

# SETTLING THE SCORE WITH SADDAM: RESOLUTION 1441 AND PARALLEL JUSTIFICATIONS FOR THE USE OF FORCE AGAINST IRAQ\*

## I. INTRODUCTION: HOW DO U.S. JUSTIFICATIONS FOR THE USE OF FORCE AGAINST IRAQ RELATE TO INTERNATIONAL LAW?

We have a vision of a new partnership of nations that transcends the Cold War. A partnership based on consultation, cooperation, and *collective action, especially through international and regional organizations*. A partnership *united by principle and the rule of law*. . . . A partnership whose goals are to increase democracy, increase prosperity, increase the peace, and reduce arms.<sup>1</sup>

Former President George H.W. Bush made this statement to the United Nations General Assembly as United States and coalition forces were gathering to push Saddam Hussein's Iraqi army out of Kuwait. Bush criticized Iraq's invasion of Kuwait as a clear violation of international law that required a response from the international community.<sup>2</sup> Over a decade after Desert Storm and in the aftermath of the terrorist attacks of September 11, 2001, a newly assertive United States has placed considerable strain on the existing international legal rules governing the use of force by resolving publicly to end the threat posed by Saddam Hussein's Iraqi regime and to do so unilaterally if necessary.<sup>3</sup> The United States has advanced a range of

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\* The author would like to thank Professors Scott L. Silliman and Michael Byers of Duke University School of Law for their thoughtful guidance and comments, and the editors of the Duke Journal of Comparative and International Law. All errors and omissions are those of the author.

1. President George H.W. Bush, The U.N.: World Parliament of Peace, Address to the United Nations General Assembly (Oct. 1, 1990), *in* 1 U.S. DEP'T. ST. DISPATCH 151, 152 (1990) (emphasis added).

2. *See id.* at 151-52.

3. *See* President George W. Bush, Remarks by the President on the United Nations Security Council Resolution (Nov. 8, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/11/20021108-1.html> (last visited Dec. 1, 2002) ("The United States has agreed to discuss any material breach with the Security Council, but without jeopardizing our freedom of action to defend our country. If Iraq fails to fully comply, the United States and other nations will dis-

debatable legal justifications for military action against Iraq while, after much internal debate, it simultaneously engaged the United Nations Security Council.<sup>4</sup> The resulting Security Council measure, Resolution 1441, stops short of explicitly authorizing force, yet the United States maintained that such explicit authorization was unnecessary.<sup>5</sup> This latest confrontation between the United States and Iraq illustrates the great challenge faced by the international legal regime for the use of force. This regime faces the daunting task of providing effective restraints on the use of force for an international security environment in which a lone superpower perceives serious, undeterrable threats from terrorists and aggressive states wielding weapons of mass destruction (WMD). Despite this challenge, the continued relevance of international institutions and legal norms is illustrated by the U.S. decision to modify its approach to Iraq and work in conjunction with the Security Council despite the opposition of powerful figures in the Bush administration.<sup>6</sup>

This paper examines the validity of U.S. justifications for a large-scale use of force against Iraq in light of relevant international law. The United States is a founding member of the United Nations Charter.<sup>7</sup> The UN Charter proscribes the use of force except in cases of Security Council authorization or self-defense.<sup>8</sup> Both exceptions will be discussed along with other, less traditional theories as possible justifications for U.S. military action.

This paper concludes that the justifications for unilateral U.S. action are inconsistent with existing international law. That inconsistency is significant for two reasons. First, it means that largely baseless theories for unilateral force helped to influence the behavior of

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arm Saddam Hussein.”); *Statement by U.S. Ambassador John Negroponte*, U.N. Press Release SC/7564 (Nov. 8, 2002), available at <http://www.un.org/News/Press/archives.htm> (last visited Dec. 1, 2002) (“The resolution contained, he said, no ‘hidden triggers’ and no ‘automaticity’ with the use of force. The procedure to be followed was laid out in the resolution. And one way or another, Iraq would be disarmed. If the Security Council failed to act decisively in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security.”).

4. See Steven R. Weisman, *How Powell Lined Up Votes, Starting With His President's*, N.Y. TIMES, Nov. 9, 2002, at A1.

5. See Statements by President George W. Bush and U.S. Ambassador John Negroponte, *supra* note 3.

6. See Weisman, *supra* note 4.

7. See The United Nations Participation Act, 22 U.S.C. §§ 287–87e (1994).

8. U.N. CHARTER arts. 2, para. 4, 42, 51.

the Security Council. Second, the United States has maintained these theories even after the passage of Resolution 1441, sustaining their potential to change the laws governing the use of force. U.S. attempts to fashion new rules in response to a changing international security environment, while understandable, have not yielded a preferable alternative to the current legal regime governing the use of force. The U.S. arguments are unattractive because they are not characterized by any coherent limiting principle to protect the general prohibition on the use of force. There is, however, the possibility that no better alternative approach exists to alleviate the strain between international law and the altered imperatives of self-preservation.

Despite its recourse to the Security Council, the United States still claims it already has enough authority to unilaterally enforce existing Council resolutions and also a parallel right to act preemptively in self-defense.<sup>9</sup> Even if the United States obtains explicit Security Council authorization to use force under Chapter VII of the Charter, these purported rights may have assumed at least an informal role in international law. This is because, in threatening to make the Security Council irrelevant, these unilateral justifications likely helped to compel the Council to initiate decisive measures toward Iraq. It is thus vitally important to examine the international legal bases for the U.S.' proposed military action to determine whether its claims are valid under the circumstances or whether, despite their effectiveness in moving the Security Council, they threaten to obliterate the existing international legal restrictions on the use of force.

#### A. Background: The United States and Iraq after September 11th

Shortly following the September 11th attacks, Iraq was identified as another prime target for an armed attack by the United States.<sup>10</sup> Despite reports that one of the alleged hijackers met with Iraqi intelligence agents in Prague in early 2001,<sup>11</sup> to date, the Bush Administration has not made any statement that it has credible evidence indi-

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9. See President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3.

10. See William M. Arkin, *Should Iraq be Next?*, WASH. POST (Dec. 3, 2001), available at <http://www.washingtonpost.com/wp-dyn/nation/columns/dotmil> (last visited Oct. 1, 2002).

11. John Hendren, *U.S. Expands Aggressive Defense in Iraq; Military: Punishing Airstrikes First Stage of War, Analysts Say. Meanwhile White House Continues Effort to Link Baghdad, Al Qaeda*, L.A. TIMES, Sept. 27, 2002, at A17.

cating any Iraqi responsibility for the September 11th attacks.<sup>12</sup> Secretary of State Colin Powell has gone so far as to admit that he is unaware of any “smoking gun” linking Iraq to September 11th.<sup>13</sup> Similarly, no reports have emerged to connect Iraq with the anthrax mail attacks which terrorized the United States in the fall and winter of 2001.<sup>14</sup>

Despite the lack of connection between these attacks and Iraq, the tragic events of September 11th have altered the context of the United States–Iraq confrontation.<sup>15</sup> The resulting U.S. shift to an aggressive Iraq policy has forced it to advance legal justifications for a full-scale invasion of Iraq; justifications that place great strain on the coherence of the general prohibition on the use of force. To justify its policy toward Iraq and other hostile states, the Bush Administration has developed a new, multifaceted strategic doctrine, known as the “Bush Doctrine,” that advocates preemptive or preventive strikes against terrorists, states that support terrorists, and hostile states possessing WMD.<sup>16</sup> The United States has maintained provocative theo-

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12. Dana Priest, *U.S. Not Claiming Iraqi Link to Terror*, WASH. POST, Sept. 10, 2002, at A1 (reporting that CIA analysts are unable to validate reports that the Iraqi government has ties to al Qaeda); Walter Pincus, *No Link Between Hijacker, Iraq Found, U.S. Says*, WASH. POST, May 1, 2002, at A9; KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* xxi–xxii (2002).

13. Bill Keller, *The World According to Colin Powell*, N.Y. TIMES MAGAZINE, Nov. 24, 2001, at 63.

14. See POLLACK, *supra* note 12, at 364.

15. POLLACK, *supra* note 12.

16. President George W. Bush, Graduation address at the U.S. Military Academy (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/print/20020601-3.html> (last visited Aug. 31, 2002) (“Deterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nation or citizen to defend. . . . Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons or missiles or secretly provide them to terrorist allies. . . . If we wait for threats to fully materialize, we will have waited for too long. . . . In the world we have entered, the only path to safety is the path of action. And this nation will act.”); G. John Ikenberry, *America’s Imperial Ambition*, FOREIGN AFFAIRS, Sept./Oct. 2002, at 51–52 (“Even without a clear threat, the United States now claims a right to use preemptive or preventive military force . . . . The [Bush administration’s] worry is that a few despotic states—Iraq in particular, but also Iran and North Korea—will develop capabilities to produce weapons of mass destruction and put these weapons in the hands of terrorists. . . . [These regimes] might pass along these weapons to terrorist networks that are not deterred. Thus another emerging principle within the Bush administration: the possession of WMD by unaccountable, unfriendly, despotic governments is itself a threat that must be countered.”); Norman Podhoretz, *In Praise of the Bush Doctrine*, COMMENTARY, Sept. 2002, at 23–24 (“[T]he third [pillar of the Bush Doctrine] was the assertion of [the U.S.] right to preempt.”); Thomas E. Ricks and Vernon Loeb, *Bush Developing Military Policy of Striking First*, WASH. POST, Jun. 10, 2002, at A1; Mike Allen and Karen DeYoung, *Bush: U.S. Will Strike First at Enemies*, WASH. POST, June 2, 2002, at A1.

ries of unilateral action despite the passage of Resolution 1441 by the Security Council.<sup>17</sup> The fact that the United States chose to channel its Iraq policy through the Security Council is significant,<sup>18</sup> but it remains questionable whether international law has much effect on current U.S. policy.<sup>19</sup>

The current standoff between the United States and Iraq presents a useful case study to examine whether, considering the events of September 11th, these unilateral justifications are legally valid or whether existing international legal rules and institutions are adequate to address the challenges of the post-September 11th world. The United States has supplied several reasons for military action,<sup>20</sup> and its legal argument seems to have coalesced into a three-step approach. The starting point is that the United States already has sufficient authority by virtue of Iraq's "material breach" of existing Security Council resolutions and an independent right of preemptive self-defense.<sup>21</sup> Second, the United States acknowledges that Resolution 1441 requires the Security Council to convene in the event of Iraqi noncompliance, and, under such circumstances, the United States would appreciate the unambiguous legal cover that a new resolution explicitly authorizing force would provide.<sup>22</sup> Third, should explicit

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17. See President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3.

18. See Weisman, *supra* note 4.

19. See Michael Hirsh, *Bush and the World*, FOREIGN POLICY, Sept./Oct. 2002, at 20 ("Bush, to judge by his actions, appears to believe in a kind of unilateral civilization . . . the United Nations is an afterthought, treaties are not considered binding").

20. President George W. Bush, Address to the United Nations General Assembly (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html> (last visited Oct. 26, 2002). In his speech to the U.N., President Bush advanced several reasons for action against Iraq within the general context of Iraq's violation of existing Security Council resolutions: "[Saddam Hussein] has proven instead only his contempt for the United Nations, and for all his pledges. By breaking every pledge—by his deceptions, and by his cruelties—Saddam Hussein has made the case against himself."

21. See *id.*

22. See S.C. Res. 1441, U.N. Doc. S/RES/1441, at 13–14 (2002); *Statement by U.S. Ambassador John Negroponte*, U.N. Press Release SC/7564 (Nov. 8, 2002), *supra* note 3 ("The resolution contained, he said, no 'hidden triggers' and no 'automaticity' with the use of force. The procedure to be followed was laid out in the resolution. And one way or another, Iraq would be disarmed. If the Security Council failed to act decisively in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security."); Eric Black & Bob von Sternberg, *The Case Against Iraq*, RALEIGH NEWS & OBSERVER, Oct. 6, 2002, at 19A (quoting National Security Council spokesman Mike Anton as saying that because a new resolution would be forthcoming, "[g]oing into any length about the legal case is not that important.").

Security Council authorization for force not follow a report of Iraqi noncompliance, the United States asserts that it may still act on the aforementioned bases of existing Security Council resolutions and a right of preemptive self-defense.<sup>23</sup> This final step in the argument also implies a unilateral right to use force based on the failure of the Security Council to fulfill its responsibility to maintain international peace and security.<sup>24</sup> Thus, despite the passage of Resolution 1441, ambiguities still exist as to the legality of force against Iraq, and the United States purports that several justifications exist in parallel.

A thorough inquiry must evaluate these different arguments to determine whether they, individually or in the aggregate, give the United States a right to use force without new and explicit authorization from the Security Council or an armed attack by Iraq. Part II discusses the possibility that the United States is implicitly authorized to use force because of Iraq's violation of its obligations under UN Security Council resolutions.<sup>25</sup> Part III examines whether the failure of the UN Security Council to deal with the threat to international peace and security posed by Saddam's regime gives rise to a unilateral right of intervention.<sup>26</sup> Part IV reviews the international law governing states' rights of self-defense and evaluates whether those rules or an emerging rule allows the United States to exercise a right of preemptive self-defense. The United States asserts this right in response to the threat posed by Iraq itself, i.e., its aggressive tendencies combined with its pursuit of WMD,<sup>27</sup> as well as Iraq's support of terrorism, including the possibility that Iraq may provide terrorists with WMD for use against the United States.<sup>28</sup> Part IV also proposes a new rule that attempts to provide a mechanism for dealing with

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23. See *Statement by U.S. Ambassador John Negroponte*, U.N. Press Release SC/7564 (Nov. 8, 2002), *supra* note 3.

24. *Id.* ("If the Security Council *failed to act decisively* in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security.") (emphasis added).

25. President Bush, Address to the United Nations General Assembly, *supra* note 20.

26. *Id.* ("Will the United Nations serve the purpose of its founding or will it be irrelevant?").

27. *Id.* ("Saddam Hussein's regime is a grave and gathering danger. To assume this regime's good faith is to bet the lives of millions and the peace of the world in a reckless gamble. And this is a risk we must not take.").

28. *Id.* ("And if an emboldened [Iraqi] regime were to supply these weapons [of mass destruction] to terrorist allies, then the attacks of September 11th would be a prelude to far greater horrors.").

threats like Iraq that are inadequately addressed by the existing legal regime without surrendering completely to the discretion of individual states.

#### B. The Sources of International Law and the Capacity for Change

In order to evaluate the U.S. legal arguments, it is important to be aware of the nature of the applicable rules of international law and their capacity for change. The United Nations Charter is the primary source of international law governing the use of force.<sup>29</sup> Article 2(4) of the Charter generally prohibits the threat or use of force,<sup>30</sup> a prohibition qualified by uses of force authorized by the Security Council under Article 42<sup>31</sup> or as self-defense “if an armed attack occurs.”<sup>32</sup> In the *Nicaragua* case, the International Court of Justice identified the need to supplement the Charter provisions with customary international law.<sup>33</sup>

Customary international law consists of state practice and *opinio juris*.<sup>34</sup> *Opinio juris* can be generally understood as a sense of obligation that gives legal relevance to certain instances of state practice.<sup>35</sup> Most scholars agree that state practice consists of the actions and statements of states.<sup>36</sup> State practice need not be uniform to create a rule of customary international law, but a customary rule cannot be created if a large amount of state practice is in conflict with the purported rule.<sup>37</sup>

According to Professor Gray, a statement of condemnation by the Security Council or the General Assembly constitutes collective

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29. See THOMAS M. FRANCK, *RECOURSE TO FORCE* 2, 5 (2002).

30. U.N. CHARTER art. 2(4).

31. U.N. CHARTER art. 42.

32. U.N. CHARTER art. 51.

33. *Nicaragua v. United States of America*, 1986 I.C.J. 14, at 176 (June 27); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 4 (2000).

34. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 39 (7th ed. 1997). See also Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 EUR. J. INT'L L. 21, 28 (2002) (discussing the appropriate methodology for determining whether a right of unilateral humanitarian intervention exists). But see FRANCK, *supra* note 29, at 191 n.40 (impugning the relevance of *opinio juris* when reviewing the reaction of the Security Council or General Assembly to a particular use of force).

35. See MALANCZUK, *supra* note 34, at 44.

36. See Byers, *supra* note 34, at 30 (contrasting this prevailing view with that of writers such as Anthony D'Amato who insist that only physical acts constitute state practice).

37. MALANCZUK, *supra* note 34, at 40.

state practice that strongly indicates the illegality of a particular use of force.<sup>38</sup> In its 1971 *Namibia* Advisory Opinion, the International Court of Justice urged that the effect of a Security Council resolution must be drawn in large part from its language.<sup>39</sup> This approach is not as strict as the rule governing treaty interpretation, but it appears somewhat similar to the fundamental rule that treaties be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>40</sup>

Professor Thomas M. Franck argues that the meaning of the Charter can change through state practice: “the Charter will be subjected to continuous interpretation and adaptation through the member states’ individual and collective practice: their actions, voting, and rhetoric.”<sup>41</sup> The prohibition on the use of force, however, is a rule widely regarded as possessing the character of *jus cogens*, a legal principle so fundamental that states are not permitted to derogate from it.<sup>42</sup> Modifications of rules with the status of *jus cogens* are generally thought to require a higher standard of consistent state practice and *opinio juris* than other rules.<sup>43</sup>

Professor Byers identifies difficult issues that remain as to the relative significance that should be accorded to state practice; issues that have been brought to the fore by U.S. military action in the post-Cold War era. Are actions more powerful than statements?<sup>44</sup> Has the principle of sovereign equality eroded to the extent that the practice of a more powerful state is more significant than the practice of a less powerful state?<sup>45</sup> Is the legality of an action supported if states fail to condemn the action or provide only muted criticism?<sup>46</sup> These issues cannot be resolved in this paper. Suffice to say that the U.S. and international law commentators who tend to support the legality of its

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38. GRAY, *supra* note 33, at 15.

39. 1971 I.C.J. 15, ¶ 53 (Jan. 29) (“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect.”).

40. Byers, *supra* note 34, at 21, 23 (quoting art. 31(1) of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969)).

41. FRANCK, *supra* note 29, at 7–8 (illustrating his point by referring to the practice of interpreting abstentions by Security Council as not constituting a veto).

42. See GRAY, *supra* note 33, at 24.

43. Byers, *supra* note 34, at 35.

44. *Id.* at 31.

45. *Id.* at 32.

46. See *id.* at 35–36.

actions generally support an approach to international legal sources that, as Professor Ian Brownlie describes, “involves maximizing the occasions when the powerful actor will obtain ‘legal approval’ for its actions and minimizing the occasions when approval may be conspicuously withheld.”<sup>47</sup> The opposing view, which coincides with the interests of less powerful states, favors a stricter interpretation of the operative language of the Charter and Security Council resolutions and a high standard for changes in customary international law.<sup>48</sup> The current dialogue about Iraq is then a debate about the content and foundations of the law *and* its application to a particular circumstance.

## II. USE OF FORCE UNDER AUTHORITY OF THE UN SECURITY COUNCIL

### A. A Brief Survey of Events from the Gulf War to the Present

Before addressing the current situation, it is helpful to review the relevant events that followed the Persian Gulf War of 1990–91. On August 2, 1990, Iraq invaded and occupied Kuwait.<sup>49</sup> The United Nations Security Council responded by passing Resolution 660, which declared a breach of international peace and security and demanded Iraq’s immediate withdrawal from Kuwait.<sup>50</sup> The Security Council also passed Resolution 661, imposing sanctions on Iraq and reaffirming its commitment to Resolution 660.<sup>51</sup> Eventually, the Security Council found it necessary to pass Resolution 678, authorizing Mem-

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47. Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations*, 255 RECUEIL DES COURS 9, 49 (1995–I). For examples of commentators using an expansive purposive approach to the rules governing the use of force, see generally FRANCK, *supra* note 69, at 107 (often looking beyond the failure of states to express support for armed interventions to circumstances suggesting their approval or acquiescence; for instance, characterizing the state practice regarding anticipatory self-defense as ambiguous); Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction*, 92 AM. J. INT’L L. 725 (1998) (arguing that the prohibition on the use of force did not preclude the reactivation of coalition forces’ authorization to use force under Resolution 678 upon Iraq’s “material breach” of Resolution 687).

48. See generally GRAY, *supra* note 33. For example, unlike Franck’s view of anticipatory self-defense, Gray interprets the lack of explicit support for the theory not as a sign of ambiguity but as “a clear indication of the doubtful status of this justification for the use of force.” *Id.* at 112.

49. See POLLACK, *supra* note 12, at 36–37.

50. S.C. Res. 660, U.N. Doc. S/RES/660 (1990).

51. S.C. Res. 661, U.N. Doc. S/RES/661, at 1–2 (1990).

ber States cooperating with Kuwait to use “all necessary means” to implement Resolution 660.<sup>52</sup> On January 17, 1991, a United States–led coalition of states commenced hostilities against Iraq. Following weeks of aerial bombardment and a 100-hour ground campaign, Iraq agreed to a cease-fire on February 28th.<sup>53</sup>

The debates in the Security Council reveal that Resolution 678 clearly contemplated the use of force by Member States against Iraq.<sup>54</sup> Despite the fact that Resolution 678 referred to Chapter VII, some controversy arose over the legal basis for the coalition action and the lack of UN control over the operation.<sup>55</sup> Ambiguity exists as to whether the Security Council was acting under the authority of Article 42 of the UN Charter in particular, Chapter VII generally, or approving the exercise of collective self-defense by the participating states.<sup>56</sup> As compared with later events, however, the intervention by the United States–led coalition during the Gulf War appears well grounded in Security Council authorization.

The United States used pre- and post-cessate-fire Security Council resolutions to justify the majority of its military interventions in Iraq over the next decade. To legitimize these interventions, the United States claimed that the various Security Council resolutions gave rise to implied authorizations for the use of force.<sup>57</sup> Aside from the June 26, 1993, forcible response to a plot to assassinate former President George H.W. Bush,<sup>58</sup> the United States military interventions can be classified into two groups: (1) those justified as penalizing Iraqi non-compliance with Resolution 688, which demands an end to repression of Kurdish and Shi’ite minority groups; and (2) those justified as penalizing Iraqi non-compliance with Resolution 687, which requires Iraq to submit to the internationally supervised destruction of its WMD. These Security Council resolutions were inadequate as

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52. S.C. Res. 678, U.N. Doc. S/RES/678, at 1 (1990).

53. See POLLACK, *supra* note 12, at 44–46.

54. GRAY, *supra* note 33, at 153.

55. *Id.* at 154.

56. *See id.*

57. *Id.* at 191.

58. See Federation of American Scientists, *Operation Southern Watch*, at [http://www.fas.org/man/dod-101/ops/southern\\_watch.htm](http://www.fas.org/man/dod-101/ops/southern_watch.htm) (last visited Nov. 5, 2002). The Clinton administration learned of a failed attempt to assassinate former President Bush during his April 1993 visit to Kuwait. On June 26, 1993, U.S. warships launched 23 cruise missiles at the principal headquarters of the Iraqi Intelligence Service, which was charged with planning the assassination attempt. 16 missiles hit the target. Three landed in a residential area, killing at least nine civilians. See also GRAY, *supra* note 33, at 117.

justification for past U.S. interventions in Iraq, however. Resolution 1441 recently joined these resolutions, and is notable for its deliberate ambiguity.<sup>59</sup>

By finding Iraq to be in “material breach,” Resolution 1441 represents a concession by the other members of the Security Council to allow the United States to make the strongest case yet for implied authorization for force.<sup>60</sup> The problem remains that, like Resolutions 688 and 687, Resolution 1441 contains no explicit authorization. Considered in light of the general prohibition on the use of force, there is a strong case that conscious inclusion of “material breach” nevertheless fails to activate a unilateral right of intervention.

1. *Resolution 688, Safe Havens, No-fly Zones, and Desert Strike.* The Gulf War cease-fire gave way in March 1991 to revolts by elements of the Kurdish population in northern Iraq and Shi’ite groups in the south.<sup>61</sup> Saddam Hussein’s regime displayed considerable resiliency in recovering from its Gulf War defeat to brutally suppress the majority of the resistance within the month.<sup>62</sup> The Security Council responded by passing Resolution 688. It condemned the repression of Kurds and Shi’ites, demanded that Iraq end its repression of these groups, and called on Iraq to allow access to international humanitarian organizations.<sup>63</sup> Resolution 688 does not directly invoke Chapter VII and did not explicitly authorize force to implement its demands. Nevertheless, the United States, United Kingdom, and France used Resolution 688 to support the establishment of safe havens and the subsequent imposition of no-fly zones over the northern and southern thirds of Iraq’s territory.<sup>64</sup> Beginning in August 1992, the United Kingdom gradually articulated an additional justification for the intervention based on a putative right of humanitarian intervention.<sup>65</sup>

Since the institution of no-fly zones, clashes between U.S. and British warplanes and Iraqi anti-aircraft defenses have become commonplace.<sup>66</sup> The United States cited Resolution 688 as authorization

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59. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002).

60. See Weisman, *supra* note 4.

61. POLLACK, *supra* note 12, at 47–51.

62. *Id.* at 50–51.

63. S.C. Res. 688, U.N. Doc. S/RES/688, at 2 (1991); GRAY, *supra* note 33, at 191.

64. GRAY, *supra* note 33, at 191.

65. *Id.* at 29.

66. See *id.* at 30.

for forcible measures against Iraqi air defenses, even though the resolution does not authorize such use of force.<sup>67</sup> The sporadic clashes were punctuated in September 1996, by Operation Desert Strike, the largest U.S. intervention under color of Resolution 688.<sup>68</sup> Although the focus of the U.S. legal argument for action against Iraq seems to be on the Resolution 687/678 material breach theory,<sup>69</sup> the United States has cited compliance with Resolution 688 as one of the conditions for a peaceful resolution to the standoff.<sup>70</sup> Moreover, Resolution 1441 lists Resolution 688 as one of the “relevant resolutions” materially breached by Iraq.<sup>71</sup> Nevertheless, the conduct of Desert Strike and the response of the Security Council offer little support, if any, to the proposition that international law permits one or two states to enforce Security Council resolutions without express authorization.

In late August 1996, Iraq intervened on the side of the Kurdish Democratic Party (KDP) in a conflict between the KDP and the other main Kurdish militia group, the Patriotic Union of Kurdistan (PUK).<sup>72</sup> Roughly thirty thousand Iraqi troops moved against areas held by the PUK and the Iraqi National Congress.<sup>73</sup> Though Iraq’s actions against elements of the Kurdish minority seemed to constitute a clear violation of Resolution 688, the subsequent U.S. action was merely punitive in nature and did not directly protect the Kurds from Iraqi government repression.<sup>74</sup> The United States fired 44 cruise missiles against air defense and command and control targets in *southern* Iraq. In addition, U.S. and British forces expanded the *southern* no-

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67. *Id.* at 29.

68. Federation of American Scientists, *supra* note 58.

69. *See* Part II(B) & (C), *infra*.

70. *See* President Bush, Address to the United Nations General Assembly, *supra* note 20 (“If the Iraqi regime wishes peace, it will cease persecution of its civilian population, including Shi’a, Sunnis, Kurds, Turkomans and others—again as required by Security Council resolutions.”).

71. S.C. Res. 1441, U.N. Doc. S/RES/1441, at 1 (2002) (referring to “relevant resolutions” listed in the preamble, which include Resolution 688).

72. POLLACK, *supra* note 12, at 81–83.

73. Alain E. Boileau, Note & Comment, *To the Suburbs of Baghdad: Clinton’s Extension of the Southern Iraqi No-Fly Zone*, 3 ILSA J. INT’L & COMP. L. 875, 879 (1997); POLLACK, *supra* note 12, at 82.

74. Boileau, *supra* note 73; POLLACK, *supra* note 12, at 82 (“[T]he administration opted to mount a sizable air campaign against a range of targets, mostly in southern Iraq . . . to demonstrate to Saddam that he would pay a price for any aggression.”).

fly zone northward from the 32nd to the 33rd parallel.<sup>75</sup> Explaining the action, President Clinton explicitly identified the practical reasons for the intervention, but was silent as to the relationship between the plight of the Kurds and the strikes in the south.<sup>76</sup> The apparent reason for not striking around the endangered northern areas was the lack of sufficient forces nearby.<sup>77</sup>

The actual U.S. response, though attenuated from the humanitarian threat and punitive rather than protective, might be considered a better policy choice than doing nothing. The response of the Security Council does not represent the kind of consistent support that would seem necessary to establish an implied right of intervention, however. Of the Security Council members, only one permanent member, Great Britain, and three other members, Germany, Canada, and Japan, offered general support for the intervention.<sup>78</sup> France and Spain criticized the action as a hasty use of force,<sup>79</sup> and France soon withdrew completely from its role in patrolling the no-fly zones.<sup>80</sup> Meanwhile, Russia denounced the action as an “absolutely impermissible” unilateral use of force.<sup>81</sup> The objections to Desert Strike, especially by France which had initially been a partner in protecting the Kurds, illustrate the tenuous legal basis that Resolution 688 would offer a major U.S. intervention in Iraq today.

The frequency and scope of clashes in the no-fly zones increased after the United States and Britain expanded the rules of engagement for their aircrews in December of 1998.<sup>82</sup> Renewed Russian and Chinese protests were joined by a call from the Arab League to halt all activity not authorized by the Security Council.<sup>83</sup> The United States countered by reiterating that its actions were taken in support of, and in accordance with, Resolution 688.<sup>84</sup>

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75. Federation of American Scientists, *supra* note 58.

76. See Michael Cornell, Comment, *A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction*, 16 CONN. J. INT'L L. 325, 354 (2001).

77. POLLACK, *supra* note 12, at 82.

78. Boileau, *supra* note 73, at 890–91.

79. *Id.* at 891.

80. *Id.*

81. *Id.*

82. GRAY, *supra* note 33, at 191.

83. *Id.* at 191–92.

84. See U.N. Press Release SC/6683 (May 21, 1999), available at <http://www.un.org/News/Press/docs/1999/19990521.Sc66883.html> (last visited Dec. 14, 2002).

2. *Resolution 687, the Weapons Inspection Regime, and Desert Fox.* Passed in connection with the Gulf War cease-fire, Resolution 687 requires the destruction of Iraq's chemical, biological, and nuclear weapons and long-range ballistic missiles as well as Iraq's commitment not to develop such weapons in the future.<sup>85</sup> Iraq's compliance with Resolution 687 is a condition for lifting of the economic sanctions imposed by Resolution 661.<sup>86</sup> Resolution 687 led to the creation of the UN Special Commission (UNSCOM) and an International Atomic Energy Agency (IAEA) inspection team to monitor and verify Iraq's disarmament.<sup>87</sup>

Iraq repeatedly claimed to have complied with its disarmament obligations, but UNSCOM has repeatedly found Iraq to be concealing its weapons.<sup>88</sup> The United States and Britain responded to Iraq's intransigence with military intervention on two occasions.<sup>89</sup> The first incident consisted of cruise missile strikes on January 17, 1993.<sup>90</sup> In the following years, Iraq responded to the inspection efforts with a pattern of obstruction, deception, and bullying.<sup>91</sup> Iraq alleged that it had disclosed all information on its weapons programs on numerous occasions, trying to induce the weapons inspectors to conclude their work and leave the country for good.<sup>92</sup>

The suspicions of the weapons inspectors and Western leaders were confirmed in August, 1995 with the defection of General

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85. S.C. Res. 687, U.N. Doc. S/RES/687, at 5 (1991). The Security Council passed Resolution 687 on April 3, 1991, and Iraq accepted it without condition three days later. Specifically, the resolution requires Iraq to "unconditionally accept the destruction, removal, or rendering harmless, under international supervision" of its weapons of mass destruction. Weapons of mass destruction include its "ballistic missiles with a range greater than one hundred and fifty kilometers, and related major parts and repair and production facilities." See Cornell, *supra* note 76, at 327.

86. See S.C. Res. 687, U.N. Doc. S/RES/687, at 24, 28 (1991).

87. See Cornell, *supra* note 76, at 330. Resolution 699 confirmed that UNSCOM and IAEA inspectors had authority to implement the arms control provisions of Resolution 687, Section C. S.C. Res. 699, U.N. Doc. S/RES/699 (1991).

88. Christine Gray, *After the Ceasefire: Iraq, the Security Council and the Use of Force*, 65 BRIT. Y.B. INT'L L. 135, 152-54 (1994).

89. GRAY, *supra* note 33, at 192.

90. See Federation of American Scientists, *Cruise Missile Strike—17 January 1993*, Apr. 14, 1998, available at [http://www.fas.org/man/dod-101/ops/strike\\_930117.htm](http://www.fas.org/man/dod-101/ops/strike_930117.htm) (last visited Oct. 26, 2002). On January 17, 1993, the U.S. launched 46 Block II TLAM-C "Tomahawk" cruise missiles at the Zafraniyah Nuclear Fabrication Facility outside Baghdad. Most of the missiles hit the target, but one was apparently struck by Iraqi anti-aircraft fire and crashed into the Al Rasheed Hotel, killing at least two civilians, possibly more. *Id.*

91. See Cornell, *supra* note 76, at 333-34.

92. *Id.*

Hussein Kamel, head of all of Iraq's weapons programs.<sup>93</sup> Kamel disclosed Iraq's efforts to conceal the dimensions of its weapons programs, which included a persistent nuclear weapons program.<sup>94</sup> In the aftermath of Kamel's defection, Iraq admitted to having maintained an extensive biological weapons program and achieving significant advances in its ballistic missile development.<sup>95</sup>

The inspections program then proceeded sporadically, until deteriorating completely in 1998.<sup>96</sup> The Security Council passed Resolution 1154 on March 2, 1998, explicitly linking weapons inspection compliance with fulfillment of Resolution 687 and threatening the most severe consequences for continued non-compliance.<sup>97</sup> The United States had been trying since November 1997 to obtain Security Council authorization for force in response to Iraqi intransigence.<sup>98</sup> While Resolution 1154 threatened severe consequences, China, France, and Russia declared that it did not authorize force.<sup>99</sup> In addition to its failure to obtain a resolution authorizing force,<sup>100</sup> the U.S. government's efforts to secure authorization undermine the proposition that existing resolutions already provided a sufficient legal basis for the use of force.

Iraq continued to obstruct the inspection process, and in September of 1998 the Security Council passed Resolution 1205, which expressed alarm at Iraq's failure to comply and demanded that Iraq reverse its position.<sup>101</sup> Iraq eventually responded to UN pressure, not with compliance, but by ceasing all cooperation with UNSCOM that December.<sup>102</sup> This action precipitated a crisis resulting in Operation Desert Fox, the largest U.S. military action against Iraq since the Gulf War.

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93. *Frontline: Spying on Saddam*, P.B.S. ONLINE (1999), at <http://www.pbs.org/wgbh/pages/frontline/shows/unscom/experts/defectors.html> (last visited Oct. 3, 2002).

94. See Cornell, *supra* note 76, at 333–34.

95. *Id.*

96. See GRAY, *supra* note 33, at 192.

97. S.C. Res. 1154, U.N. Doc. S/RES/1154, at 2 (1998).

98. Remarks by Paul C. Szasz, *Legal Authority for the Possible Use of Force Against Iraq*, 92 AM. SOC'Y INT'L L. PROC. 136, 141 (1998).

99. *Id.* at 140–41.

100. *Id.* at 141.

101. S.C. Res. 1205, U.N. Doc. S/RES/1205, at 2 (1998).

102. BBC News, *Timeline: Iraq* (Aug. 2, 2002), available at [http://news.bbc.co.uk/2/hi/middle\\_east/737483.stm](http://news.bbc.co.uk/2/hi/middle_east/737483.stm) (last visited Sept. 23, 2002).

In early December 1998, UNSCOM evacuated its staff from Iraq in response to the Iraqi government's continued obstruction of weapons inspections.<sup>103</sup> The United States demanded that Iraq allow them to reenter, but Iraq refused. On December 16, 1998, the United States and United Kingdom commenced Operation Desert Fox, which consisted of four days of cruise missile strikes on missile factories, command centers and airfields.<sup>104</sup> The British legal justification alleged that Iraq was in material breach of Resolution 687, and the United States similarly asserted that its actions were authorized by existing resolutions.<sup>105</sup> In contemporaneous Security Council debates, the majority of states rejected the legality of the intervention.<sup>106</sup> The response of the Security Council thus prevented the formation of a rule granting implied authorization to the United States and United Kingdom to enforce Iraqi compliance with Security Council resolutions. The material breach theory retained sufficient support that the term "material breach" was eventually included in Resolution 1441 in 2002, however.<sup>107</sup> A review of the theory reveals that it contains flawed premises which prevent even the explicit use of the term from affirming the existence of a unilateral right of enforcement.

According to the material breach theory, the cessation of hostilities provided for in Resolution 687 was predicated on Iraq's acceptance of and compliance with the obligations contained therein. With a material breach of Resolution 687, proponents of the material breach theory conclude that the cessation of hostilities is revoked, and the "all necessary means" provision of Resolution 678 is reactivated. Resolution 678 authorized Member States co-operating with Kuwait to "use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security to the area."<sup>108</sup>

Thus, in providing material breach as a legal foundation for Desert Fox, the United States and United Kingdom were forced to argue that in 1990, before the primary obligations at issue had even been imposed on Iraq, the Security Council granted a right of unilateral military action against Iraq that could last through 1998 and beyond,

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103. *Id.*; POLLACK, *supra* note 12, at 92.

104. BBC News, *supra* note 102.

105. GRAY, *supra* note 33, at 192.

106. *Id.*

107. S.C. Res. 1441, U.N. Doc. S/RES/1441, at 1 (2002).

108. Cornell, *supra* note 76, at 355.

even after Iraq had been expelled from Kuwait. As a noted advocate of the material breach theory, Professor Ruth Wedgwood supported unilateral U.S. action on the grounds that the conditional nature of the 1991 cease-fire agreement, a cease-fire recognized in Resolution 687, enabled the United States to suspend the agreement upon material breach and resume military operations. It may comport with basic contract principles to argue that Iraq should not receive the benefits of the cease-fire while violating its principal provisions, but a detailed review of the argument reveals its flaws and tenuous assumptions.

Perhaps the most convincing argument against the theory of material breach is the actual language of Resolution 687. The resolution declares that a formal cease-fire “between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678,” would become effective with Iraq’s notification to the Secretary-General and the Security Council of its acceptance of the provisions of 687.<sup>109</sup> According to this language, the Security Council seems to act as an intermediary between the Gulf War antagonists. This might allow one to argue that the right of enforcement of the cease-fire arrangements accrues to a Member State cooperating with Kuwait, but the last paragraph of Resolution 687 vests the authority for its enforcement in the Security Council.<sup>110</sup> In paragraph 34 of the resolution, the Security Council “[d]ecides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.”<sup>111</sup> In short, Resolution 687 does not provide for a right of unilateral intervention that vests upon a breach by Iraq nor is it silent on the issue of authority to enforce its provisions. Instead, Resolution 687 explicitly provides that the Security Council will evaluate how best to implement the resolution and to secure peace and security in the region.<sup>112</sup> Unilateral U.S. efforts to coerce Iraqi compliance with Resolution 687 have been at odds with the approach prescribed by the resolution itself.

Moving beyond the language of Resolution 687 to its supposed purpose does little to support the theory of material breach. On the question of whether Iraq’s material failure to fulfill its cease-fire obli-

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109. S.C. Res. 687, U.N. Doc. S/RES/687, at 33 (1991).

110. *Id.* at 34 (1991). See Cornell, *supra* note 76, at 357.

111. S.C. Res. 687, U.N. Doc. S/RES/687, at 34 (1991).

112. *Id.* at 34 (1991).

gations automatically revives authorization for armed intervention, Professor Wedgwood's argument incorrectly assumes that the pre-Charter doctrine that material breach of a cease-fire allows an injured party to resume hostilities has survived in parallel with the Article 2(4) prohibition on the use of force.<sup>113</sup> It is more consistent with the language and purpose of the Charter to take the view that Article 2(4) fundamentally altered armistice doctrine. States are thus required to refrain from the use of force even if a counter-party commits a material breach of a cease-fire agreement short of an armed attack.<sup>114</sup> The explicit adoption by Resolution 1441 of the term "material breach"<sup>115</sup> has given greater weight to Professor Wedgwood's theory, but, as discussed below, not enough weight to justify implied enforcement of relevant Security Council resolutions.

Another critical premise in the material breach argument for the Desert Fox intervention was including Resolution 687 in the group of 'subsequent resolutions' referred to by Resolution 678. Resolution 678 was passed in 1990 primarily to make way for the coalition military action that ejected Iraq from Kuwait and remedied the primary breach of international peace and security. If the majority of Iraqi violations constituting the material breach are breaches of specific provisions of Resolution 687 or other post-678 resolutions (and President Bush seemed to focus on Iraq's violations of Resolution 687 in his address to the United Nations),<sup>116</sup> proponents of material breach theory are forced to argue that Resolution 678 authorized the use of force not only to implement Resolution 660 and other relevant resolutions leading up through 678, but also to enforce obligations that at the time had neither been offered by the Security Council nor accepted by Iraq. Such an approach seems speculative and far-fetched.

Resolution 678 does authorize states to "restore international peace and security to the area," but, coming as it does after the specific language regarding enforcement of Resolution 660 and other resolutions, it seems more like a catchall provision to provide sufficient authorization for the liberation of Kuwait and any related ac-

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113. Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 144 (1999).

114. *Id.*; David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 802, 822-23 (1996).

115. S.C. Res. 1441, U.N. Doc. S/RES/1441, at 1 (2002).

116. *See generally* President Bush, Address to the United Nations General Assembly, *supra* note 20.

tions. It is unlikely that the provision was intended to authorize force after the liberation of Kuwait for an indefinite period until Iraq complied with obligations that were not yet in existence.

Aside from flaws in the material breach theory, the specific facts of the Gulf War cease-fire weigh against an argument for unilateral enforcement. Resolution 686 clearly contemplated a temporary cease-fire and stated explicitly that Resolution 678 would remain in force until Iraq complied with the terms of 686.<sup>117</sup> Resolution 687 contained no such provision: it instituted a permanent cease-fire that became effective with Iraqi acceptance of the agreement and was not contingent on Iraqi compliance.<sup>118</sup> It is particularly telling that the Security Council rejected a U.S. proposal that would have authorized force if Iraq failed to comply with the cease-fire provisions.<sup>119</sup>

When this is taken into consideration, it is apparent that the U.S. government could not rely on the “all necessary means” provision of Resolution 678, a resolution passed roughly eight years earlier to allow for the imminent expulsion of Iraq from Kuwait. This view of the resolutions and their surrounding circumstances is not only the most reasonable interpretation; it is in harmony with the object and purpose of the UN Charter, which installed the Security Council, not great power subcontractors, as the primary manager of armed force in the international system.<sup>120</sup> Iraq should be penalized for its breach of the cease-fire, but it does not follow that a single state should be allowed to unilaterally craft and implement the punishment based on both its own estimation of the situation and its own political interests.

Professor Wedgwood also argued that unilateral U.S. action was justified because the prior practice of the UNSCOM regime was to rely on the threat and use of U.S. force to ensure Iraq’s compliance.<sup>121</sup> The Security Council has shown itself to be an organic and increasingly non-formalistic institution. Thus, an argument like Professor Wedgwood’s “prior practice” argument is worth considering. In 1993, the President of the Security Council responded to Iraq’s interference with inspections that threatened Iraq with “serious consequences” for

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117. S.C. Res. 686, U.N. Doc. S/RES/686 (1991).

118. S.C. Res. 687, U.N. Doc. S/RES/687 (1991); *see also* Lobel & Ratner, *supra* note 113, at 149.

119. Lobel & Ratner, *supra* note 113, at 149.

120. *See id.* at 134.

121. *See* Wedgwood, *supra* note 47, at 725.

its “continued defiance.”<sup>122</sup> Without any new authorizing resolution, coalition forces launched air strikes against Iraq.<sup>123</sup> Professor Wedgwood offers this symbiotic interaction between the Security Council and the United States–led coalition in 1993 as evidence corroborating a custom that obviated the need for a new authorizing resolution in 1998.<sup>124</sup> This, of course, ignores the practice of Security Council members in the intervening years, when support for United States–led enforcement measures steadily eroded. If Professor Wedgwood’s argument is based on practice and custom, then it would be possible for subsequent practice to foreclose action that, for the sake of argument, would have been considered valid in 1993. The practice of a majority of Council members in 1998, including China, France, and Russia, was that even a new, saber-rattling resolution such as Resolution 1154 (threatening Iraq with the “severest consequences” for non-compliance) was insufficient to act as “automatic authorization of the use of force against Iraq.”<sup>125</sup> If there were any remaining possibility that Desert Fox was authorized by state practice subsequent to Resolution 687, it is foreclosed by the fact that a majority of the members of the Security Council rejected the legality of the action.<sup>126</sup>

The arguments of the U.S. government and scholars like Professor Wedgwood probably seem attractive to anxious Americans who fear a catastrophic terrorist attack. The United States, however, like all other states, is bound by a general prohibition on the use of force that is contained in the UN Charter.<sup>127</sup> Such a prohibition may be ill-advised in a violent world, but it persists nevertheless. Unless we are to scuttle the current international legal order, it must weigh heavily in situations where overly creative arguments are advanced to justify the use of force. Where there is a conflict between Article 2(4) of the UN Charter and the quasi-contractual theory of material breach, Article 2(4) should prevail.

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122. *Note by the President of the Security Council*, U.N. Doc. S/25091, at 2 (1993).

123. Wedgwood, *supra* note 47, at 727.

124. *Id.* at 728.

125. *See Statement of China*, U.N. Doc. S/PV.3858, at 14 (1998); *see also* Lobel & Ratner, *supra* note 113, at 124.

126. GRAY, *supra* note 33, at 192.

127. U.N. CHARTER art. 2(4).

## B. Resolution 1441 and the Legality of a Future Forcible Intervention

If getting the UNSCOM inspectors back into Iraq was the goal of Operation Desert Fox, the operation was a failure.<sup>128</sup> Signaling the failure of forcible intervention to bring about Iraq's compliance with Resolution 687, the Security Council passed Resolution 1284 on December 17, 1999, which replaced UNSCOM with the UN Monitoring, Verification and Inspection Commission (UNMOVIC).<sup>129</sup> Three of the five permanent members of the Security Council, China, France, and Russia, abstained from the vote.<sup>130</sup> The inspections regime lay dormant until the autumn of 2002, when a vigorous new U.S. initiative toward Iraq resulted in the passage of Resolution 1441.<sup>131</sup> Given the divisiveness of the Iraq issue over the years, it is surprising that Resolution 1441 passed with a unanimous vote of 15–0, including Syria.<sup>132</sup>

The text of Resolution 1441 is notable for several reasons. First, it invokes Chapter VII of the UN Charter and recognizes that Iraq's non-compliance with its inspection obligations and its WMD proliferation activities constitute a threat to international peace and security. Second, the Council specifically invokes the language of material breach when it

*[d]ecides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991); including Resolution 687.*<sup>133</sup>

Third, the resolution places the burden of proof on Iraq to affirmatively demonstrate that it does not possess WMD or related materi-

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128. BBC News, *supra* note 102.

129. S.C. Res. 1284, U.N. Doc. S/RES/1284 (1999).

130. *Security Council Establishes New Monitoring Commission for Iraq Adopting Resolution 1284 (1999) by vote of 11–0–4*, Press Release, U.N. Doc. SC/6775 (Dec. 17, 1999), available at <http://www.un.org/News/Press/docs/1999/19991217.sc6775.doc.html> (last visited Oct. 26, 2002).

131. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002).

132. See Weisman, *supra* note 4 (describing the 15–0 vote as “extraordinary”).

133. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002) (“Recalling all its previous relevant resolutions, in particular its resolutions 661 (1990) of 6 August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991, 687 (1991) of 3 April 1991, 688 (1991) of 5 April 1991, 707 (1991) of 15 August 1991, 715 (1991) of 11 October 1991, 986 (1995) of 14 April 1995, and 1284 (1999) of 17 December 1999, and all the relevant statements of its President, Recalling also its resolution 1382 (2001) of 29 November 2001 and its intention to implement it fully”).

als,<sup>134</sup> and provides that “false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach.”<sup>135</sup> Fourth, it gives the UNMOVIC and IAEA inspection personnel wide latitude to inspect any site and to interview any person in Iraq, including the authority to remove an interviewee and his or her family from Iraq.<sup>136</sup> Fifth, it forbids Iraq from taking or threatening “hostile acts directed against any representative or personnel of the United Nations or the IAEA *or of any Member State taking action to uphold any Council resolution.*”<sup>137</sup>

Sixth, if Iraq is found to be in violation by making a false statement or omission in its mandatory disclosure or if the Council receives a report from the Executive Chairman of UNMOVIC or the Director-General of the IAEA of any Iraqi interference or failure to comply with its disarmament obligations, the Council has decided “to convene immediately . . . in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.”<sup>138</sup> Such violations will be considered with the understanding that “the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.”<sup>139</sup>

Finally, Resolution 1441 is notable for what it does not include, namely, an authorization for Member States to use “all necessary means” to ensure compliance. This omission did not result from a lack of effort by the United States to include the language. Facing opposition by France and other states to a resolution that provided automatic authorization for the use of force in the event of Iraqi non-compliance, the United States agreed to let the resolution proceed without the clear “all necessary means” language.<sup>140</sup>

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134. S.C. Res. 1441, U.N. Doc. S/RES/1441, at 3, 4 (2002).

135. *Id.* at 4.

136. *Id.* at 5.

137. *Id.* at 8 (emphasis added).

138. *Id.* at 12.

139. *Id.* at 13.

140. Weisman, *supra* note 4 (“Although the United States wanted a strong resolution, Secretary Powell made important concessions to the French and others to get their support. First, the administration dropped its insistence on calling for “all necessary means” to enforce its terms, code for military force. In addition, the Americans sought to accommodate the French

Subsequent interpretations of the resolution demonstrate how the drafting process deliberately left the issue of enforcement ambiguous.<sup>141</sup> The resolution invokes the term “material breach,” but the effect of that term is undermined by the conspicuous absence of the “all necessary means” language and a non-automatic procedure for enforcement. U.S. Permanent Representative to the UN John Negroponte admitted that, in the event of Iraqi noncompliance with 1441, there were no hidden triggers or automatic authorizations for force. Instead, the Council is to consider the matter in accordance with the resolution.<sup>142</sup> Both Ambassador Negroponte and President Bush maintained, however, that if the Security Council fails to enforce compliance, the United States would then be able to intervene to enforce the resolutions and defend itself.<sup>143</sup> Under this conception of Resolution 1441, the convening of the Security Council is little more than a formality; force may be used even if the Council decides not to authorize it. The United States apparently finds a meaningful difference between automatic recourse to force, which was rejected in the drafting of Resolution 1441, and recourse to force after the Security Council has fulfilled a mere procedural obligation to convene. This distinction is strained at best, and it also seems to conflict with the views of most other Security Council members.

France believed that the non-automatic, two-stage approach was meant “to ensure that the Security Council maintains control of the process at each stage.”<sup>144</sup> It is hard to see how the Security Council would maintain control if the United States could use force regardless of what the Council decides. Russia emphatically stated that “the resolution that has just been adopted does not contain any provisions about automatic use of force,” but did not comment on whether indi-

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demand for a two-stage process in which the Security Council would have to be convened to discuss what to do if Iraq rebuffed the inspectors or was shown to have illegal weapons.”)

141. *Id.* (describing how the U.S. exchanged the explicit “all necessary means” language for “little triggers” for force, such as Iraq’s continuing material breach and the potential for Iraqi misstatements or omissions to constitute a further material breach).

142. *Statement by U.S. Ambassador John Negroponte*, U.N. Press Release SC/7564 (Nov. 8, 2002), *supra* note 3.

143. *Id.* (“If the Security Council failed to act decisively in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security.”); President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3.

144. The Rationale for the U.N. Resolution on Iraq, in *The Diplomats’ Own Words*, N.Y. TIMES, Nov. 9, 2002, at A10 (statement by Ambassador Jean-David Levitte of France).

vidual states could use force if the Security Council met and did not provide authorization.<sup>145</sup> Syria stated that it received reassurance from the United States, United Kingdom, France and Russia that Resolution 1441 “would not be used as a pretext to strike Iraq, and does not constitute a basis for any automatic strikes against Iraq.”<sup>146</sup> No other state affirmed the U.S. view that Member States could use force if the Security Council failed to provide explicit authorization.<sup>147</sup>

Proponents of the U.S. view might argue that, in spite of the lack of explicit support for the U.S. interpretation of Resolution 1441, the consent of the Council to include the “material breach” language constituted a tacit acknowledgement that the United States could use force if the Council failed to act. Such an approach purports to alter the *jus cogens* prohibition on the use of force on the basis of a largely imperceptible—and possibly nonexistent—agreement among the members of the Council that finds little support in the resolution or the statements of the other Council members. If the Council were to ultimately concede that “material breach” was included to allow the United States to use force if the Council demurred, it would set a dangerous precedent that the subtlest ambiguity in a resolution may support the use of force. As Professor Michael Byers and Simon Chesterman observe, the unrivaled power of the United States may be substantially lowering the standard for the modification of international law;<sup>148</sup> perhaps to the extent where a nod and a wink may provide an exception to the prohibition of the use of force. As it stands now, however, Resolution 1441 is unable to compensate for the failure of earlier resolutions to provide implied authorization for the use of force against Iraq.

Even if one accepts, *arguendo*, the U.S. position that Resolution 678 allows for unilateral military action to enforce its provisions, the likely U.S. intervention would be of such a scope as to overwhelm any

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145. *Id.* (statement by Ambassador Sergey Lavrov of Russia).

146. *Id.* (statement by Deputy Representative Fayssal Mekdad of Syria).

147. *See id.* (the United Kingdom only expressed its expectation that the U.N. would take action in the event of Iraqi noncompliance); U.N. Press Release SC/7564 (Nov. 8, 2002), *supra* note 3.

148. *See* Michael Byers and Simon Chesterman, *Changing the rules about rules? Unilateral humanitarian intervention and the future of international law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 192 (Holzgrefe & Keohane eds., forthcoming 2003) (“The United States, and at least some authors, may also be seeking a degree of *formal* recognition for the greater influence of the actions and opinions of powerful states in the formation of customary international law”).

suggestion that it was intended to ensure compliance with the weapons inspection regime,<sup>149</sup> thus undermining the premise of the intervention. Forcible U.S. intervention will likely be pursued to bring about a comprehensive regime-change in Iraq; to affect an end-game to the costly standoff between Saddam Hussein and the United States.<sup>150</sup> U.S. practice in the conduct of the Gulf War reveals the internal inconsistency of such a policy.

The active provision in Resolution 678 is the permission for Member States to use “all necessary means” to ensure compliance with the Security Council resolutions.<sup>151</sup> The United States–led coalition forces did not continue their offensive through to Baghdad, however, in part because such a move would have exceeded their UN mandate.<sup>152</sup> Kenneth Pollack’s description of the decision to conclude the Gulf War is illuminating:

[T]here was little question that coalition forces could have taken Baghdad, and done so quickly. But the Bush administration chose not to. In fact, as President Bush and his national security adviser, Brent Scowcroft, have written, they never believed it was an option: the mandate from the United Nations was to liberate Kuwait. Neither the coalition nor the American people were prepared to change the government of Iraq by force.<sup>153</sup>

If the “all necessary means” provision of Resolution 678 did not permit the forcible removal of Hussein from power in the course of Ku-

149. See Television Interview by Jim Lehrer with Condoleeza Rice, U.S. National Security Adviser, PBS’s *Newshour with Jim Lehrer*, Mar. 11, 2002 (“We’ve been down this road before, and there is nothing in Iraq’s past or present that suggests that they’re serious about weapons inspections that would make clear that they have no weapons of mass destruction.”); see also television interview by Tim Russert with Colin Powell, U.S. Secretary of State, NBC’s *Meet the Press*, Feb. 17, 2002 (“And until [the weapons development] stops—and, frankly, we believe, as a U.S. position, until that regime is changed, then his neighbors have much to fear, and we should be fearful, too, because the weapons he is developing could well fall into the hands of terrorists who might be able to use them.”).

150. See Peter Slevin, *Powell Casts Attack on Iraq as ‘Liberation’*, WASH. POST, Sept. 20, 2002, at A20 (describing testimony by Secretary of State Colin Powell to the House International Relations Committee in which Secretary Powell declared that, with regard to U.S. plans for Iraq, “[w]e understand the implications of such a change-of-regime action.”).

151. S.C. Res. 678, U.N. Doc. S/RES/678, at 1 (1990).

152. POLLACK, *supra* note 12, at 46; Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT’L L. 452, 468 (1991) (“[T]he principles of the Charter require respect for ‘sovereign equality’ and the right of states to political independence and territorial integrity. These principles and the related Charter purposes may be considered to limit the authority of the Council to impose a regime on the defeated aggressor, even if the leaders responsible for aggression and war crimes might be subject to prosecution by victim states. The people of the country would still be entitled to self-government and basic political rights.”).

153. POLLACK, *supra* note 12, at 46.

wait's liberation, it does not permit a forcible regime change a decade later.

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Implied Security Council authorization under the ambit of Resolution 687 was insufficient to justify Operation Desert Fox, and it is similarly incapable of supporting future U.S. military intervention in Iraq. Resolution 1441 makes implied authorization a somewhat closer question, but it is still an unconvincing argument in light of the Council's conscious decision to omit an explicit "all necessary means" authorization for force.

### III. AN INDEPENDENT RIGHT TO USE FORCE ARISING FROM THE INEFFECTIVENESS OF THE SECURITY COUNCIL

As discussed earlier, existing Security Council resolutions are insufficient to authorize a U.S. military intervention in Iraq. Many provisions of those resolutions remain unenforced, however, and Saddam Hussein's regime apparently continues to starve and repress Iraqi civilians, develop WMD, and support terrorism.<sup>154</sup> Some might argue that by permitting Saddam's regime to remain in power, the Security Council has manifestly failed in its task to ensure international peace and security. Such an argument would look to the United States, as the world's lone superpower,<sup>155</sup> to overcome the failure of the Security Council and use force unilaterally to topple Saddam's regime. The framers of the UN Charter did not envision a system in which one state could unilaterally change the government of another state in the event that the Security Council failed to act.<sup>156</sup> Instead they gave the

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154. See generally *A Decade of Deception and Defiance: Saddam Hussein's Defiance of the United Nations*, Background Paper for President George W. Bush's address to the United Nations General Assembly on September 12, 2002 (Sept. 12, 2002), available at [www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf](http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf) (last visited Dec. 14, 2002) (enumerating Iraq's violations of its obligations under various Security Council resolutions).

155. Byers, *supra* note 34, at 39 (discussing the potential that the U.S. would use its superpower status to create a unique set of legal rules for itself).

156. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW & THE USE OF FORCE* 34 (1993) ("[T]he delegates of the San Francisco Conference were convinced that force was simply too destructive to be considered an acceptable means of pursuing changes or advancing other policy. Force was not to be used to gain territory, to change the government of another state—no matter how 'bad' that government may have been—or even to right a past 'wrong.' Such uses of force were considered 'aggression' or, as Professor Myres McDougal terms them, *uses of force for 'value extension,' and were prohibited. Instead, force was to be used*

Security Council primary responsibility for the maintenance of international peace and security<sup>157</sup> and allowed states to act unilaterally only if they were attacked first by another state.<sup>158</sup> Professor Franck identifies the tension between the Charter's insistence on a non-violent order and the imperatives of justice: "[i]n practice, the problem of injustice in the operation of the Charter has turned out to be manifest less in unconscionable actions of the Council than in its inaction owing to the veto."<sup>159</sup> In light of the deplorable behavior of Saddam's regime, the effectiveness of the Security Council can be legitimately questioned. This section demonstrates, however, that no rule of customary international law permits the United States to use force unilaterally to advance its conception of the interests of the international community.

Some situations present such a compelling moral or political case that it is tempting to support intervention even if it violates existing international law. With regard to NATO's intervention in Kosovo in 1999, the concept of exceptional illegality would allow the humanitarian goals of the intervention to mitigate the unlawful acts.<sup>160</sup> Similarly, the international community seems to have benefited from Israel's unlawful destruction of Iraq's nuclear reactor at Osirak. The past decade of confrontation between the United States and Iraq would likely have been much more frightening if Israel had not acted.<sup>161</sup> As this confrontation reaches a climax, the Bush Administration claims that Iraq poses such a grave threat that it will act alone if the Security Council is unable or unwilling to address the situation.<sup>162</sup>

Fearing that Iraq may collaborate with a terrorist group such as al Qaeda,<sup>163</sup> or directly attack the United States or Iraq's neighbors in

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*only for 'value conservation,' for the preservation of the existing political and territorial status quo, either through the exercise of self-defense or as determined by the Security Council.*") (emphasis added).

157. U.N. CHARTER art. 39.

158. U.N. CHARTER art. 51.

159. FRANCK, *supra* note 29, at 16.

160. *See* Byers and Chesterman, *supra* note 148, at 198–99.

161. *See* POLLACK, *supra* note 12, at 369.

162. *See* President Bush, Address to the United Nations General Assembly, *supra* note 20 ("The purposes of the United States should not be doubted. The Security Council resolutions will be enforced—the just demands of peace and security will be met—or action will be unavoidable. And a regime that has lost its legitimacy will also lose its power.").

163. *See* President George W. Bush, Remarks by the President on Iraq in Cincinnati, Ohio (Oct. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html> (last visited Oct. 26, 2002) ("Saddam Hussein is harboring terrorists and the instruments of ter-

the Middle East, the United States has argued that it should not be forced to sit and wait until Saddam Hussein acquires a nuclear weapon before it addresses the threat he represents.<sup>164</sup> Although the U.S. position is based in part on a claim of self-defense,<sup>165</sup> President Bush has openly questioned the relevance of the United Nations: “All the world now faces a test and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced or cast aside without consequence? Will the United Nations serve the purpose of its founding or will it be irrelevant?”<sup>166</sup> This statement from the United States implies that the international community should not be forced to risk a catastrophic attack because of the institutional shortcomings of the Security Council. In discussing Resolution 1441, the United States stated that it would be legitimate for it to “protect world peace and security” if the Security Council “failed to act decisively.”<sup>167</sup> President Bush reinforced this view in his response to the passage of Resolution 1441 by the Security Council: “[i]n confronting this threat, America seeks the support of the world. If action becomes necessary, we will act in the interests of the world.”<sup>168</sup>

The UN Security Council is the institution designated by the UN Charter to identify and address threats to international peace and security.<sup>169</sup> The Charter enables the Security Council to authorize states to take forceful measures to enforce its will.<sup>170</sup> Given the frequency of interstate and intrastate conflict since 1945, some observers understandably perceive that the UN has failed as a legal regime for regu-

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ror, the instruments of mass death and destruction. And he cannot be trusted. The risk is simply too great that he will use them, or provide them to a terror network.”)

164. President Bush, Address to the United Nations General Assembly, *supra* note 20. See also POLLACK, *supra* note 12, at 418 (“This is the problem we face: by the time Saddam truly is threatening, it will be too late to do anything about it.”).

165. *The National Security Strategy of the United States of America* (Sept. 24, 2002), at <http://www.whitehouse.gov/nsc/nss.html> (last visited Oct. 21, 2002).

166. President Bush, Address to the U.N. General Assembly, *supra* note 20.

167. *Statement by U.S. Ambassador John Negroponte*, U.N. Press Release SC/7564 (Nov. 8, 2002), *supra* note 3 (“If the Security Council failed to act decisively in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security.”).

168. President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3.

169. U.N. CHARTER art. 39.

170. U.N. CHARTER art. 42.

lating the use of force in the international system.<sup>171</sup> Much of this apparent failure can be attributed to the paralytic effect of the veto power.

The UN Charter gives the five permanent members of the Security Council the power to veto any substantive resolution.<sup>172</sup> This provision creates a major institutional impediment to the Security Council's effectiveness in managing a global system of collective security.<sup>173</sup> Moreover, the voting scheme in the Security Council is an area where international law and politics are heavily mixed.<sup>174</sup> Although the veto exists to allow a permanent member to block deeply divisive resolutions that would otherwise move the member to withdraw from the UN,<sup>175</sup> permanent members can just as easily cast a veto against a measure in which they have marginal interest. For example, China may never actually fight a war alongside Iraq, but it could still veto a resolution on Iraq as a check on U.S. power or, perhaps conscious of its own internal security concerns, to inhibit the development of interventionist rules governing the use of force.

In the current circumstances, the United States does not completely trust the Security Council to identify and deal with the threat posed to international peace and security by Saddam Hussein's regime. The primary reason for this dilemma is that China, France, and Russia have veto power. Since these countries perceive themselves to be unlikely targets for future Iraqi attacks, they have a greater willingness to assume that Iraq does not pose a sufficiently imminent or concrete threat to warrant the use of force. The United States, fearing cataclysmic attacks against itself and possibly Iraq's neighbors, has a much different calculus of risk:

We could wait and hope that Saddam does not give weapons to terrorists, or develop a nuclear weapon to blackmail the world. But I'm convinced that is a hope against all evidence. . . . [T]here can be no peace if our security depends on the will and whims of a ruthless

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171. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 540-41 (2002).

172. U.N. CHARTER art. 27, ¶ 3 (The five permanent members are China, France, Russia (as successor to the USSR), the United Kingdom, and the United States).

173. See AREND & BECK, *supra* note 156, at 51-52.

174. JOSEPH S. NYE, UNDERSTANDING INTERNATIONAL CONFLICTS 146-47 (1997) (describing the tendency of states to reach conclusions of legal significance based on their political allegiance during the Cold War).

175. *Id.* at 146.

and aggressive dictator. *I'm not willing to stake one American life on trusting Saddam Hussein.*<sup>176</sup>

Consequently, the United States is much less demanding in terms of the factual predicate required to justify a strike on Iraq.<sup>177</sup> The problem with the U.S. argument is that it ultimately invests all states with a unilateral right both to determine a threat to international peace and to take action against the threat. Such a development would effectively return the international legal order to its nineteenth century condition, permitting states to attack each other based on anxiety about their neighbors' military strength and intentions.

Under this line of reasoning, it would be hard to differentiate a U.S. strike on Iraq from an Indian strike on Pakistan or even an Iraqi strike on Israel, a nuclear-armed country that is openly hostile to Iraq and even bombed Iraq in 1981.<sup>178</sup> Surely, one could try to distinguish Israel's nuclear program from Iraq's by arguing that Israel's nuclear program was justified as a response to its neighbors' attempts to destroy its existence. In defining the "rogue" states that would be subject to its expanded right of self-defense, the United States similarly attempted to single out "aggressive" states that possess WMD as targets for unilateral action.<sup>179</sup> Such normative distinctions, however, could easily become lost in a system where individual states are sole arbiters of what constitutes a threat to peace and security.

A similar concern is voiced by those who oppose a purported right of unilateral humanitarian intervention, and the failure of this theory to establish itself as a rule of customary international law further undermines the U.S. claim of a right to act unilaterally against Saddam's regime on behalf of the interests of the international community.

To override the UN Charter's prohibition on the use of force, a right of unilateral humanitarian intervention would generally have to acquire *jus cogens* status through the overwhelming support of states.<sup>180</sup> State practice has come up far short of that threshold.<sup>181</sup> Opponents of an independent right of forcible humanitarian intervention

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176. President Bush, Remarks on Iraq in Cincinnati, *supra* note 163 (emphasis added).

177. See President Bush, Graduation address at the United States Military Academy, *supra* note 16. See also Allen & De Young, *supra* note 16.

178. GRAY, *supra* note 33, at 114.

179. The National Security Strategy of the United States, *supra* note 165.

180. Byers & Chesterman, *supra* note 148, at 180, 183.

181. *Id.* at 183-84.

further criticize the proposition as an imprudent expansion of the legitimate use of force with limitless potential for misuse.<sup>182</sup> These opponents echo the fears expressed by the International Court of Justice over fifty years ago in the *Corfu Channel* case in response to the United Kingdom's claim of a right to intervene in Albanian waters to retrieve evidence in connection with the destruction of two British warships:

[The ICJ] can only regard the alleged right of intervention as the manifestation of a policy of force such as has in the past given rise to most serious abuses and such as cannot find a place in international law. It is still less admissible in the particular form it would take here—it would be reserved for the most powerful states.<sup>183</sup>

In the *Nicaragua* case in 1986, the ICJ concluded that this statement referred to the illegality of intervention in general.<sup>184</sup>

The 1991 intervention by the United States, the United Kingdom, and France in northern Iraq to create a safe haven for the Kurds was only partially justified by the United Kingdom as humanitarian intervention, and this example offers meager support for the existence of a general right.<sup>185</sup> In 1999, NATO bombed targets in Kosovo and Serbia to protect Kosovar Albanians from repression.<sup>186</sup> NATO Member States were sufficiently wary of an independent right of humanitarian intervention that they took great care to limit the precedential value of the Kosovo action.<sup>187</sup> In addition to NATO's reluctance to assert the existence of a right beyond the specific case of Kosovo, the intervention was bitterly opposed by Russia and the non-aligned states.<sup>188</sup> UN Secretary-General Kofi Annan commented that "enforcement actions without Security Council authorization threaten the very core of the international security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force."<sup>189</sup>

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182. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 272–73 (3d. ed. 2001) (discussing NATO's intervention in Kosovo).

183. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 34 (Apr. 9); see also GRAY, *supra* note 33, at 25.

184. *Nicaragua*, *supra* note 33, at 202; see also GRAY, *supra* note 33, at 25.

185. Byers & Chesterman, *supra* note 148, at 183–84.

186. *Id.* at 177.

187. *Id.* at 199.

188. *Id.* at 184.

189. *Report of the Secretary General on the work of the Organization*, U.N. GAOR, 54th Sess., Supp. No. 1, ¶ 66, U.N. Doc. A/54/1 (1999).

Professor Jules Lobel and Michael Ratner argue that, even in a rare case that was justified on political and moral grounds, such considerations should serve only as mitigating factors.<sup>190</sup> A comprehensive prohibition of humanitarian intervention should then prevail to maintain the integrity of the broader prohibition on the use of force, so that Article 2(4) is not eroded by a mixture of benign and duplicitous interventions.<sup>191</sup> Professor Byers and Simon Chesterman conclude that:

a select group of states (such as Western liberal democracies, or perhaps the United States alone) agreeing on criteria [for intervention] amongst themselves—would seriously undermine the current system of international law: It would also greatly undermine the position of the United Nations as an effective organization in the field of peace and security, after the decade in which, despite some obvious failures, it achieved more than in the previous half-century.<sup>192</sup>

These criticisms of NATO's use of force in Kosovo reflect concerns about the impact of allowing one state, or a small group of states, to claim the right both to define the interests of the international community and to use force in pursuit of those interests outside of the Charter framework. The U.S. claim to protect the world from the threat posed by Iraq raises similar fears. Just as with the Kosovo intervention, insufficient legal authority exists to support such a claim. The September 11th terrorist attacks may have reinforced the proposition that the UN Charter system is ill-equipped to deal with contemporary security threats, but we must ask whether proposed alternatives to the existing legal framework are superior solutions or just gateways to a more chaotic system.

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It is encouraging that the U.S. engagement of the Security Council resulted in Resolution 1441, but the United States persists in maintaining a parallel right to enforce the interests of the international community if the Security Council is immobilized by the veto.<sup>193</sup>

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190. See Lobel & Ratner, *supra* note 113, at 137.

191. See *id.*

192. Byers and Chesterman, *supra* note 148, at 202.

193. See President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3; Statement by U.S. Ambassador John Negroponte, *supra* note 3 (“If the Security Council failed to act decisively in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or

Unilateral action may seem justified in light of the threat presented by Iraq, but there are countervailing risks in creating a rule of international law that gives unilateral enforcement powers to any state strong enough to use them. If Iraq presents the uniquely grave threat that the United States says it does,<sup>194</sup> then the United States should be able to convince and cajole the permanent members of the Security Council to support a resolution subsequent to Resolution 1441 that specifically authorizes the use of force under Chapter VII of the Charter. If the Council remains immobilized by the threat of veto, the approach proposed in Part IV offers a more measured procedure for unilateral action than the highly discretionary and potentially arbitrary theory of the United States.

### III. SELF-DEFENSE

The most provocative claim of the United States after September 11th is that it is legally justified in exercising a right of self-defense to attack hostile “rogue” states and states that harbor terrorists even if the United States has not been attacked. As with its claimed right to enforce the interests of the international community, the United States maintains a right of preemptive self-defense in parallel with the process set forth in Resolution 1441.<sup>195</sup> Throughout this section, it is important to remember the axiom that the UN Charter is not a suicide pact. The Charter will not function if states feel that the fulfillment of Charter obligations may come at the cost of their survival. This sentiment underlies the self-defense exception of Article 51. The International Court of Justice considered this proposition in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*: “Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake.”<sup>196</sup> The September 11th terrorist attacks influ-

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*to enforce relevant United Nations resolutions and protect world peace and security.”*) (emphasis added).

194. President Bush, Remarks on Iraq in Cincinnati, *supra* note 163.

195. See President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3; Statement by U.S. Ambassador John Negroponte, *supra* note 3 (“If the Security Council failed to act decisively in the event of further Iraqi violation, *the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security.*”) (emphasis added).

196. 1996 I.C.J. 226, ¶ 96 (July 8).

enced this current of thought in a way unlike any previous terrorist attack. For the foreseeable future, the United States will no longer conceive of terrorism as merely a sporadic series of pinpricks, but rather focus on the potential of terrorist attacks to inflict catastrophic destruction.<sup>197</sup>

September 11th presents a challenge for international law scholars. Future U.S. responses can no longer be dismissed as the heavy-handedness of a reactionary government with no respect for international law. International law scholarship must adapt to address legitimate U.S. security concerns or else risk letting the United States establish new practices in a vacuum. Professor Philip Bobbitt identifies the challenge of creating a new legal regime for post-Cold War era, in which the international community now faces undeterrable threats.<sup>198</sup> Bobbitt observes that two distinct temptations will be to spiral into “a chaos of self-help” or, alternatively, to “use the discredited multilateral institutions of the nation-state as a way of frustrating action in order to control the acts of its strongest member, the United States.”<sup>199</sup> The multilateral institutions of the nation-state should not, however, be discarded when the alternative offered by the United States is so standardless as to be tantamount to inviting the chaos of self-help.

#### A. Classic, Anticipatory and Precautionary: Self-defense Under the UN Charter and Customary International Law

Aside from use of force authorized by the Security Council under Article 42, self-defense as set forth in Article 51 constitutes the principle exception to the Charter’s general prohibition on the threat or use of force. Article 51 explicitly states that the other provisions of Chapter VII do not prejudice a state’s inherent right of self-defense to an armed attack.<sup>200</sup> On its face, Article 51 permits forcible countermeasures only in response to an armed attack.<sup>201</sup> Given the ab-

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197. See President Bush, Address to the United Nations General Assembly, *supra* note 20 (“[I]f an emboldened regime were to supply [weapons of mass destruction] to terrorist allies, then the attacks of September 11th would be a prelude to far greater horrors.”).

198. PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 820–21 (2002).

199. *Id.* at 821.

200. U.N. CHARTER art. 51.

201. See U.N. CHARTER art. 51; LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 295 (2d ed. 1979).

sence of an armed attack by Iraq in the current circumstances, the validity of anticipatory self-defense must be examined.<sup>202</sup>

While a majority of scholars adopt a narrow construction of Article 51, Professor Dinstein points to a significant number of scholars who believe that customary international law expands the scope of circumstances permitting a state to act forcibly in self-defense.<sup>203</sup> In particular, these scholars argue that the right of self-defense is exercisable in anticipation of an imminent armed attack (anticipatory self-defense).<sup>204</sup> Professor Dinstein and the balance of international law publicists conclude that self-defense can only be exercised in response to an armed attack.<sup>205</sup> They are persuaded by the clarity of Article 51 and the overall intent of the UN Charter to narrow the use of force in international affairs.

Beyond the armed attack predicate, self-defense requires two principal elements: necessity and proportionality.<sup>206</sup> Famously set forth in the correspondence between the United States and Great Britain regarding the *Caroline* incident in 1837,<sup>207</sup> these requirements remain a part of customary international law.<sup>208</sup> Necessity requires that the use of force must be the response of last resort to an armed attack,<sup>209</sup> and prevents self-defense from justifying retaliatory or punitive uses of force.<sup>210</sup> Proportionality requires that the force used to repel the armed attack must bear a rational relationship to the level of threat and not inflict disproportionate harm.<sup>211</sup> The response does not, however, have to mirror the mode of the attack.<sup>212</sup>

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202. DINSTEIN, *supra* note 182, at 165.

203. *See id.* at 167 n.51 (citing D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 187–92 (1958); M.S. MCDUGAL AND F.P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232–41 (1961); J. STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 44 (1958)).

204. *See generally* BOWETT, *supra* note 203 (arguing that the inherent right of self-defense continues to include a right of anticipatory armed measures).

205. DINSTEIN, *supra* note 182, at 168.

206. Nicaragua, *supra* note 33, at 122–23; GRAY, *supra* note 33, at 105; *see also* MALANCZUK, *supra* note 34, at 316.

207. *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89; GRAY, *supra* note 33, at 105.

208. GRAY, *supra* note 33, at 106.

209. Jennings, *supra* note 207.

210. GRAY, *supra* note 33, at 106.

211. *Id.*

212. MALANCZUK, *supra* note 34, at 317.

It is sometimes noted that in the *Caroline* case, no armed attack had occurred prior to the defensive use of force.<sup>213</sup> While one could interpret the facts of the case to indicate that attacks had already occurred against British territory,<sup>214</sup> the *Caroline* incident is still used as an early example of anticipatory, or preemptive, self-defense.<sup>215</sup> In claiming a right of preemptive self-defense, the Bush Administration explained its position as if the existence of such a right was a foregone conclusion and the only issue was the adaptation of the principle to the current threats facing the United States.<sup>216</sup> On the contrary, the international community is deeply divided on the existence of such a preemptive right of self-defense, and no international adjudicatory body has issued an authoritative decision on the issue.<sup>217</sup>

Scholars such as Brownlie and Dinstein take a restrictionist view of the right to self-defense, concluding that Article 51 prohibits anticipatory armed measures because it explicitly requires an armed attack as a predicate for a lawful exercise of self-defense.<sup>218</sup> Restrictionist scholars maintain that, in requiring an armed attack before the exercise of self-defense, the framers of the UN Charter intended “to make acceptable uses of force readily distinguishable from unacceptable uses of force.”<sup>219</sup> This view also concludes that, because Article 51 only mentions “an armed attack” as a possible predicate for the exercise of self-defense, the framers deliberately precluded the possibility that a right of self-defense could be activated by other means.<sup>220</sup>

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213. See AREND & BECK, *supra* note 156, at 72.

214. See Jennings, *supra* note 207, at 83 (quoting a report of the Law Officers of Great Britain: “It appears that on the 13th of December last, a numerous Armed body, composed chiefly of American Citizens, had openly invaded and taken possession of Navy Island, a Part of the British Possessions.”).

215. AREND & BECK, *supra* note 156, at 79.

216. The National Security Strategy of the United States, *supra* note 165 (“For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”).

217. AREND & BECK, *supra* note 156, at 73, 79.

218. *Id.* at 73 (citing IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275–278 (1963) and DINSTEIN, *supra* note 182, at 173).

219. See Glennon, *supra* note 171, at 546 (though Glennon himself does not seem to be a restrictionist scholar).

220. *Id.* at 547.

Other, counter-restrictionist scholars like D.W. Bowett and William V. O'Brien disagree. They concentrate on the reference in Article 51 to the 'inherent' right of self-defense as acknowledging the persistence of a wider customary right that includes anticipatory self-defense. They also cite events subsequent to the UN Charter's drafting, including certain state practices and the failure of collective security, in support of their view that anticipatory self-defense is an indispensable right of states.<sup>221</sup> Assuming a right of anticipatory self-defense exists, the exercise of that right still requires "a reasonable belief that a particular attack, or raid, is imminent."<sup>222</sup> Restrictionist scholars counter the "inherent right" contention by arguing that, even if a customary right of anticipatory self-defense existed at the time of the Charter's drafting in 1945, the vast weight of subsequent state practice has eliminated that right by adhering to a much more narrow interpretation of Article 51.<sup>223</sup>

There have been three major instances that fit the theoretical profile of anticipatory self-defense: the 1962 U.S. "quarantine" of Cuba during the Cuban Missile Crisis; the 1967 Six Day War between Israel, Egypt, Jordan, and Syria; and the 1981 Israeli strike against the Iraqi nuclear reactor at Osirak. In reviewing these examples, it is helpful to keep in mind Professor Gray's observation that:

[T]he actual invocation of the right to anticipatory self-defence in practice is rare. States clearly prefer to rely on self-defence in response to an armed attack if they possibly can. In practice they prefer to take a wide view of armed attack rather than openly claim anticipatory self-defence. It is only where no conceivable case can be made for this that they resort to anticipatory self-defence. This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force. States take care to try to secure the widest possible support; they do not invoke a doctrine that they know will be unacceptable to the vast majority of states.<sup>224</sup>

The U.S. explanation for its quarantine of Cuba during the Cuban Missile Crisis reflects this reluctance to rely on anticipatory self-defense.<sup>225</sup> In fact, the United States avoided Article 51 altogether

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221. AREND & BECK, *supra* note 156, at 73.

222. D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 898 (5th ed. 1998).

223. GRAY, *supra* note 33, at 87.

224. *Id.* at 112.

225. See Abram Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T ST. BULL. 763-65 (Nov. 19, 1962); Glennon, *supra* note 171, at 546 n.23.

and instead relied on the provisions for regional measures provided in Article 52.<sup>226</sup>

The Six Day War began when, in response to massive troop buildups and the blocking of the Straits of Tiran by the Arab states, Israel attacked Egypt, Jordan, and Syria in 1967. Exemplifying Professor Gray's observation, Israel did not claim anticipatory self-defense but instead argued that the actions of the Arab states were irrevocable steps toward war and thus constituted a prior armed attack.<sup>227</sup> Professor Dinstein supports the Israeli argument, and uses the war to demonstrate the difference between interceptive and anticipatory self-defense.<sup>228</sup> According to Dinstein, interceptive self-defense takes place after the aggressor state has taken irrevocable steps to make an armed attack but before the aggressor is able to actually fire the first shot. As an armed attack was effectively underway, Israel's right of self-defense was activated, and it did not have to absorb the first blow from the Arab states in order to activate Article 51.<sup>229</sup> In contrast, anticipatory self-defense occurs when a state acts in response to "[mere] threats and potential danger" but not "an attack being actually mounted."<sup>230</sup> Professor Franck finds that, though Israel did not advance a claim of anticipatory self-defense, its actions constitute an example of the practice simply because Israel acted before it suffered any attack.<sup>231</sup> Franck then finds that most states considered Israel's actions not to be unreasonable, in part because they concluded that an armed attack was imminent.<sup>232</sup> This response, according to Franck, indicates that anticipatory self-defense "may be a legitimate exercise of a state's right to ensure its survival."<sup>233</sup>

Israel's 1981 strike against the Iraqi nuclear reactor at Osirak presents a rare case where a right of anticipatory self-defense was actually asserted.<sup>234</sup> Israel feared that once the reactor was operational,

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226. *Id.*

227. GRAY, *supra* note 33, at 112–13.

228. *See* DINSTEIN, *supra* note 182, at 173.

229. *Id.*

230. Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 498 (1952); *see also* DINSTEIN, *supra* note 182, at 172.

231. FRANCK, *supra* note 29, at 104–05.

232. *Id.* at 105.

233. *Id.*

234. GRAY, *supra* note 33, at 114.

Iraq would use it to create a nuclear weapon to use against Israel.<sup>235</sup> Nevertheless, the Security Council passed Resolution 487, condemning Israel's attack.<sup>236</sup> The condemnation by the Security Council is especially significant considering that the United States voted for the resolution.<sup>237</sup> It was unclear whether the Council's condemnation was directed at Israel's claim of anticipatory self-defense or a lack of necessity for action.<sup>238</sup> Indeed, while some states implicitly acknowledged a right of anticipatory self-defense, they still condemned the action because, as the reactor was not yet finished, no Iraqi armed attack was imminent.<sup>239</sup> Professor Franck observes that the question of imminence turned less on Iraq's capabilities and more on its propensity to use nuclear weapons.<sup>240</sup> In this regard, Franck touches on one of the critical problems with the question of whether Iraq is likely to use WMD in the future: "[p]ropensities . . . are obdurately unamenable to conclusive proof."<sup>241</sup>

In reviewing state practice and the opinions of publicists, there is certainly no consensus opposed to anticipatory self-defense. Indeed, many states support a right of anticipatory self-defense in certain situations,<sup>242</sup> particularly where there is strong evidence that an overpowering attack is imminent.<sup>243</sup> Before examining the current situation with regard to Iraq, it is important to review how the right of self-defense relates to terrorist attacks. The complexity of this inquiry into self-defense doctrine reflects the complexity of the Iraq situation, where classic state-to-state use of force issues are intertwined with new concerns about non-state actors and state sponsorship of terrorism.

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235. *Id.*

236. See S.C. Res. 487, S/RES/487 (1981).

237. Glennon, *supra* note 171, at 546 n.23.

238. See Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933, 943-44 (1986).

239. AREND & BECK, *supra* note 156, at 78-79.

240. FRANCK, *supra* note 29, at 106.

241. *Id.*

242. AREND & BECK, *supra* note 156, at 79.

243. FRANCK, *supra* note 29, at 107.

## B. Self-Defense and Terrorism

The U.S. response to terrorism after September 11th has been portrayed as a global “war” against terrorism.<sup>244</sup> The adversaries in this conflict are terrorist groups *and* the states that harbor them.<sup>245</sup> The legal challenge of justifying military intervention grows as the link between target states and the September 11th attack attenuates. The question of Iraq compounds this problem because, in addition to having little or no connection with the September 11th attacks, Iraq’s sponsorship of terrorism has, until now, been only a secondary concern for U.S. policymakers.<sup>246</sup> Nevertheless, the United States bases its justification of a potential invasion in part on Iraqi support for terrorism.<sup>247</sup>

Terrorism is a phenomenon that does not fit easily into the modality of self-defense. Professors Beck and Arend have succinctly addressed this ambiguity by posing two questions raised by forcible state responses to terrorism: (1) Under what circumstances may a victim state legally respond with armed force to an act of terrorism?; and (2) How may the state do so?<sup>248</sup> Beck and Arend review the differing answers that international law scholars provide for these questions,<sup>249</sup> but these responses are of limited help in the case of Iraq.

Assuming there is room in self-defense doctrine for deterrent counter-terror attacks, the most important issue with regard to Iraq and terrorism is whether states who merely harbor terrorists open themselves up to attack. A notable aspect of the Bush Doctrine is the policy of making no distinction between terrorists and the states that harbor them.<sup>250</sup> This policy is not altogether new. In 1986, U.S. Secre-

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244. The National Security Strategy of the United States, *supra* note 165, at part III (“The United States of America is fighting a war against terrorists of global reach. . . . We will disrupt and destroy terrorist organizations.”). *See also* U.S. DEPARTMENT OF STATE, GLOBAL PATTERNS OF TERRORISM 63 (May 2002).

245. *Id.* *See also* Wendy Ross, *Bush Says Iraq Must Permit Weapons Inspections* (Nov. 26, 2001) (reporting President Bush’s White House press conference on Nov. 26, 2001), at <http://usinfo.state.gov/topical/pol/terror/01112608.htm> (last visited Dec. 15, 2002).

246. POLLACK, *supra* note 12, at 153.

247. President Bush, Address to the United Nations General Assembly, *supra* note 20.

248. Robert Beck & Anthony Arend, “*Don’t Tread on Us*”: *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT’L. L.J. 153, 156 (1994) [hereinafter Beck & Arend].

249. *See generally id.* (surveying the opinions of prominent international law scholars with regard to the conditions under which states may respond to terrorist attacks and the form that that response may take).

250. President George W. Bush, Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 11, 2001); Address Before a Joint Session of the Con-

tary of State George Schultz claimed a similar right for the United States, adamantly rejecting the proposition that state sovereignty prevented the use of force against terrorists and the states that harbor them: “It is absurd to argue that international law prohibits us from . . . attacking [terrorists] on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerillas.”<sup>251</sup>

The Bush Doctrine’s approach to terrorism was manifest in the U.S. intervention in Afghanistan in 2001; the United States attacked both al Qaeda forces and the Taliban regime that supported them.<sup>252</sup> Before the United States even attacked Afghanistan, the UN Security Council affirmed that the September 11th attacks gave rise to a right of self-defense.<sup>253</sup> Passed by the Council the day after the attacks, Resolution 1368 condemned the attacks and recognized “the inherent right of individual or collective self-defence in accordance with the Charter.”<sup>254</sup> Resolution 1373, passed on September 28th, reaffirmed the right of self-defense in the context of the September 11th attacks and went on to reaffirm “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”<sup>255</sup> Thus, the United States enjoyed strong support from the Security Council before it had to articulate the actual case for its actions in Afghanistan and despite the possibility that existing restrictions on the right of self-defense precluded a lawful exercise of that right under the circumstances.<sup>256</sup>

The United States connected the Taliban regime to al Qaeda on the grounds that it harbored Osama bin Laden and his organization,

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gress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001). See Podhoretz, *supra* note 16, at 23 (“The second [pillar of the Bush Doctrine] stood tall on a recognition of terrorism as a problem involving states and therefore calling for a military response (along with other instruments of power, whether economic or diplomatic).”); Mike Allen, *From Both Sides, Promises to Fight On: Bush Says Hardest Part is Ahead*, WASH. POST, Nov. 22, 2001, at A28; Glennon, *supra* note 171, at 548 n.31.

251. U.S. Secretary of State George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, Address to the National Defense University, Washington, D.C. (Jan. 15, 1986), reproduced in 25 INT’L LEGAL MATERIALS 204, 206 (1986).

252. Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT’L & COMP. L. Q. 401, 408 (2002).

253. S.C. Res. 1368, U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001).

254. S.C. Res. 1368, U.N. Doc. S/RES/1368 (2001).

255. S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001).

256. Glennon, *supra* note 171, at 542–44.

refused to deliver bin Laden to requesting states, and, possibly, on the grounds that the Taliban increased their responsibility for al Qaeda's actions after the fact by endorsing the September 11th attacks.<sup>257</sup> As reflected in Afghanistan, the Bush Doctrine bases the right of self-defense against terrorism in part on principles of state responsibility.<sup>258</sup> The United States seemed to restrict this right to situations in which states willfully allow terrorists sanctuary and where such harboring results in an attack against the United States.<sup>259</sup> The United States did not go so far as to declare that states were open to attack merely because terrorists happened to be on their territory.<sup>260</sup> The United States' narrow articulation of its right of self-defense to terrorist threats seems valid as long as the definition of "harbor" is not stretched so far as to hold failed states responsible for the operations of groups that the states are powerless to control.<sup>261</sup>

Professor Michael J. Glennon laments that, in light of the ICJ's *Nicaragua* decision,<sup>262</sup> the Bush Doctrine's approach to terrorism cannot be reconciled with existing international law.<sup>263</sup> For example, Glennon interprets *Nicaragua* to mean that providing weapons and logistical support to terrorists does not constitute an armed attack.<sup>264</sup> The Court's pronouncements must be understood in the context of an ongoing civil war. To be sure, *Nicaragua* makes it difficult to impute the injuries caused by insurgents to the state supporting those insurgents.<sup>265</sup> It is reasonable to suggest, however, that the high threshold for state responsibility resulted from the evidentiary difficulty of parsing out blame for thousands of acts in the midst of a complex and

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257. Byers, *supra* note 252, at 408–09.

258. *See id.* at 408 n.38.

259. Letter from John Negroponte, U.S. Permanent Representative to the U.N., to the President of the U.N. Security Council (Oct. 7, 2001) ("The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation.") (emphasis added).

260. Byers, *supra* note 252, at 408–09 ("Although [the U.S. claim] would normally still be contentious, this is much less of a stretch from pre-existing international law than a claimed right to attack terrorists who simply happened to be within the territory of another State.").

261. *See id.*

262. *Nicaragua*, *supra* note 33.

263. *See* Glennon, *supra* note 171, at 543–44.

264. *Id.* at 542.

265. *See id.*

ongoing civil war.<sup>266</sup> Terrorist attacks, on the other hand, are much more discrete events, and a court might be better able to identify a causal connection between the harboring and the attack. The Security Council, for its part, already recognized the need for self-defense in response to terrorism by passing Resolutions 1368 and 1373.<sup>267</sup> Consequently, the Bush Doctrine, if restrained by the UN Charter's general prohibition on the use of force, may be consistent with an emerging alteration of the right of self-defense in a post-September 11th world.<sup>268</sup> Unlike al Qaeda and the Taliban in Afghanistan, however, Iraq does not bear responsibility for a recent terrorist attack against the United States.<sup>269</sup> The absence of such an attack limits the application of any new rule of international law to Iraq because the strongest endorsements of U.S. action in Afghanistan—Security Council Resolutions 1368 and 1373—were offered because a severe attack had already occurred.

### C. Does Iraq Pose a Threat Giving Rise to a Right of Self-Defense?

In the pre-September 11th environment, Iraq was not typically relevant in discussing U.S. responses to terrorism. The United States viewed Iraq as a more standard state-to-state threat than as a state sponsor of terrorism.<sup>270</sup> Because of the perceived magnitude of the threat of catastrophic terrorist attacks in the post-September 11th environment, the mere possibility of collusion between Iraq and terrorists leads policymakers to identify Iraq as an appropriate target in the War on Terror.<sup>271</sup> The result is the Bush Administration's somewhat incoherent depiction of Iraq as both a traditional threat and a major terrorist threat.

1. *Iraq and Terrorism.* The last instance of Iraq's direct involvement in an anti-American terrorist act was the April 1993 plot to assassinate former President Bush.<sup>272</sup> Iraq was even removed from

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266. See FRANCK, *supra* note 29, at 62 ("To qualify [as an armed attack], the Court thought, the evidence would have had to show a pattern of deliberate despatch of irregular armed forces into El Salvador from Nicaragua.").

267. S.C. Res. 1368, U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001).

268. See Byers, *supra* note 252, at 409.

269. See POLLACK, *supra* note 12, at 157.

270. PAUL PILLAR, TERRORISM AND U.S. FOREIGN POLICY 160 (2001).

271. See POLLACK, *supra* note 12, at 157–58.

272. GRAY, *supra* note 33, at 117.

the U.S. list of state sponsors of terrorism in 1982 as part of the U.S.' tilt toward Iraq in the Iran-Iraq War.<sup>273</sup> The United States only renewed Iraq's listing after it invaded Kuwait in 1990.<sup>274</sup> Iraq remains on the list because it harbors members of the Abu Nidal organization, the Kurdistan Workers' Party (PKK), the Mujahedin-e Khalq (MEK), and the Palestine Liberation Front.<sup>275</sup> Iraq's main focus in supporting terrorism is to use the PKK against Turkey and the MEK against Iran.<sup>276</sup> In addition, Iraq is also involved in the ongoing Palestinian *intifadah*, supporting Hamas and other Palestinian terrorist groups<sup>277</sup> and awarding \$25,000 to the families of Palestinian suicide bombers.<sup>278</sup> Apart from the Abu Nidal organization and the Palestine Liberation Front, the United States does not claim that any terrorist organization harbored by Iraq has ever attacked U.S. targets.<sup>279</sup> Reported links between Iraq and the 1993 bombing of the World Trade Center do not appear credible.<sup>280</sup> It is, of course, reasonable to imagine that Iraqi-supported terrorist groups may yet attack U.S. targets in the future. Still, the U.S. Department of State's 2001 report on global terrorism admits that, while the Iraqi regime "continued to provide training and political encouragement to numerous terrorist groups," "its main focus was on dissident Iraqi activity overseas."<sup>281</sup> As Paul Pillar observes, "[t]errorism is by no means the main U.S. concern regarding Iraq."<sup>282</sup>

Indeed, Saddam Hussein's more secular regime has not been keen to embrace the militant Islamic forces underpinning most terrorist attacks on the United States.<sup>283</sup> Anti-American terrorism has received far more support from Iran than from Iraq.<sup>284</sup> Contacts between Iraq and al Qaeda have been apparently "tenuous and inconsequential," and Saddam's secularism may clash with the fundamen-

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273. PILLAR, *supra* note 270, at 170.

274. *Id.*

275. GLOBAL PATTERNS OF TERRORISM, *supra* note 244, at 65.

276. POLLACK, *supra* note 12, at 156.

277. *Id.* at 156-57.

278. *A Decade of Deception and Defiance*, *supra* note 154, at 18.

279. *See id.*

280. POLLACK, *supra* note 12, at 156.

281. *A Decade of Deception and Defiance*, *supra* note 154, at 18.

282. PILLAR, *supra* note 270, at 160.

283. Council on Foreign Relations, *Iraq*, available at <http://www.terrorismanswers.com/sponsors/iraq.html#Q1> (last visited Aug. 30, 2002).

284. PATTERNS OF GLOBAL TERRORISM, *supra* note 244, at 64 ("Iran remained the most active state sponsor of terrorism in 2001").

talism of al Qaeda to prevent more meaningful links.<sup>285</sup> Why, then, is Iraq so frequently mentioned as a future battleground of the War on Terror? The primary reason is that President Bush has portrayed the War on Terror as a broad campaign against all terrorist groups of global reach and states that support or harbor them, not just those responsible for the September 11th attack.<sup>286</sup> He has also deliberately blurred the distinction between the threat posed directly by Iraq and the threat posed by terrorists that might or might not strike at the United States: “[t]error cells and outlaw regimes building weapons of mass destruction are different faces of the same evil. Our security requires that we confront both.”<sup>287</sup>

Iraq’s harboring of some terrorists also coincides neatly with other, more pressing, U.S. policy priorities to pave the way for intervention. The Bush Administration has attempted to argue that Iraq’s involvement in terrorism and links with al Qaeda make their possible collusion a compelling threat requiring preemptive U.S. action:

We know that Iraq and the al Qaeda terrorist network share a common enemy—the United States of America. We know that Iraq and al Qaeda have had high-level contacts that go back a decade. Some al Qaeda leaders who fled Afghanistan went to Iraq. These include one very senior al Qaeda leader who received medical treatment in Baghdad this year, and who has been associated with planning for chemical and biological attacks. We’ve learned that Iraq has trained al Qaeda members in bomb-making and poisons and deadly gases. And we know that after September the 11th, Saddam Hussein’s regime gleefully celebrated the terrorist attacks on America.<sup>288</sup>

Despite indications to the contrary,<sup>289</sup> the links between Iraq and al Qaeda may in fact be significant. It would be hard, though, to maintain a prohibition on the use of force in international law if such inconclusive information constituted the predicate for the invasion and occupation of a country.

2. *Iraq as an Aggressive State Pursuing Weapons of Mass Destruction.* In light of the challenge of harmonizing the Iraq situation and other current threats within the standard modality of self-

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285. POLLACK, *supra* note 12, at 157.

286. President Bush, Address to the United Nations General Assembly, *supra* note 20. See Ross, *supra* note 245.

287. President Bush, Remarks on Iraq in Cincinnati, *supra* note 163.

288. *Id.*

289. POLLACK, *supra* note 12, at 157.

defense, the Bush Doctrine of preemptive self-defense has emerged to explain how September 11th has shattered basic assumptions about peace and security. By dropping the requirement of an armed attack and even rejecting the need for an imminent threat in case of preemptive action, the Bush Doctrine makes some dramatic departures from the existing international law that governs the use of force.<sup>290</sup>

The United States claims a right to attack preemptively to counter a “sufficient threat” to its security.<sup>291</sup> Despite the measures taken by the Security Council in Resolution 1441, the United States maintains that this right of preemptive action persists with regard to Iraq.<sup>292</sup> Little or no evidence exists, however, to suggest that Iraq is planning an imminent attack or aiding a terrorist group that will execute an imminent attack.<sup>293</sup> Indeed, the methodical planning for a U.S. invasion of Iraq suggests the absence of any imminent threat.<sup>294</sup> A U.S. invasion under these circumstances would go far beyond even anticipatory self-defense and would constitute unlawful precautionary self-defense; that is, self-defense in response to threats that are not imminent and may never become imminent.

The Bush Doctrine responds to the current, uncertain threat environment by shifting to a strategic posture based on preemptive action.<sup>295</sup> The Bush Doctrine of preemptive action starts with the premise that, prior to September 11th, powerful states could bear the cost of narrowly drawn self-defense rights because nuclear deterrence diminished the prospect of a cataclysmic attack that would threaten their survival. NATO and the Warsaw Pact states confronted each other during the Cold War with the knowledge that both sides were

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290. The National Security Strategy of the United States, *supra* note 165.

291. *Id.*

292. See President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3 (“The United States has agreed to discuss any material breach with the Security Council, *but without jeopardizing our freedom of action to defend our country.*”) (emphasis added); Statement by U.S. Ambassador John Negroponte, U.N. Press Release SC/7564 (Nov. 8, 2002), *supra* note 3 (“If the Security Council failed to act decisively in the event of further Iraqi violation, *the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant United Nations resolutions and protect world peace and security.*”) (emphasis added).

293. See POLLACK, *supra* note 12, at 148.

294. See Thom Shanker & David E. Sanger, *U.S. Envisions Blueprint on Iraq Including Big Invasion Next Year*, N.Y. TIMES, Apr. 28, 2002, at A1.

295. See *supra* note 16 and accompanying text.

deterred from aggression.<sup>296</sup> This equilibrium saved the UN Charter's narrow allowance for the use of force from being discarded outright by powerful states even though the Charter's legal restrictions probably had little to do with the absence of major war between the great powers.<sup>297</sup> The disappearance of the bipolar conflict of the Cold War has revealed the full implications of the UN system's failed attempt to become the world's dominant regulator of the use of force; a goal envisioned in Articles 43 through 47 of the Charter.<sup>298</sup> As a result of the incomplete implementation of the Charter regime for international order, the use of force has remained the province of individual states.<sup>299</sup> The attraction of self-help is now felt more acutely by the United States because of the threat posed by the proliferation of WMD, particularly nuclear weapons.<sup>300</sup> In response to this threat, the United States has chosen to prevent the proliferation of nuclear weapons to aggressive states by ad hoc intervention.<sup>301</sup> The problem is that the legal justification for this policy choice is extremely difficult to reconcile with the UN Charter system for the use of force, which may explain the Bush administration's conspicuous failure to mention the UN Charter when discussing preemptive self-defense in its National Security Strategy.<sup>302</sup>

President Bush signaled the change from Cold War thinking when he declared that “[c]ontainment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.”<sup>303</sup> Influenced heavily by the attacks of September 11th, the Bush Doctrine

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296. The National Security Strategy of the United States, *supra* note 165 (“In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary.”).

297. See BOBBITT, *supra* note 198, at 640 (“The irrelevance of international law to the global, epochal conflict then raging was compounded by changing attitudes toward law itself.”).

298. See *id.* at 473; U.N. CHARTER arts. 43–47 (providing for the arrangements whereby Member States would make forces and other resources available to be directed by the U.N. Military Staff Committee).

299. See BOBBITT, *supra* note 198, at 473.

300. See *id.* at 688 (“Insofar as [medium-size states such as Iraq] develop a capacity to deter Western intervention, they check the West’s power to enforce international norms, as we saw in the Gulf War.”).

301. See The National Security Strategy of the United States, *supra* note 165. See also BOBBITT, *supra* note 198, at 713.

302. See The National Security Strategy of the United States, *supra* note 165.

303. President Bush, Graduation Address to the United States Military Academy, *supra* note 16. See also Allen & DeYoung, *supra* note 16 (Aides to the President called the containment comment a reference to Iraq and North Korea).

conceives of contemporary threats as so qualitatively different from prior threats that it must discard a reactive security strategy:

It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.<sup>304</sup>

On the issue of deterrence, President Bush declared that it "means nothing against shadowy terrorist networks with no nation or citizens to defend."<sup>305</sup> While deterrence is not a concept that is recognized in international law, the perceived inapplicability of deterrence places a new and tremendous strain on the existing international law governing the use of force. The United States now faces a future where a catastrophic attack is always possible, but the source and timing of an attack is unknown.<sup>306</sup> The cost of waiting to respond to a terrorist attack or an attack by a hostile state has become extremely high; to the point where the populations of major cities are put at risk.

The Bush Doctrine, perceiving the failure of deterrence to inhibit terrorists and "rogue" states who possess the will and the means to wreak catastrophic destruction, avers that the terrorist threat has become an overriding threat to national survival that trumps existing international law. The United States feels it cannot afford to let terrorists have any safe harbor from which to craft a future catastrophic attack on America. Some state sponsors of terrorism may even assist groups in their efforts to acquire WMD. Just as the terrorists will not be deterred by the post-attack response, the United States similarly refuses to speculate as to whether the state sponsor will be deterred from providing such assistance: "If we wait for threats to fully materialize, we will have waited too long . . . [t]he war on terror will not be won on the defensive."<sup>307</sup> The United States has therefore claimed a right of self-defense that may be asserted against state harborers and state sponsors of terrorism. Since Saddam Hussein's regime is cer-

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304. The National Security Strategy of the United States, *supra* note 165.

305. President Bush, Graduation Address to the United States Military Academy, *supra* note 16.

306. See BOBBITT, *supra* note 198, at 811-13 ("Because it may not be possible to determine the source of the incursion, strategies of retaliation and deterrence, which have served us well in the past, become less useful").

307. President Bush, Graduation Address to the United States Military Academy, *supra* note 16.

tainly a harbinger and sponsor of terrorism,<sup>308</sup> the Bush Doctrine dictates that the United States can assert its right of self-defense against Iraq.

While it is an intriguing reaction to recent events, the Bush Doctrine of preemptive self-defense contains several elements that make it an unconvincing legal theory. First, the Bush Doctrine purports to replace the anticipatory self-defense requirement of an imminent armed attack with a sliding scale that at some point reaches a “sufficient threat” for preemptive action:

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

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.

...

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. *The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.*<sup>309</sup>

The language of the National Security Strategy reveals the delicate nature of the U.S. attempt to legitimize its post-September 11th security strategy. Note that the United States does not explicitly affirm the legality of its longstanding policy of preemptive actions against sufficient threats; referring to preemptive action as an “option” and not a principle. In contrasting the reference to the legal rights of nations over the centuries with the particular discussion of the policy option the United States reserves for itself, it is possible to infer that the United States is hesitant to articulate a right that could be used by other states. In addition, the discussion of the international law governing the use of preemptive force fails to mention the UN Charter; a seemingly deliberate omission that leads to the ques-

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308. David Rose, *Iraq’s Arsenal of Terror*, VANITY FAIR, May 2002, at 124.

309. The National Security Strategy of the United States, *supra* note 165.

tion of why the United States is not articulating its policy in the context of the legal framework that currently governs the use of force.

The principle of anticipatory self-defense, while arguably not an active rule of customary international law, has always required that an armed attack be imminent.<sup>310</sup> The mere possession of a weapon that may be used or deployed in a matter of minutes does not, by itself, constitute an imminent threat—logic dictates that intent is required. An imminent threat requires that an adversary intend to attack the preempting state; otherwise the United States would be justified in attacking the United Kingdom merely because it possesses nuclear weapons. The imminence requirement is extremely problematic in the WMD context, though, because such weapons have great potential to be used without ever revealing any evidence that an attack is imminent. The U.S. alternative, the ambiguous concept of “sufficient threat,” loosens beyond all recognition the requirement that an attack is likely.

While the threat of WMD may render the imminence requirement obsolete, the United States has failed to provide a new rule that retains any objective restrictions on a state’s discretion to use force. Under this theory, the Bush Administration argues that the possibility of collusion between Iraq and al Qaeda, while remote, promises such terrible harm to the United States that action is justified. It seems difficult to reconcile such an expansive right of preemptive action with a general prohibition on the use of force. Nevertheless, the United States has asserted such a right with regard to Iraq, and has continued to do so despite the passage of Resolution 1441. The interplay of the Bush Doctrine of preemptive self-defense with the procedures of the Security Council may have a profound effect, formally or informally, on international law.

Former CIA and National Security Council Middle East analyst Kenneth Pollack has provided an illuminating discussion of U.S. perceptions of the threat posed by Iraq.<sup>311</sup> While not purporting to provide a rigorous analysis of the restrictions imposed on policy options by international law, he demonstrates that Iraq poses a serious threat to regional and global stability. Pollack argues convincingly that Saddam’s Iraq (1) already possesses biological and chemical weapons,<sup>312</sup> (2) is pursuing nuclear weapons and will most likely obtain them if

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310. HARRIS, *supra* note 222.

311. POLLACK, *supra* note 12, at chs. 5, 8.

312. *Id.* at 170–73.

not stopped;<sup>313</sup> (3) is likely to use or threaten force against some of its neighbors in the future;<sup>314</sup> (4) is unlikely to be deterred by the threat of retaliatory force by other states, especially once it obtains nuclear weapons;<sup>315</sup> and (5) will be extremely dangerous to confront once it obtains nuclear weapons because Saddam seems willing to use a nuclear weapon if his survival is threatened (i.e., if the world waits until Iraq obtains a nuclear weapon, it will be too late to stop a nightmare scenario).<sup>316</sup>

This factual predicate yields the conclusion that Saddam's Iraq poses a grave and exceptional threat to international peace and security, and this conclusion is confirmed by the Security Council's determination in Resolution 1441.<sup>317</sup> Further, the cataclysmic consequences of a nuclear attack against the United States or any of Iraq's neighbors means that it is unacceptable to wait for Iraq to attack first. These conclusions present compelling circumstances for a forceful policy towards Iraq in the near future. The dilemma is that international law, according to prevailing interpretations, does not recognize those circumstances as giving rise to a unilateral right to threaten or use force. The only remaining option would seem to be Chapter VII action through the Security Council to either disarm Iraq or invade Iraq if it refuses to disarm. The United States has proceeded along this path, but the circumstances leading to the passage of Resolution 1441 send a mixed signal about the viability of the current international legal order.

Given the inclination of many states after September 11th to preserve the status quo or retire the sanctions regime in exchange for the appearance of normalcy,<sup>318</sup> the Security Council likely undertook its most recent measures because the United States adamantly asserted a unilateral theory of action against Iraq and threatened that the United States would act unilaterally if the Council failed to act. The Bush Doctrine of preemptive self-defense was advanced to legitimize this approach. As shown above, this theory is not supported by existing international law, and, with its lack of limiting principles, is so expansive that it would seriously undermine the general prohibition

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313. *Id.* at 174–75.

314. *See id.* at 149–52.

315. *Id.* at 268, 272.

316. *Id.* at 276, 418.

317. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002).

318. *See* POLLACK, *supra* note 12, at 224–25.

on the use of force. Yet it is this controversial theory that formed part of the justification for possible unilateral action. The United States' demonstrated will to act unilaterally was probably critical in moving the Security Council to address Iraq in such a vigorous fashion. The resulting measures contained in Resolution 1441—arms inspections with the burden of proof on Iraq to show it possesses no WMD or related materials—made unilateral U.S. action temporarily unnecessary and thereby forestalled an explicit and fundamental departure of the world's lone superpower from the established international legal order.

The U.S. method of engaging the Security Council thus had the paradoxical effect of sustaining the international legal system through the use of a threat to act unlawfully. Perhaps this willingness to commit a highly visible violation of prevailing international law was necessary. Perhaps there was no other way to move the international community to reconfigure the regime governing the use of force so that it is compatible with the realities of a new strategic environment. This environment is characterized by the danger and unacceptable costs of an unconventional armed attack; the tremendous difficulty of detecting an imminent unconventional attack; and the perceived inability to deter such an attack with the threat of retaliatory force. The extension of Security Council authorization for U.S. policy toward Iraq has muted the perceived impact of this development; but it remains that the United States is advocating its controversial theory of precautionary self-defense in parallel with the process of obtaining the standard Chapter VII authorization for the use of force.<sup>319</sup> The curative effect of explicit Chapter VII authorization for force would delay the ripening of a debate among states about the validity of precautionary self-defense, but it is important not to underestimate the subtle persistence of preemptive self-defense amidst the legitimating mechanisms of the Security Council. Indeed, the Security Council has effectively rewarded the promulgation of the Bush Doctrine of preemptive action by initiating an invigorated inspection process with the more concrete possibility of forcible measures to enforce compliance.

Because the Security Council, after some cajoling, was willing to embark on a moderated form of the U.S. policy choice for Iraq, the United States is unlikely to be deterred in the future from asserting its claim of a right of precautionary self-defense. Instead, the United

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319. See President Bush, Remarks on the United Nations Security Council Resolution, *supra* note 3.

States has used the threat of unilateral preemptive action to create a dynamic whereby the Security Council must respond to vital U.S. security concerns in order to stay relevant. If this is the case, one wonders whether it is even necessary for states to approve of the Bush Doctrine. At least with regard to Iraq, the United States may achieve the policy goal the Bush Doctrine was used to support—the removal of the threat posed by Saddam Hussein’s regime—under Chapter VII of the Charter; a different legal justification that might even have been a preferable political approach for building a coalition.

If it becomes recognized as a feature of customary international law, the Bush Doctrine would open the door for states to claim an exception to the prohibition on the use of force in a virtually limitless set of circumstances. An expansion of the legitimate use of force under international law should only take place where there are compelling reasons and clear standards to restrict the scope of the new rule. Given the chaotic consequences of the new rule articulated by the United States, it is preferable to redouble efforts to make the Security Council an effective instrument in dealing with unconventional threats.

The Bush Doctrine is alluring because it flows from a realistic assessment of the global security environment, but it has no standards to prevent it from washing away the general prohibition on the use of force. As President Bush said, threats need not “fully materialize” before the United States will use force.<sup>320</sup> How slight can a threat be and still warrant military action? How can military action in anticipation of a partially materialized threat be characterized as a policy of last resort? How can one formulate a proportionate use of force when a threat has not fully materialized? Is the terrorist threat so completely pervasive that the United States is exempt from the obligation to resolve disputes peacefully? There is no limiting principle in this new policy to prohibit the United States from immediately launching invasions of every potential enemy state across the globe.

It is also important to remember that the Article 2(4) prohibition is not a one-sided provision that hampers only U.S. policy; it applies to all members of the United Nations. Accordingly, an erosion of the prohibition on the use of force enables not only the United States, but

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320. President Bush, Graduation Address to the United States Military Academy, *supra* note 16. See also Allen & DeYoung, *supra* note 16.

also all other states to use force more freely.<sup>321</sup> U.S. policymakers, perhaps considering other states too weak to exploit the new rules for the use of force, may be willing to tolerate this situation. That would be tragically shortsighted. How can the United States advance its new strategic policy of preemption, and yet tell India, a nuclear power, that it must refrain from striking Pakistan for its harboring of Kashmiri insurgents, whom some would label terrorists? Despite the horrific example of September 11th, the Bush Doctrine, if taken to its logical conclusion, is too all-encompassing to conform to even an expansive reading of the UN Charter.

#### D. Mandatory Recourse to the Security Council: An Alternative to the Bush Doctrine of Preemptive Self-Defense

The challenge of providing an alternative to the Bush Doctrine lies in the limited extent to which the United States will alter its security policy for the sake of international law. A proposal that is too stringent will likely be ignored by the United States and similarly positioned states that feel compelled to address serious threats to their interests. One response to this challenge would be to acquiesce to the proposals of the United States; to let the Bush Doctrine set the standard for the use of force in the twenty-first century. The problem with acquiescence, as noted above, is that the Bush Doctrine is really no standard at all but a license to powerful states to use force at their own discretion.

Another alternative would be to use the concept of mitigation to deal with cases such as Iraq. This approach counsels that the integrity of the law should not be sacrificed because of an exceptionally challenging case.<sup>322</sup> Thus, unilateral force absent an imminent armed attack would remain unlawful and difficult situations such as Iraq would instead be addressed by the tendency of states to moderate their criticism and countermeasures as a means of acknowledging a reasonable response to a compelling circumstance. The problem with mitigation is that it works best if it only needs to be employed sparingly. If unconventional threats like WMD proliferation, terrorism, and humanitarian disasters are commonplace, then mitigation may degenerate into a *de facto* customary justification for unilateral force. Because these unconventional threats will likely become commonplace (if they

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321. GRAY, *supra* note 33, at 23 (“the language of states in their interpretation and application of the UN Charter could operate as a precedent and later be invoked against them.”).

322. See FRANCK, *supra* note 29, at 175.

are not already), the better solution is to craft a rule that explicitly justifies responses to such situations. In the hope that there is a middle course between the flawed UN Charter framework and the Bush Doctrine's wholesale regression to self-help, a possible alternative is to build upon the multilateral approach taken by the United States in obtaining Resolution 1441.

In cases such as the current standoff with Iraq—cases of precautionary self-defense where a state feels threatened but has not been attacked and is not faced with an imminent threat—it is worth considering a new rule of international law that requires such a state to channel its response through the Security Council. As set forth in Article 51 of the UN Charter, the right of self-defense is already subject to a retrospective reporting requirement.<sup>323</sup> This new rule would require prospective engagement of the Council in order for instances of precautionary self-defense to be considered valid.

The first element of this rule requires that a state present its case to the Security Council and offer the Council an opportunity to address the threat through measures taken under Chapters VI and/or VII of the UN Charter. Failure to make prior recourse to the Security Council would then be considered *prima facie* evidence of unlawful use of force.

If the pleading state is unsatisfied with the Council's response, it is then obligated to seek the Council's confirmation that unilateral action constitutes lawful self-defense. This process would employ the Security Council as a quasi-jury reviewing the validity of a proposed exercise of a unilateral right (as with Resolution 1368 before the U.S. intervention in Afghanistan), in contrast to the Council's role of quasi-legislature taking collective measures to address threats to international peace and security.

In presenting its case to the Security Council, the pleading state would bear the burden of providing evidence that establishes, to a reasonable extent given the circumstances, (a) that the pleading state, or a state requesting the assistance of the pleading state, faces a serious threat from another state or a non-state entity operating in another state; and (b) that the circumstances make it unreasonable for the pleading state to wait until it is attacked or an attack is imminent (e.g., that the threat of a nuclear attack is an unacceptable risk to bear

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323. U.N. Charter art. 51 ("taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council").

under the circumstances). The pleading state would not be excused from its burden by a claim that the production of evidence would possibly reveal information detrimental to its national security (e.g., the disclosure of intelligence sources and methods); the extraordinary remedy sought by the pleading state demands that it go to great lengths to demonstrate the necessity for such an action.

The case would then be put to a vote of the Security Council, with the outcome determined regardless of whether a vote was cast by a permanent member of the Council. A reasonable number of votes in favor of the pleading state's proposed exercise of self-defense would constitute *prima facie* evidence that the right of self-defense was activated (the actual armed action would still be required to conform to the principle of proportionality). The number of votes constituting a reasonable number of affirmative votes would depend on the circumstances. Nine affirmative votes, a simple majority of the fifteen-member Council, would likely be insufficient if all nine votes were cast by states that were going to participate in a given action.

To illustrate further, imagine that the United States and its allies were seeking ratification of their claim to act in self-defense against State X. State X is a country hostile to the United States, is attempting to obtain WMD, and has a history of aggressive behavior. Suppose the United States and its allies were frustrated in their attempts to obtain a Chapter VII resolution authorizing force by the threat of veto by China and Russia. The United States then makes its case to the Council for action in self-defense and puts to a vote a draft resolution affirming that action in self-defense is appropriate under the circumstances. The draft resolution receives twelve votes in favor (including several states who are not parties to the dispute), but is defeated by the negative votes of China and Russia. According to Article 27 of the Charter, the draft resolution fails.<sup>324</sup> Under the proposed customary rule, however, the affirmative votes of twelve members of the Council establish a presumption that the proposed exercise of self-defense is valid. Though the use of force against State X will now take place under conditions not originally approved of by the Charter, the United States and its allies would likely have acted regardless, as they did in Kosovo.

The goals of this proposed rule are to maximize the opportunities for collective measures in situations where a state might otherwise act

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324. See U.N. CHARTER art. 27.

hastily and to provide the opportunity for collective deliberation on unilateral action where collective measures are frustrated by the veto. The advantage of this new approach as opposed to the current system is that it subjects claims of precautionary self-defense to international debate in a formal and institutionalized procedure before the act has occurred.

The underlying assumption of this rule is that one of the most important ways in which international law influences the behavior of states is by affecting the perceived legitimacy of governments; that states are willing to incur certain costs to promote their interests in a way that is perceived as legitimate by the international community. There is, of course, a limit to the tolerance of states for the costs of appearing legitimate. If international law rules are too restrictive, states may choose to ignore them in pursuit of key policy goals, particularly when national security is implicated. The challenge for the progressive development of international law with regard to the use of force is to achieve a system of rules that imposes effective restrictions on international violence without becoming so restrictive as to be ignored by the most powerful states. The proposed rule hopefully takes a modest step in that direction, and the persistence of international conflict suggests that we should expect only modest results from international legal rules.

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The doctrine of self-defense must be adapted to recognize that states have a legitimate right to defend themselves against terrorist attacks and reckless states possessing WMD. States must have reasonable leeway to counter threats that are extremely difficult to detect. The great challenge is to formulate a rule that, in the event the Security Council is unable or unwilling to act, allows states to protect their survival without obliterating the prohibition on the use of force. A rule of customary international law that requires states to engage the Security Council before acting in precautionary self-defense may meet that challenge. If the Bush Doctrine of preemptive self-defense is the best possible solution, then the future of the current international legal order is grim indeed.

#### IV. CONCLUSION

The potential justifications for unilateral intervention in Iraq are inconsistent with existing international law. That is not to say defini-

tively that Saddam Hussein's Iraq does not or will not present a credible threat to the United States or the international community, just that it does not currently present a threat that is recognized by international law as giving rise to unilateral armed intervention. The standoff over Iraq reflects the difficulty with which international law addresses the unconventional threats that states will be increasingly likely to face: weapons of mass destruction and terrorism.<sup>325</sup>

In the face of this difficulty, Resolution 1441 was a step in the right direction. The United States perceived an unconventional threat and channeled it through the mechanisms of the Security Council. On the other hand, the United States may have placed the Security Council under duress when it brought the Iraq matter before it in September 2002, challenging the Council to remain relevant and threatening to use force unilaterally if the Council did not respond adequately. The United States rested this challenge on theories for the use of force that, if accepted by states, would expand considerably the circumstances in which force may be used lawfully. The United States also maintained the validity of these theories after recourse to the Security Council, preserving justifications for unilateral action if the Council fails to follow Resolution 1441 with an explicit authorization to use armed measures. Moreover, if the Council continues to respond to threats of unilateral action by accommodating the U.S. position, the development of independent customary rules may be unnecessary.

The practice of the United States over recent years and especially after September 11th may eventually alter the law, but, over the long term, such alterations are risky. It is dangerous to construct a legal order which permits a single state to enforce what it perceives to be the collective interest and also grants a virtually standardless right of self-defense.<sup>326</sup> It is easy to imagine a succession of other states that will justify their aggressive uses of force by referring to the way the United States acted when it felt threatened by Iraq. The United States no doubt anticipates this and would like to restrict the precedent-setting impact of any action toward Iraq.<sup>327</sup> Given the propensity

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325. See FRANCK, *supra* note 29, at 3–4 (describing the emergence of indirect aggression and weapons of mass destruction as two of four “seismic developments” that seriously undermined the effectiveness of the U.N. Charter system governing the use of force).

326. See U.N. CHARTER art. 2(4); Nicaragua, *supra* note 33; GRAY, *supra* note 33, at 24.

327. *The National Security Strategy of the United States of America*, *supra* note 165 (“The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression.”).

of states to grasp at any remotely plausible legal justification,<sup>328</sup> however, the U.S. attempt to confine these rights to itself seems unlikely to dissuade an aggressive state seeking to legitimize its actions.

The Iraq crisis embodies the challenges to the international order that have emerged in the post-Cold War period. The legal regime provided by the UN Charter and customary international law is straining to address these challenges. The problem with the parallel justifications offered by the United States to support unilateral intervention in Iraq is that they may obliterate that regime without providing a stable and coherent alternative. The Security Council delayed the impact of these justifications, but they may reemerge in the future when the Council is immobilized by the veto.

Perhaps it is impossible to realign the existing rules on the use of force to match the altered international security environment and yet maintain meaningful limits on the use of force. On the other hand, it may be possible to achieve a viable solution by creating a rule of customary international law that requires states to approach the Security Council before self-defense may be used as a precaution against unconventional threats. Consolation may be found in the fact that the United States muted its parallel justifications somewhat when it engaged the Security Council, even to the extent that the United States agreed to a renewed inspections effort that some in the Bush administration wanted to avoid. International law may, after all, have some effect on the behavior of powerful states.

Patrick McLain

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328. See GRAY, *supra* note 33, at 6 (“It is clear that in the overwhelming majority of cases of inter-state use of force both states involved invoke self-defence against an armed attack by the other state.”).