ANTICIPATORY SELF-DEFENCE UNDER INTERNATIONAL LAW

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INTRODUCTION

The law of recourse to force has changed dramatically over the last centuries. The theory and practice of the use of force during the nineteenth and early twentieth centuries was that of *bellum justum*.[1] The *bellum justum* doctrine, which originated in the Middle Ages, legitimised the resort to violence in international law as a procedure of self-help only if certain criteria were met relating to a belligerent's authority to make war, its objectives and its intent.[2]

The doctrine of *bellum justum* was an objective one in the late Middle Ages; an independent organisation, the supreme ecclesiastical authority of Rome, supervised the justice of warfare.[3] After the Reformation, with its disintegrating impact on the unity and authority of the Church, the *bellum justum* doctrine lost its central supervision and became a subjective one.[4] Each belligerent was, in effect, "his own and final judge" of the *justum* aspect of his war.[5]

The Covenant of the League of Nations represented a first significant break with the traditional theory and practice of the *jus ad bellum*.[6] The Covenant placed "resort to war" under international

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1. *See* MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION, 131-32 (1961) (defining the principle of "bellum iustum").

2. *See* Hans Wehberg, *L'interdiction du Recours à la Force. Le Principe et les Problèmes qui se posent*, 1951-I RECUEILS DES COURS 1, 11-20 (1951) (noting preconditions to use of force).

3. *See* MCDOUGAL & FELICIANO, *supra* note 1, at 133 ("The degree of unity and centralized organisation of authority achieved by the Papacy was such that medieval Christendom has been described by a scholar as an 'international state.'").

4. *See id.* at 133-34 (describing the changes brought about by the Reformation and the consequences of these changes).

5. *Id.* at 131-38 (noting that this was the result of a lack of effective central authority).

6. *See id.* at 138 (noting that there were other minor efforts to limit the *jus ad bellum* of traditional law).

supervision, and rendered it unlawful in four situations: (1) when made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League;[7] (2) when begun before the expiration of three months after the arbitral award or judicial decision or Council report;[8] (3) when commenced against a member which had complied with such award or decision or recommendation of a unanimously adopted Council report;[9] and, (4) under certain circumstances, when initiated by a non-member state against a member state.[10]

The major breakthrough came about seventy years ago, when international law reached the position where it could outlaw war as such, as an instrument of international policy.[11] The 1928 General Treaty for the Renunciation of War ("Kellogg-Briand Pact" or "Pact of Paris") first reflected this principle by condemning "recourse to war for the solution of international controversies," setting out various undertakings to renounce "war as an instrument of national policy."[12] This prohibition of threat or use of force was repeated in Article 2(4) of the United Nations ("U.N.") Charter.[13]

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7. *See* LEAGUE OF NATIONS COVENANT, June 28, 1919, art. 12, *reprinted in* THE MAJOR INTERNATIONAL TREATIES OF THE TWENTIETH CENTURY, at 100 (J.A.S. Grenville & Bernard Wasserstein eds., 2001) (requiring Members to submit disputes to arbitration, judicial settlement or inquiry); *id.* art. 13 (stating that Members may not resort to war with fellow Members who comply with the covenant's provisions); MCDOUGAL & FELICIANO, *supra* note 1, 131-38 (explaining the war-related provisions in the Covenant).

8. *See* LEAGUE OF NATIONS COVENANT, art. 13.

9. *Id.* art. 15 (noting that if a report is unanimously agreed to, Members may not go to war with a complying Member).

10. *Id.* art. 17 (outlining procedures for disputes involving non-Member states).

11. *See* Roberto Ago, *Addendum to the 8th Report on State Responsibility*, [1980] 2 Y.B. Int'l L. Comm'n 52, para. 83, U.N. Doc. A/CN.4/318/ADD. 52 (defining self-defence as the use of force "where the use of force would take the form of resistance to a violent attack by another").

12. Treaty between the United States and other Powers providing for the Renunciation of War as an instrument of national policy, Aug. 27, 1928, art. 1, 46 Stat. 2343, 2345, 94 L.N.T.S. 57,59 [hereinafter Kellogg-Briand Pact]; *see* MCDOUGAL & FELICIANO, *supra* note 1, at 139-41 (explaining the 1928 treaty). S*ee generally* Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT'L L. 39 (1933) (discussing the obligations under the Kellogg-Briand Pact).

13. *See* U.N. CHARTER art. 2, para. 4 (requiring Members to refrain from using force against other states); *see also* Hans Kelsen, *Collective Security and*

The right of self-defence is closely related to the *jus ad bellum*.[14] As long as war could be lawful under the *bellum justum* doctrine, international law would simply regard self-defence as a counter-war against an illegal war.[15] However, as soon as warfare was in principle outlawed under the Kellogg-Briand Pact and the U.N. Charter, the notion of self-defence became a critical exception, restricting the use of force in a world united under the flag of international peace and security.[16]

The purpose of this article is to present the notion of anticipatory self-defence, which is the use of force by a state to repel an attacker before an actual attack has taken place, before the army of the enemy has crossed its border, and before the bombs of the enemy fall upon its territory.[17] "Anticipatory" is a term that "refers to the ability to foresee consequences of some future action and take measures aimed at checking or countering those consequences."[18] Part I of this article deals with the question of whether Article 51 of the U.N. Charter, which explicitly refers to the right of self-defence in armed conflict, substitutes the customary international law of self-defence. This article will argue that Article 51 leaves the customary right of self-defence unimpaired. Part II states that anticipatory self-defence is just one of the many forms of self-defence, and that it is legitimate to

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Collective Self-Defence Under the Charter of the United Nations, 42 AM. J. INT'L L. 783, 793 (1948) (arguing that obligatory reporting required by the U.N. Security Council discourages the exercise of the right of self-defence).

14. *See* MCDOUGAL & FELICIANO, *supra* note 1, at 138 (noting that the Covenant was the first significant break from the *jus ad bellum* of traditional law).

15. *See id.* at 131-32 (defining the *bellum justum* doctrine as the theory that the international community could regard violence as self-defence under certain circumstances).

16. *See* TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW – THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 119 (1996) (noting that self-defence holds the unique status as the only ongoing exception for a state's unilateral use of force).

17. *See* Michael Franklin Lohr, *Legal Analysis of US Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 16 (1985) (explaining that a state may only employ anticipatory self-defence when "the evidence of a threat is compelling and the necessity to act is overwhelming").

18. Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm*, 10 USAFA J. LEG. STUD. 27, 32 (1999-2000).

expect a state to use force in anticipation of armed attack. Part III looks at reports and judgments of U.N. authorities, which explicitly recognize that states have the right to use pre-emptive force. Finally, Part IV will present the conditions under which international law will accept the plea of anticipatory self-defence.

I. ARTICLE 51 OF THE U.N. CHARTER PRESCRIBES CONDITIONS FOR THE EXERCISE OF A PRE-EXISTING, INHERENT RIGHT OF SELF-DEFENCE, RECOGNIZED IN CUSTOMARY INTERNATIONAL LAW

As a fundamental "Principle of the Organization" and a general principle of international law, Article 2(4) of the U.N. Charter requires that states refrain from the use of force, and states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[19] However, one must consider the prohibition of the use of force under the U.N. Charter in light of other relevant provisions. In Article 42, the U.N. Charter states that the "Security Council may take military enforcement measures in conformity with Chapter VII."[20] Article 51 envisages a further lawful use of force in the even of an armed attack:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[21]

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19. U.N. CHARTER art. 2, para. 4; *see also Report of the International Law Commission on the Work of its 18th Session*, [1966] 2 Y.B. Int'l L. Comm'n 247, art. 49, para. 8, U.N. Doc. A/6309/Rev.1 (stating that the majority view is that Article 2(4) reflects the modern customary law regarding the use of force).

20. U.N. CHARTER art. 42.

21. U.N. CHARTER art. 51; *see also* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 244, (July 8), para. 38 (stating that the "Charter recognizes

The question in relation to anticipatory self-defence is, therefore, whether Article 51 of the U.N. Charter has become the only source of a state's right of self-defence in international law (and, therefore, one is limited to considering whether Article 51 permits anticipatory self-defence), or whether Article 51 only imposes certain conditions for the application of a pre-existing, inherent right of self-defence (where one would consider, in addition to Article 51, customary international law).[22] For the reasons that follow, this article maintains that Article 51 "only highlights one form of self-defence (namely in response to an armed attack)," and that the right of self-defence is a pre-existing, inherent right recognized in customary international law.[23]

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the inherent right of the individual or collective self-defence if an armed attack occurs."); MCCORMACK, *supra* note 16, at 119 (stating that the "right of self-defence is the only ongoing exception for a state's unilateral resort to the use of force explicitly recognised by the Charter"). Under Articles 10 and 11 of the U.N. Charter, the General Assembly has the power to "recommend" enforcement action. U.N. CHARTER arts. 10-11. Articles 52 and 53 of Chapter VIII grant regional agencies certain power in matters relating to the maintenance of international peace and security. *Id.* arts. 52-53. However, enforcement action by such agencies [redacted]

A. THE CHARTER'S DRAFTERS DID NOT INTEND TO RESTRICT BROADER NOTIONS OF TRADITIONAL SELF-DEFENCE

First, the drafting history of Article 51 of the U.N. Charter makes it clear that this Article only refers to a pre-existing, inherent right of self-defence under customary international law. As mentioned in the introduction, approximately seventy years ago, international law reached a position where it could outlaw war as an instrument of international policy.[24] This was reflected in the 1928 Kellogg-Briand Pact and repeated in Article 2(4) of the U.N. Charter.[25] However, the right of individual self-defence was regarded as so firmly established in international law that it was automatically excepted from the Kellogg-Briand Pact without any mention of it.[26] When negotiating the Kellogg-Briand Pact, the United States sent a series of identical notes to a number of other governments inviting them to become parties to the Kellogg-Briand Pact and stating that:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign [s]tate and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.[27]

The 1948 Tokyo Judgment, which reads that "[a]ny law, international or municipal, which prohibits recourse to force, is

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24. *See* Ago, *supra* note 11, at 52, para. 83 (noting that self-defence is an "exceptional circumstance").

25. *See* U.N. CHARTER art. 2, para. 4 (stating that "[a]ll 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"); *see also* Kellogg-Briand Pact, *supra* note 12, at art. 1 (condemning "recourse to war for the solution of international controversies").

26. *See* Lohr, *supra* note 17, at 17 (commenting on the U.S. note, which firmly established the right to self-defence, so that an express reservation was not required).

27. *See* DINSTEIN, *supra* note 23, at 164 (arguing that self-defence is inherent in the "sovereignty of states"); *see also* Wright, supra note 12, at 42-44 (noting that critics have argued the notes reveal the negotiators' intent to interpret the treaty as a domestic question, departing from established international law).

necessarily limited by the right of self-defence,"[28] further affirms this idea.

The principle of automatically excepting acts of self-defence from international legal instruments addressing armed aggression would have been true in the U.N. Charter if there had been no Article 51, as indeed there was not in the original Dumbarton Oaks Proposals.[29] U.N. Members inserted Article 51 of the U.N. Charter not for the purpose of defining the individual right of self-defence, but for the purpose of clarifying the position in regard to collective understandings for mutual self-defence.[30] There was concern among the delegates to the San Francisco Conference that the U.N. Charter might affect the Pan-American treaty, known as the Act of Chapultepec, signed by all the American republics on March 8, 1945 (one month before the San Francisco Conference) declaring that aggression against one American State would be considered an act of aggression against all.[31] The U.N. Members drafted Article 51 to clarify this issue, and, with regard to defence against external aggression, it was natural for Article 51 to be related to collective defence against armed "attack."[32] The delegates originally considered

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28. Judgment of the International Military Tribunal for the Far East (Nov. 1948) *reprinted in* 101 THE TOKYO MAJOR WAR CRIMES TRIAL 48494 (R. John Pritchard ed., 1998).

29. *See Verbatim Minutes of the Fourth Plenary* Session, April 28, U.N. Doc. 24 (1945), *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANISATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945, SELECTED DOCUMENTS 313 (1946) (stating that the Dumbarton Oaks proposal was merely a framework that is open for improvement).

30. *See id.* at 313 (acknowledging the need for organized coercive action).

31. *See id.* at 312 (noting that Uruguay follows the principle behind the Act of Chapultepec).

32. *See id.* (expressing hope that the agreement will protect the principle of self-defence); *see also Verbatim Minutes of the Fifth Plenary Session, April 30,* U.N. Doc. 42 (1945), *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANISATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945, SELECTED DOCUMENTS 329-330 (commenting on the defects in the Security Council's voting procedures); *Report of June 8 of Rapporteur of Subcommittee III/4/A to Committee III/4 on the Amalgamation of Amendments,* U.N. Doc. 854 (1945), *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANISATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945, SELECTED DOCUMENTS 779 (discussing the insertion of text into the Dumbarton Oaks proposals); *Verbatim Minutes of Second Meeting of Commission*

placing Article 51 in Chapter VIII of the U.N. Charter, which would limited the right of collective self-defence to regional organizations and would have required prior approval by the U.N. Security Council to exercise the right of self-defence.[33]

In the ensuing debate, the delegates clearly intended for the customary right of self-defence to be unaltered and sought to prevent a single permanent member of the U.N. Security Council from being able to prevent a regional organization from taking any action by using its veto power.[34] As a result, the delegates placed Article 51 in Chapter VII.[35] Moreover, the relevant San Francisco Conference Report that considered Article 2(4) of the U.N. Charter contains the statement that "[t]he use of arms in legitimate self-defence remains admitted and unimpaired."[36] Senator Vandenberg, a member of the U.S. Delegation, declared that "we here recognize the inherent right of self-defence, whether individual or collective, which permits any sovereign state among us or any qualified regional group of states to ward off attack pending adequate action by the parent body."[37]

III on June 13, U.N. Docs. 972, 1078 &1198 (1945), *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANISATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945, SELECTED DOCUMENTS 783-790 (setting forth the discussion leading to the report's unanimous approval); Josef L. Kunz, *Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 873 (1947) (noting that the session distinguished between armed attack and other acts of aggression). *See generally* Claud H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law,* 1952 II RECUEIL DES COURS 451, 496-97 (discussing Article 51 of the U.N. Charter).

33. *See* RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM, 140-41 (1989) (explaining the origins and significance of Article 51).

34. *See* D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 183 (1958) (noting the fear that a single permanent Member's veto could prevent action by the regional organisation).

35. *See* ERICKSON, *supra* note 33, 140-41 (noting the eventual placement of Article 51).

36. *Report of June 13 of Rapporteur of Committee I/1 to Commission I,* U.N. Doc. 944 (1945), *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANISATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945, SELECTED DOCUMENTS 490, 498.

37. *Verbatim Minutes of Second Meeting of Commission III on June 13,* U.N. Docs. 972, 1078, & 1198 (1945) *reprinted in* THE UNITED NATIONS CONFERENCE

Article 51 therefore leaves unimpaired the right of self-defence as it existed prior to the adoption of the U.N. Charter.[38]

B. THE PLAIN LANGUAGE OF ARTICLE 51 DOES NOT SEEK TO RESTRICT BROADER NOTIONS OF SELF-DEFENCE

However, it is not the drafting history alone that makes clear that Article 51 refers to a pre-existing right.[39] The wording of Article 51 also supports the position that the U.N. Charter preserves the customary international law concept of self-defence.[40] Article 51 explicitly acknowledges the pre-existing customary right of self-defence, as recognized by the International Court of Justice ("ICJ")[41] and the U.N. Security Council,[42] by stating that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence."[43] The word "inherent" – mistranslated into French by the term "*droit naturel*" (with its undesirable connotations of the natural law theory of the fundamental rights of states),[44] and better reflected in Spanish by the term "*derecho inmanente*" and in Russian by "*neotemlemoe pravo*" (indefeasible right) – was used in

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ON INTERNATIONAL ORGANISATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945, SELECTED DOCUMENTS 785.

38. *See* Report of the Committee on Use of Force in Relations Among States, 1985-86 AM BRANCH OF THE INT'L LAW ASS'N 188, 203 (interpreting Article 51 as leaving the right to self-defence unimpaired).

39. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J 14, 94 (June 27) (noting the text's reference to a pre-existing right).

40. *See id.* (stating that the right of self-defence has a customary nature); *id.* at 102 (commenting that the resolution shows that self-defence is a matter of customary international law).

41. *See id.* (noting that the treaty refers to "pre-existing customary international law").

42. *See* S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/368 (2001) ("Recognizing the inherent right of individual or collective self-defence in accordance with the Charter."); S.C. Res. 1373, U.N. SCOR, 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001) ("Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368.").

43. U.N. CHARTER art. 51.

44. *See* DINSTEIN, *supra* note 23, at 163 (2001) (noting that "[a]t the present time, there is not much faith in transcendental truths professed to be derived from nature.").

the United States note during the negotiation of the Kellogg-Briand Pact.[45] It is intended primarily to emphasize that the ability to make an exception to the prohibition on the use of force for the purpose of lawful self-defence against an armed attack is a prerogative of every sovereign state.[46] Article 51 of the U.N. Charter explicitly recognizes this inherent right, and prescribes some conditions for its legitimate exercise.[47]

The U.N. Charter, having recognized the existence of the inherent right of self-defence, does not go on to regulate directly all aspects of its content.[48] The preconditions under Article 51 for the exercise of the inherent right are too vague to assume that the architects of Article 51 intended to substitute the customary right of self-defence with a statutory one.[49] For instance, there are no other references to other preconditions of the right of self-defence, such as the nature of the rights a state is entitled to protect with force.[50] Article 51 does not explain the intended scope of the phrase "if an armed attack occurs."[51] Therefore, various questions may arise "because of the

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45. *See Verbatim Minutes of the Fourth Plenary Session*, *supra* note 29 (discussing notes related to negotiation).

46. *See* Lohr, *supra* note 17, at 17 (commenting on the U.S. notes).

47. *See* Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14, 102-03 (June 27) (setting forth the exceptions to the prohibition of force).

48. *See* MCCORMACK, *supra* note 16, 120-21 (commenting that Article 51 is silent as to what constitutes the preconditions for a legitimate exercise of self-defence and as to what constitutes a permissible amount of force).

49. *See* Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defence*, 57 AM. J. INT'L L. 597, 599-600 (claiming that the purpose of the broad language of Article 51 was to accommodate regional organisations rather than restrict the customary right of self-defence).

50. *See* MCCORMACK, *supra* note 16, at 120 (arguing that Article 51 does not specifically address the preconditions for a legitimate exercise of self-defence).

51. *See* G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/Res/3314 (XXIX) (1975) (providing a definition of aggression); *see also* Military and Paramilitary Activities, 1986 I.C.J at 94, 103 (noting the text's reference to a pre-existing right and that the definition of aggression may be taken to reflect customary international law). However, under the heading of acts of aggression, the Definition includes acts that do not necessarily all qualify as "armed attacks." *Id.*; *see also* G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/Res/2625 (XXIV) (1970) (requiring all states to comply in good faith with their obligations under the rules of international law with respect to international peace and security).

particular 'object' against which the armed attack was directed or because of the 'subjects' that carried it out."[52] Finally, Article 51 is silent about the amount of force permitted in a legitimate exercise of self-defence.[53] This silence demonstrates that in the field of self-defence, customary international law continues to exist alongside treaty law.[54]

Article 51 is therefore only meaningful on the basis that there is a "customary" or "inherent" right of self-defence.[55] Article 51 sets certain conditions and refers further to the principle contained in customary international law to respond unilaterally (perhaps in association with other states) with lawful force to unlawful force.[56] The next question is, therefore, whether this customary right of self-defence "is also accorded to [s]tates as a preventive measure (taken in 'anticipation' of an armed attack, and not merely in response to an attack that has actually occurred)."[57]

II. THE PRESCRIBED RIGHT OF SELF-DEFENCE DOES NOT EXCLUDE THE RIGHT TO TAKE ANTICIPATORY ACTION

Two schools of thought exist regarding anticipatory self-defence in international law.[58] First, the restrictive school argues for a narrow

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52. Ago, *supra* note 11, at 68, para. 117. *See generally*, Nicar. v. U.S., 1986 I.C.J 14 (examining the issues surrounding the subjects that carried out the armed attack).

53. *See* MCCORMACK, *supra* note 16, at 120 (noting that Article 51 fails to define an appropriate amount of force).

54. *See, e.g.*, McDougal, *supra* note 49, at 600 (observing that the customary right of self-defence is consistent with the purposes of the United Nations).

55. *See* Lohr, *supra* note 17, at 18 (arguing that the negotiating history of Article 51 reveals the intention of incorporating the entire customary law).

56. *See* U.N. CHARTER, art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

57. DINSTEIN, *supra* note 23, at 165-66 (arguing that Article 51 deliberately restricts the right of self-defence to a response to an armed attack).

58. *See* ERICKSON, *supra* note 33, at 136-41 (discussing the differing interpretations of Article 51 of the U.N. Charter by the restrictive and expansive schools of thought).

interpretation of self-defence, excluding anticipatory self-defence. These scholars refer to Article 51 of the U.N. Charter and to customary international law and assert that there is no right of self-defence absent an armed attack.[59] In the event of a possible attack "[a] state can meet preparations for attack only by preparations to resist."[60] A state can also bring the matter to the attention of the U.N. Security Council.[61]

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59. *See, e.g.*, Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947) (arguing that Article 51 prohibits preventative war); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1948) ("Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened."); Wehberg, *supra* note 2, 81-82 (1951) (describing the exception for individual or collective self-defence under Article 51 of the U.N. Charter as "substantially limited," and indicating that parties may not invoke the exception except in cases of "armed aggression," and not simply in cases of threat of aggression); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 61 (1952) (describing Article 51 as restricting the right of self-defence to instances when armed attacks against members of the United Nations occur until the time the Security Council intervenes); Ian Brownlie, *The Use of Force in Self-Defence*, 1961 BRIT. Y.B. INT'L L. 183, 244 (asserting that Article 51 does not permit anticipatory action and that arguments that claim otherwise are not convincing); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 560 (1963) (noting that other provisions of the U.N. Charter require states to submit disputes to the United Nations and to refrain from use of unilateral force); K. Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality.*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW 767 (Max Sorensen ed., St. Martin's Press 1968) (noting that the Charter introduces a new approach to self-defence in that it only offers protection against the illegal use of force and not against violations of the fundamental rights of states); DINSTEIN, *supra* note 23, at 166-69 (promoting the strict interpretation of Article 51); Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 213 (2001) (asserting that the wording of Article 51 requires an armed attack using weapons and that mere threats or declarations are insufficient); 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, 547 (2002) (claiming that arguments that the Charter permits anticipatory self-defence are unpersuasive).

60. ERICKSON, *supra* note 33, at 136.

61. *See* JESSUP, *supra* note 59, at 166 (arguing that under the U.N. Charter, military preparations by a neighboring state would warrant resorting to the U.N. Security Council, but would not justify resorting to anticipatory force).

However, a significant number of publicists have supported the view that the customary right of self-defence includes the use of force in anticipation of an attack in certain circumstances.[62] According to the expansive theory, this customary right of anticipatory self-defence survives under Article 51 of the U.N. Charter.[63] This article proposes that the restrictive school is incorrect,

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62. *See* ERICKSON, *supra* note 33, at 138 (listing the members of the expansive school of thought who interpret Article 51 as permitting anticipatory self-defence in response to imminent armed attack).

63. *See, e.g.*, Claud H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, *in* RECUEIL DES COURS II , 451, 496-97 (1952) (arguing that Article 51 does not limit the customary right of self-defence to situations of resistance to armed attacks); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 188-92 (Manchester University Press 1958) (asserting that Article 51 does not preclude actions taken against an imminent danger); MCDOUGAL & FELICIANO, *supra* note 1, at 232-41 (noting that the preparatory work on the U.N. Charter indicates that U.N. Members did not draft Article 51 for the purpose of narrowing the scope of customary law regarding self-defence); W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defence Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 362-63 (1962-1963) (proposing that construing Article 51 as allowing for anticipatory self-defence is both more consistent with public policy and with the preparatory work of the U.N. Charter); D.P. O'CONNELL, INTERNATIONAL LAW 317-318 (Stevens & Sons 2d ed. 1970) (observing that debates during and after the adoption of the U.N. Charter indicate that member nations did not read Article 51 to exclude anticipatory action); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972) (noting that anticipatory self-defence is necessary and practiced in today's world); Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV. 187, 201-02 (1984) (asserting that because the U.N. Charter is silent on the issue of defensive use of anticipatory force, a presumption that pre-emptive attacks are permitted exists); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-35 (1984) (suggesting that it is erroneous to read Article 51 as completely excluding anticipatory self-defence because it is unclear whether Article 51 intended to eliminate the customary right of self-defence); Lohr, *supra* note 17, at 18 (noting that the negotiating history of Article 51 supports the contention that the inherent right to self-defence includes reasonable and necessary anticipatory self-defence); Uri Shoham, *The Grenada Intervention: The Israeli Aerial Raid upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191, 198 (1985) (concluding that the right of preventative self-defence under customary law is necessary in the age of nuclear weapons); Report of the Committee on Use of Force in Relations Among States, *supra* note 38, at 203-04 (arguing that because it is not clear that the purpose of Article 51 was to eliminate the customary right of self-defence, it should not be given that effect); Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, *in* THE CURRENT LEGAL REGULATIONS OF

THE USE OF FORCE 509, 516 (A. Cassese ed., 1986) (arguing that strict interpretation of the right to anticipatory action is essential and considering the consequences if a state were to abuse such a right); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 135-36 (1986) (noting the necessity of pre-emptive force when an attack is immediate and massive); Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, *in* THE CURRENT LEGAL REGULATIONS OF THE USE OF FORCE 435, 442 (A. Cassese ed.,1986) (commenting that there are certain circumstances that allow a state to take pre-emptive military action in self-defence); Higgins, *supra* note 63, 299-302 (maintaining that a state may use anticipatory force if the state is threatened by border raids or harassing restrictions to trade by other nationals or governments); Louis Rene Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 32 (1994) [hereinafter *On International Law*] (arguing that a narrow interpretation of Article 51 ignores the fact that international law cannot force a state to withstand a devastating first strike before taking preventative action); Louis Rene Beres, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMP. INT'L & COMP. L.J. 437, 438 (1995) (declaring that the right of anticipatory self-defence is especially compelling in today's age of mass destruction weaponry); Louis Rene Beres, *A Rejoinder*, 9 TEMP. INT'L & COMP. L.J. 445-49 (1995) [hereinafter *A Rejoinder*] (discussing Israel's right to destroy an Iraqi nuclear reactor in anticipatory self-defence); Louis Rene Beres, *Israel, Lebanon, and Hizbullah: A Jurisprudential Assessment*, 14 ARIZ. J. INT'L & COMP. L. 141, 149-50 (1997) (noting Israel's right of pre-emptive self-defence against terrorist attacks is assured both by Article 51 and the customary right of anticipatory self-defence); Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 228 (1998) (commenting that to justify anticipatory self-defence an imminent, not remote nor constructive threat, must exist); James C. Duncan, *A Primer on the Employment of Non-Lethal Weapons*, 45 NAVAL L. REV. 1, 45-47 (1998) (stating the three necessary criteria which must be met in order for a state to engage in anticipatory self-defence as imminence, necessity, and proportionality); Louis Rene Beres, *Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment*, 17 DICK. J. INT'L L. 229, 283 (1999) (noting that the U.N. Security Council implicitly approved of Israel's pre-emptive attacks against Arab states in 1967); John-Alex Romano, Note, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L.J. 1023, 1036 (1999) (maintaining that the argument that Article 51 permits some form of anticipatory action is more reasonable than the contention that it does not, especially when pre-emptive action is essential for self-preservation); Joyner & Arend, *supra* note 18, at 34-35 (noting that debates within the U.N. Security Council provide no consensus as to whether Article 51 limits the right to self-defence to situations when an actual attack occurs); George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1123 (2000) (asserting that because the right of anticipatory self-defence existed before the Charter era and because mutual defence treaties have continued to provide for anticipatory self-defence, the right still exists in international law); McDougal, *supra* note 49, 599-601 (arguing that there is no

and that the right to engage in anticipatory self-defence comports with the more accurate interpretation of the customary right of self-defence and of Article 51.

A. THE RESTRICTIVE INTERPRETATION OF ARTICLE 51

First, the restrictive school has a textual argument. Proponents argue that "[t]here is not the slightest indication in Article 51 that the occurrence of an 'armed attack' represents only one set of circumstances (among others) in which self-defence may be exercised."[64] The restrictionists maintain that there is no point in stating the obvious (*i.e.*, that an "armed attack" gives rise to the right of self-defence), while omitting a reference to the ambiguous (*i.e.*, that Article 51 allows self-defence as an anticipatory measure).[65] Anticipatory self-defence, if legitimate under the U.N. Charter, "would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater."[66] Moreover, Article 51 not only fails to intimate that anticipatory self-defence is allowed, it even restricts the critical task assigned to the U.N. Security Council to the exclusive setting of counter-force employed in response to an armed attack.[67] If an anticipatory self-defence war was justified, "it ought to be exposed to no less – if possible, even closer – supervision by the Council."[68]

Article 51, however, reads that "nothing in the present U.N. Charter shall impair the inherent right of individual or collective self-defence."[69] As mentioned above, the drafting history and the wording of Article 51 reflect the intention of the architects of the U.N. Charter

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evidence to support the contention that the framers of the U.N. Charter intended to impose new limits upon the traditional right of self-defence).

64. DINSTEIN, *supra* note 23.

65. *See id.* (questioning the reasoning behind stating that armed attack evinces the right of self-defence while neglecting to reference the ambiguous conditions of preventive war).

66. *Id.*

67. *See id.* (stating that Article 51 does not address whether preventive war is allowable and restricts the U.N. Security Council's role).

68. *Id.*

69. U.N. CHARTER, art. 51.

to refer in Article 51 to a pre-existing, inherent right of self-defence.[70] No argument can therefore be drawn from the wording "if an armed attack occurs" in Article 51.[71] Moreover, relying upon that phrase alone does not lead to the conclusion that armed attack is a necessary prerequisite to self-defence:

> [a] proposition that "if A, then B," is *not* equivalent to, and does *not* necessarily imply, the proposition that "if, and only if A, then B." To read one proposition for the other, or to imply the latter form the former, may be the result of a policy choice, conscious or otherwise . . . such identification or implication is assuredly not a compulsion of logic.[72]

Further, "where there is convincing evidence not merely of threats of force and potential danger but of an attack actually being mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier."[73] Reading "if an armed attack occurs" as "after an armed attack has occurred" goes beyond the necessary meaning of the words.[74] Finally, Article 2(4) of the Charter requires Members to refrain not only from the use of force, but also from the threat of force.[75] If states had to wait for an armed attack to occur, then maintenance of international peace and security could not

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70. *See supra* note 59 and accompanying text (arguing that the drafting history of Article 51 does not indicate that its purpose was to limit the customary right of anticipatory self-defence).

71. *See* MCDOUGAL & FELICIANO, *supra* note 1, at 234 (arguing that the words of Article 51 do not have any clear, unambiguous, or predetermined meaning); *see also* KELSEN, *supra* note 13 (observing that the U.N. Charter does not define "armed attack"). The interpretation of the phrase is left to the states involved in the conflict. *Id.*

72. MCDOUGAL & FELICIANO, *supra* note 1, at 237 n.261 (emphasis in original).

73. Waldock, *supra* note 32, at 498 (noting that an imminent threat exists when a country mounts an attack, thus implying a right to self-defence).

74. Waldock, *supra* note 32, at 497-98 (noting one authority, Sir Erick Beckett, who has interpreted the phrase to mean after an armed attack occurs).

75. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J, 222, 246-47 (declaring that if a country possessed nuclear weapons and threatened the integrity of a state or the purposes of the United Nations with such weapons, the country would violate the U.N. Charter).

take place.[76] If states waited for such an attack, they would then become responsible for the restoration, instead of maintenance, of international peace and security. [77]

B. POLICY CONSIDERATIONS OF THE RESTRICTIVE SCHOOL

The restrictionists have put forward additional policy reasons against anticipatory self-defence.[78] They argue that "determining with certainty that an armed attack is imminent is extremely difficult," because any error in judgment could lead to an unwarranted and unnecessary conflict.[79] In many cases, government leaders will make aggressive statements without harbouring any actual intent to attack.[80] This form of posturing could have dangerous results:

> The Soviet Union and the United States each drew up contingency plans to attack the other, and each made negative statements about the other. In these circumstances, intentions may be misunderstood. Soviet premier Nikita Khrushchev at one point made the statement, "We shall bury you." This statement was intended by Khrushchev as a prediction that socialism would outlast capitalism, but it was widely misconstrued (either innocently or intentionally) as an expression of intent to destroy the United States by force of arms.[81]

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76. *See, e.g.*, ERICKSON, *supra* note 33, at 139 (noting that Article 51 contemplates the maintenance of international peace and security by allowing for anticipatory self-defence); Polebaum, *supra* note 63, at 228 (arguing that pre-emptive attacks are necessary because of the potential for total destruction in the age of nuclear weapons); Waldock, *supra* note 32, at 498 (arguing that compelling a state to allow its aggressor to strike the first blow is especially lethal in the era of atomic warfare).

77. *See* ERICKSON, *supra* note 33, at 139 (observing that states would be unable to maintain international peace and security if they were forced to wait for an armed attack to occur).

78. *See id.* at 138 (providing several policy reasons why the rules of international law should not permit anticipatory self-defence).

79. *Id.*

80. *See* John Quigley, *A Weak Defense of Anticipatory Self-Defence*, 10 TEMP. INT'L & COMP. L.J. 255, 257 (1996) (discussing international posturing).

81. *Id.* at 257.

However, it does not follow logically from the possibility of mistake that there should be a limit to the right of self-defence. States who engage in an anticipatory action will do so at high cost, and will, out of self-interest, consider other options to avoid recourse to force.[82]

C. PRETEXT CONCERNS

The restrictive school also anticipates that a government could deliberately portray its adversary as being positioned to attack to gain carte blanche for aggression under the flag of anticipatory self-defence.[83] A "jurisprudentially creative nation can use the right of self-defence to justify virtually any aggressive action."[84]

In response, acts of self-defence should always be subject to international investigation and control.[85] Moreover, the possibility of abuse is not a sufficient reason to discount the existence of the right.[86]

D. DANGER OF AMBIGUITY

Further, an expansionist notion of self-defence, including anticipatory action, is alleged to be a danger to international order. "In a world that is hard pressed to stop aggressive war," customary

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82. *See generally* Romana Sadurska, *Threats of Force*, 82 AM. J. INT'L L., 239, 239-68 (1988) (relaying the three different functions of threats in the international community). A threat may operate as a notice of the likelihood of a sanction, it may be an attempt to hasten the resolution of a dispute by non-forcible measures, or it may act as a substitute for violence. *Id.*

83. *See id.* (explaining the strategic considerations involved in feigning self-defence).

84. Clemmons & Brown, *supra* note 23, at 223.

85. *See* Waldock, *supra* note 32, at 496 (commenting that for the right of self-defence to function as more than just an excuse for aggression, the right must be subject to international scrutiny).

86. *See* MCCORMACK, *supra* note 16, at 120 (asserting that the primary argument against anticipatory self-defence, abuse of the right, is insufficient to discount the right).

law provides no clear guidelines for application.[87] "Concepts such as 'force,' 'threat of force,' or 'political independence' embrace a wide range of possible meanings."[88] This customary law of anticipatory self-defence might just be "too fraught with danger for the basic policy of peace and stability."[89]

There are, however, no clear and precise guidelines for "self-defence in general" either.[90] It is clear that once one argues for the existence of the right of anticipatory self-defence, one needs "a clear statement of the legal limits so that any purported exercise of the right is capable of legal evaluation and not just a matter for the 'self-judgment' of the 'defending' state."[91] Part IV of this article will provide further explanation of these limits. Moreover, the absence of a clear definition of a right cannot be used as an argument denying the existence of a right.

E. BALLISTIC MISSILE CONCERNS

Finally, those who state that there can be no right of anticipatory self-defence argue that "the existence of nuclear missiles has made it even more important to maintain a legal barrier against pre-emptive strikes and anticipatory defence."[92] Others, even some members of the restrictive school, see the advent of modern weapons of mass destruction as an exception. The fear that nuclear missiles could, on the first strike, destroy the capability for defence and allow virtually

87. Quigley, *supra* note 80, at 257; *see also* ERICKSON, *supra* note 33, at 138 (explaining that customary law provides no clear guidance on the application of this principle).

88. Report of the Committee on Use of Force in Relations Among States, *supra* note 38, at 201.

89. Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States United Nations Practice*, 1961, BRIT. Y.B. INT'L L. 269, 302.

90. *See* MCCORMACK, *supra* note 16, at 111-12 (noting how the U.N. Charter's provisions regarding self-defence have several different interpretations).

91. *Id.*

92. Report of the Committee on Use of Force in Relations Among States, *supra* note 38, at 203; *see also* Wehberg, *supra* note 2, at 82 (stating that, in light of recent developments in atomic armament, it is impossible to maintain the view that parties can evade Article 51's prohibition against the use of force by invoking classic international law's admission of a legitimate right to self-defence against a simple threat of aggression).

no time for defence has appeared to many to render a requirement of armed attack unreasonable.[93] A scholar suggested that "it would be reasonable to put an interception system into operation against a rocket approaching through airspace over the high seas, the airspace of third states, or through Outer Space."[94] If the state that launched the rocket has frontiers contiguous with the state threatened, the preventive measures may be taken over the territory of the putative aggressor.[95]

The restrictive school would argue that "[s]uch relaxation should only be allowed in the case of rockets in flight: if it is extended to fast aircraft and other instruments the possibilities of abuse of the law increase."[96] The more generally accepted point of view is that to wait for the first strike would be insanity when military preparation is inadequate as a deterrence or as a shock absorber.[97] A narrow reading of the right of self-defence would only protect the aggressor's right to the first strike.[98] One of the purposes of international law is to prevent acts of aggression, not foster them.[99]

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93. *See On International Law*, *supra* note 63, at 32 (arguing that international law cannot force a state to wait to absorb devastating strikes before taking protective measures).

94. *See* Brownlie, *supra* note 59, at 259 (explaining that in certain cases the means of countering the aggression will be inadequate to ensure protection if action is only taken once an object of aggression enters the territory of the threatened state).

95. *See id.* (noting that such action is justified even if the rocket was launched without authority or by mistake).

96. *Id.*

97. *See On International Law*, *supra* note 63, at 32 (suggesting that waiting for a nuclear attack is the equivalent of accepting annihilation); *A Rejoinder*, supra note 63, at 445-46 (noting that the argument for anticipatory self-defence has strengthened in the nuclear age); DINSTEIN, *supra* note 23, at 184 (suggesting that in Article 51 the occurrence of an armed attack represents only one set of circumstances in which a state may exercise self-defence); Mark E. Newcomb, *Non-Proliferation, Self-Defence, and the Korean Crisis*, 27 VAND. J. TRANSNAT'L. L. 603, 620 (1994) (explaining that advances in weapons technology have altered the imminence requirement of self-defence).

98. *See* ERICKSON, *supra* note 33, at 142-43 (1989) (explaining that a narrow reading of the U.N. Charter does not permit anticipatory self-defence).

99. *See id.* at 143 (stating the purpose of the U.N. Charter).

Anticipatory self-defence should therefore be considered as a part of the more general right of self-defence under customary international law, recognized in Article 51 of the U.N. Charter.[100] Moreover, in recent years, although some authoritative bodies of the United Nations have had the opportunity to dismiss anticipatory self-defence in favor of a more restrictive interpretation, they have not done so.[101]

III. GUIDANCE BY UNITED NATIONS AUTHORITIES ABOUT THE RIGHT OF ANTICIPATORY SELF-DEFENCE

Organs of the United Nations considered, on three occasions, whether force was permitted in anticipation of an attack.[102]

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100. *See id.* at 138-39 (explaining how anticipatory self-defence is consistent with article 51 of the U.N. Charter).

101. *See* MCCORMACK, *supra* note 16, at 140 (referring to Roberto Ago's submission to the International Law Commission on state responsibility and the ICJ judgment on the *Nicaragua* case).

102. There is also discussion in the literature about the *Corfu Channel* case. Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4, 77 (April 9); Waldock, *supra* note 32, at 451. Professor Claud H.M. Waldock stated that in so far as the ICJ considered that strong force – amounting to a demonstration of force by sending two cruisers and two destroyers of the Royal Navy with their crews at action stations on October 22, 1946 through the Corfu Channel – is legitimate to ensure the safe exercise of the right of passage which has been illegally denied, "the Court did not take a narrow view of the inherent right [of self-defence] reserved by Article 51." *Id.* According to Waldock, the Court apparently allowed a demonstration of force not merely for insuring safe exercise of the right of passage but to test the attitude of Albania and to coerce it into future good-behavior. *Id.* However, there is no firm support for Waldock's view in the Judgment. *See* Brownlie, *supra* note 59, at 244 (arguing that Article 51 does not permit anticipatory action). The Court was considering the general question of delictual responsibility and had regard to all the circumstances of the case. Corfu Channel, 1949 I.C.J. at 77. It was concerned with the dominant character of the passage. *Id.* And in fact there was no preventive self-defence but merely the taking of precautions to defend the British ships in case of attack. *Id.* Moreover, only in two of the Dissenting Opinions, and there merely in relation to the "operation Retail" – the British minesweeping operation in Albanian waters on November 12 and 13, 1946, reference is made to some of the relevant Articles of the Charter. *See* Corfu Channel, 1949 I.C.J. at 77 (Krylov, J., dissenting) (discussing Articles 2 and 42 of the U.N. Charter); *see also id.* at 252 (Ecer, J., dissenting) (declaring agreement with Judge Krylov's dissent); George Schwarzenberger, *Report on Some Aspects of the Principle of Self-Defence in the Charter of the United Nations and the Topics Covered by the Dubrovnik Resolution, in Report of the Forty-Eighth*

A. PRE-EMPTIVE FORCE IN ANTICIPATION OF A NUCLEAR STRIKE

The Atomic Energy Commission ("AEC") suggested in its First Report in December 1946 that preparation for atomic warfare in breach of a multilateral treaty or convention would, in view of the appalling power of the weapon, have to be treated as an "armed attack" within Article 51 of the U.N. Charter.[103] More specifically, the AEC made the following recommendations to the Security Council about the control of nuclear energy and nuclear weapons: "[T]he development and use of atomic energy are not essentially matters of domestic concern of the individual nations, but rather have predominantly international implications and repercussions."[104] An "effective system for the control of atomic energy must be international, and must be established by an enforceable multilateral treaty or convention which in turn must be administered and operated by an international organ or agency within the United Nations."[105] When a state violates the terms of this multilateral treaty or convention, the AEC stated that "it should . . . be borne in mind that a violation might be so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter of the United Nations."[106] This statement implies that the AEC recognized a right of anticipatory self-defence.

The representative of the United States made the importance of self-defence clear in a memorandum, submitted in response to a request of the Chairman of the AEC. The memorandum read that it is impossible to treat atomic energy and atomic weapons without reference to Article 51 of the U.N. Charter. According to the

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Conference Held at New York, 1958 INT'L. L. ASS'N. 550, 572 & 585 (explaining that the Dissenting Opinions criticized the majority Judgment for failing to mention provisions of the U.N. Charter); BOWETT, *supra* note 34, at 189-90 (noting that the ICJ did not make any statements regarding the right to self-defence as related to articles of the U.N. Charter).

103. *See* Waldock, *supra* note 32, at 498 (recounting the Atomic Energy Commission's suggestions to the U.N. Security Council).

104. THE INTERNATIONAL CONTROL OF ATOMIC ENERGY: THE FIRST REPORT OF THE UNITED NATIONS ATOMIC ENERGY COMMISSION TO THE SECURITY COUNCIL 19 (U.S. & U.N. Report Series No. 8, 1946).

105. *Id.*

106. *Id.* at 22.

representative of the United States, it was clear that an armed attack under Article 51:

> is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define 'armed attack' in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.[107]

B. UNDECLARED CONSENSUS?

In 1980, Roberto Ago, the Special Rapporteur to the International Law Commission ("ILC"), presented the final section of his report on State Responsibility.[108] This final section dealt with the issues of "state of necessity" and "self-defence."[109] In the course of his discussion on self-defence, Ago rejected the notion of the "right" of self-defence.[110] "Self-defence" is an expression that connotes a situation or *de facto* condition, not a subjective "right."[111] Considering the different interpretations of Article 51 and in reference to the argument for anticipatory self-defence, Ago argued that the majority of the publicists who have written about self-defence by no means share the opinion that anticipatory self-defence is legitimate.[112] Ago clearly favoured the view that the theses of the advocates of the school of anticipatory self-defence have been "rejected one by one."[113]

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107. *The First Report of the Atomic Energy Commission to the Security Council*, U.N. SCOR, 2d Sess., Special Supp., Annex 4, at 109-10, U.N. Doc. 5/Supplements (1946).

108. Ago, *supra* note 11.

109. *See id.* at 13 (stating the contents of the report).

110. *See id.* at 53, para. 87 (explaining that the right to self-defence is conceded to a state under certain conditions rather than as a fundamental right of a state).

111. *See id.* (explaining that a state is in a position to use self-defence only when exonerated from the duty to refrain from the use of force because of an aggressor).

112. *See id.* at 66-67, para. 114 (questioning the legitimacy of anticipatory self-defence).

113. *See id.* at 65-66, para. 113 (stating that his opinions diverge from the views of writers who support the legitimacy of anticipatory self-defence).

However, Ago goes on to state that it is not for the ILC "to settle some highly controversial problems arising, in doctrine and in United Nations practice, in connection with the interpretation and the wording of Article 51 of the Charter."[114] Instead, his recommended provision on self-defence renders the interpretation of Article 51 uncertain.[115] "If the case against anticipatory self-defence really is a closed one, why not say that and have the International Law Commission approve the restrictive interpretation as a formal decision?"[116]

C. NICARAGUA V. UNITED STATES

In the 1986 *Nicaragua* case, the ICJ held that "[i]n the case of individual self-defence, the exercise of this right is subject to the [s]tate concerned having been the victim of an armed attack."[117] This is an apparently unambiguous statement on the scope of the right of self-defence in customary international law.[118] However, from the context of the paragraph in which this statement appears, and from the paragraphs immediately preceding this statement, one can argue that the ICJ was not making a judgment here about whether an armed

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114. *See* Ago, *supra* note 11, at 5-7 (explaining that the function of the International Law Commission is to codify international law, not settle doctrinal issues).

115. *See Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, U.N. GAOR, Int'l L. Comm'n, 53rd Sess., art. 21, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) (providing a provision on self-defence which states that "the wrongfulness of an act of a [s]tate is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."); MCCORMACK, *supra* note 16, at 141 (explaining Ago's imprecise provision).

116. MCCORMACK, *supra* note 16, at 141 (suggesting that it is difficult to explain the failure of authoritative bodies to dismiss broad interpretations of Article 51 in light of broad dismissal of arguments in favor of anticipatory self-defence).

117. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27); *see also* Romano, *supra* note 63, at 1036-38 (explaining that the ICJ held that an armed attack does not include weapons or logistical support to rebels).

118. *See* MCCORMACK, *supra* note 16, at 141 (explaining that the ICJ also discussed the sorts of acts considered to be armed attacks).

attack is always a prerequisite for using force in self-defence.[119] The Court's holding avoids the issue:

> In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised. Accordingly the Court expresses no view on that issue.[120]

The references in this case to individual or collective self-defence requiring an armed attack for justification are therefore taken out of the context of the judgment.[121]

Judge Schwebel, in a strong and detailed dissenting opinion, recalled that the ICJ had not expressed a view on the issue of anticipatory self-defence.[122] He stated that the Judgment, nevertheless, might "be open to the interpretation of inferring that a [s]tate may react in self-defence . . . only if an armed attack occurs."[123] Judge Schwebel therefore chose not to leave the question open and took the opportunity to make comments:

> I wish . . . to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: "Nothing in the present Charter shall impair the inherent right of individual of collective self-defence if, and only if, an armed attack occurs . . . ." I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of Article 51.[124]

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119. *See* Military and Paramilitary Activities, 1986 I.C.J at 103 (indicating that the ICJ is not expressing a view of the issue of the lawfulness of a response to an imminent threat of armed attack).

120. *Id.* at 103.

121. *See* MCCORMACK, *supra* note 16, at 141-43 (suggesting that arguments that the ICJ would have found in favour of a right to anticipatory self-defence are speculative).

122. *See* Military and Paramilitary Activities, 1986 I.C.J. at 347 (Judge Schwebel dissenting) (stating that the ICJ "observes that the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised in this case, and that the Court accordingly expresses no view on that issue").

123. *Id.*

124. *Id.*

It is, however, important that the right of self-defence should not freely allow the use of force in anticipation of an attack or in response to a threat of force.[125] At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear and the danger is so great that defensive action is essential for self-preservation of a state.[126] The next Part will, therefore, discuss the essential conditions for the admissibility of the plea of anticipatory self-defence in a given case.

IV. CONDITIONS FOR THE EXERCISE OF THE RIGHT OF ANTICIPATORY SELF-DEFENCE

What is the customary international law of anticipatory self-defence? The answer begins with the *Caroline* case. During the 1837 Canadian insurrection, rebels made preparations in U.S. territory for subversive action against the British Authorities.[127] In particular, rebels looted a U.S. arsenal in Buffalo to obtain arms.[128] The United States acted properly in taking measures against the organisation of armed forces upon its soil so that no breach of duty could be alleged against its authorities.[129] However, the steamer Caroline was reinforcing and provisioning the rebels in Upper Canada from ports in the United States.[130] While the vessel was anchored on the United States' side of the boarder of the Niagara River, an armed band under the command of a British officer crossed the river, set fire to the vessel, and cut it loose to float over the Niagara Falls.[131] The United States was understandably upset that the British raided and destroyed

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125. *See* Report of the Committee on Use of Force in Relations Among States, *supra* note 38, at 203-04 (suggesting that Article 51 should not be given the effect of eliminating the customary law right of self-defence).

126. *Id.*

127. *See* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217 (1906) (explaining the events surrounding the *Caroline* case); 1 D.P. O'CONNELL, INTERNATIONAL LAW 316 (2d ed. 1970) (noting that courts often invoke the *Caroline* case when handling issues of self-defence).

128. *See* MOORE, *supra* note 127, §17; O'CONNELL, *supra* note 127, at 316.

129. *See* MOORE, *supra* note 127, §17; O'CONNELL, *supra* note 127, at 316.

130. *See* MOORE, *supra* note 127, §17; O'CONNELL, *supra* note 127, at 316.

131. *See* ERICKSON, *supra* note 33, at 141 (discussing customary law on self-defence).

an American ship in U.S. territory. In response to American protests, Great Britain offered self-defence as a justification for the destruction of the vessel.[132]

In the diplomatic exchange that followed, Secretary of State Daniel Webster stated in a letter of April 24, 1841 to the British Government that:

> [u]nder these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show what state of facts, and what rules of national law, the destruction of the Caroline is to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.[133]

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132. *Id.*

133. Letter of Mr. Webster to Mr. Fox (April 24, 1841), *in* 29 BRITISH AND FOREIGN STATE PAPERS, 1840-41 at 1137-38 (1857). The British Government accepted the definition of Mr. Webster in a letter sent by Lord Ashburton to Mr. Webster on July 28, 1842, but disagreed on the facts:

> Agreeing, therefore, on the general principle and on the possible exceptions to which it is liable, the only question between us is, whether this occurrence came within the limits fairly to be assigned to such exceptions: whether, to use your words, there was 'that necessity of self-defence, instant, overwhelming, leaving no choice of means' which preceded the destruction of the Caroline, while moored to the shore of The United States?

Letter of Mr. Webster to Lord Ashburton (Aug. 8, 1842), *in* 30 BRITISH AND FOREIGN STATE PAPERS, 1841-1842, at 196 (1858) (arguing that the act of destruction of the Caroline was wrong).

> I would appeal to you, Sir, to say whether the facts which you say would alone justify the act, viz., 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation,' were not applicable to this case in as high a degree as they ever were to any case of a similar description in the history of nations.

Id. at 198. Mr. Webster repeated his definition in his letter of August 6, 1842 to Lord Ashburton:

> Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which 'the necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation.'

Id. at 241 (responding to Lord Ashburton's letter regarding the Caroline).

This definition created a limited right of preventive action because it did not require an actual armed attack.[134]

The classical definition of the *Caroline* case is still relevant for anticipatory self-defence today.[135] Moreover, the preconditions set in the *Caroline* case have been extended to the right of self-defence in general, which is quite logical, as the right of anticipatory self-defence is only a form of the more general customary right of self-defence, and the conditions for the application of both rights have to be more or less the same. Roberto Ago came to a similar conclusion as Secretary of State Daniel Webster when he wrote that the essential preconditions of "self-defence in general" are "necessity," "proportionality" and "immediacy."[136] These principles are moreover followed by the ICJ, when it held that "[t]here is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."[137]

The preconditions for anticipatory self-defence are, therefore, "necessity," "proportionality," and "immediacy."[138] However, it seems reasonable to add two more conditions: first, an action of anticipatory self-defence will only be justified if the U.N. Security Council has not yet been able to take affirmative action, and second,

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134. *See* Clemmons & Brown, *supra* note 23, 220-21 (explaining that Secretary of State Webster's expression of self-defence became the standard of the right of self-defence); *see also* ERICKSON, *supra* note 33, at 141 (describing the test for self-defence as set forth by Secretary of State Webster); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82-99 (1938) (recounting the development of self-defence legal doctrine); Lohr, *supra* note 17, at 17 (explaining the element of necessity in self-defence doctrine); Wright, *supra* note 12, at 44-45 (recounting the diplomatic correspondence between Lord Ashburton and Secretary of State Webster).

135. *See* Michael Lacey, *Self-Defence or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293, 294 (2000) (describing how the *Caroline* standard still applies to issues of self defence in recent U.S. military action against Libya, Afghanistan, and Sudan) .

136. *See* Ago, *supra* note 11, at 68-69, para. 119 (describing requirements frequently viewed as essential conditions for admissibility of self-defence pleas).

137. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

138. *See* Ago, *supra* note 11, at 68-69, para. 119 (describing requirements frequently viewed as essential conditions for admissibility of self-defence pleas).

the state against which the right of anticipatory self-defence is being exercised has to be in breach of international law.

A. CAPACITY OF THE SECURITY COUNCIL

The last part of the first sentence of Article 51 reads that states can only exercise their inherent right of self-defence (including anticipatory self-defence) "until the Security Council has taken the measures necessary to maintain international peace and security."[139]

It goes without saying that this recognition of liberty for the state acting in self-defence (or in anticipatory self-defence) would likewise disappear, under the system contemplated by the U.N. Charter, as soon as the U.N. Security Council took it upon itself to employ the enforcement measures necessary for ensuring the full respect of a situation jeopardized by this aggression.[140]

This is a clear limitation, imposed by the U.N. Charter, upon the inherent customary right of anticipatory self-defence in international law.[141]

However, if the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it 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.[142]

B. FLOUTING INTERNATIONAL LAW

Second, a state finds itself in a position of anticipatory self-defence when it is confronted by an unlawful armed attack or an unlawful threat of force by another state. [143]

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139. U.N. CHARTER art. 51 (allowing Members to use military action to defend their territory).

140. Ago, *supra* note 11, at 53, para. 87.

141. Waldock, *supra* note 32, at 497-98.

142. *Id.*; *see also* Kelsen, *supra* note 13, at 793 (explaining that the U.N. Security Council may restrict Members' ability to defend themselves).

143. *See* discussion *infra* Part II.D (noting that a defending state can take military action against an attacking state under international law).

This state of affairs exonerates a state from the duty to respect, vis-à-vis the aggressor, the general obligation to refrain from the use of force.[144] "It was the first [s]tate which created the danger and created it by conduct which is not only wrongful in international law, but which constitutes the most serious and unmistakable international offence of recourse to armed force in breach of the general existing prohibition of such recourse," under customary international law and under Article 2(4) of the U.N. Charter.[145]

C. NECESSITY

The third condition for the application of the right of anticipatory self-defence is the necessity-test. The state threatened with imminent attack must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.[146] There must be clear and present danger of an imminent attack, and not mere general preparations by the enemy.[147] If a state "had been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force."[148]

The decision to use force in anticipatory self-defence is generally a conditioned reflex to stress.[149] Probably the situation that fits this

144. *See* Ago, *supra* note 11, at 53, para. 87 (explaining the general obligation to refrain from use of force).

145. Ago, *supra* note 11, at 53-54, para. 88.

146. *See* DINSTEIN, *supra* note 23, at 208 (arguing that the attacked state must verify that peaceful settlement is not possible before initiating military action).

147. *See* ERICKSON, *supra* note 33, at 140 (noting that the requirement of "clear and present danger of an imminent attack" precludes legal attacks on the basis of an enemy's military preparations).

148. Ago, *supra* note 11, at 69, para. 120; *see* DINSTEIN, *supra* note 23, at 208 (stating that the defending state should be certain that negotiating a reasonable settlement is not possible before resorting to war).

149. *See* Newcomb, *supra* note 97, at 621 (analyzing the Israeli attack against Egypt and Syria in the Six Days War and concluding that this reaction is a conditioned reflex to stress).

necessity-test best is the 1967 attack by Israel against the Arab States in the region.[150]

After the Soviet Union falsely reported to the United Arab Republic ("UAR") that Israel was planning a major attack on the UAR, President Gamal Abdel Nasser took several very provocative actions: the UAR moved a force large enough to conduct offensive operations into the Sinai; Nasser publicly made statements that he intended to eliminate Israel; the UAR dismissed the U.N. emergency force from the Sinai; and the UAR closed the Straits of Tiran to Israel.[151]

Palestinian forces simultaneously infiltrated along the border between Israel and Syria.[152] In June of 1967, Israel mounted a massive air campaign against UAR airfields and eventually captured the Sinai, the West Bank, and the Golan Heights in ground maneuvers against the UAR, Jordan, and Syria.[153] Israel argued that the attack was justified because the UAR's decision to close the Straits of Tiran was an act of war by the UAR, and the massing of the UAR troops on the borders of Israel posed a serious and imminent threat to Israel's security.[154] Israel struck pre-emptively against the Arab coalition of the UAR, Jordan, Syria, and Iraq to

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150. *Id.* (noting that the Six Days War serves as a classic depiction of this reflex to stress).

151. Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 136-137 (1999); *see also* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 101-02 (2002) (describing the UAR's conduct preceding the outbreak of hostilities); George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 557 (1996) (emphasizing that President Nassar repeatedly made "bellicose threats" against Israel); Eugene V. Rostow, *The Drafting of Security Council Resolution 242: The Role of the Non-Regional Actors*, 25 N.Y.U. J. INT'L L. & POL. 489, 491-94, 496-98 (1993) (highlighting various factors which contributed to the Six Day War and emphasizing the important role of Soviet disinformation in inflaming hostilities).

152. *See* FRANCK, *supra* note 151, at 102 (suggesting that the increase of Palestinian forces along the Israeli border contributed to heightened tensions).

153. *See* Condron, *supra* note 151, at 136 (describing the conflict); FRANCK, *supra* note 156, 102-103 (describing Israeli gains during the war).

154. *See* FRANCK, *supra* note 151, and 102-03 (describing the reasons for Israel's perception of an Arab threat and Israeli gains during the war).

prevent an attack.[155] The discussion that followed in the U.N. Security Council was predominantly a result of Cold War feuding between the East and the West.[156] The delegates spent very little time actually addressing the right of anticipatory self-defence.[157] They linked the return of the land to satisfaction of Israel's reasonable security concerns.[158]

A special factor to consider in terms of the necessity test is the nature of the weapon.[159] For instance, the United States imposed a "quarantine" on Cuba in 1962, subsequent to the installation of Soviet missiles on the island, because this installation of missiles could only be considered as a direct nuclear threat to the United States.[160] Even in the absence of an armed attack, the threat of nuclear warfare was a sufficient ground for the anticipatory self-defence measure of the quarantine.[161]

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155. Condron, *supra* note 151, at 137; *see also* FRANCK, *supra* note 151, at 103 (noting Professor Weisburd's conclusion that the war began with Israel's "preemptive air strike").

156. A series of U.N. Security Council resolutions strongly condemned Israel's actions. *E.g.*, S.C. Res. 233, U.N. SCOR, 2288th Meet., U.N. Doc. S/P.V. 1352 (1967); S.C. Res. 234, U.N. SCOR, 1350th Meet., U.N. Doc. S/P.V. 1352 (1967); S.C. Res. 235, U.N. SCOR, 1352nd Meet., S/P.V. 1352 (1967); S.C. Res. 236, U.N. SCOR, 1357th Meet., U.N. Doc. S/P.V. 1352 (1967); S.C. Res. 237, U.N. SCOR, 1361st Meet., U.N. Doc. S/RES/237 (1967); S.C. Res. 240, U.N. SCOR, 1371st Meet., U.N. Doc. S/RES/240 (1967); S.C. Res. 242, U.N. SCOR, 1382nd Meet., U.N. Doc. S/RES/242 (1967).

157. *See* Condron, *supra* note 151, at 136-37 (noting that the Cold War politics dominated the debate).

158. *See* FRANCK, *supra* note 151, at 101-05 (citing Professor Weisburd's summary that the international community determined that Israel could not retain any of the conquered territories, but Israel could link the return of the lands to the furtherance of Israel's security goals).

159. *See infra* notes 160-161 and accompanying text (describing the Cuban Missile Crisis as a situation where the type of weapon at issue was crucial for calculating a military response).

160. *See* Mallison, *supra* note 63, at 340-43 (emphasizing that the Soviet missiles were "offensive" weapons with nuclear capabilities).

161. *See id.* at 344-64 (analyzing national self-defence theories and their validity in international law); *see also* FRANCK, *supra* note 151, at 99-101; McDougal, *supra* note 49, at 602 (noting that the U.S. action was solely defensive). *Contra* Sadurska, *supra* note 82, at 254-58 (explaining that the U.S. quarantine probably did not meet the international standards of a defensive action).

One can apply the same principle to the Israeli raid on the Osirak Iraqi nuclear reactor under construction at Tuwaitha in 1981. The nuclear devices produced by Iraq would ultimately be delivered against Israeli targets.[162] The launch of thirty-nine Scud missiles against the Israeli civilian population during the Persian Gulf War in 1991 leaves no doubt about the danger that Israel faced and the real danger Israel would have faced had Prime Minister Begin not previously asserted Israel's right of anticipatory self-defence and destroyed Saddam's nuclear weapons program.[163] (Another justification of the Israeli act would have rested on the state of war that was, and still is, in progress between the two countries.)[164]

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162. *See* Uri Shoham, *The Grenada Intervention: The Israeli Aerial Raid upon the Iraqi Nuclear Reactor and the Right of Self-Defence*, 109 MIL. L. REV. 191, 191 (1985) (noting that the Prime Minster of Israel, Menachem Begin, decided that destruction of the Iraqi reactor was essential for Israeli security because he implied that Iraq could have deployed these weapons against Israel).

163. *See A Rejoinder*, *supra* note 63, at 447-48 (noting that the danger to Israel was very real because the U.N. inspectors determined that Iraq had a covert nuclear weapons facility and suggesting that the fact that Iraq attacked Israeli civilian targets in the Gulf War proves that Israel properly protected its people from a possible nuclear attack); *see also* Shoham, *supra* note 63, at 191 (reporting that the Prime Minster of Israel, Menachem Begin, had argued that the attack on the reactor was necessary because Iraq planned to use it to manufacture bombs for use against Israel).

> Imagine if Iraq had been armed with nuclear weapons during the Gulf War. At least some of its forty or more Scud missiles that bombarded Israel and Saudi Arabia would then have had thermonuclear warheads that would have killed millions of innocent people - vastly more than the deaths resulting from the atomic bombing of Hiroshima and Nagasaki in 1945.... But the foregoing scenario would not have occurred. Instead, the threat to Israel and its neighbours would have been so great that Operation Desert Storm against Iraq probably would not have been mounted by the United States and other countries. Instead, Saddam Hussein would probably have gotten away with his aggression against Kuwait. And if that had happened, Saddam's dementia combined with vast oil wealth and a nuclear capability could have altered for the worse the course of human history. Israel's pre-emptive strike against the Iraqi nuclear installation in Osiraq ironically benefited Kuwait and Saudi Arabia even more that itself.

Anthony D'Amato, *Israel's Air Strike against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259, 259 (1996).

164. *See* MCCORMACK, *supra* note 16, at 291. A number of commentators favor the self-defence argument. *See, e.g.*, Polebaum, *supra* note 63, 217-28 (analyzing the Israeli action and finding that Israel had satisfied all legal requirements with

Although many governments and the Security Council rejected the Israeli position that Saddam Hussien was deceiving U.N. inspectors and was building up an arsenal of weapons of mass destruction in 1981, it proved to be a visionary one.[165] Ten years later, the majority of the civilized world was at war with Iraq.[166]

D. PROPORTIONALITY

Another condition for an action taken in anticipatory self-defence is the requirement of proportionality. War is generally waged to bring about the destruction of the enemy's army regardless of the condition of proportionality, but the doctrines of self-defence and anticipatory self-defence, require a symmetry or an approximation between the action and its purpose, namely that of preventing the attack from occurring.[167]

It would be mistaken, therefore, to think that there must be necessarily proportionality between the conduct constituting the armed force and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the defensive action, and not the forms, substance and strength of the action itself.[168]

The 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* did not reject the possibility of resort to nuclear

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the exception of proving that there were no other reasonable alternatives). Other commentators are opposed to the self-defence argument. *See, e.g.*, Uri Shoham, *supra* note 63, at 217-24 (finding that the Israeli action was legal under international standards of self-defence); Newcomb, *supra* note 97, at 626-27 (arguing that the Israeli action was illegal).

165. *See* G.A. Res. 36/27, U.N. SCOR, 56th Meet., U.N. Doc. A/RES/36/27 (1981) (condemning the Israeli actions); *see also* Condron, *supra* note 151, at 115-25 (describing the international struggle to inspect Iraqi facilities in order to assuage the international community's concerns that Iraq was producing banned weapons of mass destruction).

166. *See* Condron, *supra* note 151, at 116-19 (noting that the effort to expel Iraqi forces from Kuwait was an international effort under U.N. authority).

167. *See* DINSTEIN, *supra* note 23, at 208 (noting the importance of balancing the unlawful force and the lawful counter-force according to measures of the totality of the situation).

168. Ago, *supra* note 11, at 69-70, para. 121.

weapons "in an extreme circumstance of self-defence, in which the very survival of a [s]tate would be at stake."[169] In other words, when the very existence of the state is menaced, the state can employ weapons of mass destruction, irrespective of their disproportionate character to the aggressor's arsenal.[170]

E. IMMEDIACY

Finally, anticipatory self-defence to the threat of force should take place immediately (*i.e.*, while the threat is still going on, and not after it has ended). If, however, the threat or the attack in question consisted of a number of successive acts, and there is sufficient reason to expect a continuation of acts from the same source, the international community should view the requirement of the immediacy of the self-defensive action in the light of those acts as a whole. [171] At all events, practice and doctrine seem to endorse this requirement, which is not surprising in view of its plainly logical link with the whole concept of self-defence.[172] Such an attack would be one of anticipatory self-defence and not of reprisal, since its prime motive would be protective, not punitive.[173] A reprisal for revenge or as a penalty (or a "lesson") would not be lawful.[174]

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169. Legality of the Threat or Use of Nuclear Weapons (United Nations), 1996 I.C.J. 244 (July 8) para. 105(2)E (stating the Court's decision); *see also* DINSTEIN, *supra* note 23, at 210 (explaining the import of the ICJ's opinion).

170. *See* DINSTEIN, *supra* note 23, at 210 (exploring the possibility of using nuclear weapons for self-defence).

171. *See* Ago, *supra* note 11, at 70 (advising that armed resistance to attack should occur immediately).

172. *See* Report of the Committee on Use of Force in Relations Among States, *supra* note 38, at 206 (noting that if a state can reasonably assume that it will suffer continuous attacks an action against the attacking state would be protective, not punitive); Romano, *supra* note 63, at 1056-57 (suggesting that new threats, such as terrorism, require a more flexible self-defence standard).

173. *See* Report of the Committee on Use of Force in Relations Among States, *supra* note 38, at 206 (arguing that such an attack would not be anticipatory, but protective); J. Nicholas Kendall, *Israeli Counter-Terrorism: "Target Killings" Under International Law*, 80 N.C.L. REV. 1069, 1081-88 (2002) (noting that the killings are preventative and are not reprisals because the purpose of the killings is to protect the state).

174. *See* Bowett, *supra* note 63, at 4 (explaining the nature of reprisals).

The military operation against Al Qaeda in Afghanistan by the United States and its Allies can be considered an act of anticipatory self-defence.[175] Since Al Qaeda was responsible for numerous terrorist attacks against the United States, and Osama bin Laden, the *président-fondateur* of Al Qaeda, specifically promised to continue these attacks, such an American reaction must be legitimate under international law.[176]

CONCLUSION

"Do unto others as you would have them do unto you."[177] The world would be a peaceful place to live, were this Golden Rule the basic standard of behaviour in international law. Unfortunately, it is not. States and their citizens are confronted with suicide bombers, state-sponsored terrorism, and wide scale aggression. [178]

The right of self-defence, inherent in every state, includes logically the right of anticipatory self-defence, ensuring that a defender has sufficient flexibility to take defensive hostile measures without waiting for the attack.[179] A state that would renounce the right of anticipatory self-defence could be indefensible in a world

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175. *See infra* note 176 and accompanying text (noting that, as Al Qaeda has promised to continue attacks against the United States, the U.S. government should take action against Al Qaeda).

176. *See* Thomas M. Franck, *Terrorism and the Right of Self-Defence*, 95 AM. J. INT'L L. 839, 839-43 (2001); *see also* Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War:" The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 60 (2003) (noting that the Bush Administration found that Al Qaeda and its leader, Osama bin Laden, were responsible for the series of attacks on September 11th, 2001 and previous attacks on American interests, prompting a war under the theory of self-defence against Al Qaeda, sparking substantial legal controversy).

177. *Book of Tobit* 4:15 (New Am. Bible) ("Do to no one what you yourself dislike."); *Sirach/Ecclesiasticus* 31:15 (New Am. Bible) ("Recognize that your neighbour feels as you do, and keep in mind your own dislikes."); *Matthew* 7:12 (New Am. Bible) ("Do to others whatever you would have them do to you. This is the law and the prophets.").

178. *See* Lacey, *supra* note 135, at 293-97 (describing the constant struggle governments face in combating varied forms of terrorisms and violence, including state and non-state supported terrorism).

179. *See* Clemmons & Brown, *supra* note 23, at 228 (arguing that anticipatory self-defence is not a new concept as it is a subset of the right to self-defence).

without a central world body that could prevent powerful aggressor states from acting at will.[180]

The elasticity of the doctrine of anticipatory self-defence should however not be stretched past logic and into fantasy[181] "In the absence of a clear immediate threat, explaining one [s]tate's aggression or violation of another [s]tate's territorial sovereignty can lead to some unsubstantial claims."[182] "Without the *sine qua non* of necessity, proportionality and immediacy, anticipatory self-defence becomes nothing more than a slippery slope of naked aggression."[183]

180. For instance, "for a [s]tate such as Israel, a [s]tate less than half the size of San Bernardino County in California that is surrounded by twenty hostile Arab States, such renunciation could be tantamount to acceptance of its own genocide." Louis Rene Beres, *A Rejoinder*, 9 TEMP. INT'L & COMP. L.J. 445, 445 & 449 (1995).

181. *See* Lacey, *supra* note 135, at 294 (cautioning governments against reliance on an overly expansive definition of self-defence to justify their military actions).

182. *Id.*

183. *Id.*