggressive action. Thus, the question becomes whether a particular attack is justified under the rules of international law as a legitimate act of self-defense, given the circumstances.

Section III of the *Strategy* states that the government will defend the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists.²

This Article addresses whether the implementation of this doctrine of preemptive attack or preventive war is consistent with international law. It is

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¹ *The National Security Strategy of the United States of America* (Sept 2002), available online at <<http://www.whitehouse.gov/nsc/nss.pdf>> (visited Apr 8, 2003) (hereinafter *Strategy*).

² Id at 6.

noteworthy that Section V of the *Strategy* itself places this new doctrine in the context of international law:

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. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.³

To emphasize that the aim of the *Strategy* is, in part, to adapt the international law of self-defense to an age where weapons of mass destruction are potentially in the hands of rogue states and terrorists, the *Strategy* also says: "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. ... We must deter and defend against the threat before it is unleashed."⁴

Evidence that the United States was prepared to engage in preemptive action in the past is beyond question. During the Cold War, if the government had received reliable information that a Soviet thermonuclear first strike was imminent, it would have contemplated using the highly accurate nuclear counterforce weapons the United States possessed, such as the Peacekeeper ICBM and the Trident D-5 nuclear missile, to remove such a threat. However, the United States was always careful to insist that it followed a second-strike policy and would only respond with its nuclear forces after being attacked, while continuing to maintain a launch-on-warning option. The Soviet Union had to assume in its nuclear planning that a counterforce attack on the United States would be ineffective because the US missiles would be launched before the arrival of Soviet weapons. However, this option was never raised to the level of a doctrine, nor even a formal government position. It seems that the *Strategy* is elevating preemptive attack, for the first time, to a doctrine that is supposed to underpin policy decisions.

Thus, preemptive attack, which was never a doctrine or even a formal policy, is raised by the *Strategy* to a doctrine of US military strategy. Yet arguably, even though such action had been contemplated in the past, the United States had never engaged in a preemptive military attack against another nation prior to

³ Id at 15.

⁴ Id at 14.

the current conflict in Iraq. The United States had intervened to restore order, to respond to an actual terrorist attack, to enforce the Monroe Doctrine, and to seize a foreign leader central to the war on drugs—but prior to the conflict in Iraq the United States had never taken a preemptive military action, defined as an action to prevent an attack or use of force against the United States.⁵ The only time the United States came close to a preemptive use of military force was during the Cuban Missile Crisis.⁶ During the crisis, strong arguments were made in the counsels of the US government to conduct air strikes against the Soviet intermediate range nuclear missile deployments before they became operational. The air strikes would then have been followed by a ground invasion. However, President Kennedy ruled out such an option, imposed a naval quarantine (a much lesser use of force), and settled the crisis peacefully.

The United Nations Charter on its face rules out preemptive attack. Article 2(4) of the United Nations Charter states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁷ The intention here was to make a state’s use of force, or threat of it, an illegitimate means of dealing with interstate disputes.

Article 51 of the UN Charter does allow the use of force in self-defense, but this authority is narrowly circumscribed:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁸

Thus, according to the Charter, a Member of the United Nations can engage in military acts of self-defense only after an armed attack has occurred, and then only until the Security Council has taken control. There are conflicting views as to what this language actually means. Some believe that Member states have only those rights specifically granted by the Charter. Thus, self-defense would be permitted only after an armed attack had already occurred—not in anticipation of one. In San Francisco in 1945, Deputy US negotiator Harold

⁵ See Richard F. Grimmet, *U.S. Use of Preemptive Military Force* 1, Cong Rsrch Serv (Sept 18, 2002), available online at <<http://fpc.state.gov/documents/organization/13841.pdf>> (visited Apr 8, 2003).

⁶ *Id.* at 4.

⁷ United Nations Charter, art 2(4).

⁸ United Nations Charter, art 51(1).

Stassen argued that this language was "intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred."⁹ Professor Louis Henkin writes, "[T]he Charter intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed attack occurs."¹⁰ *Oppenheim* states, "Article 51 of the Charter, moreover, expressly preserves the right of individual or collective self-defense against armed attack."¹¹

The requirement that there be an armed attack is clear, but not without difficulty. There are divided views whether it is permissible for a state to use force in self-defense against an attack which has not yet actually begun but is reasonably believed to be imminent. The better view is probably that while anticipatory action in self-defense is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defense than they are in other circumstances.¹²

Others argue that the rule set forth in the Charter did not extinguish customary legal rights of self-defense and that military preparations obviously undertaken as a prelude to an attack could legitimately be viewed as part of the threatened attack. Some have asserted that "[t]he inclusion of the words 'nothing ... shall impair the inherent right' shows a clear intent not to restrict" the pre-Charter customary legal rights of anticipatory self-defense.¹³ And it is important to note that Article 2(4) of the Charter does outlaw the threat of the use of force as well as its actual use. In the words of Sir Claud Humphrey Meredith Waldock, "[I]t would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first, and perhaps fatal, blow. ... To read Article 51 otherwise is to protect the aggressor's right to the first stroke."¹⁴ Advocates of this view argue that the drafters of the United Nations Charter did not intend to prohibit anticipatory self-defense—which could amount to a preemptive attack—by citing a report of the Charter drafting committee that said, "The use of arms in legitimate self-defense remains admitted and

⁹ Thomas M. Franck, *When, if Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 Wash U J L & Poly 51, 58 (2001).

¹⁰ Louis Henkin, Council on Foreign Relations, *How Nations Behave: Law and Foreign Policy* 295 (Columbia 2d ed 1979).

¹¹ Robert Jennings and Arthur Watts, eds, *Oppenheim's International Law* 418 (Longman 9th ed 1992).

¹² *Id.* at 421–22.

¹³ Guy R. Phillips, *Rules of Engagement: A Primer*, Army Law 4, 12 (July 1993).

¹⁴ C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *Recueil Des Cours* 455, 498 (1952).

unimpaired.”¹⁵ Further, they argue that state practice has long recognized an act of anticipatory self-defense as legitimate.

However, Professor Michael Glennon, in an article last year, analyzed the self-defense rule of the Charter and concluded that the language means what it says and permits unilateral military action in self-defense only if an armed attack has occurred. He cites testimony in July 2001 by former Defense Secretary William Perry on the subject of the Anti-Ballistic Missile Treaty to the effect that as a backup to a missile defense system, the United States could establish a policy of targeting the missile launch sites of any nation threatening to attack the United States with nuclear or biological weapons via long-range ballistic missiles.¹⁶ Professor Glennon suggests that this idea has merit, but it “would plainly violate Article 51 of the United Nations Charter,” as no armed attack would have occurred.¹⁷

Professor Glennon also argues that the language of Article 51 is profoundly in conflict with state behavior and, therefore, cannot be considered a valid rule of international law regulating state behavior. “No rules will work that do not reflect underlying geopolitical realities,”¹⁸ he says, and notes that there is not even an accepted international definition of aggression, pointing out that “[o]ne person’s terrorist remains another’s freedom fighter.”¹⁹ And, in a November 21, 2002 op-ed article in the *New York Times*, Professor Glennon notes, “It is hard to avoid the conclusion that the Charter provisions governing use of force are simply no longer regarded as binding international law.”²⁰ But he also correctly notes that this “breakdown ... of international rules governing the use of force” is “[t]he urgent issue today.”²¹ Conversely, some commentators assert that even following the adoption of the Charter, states retain the right to engage in anticipatory self-defense, and that while neither the Security Council nor the International Court of Justice has authoritatively spoken on the question, the practice of states and treaty codification would seem to confirm the existence of this right under contemporary customary international law.²²

Professor Ruth Wedgwood, in an article in the *National Law Journal* of October 28, 2002, asserts that Article 51 does recognize “the right of every nation to act in its own self-defense when it is the victim of an armed attack,” and that “[m]ost international lawyers recognize the logic of Daniel Webster’s

¹⁵ *Report of Rapporteur of Committee 1 to Commission I*, 6 Docs UN Conf Int Org 446, 459 (1945).

¹⁶ 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 Poly 539, 539 (2002).

¹⁷ *Id.*

¹⁸ *Id.* at 557.

¹⁹ *Id.* at 558.

²⁰ Michael J. Glennon, *How War Left the Law Behind*, NY Times A37 (Nov 21, 2002).

²¹ *Id.*

²² Phillips, *Army Law* at 11–12 (cited in note 13).

famous *Caroline* case in 1842, which allows a nation to act against a threat that is 'instant, overwhelming, and leaves no choice of means.' One need not wait until the enemy's mobilized troops have crossed the border in order to respond."²³ Professor Wedgwood implies, as have many commentators over the years, that this rule must be updated through interpretation to reflect the realities of today's world of ballistic missiles and weapons of mass destruction. Specifically, Professor Wedgwood notes, "A 'just in time' defense may not work in an age of instant deliverables."²⁴ No longer, given the existence of these weapons, can states wait to act in their own self-defense while armies mobilize near their borders, or hostile navies near their shores. Professor Wedgwood, in a colloquy reported in the *Washington Post* on September 29, 2002, argues:

There's a somewhat different reading under the U.N. Charter with a relatively pacifistic bias, which is that you really just have to wait and take a significant chance of having the first hit. ... There's quite a different formulation that comes from, of all people, Elihu Root—secretary of war, secretary of state, one of the founders of the American Society of International Law. In 1914, Root declared 'the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself.'

It's not surprising to me that how you apply Root's formulation would change over time with the development of weapons of mass destruction.²⁵

And seen in this light, arguably Secretary Perry's comment simply reflects the exigencies of self-defense in today's world. However, in the same colloquy, Professor Wedgwood also noted, "Traditionally, lawyers hold—and I think most countries have held—that pure capability is not a sufficient *casus belli* And pure capability with a smarmy attitude is not *casus belli*."²⁶

The rule of the *Caroline* case followed a failed rebellion outside of Toronto in December 1837. The rebel leader, William Lyon Mackenzie, escaped across the border to Buffalo, New York, and succeeded in convincing sympathetic Americans that his situation paralleled that of the thirteen colonies. He called for military volunteers to meet him on the American shore of the Niagara River, and—accompanied by some two-dozen recruits—occupied an uninhabited Canadian island. By the end of the month, Mackenzie's force grew to between several hundred and one thousand men, mostly Americans. The British responded by stationing about two thousand militiamen along the Canadian shore and called upon the United States to stop the flow of men, arms, and supplies to the island. As tensions rose, the British-Canadian commander ordered a Royal Navy officer to capture or destroy a ferry that was being used to

²³ Ruth Wedgwood, *Strike at Saddam Now*, Natl L J A16 (Oct 28, 2002).

²⁴ Id.

²⁵ *Outlook: Six Degrees of Preemption*, Wash Post B2 (Sept 29, 2002).

²⁶ Id.

bring supplies to the island. After rowing into the river, the officer discovered that the steamer was not docked on the Canadian island, as had been reported, but instead was docked on the US mainland. He decided to carry out his orders anyway, and sank the ship. While only one person on board the ferry was killed, US newspapers misreported the incident, further stoking tensions along the border. The British claimed the attack was an act of self-defense, but the issue festered for about five years.

In 1842, the United States and Britain finally settled the issue. During negotiations in Washington, D.C., US Secretary of State Daniel Webster, as part of the settlement, defined the conditions under which self-defense could be used to justify an unprovoked attack on another nation. He wrote that an attack on foreign territory would be justified only if the aggressor were able to show a "necessity of self-defense instant, overwhelming, and leaving no choice of means, and no moment for deliberation."²⁷ He added that the attacking country also had a responsibility to limit itself to self-defense measures and to do nothing unreasonable or excessive.

This case sets forth a rule that is still binding precedent. In 1976, Israel's ambassador to the United Nations quoted Webster's doctrine when justifying Israel's operation to rescue hostages held at the Entebbe Airport in Uganda, calling it "the classic formulation" of the right to self-defense (though its applicability in that situation would appear to be questionable).²⁸

However, in defining when self-defense could be used to justify an attack on another nation, Secretary Webster emphasized that any such military action based on self-defense must be proportionate to the threat and involve nothing "unreasonable or excessive"²⁹ since the act justified by the necessity of self-defense must be limited by the necessity.³⁰ Thus, commentators have argued that the three conditions for preemptive self-defense are:

- 1) whether the military response was necessary;
- 2) whether the response was proportionate; and
- 3) whether the response was immediate.

These three principles are said to prevent states "from acting in retaliation or reprisal, which is considered a violation of international law."³¹ The last of these

²⁷ John Bassett Moore, 2 *A Digest of International Law* 412 (GPO 1906) (quoting Webster's correspondence to Lord Ashburton, a special British representative to Washington in the *Caroline* dispute).

²⁸ United Nations, *Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport*, reprinted in 15 ILM 1224, 1231 (1976).

²⁹ Christopher C. Joyner and Anthony Clark Arend, *Anticipating Humanitarian Intervention: An Emerging Legal Norm?*, 10 USAFA J Legal Stud 27, 34 (1999–2000).

³⁰ Id.

³¹ Maureen F. Brennan, Comment, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 La L Rev 1195, 1203 (1999).

conditions, immediacy, has been somewhat diminished in importance by state practice in an age of terrorism and attacks without warning. This “suggests that a reasonably delayed response is acceptable where there is a need to gather evidence of the attacker’s identity and/or collect the intelligence and [organize the] military force in order to strike back in a targeted manner.”³² However, the right of anticipatory self-defense “is always tempered by necessity and proportionality principles,” as is the right of self-defense generally.³³ And again, in today’s world of nuclear weapons, intercontinental ballistic missiles, and terrorism, a less precise definition of a potential threat justifying military action under the rule permitting anticipatory self-defense is appropriate. Indeed, this is the point of Section V of the *Strategy*.

Thus, the present state of international law as to the legitimate use of self-defense is not entirely clear. Richard G. Maxon has argued that the following are the important questions that generally should be addressed in considering military action in self-defense:³⁴

- 1) “*Is the proposed response aimed at protecting the status quo?*” If not, it is not really defensive in character.
- 2) “*Has there been a violation of a legal obligation?* Each member state of the United Nations is obligated by Article 2(4) to refrain from using force or threats of force against the territorial integrity or political independence of any state.” Thus a clear and direct threat would violate the Charter.
- 3) “*Has there been an actual armed attack from an external source?*” Or, as the World Court recognized in the Nicaragua case, indirect aggression having the effect of an armed attack?
- 4) “*Is the response, or proposed response, timely?*”
- 5) “*Is the military response in self-defense necessary?*”
- 6) “*Is the military response in self-defense proportionate to the threat?*”
- 7) “*Has any military response been immediately reported to the Security Council?*”
- 8) “*Has the Security Council taken meaningful, effective measures to stop the aggressive conduct?*”

While many of the questions related to anticipatory self-defense or preemptive attack are those applicable to responsive self-defense, the unique questions related to anticipatory self-defense are more difficult. Is there an

³² Angus Martyn, *The Right of Self-Defence Under International Law—The Response to the Terrorist Attacks of 11 September*, available online at <<http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm>> (visited Apr 8, 2003) (punctuation added).

³³ George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 Cornell Intl L J 321, 375 (1998).

³⁴ Richard G. Maxon, *Nature’s Eldest Law: A Survey of a Nation’s Right to Act in Self-Defense*, 25 Parameters 55, 62–63 (Autumn 1995).

immediate or imminent threat of an armed attack in terms of the rule in the *Caroline* case? More specifically, four questions are applicable:³⁵

- 1) “Are there objective indicators that an attack is imminent? Factors such as troop buildups, increased alert levels, increased training tempo, and reserve call-ups may suggest that an attack is imminent.”
- 2) “Does the past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack is probable?”
- 3) “What is the nature of the weapons available to the alleged aggressor nation, and does it have the ability to use them effectively?”
- 4) “Is the use of force the last resort after exhausting all practicable, peaceful means?” Diplomacy is always the best course to take for long-term success if it is possible.

As the third question illustrates, weapons of mass destruction and long-range ballistic missile systems might make waiting for an actual armed attack exceedingly dangerous. Thus, Secretary Perry’s suggestion to target missile launch sites could be construed as falling within the *Caroline* rule. In judging such a case, much would depend on whether there had been a test program demonstrating a long-range ballistic missile capability. Such a program could be easily monitored by intelligence collection systems available to a number of states. Another important consideration would be the likelihood that an alleged aggressor had developed weapons of mass destruction, particularly nuclear weapons. To possess nuclear weapons that are deliverable by ballistic missiles, a nuclear weapons test program—also monitorable—is almost certainly required. Crude nuclear weapons of the Hiroshima-type, which can be reliably constructed without a test program, are too heavy and unwieldy to be delivered effectively by a long-range ballistic missile. Chemical weapons affect only a limited geographic area, and would not be worth delivering via long-range ballistic missiles. Biological weapons are slow acting, unlikely to have a short-term military effect, and the microbes would probably be destroyed by the missile impact. Both chemical and biological weapons are probably more suitable as terrorist weapons than for use on the battlefield, given these limitations on their effectiveness and long-range deliverability. However, it should be noted that many terrorist organizations do not have or leave any return address. Even with modern weapons, can a reasonably reliable warning of attack be expected or is it more likely that such an attack will come by surprise? If the former, it would be reasonable to wait for the warning before acting in anticipatory self-defense. If the latter, there would seem to be a lesser obligation to wait before taking preemptive action.

Of course the delivery of crude nuclear weapons by aircraft would be a possibility, posing a threat to neighboring countries, but likely not distant

³⁵ Id at 64.

countries. Therefore, the proximity of the potential aggressor state is also an issue. In addition, one truly difficult issue involves classified information that an attack is coming, but which a government cannot release to the public because its release would compromise that government's intelligence sources and methods. What burden of proof must a government carry to operate within the rule of international law? Can it act legally on its secret information and trust that later events will justify its actions?

And, should the alleged aggressor nation be a modern nuclear weapon state such as Russia or China, preemptive military attack or preventive war is unlikely to be a viable option, since such an action could trigger a nuclear war. It would only be attempted in the most desperate of circumstances, as in the Cold War option of launch-on-warning or launch-under-attack. Thus, a Cold War-style nuclear deterrence strategy with a secure second-strike capability is the only practical policy in dealing with a modern nuclear weapon state. As a result, a threatened preemptive strike in anticipatory self-defense would be a viable option only against states that have not become modern nuclear weapon states. This is a strong reason for weighing this option very carefully indeed, lest more states become encouraged to develop nuclear weapons.

Together, these questions form a test for the legality of steps taken in the name of preventive attack or anticipatory self-defense. A case worth examining in this context is the preemptive attack by Israel on the Osiraq nuclear power reactor in Iraq some twenty years ago. On June 7, 1981, Israel sent fourteen F-16 Falcons to Iraq, with two one thousand kilogram bombs each, and six F-15 Eagles serving as escort planes, to destroy Iraq's Osiraq nuclear power reactor shortly before it was ready to go "on line," that is, to become operational with nuclear fuel.³⁶ The Israelis claimed the right of preemptive self-defense, asserting that an operational reactor would be a step in the direction of Iraq acquiring nuclear weapons, which would pose a direct and immediate threat to Israel.

Israel justified its attack on the theory that Iraq refused to recognize Israel's right to exist and endorsed violence against Israel. A completed nuclear reactor would have allowed Iraq to create the nuclear material necessary to develop nuclear weapons. Those nuclear weapons could be used against Israel. Therefore, argued Israel, its attack was lawful as self-defense.³⁷

³⁶ Louis Rene Beres and Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 Temple Int'l & Comp L J 437, 438 (1995); Louis Rene Beres, *Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law*, 14 Dick J Intl L 187, 203-05 (1996).

³⁷ Byard Q. Clemons and Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 Naval L Rev 217, 227 (1998). See also Louis Rene Beres and Yoash Tsiddon-Chatto, *Twenty-One Years Later: Israel, Iraq, and International Law*, Jewish Star Times (June 19, 2002).

Nevertheless, this action was strongly condemned by the Security Council, and the United States joined in a Security Council resolution denouncing the raid as illegal under international law. Referring to the attack, British Prime Minister Margaret Thatcher said, "Armed attack in such circumstances cannot be justified. It represents a grave breach of international law."³⁸ The United Nations Security Council, in Resolution 487 of June 19, 1981, "strongly" condemned the attack and indicated that under international law, "Iraq is entitled to appropriate redress for the destruction it has suffered."³⁹

In hindsight, what judgment can be made with respect to this case? We now know, as a result of the Gulf War and subsequent inspections by the United Nations in the 1990s, that Iraq was in fact attempting to produce nuclear weapons, had an aggressive nuclear weapon program, and likely was within a few years of acquiring such weapons in 1990. If the Osiraq reactor had gone online in 1981, a substantial amount of spent fuel would have accumulated within several years. From this fuel it would have been possible to chemically separate plutonium and construct Hiroshima-type nuclear weapons relatively quickly. Thus, Saddam Hussein could have been in possession of crude nuclear weapons in advance of the Gulf War, even without nuclear weapon explosive tests. The necessary chemical reprocessing plant would have been easy to hide, unlike a power reactor, which is comparatively large.

Iraq was also developing medium-range SCUD missiles with sufficient range to reach Israel. These are World War II technology ballistic missiles: slow, large, and inaccurate. However, at the time of the Gulf War, Iraq possessed a number of such missiles and actually fired some into Israeli territory.

A nuclear weapons test program would have been necessary to develop nuclear weapons small and light enough to be carried on these missiles. Such a program would have taken at least several years and would certainly have been detectable as the necessary tests could not have been effectively hidden. On the other hand, by the time Iraq had begun such tests, it probably could have been stopped from developing such weapons only by a military invasion. This would have been very unlikely prior to the Gulf War, given the lack of public support for any such action before the provocation of the Kuwait invasion.

Under the test set forth above, the Israeli response was aimed at protecting the status quo, yet there still was not a violation of a legal obligation, nor had there been an armed attack. Arguably, the military response was timely, necessary, and proportionate, given that there was little collateral damage. No attack was imminent, but past conduct indicated that the possibility of a devastating attack some years into the future had to be taken seriously. The weapons that the Israelis believed Iraq was seeking—correctly as it turned out—

³⁸ Bruce Ackerman, *But What's the Legal Case for Preemption?*, Wash Post B2 (Aug 18, 2002).

³⁹ Security Council Res No 487, UN Doc No S/RES/487 (1981).

were nuclear weapons, perhaps deliverable by ballistic missile, and such weapons would have been a grave threat to the survival of Israel. And almost certainly a diplomatic solution was not possible, given the nature of the government of Iraq. Thus, perhaps Israel's action was justified and consistent with the rule of the *Caroline* case.

However, this hindsight view is not a sound basis for a rule of law. Otherwise, nations around the world will seek nuclear weapons, claiming self-defense, on the basis of the propensity of some nations to engage in preemptive attacks allegedly justified under international law, and will thereby destroy the Nuclear Non-Proliferation Treaty ("NPT") regime that is essential to world peace and security. Such nations would heed some variation of the statement, perhaps apocryphal, but sometimes attributed to George Fernandez, the Indian Defense Minister, that "before one challenges the United States, one must first acquire nuclear weapons."⁴⁰ It would be deeply contrary to the interests of the United States, as well as the interests of the world community, to encourage such a psychology. Also, there is the question of how to respond to a threat emanating from within a country but not from its government—for example, a country too weak to suppress a highly sophisticated terrorist organization operating within its territory. Could international law countenance an act of anticipatory self-defense, otherwise justified, against the territory of such a state and over the wishes of the government on the ground that the government in question was not in control of its own territory? This presents a difficult issue.

The new doctrine set forth in the *Strategy* declares that the United States will not hesitate to act preemptively, alone if necessary, against rogue states and terrorists that threaten the United States with weapons of mass destruction. But the *Strategy* also sets this doctrine within the rubric of international law, and states that the world community "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."⁴¹ The current military action against Iraq is the first application of this doctrine; therefore, it is only fitting that it should also serve as the first test of the legality of that doctrine and the updated concept of preventive attack or anticipatory self-defense that it embraces. The questions presented above could be employed as a test of such legality in this case of preemptive military action against Iraq.

Military action against Iraq, if authorized by a new Security Council mandate, would have presented quite a different set of legal issues, since such action would have been permitted under international law. Given that the Security Council, pursuant to Resolution 1441 of November 8, 2002,⁴² had for

⁴⁰ Robert S. McNamara and Thomas Graham, Jr., *A Pretty Poor Posture for a Superpower*, LA Times B13 (Mar 13, 2002).

⁴¹ *Strategy* at 15 (cited in note 1).

⁴² Security Council Res No 1441, UN Doc No S/RES/1441 (2002).

some months been demanding that Iraq disarm with respect to its weapons of mass destruction and permit inspectors access to Iraqi territory to verify this disarmament, the current issue should be looked at in light of Resolution 1441 and the support of the world community for this resolution. If Iraq did not comply with the resolution and attempted to hide or deny access to weapons of mass destruction, the Security Council could have ordered the use of "all necessary means" to compel compliance, thereby authorizing military action against Iraq. Military action taken by the United States or any other state pursuant to such authorization would have been legal under international law. On February 14, 2003, the Chief Inspectors, Dr. Hans Blix and Mohammed el Baradei, Director of the International Atomic Energy Agency ("IAEA"), reported mixed results to the Security Council on the issue of Iraq's compliance with the resolution. On March 7, 2003, they returned to the Council with a somewhat more positive report. Not long after that, on March 20, 2003, the United States, supported by the United Kingdom, terminated the inspection process and launched a preemptive military attack on Iraq. The United States asserted that its own intelligence indicated that Iraq did, in fact, possess weapons of mass destruction, notwithstanding the inspectors' findings, and that these weapons represented an imminent threat to the security of the United States. This attack is indistinguishable from a preemptive attack outside the United Nations' system, as it bypassed the UN and Resolution 1441. Whether this action, taken outside of Security Council authorization under the rationale of the new doctrine, is legal as self-defense under international law depends heavily on the facts and the degree to which they can be ascertained.

In a letter dated October 15, 2002 to President Bush, the Association of the Bar of the City of New York had strongly urged that the administration consider military action against Iraq only in the context of a new Security Council resolution. The letter referred to Secretary Webster's rule, and also recognized that "what constitutes an imminent threat today cannot be limited to what constituted an imminent threat in Secretary Webster's day."⁴³ However, the letter went on to say that on the basis of information so far made publicly available:

[The United States] has itself not appeared to present the case of an actual or imminent Iraqi attack. In our view, the distinction is not simply a question of uncertainty as to 'the time and place of an attack.' More fundamentally, the United States has so far not publicly made a claim of any

⁴³ Letter from E. Leo Milonas, Association of the Bar of the City of New York, to George W. Bush, *New York City Bar Urges No US Military Action in Iraq Without UN Security Council Authorization* (Oct 15, 2002), available online at <http://www.abcny.org/currentarticle/abcny_%20Urges_No_US_Military.html> (visited Apr 8, 2003).

certainty or even probability of an Iraqi attack against the United States that rises to a level of imminence justifying unilateral action at the present time.⁴⁴

This letter, I believe, highlights concerns about secrecy—that if a world order governed by a system of international law is to have a chance to be workable, nation states must openly justify their actions. Otherwise, virtually any action can be justified on the basis of “secret information” to which no one else is privy.

The *Strategy* suggests a broad world-policing role to defend the United States and its allies. But exactly how far can the doctrine of preventive action go? Would it apply to a potential conflict where our interests—but not a specific alliance organization—are involved? For example, would a potential attack by India on Pakistan, an important ally for the US in the war on terrorism, give rise to the possibility of preventive action against India?

Transparency and predictability are important to the perceived legitimacy of any assertions about the existence of weapons of mass destruction. If the United States intends to assume such a broad world-policing role, as is suggested by the *Strategy*, it is essential for the United States to support those international treaty regimes and other international institutions, designed to make the facts in any given case more transparent. Support for the NPT regime, which legally binds all of the world's nations save five (India, Pakistan, Israel, East Timor, and North Korea, which has recently renounced the NPT), is essential to preventing the spread of nuclear weapons to additional countries. Also, a new verification protocol,⁴⁵ providing for intrusive worldwide inspection to help enforce this treaty regime, was negotiated five years ago in Vienna, although only a handful of countries have ratified it. The United States should ratify this protocol as part of its new *Strategy*. Further, the Comprehensive Test Ban Treaty (“CTBT”) provides for a worldwide, all-embracing, intrusive verification system on land, sea, and air, which will detect even the smallest nuclear detonation. The United States signed the Treaty in 1996, but the Senate rejected it in 1999. Three of the other four NPT-recognized nuclear weapon states, the United Kingdom, France, and Russia, have ratified the CTBT, and China is expected to do so upon ratification by the United States. If the United States desires to be seen as consistent in its actions relating to the new *Strategy*, it must, among other things, promptly ratify the CTBT. The nuclear-weapon-free zone treaties should also be considered part of the transparency process, as they enhance the NPT-based International Atomic Energy Agency verification procedures. The United States is the only nuclear weapon state that has not ratified the supporting protocols for the South Pacific Nuclear-Weapon-Free Zone Treaty, the Treaty of

⁴⁴ Id.

⁴⁵ *Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, IAEA Doc No INFCIRC/540 (May 1997).

Rarotonga.⁴⁶ With Russia and the United Kingdom, the US stands apart from the other two nuclear weapon states in not ratifying the relevant supporting protocols of the Treaty of Pelindaba, the African Nuclear-Weapon-Free Zone Treaty.⁴⁷ On the other hand, the United States, along with the other four nuclear weapon states, has ratified the supporting protocols to the Latin American Nuclear-Weapon-Free Zone Treaty, the Treaty of Tlatelolco.⁴⁸ If the United States is serious about its new *Strategy*, it should act similarly with respect to the Treaties of Rarotonga and Pelindaba, as these treaties are important contributors to transparency. And how can the US argue the case for preemptive attack to prevent attacks on the US with weapons of mass destruction, to include biological weapons, and refuse the negotiation of a verification protocol to the Biological Weapons Convention?

Now turning to the test case of the preemptive military attack on Iraq, under today's circumstances, outside of Resolution 1441, let us apply Richard G. Maxon's test, described previously:⁴⁹

- 1) "*Was the response aimed at protecting the status quo?*" Probably not, since the administration has stated that it is seeking "regime change."
- 2) "*Was there a violation of a legal obligation?*" Yes, Iraq has violated the terms of the cessation of the Persian Gulf War, and sixteen United Nations Security Council resolutions related to this matter. The US has also argued that the facts indicate that Iraq has violated Resolution 1441.
- 3) "*Was there an actual attack?*" No.
- 4) "*Was the response timely?*" No evidence has been advanced that would purport to answer the question of why such an action is necessary now.
- 5) "*Was the military response necessary?*" No, since there is no imminent, identifiable threat (very different from the situation Israel faced in 1981, with the impending completion of the Osiraq reactor and the threat of reprocessing to obtain plutonium) against the United States or anyone else.
- 6) "*Was the response proportionate?*" If Iraq truly were threatening to develop weapons of mass destruction deliverable against the United States, particularly nuclear weapons combined with long-range

⁴⁶ US Department of State, *Article IV of the NPT: U.S. Support for Peaceful Nuclear Cooperation*, Fact Sheet, Bureau of Non-Proliferation (Jan 20, 2001), available online at <<http://www.state.gov/t/np/rls/fs/2001/3052.htm>> (visited Apr 8, 2003).

⁴⁷ Id.

⁴⁸ US Department of State, *Treaties In Force: A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2000* 432, available online at <http://www.state.gov/www/global/legal_affairs/tif_01e.pdf> (visited Apr 8, 2003).

⁴⁹ Maxon, 25 Parameters at 64–66 (cited in note 34).

ballistic missiles as delivery vehicles—which is in doubt—regime change as a war objective would be proportionate.

- 7) *“Was the action immediately reported to the Security Council?”* This is not applicable here.
- 8) *“Did the Security Council take meaningful, effective measures to stop the aggressive conduct?”* It is currently seized with the issue and has been for more than a decade.
- 9) *Was there “an imminent or immediate threat of an armed attack” from Iraq, even considering modern capabilities of weapons of mass destruction and ballistic missiles?* No. In March 2003, Saddam Hussein’s sole objective seemed to be to preserve his rule. An aggressive step toward the United States or any other nation would have triggered his demise.
- 10) *Were there “objective indicators that an attack [was] imminent,” such as troop buildups, missile tests and deployments, and nuclear tests?* No. The objective indicators suggested that he was preparing for an invasion, not preparing to attack another nation.
- 11) *Did “the past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack [was] probable?”* Perhaps in the past, but not now.
- 12) *What was “the nature of the weapons available to the alleged aggressor nation, and [did] it have the ability to use them effectively?”* It appears that Iraq had a limited air force, had virtually no usable medium or long range ballistic missiles, was years away from a nuclear weapon, had a greatly weakened army, and had no means of delivering the chemical and biological weapons it likely possesses except possibly through terrorist agents. Compared to other threats such as North Korea, al Qaeda, and other terrorist organizations, Iraq was not a short-term probable threat.
- 13) *Was “the use of force the last resort after exhausting all practicable, peaceful means?”* Certainly not, as of March 2003.

To sum up, military action against Iraq did not appear to be directed at protecting the status quo. No immediate attack by Iraq threatened the United States or its allies. No evidence had been advanced that explained why immediate military action against Iraq was necessary. And, finally, the military force available to Iraq appeared to be limited in scope and effectiveness. Thus, this preemptive attack on Iraq, without the sanction of the Security Council, does not appear to have been consistent with international law. A majority of the members of the Security Council interpreted Resolution 1441 (and all past resolutions) as requiring a new Security Council resolution authorizing the use of force, based on the reports of the inspectors, before it could be said that military action against Iraq was taken pursuant to Security Council auspices. And surely,

a majority of the Security Council is the appropriate interpreter of its own resolutions, as opposed to one or two of its members.

Thus, if the plan of preemptive military action against Iraq, taken outside of the generally held interpretations of Resolution 1441, is illustrative of the proper interpretation of the new *Strategy* doctrine, the doctrine must be regarded as seriously questionable under international law. If, on the other hand, the clause stating that the US would be prepared to act preemptively, alone if necessary, is properly interpreted as referring to action either pursuant to international law rules or as authorized by the Security Council, then the *Strategy* doctrine would be consistent with international law. As of April 2003, the former would seem to be the correct interpretation. The Bush administration made it clear that, in its opinion, it did not need a new Security Council resolution authorizing the invasion of Iraq. This was contrary to the views of a majority of the Security Council, which did not interpret Resolution 1441 as authorizing force. According to an article in the *Washington Post* on March 17, 2003, the administration gave the United Nations one more day to support the US/British draft resolution which would have authorized force, but that the administration had made it clear that this was "mostly for show."⁵⁰ Indeed, Robert D. Novak, in his column in the *Chicago Sun-Times* on the same day, indicated that the Vice President had implied in a private meeting on Capitol Hill the previous week that "the quest for UN sanctioning" for war in Iraq was "merely a means of securing Britain as a junior military partner."⁵¹ And, as noted above, a preemptive attack on Iraq was not at this time justifiable under the rules of international law.

In conclusion, the above analysis indicates that the apparent intended implementation of the new *Strategy* is not consistent with international law.

⁵⁰ Dana Milbank, *U.S. Officials Make It Clear: Exile or War*, Wash Post A1 (Mar 17, 2003).

⁵¹ Robert D. Novak, *Quiet Cheney Finally Speaks Up*, Chi Sun-Times 31 (Mar 17, 2003).