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THESIS

DOMESTIC AND INTERNATIONAL LAW, AND TRANSNATIONAL TERRORISM: CAN "REASONABLE APPREHENSION OF PHYSICAL HARM" AND "PROBABLE CAUSE" ELUCIDATE ISSUES CONCERNING IMMINENCE AND ANTICIPATORY SELF-DEFENSE?

by

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Prior to the adoption of the Charter of the United Nations, customary international law permitted, under certain circumstances, the use of force in anticipation of an armed attack. However, the Charter is ambiguous on this issue, and thus, it currently is a topic of intense debate whether this customary right still exists. On the one hand, a strict reading of Article 51 suggests that the requisite threshold for the use of force is an actual armed attack, and that this requirement is absolute. By this interpretation, states no longer have the right to anticipatory self-defense. However, this thesis argues that a closer reading of Article 51, vis-à-vis both the broader purposes of the U.N. Charter and customary international law, suggests that the right to anticipatory self-defense still exists where there is a discernable imminent attack. Therefore, the central issue is the reasonability of a claim that a threat is imminent and that the use of force is necessary to thwart that danger. This thesis examines the municipal law doctrines of *reasonable apprehension of physical harm* in matters of self-defense (and the defense of others), and of *sufficient probable cause* in matters of police action, and suggests that they can be useful in devising an analytical framework to inform the central issue.

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ABSTRACT

Prior to the adoption of the Charter of the United Nations, customary international law permitted, under certain circumstances, the use of force in anticipation of an armed attack. However, the Charter is ambiguous on this issue, and thus, it currently is a topic of intense debate whether this customary right still exists. On the one hand, a strict reading of Article 51 suggests that the requisite threshold for the use of force is an actual armed attack, and that this requirement is absolute. By this interpretation, states no longer have the right to anticipatory self-defense. However, this thesis argues that a closer reading of Article 51, vis-à-vis both the broader purposes of the U.N. Charter and customary international law, suggests that the right to anticipatory self-defense still exists where there is a discernable imminent attack. Therefore, the central issue is the reasonability of a claim that a threat is imminent and that the use of force is necessary to thwart that danger. This thesis examines the municipal law doctrines of *reasonable apprehension of physical harm* in matters of self-defense (and the defense of others), and of *sufficient probable cause* in matters of police action, and suggests that they can be useful in devising an analytical framework to inform the central issue.

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I. INTRODUCTION

A. PURPOSE

The purpose of this thesis is to examine the current state of international humanitarian law – the branch of international law governing the use of force – and apply the law to the current international security environment. It will: (1) holistically examine the legal environment embodied in customary international law and the U.N. Charter; (2) briefly discuss the geopolitical milieu vis-à-vis state and non-state actors and outline the challenges posed by transnational terrorism perpetrated by non-state actors; (3) assess how the current risks in the international security environment, including new weapons and information technology, affect the decision-making process through which a state may decide to preemptively employ military force; (4) analogize the municipal legal doctrines of "reasonable apprehension of physical harm" and "sufficient probable cause" in the international legal order to assess the efficacy of U.N. Charter and customary international law in regulating, without necessarily hamstringing, a state's ability to defend itself; and (5) advocate a framework incorporating principles of "reasonable apprehension" and "probable cause," which may prove useful in developing a more usable doctrine – to wit, the development of legal objective standards for assessing and determining reasonable belief of imminent danger – that ultimately can better guide state actors in the legal use of preemptive armed force.

B. IMPORTANCE

When the U.N. Charter was written, the geopolitical and international security milieu was fundamentally different from that of present day. Fear of major interstate conflict has been supplanted by the threat of transnational terrorism perpetrated by decentralized and loosely connected non-state actors – a serious security challenge that

was not anticipated in the immediate aftermath of the Second World War.[1] This profound change in the security environment poses the following central questions: Is the current U.N. Charter framework and customary international law applicable, relevant, and sufficient to regulate the use of force against international terrorist activity by non-state actors? And, if not, what adjustments should the United Nations consider to provide for a more robust and usable legal regime – one that ensures no nation has carte blanche in the use of force against a perceived aggressor while not unreasonably hamstringing nations that have a legitimate case for military action? Concomitantly: Does the U.N. Charter completely proscribe the use of military force absent an armed attack or Security Council imprimatur; or, does it allow under certain circumstances the use of preemptive force in an act of anticipatory self defense? To what extent, if any, do advances in technology and communications enhance a potential adversary's capabilities and thus make the price of inaction unacceptably greater than in previous eras? Can principles from municipal law, such as reasonable apprehension of physical harm in matters of self-defense (or the defense of others), and sufficient probable cause in matters of police action, be applied toward an analytical framework through which international legalists can examine aforementioned issues and create legal objective standards to aid policymakers in judging whether the employment of military force to preempt an imminent attack would be legal?

Absent U.N. Security Council imprimatur, Article 2(4) of the U.N. Charter proscribes the use of force in the conduct of international affairs: "All 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."[2] Article 42 represents the formal mechanism whereby the Security Council can approve the legal use of force: "Security Council may

[1] The author recognizes that terrorism is but one – though the pivotal – of a plethora of multiple interrelated threats such as the proliferation of weapons of mass destruction; rogue and failing states; the unique legal challenges posed by intra-state conflict and forced migrations; and so on. For the purposes of this thesis, the examination will limit itself only to transnational terrorism.

[2] 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).

take *military enforcement measures* in conformity with Chapter VII" (emphasis added),[3] as opposed to measures not involving the force of arms, pursuant to Article 41.[4]

Article 51 represents the codified exception to this regime of non-violence, by affirming every state's inherent right under customary international law to use armed force in self-defense (and the defense of others). Most agree to the general premise that a nation can defend itself using the force of arms, insofar as

> 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.[5]

However, agreement in interpreting how broadly the article should be construed, i.e., whether the right includes anticipatory self-defense, is a much more difficult proposition.

This issue is a function of how one regards the trigger threshold for the permissible use of force. Any agreement on this is contingent upon the treatment of the continuum of preemptive uses of force. The distinction between "anticipatory" and "preemptive" self-defense – to the extent there is one – is vague. Some scholars consider "anticipatory self-defense" and "preemption" as one and the same.[6] In such cases, as one writer noted, "'Anticipatory self-defense' [is] sometimes referred to as 'preemptive self-defense,' distinct from 'prevention,' which refers to the use of force to address the mere conjectural threat."[7] This represents the most drastic – indeed, the most criticized – use of force. Other scholars make a distinction between "anticipatory self-

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[3] U.N. Charter art. 42.

[4] *Ibid.*, 41.

[5] *Ibid.*, 51.

[6] Michael C. Bonafede, "Here, There, and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism After the September 11 Attacks," November 2002, 88 Cornell L. Rev. 155 (2002), 177

[7] Miriam Sapiro, "Iraq: The Shifting Sands of Preemptive Self-Defense," *American Journal of International Law*, 97, 3 (July 2003), 602. Another possible definition of "preventive" war, as it pertains to this thesis, is "war not to beat an opponent to the punch, but to forestall some putatively foreseeable but still somewhat remote threat or disadvantage." Daniel Moran, "Preventive War and the Crisis of July, 1914" (November 2002).

defense" and "preemptive self-defense," and consider the latter to be "prevention."[8] This is a highly controversial debate, on both the legal and political levels of analyses, and is one that for now remains unresolved.[9]

For the purposes of this thesis, the author considers the term "anticipatory self-defense" as comprising the full spectrum of responses from one that, at one end, addresses a temporally proximate and demonstrably imminent threat – "preemptive self-defense" – to, at the other, the use of force to address the merely conjectural and highly contingent threat, i.e., "preventive self-defense." Having clarified this war of words only for the purposes of this thesis, the central issue remains one of legal interpretation: What is more appropriate – the "prohibitive" theory of interpretation, which states that there is a presumptive legality of an act that is not expressly prohibited, or the "permissive" theory, holding that only those items expressly enumerated as being legal are permitted?[10] Or, put another way, how rigidly or loosely should the law be construed to either exclude or include, respectively, the preemptive use of force?

If the "permissive" theory, requiring the express mention of an act in order for it to be legal, is applied, it begs a separate but related issue on legal construction: Does the express mention of one or more specific items necessarily imply the exclusion of others? This debate is similar to that regarding the treatment of the individual Amendments under the Bill of Rights in the U.S. Constitution – i.e., whether guaranteed individual rights either were: (1) limited to the ten amendments; or (2) not limited, but that the enumeration of the ten Amendments merely represented the codification of the most crucial of the individual rights.[11] Applied to the issue under present examination: What did the framers of the U.N. Charter intend – to merely codify a crucial doctrine and

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[8] Michael Reisman and Andrea Armstrong. "The Past and Future of the Claim to Preemptive Self-Defense," American Journal of International Law 100, no. 3 (July 2006), 526.

[9] For example, according to Robert Pape, the Bush Administration really means "preventive war" when it refers to "preemption." According to Pape's definition, preemption presupposes imminence, which he argues was not present regarding Iraq in 2003. See "Soft Balancing Against the United States," *International Security*, 30:1 (Summer 2005), 7-45.

[10] Francis A. Boyle, "The Relevance of International Law to the "Paradox" of Nuclear Deterrence," 80 Nw. U.L. Rev. 1407 (Summer 1986), 1413.

[11] Jerome A. Barron, et al., *Constitutional Law: Principles and Policy, Cases and Materials* (Newark NJ: Matthew Bender and Co., 2002).

"leave the customary right to self-defense unimpaired";[12] or, by express mention in the Charter, to limit the right, erstwhile construed more broadly under customary law, to *only* instances of armed attack? If the former, does the customary right to self-defense include preemptive employment of military force?[13] This question requires an analysis not only of the Article 51 provisions but also of the purpose and intent of the U.N. Charter itself – a topic to be addressed in Chapter II.

A growing body of literature has been devoted to defending the U.N. Charter system from criticisms that its relevance is waning in relation to anticipatory self-defense, such that, while not completely antiquated, it requires a deliberate and concerted reexamination by member states, to consider current threats and to properly align the Charter so that it retains its relevance in addressing current challenges to international peace and order. One scholar has argued that the U.N. Charter system is still relevant, that international law is still sufficiently flexible to allow "novel security needs" to be met, and that "adherence [to the U.N. system] is the best policy, if understood against a jurisprudential background that is neither slavishly legalistic nor cynically nihilistic."[14] Another has written that "the U.N. Charter still provides a viable and stabilizing framework for addressing threats to peace and security" but with the *caveat* that "the need for a revitalized normative and institutional framework governing the use of force is clear."[15]

This author agrees with the above sentiments to the extent that it is premature to sound the death knell for the U.N. Charter system as it pertains to anticipatory self-defense, but asserts that clarification on this issue – i.e., whether it is allowed under U.N. Charter law – is required. Mere adherence to the current system, in which the existence

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[12] Leo Van Den Hole, "Anticipatory Self-Defence under International Law," 19 Am. U. Int'l L. Rev. 69 (2002), 72.

[13] How Article 51 treats or informs the customary right of self-defense has been the subject of much literature. See Leo Van Den Hole, "Anticipatory Self-Defence under International Law," 19 Am. U. Int'l L. Rev. 69 (2002), 72; Lucy Martinez, "September 11th, Iraq and the Doctrine of Anticipatory Self-Defense," 72 UMKC L. Rev. 123 (Fall 2003).

[14] Richard A. Falk, "What Future for the U.N. Charter System of War Prevention?" 97 A.J.I.L. 590 (July 2003).

[15] Jane E. Stromseth, "Law and Force after Iraq: A Transitional Moment," 97 A.J.I.L. 628 (July 2003).

of the right to anticipatory self-defense still is a point of contention, will not meet the security needs of states. This thesis will argue that the U.N. Charter system, as it pertains to anticipatory self-defense, is still relevant provided that it is interpreted so as to allow the preemptive use of force. It will also argue that anticipatory self-defense *is* permitted under international law under certain circumstances, and will attempt to allay concerns that the insidious expansion of this norm will continue to the detriment of international peace and order, absent a comprehensive reassessment of the legal regime. By analogizing doctrines from municipal law that guide the determination of what is a reasonable apprehension of physical harm, and of what constitutes probable cause to use force – principles that currently exist only in vague form in the international setting – a useful analytical lens can be devised to address the central questions raised above.

Insofar as the contours of international law, especially with regard to the inextricability of politics and law on matters of consensus and sovereignty, and on issues of enforcement and compliance, are in many respects more complicated than municipal law, the development of customary international law is necessarily a delicate balance of "push" and "pull" – respectively: 1) states' actions driving the advance of new legal concepts, principles, and doctrines that are promulgated *post facto*;[16] and 2) the proactive assessment, formulation, and promulgation of conventions, treaties, and other legal instruments, as well as perhaps amendments to the U.N. Charter itself. In this context, this thesis will argue that neither the expansion of anticipatory self-defense to include preventive war (forestalling an anticipated, but not temporally immediate, threat or disadvantage) nor a strict interpretation of the U.N. Charter to unnecessarily hamstring states in the legitimate use of force in self-defense, is a prudent approach in developing the U.N. Charter to maintain its continued relevance. The evolution of key doctrines to guide the legal determinations of state actions involving the force of arms in crisis management will require policymakers and legalists to carefully balance the need for legal clarity and the prospects of political viability. To that end, this thesis also will

[16] John Alan Cohan writes, "Customary international law is constantly evolving; the seeds of a new state practice can become the substance of tomorrow's new custom." Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law," 15 Pace Int'l L. Rev. 283, 289.

attempt to demonstrate that doctrines from municipal law – to wit, "reasonable apprehension of physical attack" in cases of self-defense and the defense of others, and "probable cause" in matters of police action – can be applied, to a certain extent, in the international setting to provide an analytical framework.

Ultimately, this thesis suggests that the customary right to self-defense was left unimpaired by Article 51, and that moreover a state has the right to act preemptively under certain circumstances. However, legal objective criteria remain vague and in need of clarification. This gap in the international legal regime is the subject of both this thesis's central inquiry – whether an analytical framework can be devised from analogizing the domestic law doctrines of "reasonable apprehension of physical attack" and "probable cause" – and its final conclusion: that legal objective standards must be developed, as analyzed through said framework, so that the preemptive use of force is regulated and the doctrine of anticipatory self-defense is not allowed to expand unchecked. This thesis will *not* purport to have a final solution as to what objective standards can at once aid the determination of legality of a preemptive act of self-defense and prevent the unchecked expansion of the anticipatory self-defense doctrine, while remaining sufficiently feasible from a political perspective, such that U.N. member states can reach a consensus as to the criteria's legitimacy. This final outcome remains for further study and analysis that is beyond the scope of this thesis.

C. ROADMAP

This thesis will begin with an examination, in Chapter II, of what right to self-defense actually exists, elucidating on: (1) the finer points of what was allowed under customary international law before the adoption of the U.N. Charter; (2) the effect of codification under Article 51; and (3) whether this right – is inclusive of the right to act preemptively, i.e., anticipatory self-defense.

Chapter III will explore, cases from US domestic law, the principles of determining reasonability of an individual's apprehension of physical attack or harm, and the use of force to preemptively prevent such harm. The issue of "actual belief" will be examined in further detail to elucidate on reasonability, with the intention of

extrapolating it into the international environment (Chapter V) and how it can inform determinations on whether an attack by an aggressor state is imminent and thus a preemptive use of force is warranted. Chapter IV will take the same approach by examining the doctrine of probable cause to use force in a police action. The intent is to examine whether the original concept of the "Five Policemen"[17] comprising the UN Security Council is appropriate; and, if so, whether rules of engagement for municipal police action can inform decisions on anticipatory self-defense in the international milieu.

Chapter V examines how international lawyers and policymakers might utilize this novel framework to make legal determinations and, if necessary, revise the Charter framework such that decisions to preemptively use the force of arms can be at once efficacious and comport with the law.

[17] At the heart of Roosevelt's original conception of the United Nations is the Security Council that would function as the "Four Policemen" – the United States, the United Kingdom, China, and the Soviet Union – of world politics. A fifth policeman, France, was added because of British apprehensions (which proved to be well-founded) about the Soviet intent.

II. U.N. CHARTER AND CUSTOMARY INTERNATIONAL LAW

A. INTRODUCTION

Well before the drafting of the Charter of the United Nations and other legal instruments, customary international law provided guidelines for the use of force in self-defense. Sovereign states have always asserted the right to defend themselves by force. Such rightful use of force is integral to the idea of sovereignty itself, and has been legitimized in the West, particularly by a large body of early Christian writing relating to "just war," in which the claim to have acted defensively was always deemed essential. Such authoritative writings, combined with state practice, created what today would be called a customary law – in this case, an inherent legal right to self-defense.

Yet, the claim to have acted in self-defense has, until recently, been a unilateral and unchecked one, resting upon the subjective perceptions and claims of the individual state that rarely appeared to have much difficulty finding just cause for whatever use of force it contemplated. Over the last several centuries, the theory and practice of this *bellum justum* doctrine, which "legitimized the resort to violence in international law as a procedure of self-help, [provided that] certain criteria…relating to a belligerent's authority to make war, its objectives, and its intent [were met],"[18] alternated between regulation by an independent, generally accepted supervising organization, e.g., the Catholic Church[19] or the League of Nations, which established legally objective criteria relating to a belligerent's employment of military force; and the lack of any authority that eviscerated any central control over the use of force. The result was a legal vigilantism in which the *bellum justum* doctrine was applied subjectively and upon which claims to have acted defensively were routinely overlaid. As one writer has noted, "each

[18] Van Den Hole, 70.

[19] Prior to the League of Nations, no organization existed that was generally recognized as having a say in the *bellum justum*, save for the Catholic Church, which can be said to have exercised a theoretical and "legalistic" influence by virtue of Christian writings about "just war."

belligerent was, in effect, 'his own and final judge' of the *justum* aspect of his war,"[20] unilaterally determining the verity and legitimacy of their claim to use the force of arms.

The turn of the twentieth century and the Covenant of the League of Nations brought about the first significant departure from traditional theory and practice. The resort to war now would be centrally supervised by an independent international organization, with specific criteria of what was to be considered an illegal use of force. The League was in this respect a path-breaking attempt to develop a more objective approach to determining the legal use of force. Yet, while its Covenant seemed to clearly enumerate those instances in which the use of force was to be proscribed, its interpretation was in practice quite problematic.[21] Francis Boyle notes that although the Kellogg-Briand Peace Pact of 1928 "renounced war as an instrument of national policy," it did not expressly prohibit the right of states to use force in self-defense. This was due, in large part, to deference to the objections of some of the delegates – reservations which, through the fundamental legal principle of "reciprocity of reservations," allowed the other parties that did not object to invoke it against any of the original objectors.[22] Instead, the Covenant expressly enumerated only a few instances in which the use of force was prohibited, which, by a familiar canon of legal interpretation,[23] means that all other uses of force would be permitted. Effectively, then, the fundamental right to self-defense using the force of arms remained open to the broadest possible interpretation, impaired only by other doctrines of customary international law.

The Charter of the United Nations was supposed to categorically deny the use of force, save for self-defense, in the conduct of international relations. Article 51 states the self-defense exception:

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[20] Van Den Hole, 70.

[21] John F. Murphy, "Force and Arms," in *The United Nations and International Law* (New York: The Press Syndicate of the University of Cambridge, 1998), 101.

[22] Francis A. Boyle, "The Relevance of International Law to the "Paradox" of Nuclear Deterrence," 80 Nw. U.L. Rev. 1407 (Summer 1986), 1420-1.

[23] The express mention of an item necessarily excludes the legitimacy of all other items not explicitly enumerated.

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[24]

The wording of Article 51 nevertheless leaves open the issue of whether the U.N. Charter supplants the inherent right to self-defense under international law, or merely reaffirms and codifies "otherwise extant rules of international law."[25] In particular, the phrase, "if an armed attack occurs," is ambiguous. It can be interpreted either inclusively or exclusively – that an armed attack is: (1) merely one condition among others under which a state can use force in self defense; or (2) the *only* condition under which defensive force can be used. Accordingly, it is unclear whether Article 51 is the sole source of a state's right to defend itself using the force of arms, and, as a corollary, whether it permits anticipatory self-defense;[26] or alternatively, whether the Article "only imposes certain conditions for the application of a pre-existing, inherent right of self-defense"[27] and therefore should be considered vis-à-vis customary international law, which many legal scholars argue includes the right to act preemptively.[28]

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[24] U.N. Charter art. 51.

[25] David B. Rivkin, Jr., Lee A. Casey, and Mark Wendell DeLaquil, "War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century," 5 Chi. J. Int'l L. 467 (Winter 2005), 474. See also Van Den Hole (2003) and Murphy (1998).

[26] Bordelon, 121. It should be noted that the distinction between "anticipatory" and "preemptive" self-defense – to the extent there is one – is vague. Some scholars consider "anticipatory self-defense" and "preemption" as one and the same, e.g., Bonafede, 177. In such cases, the term "prevention" is used to refer to the so-called Bush Doctrine, e.g., Miriam Sapiro, "Iraq: The Shifting Sands of Preemptive Self-Defense," *American Journal of International Law*, 97, 3 (July 2003), 602, who also wrote, "anticipatory self-defense" [is] (sometimes referred to as "preemptive self-defense)…" On the other hand, Reisman and Armstrong make a distinction between "anticipatory self-defense" and "preemptive self-defense," and consider the latter to be what others consider "prevention" (Reisman and Armstrong, 526).

[27] Van Den Hole, 74.

[28] Van Den Hole argues not only that the right of anticipatory self-defense existed under customary international law, but that it "*survives* under Article 51 of the U.N. Charter" (emphasis added; 82).

It should be underscored that customary international law, albeit subordinated to codified treaty law,[29] remains one of the two major sources of international law and thus must be considered in any legal interpretation. Moreover, in areas that remain unaddressed by treaty law or other legal instruments, customary international law becomes even more crucial, since it may well be the sole source of international legal guidance.[30] This chapter will examine these issues, beginning with an analysis of how international law interacts with state sovereignty. It then will examine how the Charter of the United Nations interacts with customary international law – specifically, whether it created new legal norms or whether it merely codified preexisting rights under the latter. Next, the two schools of thought regarding anticipatory self-defense will be examined by interpreting the U.N. Charter, both implicitly and vis-à-vis customary international law, noting the effect of restrictive and liberal interpretations of the body of law.

Finally, this chapter draws the conclusion that the U.N. Charter does not restrict the inherent right of a state to defend itself using the force of arms and, with a careful reading of Article 51 vis-à-vis the purposes of the U.N. Charter, that it includes the right to act in anticipatory self-defense, given a reasonably imminent threat and provided that the armed response is necessary and proportional.[31] From this departure point, then, the author can assert that the legal regime requires thoughtful revision – viewed through the framework analogized from municipal law, to be discussed in the following chapters – to contemporaneously ensure a state's right to act absent an actual armed attack under certain circumstances while preventing the unchecked expansion of the doctrine of anticipatory self-defense.

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[29] Article 38 of the Statute of the International Court of Justice regards "international custom, as evidence of a general practice accepted as law," as a "notch lower in authoritativeness than treaty law." See John Alan Cohen, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law," 15 Pace Int'l L. Rev. 283 (Fall 2003), 292.

[30] Cohen, 292.

[31] Customary international law requires that any response with the force of arms is both necessary to thwart the initial aggression and proportional to the amount of force that the aggressor employed. See the Caroline case.

B. THE INHERENT RIGHT TO SELF-DEFENSE

Under customary international law, a state's right to defend itself was held to be inherent. With the adoption of the Covenant of the League of Nations, and then the Charter of the United Nations, debate ensued over whether the inherent right to self-defense under customary international law was left unimpaired or became more limited, including with regard to the right to use military force in the absence of an actual armed attack. This was emblematic of the broader debate in determining legality through either of two canons of legal construction – what Francis A. Boyle calls the "prohibitive" and "permissive" theories of international law.[32] The "prohibitive" theory – that which is not expressly prohibited is thus presumptively permitted – essentially embraces a looser standard and thus effectively allows for broader interpretations. The "permissive" approach, on the other hand, disallows that which is not specifically permitted and therefore construes more narrowly.[33] Many scholars have bemoaned the "prohibitive" approach, which they argue has led to a steady and inexorable loosening of the tight parameters for the use of force. Consequently, over 60 years of state practice has tended toward the expansion of the doctrine of anticipatory self-defense, most dramatically exemplified by the US invasion of Iraq in 2003. This underscores the urgency in reassessing the U.N. Charter framework with regard to standards of imminence and, ultimately, the permissible use of preemptive force. In this context, the question of anticipatory self-defense now will be examined.

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[32] Francis A. Boyle, "The Relevance of International Law to the "Paradox" of Nuclear Deterrence," 80 Nw. U.L. Rev. 1407 (Summer 1986), 1420.

[33] Insofar as in their application, the "prohibitive" theory actually facilitates *broader* (actually *more permissive*) interpretation of what is allowed, while the "permissive" theory results in *narrower* (*more restrictive*) construing of the law, this thesis's author, respectfully disagreeing with the redoubtable Professor Boyle, believes that the labels are counterintuitive. Therefore, to avoid confusing misnomers, the author of this thesis hereafter will avoid said labels and instead appropriately describe the *effect* of the "prohibitive" and "permissive" theories, e.g., "broadly" and "narrowly," construed, respectively.

1. International Law vis-à-vis State Sovereignty

In the municipal setting, citizens and residents[34] are afforded individual rights and protections vis-à-vis the state and its domestic legal system, and any study of the extent of said rights must begin with the relationship between the two entities. To wit, as a legal and police system becomes more established and reliably efficacious, individual citizens necessarily relinquish their right to vigilantism and other forms of self-help. Absent this system, the right of civil society to organize to defend itself was neither seriously questioned nor limited in practice. Up until the last several hundred years, societies, almost universally, had no formal police force. Consequently, communities organized the use of force according to their druthers, and vendettas extending over years and even generations were commonplace and even accepted in some places. Once a society develops a legal regime and establishes a police system, however, civil society becomes limited in the nature and extent to which it can use force in self-defense. Indeed, in modern jurisprudence, "it is well-recognized that the law of crimes and torts owe their origin to the state's desire to eliminate private vengeance and to minimize other forms of self-help."[35]

The analogy from the domestic setting is apparent: the prerogative of actors subject to the law, and progress made in the legal order and its enforcement mechanisms, are inversely proportional. Similarly, then, the extent of a state's right to defend itself is central to the question of how international law interacts with state sovereignty. "A cardinal principle of international law," write Christopher C. Joyner and Anthony Clark Arend, "is state sovereignty. The condition of sovereignty identifies the state as a legitimate actor entitled to protection under international law."[36] This protection, however, affects a corresponding diminution of a state's repertoire of self-help measures. The extent of this ceding of sovereignty, and thus effectively what rights that states

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[34] Inasmuch as the only point that is germane to this thesis is that the individual is, in whatever manner, entitled to equal protection under the law, the author here chooses not to pursue any legal distinction between citizens or residents, either legal or illegal, or temporary or permanent.

[35] John D. Calamari and Joseph M. Perillo, *The Law of Contracts* (St. Paul MN: West Group, 1998), 6.

[36] Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" 10 USAFA J. Leg. Stud. 27 (1999-2000), 47.

maintain under the legal regime, largely depends on the development of international law, the proper mechanisms to enforce the law, and ultimately the effectiveness of the law and its enforcement in maintaining the peace. "Possession of sovereignty," professors Joyner and Arend argue, "imbues the government of a state with supremacy over its territory and its independence in international relations. In principle, however, such independence is neither absolute nor unlimited."[37] In the 1923 *Tunis-Morocco Nationality Decrees*[38] case, the Permanent Court of International Justice (PCIJ) dealt with this very issue of what rights are maintained by states where international law has not sufficiently developed to efficaciously serve as a guideline for state action. In this ruling, the court affirmed the primacy of the state but held that "as the strength of the international legal order develops and improves over time, the domain of state sovereignty necessarily diminishes in direct proportion."[39]

To summarize the implications: on particular matters not covered by international law, the sovereignty of states, until such a time that international law develops to address said issue, shall remain unimpaired; and, where the legal regime and enforcement mechanisms develop, the right to states to act in a self-help manner presumably is diminished. Thus, in both the municipal and international settings, the relationship between the law and its enforcement, and those subject to the law, informs what rights the latter maintains. To the extent that the international legal order has been under constant development – and indeed continues to develop – this issue has neither remained static nor has it been resolved. With regard to the central issue of this thesis, the legal order continues to progress in order to maintain peace and security with as much regulation as politically feasible, so that vigilantism does not reign. This begs the

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[37] Joyner and Arend, 47.

[38] Tunis-Morocco Nationality Decrees (Fr. v. Eng.), 1923 P.C.I.J., Ser. B, No. 4 (judgment of February 7). The court stated: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within the reserved domain. For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states." *See* Francis A. Boyle, "The Relevance of International Law to the "Paradox" of Nuclear Deterrence," 80 Nw. U.L. Rev. 1407 (Summer 1986).

[39] Boyle, 1414.

question: How is law interpreted, and therefore how is the latitude to act in a self-help manner determined? The following section will discuss the various ways in which theories of legal construction can affect interpretation of the law, especially as it pertains to the extent to which states, using the force of arms, can act preemptively.

2. Interpretations of Law: Permissive vs. Restrictive

In the area of anticipatory self-defense, U.N. Charter law remains ambiguous. That is, there are two clear, equally reasonable, interpretations on what Article 51 directs with regard to preemption: (1) consonant with customary law, it is allowed, within narrow parameters and under certain circumstances; or, (2) it is completely proscribed absent an armed attack.[40] Without explicit clarification to the U.N. Charter, the international legal regime can only judge state actions *post facto,* effectively shifting the issue back into the realm of customary international law. Many legal scholars have commented on how, as one writer put it, "Customary international law is constantly evolving…[and] the seeds of a new state practice can become the substance of tomorrow's new custom."[41] Therefore, interpretations of customary law to judge state actions are critical in determining how the law develops thereafter. To arrive at its conclusion, the *Tunis-Morocco* court applied the "prohibitive" theory of international law, to allow more latitude for states to act in areas where international law had not yet developed. This trend prevailed in the 1927 case of *S.S. Lotus,*[42] in which the PCIJ again decided "in favor of the 'prohibitive' theory of international law, and therefore in favor of state sovereignty whenever international law is not expressly applicable."[43] Consequently, "restrictions upon the independence of States cannot…be presumed."[44]

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[40] See Lucy Martinez, "September 11th, Iraq, and the Doctrine of Anticipatory Self-Defense," 72 UMKC L. Rev. 123 (Fall 2003); and Chris Bordelon, "The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law," 9 Chap. L. Rev. 111 (Fall 2005).

[41] Cohen, 289.

[42] *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J., Ser. A, No. 10 (judgment of September 7).

[43] Boyle, 1420.

[44] *Ibid*.

In addition to analyzing restrictive versus broad interpretations of the law, it also is important to consider what *type* of law – i.e., those that govern during peacetime and others that inform during times of war – is being developed. Professor Boyle notes that "at the time of the *Lotus* decision, international law recognized a clear-cut bifurcation into two mutually exclusive international legal orders: the laws of peace and the laws of war. This bifurcation was due to the lack of an absolute prohibition on a state's going to war or threatening or using force in international relations." Consequently, while the *Lotus* doctrine – the less restrictive approach – operated in peacetime, it did not apply in international law of humanitarian armed conflict.[45] Instead, in these areas, a more restrictive theory would have applied.

Therefore, one would logically expect, as the international legal order continued to develop – specifically, with the passage of the U.N. Charter and the express prohibition against the use of force in international relations – that the trend toward less restrictive theory of international law enshrined in *Lotus* would have been reversed or at least challenged, and that the still remaining vague and/or ambiguous areas of *jus ad bellum* would be interpreted more strictly. Instead, since the early 1950s, we have seen decades of state actions driving the development of customary law – yet more examples of how "much of the law of nations has its roots in custom"[46] – to have it interact with Charter law, while the *per se* development of the Charter itself remains conspicuously absent. Despite many legal scholars' narrow interpretation of the U.N. Charter, in effect disallowing all uses of force other than in self-defense, the United States, with a reasonable but controversial legal reading of Article 51 vis-à-vis the concatenation of U.N. Security Council resolutions relating to Iraq, embarked on a war against the Saddam Hussein regime. This was a watershed moment in which many policymakers, analysts, and scholars, by their interpretation of the law and the facts of the situation, became even more alarmed at what was already perceived as a largely unchecked expansion of the doctrine of anticipatory self-defense.

[45] Boyle, 1422.

[46] Cohen, 294.

This was possible because looser interpretations of the Charter have resulted in a more "purposively-oriented"[47] interpretation of Charter law and other applicable legal instruments. A permissive reading of Article 51 holds that actual armed aggression need not occur before force may be used in self-defense, and that instead force may be used in anticipatory self-defense. Insofar as customary international law "permits the use of force only in self-defense and perhaps, under some circumstances, in preemptive or anticipatory self-defense",[48] and as "[readings of] customary international law generally influences any interpretation of the Charter",[49] anticipatory self-defense has been interpreted – not without controversy – to be permissible under Article 51, provided there are at least narrow parameters, if not a specific set of conditions.

These parameters, of course, have not been developed yet; and, thus, this gap leaves the international law regime in a legally subjective state of affairs not unlike what had existed in the remote past, and which the United Nations was ostensibly created to replace. In making the legal case for the 2003 Iraq War, lawyers broadly construed Article 51 vis-à-vis, *inter alia*, Security Council resolutions 678,[50] 687,[51] and 1441.[52] Resolution 678 recalled Resolution 660 and its demand that Iraq completely withdraw from Kuwait, and, if by January 15, 1991, Saddam Hussein failed to do so,[53] expressly authorized Member States "to use all means necessary to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions [pertaining to "the situation between Iraq and Kuwait"[54]] and to restore international peace and security in the area."[55] After Iraq was expelled from Kuwait on February 27, 1991, the Security Council began drafting Resolution 687, which formally established a conditional cease-

[47] Jason Pedigo, "Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?" Winter 2004, 32 Ga. J. Int'l and Comp. L. 199 (2004). 218.

[48] Bonafede, 177.

[49] Timothy Kearley, *Raising the Caroline*, 17 Wis. Int'l L.J. 325, 328 (1999).

[50] S.C. Res. 678 (1990).

[51] S.C. Res. 687 (1991).

[52] S.C. Res. 1441 (2002).

[53] See S.C. Res. 660 (1990).

[54] U.N. Repertoire of Practice, Ch. XI (1989-92).

[55] S.C. Res. 678 (1990).

fire and demanded that Iraq: (1) destroy its stockpiles of chemical and biological weapons and ballistic missiles, and agree to on-site inspections; (2) not "use, develop, construct, or acquire" aforesaid weapons of mass destruction and means of delivery; (3) destroy all nuclear-related weapons or materials and not acquire or develop additional nuclear weapons or critical materials or components; and (4) agree to an on-site inspection regime to verify compliance with provisions pertaining to nuclear or nuclear-related weapons and critical materials."[56] Thus, although Resolution 1441 did not explicitly authorize the use of force,[57] proponents of the 2003 invasion claimed, notwithstanding continued ambiguity surrounding Article 51's guidance on anticipatory self-defense, "that the United States [was] entitled to use of force in response to Iraqi violations of Resolution 687 without further authorization from the [Security] Council, on the basis that the violations constituted a 'material breach' that reactivated the earlier authorization [in Resolution 678]."[58]

C. INTERPRETING ARTICLE 51: THE EXTENT OF A STATE'S RIGHT TO SELF-DEFENSE

In a highly-charged legal and political environment wherein Article 51 remains ambiguous regarding the anticipatory use of military force absent an actual armed attack, how was such a case made?[59] As this section shall demonstrate, interpreting Charter text vis-à-vis other applicable legal instruments is not as clear-cut as a plain-text reading would suggest. This section will argue that, of the two aforesaid central issues regarding Article 51 of the U.N. Charter – (1) whether it completely supplants customary international law and, concomitantly, whether it still permits anticipatory self-defense as did customary law; or, (2) whether it continues to interact with customary international law, which allows anticipatory self-defense under certain circumstances – the more incisive examination is the one that considers the Charter *without* its customary law

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[56] S.C. Res. 687 (1991).

[57] S.C. Res. 1441 (2002).

[58] Michael Byers, "The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq," *EJIL*, 13 (1), 23-4.

[59] John Yoo, "International Law and the War in Iraq," *American Journal of International Law*, 97, no. 3 (July 2003), 572.

counterpart that permits anticipatory self-defense. In this fashion, the Charter must stand on its own merit as it regards the central issue. Even if one temporarily suspends reality for the sake of argument and interprets the Charter in a vacuum, this author argues that the right to anticipatory self-defense remains unimpaired and therefore, *a fortiori*, does so when interpreted vis-à-vis customary international law.

1. The U.N. Charter and Customary International Law

Within the context of broader ("prohibitive") and narrower ("permissive") construing of the law, scholars specifically look to methods endorsed by the Vienna Convention.[60] At one end of the spectrum is the "core theory,"[61] a narrow approach that constitutes the strictest "black-letter" interpretation. Thus, at present case, in order for any application of military force to be legal, it must be in self-defense; and, even then, by construction from customary humanitarian law, it moreover must meet the strictest of requirements for necessity, immediacy, and proportionality.[62] In other words, it completely proscribes the use of force in any circumstance beyond thwarting an ongoing armed attack – including preemptively, in anticipation of a military attack – and essentially regards the permissible use of force as a binary condition.[63] By a strict reading, then, any infraction thereof, involving the use of force absent an armed attack, is "most assuredly…a breach of the 'non-intervention principle' under customary international law." Michael C. Bonafede writes, "No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic, and cultural elements are in violation of international law."[64]

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[60] Vienna Convention on the Law of Treaties (May 23, 1969).

[61] Pedigo.

[62] International law scholars generally agree that the requirements for necessity, immediacy, and proportionality emanate from the seminal *Caroline* affair. See Van Den Hole (2003), 95-97.

[63] Reisman and Armstrong, 525.

[64] Bonafede, 169.

At the other end of the spectrum of interpretation is the "rejectionist" theory,[65] which calls for completely abdicating all Charter obligations out of frustration over "the Charter's inability to 'justify legally what they consider so palpably proper and politically essential…[rendering] the civilized world helpless to deal with such patently lawless and inhumane conduct.'"[66] The problem with treating U.N. Charter law, according to rejectionist legal scholars, in exactly the same fashion as domestic law designed to administer justice, is that the U.N. Charter was not meant to provide such a comprehensive system of justice, but to provide a basic system for regulating relations among states whose interests were known to conflict.[67] This is especially true, according to rejectionist proponents, when one considers the lack of a U.N. armed force to act as a sort of police unit, as envisioned under Article 41.[68]

The Security Council is far from being an independent and disinterested arbiter of justice in the sense required by modern domestic jurisprudence. Rather, the Council comprises states with often diverging interests – political and economic – that can be persuaded by other enticements. Thus, rejectionists feel that the U.N. has unequivocally demonstrated that it cannot provide security in the current international political setting, especially when it attempts to act as a system of justice and policing. The most dramatic example of a broad interpretation of the right to use force in self-defense asserts "explicit authorization of the use of force is in fact not required," and that all one needs "is a determination by the [Security] Council that a situation constitutes a threat to international peace…[and that] should the Council fail to adopt a further resolution explicitly authorizing force, the determination of a threat to the peace may be taken as an implied authorization."[69]

There is general agreement that two schools of thought exist regarding the interpretation of Article 51, all labeled in a variety of ways but all pointing to either a

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65 Rejectionist theory is "more of a perspective than a theory." Pedigo, 217.

66 Pedigo, 218.

67 Pedigo.

68 U.N. Charter, Art. 41.

69 Byers, 24.

more restrictive or more liberal reading of the text.[70] Those who call for a more restrictive reading of the Article point to the phrase "if an armed attack occurs"[71] as proof positive that the drafters of the Charter intended to prohibit military action absent an ongoing armed attack. Others argue that preemption is allowed under some circumstances. It is the argument of this thesis that such circumstances do exist, but that they require a clear, present, and demonstrable danger that reasonably causes apprehension of harm to the state actor, absent which the use of force is legally prohibited under the Charter. The presumption is that the potential user of force bears the onus of justifying such use, insofar as the law expressly limits it with exceptions, rather than permits it with exclusions. Moreover, the burden of proof is heavy, resting on the state using or proposing to use force, as will be explained henceforth.

In summary, the "prohibitive" theory – i.e., that actions are legal unless expressly prohibited – has been applied, in state practice, in favor of the "permissive" theory, that actions are illegal unless expressly permitted. Thus, the former allows for broader interpretations of the law while the latter is more narrowly construed. Deducing this general proposition into the issue under present examination, then, the presumption, under a stricter interpretation of the Article 51 exception to Article 2(4), is that the preemptive use of force in anticipatory self-defense is proscribed, and thus that those who argue that Article 51 allows, as did customary international law on the inherent right to self-defense, for nations to consider an imminent threat and act on it before an actual armed attack bears the greater burden of proving their case.

In this following sections, it will be argued that a mere black-letter reading of the Article 51 self-defense exception, without careful consideration of the Article 2(4) text that prohibits the use of force in the first place, leads one to prematurely conclude that there is one, and only one, circumstance under which military force is allowed – i.e., in response to an ongoing armed attack – resulting in the abrogation of the right to act preemptively given reasonable indications of an imminent attack, as it existed under customary international law. On the other hand, examining Article 2(4) with

[70] *E.g.*, Van Den Hole refers to the "restrictive" and "expansive" schools, 81.

[71] U.N. Charter, art. 51.

commensurate assiduousness reveals an equally reasonable interpretation that ultimately allows anticipatory self-defense under the U.N. Charter.

2. Interpreting Article 51 vis-à-vis Article 2(4)

As previously mentioned, Article 2(4) of the U.N. Charter prohibits the use of force in the conduct of international relations; but, it can be argued that the Article does not categorically proscribe military force absent an armed attack. As David B. Rivkin, Jr. et al. (2005) argue,[72] Article 2(4), requiring that all members "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,"[73] actually enumerates only three conditions under which the use of force *is* absolutely prohibited – where a state uses military force to infringe upon: (1) another's territorial integrity; (2) another's political independence; or (3) the Purposes of the U.N. Charter,[74] chief of which are:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[75]

Given also that international legal norms generally recognize that the use of force is sometimes required "to maintain international peace and security,"[76] the employment of military force absent an armed attack is not necessarily illegal. As has been noted, "Obviously there are times when that peace can be maintained only through the use of

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[72] David B. Rivkin, Jr., Lee A. Casey, and Mark Wendell DeLaquil, "War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century," 5 Chi. J. Int'l L. 467 (Winter 2005).

[73] 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).

[74] *Ibid.*

[75] U.N. Charter art. 1.

[76] *Ibid.*

force – an eternal truth acknowledged even by the [United Nation's] spiritual father, Woodrow Wilson, who sent young Americans to die on Europe's battlefields in a 'war to end all wars.'"[77]

3. The Right of Anticipatory Self-Defense under the U.N. Charter

Thus, ironically, a more careful reading of the Article 2(4) proscriptive text actually allows for a more *permissive* reading of the Article 51 exception, such that the right to act in anticipation of an armed attack remains unimpaired under the U.N. Charter. Moreover, anticipatory self-defense actually may be consistent, contingent upon attending circumstances, with the three aforementioned goals of the U.N. Charter, and *ipso facto* is not impaired through its codification from unwritten customary international law to express mention in the Charter. Provided that the use of force is consonant with aforementioned Article 2(4) prohibitions – i.e., that it is not for the purpose of breaching another state's territorial borders; intervening in another's domestic political affairs; or threatening peace, security, and justice under international law – the belligerent is within the bounds of the law.[78]

D. CONCLUSION

Critics of the doctrine of anticipatory self-defense have a reasonable fear of its unchecked expansion. For centuries before 1945, states had carte blanche in justifying or excusing their use of force in the conduct of international relations. The adoption of the U.N. Charter made most uses of force illegal. Nonetheless, the legal regime still remains ambiguous in the area of anticipatory self-defense, which was allowed under certain circumstances under customary international law but is debatable under the U.N. Charter system. Insofar as a close examination of Article 51 vis-à-vis Article 2(4) reveals that the use of force is allowed in meeting the goals of the United Nations, said use of force is allowed even in the absence of an armed attack, provided it is consonant with said goals. Therefore Article 51 must be construed as merely mentioning one instance *inter alia* in

[77] Rivkin et al (2005), 475.

[78] *Ibid.*

which the use of force is permitted. Given this scrutiny of the U.N. Charter isolated from extant rules from customary international law, this author concludes that reading the Charter vis-à-vis customary law *a fortiori* permits the use of force in anticipatory self-defense.

The central issue, then, becomes what constitutes a reasonable belief that an attack is imminent. Elucidating this issue is a difficult proposition to the extent that the continuum of anticipatory self-defense measures spans from preemption to prevention. From a legal perspective, the former is allowed based on the foregoing argument; and, from a political perspective, *should* be allowed, else states would be forced to absorb the first blow and to act with the force of arms merely to strike back after harm has been inflicted. At the other end of the spectrum, prevention is problematic insofar as it embarks on war where there is only a perceived threat of uncertain imminence. The following chapters will address what constitutes a reasonable belief in an imminent attack by viewing the issue through the lens provided by the municipal law doctrine of reasonable apprehension of physical harm, which is common in legal analyses of this sort, and then through the prism of sufficient probable cause, on which there is a paucity of literature, if any.

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III. REASONABLE APPREHENSION OF PHYSICAL HARM

A. INTRODUCTION

The use of force in self-defense consequent to a reasonable apprehension of physical harm, and where the victim cannot reasonably be expected to resort to higher authority (i.e., the law) for defense, is a long-standing legal doctrine in both tort and criminal law.[79] Reasonable belief must extend to both imminent physical harm and the necessity to use force. In both U.S. municipal law and international law, these two concepts – reasonable apprehension of physical harm and reasonable belief that force is necessary to thwart the aggression – are related but distinct. The line between the two is often not clear; indeed, as this chapter will illustrate, circumstances often warrant consideration of both as part of the same analysis. The separate requirements and their relationship to one another have been articulated in numerous ways. One author has noted that "the use of force must be *necessary because the threat is imminent*…"[80] This thesis argues that even with an imminent threat, other conditions must exist before a reasonable belief for the necessity to use force follows. Therefore, from a conceptual perspective, careful attention should be paid to ensure that they are not inappropriately conflated into a single issue, as they often are under casual observation. Doing so could, in the presence of a reasonable fear of attack, result in the exclusion of non-violent solutions that otherwise may be still present for consideration. In other words, even with reasonable apprehension of physical harm, the need to use force does not necessarily follow insofar as there may be other non-forceful recourses to mitigate the aggression.

B. DETERMINING REASONABILITY: OBJECTIVE AND SUBJECTIVE STANDARDS

The central inquiry for this chapter is: How does one determine reasonableness – through objective standards, subjective standards, or a combination of both? Legal

[79] LaFave (2003), 539.

[80] Yoo, 572, emphasis added.

objective standards require that the act comport with what other prudent and competent persons in the same or similar circumstances also would consider reasonable, while subjective standards delve into the mind and intent of the actor, irrespective of what the hypothetical reasonable person would believe. A hybrid approach involves elements of both by considering the state of mind of the individual (the subjective element) but still requiring that the opinion of the individual be reasonable by the objective standard.[81]

This section is devoted to examining: (1) what constitutes reasonable belief in the broadest sense; and (2) how these general principles are applied, vis-à-vis apprehension of physical harm and the necessity to use force, to deduce reasonableness in both. As was famously articulated in *Bechtel v. State*:

> Standards of reasonableness have been traditionally characterized as either "objective" or "subjective." Under the objective standard of reasonableness, the trier of fact is required to view the circumstances, surrounding the accused at the time of the use of force, from the standpoint of the hypothetical reasonable person. Under the subjective standard of reasonableness, the fact finder is required to determine whether the circumstances, surrounding the accused at the time of the use of force, are sufficient to induce in the accused an honest and reasonable belief that he/she must use force to defend himself/herself against imminent harm.[82]

A hybrid approach, as one can deduce, involves "the viewpoint and circumstances of the defendant in assessing the reasonableness of his or her belief, i.e., *subjective*, [but] also requires the defendant's viewpoint to be that of a reasonable person, in similar circumstances and with the same perceptions, i.e., *objective*." [83] In effect, the subjective personal experiences that can illuminate the perspective and standpoint of the actor is considered admissible in establishing justification or excuse in the criminal and tort law

[81] Black's Law Dictionary.

[82] *Bechtel v. State*, 840 P.2d 1.

[83] *Ibid.*, emphases added.

defense of self-defense;[84] but, in and of itself, this element is not necessarily dispositive insofar as the belief must also comport with what a reasonable person in the same or similar circumstance would believe. *State v. Coffin*[85] elucidates this hybrid test, ruling that "the appearance of immediate danger and being placed in fear thereby are totally subjective, *to which is added the objective requirement* that a reasonable person in the circumstances would have reacted similarly."[86] Especially under certain extreme circumstances, personal experience can be admitted into consideration. Such incorporation of the subjective element is illustrated in cases of self-defense with deadly force by a battered wife,[87] which will be elaborated below in the section on reasonable belief in the necessity for force.

In addition to the requirement that the belief be reasonable, there is also one that said belief must be an honest one. It does not suffice merely to purport to believe what the hypothetical reasonable and prudent person would believe. This is particularly critical in assessing reasonability in the belief of the necessity for force.

1. Reasonable Belief in Imminent Physical Attack

According to U.S. case and statutory law, an actor must reasonably believe that he or she is about to be the victim of a physical attack that is "almost immediately forthcoming,"[88] i.e., imminent. This requirement, as a general matter, appears to be sensible insofar as aggression or other threatened violence that is supposed to occur further in the future gives the potential victim other avenues of self-defense action than if the attack were imminent.[89] The doctrine of imperfect self-defense, while applicable to

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[84] "Justifications" and "excuses" are analyzed and differentiated by Kent Greenawalt. See "Distinguishing Justifications from Excuses," 49 Law & Contemp. Probs. 89, 91 (Summer 1986). While material to the building of the criminal and tort law defense of self-defense, the distinction is beyond the scope of this analysis. The reader should note only that both justifications and excuses are used in establishing reasonability, and should not pay too much attention, for the purposes of this thesis, to the particular ways in which the concepts are utilized in the criminal and tort law.

[85] *State v. Coffin*, 128 N.M. 192, 991 P.2d 477 (1999).

[86] See LaFave, note 34, 543, emphasis added.

[87] *Bechtel v. State*, 840 P.2d 1 (1992).

[88] LaFave (2003), 544.

[89] LaFave (2003), 544-5.

determining whether the amount of force was reasonable (i.e., "proportional," in the parlance of international humanitarian law, as discussed *infra*) where deadly force was used in self-defense – can inform as to how both the subjective and objective standards for reasonableness can be effectively employed.[90]

The interplay between objective and subjective standards is illustrated in *Bechtel v. State*, a murder case in which expert testimony as to the controversial doctrine of Battered Woman Syndrome was deemed inadmissible at trial but was overturned on appeal. The Court of Criminal Appeals of Oklahoma, agreeing that the experiences of the battered wife who exercised deadly force against her husband, even if he were not presently threatening, "affected her state of mind at the time of the killing…[and thus] goes to the reasonability of her belief that she was in imminent danger."[91] This case also illustrates how the reasonable belief standard was contemporaneously extended to both imminence of attack and necessity for force. Battered Woman Syndrome has been analogized into the international setting as an illustration of how the standard of imminence may be appropriately relaxed in the international milieu, in order to consider more than the mere temporal proximity of a threat. Unnecessarily strict standards, it has been argued, can be detrimental to maintaining security.[92]

2. Reasonable Belief in the Necessity for Force: Whether Non-Violent Means Remain, or if Use of Force is Required

Once a reasonable belief of an imminent attack has been established, the case for the use of force must still be made. Scholars of U.S. municipal law have opined that "the proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense."[93] This assertion aptly describes the perspective through which this issue should be analyzed, as it also takes into account the nature of the threat. In other words, the use of violent means must be assessed by appropriately taking into account the

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[90] See *State v. Faulkner*, 301 Md. 482, 483 A.2d 759 (1984).

[91] *Bechtel v. State*, 840 P.2d 1 (1992).

[92] Michael Skopets, "Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law," 55 Am. U.L. Rev. 753 (February 2006).

[93] LaFave, 545.

possibility of non-violent resolution. In the municipal setting, both U.S. case law and statutory law on self-defense generally require that the victim's belief in the necessity to use force, as it is regarding the belief of imminent harm, "be a reasonable one,"[94] typically determined by an objective standard; but in some instances, such as those involving a battered woman, objective, subjective, or a combination of both have been employed.

The determination of what is reasonable to the victim and also what would be reasonable to another prudent individual in a similar circumstance[95] also must be accompanied by an *honest* and *actual* belief in the necessity for force, which is a subjective requirement. Honest belief is critical, to the extent that the U.S. Modern Penal Code endorses the view that only an honest belief in the necessity for force will suffice, and that such belief need not be reasonable, for an actor to claim self-defense.[96] This is premised on the principle that an actor cannot be convicted of a crime requiring intentional misconduct if his only crime is unreasonably determining that the use of force was necessary. In such instances where said belief is found to be unreasonable, the accused can still be found guilty, but only for an offense for which negligence or recklessness is sufficient to establish culpability.[97] Even with an honest belief, an actor can be found to have acted negligently or with reckless disregard in making the unreasonable mistake of using force, if other prudent persons in a similar circumstance would have found that act to be unreasonable. However, the majority of U.S. jurisdictions have not supported this view, instead requiring both objective reasonableness and subjective honesty as part of the same analysis.

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[94] Professor LaFave notes, "The modern codes typically make it explicit that the defendant must have been reasonable in his belief as to the need for the force of the amount used." See note 24 in LaFave (2003), 542.

[95] *People v. Goetz*, 68 N.Y.2d 96, 506 N.Y.S.2d 18, 497 N.E.2d 41 (1986), held, the self-defense statute stated an objective test; and therefore, the lower court erred in allowing the defendant's prior experience to be entered into evidence, thereby making the defendant's belief only "reasonable to him."

[96] The Modern Penal Code supports the view that, in establishing the necessity of self-defense, the actor need only honestly "believes" that the use of force is necessary. See Modern Penal Code, § 3.04, Comment at 36 (1985). LaFave, 543.

[97] LaFave (2001), 498.

The uniqueness of aforementioned *Bechtel v. State* and other cases of battered women – what distinguishes it from aforesaid necessity to separate, where possible, the related but distinct issues of imminence of attack and necessity for force – is that once imminence is established as being reasonably and honestly believed, it seems that the necessity for deadly force is a foregone conclusion. Although the defendant was on trial for killing her abusive husband, the ruling of *Bechtel v. State* indicated that, using the "hybrid" reasonableness standard, "the issue is not whether the danger was in fact imminent, but whether, given the circumstances as she perceived them, the defendant's belief was reasonable that the danger was imminent." Thus, given that this reasonable belief of attack was established, the belief in the necessity for *deadly* force seemed to necessarily follow.

In the municipal setting, non-violent means of self-defense include *inter alia* retreat where possible.[98] However, in the international setting, the full spectrum of redress not involving the force of arms includes diplomatic negotiations at one end, to economic sanctions and other more onerous means at the other. Once all these avenues are perceived to have been exhausted in a crisis situation, and armed force is deemed necessary to thwart aggression, the issue becomes the reasonability of that belief, and exactly how much force is appropriate to defuse the situation.

C. REASONABLE AMOUNT OF FORCE

Once the necessity for force is established, the case law in the United States requires that the force applied to thwart an actual or perceived attack to be proportional to the threat. For example, deadly force is never allowed in the defense of property.[99] The criminal law usually deals with the use of deadly force in self-defense and whether it is to be "justified," which eliminates the guilty intent necessary for a murder conviction but leaving the guilty act itself sufficient for manslaughter, or "excused," which eliminates

[98] The so-called "castle" or "no retreat" doctrine is a notable exception to the expectation to retreat, where possible, to mitigate any violence associated with self-defense. It states that "one who through no fault of his own is attacked in his home is under no duty to retreat therefrom," is well-settled and has "practically universal acceptance." See *United States v. Peterson*, 483 F.2d 1222 (1973).

[99] LaFave (2003).

not only the *mens rea* but also the *actus reus*, so as also to preclude manslaughter. The civil law, on the other hand, involves cases of non-deadly but nonetheless "offensive" contact that can form the basis of a tortuous assault or battery case. In either event, the main consideration is whether the belief is subjectively "honest" and objectively "reasonable."

D. CONCLUSION

It is critical to underscore that the workings of the distinct requirements analyzed in this chapter occur at their confluence, resulting in an intricate interplay between them. As was written in the ruling for *United States v. Peterson*:

> …necessity is the pervasive theme of the well-defined conditions which the law imposes on the right to kill or maim in self-defense. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances. It is clear that no less than a concurrence of these elements will suffice.[100]

As will be discussed in Chapter IV, this sentiment is highly relevant in the international setting, where the appropriateness of the possible use of force in anticipatory self-defense will continue to be deliberated.

[100] *United States v. Peterson*, 483 F.2d (1973), 1222.

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IV. PROBABLE CAUSE

A. INTRODUCTION

As discussed in the previous chapter, much of the literature on anticipatory self-defense has been devoted to the question of what constitutes reasonable imminence. These works have focused on the tort and criminal law concept of reasonable apprehension of physical harm as the municipal law analogue to assessing a particular factual situation and determining whether the threat of armed attack is imminent in the international setting. In this chapter, the author will argue that another municipal law concept, that of "sufficient probable cause" (which governs the right of a magistrate to grant an arrest or search warrant) also can serve as a useful analogue in devising an analytical framework to aid in the determination of whether the preemptive use of force is warranted internationally.

Collecting intelligence and assessing its probative value in the international milieu is akin to the gathering of "tips" from informants and analyzing the totality of the evidence in the practice of domestic law enforcement. At its most rudimentary level, this analysis considers that erratic or unusual behavior, either directly observed by police officers or purported by an informant, that can be indicative of possible illegal activity, can "tip off" police (i.e., give them probable cause), and lead to an arrest. In U.S. municipal law, the challenge has always been determining the reliability of the informants and of the entire body of relevant evidence. Analogously, erratic behavior (e.g., defying U.N. resolutions, treaties, and other legal instruments) can be considered by the U.N. Security Council – for the purposes of this discussion, the world's "magistrate" – as indicators of probable illegal activity (e.g., contravening U.N. proscriptions on nuclear weapons, possibly indicating intent to illegally use them in aggressive use or threat of force), thereby empowering the Security Council to act in defense of possible victims by authorizing the use of force by member nations.

Sufficiency of probable cause depends upon the quality of the total evidence purporting to justify search or arrest. Affidavits for search warrants are tantamount in the

international legal regime to comprehensive intelligence estimates that call for inspection regimes or otherwise invasive actions ("searches") to investigate proscribed activities, e.g., proliferation of weapons of mass destruction. The request for an arrest warrant can be analogized as U.N. Security Council imprimatur for the use of force to prevent a state from engaging in suspected illegal activity.

The quantum and nature of the evidence required for search warrants as opposed to arrest warrants are similar. The latter is the more demanding standard, however, and it is there that the present argument will focus, since it is the use of force that concerns us, and an arrest is most definitely an act of force (although not necessarily of violence). This chapter will analyze seminal cases in U.S. municipal law to discern patterns in establishing probable cause and comment on possible utility of said patterns as framework for deciding when the Security Council is entitled to authorize the use of force, absent an actual attack, in order to maintain peace and security.

B. DETERMINATIONS OF PROBABLE CAUSE IN U.S. MUNICIPAL LAW

If an enforcement arm of the United Nations had been created, the Security Council would certainly have required something like probable cause in order to use the force at its disposal, in a manner similar to a police force in the municipal setting. Rather than calling upon a ready reserve of military forces under the U.N. flag, however, the Security Council instead must assemble an Article-43-derived "coalition of the willing" to enforce its mandates. Regardless of the political complexity this additional step may introduce, however, the comparison with municipal law still is useful, insofar as the process for authorizing the legal use of force is the same: the Security Council, when deliberating whether to sanction a state's request to use force in individual or collective security measures, must consider – in a fashion comparable to magistrates' assessing an affidavit and issuing a warrant for arrest – the reliability and probative value of intelligence gathered, analyzed estimates that purport possible illegal activity, and the underlying circumstances.

In U.S. domestic law, different conclusions are required for probable cause to arrest versus that for search, even though:

> …it is generally assumed that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search...For arrest, there must be a substantial probability that a crime has been committed and that the person to be arrested probably committed it; for search, there must be a substantial probability that certain items are the fruits, instrumentalities, or evidence of crime and that these items are presently to be found at a certain place.[101]

What is material and constant is that probable cause involves the sufficiency of the evidence to affect action that suspends individual rights in the domestic setting and sovereignty rights in the international milieu. Therefore, this perspective is useful in the international setting: an "arrest" is the legal use of force under international law (including the preemptive use of force absent an actual attack); while a "search" is any investigative action by a U.N.-sanctioned regime for suspected contravention to international law (e.g., an International Atomic Energy Agency [IAEA] inspection of nuclear facilities suspected of violating the non-proliferation treaty). Therefore, the utility of "probable cause" in the international legal regime is also two-pronged: (1) in those instances where a nation is believed to have engaged in illegal activity (e.g., disregarding U.N. Security Council resolutions), the "fruits, instrumentalities, or evidence of crime" can be pursued through a U.N. special commission "searching" for telltale signs of wrongdoing; and (2) given probable cause for an "arrest," the Security Council could authorize the use of force to bring an intransigent state into compliance.

The central issue is, of course, what constitutes "sufficient probable cause." U.S. municipal law has oscillated between stricter, more technical assessments as to the probative value of "tips" that lead to the issuing of a warrant, to a more "common-sense" and non-technical approach that is less prohibitive and more conducive to the preparation of affidavits for warrants by police and other non-lawyers, who often have neither legal education and training nor time to deliberate during exigent circumstances. The following section traces the history of how particular factual situations are regarded in establishing sufficient probable cause in U.S. domestic law, and analyzes its applicability in the international legal order.

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[101] Kamisar et al., 183.

1. From *Aguilar* to a Broader "Totality of the Circumstances"

Among other requirements, *Aguilar v Texas*[102] held that absent (1) relevant "underlying circumstances" (for the magistrate to independently judge the verity of the informant's claim that narcotics were where he said they would be), and (2) support by the affiant-officers that their informant was "credible" or his information "reliable," there is insufficient probable cause and that therefore the affidavit requesting and justifying a warrant (in this case, a search warrant) would be rendered "inadequate."[103] This two-pronged test examines the quantum and nature of evidence that informs the finding of probable cause, and was applied in *Spinelli v. United States*,[104] in which the informer's tip vis-à-vis a narrowly construed "totality of circumstances" was required to have been more carefully "determined by a more precise analysis"[105] in order to judge its probative value. Essentially, the first test, the underlying circumstances, must be sufficiently expressed such that it can independently inform the second test, providing justification for the reliability of the tip and for why the sources are reliable. In *Spinelli*, Justice Harlan, writing for the majority, stated that reliability requires more than mere "casual rumor" or "an accusation based merely on…general reputation."[106] Therefore, the totality of circumstances must be sufficiently precise and appropriate such that it is sufficient to inform the determination of the reliability of the tip and not merely engender another generalization.

The two-pronged test again was applied in *Illinois v. Gates*,[107] to deduce whether an anonymous letter informing a local police department of drug activity met the *Aguilar* standard for sufficient probable cause. The Supreme Court ruled that, while agreeing with the Illinois Supreme Court that "veracity," "reliability," and "basis of knowledge" are all highly apropos, they alone are not sufficient to establish probable cause. Rather,

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[102] *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

[103] See Kamisar et al., 167.

[104] *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

[105] Justice Harlan, *Spinelli v. United States.*

[106] Justice Harlan, *Spinelli v. United States*, in Kamisar, 168.

[107] *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, L.Ed.2d 527 (1983).

"they should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is 'probable cause.'"[108] In other words, the rigidity of the two-pronged test perhaps was overemphasized, spiting the substance of the information itself in favor of strict technical adherence. Beyond the underlying circumstances, the quality of the information also must be assessed for verity and appropriateness to the attending circumstances. Therefore, it is possible that a tip corroborated by independent sources will still *not* pass muster when applied to the *Aguilar* test, and for a tip *without* independent corroboration to *pass* the test. Thus, even in *Spinelli*, it was questioned: "Can it be fairly said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration?"[109]

This trend toward loosening the technical two-pronged standard continued in the seminal case of *Brinegar v. United States,*[110] which established the standard that the "totality of the circumstances is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip. Perhaps this is the central teaching of our decisions…"[111] This approach allows for a deficiency in one area of analysis to be compensated by a "strong showing" in another area, or by "some other indicia of reliability."[112] Barring this discretionary flexibility to assess all the indicia of reliability toward an estimation of the totality of the circumstances, the *Aguilar* two-pronged test had reduced probable cause determinations to "an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts…"[113] Moreover, the Supreme Court recognized that affidavits normally are prepared by police and other non-lawyers who are not trained to consider all the legal technicalities that lawyers and judges must address in the course of their responsibilities. Perhaps most

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[108] Justice Rehnquist, *Illinois v. Gates*, in Kamisar, 171.

[109] Justice Harlan, *Spinelli v. United States*, in Kamisar, 168.

[110] *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

[111] Justice Rehnquist, *Illinois v. Gates*, in Kamisar, 171.

[112] *Ibid.*, 172.

[113] *Ibid.*, 173.

importantly, the police – often urgently acting to meet developing and time-critical situations involving possible criminal activity, high stakes, and precious little time to deliberate – is in those exigent circumstances required to be "hastier" such that its non-technical judgment otherwise would not pass muster under the stricter *Aguilar* test. Although it was argued that the two-pronged test possessed "built-in subtleties" that were supposed to consider all these non-technical considerations, the Supreme Court nonetheless deemed affidavits to be "quite properly" issued on a "non-technical" and "common sense" basis, so as to grant more latitude in determining the existence of probable cause, even with a quantum and nature of the evidence that is, from a strict legal perspective, technically deficient. Essentially, in *Gates*, the Supreme Court rejected the more rigid and technical approach and thus reversed its rulings in *Aguilar* and *Spinelli*, instead opting for a more common-sense approach.

2. Probabilities, Not Certainties

Lawyers and judges attempt to analyze particular factual circumstances with as much technical precision as possible, creating, where feasible, objective standards for assessing the reasonability of an action to determine its legality. Police officers, on the other hand, must deal with emerging and exigent circumstances in "real time" and respond appropriately. Thus, the challenge is achieving the balance between protecting the rights of individuals (or, in the international milieu, state sovereignty) and the ability to address time-critical predicaments in which the ability to deliberate is curtailed, if not precluded. It is important to bear in mind, however, that neither magistrates nor the U.N. Security Council, when called to render judgment, has the luxury of dealing with complete certainties, but must settle for reasonable deductions and inferences based on imperfect knowledge of the facts. As was articulated in *United States v. Cortez*, "the process does not deal with hard certainties, but with probabilities."[114] A similar situation applies in the international setting: the decision by the United Nations to use force almost always involves intelligence estimates rather than hard conclusions. Therefore, careful

[114] *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

consideration toward action should be given when it is more probable than not that an infraction of international law has occurred.

C. U.N. SECURITY COUNCIL IMPRIMATUR TO USE FORCE

In much the same manner as magistrates who must determine the legality of an arrest or search in the municipal setting, the U.N. Security Council, with its mandate to ensure "the maintenance of international peace and security,"[115] is charged with the responsibility to assess intelligence estimates in the context of the totality of the circumstances and, as articulated in *Cortez*, to raise a "particularized suspicion"[116] that a state against whom the use of force is being considered is engaged in wrongdoing; or, in the parlance of the U.N. Charter: "to determine the existence of any threat to the peace, breach of the peace, or act of aggression."[117]

Recourse to force in the international milieu, no less than in a municipal one, must be grounded in the totality of the circumstances and the reliability of available sources that speak to the facts of a particular situation. This is something the U.N. system is not well-equipped to ensure reliably.[118] Inasmuch as the Security Council is not a strict legal body designed to administer justice on the world stage, but a political institution charged with keeping the peace,[119] national interests – particularly among the Permanent Five – will often trump strict legalistic assessments in Security Council deliberations and decisions. Moreover, its determination of a threat to or breach of the peace can be expressed only as authorization for Members States to use force, a process in which political considerations must also intrude.

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[115] U.N. Charter, art. 24.

[116] *United States v. Cortez.*

[117] U.N. Charter, art. 39.

[118] Thomas M. Franck, "The U.N. and the Protection of Human Rights: When, If Ever, May States Deploy Military Force without Prior Security Council Authorization?" 5 Wash. U. J.L. & Pol'y 51 (2001), 61.

[119] Pedigo.

At least in part as a consequence of these political constraints, the Security Council has only twice in its history[120] expressly declared the existence of a breach of the peace *and* countenanced the use of force in collective security actions under the U.N. banner: for the Korean War (1950-3)[121] and the Persian Gulf War (1990-1).[122] Of the two, it is noteworthy that one of the instances – the Korean case – pitted forces under the U.N. flag directly against the interests of a permanent Security Council member (the Soviet Union),[123] thus demonstrating the inherently political nature of the Security Council function that is inimical to fair and impartial juridical proceedings. In 1982, the Security Council also expressly determined that a breach of the peace existed – this time concerning the Falkland Islands (Islas Malvinas) – but did not go so far as to approve the use of force[124] as it did for Korea[125] and Iraq (1990),[126] instead opting to issue only anodyne proclamations demanding the immediate cessation of hostilities and the withdrawal of Argentine forces from the area of conflict.[127] Five years later, the Council pursued a similar strategy, passing Resolution 598, which expressed "a breach of the peace as regards the conflict between Iran and Iraq" and demanded an immediate cease-

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[120] Heung-Soon Park, "Collective Security and International Order: The Role of the United Nations in the Korean War (1950) and the Persian Gulf War (1990)," (Ph.D. diss., University of South Carolina, 1993).

[121] Resolution 83 (1950) recommended that its Member States assist the Republic of Korea in repelling the attack by North Korean armed forces. Resolution 83 (1950).

[122] One of the most recent imprimatur to use force was expressed in Resolution 678 (1990), which, after a long concatenation of previous resolutions and "all [other] efforts by the United Nations," and where Iraq refused "to comply with its obligation to implement…relevant resolutions, in flagrant contempt of the Security Council," authorized "Member States…*to use all necessary means* to uphold and implement…all…relevant resolutions and to restore international peace and security in the area" (emphasis added). U.N. Security Council Resolution 678 recalled, reaffirmed, and called for the compliance of 11 previous resolutions, beginning with Resolution 660 (1990), which affirmed "a breach of international peace and security as regards the Iraqi invasion of Kuwait." All these foregoing resolutions, and finally Resolution 678, comprised the quantum of evidence that indicated the intransigence of the Iraqi regime insofar as it was not compliant, and indeed remained defiant, of the consensus of the international community as embodied in the Security Council mandates. However, this case still is not entirely analogous inasmuch as an armed attack actually occurred – a material fact to which the authorization to use force can be reasonably attributed and which, in the absence of an actual attack, the probability of said authorization would have been dubious.

[123] Murphy, 115.

[124] Resolution 502 (1982).

[125] Resolution 82 (1950).

[126] Resolution 678 (1990).

[127] Yoram Dinstein, *War, Aggression, and Self-Defence*, Third Edition (Cambridge, U.K.: Cambridge University Press, 2001), 257.

fire without itself intervening with the force of arms.[128] In aforementioned instances, an aggressor egregiously violated international law by using the force of arms to offend the sovereignty of another state. The same condition existed in 1984, as regards the attack by South African forces on Angola. Invoking Chapter VII, the Security Council passed Resolution 546, which reaffirmed Angola's right to self-defense under Article 51 and called for collective security action by Members States to aid the attacked country. However, the resolution never achieved (in) assembling an Article-43-derived collective security force; and thus, Resolution 546 remained (as) little more than an official condemnation of an aggressive act that was virtually unheeded.[129] These and other instances underscore the limitations of the Security Council as a juridical body, even though its resolutions are considered authoritative sources of international law.

Again, the two instances in which the Security Council granted the use of force were pursuant to actual armed aggression. With the lack of case studies that can be analyzed for particularities of the factual circumstances *prior to* an actual armed attack – akin to municipal cases involving whether a magistrate grants a warrant – it is more difficult to discern patterns as to when the Council might countenance the use of force to restore the peace in one instance but not another. Insofar as this examination intends to assess the link between reliability of sources and verity of intelligence in instances where threats seem to be materializing, but where aggressive action has not yet occurred, the aforementioned cases have limited applicability. Moreover, the fact that such serious inconsistencies are observable in cases with an initial armed aggression, it is difficult to speculate how the Security Council would assess the quantum and nature of the evidence in the absence of such aggression. Thus, although the logic of "probable cause" may translate well into the international arena, the institutional requirements for determining it are not present within the current structure of the United Nations.

[128] Resolution 598 (1987).

[129] Dinstein, 259.

D. CONCLUSION

Since the Security Council has never authorized the use of preemptive force, it is difficult to compare its history of practices to that of U.S. magistrates in granting warrants. Nevertheless, the notion of sufficient probable cause still can be useful in assessing a state's claim to use preemptive force in self-defense. As concluded above, the *Aguilar* two-pronged test in the municipal setting is too technical and restrictive, unreasonably hamstringing law enforcement officers in rapidly unfolding circumstances that require reasonable but quick judgment, and do not afford the opportunity for deliberations based on objective legal standards. Instead, a "totality of the circumstances" approach – less technical and relying more on the expertise, experience, and professional instinct of trained arresting officers and other non-lawyers – perhaps is more appropriate in addressing common exigencies.

In the international setting, where the development of circumstances leading to armed aggression usually take longer to develop and thus typically allows for more deliberations over applicable standards, a shift toward the more technical approach exemplified by *Aguilar* may be more appropriate. This would ensure that the decision to use force is no more hastily concluded than is absolutely required. Insofar as the consequences of using armed force – in particular the suffering of innocents that always results from the commitment of military forces – are arguably greater and more severe than municipal police affecting an arrest, it would be appropriate to analyze the quantum and nature of available evidence more stringently, using more technical and narrower criteria. Loosening of standards should be considered only in the most exigent of circumstances, meaning those that afford, as Daniel Webster stated, "no choice of means, and no moment for deliberation."[130]

This scenario is regular in police actions in municipalities but less likely in the international setting. There are those who argue the opposite, however: that in today's high-technology environment a "threatened magnitude of harm"[131] must be part of any

[130] See Letter from Daniel Webster to Henry Fox (April 24, 1841).

[131] John Yoo, 572.

calculus of whether to permit the preemptive use of force. The cost of inaction, it is argued, is too great in such an environment of advanced capabilities to inflict widespread harm. The corollary, then, is that it is foolhardy to allow perceived existential threats to materialize into imminent ones. How should advanced weapon systems and communications be taken into account vis-à-vis the quantum and nature of the evidence before the Security Council? The totality of the circumstances may account for this, and will allow for prompter action, at the risk of greater imprudence. A more technical legal requirement – the two-pronged approach that objectively analyzes the reliability of the sources and the underlying circumstances – will be more precise, however, and when one considers the inherently political environment of the U.N. Security Council, the case for such a legal counterpoise becomes very strong. Given that the alternative is to base the use of force on purely political bargaining, a strict legal standard such as that enshrined in *Aguilar* may be useful in pointing the way toward more consistent and transparent standards.

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V. CONCLUSION: TOWARD A RELEVANT ANALYTICAL FRAMEWORK

The aim of this thesis was to propose a theoretical framework, based upon settled concepts of municipal law, that could guide the further advance of international law governing the use of force. The concepts of municipal law presented here, drawn from Anglo-American notions of the common law and the U.S. statutory law, are meant to elucidate possible analogues that can be applied in the international setting in critical matters of determining imminence.

As argued in the foregoing chapters, the determination of imminence requires an assessment of the totality of the circumstances that magistrates – and, by analogy, the U.N. Security Council – must consider in determining whether to authorize, respectively, an arrest warrant or the use of military force. The comparison of a magistrate to the U.N. Security Council is limited, insofar as the latter is a body that deliberates and acts on political considerations rather than on strictly legal concerns. The history of its decision-making processes bears this out.[132] Notwithstanding this material difference between the two entities being compared, the similarities between the Security Council and magistrates, even if limited only to how the Security Council is theoretically supposed to function, can help establish a possible framework to assess the justification of nations claiming the necessity to use force.

How one regards what constitutes an imminent attack and, ultimately, what is a legal application of the doctrine of anticipatory self-defense, turns on how one interprets Article 51, as described in Chapter II. A restrictive approach embraces the canon of construction under which the express mention of one thing implies the exclusion of others. By this reading, that Article 51 allows the use of force "if an armed attack occurs" means that all other uses of force would be deemed illegal. Conversely, a permissive approach recognizes the inherent right to anticipatory self-defense under customary international law alongside the strictures of Article 2(4), and reads Article 51

[132] See Stanley Meisler, *The United Nations: The First Fifty Years*; and U.N. Repertoires of Practice.

as an expression of the broader purposes of the United Nations, which in turn leads to the conclusion that anticipatory self-defense is permitted.

On matters of anticipatory self-defense, issues of imminence are especially germane to the debate on the permissive use of armed force, ultimately driving the legality of anticipatory self-defense. The *Caroline* affair established the imminence requirement (along with that of proportionality) as a function of "necessity of that self-defence [that is] instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[133] However, concomitant sub-issues accompany this broad discussion of imminence, especially in today's age of advanced technology and capabilities. John Yoo writes of three factors that give greater analytical granularity "beyond mere temporal imminence": 1) whether a nation has the capability and intent to launch a WMD attack; 2) the small window of opportunity within which nations can act to protect itself from terrorist attackers "who seem immune to traditional methods of deterrence"; and 3) the "vast potential destructive capability of WMD and the modest means required for their delivery.".[134] This framework considers the remarkable speed and potential destructiveness afforded by today's high technology, and comports with what has been opined by prominent scholars on U.S. domestic law: that "the proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense."[135]

Thus, certain principles of domestic criminal law may be useful, at least to the extent of analogizing objective legal standards of reasonableness to the determination of what is and is not reasonable apprehension of an imminent attack. What is required is the gradual and deliberate evolution of self-defense requirements codified into appropriate legal instruments, without which international law will continue to be defined by state practice, evolving only in the realm of customary international law. The argument has been made that conventional ideas of imminence are insufficient to address the

[133] Letter from Daniel Webster to Lord Ashburton (August 6, 1842), quoted in Gardner, 587, in 30 British and Foreign State Papers 1841-1842; also available at http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm (last accessed December 19, 2007).

[134] Yoo, 575.

[135] LaFave, 545.

continually emerging advances in military technology and communications.[136] Therefore, the case for war in 2003 is widely regarded as being insufficient, were the case to have proceeded through the criminal law system, to establish either justified or excused self-defense.[137] Insofar as the requirements to maintain international security and peace require special consideration of aforementioned technological factors, mere imminence alone is insufficient in the international setting where a state, bearing a heavy burden of proof, must request the imprimatur of the U.N. Security Council to use force.

Thus, it has been argued that criminal law standards for imminence should not be applied.[138] However, neither excessively strict nor a haphazard loosening of the standards for imminence is desirable. The challenge is taking these legal analyses and applying it to a highly-charged political milieu, in order to determine standards that are contemporaneously politically feasible as well as more objective in establishing temporal imminence in the totality of the circumstances. What is encouraging is that legal doctrines can develop – indeed, has developed – such that there is a careful and deliberate evolution that keeps the laws current and relevant. Using the example of the Battered Woman Syndrome, Michael Skopets argues that "its use and acceptance by the judicial system [of the United States] has effectively broadened the temporal aspect of imminence in self-defense claims and demonstrates that the traditional requirements of self-defense, although rigid, can indeed evolve over time."[139]

Combining the notions of sufficient probable cause with the general concepts of reasonable imminence of physical harm and the necessity for force can constitute the beginnings of an efficacious analytical framework through which cases before the U.N. Security Council can be examined and assessed for legality, and proactive development of international law can occur. Specifically, the practice of considering the totality of the circumstances would consider not just the imminent threat but also the costs of

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[136] See Yoo, Skopets.

[137] Skopets.

[138] *Ibid.*

[139] *Ibid.*, 757.

inaction.[140] A careful examination of the criminal law standard for imminence also reveals that the proper inquiry is *not* the immediacy of the threat but that of the response that is reasonably determined to be necessary in defense.[141] Granting this maxim, it can be argued that the criminal law standards for imminence and the totality of the circumstances can in fact be helpful, if not definitive, in determining the reasonability of a state's apprehension of physical harm.

From a substantive perspective, the probable cause lens seems to lead to more permissive uses of force than by assessing imminence through a reasonable apprehension lens. The more compelling discourse on imminence seems to be *against* the use of force when viewed in light of what constitutes a reasonable threat, insofar as the burden of proof on the state acting with armed force is high, as it should be. Through the probable cause lens, however, a magistrate – analogously, the Security Council – would consider, in the 2003 Iraq War for example, the "personal psychopathology"[142] of Saddam Hussein and the long history of aggression against his neighbors, non-compliance with the Security Council resolutions, and insolence and intransigence toward the international community, as relevant to the question whether Saddam would again commit an aggressive act. This was a critical component of the United States' argument, justifying the use of force in anticipation of an actual armed attack.

However, from a procedural perspective, the legal requirements to establish sufficient probable cause lend itself to a more stringent assessment, which might be more appropriate in a circumstance in which military forces might be employed. Both Skopets and Yoo, in separate writings, argue that an examination of the totality of the circumstances is required to make a prudent decision on whether one should use force to repel a perceived threat. Skopets states that "the question of imminence in both [states that initiate preemptive strikes and battered women] should address other factors in

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[140] Yoo.

[141] LaFave, 545.

[142] Charles Pierson, "Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom," 33 Denv. J. Int'l L. & Pol'y 150, 176.

addition to the temporal proximity of harm,"[143] while Yoo argues that "under international law, the concept of imminence must encompass an analysis that goes beyond the temporal proximity of a threat to include the probability that the threat will occur."[144] This comports with the probable cause maxim that suggests that we deal with probabilities, not certainties. It is arguably true that the standard of imminence ought to be relaxed to address the technological advances in weaponry and communications, which have turned the metaphorical "bolt out of the blue" into a living possibility. This is a revolutionary change from the days when armed aggression meant the massing of troops on borders, accompanied by mobilization of massive logistical systems and other reliable indicia of an imminent armed attack. In today's environment, this is no longer the case.

Nevertheless, this thesis argues that, rather than an uncontrolled relaxation of the imminence requirement – at least to the extent that there has not been a methodology offered to ensure a deliberate and gradual expansion of the preemption doctrine – the prism of sufficient probable cause can inform and check this undesired development. Probable cause doctrines could have been used in the case of the Iraq War, which this author argues was the missing element in the quasi-legal political process, particularly within the United Nations, that preceded it. While many recent commentaries have indicated that the lack of weapons of mass destruction "proved" that the perception of imminence would not have passed muster in a criminal or civil court, this author argues that it was in fact a failure to establish *sufficient probable cause*. Contrary to recent opinions, the issue of imminence – *presupposing the clarity of the underlying circumstances, the reliability of the sources, and thus, ultimately, the verity of the intelligence* – was actually quite adeptly and convincingly established by Colin Powell, then-U.S. Secretary of State. The lack of such clarity, reliability, and verity all reveal the true nature of the failure: the lack of meaningful and proper corroboration of the various intelligence sources and the verity of the WMD threat.

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[143] Skopets, 769.

[144] Yoo, 572.

All of these shortfalls constitute *probable cause*, not imminence, issues. Had the two-pronged approach used in *Cortez* and *Spinelli* been used, this stricter standard, while deemed too prohibitive and therefore inappropriate in the *Gates* case, might have been more appropriate in assessing the case for the 2003 Iraq War, in which Saddam was already contained (albeit imperfectly) by sanctions (and, thus, it was argued, time was not of the essence in the rush to war). Substantively, the probable cause standard arguably is more loosely-construed than that of reasonable apprehension of physical attack, perhaps because the former is used to deal with emerging exigencies that sometimes require a quick and non-technical decision. Procedurally, however, it can be more stringent; and therefore, it is reasonable to apply this more complicated, more technical standard, to determinations of the totality of the circumstances, including imminence, which should be construed as narrowly as possible in checking what is perceived to be an uncontrolled and insidious expansion of the anticipatory self-defense doctrine.

A great deal of the force that is employed internationally today, at least by the great powers and other leading members of the international system, can be fairly characterized as police actions. Therefore, to the extent that municipal criminal and tort law are part of a justice system that comprises police actions, it is not inappropriate to consider the legal principles from criminal law, as has been done in this thesis. In considering the totality of the circumstances, the framework that this thesis proposes will inherently include technological advances in the calculus. Given the numerous uncertainties in the international security milieu, it is time that sufficient resources are gathered and utilized toward conceptualizing a more reliable and more efficacious standard for the use of force in anticipation of an armed attack.

LIST OF REFERENCES

Barron, Jerome A. et al. *Constitutional Law: Principles and Policy, Cases and Materials* (Newark NJ: Matthew Bender and Co., 2002).

Bechtel v. State, 840 P.2d 1 (1992).

Bonafede, Michael C. "Here, There, and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism After the September 11 Attacks," 88 Cornell L. Rev. 155 (November 2002).

Bordelon, Chris. "The Illegality of the US Policy of Preemptive Self-Defense Under International Law," Fall 2005, 9 Chap. L. Rev. 111 (2005).

Boyle, Francis A. "The Relevance of International Law to the "Paradox" of Nuclear Deterrence," 80 Nw. U.L. Rev. 1407 (Summer 1986).

Byers, Michael. "The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq," *EJIL*, 13 (1).

Calamari, John D. and Joseph M. Perillo. *The Law of Contracts* (St. Paul MN: West Group, 1998).

Cohan, John Alan. "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law," 15 Pace Int'l L. Rev. 283.

Dinstein, Yoram. *War, Aggression, and Self-Defence*, Third Edition (Cambridge, U.K.: Cambridge University Press, 2001).

Falk, Richard A. "What Future for the U.N. Charter System of War Prevention?" 97 A.J.I.L. 590 (July 2003).

Franck, Thomas M. "The U.N. and the Protection of Human Rights: When, If Ever, May States Deploy Military Force without Prior Security Council Authorization?" 5 Wash. U. J.L. & Pol'y 51 (2001).

Joyner, Christopher C. and Anthony Clark Arend. "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" 10 USAFA J. Leg. Stud. 27 (1999-2000).

Murphy, John F. "Force and Arms," *The United Nations and International Law* (New York: The Press Syndicate of the University of Cambridge, 1998).

Park, Heung-Soon. "Collective Security and International Order: The Role of the United Nations in the Korean War (1950) and the Persian Gulf War (1990)," (Ph.D. diss., University of South Carolina, 1993).

Pedigo, Jason. "Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?" Winter 2004, 32 Ga. J. Int'l and Comp. L. 199 (2004).

People v. Goetz, 68 N.Y.2d 96, 506 N.Y.S.2d 18, 497 N.E.2d 41 (1986).

Pierson, Charles. "Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom," 33 Denv. J. Int'l L. & Pol'y 150, 176.

Reisman, W. Michael and Andrea Armstrong. "The Past and Future of the Claim to Preemptive Self-Defense," *American Journal of International Law*, 100, no. 3 (July 2006).

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

Rivkin, Jr., David B., Lee A. Casey, and Mark Wendell DeLaquil. "War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century," 5 Chi. J. Int'l L. 467 (Winter 2005).

Sapiro, Miriam. "Iraq: The Shifting Sands of Preemptive Self-Defense," *American Journal of International Law*, 97, no. 3 (July 2003), 602.

Skopets, Michael. "Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law," 55 Am. U.L. Rev. 753 (February 2006).

Spinelli v. United States.

State v. Coffin, 128 N.M. 192, 991 P.2d 477 (1999).

State v. Faulkner, 301 Md. 482, 483 A.2d 759 (1984).

Stromseth, Jane E. "Law and Force after Iraq: A Transitional Moment," 97 A.J.I.L. 628 (July, 2003).

U.N. Repertoire of Practice, Ch. XI (1989-92).

United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

Van Den Hole, Leo. "Anticipatory Self-Defence under International Law," 19 Am. U. Int'l L. Rev. 69 (2002).

Yoo, John. "International Law and the War in Iraq," *American Journal of International Law*, 97, no. 3 (July 2003).

BIBLIOGRAPHY

Dinstein, Yoram. "The Rule of Law in Conflict and Post-Conflict Situations: Comments on War," 27 Harv. J.L. & Pub. Pol'y 877 (Summer 2004).

Gardam, Judith (ed.). *Humanitarian Law* (Brookfield VT: Ashgate Publishing Company, 1999).

Joyner, Christopher C (ed.). *The United Nations and International Law* (Cambridge, U.K.: Cambridge University Press, 1998).

Kagan, Robert. "Power and Weakness: Why the United States and Europe See the World Differently," *Policy Review* (2003), 113.

Kelly, Michael J. "Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law," 13 J. Transnat'l L. & Pol'y 1 (Fall 2003).

Ku, Charlotte and Harold K. Jacobson (eds.). *Democratic Accountability and the Use of Force in International Law* (Cambridge, U.K.: Cambridge University Press, 2002).

Lieven, Anatol. "In the Mirror of Europe: The Perils of American Nationalism," *Current History* (Mar 2004), 103, 671.

Magenis, Sean D. "Natural Law as the Customary International Law of Self-Defense," 20 B.U. Int'l L.J. 413 (Fall 2002).

Millen, Raymond A. "Strategic Effects of the Conflict with Iraq: Europe," Strategic Studies Institute (March 2003).

Nabati, Mikael. "International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)," Fall 2003, 13 Transnat'l L. and Contemp. Probs. 771 (2003).

Nungesser, Donald. "United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts," 16 Pace Int'l L. Rev. 193 (Spring 2004).

Provost, René. *International Human Rights and Humanitarian Law* (Cambridge, U.K.: Cambridge University Press, 2002).

Walker, George K. "Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said," 31 Cornell Int'l L.J. 321 (1998).

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