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## IRAQ WAR: ANTICIPATORY SELF-DEFENSE OR UNLAWFUL UNILATERALISM?

JORGE ALBERTO RAMÍREZ\*

### INTRODUCTION

The fall of the Berlin Wall in 1989 marked the end of the Cold War<sup>1</sup> and the beginning of a new era of international cooperation not previously seen in modern history. The U.N. Security Council, healed of the 45-year paralysis brought on by East-West confrontations, began to exercise powers with the authority and credibility originally envisioned for it, but never before realized.<sup>2</sup> The hope for a new, more peaceful millennium was further encour-

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\* Associate Professor of Law and Director, International Programs, Texas Tech University School of Law; B.A., Harvard University; J.D., Harvard University. The author would like to thank Professor Victoria V. Sutton, Professor Frank René López, Professor William R. Casto and Professor Robert E. Lutz II for their valuable comments provided on an earlier draft, and Texas Tech Law Librarian Stephen Good for invaluable research assistance.

1. "The Cold War was also an international system. It lasted roughly from 1945 to 1989, when, with the fall of the Berlin Wall, it was replaced by another system: the new era of globalization we are now in." THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xvii (2000). In November 1989, East Germany was at the point of bankruptcy, and, in the hopes of receiving a large loan from the West Germans, East Germany decided to allow its citizens to travel abroad upon request. NORMAN FRIEDMAN, *THE FIFTY-YEAR WAR* 479 (2000).

The opportunity to go West was too good to miss. Large crowds began to move to the Berlin Wall. To avoid riots, the East Germans simply opened their borders. Soon the opening was made permanent: the wall was torn down. The East Germans had thrown their state away, although probably they did not yet realize that. . . . To the extent that the Cold War had been fought over Germany, Gorbachev had lost.

*Id.* (citation omitted).

2. See DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE* 1 (2000) ("The end of the Cold War brought with it a new willingness among the once contentious superpowers to use the Chapter VII instruments vested in the United Nations (U.N.) Security

aged by implementation of the Uruguay Round Agreements, which created the World Trade Organization in 1995.<sup>3</sup> By the beginning of the new millennium, political and social scientists were arguing that wars would become obsolete as economic and political integration continued to grow among the nations of the world.<sup>4</sup>

Then came September 11th, and along with it came a sea of change in geopolitical strategies and responses.<sup>5</sup> In his 2002 State of the Union Ad-

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Council as the peace and security mechanisms originally envisioned in the U.N. Charter.”) (citation omitted); Tetsuo Sato, *The Legitimacy of Security Council Activities Under Chapter VII of the U.N. Charter Since the End of the Cold War*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 309 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (“[T]he practice of the Security Council, particularly the enforcement activities based upon the powers enjoyed by the Security Council under Chapter VII of the U.N. Charter, have changed dramatically since the end of the Cold War.”) (citation omitted); Michael J. Jordan, *Who’s In, Who’s Out: U.N. Security Council Mulls Reform*, CHRISTIAN SCI. MONITOR, Oct. 16, 2002, at 7.

3. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1 LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1125, 1143-44 (1995).

4. This was certainly not a new idea. The purpose of the Bretton Woods Conference, which created the International Monetary Fund and World Bank and from which emerged the General Agreement on Tariffs and Trade (GATT), Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order*, 23 B.C. THIRD WORLD L.J. 57, 63 (2003), was to integrate the world economies and lead to a more lasting peace following World War II. See PATRICK A. MCCARTHY, HIERARCHY AND FLEXIBILITY IN WORLD POLITICS 164-67 (1998). “A strong world economy enhances our national security by advancing prosperity and freedom in the rest of the world. Economic growth supported by free trade and free markets creates new jobs and higher incomes. . . . [I]t reinforces the habits of liberty.” WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (2002), <http://www.state.gov/documents/organization/15538.pdf> [hereinafter NATIONAL SECURITY STRATEGY]. At least one Congressman has argued that stability and democracy have spread throughout Latin America because of liberalization of trade and integration of economies: “We can’t take this for granted. We cannot assume it will always be this way. The trend towards open markets and democratic rule may not continue. . . . [E]conomic stagnation breeds political instability, and instability breeds mass emigration, civil unrest, military conflict, and poverty.” Jim Kolbe, *The NAFTA and the Expansion of Free Trade: Current Issues and Future Prospects “A View from Capitol Hill,”* 14 ARIZ. J. INT’L & COMP. L. 291, 293 (1997). President Clinton’s U.S. Trade Representative, Charlene Barshefsky made a similar argument in 1999 while defending pursuit of the Free Trade Area of the Americas: “Trade integration has both benefited from and strengthened peace, freedom, democracy and the rule of law throughout the hemisphere. And the Free Trade Area of the Americas will improve, strengthen, and transcend all of this.” Charlene Barshefsky, *Keynote Address*, 30 L. & POL’Y INT’L BUS. 1, 5 (1999). New York Times foreign affairs columnist, Thomas L. Friedman, in his book, *The Lexus and the Olive Tree*, recognized the power of economic integration to bring about peace, but also recognized the influence of power:

The fact that no two major countries have gone to war since they both got McDonald’s is partly due to economic integration, but it is also due to the presence of American power and America’s willingness to use that power against those who would threaten the system of globalization—from Iraq to North Korea. The hidden hand of the market will never work without a hidden fist.

THOMAS L. FRIEDMAN, *supra* note 1, at 443.

5. Evan Thomas et al., *The 12 Year Itch*, NEWSWEEK, Mar. 31, 2003, at 54.

In his first few months in office, Bush was much more worried about the coming threat from China than he was about Iraq. He had no desire to be an interven-

dress, George W. Bush outlined a new and forceful international role for the United States in policing the world and providing for the country's national security.<sup>6</sup> President Bush made it clear that the United States would act unilaterally, if necessary, to protect our national interests.<sup>7</sup> The vast majority of

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tionist president, to play GloboCop. His foreign-policy pronouncements during the 2000 campaign had stressed the need for humility by the world's only superpower.

Then came 9-11. Almost instantly, everything changed. Bush seemed staggered, but only for a moment. By the time he climbed onto the rubble at the World Trade Center on the afternoon of Sept. 14 to vow revenge, he had dedicated his presidency—and apparently his whole being—to making sure such an attack never happened again. Without much consultation or debate, Bush formulated his own “doctrine,” holding that the United States would go after not only terrorists but countries that harbored them as well.

*Id.*

Vice President Dick Cheney said the Sept. 11 attacks had changed all of the rules of how the U.S. would defend itself. “If we simply sit back and operate by 20th-century standards . . . , we say wait until we’re hit by an identifiable attack from Iraq,” he said. “The consequences could be devastating.”

Carla Anne Robbins, *Endgame: Ceasing Diplomacy, U.S. Nears War*, WALL ST. J., Mar. 18, 2003, at A1. Political commentator and former presidential candidate, Patrick Buchanan, saw September 11th as confirming his belief in isolationism:

The New World Order of George H.W. Bush's vision, where the United States would work through the United Nations to police the world, as free trade spread and democratization deepened, can now never be realized by his son. The Clinton vision, where America would nurture the institutions of World Government that would grow in power to constrain the sovereignty of nations to create world peace, is also dead.

Patrick J. Buchanan, *A Time for Unity*, WORLD NET DAILY (Mar. 19, 2003), at [http://www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE\\_ID=31598](http://www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=31598).

6. President Bush warned the country that:

States like these [North Korea, Iran and Iraq], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.

President George W. Bush, State of the Union Address (Jan. 29, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> [hereinafter State of the Union Address 2002]. “We will develop and deploy effective missile defenses to protect America and our allies from sudden attack. . . . And all nations should know: America will do what is necessary to ensure our nation's security.” *Id.*

7. Bush's *National Security Strategy* stated:

While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against . . . terrorists, to prevent them from doing harm against our people and our country.

NATIONAL SECURITY STRATEGY, *supra* note 4, at 6. President Bush promised to take action:

We'll be deliberate, yet time is not on our side. I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons.

State of the Union Address 2002, *supra* note 6. The President expressed a similar sentiment a year later during his 2003 State of the Union speech: “In all these efforts, however, America's purpose is more than to follow a process—it is to achieve a result: the end of terrible threats to the civilized world.” President George W. Bush, State of the Union Address (Jan. 28, 2003),

states supported our war against Al Qaeda and their host government in Afghanistan, the Taliban.<sup>8</sup> However, that support quickly evaporated when we turned our sights on Baghdad and Saddam Hussein.<sup>9</sup> The United States and Great Britain, believing Hussein to be in possession of weapons of mass destruction and attributing that fact to the limited progress that had been made since the previous Gulf War with regard to enforcement of U.N. resolutions, felt justified in taking preemptive action in this post-9/11 era to protect the world from the possible use of these terrible weapons.<sup>10</sup> None of the other

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<http://www.whitehouse.gov/news/releases/2003/01/2003012819.html>. "The world has waited 12 years for Iraq to disarm. America will not accept a serious and mounting threat to our country, and our friends and our allies." *Id.*

[O]n June 1, 2002, in an address at West Point, Bush elaborated on themes he had in the past applied primarily to Iraq, spelling out what would henceforth be known as the Bush Doctrine. First, he said that the United States would no longer rely solely on "Cold-War doctrines of containment and deterrence." Instead, it would reserve the right to preempt threats, to "take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."

LAWRENCE F. KAPLAN & WILLIAM KRISTOL, *THE WAR OVER IRAQ* 73-74 (2003).

8. "[T]he U.S. drew international sympathy" after the September 11th terrorist attacks. *War Draws Ire, Support from Unlikely Places*, WALL ST. J., Mar. 21, 2003, at A12. For example, Russia and China were two countries that provided "strong backing for the U.S.-led war on terrorism." *Id.* "Indonesian President Megawati Sukarnoputri . . . [also] backed the Bush administration's war in Afghanistan in 2001." *Id.* Pakistan was yet another supporter of the U.S. war in Afghanistan. Peter Kammerer, *Nuclear Deterrent Deal Fueled by Oil*, S. CHINA MORNING POST, Nov. 3, 2003, at 9. Additionally, "New Zealand and Australia. . . both . . . sent [Special Air Service] units to support the US-led war against the Taleban [sic] and al Qaeda in Afghanistan." Robert Patman, *Anzac: An Unequal Alliance*, DOMINION POST, Sept. 12, 2003, at 7. Yet another country, "Algeria[,] . . . is an example of a country that supports the war on terrorism." Steven Komarow, *U.S. General Says Europe Is Major Terror Battlefield*, USA TODAY, Feb. 4, 2002, at 4A. Finally, "Germany is one of the United States's strongest supporters in the battle against terrorism." Elizabeth Becker et al., *A Nation Challenged: Hearts and Minds*, N.Y. TIMES, Nov. 11, 2001, at 1A.

9. As two journalists for the *Wall Street Journal* reported:

The war's "legitimacy will be questioned," warned U.N. Secretary-General Kofi Annan; New Zealand's prime minister called the U.S. legal position "highly debatable." And German Foreign Minister Joschka Fischer told the Security Council . . . that, "Under the current circumstances, there is no basis in the U.N. charter for a regime change with military means."

Robert S. Greenberger & Jess Bravin, *The Assault on Iraq: War May Conform with Law, but U.S. Prestige May Suffer*, WALL ST. J., Mar. 20, 2003, at A13. On March 18, 2003, French President Jacques Chirac issued a statement proclaiming that international law must be respected and declaring that any U.S. decision to invade Iraq "compromises peaceful methods for resolving crises in the future linked to the proliferation of arms of mass destruction." Kevin J. Delaney, *France's Chirac Blasts Move to War*, WALL ST. J., Mar. 19, 2003, at A12. "In Canada, Prime Minister Jean Chretien told Parliament, to storms of applause, that his country's troops wouldn't join in the U.S.-led war. The U.S. had been hoping Ottawa would send special forces." Robbins, *supra* note 5. "Russian President Vladimir Putin, despite personal appeals from Mr. Bush, denounced plans for an attack in unusually strong terms, saying a war 'would be fraught with the gravest of consequences. It will result in casualties and destabilize the international situation in general.'" *Id.*

10. Thomas et al., *supra* note 5, at 62.

The public outline [for war in Iraq] can be fairly clearly discerned by Bush's speeches, first his State of the Union when he identified the Axis of Evil to include

permanent members of the Security Council would see eye to eye with this emerging doctrine of preemption and unilateralism against Iraq.<sup>11</sup> Despite twelve years of trying to rein in Saddam Hussein, Security Council members opposed to the use of force against Iraq suggested that the U.N. resolution and enforcement regime would ultimately succeed in taming Iraq, but that more time was needed.<sup>12</sup> They argued that military action would be unjustified and premature.<sup>13</sup> Not surprisingly, news reports revealed that countries opposed to the use of force against Iraq, namely France, Germany, and Russia, were also troubled by the idea of allowing the world's last remaining superpower too much freedom in determining how to respond to perceived threats to world peace.<sup>14</sup> This new state of world affairs would bring us into conflict with our allies,<sup>15</sup> draw us into another war in the Middle East, and

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Iraq, Iran and North Korea—rogue regimes with WMD [Weapons of Mass Destruction]—then at West Point in May, when he announced that the United States would pre-empt threats from such regimes.

*Id.*

11. *War Draws Ire, Support from Unlikely Places*, *supra* note 8.

One of the strongest rebukes to the U.S. military campaign came from Russian President Vladimir Putin, who appeared on television to demand a quick end to the U.S. attack. "Military actions are taking place contrary to the world public opinion, contrary to the principles and norms of international law and the charter of the U.N."

China, too, surprised analysts with its harsh criticism of the U.S., indicating it would try to rally other nations to stop the war. "The military operation against Iraq is a violation of the United Nations' charter and the basic norms of international law," a foreign ministry spokesman said.

*Id.* "French President Jacques Chirac, who led the antiwar camp in the U.N., issued a somewhat tepid condemnation of the military strikes yesterday, saying France 'regrets this action.' German Chancellor Gerhard Schroeder called the U.S.-led attacks 'a bad decision,' but added that German-American relations were not in danger." *Id.*

12. Some also suggested that opposing Security Council members (particularly France and Russia) had a personal interest in delaying any kind of military action against Iraq because of lucrative business contacts. Thomas et al., *supra* note 5, at 60. "By the time George W. Bush became president in January 2001, Saddam Hussein had every reason to believe he was winning his long war against the United States. At the United Nations, the French and Russians, eager for oil contracts, were pushing to do away with sanctions altogether." *Id.* "[I]n 2000, Baghdad's newly reopened Saddam International Airport began disgorging a steady stream of politicians and businessmen on unauthorized flights from Russia, France and the Arab world. All were there to do business with the outlaw regime." KAPLAN & KRISTOL, *supra* note 7, at 54.

13. French President Jacques Chirac stated: "The United States has just issued an ultimatum to Iraq. Whether, I repeat, it's a matter of the necessary disarmament of Iraq or of the desirable change of regime in that country, there is no justification for a unilateral decision to resort to war." *Threats and Responses; Chirac's View: 'A Heavy Responsibility'*, N.Y. TIMES, Mar. 19, 2003, at A14 (text of statement made by French President Jacques Chirac as translated and issued by Elysee Palace).

14. "[A] key element of the criticism is global unease with U.S. might—particularly when its military is unleashed." *War Draws Ire, Support from Unlikely Places*, *supra* note 8.

15. Relations with France were particularly strained as a result of the war in Iraq:

Complicating any rapprochement with the United States is Mr. Chirac's clinging to his vision of a "multipolar" world in which the United States does not dominate.

manage to weaken the newfound powers that the Security Council was just beginning to exercise.<sup>16</sup>

The post-9/11 world provided the perfect soil for proposing invocation of the little used customary international law doctrine of anticipatory self-defense for dealing with our foes throughout the world.<sup>17</sup> Fear of future at-

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"We can no longer accept the simple law of the strongest," he said in a prepared statement during a visit to Malaysia last week.

The official Elysee Palace interpreter gave Mr. Chirac's words an even more ominous meaning in English, saying, "We can no longer agree to have the law of the strongest, the law of the jungle," although Mr. Chirac did not use that actual phrase.

What he did say was powerful enough. "What we need is an international structure, an international mechanism to eliminate unilateralism and bring about multilateralism," he said. The goal, he added, is "that nobody feels sidelined, marginalized, humiliated."

Elaine Sciolino, *France and Germany Consider Possible Roles in Postwar Iraq*, N.Y. TIMES, July 29, 2003, at A10.

Criticism of the U.S. war in Iraq was stiff among Islamic countries in Southeast Asia. Indonesian President Megawati Sukarnoputri, who backed the Bush administration's war in Afghanistan in 2001, said the war contravened international law. Acting Malaysian Premier Abdullah Ahmad Badawi said the U.S. "lacked evidence to back" the attacks on Baghdad.

*War Draws Ire, Support from Unlikely Places*, *supra* note 8. "As Vice President Cheney outlined on NBC's 'Meet the Press' Sunday, we're moving to a world of shifting coalitions. The strategies and institutions that kept the peace during the Cold War against a single great power threat are unsuited to this century's threats from terror and proliferating weapons." *Au Revoir, Security Council*, WALL ST. J., Mar. 21, 2003, at A14.

16. "President Jacques Chirac of France . . . called the divisions over the war [with Iraq] one of the gravest threats to multilateral institutions like the United Nations in modern times." Steven R. Weisman, *The Struggle for Iraq*, N.Y. TIMES, Sept. 24, 2003, at A1. "Having failed to block the U.S. from deposing Saddam Hussein, Kofi Annan now says 'the effort to relieve the suffering of the Iraqi people may yet prove to be the task around which the unity of this Council can be rebuilt.'" *Au Revoir, Security Council*, *supra* note 15.

The dysfunction starts with the Security Council and the veto. The process gives outsized influence to a country like France, which hasn't been a great power for 60 years and has as its main modern goal containing American power. One solution would be to replace France on the Security Council with a more deserving nation such as Japan or India, but that's nearly impossible under the U.N. charter.

*Id.* "Indiana Democrat Evan Bayh told Fox News this week that, 'In terms of the United Nations being a legitimate vehicle for restraining tyrants with weapons of mass destruction, for restraining aggressors, I think they have done themselves grievous damage.'" *Id.*

Mr. Bush's decision to go it nearly alone—and France and Germany's decision to allow that to happen—are threatening to relegate both the United Nations and the North Atlantic Treaty Organization to permanent weakness, if not complete irrelevance. The long-held strategy of containing enemies is now being replaced with one of pre-empting foes even before they have marshaled their forces to strike the U.S.

Robbins, *supra* note 5.

17. Scholars and commentators may also refer to the doctrine as a "preemptive use of force" or a "preventive use of force." See Gerald Powers, *Ethical Analysis of War Against Iraq*, in WOULD AN INVASION OF IRAQ BE A JUST WAR?, 2003 U.S. INST. PEACE SPECIAL REP. 98, at <http://www.usip.org/pubs/specialreports/sr98.html>. "While strong positions have been taken by nearly all States against 'preventive' or 'preemptive' war, some uncertainty remains as to threats of force that credibly appear as likely to result in imminent attack." OSCAR

tacks on the U.S. mainland, like those conducted on September 11th, gave this doctrine a renewed preeminence.

Preemption is not a new idea. As an international law doctrine, it has been around at least since the mid-19th century,<sup>18</sup> but its use against Iraq in particular emerged during the Reagan administration and had been floated for consideration in both the George H.W. Bush and the Clinton administrations.<sup>19</sup> The Bush Doctrine, as it was dubbed after being embraced by the second Bush administration,<sup>20</sup> reflected a move away from the doctrine of containment that had characterized the Cold War era and opened a Pandora-like box that could permit proactive uses of force never before seen in the post-World War II era of international law.

Part I of this article provides an overview of international law on the use of force prior to September 11th, with a focus on the application of international conventions and international custom to the doctrine of anticipatory self-defense. Part II examines the legal basis of the United States' arguments for pursuit of a war against Iraq, and the failure to achieve international co-

SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 141 (1991) [hereinafter SCHACHTER, *INTERNATIONAL LAW*]. In addition, Security Council debates as late as 1981, inferred "the continued validity of an 'inherent' right to use armed force in self-defense prior to an actual attack but only where such an attack is imminent 'leaving no moment for deliberation.'" Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984) [hereinafter Schachter, *The Right of States*].

18. Schachter, *The Right of States*, *supra* note 17, at 1634-35.

The conditions of the right of anticipatory defense under customary law were expressed generally in an eloquent formulation by the U.S. Secretary of State Daniel Webster in a diplomatic note to the British in 1842. . . . [He stated] that self-defense must be confined to cases in which "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

*Id.* The occasion for the exchange of diplomatic notes arose as the result of a British attack of a small steamer, the *Caroline*, which had been used in support of a Canadian insurrection, but was sitting in U.S. territory at the time it was destroyed. 1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW* 239 (2d ed. 1945); 2 JOHN BASSET MOORE, *A DIGEST OF INTERNATIONAL LAW* 409-10 (1906). See also R.B. MOWAT, *THE DIPLOMATIC RELATIONS OF GREAT BRITAIN AND THE UNITED STATES* 108 (1925); JESSE S. REEVES, PH. D., *AMERICAN DIPLOMACY UNDER TYLER AND POLK* 17-18 (Peter Smith 1967) (1907).

19. See KAPLAN & KRISTOL, *supra* note 7, at 79-89; Michael Kirk, *The War Behind Closed Doors*, PBS FRONTLINE, at <http://www.pbs.org/wgbh/pages/frontline/shows/iraq/> (Feb. 20, 2003).

We are writing you because we are convinced that current American policy toward Iraq is not succeeding . . . . We urge you . . . to enunciate a new strategy that would secure the interests of the U.S. . . . That strategy should aim, above all, at the removal of Saddam Hussein's regime from power.

Letter from various foreign policy experts, including Donald Rumsfeld and Paul Wolfowitz, to President Bill Clinton (Jan. 26, 1998), <http://www.newamericancentury.org/iraqclinton-letter.htm>.

20. "Without much consultation or debate, Bush formulated his own 'doctrine,' holding that the United States would go after not only terrorists but countries that harbored them as well." Thomas et al., *supra* note 5, at 61-62. "[O]n June 1, 2002, in an address at West Point, Bush elaborated on themes he had in the past applied primarily to Iraq, spelling out what would henceforth be known as the Bush Doctrine." KAPLAN & KRISTOL, *supra* note 7, at 73.

operation through the U.N. Security Council. This article concludes with a discussion of the implications for international law and international diplomacy.

## I. SOURCES OF INTERNATIONAL LAW

The development of international law as we know it today can be traced to the fall of the Holy Roman Empire and is generally dated to the Peace of Westphalia in 1648.<sup>21</sup> As the Holy Roman Empire crumbled, independent states, with their own political bases of power, began to emerge.<sup>22</sup> No longer subservient to the Emperor or the Pope, nation-states began to exercise individual sovereign authority.<sup>23</sup> This newfound power of independence inevitably led to conflict with other nascent states.<sup>24</sup> Without an Emperor or Pope as final arbiter, the newly emerging nation states were forced to look elsewhere for conflict resolution.<sup>25</sup> International law emerged to fill this vacuum with its own set of rules to govern the relations between these developing states and rules by which to settle disputes.<sup>26</sup>

The original sources of international law consisted of treaties (international conventions) made between and among the emerging states and customary practices (international custom) that developed outside of the treaty regime.<sup>27</sup> Treaty law, like contract law in our domestic societies, regulates relations by virtue of agreement between or among the states party to the treaty.<sup>28</sup> The consent of each party tends to give treaty law a high degree of legitimacy and, correspondingly, a high degree of compliance.<sup>29</sup> Unlike

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21. TIM HILLIER, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 1 (2d ed. 1999).

22. *Id.*

23. *See generally* STEPHEN J. LEE, *ASPECTS OF EUROPEAN HISTORY 1494-1789* 92-100 (2d ed. 1984) (describing the political struggles and disintegrating power of the Holy Roman Empire between 1493 and 1618).

24. *Id.* at 115.

The Empire had now lost all the characteristics of a sovereign state and was never again to come to a united political decision or to wage war as a unit. . . . In the future it was time and time again to be the scene of warfare between member states . . . as well as between external powers.

*Id.* “[W]ar made it possible for new, proud, revolutionary regimes to project worldwide a moral message which would serve as an alternative to the corrupt ways of the old established states.” TORBJØRN L. KNUSTEN, *THE RISE AND FALL OF WORLD ORDERS* 22 (1999). *See also* Ambassador Bernhard Zepter, Head of the Delegation of the European Commission in Japan, Speech at the Asia-Europe Forum 4th Symposium, Tokyo International Forum, *How Are Regions Formed: Comparing Asia with Europe* (Feb. 22, 2003), at <http://jpn.cec.eu.int/english/press-info/4-2-116.htm>.

25. *See* HILLIER, *supra* note 21, at 1.

26. *Id.*

27. *Id.*

28. *See id.* at 17.

29. “Legitimacy” has been defined by Professor Thomas Franck as “a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being



treaty law, customary international law does not derive its legitimacy from explicit agreements, but from acquiescence (implicit agreement) to the general practice of states and a belief that such practice has acquired the normative characteristics of law.<sup>30</sup> The seminal case identifying custom as a source of international law in the United States was the U.S. Supreme Court's *Paquete Habana* decision:<sup>31</sup>

[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence for these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Judicial tribunals resort to such works, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>32</sup>

Other sources of international law have emerged over the past four centuries,<sup>33</sup> but international conventions and international custom are the two that speak most directly to the state of international law on anticipatory self-defense.

#### *A. International Conventions: The United Nations Charter—Outlawing Aggression as a Prescription for Peace*

Any discussion regarding the use of force in self-defense, whether in anticipation of attack or in response to an attack already undertaken, must begin with the United Nations Charter. Written after WWII with the hope of preventing future wars, the Charter sought to outlaw aggression and encour-

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and operates in accordance with generally accepted principles of right process." THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

30. See *Paquete Habana*, 175 U.S. 677, 700 (1900).

31. *Id.* at 677.

32. *Id.* at 700.

33. Contemporary discussion of sources of international law centers around Article 38 of the Statute of the International Court of Justice, which identifies the following as sources of international law:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055. The Restatement (Third) of the Foreign Relations Law of the United States section 102 contains a very similar list of sources. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986). For a more complete discussion of the doctrine of sources, see SCHACHTER, *INTERNATIONAL LAW*, *supra* note 17, at 35-37.

age the peaceful resolution of international disputes.<sup>34</sup> Article 1(1) outlines the principal purpose of the United Nations Organization:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>35</sup>

Formation of the United Nations organization was not the first attempt by the world community to outlaw the use of force by sovereign states, but was an evolution of international law that began after the First World War.<sup>36</sup> Before WWI, use of force in general and the waging of war in particular was seen as “a natural function of the State and a prerogative of its uncontrolled sovereignty.”<sup>37</sup> As such, international law permitted a state to wage war for any reason it desired regardless of the underlying merits or justness of the act. Lassa Oppenheim’s influential treatise, *International Law*, cites to respected international law author and scholar Charles Cheney Hyde in making this point:

As Hyde, writing in 1922, said: “It always lies within the power of a State . . . to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.” International Law did not consider as illegal a war admittedly waged for such purposes.<sup>38</sup>

The terrible devastation and suffering wrought by World War I encouraged world leaders in 1919 to form the League of Nations, at least in part, to

34. The Preamble to the U.N. Charter emphasizes that one of the major goals of the Organization is “to save succeeding generations from the scourge of war.” U.N. CHARTER pmb. In addition Article 2(3) provides: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” *Id.* art. 2, para. 3.

35. *Id.* art. 1, para. 1.

36. JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE* 10-11 (1982).

The precipitating factor for the creation of the League of Nations, of course, was the carnage of World War I. Cooperation among the Allied powers during the war produced the appropriate psychological conditions for an alliance for peace . . .

Despite the collapse of the League, or perhaps because of it, there was agreement among the Allied powers early in the course of World War II that some form of international organization should be created after the war to maintain international peace and security.

*Id.*

37. 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* 177-78 (H. Lauterpacht ed., 7th ed. 1952).

38. *Id.* at 178 (citation omitted).

bring about a change in this aspect of international law that allowed nations to wage war for any reason they saw fit.<sup>39</sup> The multilateral treaty that formed the League of Nations required its members to attempt to resolve their differences by arbitration before resorting to the use of force against another member's "territorial integrity and existing political independence."<sup>40</sup>

After an initial success in dealing with the Graeco-Bulgarian crisis of 1925, and a less spectacular achievement in the Chaco dispute of 1928, the League witnessed the invasion of Manchuria in 1931, the Italo-Abyssinian War of 1934-35, the German march into the Rhineland in 1936, into Austria in 1938, into Czechoslovakia in 1939, the Soviet Union's invasion of Finland in 1939 and, finally, the German invasion of Poland in 1939. Apart from half-hearted economic sanctions against Italy in 1935, no sanctions were ever really applied by the League. To this extent the failure of the League was due, not to the inadequacies of the Covenant, but to the apathy and reluctance of the member States to discharge their obligations.<sup>41</sup>

This reluctance of nations to discharge their obligations would prove to be a major obstacle for the implementation of the United Nations Charter as well.<sup>42</sup>

To a certain extent, the United Nations Charter was the world community's second chance to obtain a progressive development of international law that the League of Nations had failed to achieve. Article 2(4) of the Charter attempted to reach this goal by prohibiting "the threat or use of force against the territorial integrity or political independence of any State, or in

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39. ELMER BENDINER, *A TIME FOR ANGELS: THE TRAGICOMIC HISTORY OF THE LEAGUE OF NATIONS* 81-82 (1975).

We are here to see, in short, that the very foundations of this war [World War I] are swept away. Those foundations were . . . the aggression of great Powers upon small . . . the holding together of unwilling subjects by the duress of arms . . . the power of small bodies of men to work their will upon mankind and use them as pawns in a game. And nothing less than the emancipation of the world from these things will accomplish peace.

*Id.* (quoting President Woodrow Wilson in presenting the idea of the League of Nations Covenant to assembled diplomats in Paris on January 25, 1919). See also *The Predecessor: The League of Nations*, HIST. & FORMATION U.N., at <http://www.weblearn.ca/teachersite/UNPeacekeeping/PrintWOpics/histformation.htm> (last visited Oct. 22, 2003).

40. LEAGUE OF NATIONS COVENANT arts. 10, 12.

41. D.W. BOWETT, Q.C., LL.D., *THE LAW OF INTERNATIONAL INSTITUTIONS* 18 (4th ed. 1982).

42. "The United Nations has failed to live up to its responsibilities in disarming Iraq, but at least the process has been educational. Americans have learned anew that they can never trust their security to that dysfunctional body. So now is an appropriate time to rethink the U.S. role." *Au Revoir, Security Council*, *supra* note 15.

The list of [the U.N.'s] failures includes most of the great human tragedies of our times—Cambodia, Somalia, Haiti, Rwanda, Bosnia and Kosovo. Today the U.N. is also failing to address North Korea's brazen rejection of its nuclear commitments. In a post-September 11 world of terror and nuclear weapons, the U.N.'s dereliction is dangerous.

*Id.* See also *infra* text accompanying notes 110-12.

any other manner inconsistent with the Purposes of the United Nations.”<sup>43</sup> In order to determine which uses of force are “inconsistent with the Purposes of the United Nations,”<sup>44</sup> one must first determine what uses of force are consistent with the Charter. The Charter provides for at least two instances in which the uses of force (or its threat) are allowed.<sup>45</sup> One can find these permissive exceptions in Article 51<sup>46</sup> and Article 42<sup>47</sup> of Chapter VII (Articles 39-51) of the Charter. Article 51 permits the use of force when a nation is exercising the right of self-defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>48</sup> Note that, even in the exception, the U.N. Charter seeks to strictly limit the use of force. First, Article 51 requires an “armed attack” as a prerequisite to invoking the right of self-defense.<sup>49</sup> Second, it allows such a defensive use of force only until the Security Council itself has had time to take measures to reinstate peace and security.<sup>50</sup> The U.N. Charter’s other exception to the proscription on the use of force is commonly referred to as an “enforcement action” of the Security Council;<sup>51</sup> it is found in Article 42 of Chapter VII of the Charter.<sup>52</sup> Chapter VII is a natural outgrowth of Article 24, which gives the Security Council the primary responsibility for maintaining international peace and security.<sup>53</sup> Chapter VII outlines the various responses or enforcement actions, including the use of force in Article 42,

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43. U.N. CHARTER art. 2, para. 4.

44. *Id.*

45. *Id.* arts. 39-43, 51.

46. *Id.* art. 51.

47. *Id.* art. 42.

48. *Id.* art. 51. Members exercising the right of self-defense under this article must immediately report such actions to the Security Council. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* art. 45 (“In order to enable the United Nations to take urgent military measures Members shall hold immediately available national air-force contingents for combined international enforcement action.”); ROBERT W. GREGG, ABOUT FACE?: THE UNITED STATES AND THE UNITED NATIONS 105 (1993) (“The United Nations had mounted only one military enforcement action under Article 42 of the Charter in its entire history, and that, of course, had occurred during the fortuitous absence of the Soviet Union from the Security Council at the beginning of the Korean War.”); HILLIER, *supra* note 21, at 268 (“Articles 41 and 42 of the Charter provide for enforcement measures, including the use of force.”).

52. U.N. CHARTER art. 42. Non-forcible measures taken by the U.N. Security Council under Article 41 of the U.N. Charter may also be referred to as an “enforcement action.” *See id.* art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions.”); HILLIER, *supra* note 21, at 268 (“enforcement measures, including the use of force”) (emphasis added).

53. “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” U.N. CHARTER art. 24, para. 1.

which the Security Council may take in order to meet their Article 24 responsibility.<sup>54</sup> Article 39 first requires that the Security Council “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>55</sup> It then proceeds to give the Council authority to “decide what measures shall be taken . . . to maintain . . . international peace and security.”<sup>56</sup> The use of force under Article 42 is among the measures that may be taken. Specifically, the Article authorizes the Security Council to “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.”<sup>57</sup> Because the Security Council never came to any

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54. *Id.* arts. 39-42.

55. *Id.* art. 39.

56. *Id.* Interestingly, Ministers from the European Union’s 15 member countries issued a joint statement on June 16, 2003, stating: “[W]eapons of mass destruction were ‘a threat to international peace and security.’” Thomas Fuller, *European Union Toughening Stance on Weapons Policy*, INT’L HERALD TRIB., June 16, 2003, reprinted in N.Y. TIMES INT’L, June 16, 2003, <http://www.nytimes.com/2003/06/16/international/europe/16CND-UNION.html>. The statement echoes the language used in Article 39 and one must assume the language was deliberate as they also “held up the primacy of the United Nations, saying that the Security Council should play a ‘central role’ in dealing with any threats from weapons of mass destruction.” *Id.* This statement represents a progressive development away from the sovereign prerogative (which itself emanated from dicta found in the Permanent Court of International Justice’s *Lotus* case holding that “[r]estrictions upon the independence of States cannot . . . be presumed,” *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A) No. 10, at 18 (Sept. 7), reprinted in 2 MANLEY O. HUDSON, *WORLD COURT REPORTS* 35 (Oceana Publ’ns, Inc. 1969) (1935)), endorsed by language used in subsequent I.C.J. opinions, including the opinion on *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8), and *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), that discuss the limits of sovereignty. In *Legality of the Threat or Use of Nuclear Weapons*, the U.N. General Assembly asked the I.C.J. for an advisory opinion as to whether the threat or use of nuclear weapons was permitted in any circumstance. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 1. The court concluded by a vote of eleven to three that there was no “comprehensive and universal prohibition of the threat or use of nuclear weapons” to be found in either customary or conventional international law. *Id.* ¶ 105(B). In addition, by a vote of seven to seven, the Court left open the question “whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” *Id.* ¶ 105(E). In *Military and Paramilitary Activities*, the ICJ held that there was no customary international law restraint inhibiting the ability of a state to decide for itself the level of armaments it deemed necessary for defensive purposes, and that “this principle is valid for all States without exception.” *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 269.

57. U.N. CHARTER art. 42. Note that, unlike Article 51, the use of force under this section of the U.N. Charter does not envision an “armed attack” as a prerequisite for action by the Security Council. Therefore, Security Council authorization clearly provides for rights of anticipatory self-defense or preemption, while seemingly denying these rights to individual states under Article 51. The rationale for such a distinction flows from the purposes of the Charter, which seek to reduce the “scourge of war,” U.N. CHARTER pmb., and centralize the power to prevent war in the Security Council, *id.* arts. 24, 39. Giving individual states the right to anticipatory self-defense would run counter to these purposes because of the possibilities for abuse and the danger that such an exception would eventually swallow the rule. As we will see, *infra* notes 70-72 and accompanying text (particularly note 71 citing Timothy Kearly, *Raising the Caroline*, 17 WIS. INT’L L.J. 325 (1999)), there is some question among commentators whether Article 51’s restrictions altered the traditional customary international

agreement regarding a use of force against Iraq,<sup>58</sup> the Security Council's enforcement powers under Article 42 of Chapter VII of the Charter can be dismissed for the purposes of this paper. However, Article 51's exception for reasons of self-defense in response to an "armed attack" could arguably come into play, although such an argument would also require an analysis of international custom and its concept of anticipatory self-defense.

### *B. International Custom: Anticipatory Self-Defense and Its Use*

Long before the drafting of the U.N. Charter and its two exceptions to the use of force under Articles 42 and 51, another exception, in truth the predecessor of the Article 51 self-defense exception, had emerged under international custom.<sup>59</sup> This third exception to the prohibition against the use of force has been referred to variously as "anticipatory self-defense,"<sup>60</sup> "pre-emptive use of force,"<sup>61</sup> or "preventive use of force."<sup>62</sup> The first known articulation of the doctrine came from Daniel Webster, as Professor Oscar Schachter tells us:

The conditions of the right of anticipatory defense under customary law were expressed generally in an eloquent formulation by the U.S. Secretary of State Daniel Webster in a diplomatic note to the British in 1842. . . . [He stated] that self-defense must be confined to cases in which "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."<sup>63</sup>

The occasion for this statement arose as a result of the 1837 British attack on an American ship (the *Caroline*) while it was moored in U.S. wa-

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law on anticipatory self-defense, which envisioned such rights for individual states in limited circumstances.

58. Felicity Barringer, *Threats and Responses: Security Council*, N.Y. TIMES, Mar. 18, 2003, at A21.

Grimly, the British envoy, Sir Jeremy Greenstock, told a crush of reporters in a basement corridor, "We have had to conclude that Council consensus will not be possible" in line with the resolution passed unanimously in November. With that statement, the possibility of a second resolution supporting the use of force evaporated, defeated by French resistance.

*Id.* See also *Spain, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution*, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/215 (2003) (Provisional Resolution never officially passed by the U.N.).

59. HILLIER, *supra* note 21, at 18.

Custom in international law is a practice followed by those involved because they feel legally obligated to behave in such a way. Custom must be distinguished from mere usage, such as acts done out of courtesy, friendship, or convenience, rather than out of obligation or a feeling that non-compliance would produce legal consequences.

*Id.*

60. See Schachter, *The Right of States*, *supra* note 17, at 1634.

61. See Powers, *supra* note 17.

62. See *id.*

63. Schachter, *The Right of States*, *supra* note 17, at 1634-35.

ters.<sup>64</sup> The British claimed that U.S. nationals were using the ship to assist Canadian rebels working to liberate French Canada.<sup>65</sup> After complaint by the U.S. for this violation of territorial sovereignty, the British government argued that the assault was necessary to prevent future attacks.<sup>66</sup> In an exchange of diplomatic notes with his British counterpart, Webster acknowledged a right to what would later become known as anticipatory self-defense, but argued that such rights were limited by the necessity to take such action as outlined above. In a separate note, Webster added an additional requirement of proportionality: “the act . . . must be limited by that necessity, and kept clearly within it.”<sup>67</sup> Unlike the right of self-defense under Article 51 of the U.N. Charter, the customary right under the *Caroline* case does not require an initial “armed attack” to have been committed.<sup>68</sup> This particular exception to the prohibition against the use of force has seldom been recognized due most probably to the potential for its abuse. As with all exceptions one must be careful that the exception does not swallow the rule.<sup>69</sup>

One question debated by commentators was whether the customary international law of anticipatory self-defense survived the progressive development of the law on self-defense brought about by international conventions, and specifically by the U.N. Charter, whose Article 51 required an armed attack to occur before the right to self-defense could be invoked.<sup>70</sup> Most of those commentators seem to agree that the U.N. Charter did not change the customary international law of self-defense.<sup>71</sup> It is clear, however, that the community of nations has rarely, if ever, allowed reliance on this international custom.<sup>72</sup> As Professor Louis Henkin explains:

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64. See MOORE, *supra* note 18, at 409, 412.

65. HYDE, *supra* note 18, at 239.

66. See MOWAT, *supra* note 18, at 109; REEVES, *supra* note 18, at 18.

67. Letter from Mr. Daniel Webster to Mr. H.S. Fox (Apr. 24, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1857).

68. See Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 894 (2002).

69. SCHACHTER, INTERNATIONAL LAW, *supra* note 17, at 145.

[T]he general reluctance to approve uses of force under expanded conceptions of self-defense is itself significant. Such reluctance is evidence of a widespread perception that widening the scope of self-defense will erode the basic rule against unilateral recourse to force. The absence of binding judicial or other third-party determinations relating to the use of force adds to the apprehension that a more permissive rule of self-defense will open the way to further disregard of the limits on force.

*Id.*

70. See, e.g., *id.* at 135-183; Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. INT’L L.J. 207 (2001); Kearly, *supra* note 57, at 343-44.

71. See Kearly, *supra* note 57, at 327.

72. SCHACHTER, INTERNATIONAL LAW, *supra* note 17, at 144, 145-46.

[I]t is clear that most governments have been reluctant to legitimize expanded self-defense actions that go beyond the paradigmatic case [under Article 51, which

If there were clear evidence of an attack so imminent that there was no time for political action to prevent it, the only meaningful defense for the potential victim might indeed be the pre-emptive attack and—it may be argued—the scheme of Article 2(4) together with Article 51 was not intended to bar such attack. But this argument would claim a small and special exception for the special case of the surprise nuclear attack; today, and one hopes for a time longer, it is meaningful and relevant principally only as between the Soviet Union and the United States.<sup>73</sup>

The fall of the Berlin Wall, and the dismantling of a large part of the former Soviet Union's nuclear arsenal, gave the world hope that such horrendous possibilities would never occur.<sup>74</sup> However, this optimistic view gave way to the reality that certain rogue states were attempting to develop nuclear weapons and that such weapons could eventually find their way into the hands of terrorists.<sup>75</sup> The events of September 11, 2001, brought those fears to the forefront of world politics.

## II. BREAKDOWN OF INTERNATIONAL COOPERATION AND FAILURE OF THE SECURITY COUNCIL

Throughout the Cold War “it was virtually taken for granted that the ideological division between the U.S. and the Soviet Union would make agreement on any substantial issue virtually impossible, not just in the powerful Security Council, but practically throughout the institution as a whole.”<sup>76</sup> The fall of communism may have thawed Cold War relations, but a single “no” vote from one of the permanent members of the Security

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requires an armed attack in the first instance]. . . . Some of these arguments, if accepted, would extend the concept of self-defense so broadly as to allow almost any unilateral use of force taken in the name of law and order. There is no evidence that governments by and large would favor this result. On the contrary, the records of the United Nations . . . show strong resistance to widening self-defense to permit force except where there has been an armed attack or threat of imminent attack. It does not seem likely that this resistance will disappear in the foreseeable future.

*Id.*

73. LOUIS HENKIN, *HOW NATIONS BEHAVE* 143-44 (2d ed. 1979).

74. See generally THOMAS L. FRIEDMAN, *supra* note 1, at 7, 12 (remembering that the two major, defining symbols of the Cold War period were the Berlin Wall and nuclear weapons, and that “the defining anxiety of the Cold War was fear of annihilation from an enemy”).

75. See generally Kirk Semple, *Atomic Agency Chief Urges Global Controls on Nuclear Fuel*, N.Y. TIMES, Nov. 4, 2003, at A13 (discussing Mohamed ElBaradei's address to the U.N. on November 3, 2003, regarding the danger posed by North Korea, Iran, and possibly Iraq because of the fact that recently, “[i]nformation and expertise on how to produce nuclear weapons has become much more accessible”); Richard Sisk, *Dire Nuke Threat Warning*, DAILY NEWS (N.Y.), May 22, 2002, at 6 (reporting on Defense Secretary Donald Rumsfeld's May 21, 2002, presentation to the U.S. Senate Appropriations Committee, in which Rumsfeld stated that “[t]errorists backed by rogue states will ‘inevitably’ get nuclear weapons and try to use them against the U.S. . . . [and] ‘that terrorist networks have relationships with terrorist states that have weapons of mass destruction’”).

76. JAMES HOLTJE, *DIVIDED IT STANDS* 19 (1995).



Council (U.S., Great Britain, France, Russia or China) can still bring about a paralysis equally as effective as any experienced during the Cold War.<sup>77</sup> Unfortunately, the diplomatic and political events leading up to the second Iraq War illustrate this point with great clarity.

An influential group of anti-Hussein hawks in the Republican Party had always been disappointed that the first President Bush did not pursue Saddam Hussein after Operation Desert Storm.<sup>78</sup> Impatience among this group of defense policy experts only grew as twelve years passed and Hussein continued to flaunt the United Nations resolutions that sought to have him dismantle his weapons of mass destruction.<sup>79</sup> After September 11th, this group of advisors saw an opportunity to finally pursue the regime change in Iraq that never materialized after the first Gulf War. The argument they had been espousing for more than twelve years of switching from a doctrine of pre-Cold War containment to one of preemption had finally found a receptive audience.<sup>80</sup> President Bush made the argument himself in his annual State of the Union Address to Congress on January 28, 2003:

Before September the 11th, many in the world believed that Saddam Hussein could be contained. But chemical agents, lethal viruses and shadowy terrorist networks are not easily contained. Imagine those 19 hijackers with other weapons and other plans—this time armed by Saddam Hussein. It would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known. We will do everything in our power to make sure that that day never comes.<sup>81</sup>

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77. The U.N. Security Council website describes the voting procedure:

Decisions on procedural matters are made by an affirmative vote of at least nine of the 15 [Security Council] members. Decisions on substantive matters require nine votes, including the concurring votes of all five permanent members. This is the rule of "great Power unanimity", often referred to as the "veto" power.

*U.N. Security Council Members*, U.N. WEBSITE, at <http://www.un.org/Docs/sc/unscmembers.html> (last visited Nov. 25, 2003).

78. See Todd S. Purdum, *The Brains Behind Bush's War*, N.Y. TIMES, Feb. 1, 2003; Kirk, *supra* note 19.

79. See generally GEORGE W. BUSH, IRAQ'S COMPLIANCE WITH U.N. SECURITY COUNCIL RESOLUTIONS, H.R. DOC. NO. 107-103 (2001) (referred by the Speaker of the House to the Committee on International Relations) [hereinafter BUSH, IRAQ'S COMPLIANCE]; KENNETH KATZMAN, FOREIGN AFFAIRS, DEFENSE, AND TRADE DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, IRAQ: COMPLIANCE, SANCTIONS AND U.S. POLICY (Issue Brief 2002); WHITE HOUSE, A DECADE OF DECEPTION AND DEFIANCE (2002), <http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf> [hereinafter A DECADE OF DECEPTION].

80. See generally Foundation for Middle East Peace, *George W. Bush, Weapons of Mass Destruction and the Middle East*, at <http://www.fmep.org/reports/2002/srSpring2002.html> (last visited Oct. 17, 2003) (discussing President George W. Bush's willingness to adopt preemption as his central strategy for dealings with the Middle East, especially Iraq).

81. State of the Union Address 2003, *supra* note 7. The President made a similar argument on March 17, 2003, when he gave Saddam Hussein forty-eight hours to leave Baghdad:

In this century, when evil men plot chemical, biological and nuclear terror, a policy of appeasement could bring destruction of a kind never before seen on this earth.

If there was any doubt by anyone that the United States had abandoned the Cold War policy of containment for one of preemption, that speech irrevocably erased such doubts. The President had begun to publicly lay the foundation for justifying a use of force against Iraq. The President and his advisors had to know that there would be detractors arguing that any use of force against Iraq would violate international law, both under the U.N. Charter (international convention) as well as under international custom. The only credible argument that the President would be able to make would be an argument under the customary international law laid out in the *Caroline* case. The U.S. government understood that it could not make a case for the use of force under the guise of international conventions, specifically Article 51 of the U.N. Charter, because Iraq had not initiated the requisite "armed attack" against the United States.<sup>82</sup> However, the government argued forcefully that an international convention argument could be justified by focusing on several resolutions that the U.N. had passed during the period following Iraq's invasion of Kuwait in August 1990.<sup>83</sup> In particular, the administration focused on U.N. Resolutions 678, 687 and 1441.<sup>84</sup>

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Terrorists and terror[ist] states do not reveal these threats with fair notice in formal declarations—and responding to such enemies only after they have struck first is not self-defense, it is suicide. The security of the world requires disarming Saddam Hussein now.

President George W. Bush, President Says Saddam Hussein Must Leave Iraq Within 48 Hours, Remarks by the President in Address to the Nation (Mar. 17, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>).

82. Following the September 11th attacks on America, the Bush administration tried hard to demonstrate a connection between Iraq and the attacks, presumably to establish the prerequisite of "armed attack" required by Article 51 of the U.N. Charter. See President George W. Bush, President Bush Outlines Iraqi Threat, Remarks by the President on Iraq (Oct. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/10/print/20021007-8.html>; Bruce Morton, *Selling an Iraq-al Qaeda Connection*, CNN.com (Mar. 11, 2003), at <http://www.cnn.com/2003/WORLD/meast/03/11/Iraq.Qaeda.link/>. No clear connection was ever established, as confirmed by the President himself on September 17, 2003, when, in response to that precise question, he replied, "No, we've had no evidence that Saddam Hussein was involved with September the 11th." Paul Waldman, *Why the Media Don't Call It as They See It*, WASH. POST, Sept. 28, 2003, at B4.

White House Press Secretary Scott McClellan stressed Wednesday that Bush administration officials never claimed any Iraq-Sept. 11 link.

Bush's remarks Wednesday followed nearly identical comments by Defense Secretary Donald H. Rumsfeld on Tuesday that the administration had no evidence tying Hussein to Sept. 11. National security advisor Condoleezza Rice also spoke on the issue Tuesday, saying on ABC's "Nightline," "We have never claimed that Saddam Hussein . . . had either direction or control of 9/11."

Greg Miller, *No Proof Connects Iraq to 9/11, Bush Says*, L.A. TIMES, Sept. 18, 2003, at A1. Despite the lack of evidence showing a connection between Hussein and September 11th, an August 2003 Washington Post survey "found that 69% of Americans believed Iraq was 'likely' behind the attacks." *Id.*

83. See A DECADE OF DECEPTION, *supra* note 79, at 4-7 (background paper for President Bush's September 12, 2002, speech to the U.N., detailing sixteen different U.N. resolutions with which Saddam Hussein had failed to comply since 1990); President George W. Bush, President's Remarks at the United Nations General Assembly (Sept. 12, 2002), at

Of the three, Resolution 678 is the only one that expressly authorized the use of force against Iraq.<sup>85</sup> That resolution, passed prior to the start of the first Gulf War, gave Iraq “one final opportunity” to withdraw from Kuwait and permitted member states “to use all necessary means” to secure Iraq’s withdrawal if such was not forthcoming by January 15, 1991.<sup>86</sup> The problem with relying upon this resolution was that it only authorized the use of force for the period of time necessary to cause Iraq’s withdrawal from Kuwait,<sup>87</sup> which of course occurred with Iraq’s surrender.<sup>88</sup>

The U.N. passed Resolution 687 after the end of military operations in Iraq on April 3, 1991.<sup>89</sup> Among other things, Resolution 687 required Iraq to “unconditionally accept the destruction, removal, or rendering harmless” its weapons of mass destruction<sup>90</sup> and to cooperate with U.N. weapons inspectors.<sup>91</sup> It did not authorize the use of force.<sup>92</sup> Some commentators have suggested that authority for the use of force found in Resolution 678 was capable of being reactivated when Iraq failed to live up to the conditions of ceasefire that were included in Resolution 687.<sup>93</sup> This was the argument pre-

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<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html> (President Bush forcefully argued the need for action in the face of Iraq’s noncompliance).

84. Minutes of the First Ministry for Peace Meeting Held in Committee Room 6, House of Commons (July 1, 2003), <http://peace.nfshost.com/minutes1.htm>.

85. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg. at 1, U.N. Doc. S/RES/678 (1990).

86. *Id.* ¶¶ 1, 2, at 1.

87. S.C. Res. 678, *supra* note 85, ¶ 2; S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg. ¶¶ 1-3, U.N. Doc. S/RES/660 (1990).

88. Iraq surrendered and withdrew its troops from Kuwait in late February of 1991, after thirty-nine days of air strikes and a “one hundred hour” ground war” waged against them by the thirty-six countries comprising the “coalition forces.” Roger Normand & Chris Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT’L L.J. 387, 390 (1994).

89. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 1, U.N. Doc. S/RES/687 (1991).

90. *Id.* ¶ 8.

91. *Id.* ¶¶ 12, 13.

92. The resolution ended with a statement by the Security Council stating that it “[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 area.” *Id.* ¶ 34 (emphasis added). The last phrase seemed to prohibit any enforcement action (“further steps”) without additional Security Council authority. *See id.*

93. TIM YOUNGS & PAUL BOWERS, IRAQ AND U.N. SECURITY COUNCIL RESOLUTION 1441 27 (Int’l Affairs & Def. Section, House of Commons Library, Research Paper No. 02/64, 2002).

Some commentators argued that the objective of removing Iraq from Kuwait had been secured, and therefore the authorisation of the use of force was no longer current, while others argued that the ceasefire [under Resolution 687] was conditional and if Iraq breached those conditions then the authorisation of the use of force had to be seen as live, including for political reasons concerning the credibility of international law.

*Id. See also* IAN JOHNSTONE, AFTERMATH OF THE GULF WAR 39 (1994) (explaining that Resolution 678’s authorization of force was invoked after the first Gulf War, with the support of

sented by Secretary of State Colin Powell on behalf of the Bush administration on November 10, 2002: "The United States believes because of past material breaches, current material breaches and new material breaches there is more than enough authority for it to act."<sup>94</sup> Article 39 of the U.N. Charter undercuts such an argument because, in the absence of authorizing force under Article 42, Article 39 provides that only the Security Council retains power to decide whether and how to enforce its resolutions.<sup>95</sup>

Finally, the U.S. administration attempted to rely upon Resolution 1441 for the authority to attack Iraq.<sup>96</sup> The Security Council passed Resolution 1441 in the wake of Iraq's failure to comply with Resolution 687's ceasefire requirements. It required Iraq "immediately, unconditionally, and actively" to fulfill its obligations or to "face serious consequences as a result of its continued violations of its obligations."<sup>97</sup> The Security Council failed to define "serious consequences" and seemingly knew what it was doing when it chose not to use the "all necessary means" formulation of Resolution 678, which everyone agreed would be interpreted as authorizing the use of force.<sup>98</sup>

Perhaps because of the inherent weaknesses in these international convention arguments, the George W. Bush administration also prepared itself to make an argument invoking international custom.<sup>99</sup> The President's speeches, after September 11th, began to be heavily laden with words and theories that suggested Hussein was an immediate threat to national security.<sup>100</sup> The U.S. was preparing to defend its actions as legitimately within

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the U.N. Secretary-General, but only because of Iraq's violation of the no-fly zones in Northern Iraq). Johnstone suggests that the use of Resolution 678's authorization of force "makes sense" for these kind of "border violations," but concludes that, "[t]he matter is less clear with respect to the weapons-related obligations," and that "further military action [in the latter case] would require a new Security Council decision." *Id.* at 39-40.

94. *We Are Ready to Attack, US Warns Saddam*, DAILY TELEGRAPH, Nov. 11, 2002, cited in YOUNGS & BOWERS, *supra* note 93, at 28.

95. For a more detailed discussion of Resolution 687 and attempts at enforcement, see, Ruth Wedgewood, *The Enforcement of Security Council Resolution 687*, 92 AM. J. INT'L L. 724, 727, 728 (1998).

96. U.S. and British officials both argued that U.N. Resolution 1441 provided a justification for war against Iraq. Peter Ford, *As Attack on Iraq Begins, Question Remains: Is It Legal?*, CHRISTIAN SCI. MONITOR, Mar. 21, 2003, at 5.

97. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. ¶¶ 9, 13, U.N. Doc. S/RES/1441 (2002).

98. For a discussion of problems inherent in deciphering the language of U.N. resolutions, see generally Jules Lobel & Michael Ratner, *Bypassing the Security Council*, 93 AM. J. INT'L L. 124 (1999).

99. Recall that the formulation established for anticipatory self-defense by the *Caroline* case requires that such defenses be confined to situations where the necessity of the self-defense is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." HYDE, *supra* note 18, at 239 (quoting Letter from Mr. Daniel Webster, *supra* note 67); MOORE, *supra* note 18, at 412 (quoting Letter from Mr. Daniel Webster, *supra* note 67).

100. See *supra* note 7 and accompanying text (citing President Bush's comments that the U.S. would act unilaterally if necessary).

the bounds allowed by international law.<sup>101</sup> Unfortunately, no other members of the Security Council, other than Great Britain, were willing to accept this argument.<sup>102</sup> The U.S. could not convince the other members of the Security Council that Hussein presented an immediate danger for which no other response but the use of force was available.<sup>103</sup>

Part of the difficulty in convincing other members of the Security Council can be attributed to the failure of diplomacy. Unlike his father, President George H.W. Bush, who had extensive foreign policy experience, President George W. Bush was given to making bold decisions on the international front without consulting our allies.<sup>104</sup> In addition, two of his most trusted advisors, Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld, were old warriors of previous administrations who were reaching the end of their careers and, as a result, felt freer to suggest extreme positions and make politically insensitive comments that would only serve to alienate our allies.<sup>105</sup> The lack of diplomacy made it more difficult to convince our allies that they should adopt our way of thinking.

France, in particular, felt slighted by the unilateralism that the United States was beginning to exercise.<sup>106</sup> President Jacques Chirac considered himself the elder statesman of global diplomacy and politics, and he did not appreciate the lack of consultation by the Bush administration.<sup>107</sup> Russia and China had their own difficulties with the new unilateralism that the U.S. government was exercising, and both wanted to restrain the actions of the

101. See generally DAVID M. ACKERMAN, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, INTERNATIONAL LAW AND THE PREEMPTIVE USE OF FORCE AGAINST IRAQ (CRS Report for Congress 2003) (examining the legality of the preemptive use of force under standards of international law in a succinct way so that members of Congress would have something to which they could refer when President George W. Bush spoke to them about the necessity of war in Iraq).

102. See *Europe and the War in Iraq*, Eur. Parl. Ass., 46th Sess., Doc. No. 9768 (2003).

103. *Iraq*, NUCLEAR THREAT INITIATIVE: WMD411, Apr. 15, 2003, at [http://www.nti.org/f\\_wmd411/f2e2.html](http://www.nti.org/f_wmd411/f2e2.html) [hereinafter *Iraq*, NUCLEAR THREAT INITIATIVE].

104. See generally Thomas et al., *supra* note 5 (referring to the “Bush administration’s failure of diplomacy” in “[t]he mishandling of the U.N. vote,” among other things); Fareed Zakaria, *The Arrogant Empire*, NEWSWEEK, Mar. 24, 2003, at 18 (contrasting George W. Bush, who sent “the signal . . . to our closest allies . . . that America didn’t need them,” with his father, George H.W. Bush, who “was envoy to China [and] ambassador to the United Nations”).

105. Thomas et al., *supra* note 5.

The threat to America posed by terrorism signaled to both men—now at the end of their careers, with nothing to lose—that this was the time to reassert American will in the world. According to aides to both men, Cheney and Rumsfeld talked often in the days and months after 9-11 about the need to be bold.

*Id.* See also Zakaria, *supra* note 104 (discussing extreme statements by both Cheney and Rumsfeld).

106. See Maggie Farley & Doyle McManus, *To Some, Real Threat is U.S.*, L.A. TIMES, Oct. 30, 2002, at A1.

107. See generally Delaney, *supra* note 9 (noting that France, led by Chirac, played an influential role in the U.N. and that Chirac seriously disapproved of the U.S. decision to attack Iraq without the U.N.’s support).

world's only remaining superpower.<sup>108</sup> It did not help that the Bush administration had made it known that regime change in Iraq had now become a new foreign policy goal of the United States.<sup>109</sup> When the time came to give Hussein one last chance to comply with U.N. demands for weapons inspections, the members of the Security Council failed to cooperate.<sup>110</sup> Members of the Security Council refused to believe that the United States was serious about enforcement. They felt the United States was using the Security Council as a vehicle to provide cover for itself under international law as it prepared for a unilateral war against Iraq.<sup>111</sup> This was a critical miscalculation on the part of Security Council members who opposed the United States' unilateralism. In a way, these Security Council members abandoned their obligations under Articles 24 and 39 of the U.N. Charter to maintain international peace and security, and this played right into the hands of the United States' view of the need for immediate action.<sup>112</sup>

The United States had invested much time in demonstrating that Hussein was not a rational actor that could be contained like Cold War adversaries of the past.<sup>113</sup> Unlike the Soviet Union of years gone by, the United States argued that nuclear and chemical weapons in the hands of an unpredictable and perhaps unstable individual like Hussein met the international

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108. See generally *War Draws Ire, Support from Unlikely Places*, *supra* note 8 ("China, too, surprised analysts with its harsh criticism of the U.S., indicating it would try to rally other nations to stop the war."); Zakaria, *supra* note 104 (reporting that Russia has used "what influence [it has] to disrupt American policy . . . over Iraq").

109. "We will continue to counter the threats posed by Iraq, but, over the long term, the most effective and lasting way to end this threat is through a change of government in Baghdad." BUSH, IRAQ'S COMPLIANCE, *supra* note 79, at 3.

110. See *Iraq*, NUCLEAR THREAT INITIATIVE, *supra* note 103.

111. Criticism against the United States for unilateralism on the world stage is not limited to Republican Party administrations. The Clinton administration received similar criticism for acting unilaterally against Iraq: "The international outrage prompted by the U.S. unilateral military intervention resulted in large part from the perception of U.S. arrogance and unfettered use of force in handling the situation as opposed to legitimate opposition to the substantive need for action." Gavin A. Symes, Note, *Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq*, 19 MICH. J. INT'L L. 581, 619 (1998). Perhaps the critical distinction that can be drawn between the Clinton unilateralism and the Bush unilateralism was that President George W. Bush had made regime change the goal of his foreign policy. See *supra* note 109 (citing BUSH, IRAQ'S COMPLIANCE, *supra* note 79, at 3).

112. France would argue that the United States had already made a decision to invade Iraq and that any input from the Security Council would have made no difference. *NewsHour with Jim Lehrer: France Weighs in on Iraq*, (PBS television broadcast, Feb. 7, 2003), at <http://www.pbs.org/newshour/bb/middleeast/jan-june03/levitte2-07.html>. This may have been true but it was no reason for the Security Council to abandon its responsibilities under the U.N. Charter and put the United States to the test. Refusal to act in such circumstances can only lead the U.N. down the same road of failure that proved to be the undoing of the League of Nations. "[T]he failure of the League was due, not to the inadequacies of the Covenant, but to the apathy and reluctance of the member States to discharge their obligations." BOWETT, *supra* note 41, at 18.

113. See discussion *supra* pp. 18–22 and accompanying notes (regarding the Bush administration's arguments for justification of the Iraq war).

law test for use of force as laid out by the *Caroline* case.<sup>114</sup> The United States argued that it could not wait until the actual use of these weapons before acting.<sup>115</sup> The Bush administration consistently expressed the additional concern that Hussein might provide such weapons to terrorist groups with designs on the United States.<sup>116</sup> Even though Hussein was not complying with U.N. resolutions, the Security Council refused to hold his “feet to the fire.”<sup>117</sup> Under this scenario, the United States felt it had no other choice than to exercise the use of force without Security Council approval.

The United States was probably correct in making a distinction between the moral characters of each of the individuals and entities possessing weapons of mass destruction. Hussein’s prior history of unpredictability and willingness to use chemical weapons on his own people<sup>118</sup> made the present situation unlike any the United States had ever faced, including the Soviet Union’s threat during the Cold War years. Given this history and the lethal nature of the weapons Hussein was believed to have been developing, and the weapons’ potential to wreak great devastation and suffering upon large numbers of people with little or no warning, the United States’ action probably did meet the legal formulation for anticipatory self-defense set out by the *Caroline* case.<sup>119</sup>

Unfortunately, in mid-2003, news sources revealed that much of the intelligence used to support the argument that Hussein was pursuing development of weapons of mass destruction was weak at best and totally fabricated at worst.<sup>120</sup> It also did not help that the U.S. military, after victory in Iraq and

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114. See NATIONAL SECURITY STRATEGY, *supra* note 4, at 17; *supra* text accompanying notes 63 and 67.

115. NATIONAL SECURITY STRATEGY, *supra* note 4, at 17.

116. Robert Kagan, *On to Phase II*, WASH. POST, Nov. 27, 2001, at A13.

117. See Thomas L. Friedman, *Vote France off the Island*, N.Y. TIMES, Feb. 9, 2003, at 15. Friedman argues that France should be kicked out of the U.N. and replaced by India because France spends too much time criticizing the U.S.’s unilateralism, and thus, France ends up hindering any possibility for the U.N. to hold “Saddam Hussein’s feet to the fire.” *Id.*

118. NATIONAL SECURITY STRATEGY, *supra* note 4, at 17.

119. “[S]elf-defense must be confined to cases in which ‘the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’” MOORE, *supra* note 18, at 412 (quoting Letter from Mr. Daniel Webster, *supra* note 67).

120. In a July 6, 2003, New York Times op-ed piece, former diplomat Joseph Wilson criticized the Bush administration for misusing intelligence information in order to justify a preemptive strike against Iraq. Joseph C. Wilson IV, *What I Didn’t Find in Africa*, N.Y. TIMES, July 6, 2003, at 9. See also Michael Duffy, *Leaking with a Vengeance*, TIME, Oct. 13, 2003, at 28. Prior to that, in March of 2003, Mohamed ElBaradei, the chief of the International Atomic Energy Agency, told the U.N. Security Council that documents supporting an accusation made by President Bush in his January 2003 State of the Union Address that Saddam Hussein had attempted to purchase African uranium for nuclear weapons research were clear forgeries. Mitch Frank, *Anatomy of a Leak*, TIME, Oct. 13, 2003, at 32.

with total control of its territory, could not find any evidence of weapons of mass destruction.<sup>121</sup>

This state of affairs demonstrates the danger of expanding the limits of the *Caroline* doctrine of anticipatory self-defense. False or inaccurate intelligence could easily lead to a justification for a use of force that might not otherwise exist. It is precisely this kind of miscalculation and potential for abuse that has led international actors and commentators to seek severe limits on the use of the customary law of anticipatory self-defense as provided for in the *Caroline* case.<sup>122</sup> United Nations Secretary-General Kofi Annan has most recently joined in this chorus by arguing that the preemptive use of force, like that used by the United States against Iraq, has opened the door to establishing a dangerous precedent that will result “in a proliferation of the unilateral and lawless use of force, with or without justification.”<sup>123</sup> Nevertheless, his September 23, 2003, address to the General Assembly seemed to concede that terrorist groups or rogue states “armed with weapons of mass destruction” did pose a new kind of threat to international peace.<sup>124</sup> Annan implied, however, that this is a threat that must be met by the Security Council under the Chapter VII enforcement powers of the U.N. Charter and not by unilateral acts of individual states.<sup>125</sup> Annan challenged Security Council members to create new procedures that would provide “for an early authorization of coercive measures to address [these new] threats” and thereby neutralize arguments like those made by the United States for the unilateral use of force.<sup>126</sup> Failure to act, he warned, would lead to a harsh judgment by his-

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121. “Pentagon officials say the 1,200-strong team led by CIA weapons expert David Kay . . . has not found any stockpiles of deadly chemical, biological or nuclear weapons.” Michael Elliott, *So, What Went Wrong?* TIME, Oct. 6, 2003, at 30, 33. The Bush administration was quick to point out that while no weapons of mass destruction have been found, Kay did discover materials that could have been used in the manufacture of such weapons. Dana Milbank & Walter Pincus, *Cheney Goes on the Offensive Over Bush’s Policy on Iraq*, WASH. POST, Oct. 12, 2003, at A4. The unclassified portion of David Kay’s Interim Progress Report to Congress can be found on the CIA’s website. David Kay, *Statement by David Kay on the Interim Progress Report on the Activities of the Iraq Survey Group* (Oct. 2, 2003), at [http://www.cia.gov/cia/publicaffairs/speeches/2003/david\\_kay\\_10022003.html](http://www.cia.gov/cia/publicaffairs/speeches/2003/david_kay_10022003.html). L. Paul Bremer III, head of the U.S. occupation authority in Iraq, announced on December 14, 2003, that Saddam Hussein had been captured the day before on an isolated farm near the village of Ad Dwar, about nine miles southeast of Tikrit. Susan Sachs, *The Capture of Hussein*, N.Y. TIMES, Dec. 15, 2003, at A1. Initial reports indicated that Hussein was not cooperating with his American captors, *id.*, but one might expect that future interrogations of Hussein may reveal the answer to the question of whether Iraq possessed the weapons of mass destruction upon which the Bush administration relied so heavily in justifying the invasion of Iraq.

122. See *supra* notes 72-73 and accompanying text. “There is a widespread feeling at the U.N. that the policies of the United States [including its preemptive invasion of Iraq] have made the Middle East and parts of the rest of the world substantially more dangerous, rather than less.” Bob Herbert, *Hard Sell on Iraq*, N.Y. TIMES, Oct. 10, 2003, at A31.

123. U.N. Secretary-General Kofi Annan, Address to the U.N. General Assembly (Sept. 23, 2003), at <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.

124. *Id.*

125. See *id.*

126. *Id.*



tory, and he punctuated the importance of the work to be done by noting that “[t]his may be a moment no less decisive than 1945 itself, when the United Nations was founded.”<sup>127</sup>

### CONCLUSION

The war in Iraq serves as a reminder that even in this post-Cold War age of unprecedented international cooperation, the United Nations, and the Security Council specifically, is capable of failure in its efforts to avoid breaches of the peace in our global community. That does not mean that we should abandon the hope for success that we have placed in such international organizations. On the contrary, the international community of states should rely upon them even more heavily, reforming them when necessary to meet new and emerging challenges. As the world becomes a more dangerous place, nation states must learn to cooperate with each other more fully. No one state, even the sole remaining superpower, can hope to police all areas of the world at all times.

The United States, with all its advantages in technology and power, must still rely upon the eyes and ears of states and other international actors for assistance. The world has moved into a new era of extreme danger—a world that can no longer assume that weapons of mass destruction will remain in the hands of rational-thinking governments and rational-thinking individuals. The availability of such weapons and their possession by individuals like Saddam Hussein has forced the United States to stretch the limits of the customary law of anticipatory self-defense to its logical extreme. Unfortunately, this sets a new precedent for other nations to follow, and puts a hair trigger on the international law doctrine of anticipatory self-defense.<sup>128</sup> As a result of our actions, justification for the use of force has now become much easier to establish and much more open to abuse or mis-

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127. *Id.*

128. One must question whether the United States is ready to trust other nations to make the same delicate calculations necessary for invoking anticipatory self-defense that it has made in going to war in Iraq:

Even to America’s staunchest allies, the British, a doctrine of pre-emptive military strikes is alarming. They worry how the doctrine might work in the hands of China or Russia as those nations deal with enemies within or on their borders.

Moscow was eager to embrace the new Bush doctrine as soon as it was articulated, warning that it could send troops into neighboring Georgia to chase down Chechen rebels. In the Middle East, Arabs worry that Israel will use pre-emption to justify stepping up its strikes at Palestinian militants—and as a way to quiet any criticisms from Washington. Similarly, Turkey might be inclined to use the same justification for moving against Kurds who have long wanted their own state.

U.S. diplomats are even more worried that India could use pre-emption as a justification to launch an attack on Pakistan, raising fears that the conflict could spiral into a nuclear shootout.

Robbins, *supra* note 5.

take.<sup>129</sup> This new and more dangerous world places a greater burden upon members of the international community to act more diligently in cooperating with each other, for even a small miscalculation could have devastating consequences for millions of people. This state of world affairs should give the United States and other nations of the world an incentive to reevaluate the definition of “national interest.”<sup>130</sup> The Bush administration acted against the will of many of the United States’ fellow members on the Security Council because of perceived threats to its existence—threats against its national interest. Opposing states saw the unilateralism of the last remaining superpower as a threat to their sovereignty and relevance in the world. These opposing members of the Security Council saw unilateral action by the United States as a threat to their national interests. What seemed to get lost in the arguments for the protection of individual national interests was the fact that we all inhabit the same fragile planet. When it comes to preventing rogue states or international terrorists from using weapons of mass destruction, the interests of all nations must be considered because the damage done, whether environmental, economic, or physical, will not be limited to the territorial borders of any single nation.<sup>131</sup> In that vein, the words of a

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129. The instability of international affairs left in the wake of our having tested the limits of the international law of anticipatory self-defense confirms a warning previously delivered by Professor Louis Henkin:

A state might knowingly deviate from what had been established law (or established interpretation of a treaty) in the hope of changing the law. But that state does so at its peril. It does so at the peril that it will not succeed in changing the law . . . . It does so at the peril that it may succeed in destroying or eroding established law, to its later deep regret.

Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT’L L. 293, 311 (1991).

130. Commentators have long argued about how to resolve the tension that naturally exists between the obligations required of securing one’s national interest and the obligations required of respect for international law. For a general discussion of such arguments, see ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 1-4 (2d ed. 1987); HANS J. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 144 (photo. reprint 1966) (1951); Wolfgang Friedmann, *The Role of International Law in the Conduct of International Affairs*, 20 INT’L J. 158, 159-62, 164-65, 168-69 (1965).

131. President John F. Kennedy made a similar point in his June 10, 1963, Commencement Address at American University while commenting on our differences with the Soviet Union and the senselessness of war in a nuclear age:

[War] makes no sense in an age when the deadly poisons produced by a nuclear exchange would be carried by wind and water and soil and seed to the far corners of the globe and to generations yet unborn.

. . . .

Genuine peace must be the product of many nations, the sum of many acts.

. . . .

So, let us not be blind to our differences—but let us also direct attention to our common interests . . . . For, in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children’s future. And we are all mortal.

President John F. Kennedy, Commencement Address at American University (June 10, 1963), in “LET THE WORD GO FORTH”: THE SPEECHES, STATEMENTS, AND WRITINGS OF JOHN F.

well-respected American revolutionary ring truer today than they did more than 225 years ago: “[W]e must, indeed, all hang together, or most assuredly we shall all hang separately.”<sup>132</sup>

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KENNEDY 1947-1963 282-90 (Dell Publ’g 1988), (text of speech available at <http://www.jfklibrary.org/j061063.htm> (last visited Nov. 30, 2003)).

132. BENJAMIN FRANKLIN, I THE WORKS OF BENJAMIN FRANKLIN 408 (J. Sparks ed. 1840).

