

PREVENTIVE USE OF FORCE AND THE JUST WAR THEORY

AN ABSTRACT

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TO THE SCHOOL OF LAW

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DOCTOR OF JURIDICAL SCIENCE

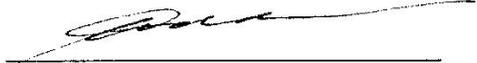
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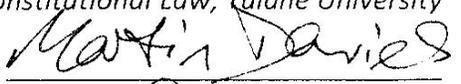


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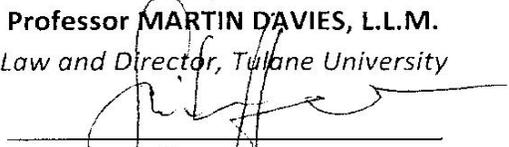
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This dissertation will examine the dangers created by governmental entities that possess or seek to possess weapons of mass destruction (WMDs), for possible use against other states.

In order to counter such a threat, traditional notions of anticipatory self-defense such as preemption might prove ineffective as the deployment of WMDs can be carried out in a matter of minutes. As a result of this, some jurists and politicians have called for the broadening of anticipatory self-defense to include preventive force. While the use of preemptive force has been recognized as a legitimate form of self-defense, such recognition has not been extended to the use of preventive force. This research attempts to answer the following questions: Under what circumstances can preventive force be used against a target state that develops WMDs with the alleged intention to use them? And what procedures would ensure that preventive force is used in a manner that minimizes the possibility of abuse by the state claiming to exercise its right of self-defense?

The dissertation will propose a normative framework that will define the scope of the lawful use of preventive force when a state is claiming to be using such force against another state as an exercise of self-defense. The proposed legal framework takes into consideration both recent legal developments as well as relevant instances of state practice in order to circumscribe the use of preventive force to clearly defined cases. The determination of the legality of a preventive strike should be made by the United Nations Security Council. The Security Council would be presented with a proposed preventive strike by a state making the allegation that the strike is necessary to stop another state from developing WMDs that would be used against it in the future. In order to secure an approval for the preventive strike, the “preventor” state would have to show compelling reasons, such as the target state’s prior bad actions, as to why such a strike is necessary.

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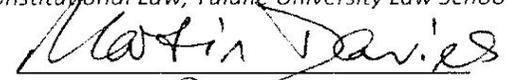
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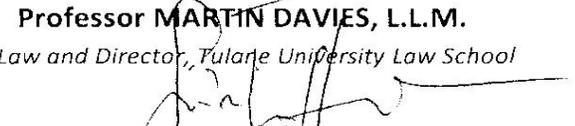
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INTRODUCTION

As we entered the 21st Century, a century heralded to be that of vast technological advances, an event of unimaginable horror struck on America's door. While Year 2000 marked the end of the 20th Century and the beginning of the 21st Century, September 11th 2001 marked an unmistakable change in the character of warfare.

By using planes to bring down the Twin Towers and the Pentagon, terrorists sought first and foremost to strike at America's symbols; a strong economy and military might. The world saw first and foremost a terrorist attack against America, but also of the use of unconventional weapons as a means of warfare. This led many politicians, lawyers, scholars and others to ponder as to whether the nature and form of war had changed.

These attacks reaffirmed the fact that time¹ and physical boundaries had been broken down. The focus was now concentrated around the surprise element created by unconventional weapons and how acts of aggression could be prevented by preempting their planners. While the fight against Al Qaeda and the Taliban was taken to Afghanistan and other parts of the world, America also decided to focus on states that caused a perceived threat to its national security interests.

¹ Aircrafts and rockets are now used to destroy in a very short amount of time an enemy's capabilities located in distant areas, which were previously accessible to armies only after spending months marching or sailing on boats.

My original contribution to the legal literature will be to propose a normative framework which will clearly define when the uses of preventive force by one state against another state, which seeks to develop weapons of mass destruction with the intent to use them in some form against the first state, will be legal. The normative framework will be refined with the application of some ethical notions inherited from the *Just War* theory. The purpose of this research will be to answer the following questions: Under what circumstances could a preventor state use preventive force against a target state that develops Weapons of Mass Destruction (WMDs) with the alleged intention to harm the preventor? Furthermore, how can it ensure that the preventor state does not commit abuses against the target state while exercising its right to self-defense?

Anticipatory self-defense, which includes both preemptive and preventive uses of force, is not a new notion and has been the subject of specific rules that have evolved over time. The modern normative framework surrounding anticipatory self-defense originated with the 1837 *Caroline* affair. The *Caroline* affair provided us with a set of criteria² which dictated under what circumstances anticipatory self-defense could be employed. In the *Caroline* affair U.S. Secretary of State Daniel Webster enounced that anticipatory self-defense could only be used in cases where a defending party was confronted with an imminent attack. Additionally, Secretary of State Webster explained that the use of force to forestall this imminent attack had to be both necessary and proportional.

² “A necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.” Note dated July 27th 1842 from Secretary Webster detailing the normative standard relating to anticipatory self-defense available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp

In 1962, more than a century after the *Caroline* affair, the world saw a possible act of anticipatory self-defense undertaken by the United States against Soviet ships which carried nuclear missiles that were to be deployed on Cuban launch sites. While these ships did not in themselves present an imminent danger to the United States since there was no evidence of an imminent attack on the United States, they did represent a more remote one, if and when the missiles they carried were deployed.³ The United States could be characterized, in this case, as having acted preventively, without resorting to overt military action.⁴ The notion of imminence here was extended to cover not merely an impending attack with deployed nuclear missiles by the Soviet Union or Cuba, but that of a future threat consisting of ships carrying deployable missiles.

The 1962 Cuban Missile Crisis was followed with the 1967 Six Day War which was described as a preemptive war by political theorists such as Michael Walzer.⁵ During this conflict Israel launched hostilities first, justifying it as an act of anticipatory self-defense in the face of an imminent attack by its neighbors. By not condemning Israel's first strike, The United Nations Security Council

³ "One possible forerunner of the U.S. unilateral claim to preemptive self-defense would be the Cuban missile crisis, but that was marked by preventive nonmilitary action that shifted the option of an overt military response to the other party." W. Michael Reisman and Andrea Armstrong, *Centennial Essay: The Past and Future of the Claim of Preemptive Self-Defense*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 100 A.J.I.L. 525, 527 (2006). See generally Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 97 A.J.I.L. 576, 584-585 (2003).

⁴ Id.

⁵ MICHAEL WALZER, JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, (Basic Books, 4th ed. 2006) (1977) at p. 85: "*The Israeli first strike is, I think, a clear case of legitimate anticipation. To say that, however, is to suggest a major revision of the legalist paradigm. For it means that aggression can be made out not only in the absence of a military attack or invasion but in the (probable) absence of any immediate intention to launch such an attack or invasion.*"

recognized implicitly⁶ that states have a right of preemptive self-defense when confronted with a threat of imminent attack from other states.

While the international community appears inclined to recognize the legitimacy of preemptive strikes against targets that present an imminent threat, this is not necessarily the case for armed preventive strikes.⁷ For instance, the United Nations Security Council set the bounds of anticipatory self-defense during the *Osirak* affair when Israel bombed the Osiris and Isis Iraqi nuclear reactors in 1981, by condemning the Israeli preventive strike.⁸ In this case the Security Council clearly condemned Israel for its strike on Iraq considering it beyond the bounds of the UN Charter or that of international law because it

⁶ Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?* 5 WASH. U.J.L. POL'Y 51, 59 (2001). "Where the state is small and the potential attacker powerful or equipped with a "first strike capability", there is verisimilitude to the claim that Article 51 should be interpreted to allow anticipatory self-defense. This may even have been acknowledged tacitly by the UN when, after Israel's "preventive" attack on Egypt in 1956, it did not criticize this action but rather authorized the stationing of UN peacekeepers along a line that left Israel temporarily in occupation of much of the Sinai. Israel again made reference to anticipatory self-defense in 1967. And again, the UN "in its debates in the summer of 1967, apportioned no blame for the outbreak of fighting and specifically refused to condemn the exercise of self-defense by Israel." See generally MALCOLM N. SHAW, INTERNATIONAL LAW 429 (1977).

⁷ Contrary to preemptive strikes, where a preemptor strikes in response to an imminent threat, the purpose of preventive strikes is to neutralize a threat which has not yet materialized.

⁸ STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW, (Kluwer Law International, The Hague) (1996) at p. 161: "All members of the Security Council disagreed with the Israeli interpretation of Article 51 and supported without reservation the resolution which condemned "the military attack by Israel in clear violation of the Charter of the United Nations and the norms of International conduct." Thus, the Security Council issued a clear and unanimous condemnation of Israel's military attack, accompanied most unusually by a statement of Iraq's right to "appropriate reparations". Yet, while the Council condemned the justification of anticipatory self-defense in circumstances in which conditions of imminent danger were not present, it can hardly be concluded that it rejected the notion of anticipatory self-defense as such." See generally Security Council Resolution 487 (June 19, 1981).

determined that there was no imminent threat of attack from Iraq against Israel.⁹ The question of Iraq and weapons of mass destruction arose more than two decades later when the American and British governments argued that the use of anticipatory self-defense was necessary to prevent the Iraqi regime from harming them in the future. Basing their arguments for military intervention on an expanded view of anticipatory self-defense, namely prevention (and other legal arguments), the United States and the United Kingdom conducted a military campaign in 2003 that led to the overthrow of the Iraqi regime in place. This military campaign was decried by a number of states as going beyond the scope of traditional anticipatory self-defense and as being contrary to international law. Critics alleged that the protagonists of the Iraqi campaign had failed to prove that Iraq indeed possessed weapons of mass destruction or that it was in the process of developing some with the intent to use them.

While current international standards inherited from the aforementioned cases have clearly defined the boundaries of preemptive use of force, prevention on the other hand remains largely a gray area. International lawyers and scholars have been extremely hesitant to recognize that prevention is a legitimate use of

⁹ David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523, 570 (2009): "The international community's divided opinion on the legality of anticipatory self-defense was reflected in its debate on Israel's actions. Some States, such as Iraq, Mexico, Egypt, Syria, Guyana, Pakistan, Spain, and Yugoslavia, challenged the concept's legitimacy in principle. Others, such as Sierra Leone, Malaysia, Uganda, Niger, and the United Kingdom, were prepared to accept anticipatory self-defense in concept-citing to the Caroline standard-but found the conditions, mainly an instant and overwhelming need for self-defense, absent in the case at hand. Other States expressed concern about the underlying fact that the IAEA had found no evidence Iraq was planning to develop nuclear weapons at the subject facility. The United States, for its part, pointed out Israel's failure to exhaust peaceful means of resolution before undertaking its attack, but did not take a position on the self-defense doctrine itself."

force in self-defense. Legitimate reasons exist that favor the exclusion of prevention as a legitimate use of force under the doctrine of self-defense. Modern, 20th Century, history is replete with instances of acts of aggression justified as acts of simple self-defense. The 1939 German invasion of Poland was justified on the grounds of self-defense after the staged attack by Germany of the German Gleiwitz border post.¹⁰ This attack had been set-up by Germany itself and was used as a pretext for going to war. In view of such abuses, giving legitimacy to actions justified as preventive strikes would be even more troubling to say the least, possibly inviting additional abuses.

Prevention does present a number of important challenges; however it also seems to provide states with a solution when faced with the threat of attack with WMDs by other states or entities. WMDs present new issues that did not exist during the *Caroline* affair or the 1967 Six Day War where conventional forces were deployed. These weapons can deliver, in a very short amount of time – which could be minutes – an unprecedented amount of destruction that could threaten the survival of a targeted state. While conventional forces can be trained to react rapidly, the level of destruction is hardly comparable to that caused by a

¹⁰ ROY GODSON AND JAMES J. WIRTZ, STRATEGIC DENIAL AND DECEPTION: THE TWENTY-FIRST CENTURY CHALLENGE (National Strategy – Information Center, Washington, 2011) (2002) at p. 100: “*The immediate cause of World War II was a deceptive measure by Hitler known as the Gleiwitz incident. “I will provide a propagandistic causus belli. Its credibility does not matter,” he told his generals on 22 August 1939. Several Abwehr and SS parties were told to raid various parts of the German-Polish frontier. One of the raids was carried out on the night of 25-26 August, when Hitler had originally wanted the war to begin. Six nights later, the radio at Gleiwitz (now Gliwice), which was then well inside the German frontier, was raided by SS men in Polish uniforms. They pretended to be Poles taking it over. They broadcast a few inflammatory phrases, in Polish; and left some corpses behind (concentration camp prisoners, who could easily be spared) to impress the United States correspondents who were summoned next day. This provided a final excuse for the German invasion of Poland early that day, 1 September 1939.*”

nuclear attack. The nuclear bombings of Hiroshima and Nagasaki in August 1945 demonstrated to the world what primitive nuclear weapons could accomplish. WMD technology has since evolved, making these weapons available not only to great powers but also to unstable regimes or to regimes that seek to project their power or influence through their use. The 1945 bombers have been replaced by supersonic jets and bombers, but also by missiles that have the ability to be delivered on targets that were once inaccessible to conventional forces.

The 2003 Iraq campaign was and remains highly controversial. Numerous states have denounced the prevention¹¹ justification to launch the Iraqi campaign. On the other hand, other states¹² have also stated that they could use

¹¹ William C. Bradford, *The Changing Laws of War: Do we need a new legal regime after September 11?: "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1383-1385 (2004): "For restrictivists, anticipatory self-defense, despite its pedigree, is "fertile ground for torturing the self-defense concept" and a dangerous warrant for manipulative, self-serving states to engage in prima face illegal aggression while cloaking their actions under the guise of anticipatory self-defense and claiming legal legitimacy [...] History is replete with examples of aggression masquerading as anticipatory self-defense, including the Japanese invasion of Manchuria in 1931 and the German invasion of Poland in 1939, and by simply re-characterizing their actions as anticipatory self-defense rather than aggression dedicated to territorial revanchism or fulfillment of religious obligations, self-interested states such as China, North Korea, Pakistan, or members of the Arab League, restrictivists warn, might claim the legal entitlement to attack, respectively, Taiwan, South Korea, India and Israel."

¹² Several nations have expressed the idea that they would use preemptive or preventive force in order to defend themselves from states or entities threatening them with weapons of mass destruction. For example, France stated that: "Outside our borders, within the framework of prevention and projection-action, we must be able to identify and prevent threats as soon as possible. Within this framework, possible pre-emptive action is not out of the question, where an explicit and confirmed threat has been recognized. This determination and the improvement of long range strike capabilities should constitute a deterrent threat for our potential aggressors, especially as transnational terrorist networks develop and organize outside our territory, in areas not governed by states, and even at times with the help of enemy states...Prevention is the first step in the implementation of our defense strategy, for which the options are grounded in the appearance of the asymmetric threat phenomenon." MICHAEL SCHMITT AND JELENA PEJIC, INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES, ESSAYS IN HONOR OF YORAM DINSTEIN, (Martinus Nijhoff publishers 2007) at p. 107. See generally Government of France, Ministry of Defense, "2003-2008 Military Program".

preemptive or preventive force¹³ against rogue states¹⁴ or terrorist entities.¹⁵ States recognize that there is a need to go beyond traditional notions of self-defense; however there is no consensus as to how far the notion of prevention could be extended. Furthermore, while international law does provide a framework surrounding the legality of preemption, it currently does not, however, address the case of preventive force in the context of weapons of mass destruction. That remains a “gray area”.¹⁶ This state of affairs creates a climate of

¹³ *Id.* at p. 105. India also expressed the fact that it understood both preemption or prevention as being key components of the right of self-defense: “*Federal Finance Minister Jaswat Singh has said every country has a right to preemptive strikes as an inherent part of its right to self-defense and it was not the prerogative of any one nation. “Preemption or prevention is inherent in deterrence. Where there is deterrence there is preemption. The same thing is there in Article 51 of the UN Charter which calls it ‘the right of self-defense’.*”

¹⁴ *Ibid.* at p. 106-107. “Rogue states” also seem to claim a right of “preemption” similar to that used by the United States in Iraq, which would actually be prevention: “*In February 2003, in the context of continuing discussions on North Korea’s alleged nuclear program, the North Korean Foreign Ministry declared that North Korea was entitled to launch a pre-emptive strike against US forces rather than wait until the American military was finished with Iraq. The deputy director states, “The United States says that after Iraq, we are next, but we have our own counter-measures. Pre-emptive attacks are not the exclusive right of the US.” Similarly, in September 2004, Yang Hyong-sop, vice-president of the Presidium of the Supreme People’s Assembly, stated that “[a] pre-emptive attack is not a monopoly of the US.” See generally: North Korean Official Says Pre-emptive Attack Not a Monopoly of the U.S., GLOBAL NEWSWIRE, September 10, 2004.*

¹⁵ *Ibid.* at p. 105. Russia also stated that it was willing to act preventively against terrorists: “*Following the seizure of a school in Beslan by Chechen militants, the Russian government indicated its willingness to strike at terrorists preemptively. President Vladimir Putin declared on September 17, 2004, that “today in Russia, we are seriously preparing to act preventively against terrorists... This will be in strict respect with the law and constitution and on the basis of international law.” The defense minister has pro-claimed that Russia claims a right of preemptive strikes against terrorists anywhere in the world. At the same time, Russian officials have noted that their preemptive strikes will not include the use of nuclear weapons.*”

¹⁶ Michael Glennon, “*Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*”, 25 HARV. J.L. & PUB. POL’Y 539, 552-553 (2002): “*Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safeguarding the well-being of their citizenry. If a State has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike, preemptive use of force is justified. Admittedly, that line is not bright. Mistakes may be made. It is better, however, that the price of those mistakes be paid by*

uncertainty and instability in international circles since states might be tempted (and believe they need) to use prevention for their defense.

The absence of criteria fails to provide states with clear “rules of engagement” on prevention, leading states to possibly interpret prevention in a very liberal manner and going beyond the bounds of self-defense, falling into aggression. Most importantly, the failure of not having a clear normative framework surrounding prevention, while knowing that some states would use preventive force in response to new threats caused by WMDs, undermines and weakens the international legal system as a whole because states need self-defense strategies that will take these threats into consideration.¹⁷

An international normative system that would determine the legality of a preventive strike against a determined target could constitute an important step towards avoiding state excesses. Furthermore, it could serve as well as a deterrent against states wishing to pursue WMDs or which possess WMDs with the intent to harm other states, because prevention will now become a legitimate self-defense option that states will be able to use.

States that so posture themselves than by innocent States asked patiently to await slaughter.”

¹⁷ Lucy Martinez, “September 11th, Iraq and the Doctrine of Anticipatory Self-Defense”, 72 UMKC L. REV. 123, 190-191 (2003): “To adequately respond to the twin evils of weapons of mass destruction and terrorism, the international community must prioritize State security over absolute certainty. The doctrine of anticipatory self defense can and should be recognized as existing in customary international law alongside the Charter rather than denying the existence of the doctrine pursuant to an overly narrow and strict view of the impact of the U.N. Charter on customary international law rights. If international law hopes to retain relevance for States in the new reality revealed by September 11, it must continue to recognize the doctrine of anticipatory self-defense.”

Such a normative framework will require a procedural system that would assess whether an authorization for a preventive action should be granted to a state. This assessment should be done under the auspices of the United Nations Security Council since it has been the guarantor of international peace and security since the end of the Second World War. According to such a framework, the Security Council will objectively assess whether a preventive strike is necessary in the specific case it reviews. The Security Council will then be able to check whether the proposed military strike meets both the standards of necessity and proportionality.

Since preventive force is a notion which could lend itself to abuses, the Security Council should also attempt to emulate values inherited from *Just War* theorists in its assessment of the legality of the strike against an alleged offending state. This would practically mean that the Security Council would review the state of mind and intentions¹⁸ of the state seeking preventive force, as well as those of the alleged tort-feasor according to various factors.

¹⁸ Mark Totten, *Using Force First: Moral Tradition and the Case for Revision*, 43 STAN. J. INT'L L. 95, 104 (2007). This would be an echo to the "right intention" prong set forth by Aquinas when deciding whether a war was just. "*While the tradition continued to develop over the next several centuries, the most important figure after Augustine is Thomas Aquinas (1225-74) in the thirteenth century. Aquinas' central intellectual achievement was his Summa Theologica. Although his systematic treatment of war is limited to a few paragraphs, it became the benchmark for later theorists who would give sustained attention to the issue of preemption. In response to the question of "whether it always sinful to wage war," Aquinas writes: In order for a war to be just, three things are necessary. First the authority of the sovereign by whose command war is to be waged [...] Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault [...] Thirdly, it is necessary that the belligerents should have a right intention, so that they intend the advancement of good, or the avoidance of evil.*" [emphasis added] See generally AQUINAS, SUMMA THEOLOGICA 1359-60 (Fathers of the English Dominican Province trans., Benziger Bros. 1948).

Part I will address the *Just War* theory. This will be the starting point of this research since it is the ancestor of modern day ethics in war. In this vein, we shall pursue a journey through time reviewing the birth and evolution to this day of the *Just War* theory. This travel will start with a chronological excursion in classical Greece and Rome in order to determine what justice in war consisted of then. While earlier civilizations also addressed the topic of justice in war, the Greek and Roman civilizations' influence on the development of justice in war has been of a significant nature. With the introduction of Christianity by Constantine in the later years of the Roman civilization came about a redefining of what justice in war entailed. Justice in war was then consequently grounded in biblical values as understood by the religious authorities of the time. Individuals such as Augustine and Thomas of Aquinas, known as "Just War" theorists, developed methods to determine conditions and circumstances under which waging a war was just. Their work constituted a foundation that would then be used by later philosophers and jurists to develop the notion of justice before and during war (*Jus ad Bellum* and *Jus in Bello*). The Renaissance and then the Enlightenment movement introduced a rationalization of justice in war and self-defense characterized by an evolution from Christian inspired norms to ones based on positive law and reason.

Part II of the project seeks to explore the different types of anticipatory self-defense. In order to do so, the notions of preemption and prevention will be addressed in detail in order to compare their similarities and differences. Modern Just War theorists shall be introduced in order to present an "up to date"

understanding of anticipatory self-defense in its various forms. Furthermore, a non-exhaustive list of relatively recent conflicts and incidents will be used as examples in order to differentiate between preemption, which is a classical form of self-defense, and prevention, a variant of anticipatory self-defense which lacks apparent immediacy between the threat created by the target state and the act of self-defense. While the *Caroline* case provided the 19th Century international lawyer guidelines to determine when an attack in self-defense could be launched, the 20th Century saw these guidelines applied in the case of the 1967 Six Day War. Since the 1967 Six Day War, the world has seen the use of anticipatory strikes of various natures against nuclear targets, and a military campaign that was partly supported by anticipatory self-defense arguments.

In part III, the last part, the reader will first be introduced to what Weapons of Mass Destruction (WMDs) are. These weapons constitute the instruments used by rogue states and other entities to threaten other nations. We shall first proceed by reviewing each type of WMD, which shall include a short history and prior instances of deployment of these weapons, as well as the normative framework regulating their development, storage or use. This will enable the reader to understand the danger created by these non-conventional weapons which allow parties to deliver in a very short amount of time an extremely lethal and damaging attack. The August 21, 2013 Syrian chemical attack shall not be discussed in detail here due to a lack of information, sources and due to the fact that as of the writing of these lines investigations are still ongoing.

Taking into consideration the fact that these weapons can be delivered without prior warning, conventional preemption might likely not work to forestall an attack by a rogue state. Recourse to preventive force will offer a solution to this singular issue since it will allow a state to act before the WMD threat materializes. This rationale was adopted by Israel for the 1981 Osirak and 2007 Syria preventive strikes whereby Israel decided to strike two nuclear reactors under construction that were allegedly going to be used to produce weapons grade nuclear material. Part III will offer guidelines preventing states could use when confronted with such a non-imminent WMD threat from another state. A state that will perceive itself threatened by another which allegedly develops WMDs would be able to refer its concerns and planned preventive strike to the UN Security Council for review. The Security Council will then assess the merits of the proposed preventive strike using a set of factors and determine whether a preventive strike would be appropriate in that particular case.

I. JUST WAR AND ANTICIPATORY SELF-DEFENSE

A. Justice in Conflict and Just War

1. Warfare and Justice: Origins

Wars have been fought since the dawn of times among men that were seeking either territorial¹⁹ or material gains or for religious reasons. These motivations seem to be constant and unchanged as centuries go by. What changed however, are the attitudes some individuals and cultures have adopted towards warfare. The same is true with regards to the justifications an entity or individual has to provide while engaging in such an activity.

Such justifications are by no means a prerequisite or even a way to ensure that the military action will be successful, but often provide either domestic or international support before and while launching a military action.

Wars have always been considered as necessary and are unlikely to ever disappear for innumerable reasons such as self-defense, the protection of a

¹⁹ For Plato, the origin, or in his terms the “root of all wars”, is the necessity to enlarge borders. He states that: “*The original healthy state is no longer sufficient...the country which was enough to support the original inhabitants will be too small now*”. PLATO, THE REPUBLIC, II, 373 b, FitzGerald, *op. cit.*, at pp. 14, 79.

state's interests and so forth, whether these reasons appear to be rational or not.²⁰ However, something that has changed and that keeps on evolving is the concept of *justice* in warfare. For centuries²¹, historians, philosophers, lawyers and other intellectuals have explored at great lengths what justice meant *prior to war* and *during war*.²² Furthermore, complications arise while trying to define what the concept of *justice during war* consists of since this concept is by itself highly subjective and abstract.²³ *Justice* has only become translated into positive law these past three centuries.²⁴ Previously, individual parties and states would

²⁰ Martin Van Creveld notes that war is not only something that brings destruction and despair, it also exerts a certain fascination among men: "*In theory, war is simply a means to an end, a rational, if very brutal activity intended to serve the interests of one group of people by killing, wounding, or otherwise incapacitating those who oppose that group. In reality, nothing could be further from the truth. Even economists now agree that human beings, warriors and soldiers included, are not just machines out for gain. Facts beyond number prove that war exercises a powerful fascination in its own right – one that has its greatest impact on participants but is by no means limited to them. Fighting itself can be a source of joy, perhaps even the greatest joy of all. Out of this fascination grew an entire culture, the one associated with war consists largely of "useless" play, decoration, and affectations of every sort; on occasion, affectations, decoration, and play even carried to counterproductive lengths. So it has always been, and so, presumably, it will always be.*" MARTIN VAN CREVELD, *THE CULTURE OF WAR*, (New York: Ballantine Books, 2008) at p. XI.

²¹ ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS*, at p. 10-11 (1954).

²² RICHARD J. REGAN, *JUST WAR: PRINCIPLES AND CASES* 51-52 (1996).

²³ The concept of "Justice" is not a positive norm and never will be. "Justice" is a subjective notion which by its intrinsic nature is an absolute notion that is unattainable. The problem we have when attempting to transcribe in a positive form the concept of "justice" is that any attempts on our part to do so would be inadequate. This stems from our inability to grasp the whole meaning of such an abstract and unlimited term, but also from the lack of uniformity that is given to its understanding. What is just to one person is unjust to the other. Our attempt to translate into positive terms some of our understanding of the concept of "justice" was done through the intermediary of positive law. However, law on the one hand being an objective instrument that regulates society's interactions, and "justice" on the other, being a highly subjective notion, are hardly a perfect match. This can be illustrated by the fact that in certain occurrences, we can be the witnesses of a law ruling that shocks us by not being "just". An analogous digression is possibly with the idea of "morality". "Morality" is again a subjective notion that does not have a clear-cut meaning. Society found a remedy to this by adopting various regulations pertaining to "public order" or "public mores" in order to create a positive framework to work with.

²⁴ What is meant by this statement is not that the abstract and unlimited concept of *Justice* was clearly defined, but that there have been attempts to provide for an enhanced sense of

use their own understanding of what *justice before and during* a conflict consisted of as a justification to wage war. So as to understand the evolution of what justice in war consists of, we will review chronologically its meaning as interpreted by the Greek and Roman cultures, as well as Christianity's and the Renaissance's contributions to it.

a. The Classical Times

Authors of Classical Greece and Rome²⁵ often debated the notion of *justice* and readers cannot but be surprised by the straightforwardness of some of these highly regarded intellectuals. For instance, Aristotle²⁶ stated in his book, *Politics*, that warfare is a natural and just way of territorial acquisition. *Justice* in warfare, in classical Greece, was not so much understood as a paramount ideal or a set of normative rules, but as a compilation of thoughts emanating from various classical thinkers. Aristotle explains in the following words his vision of warfare:

fairness before and in combat. Illustrations of this can be provided by the Hague or Geneva Conventions that seek to diminish unnecessary sufferings during an armed conflict by forbidding the use of certain munitions, protecting the civilian population during a conflict etc...

²⁵ ROBERT L. HOLMES, ON WAR AND MORALITY, AT P. 154 (1989).

²⁶ Joshua Raines, "Osama, Augustine, and Assassination: The Just War Doctrine and Targeted Killings", 12 TRANSNAT'L L. & CONTEMP. PROBS. 217, 221 (2002). See generally RICHARD J. REGAN, JUST WAR: PRINCIPLES AND CASES 4 (1996).

*“The art of war, which ought to be practiced against men who, though intended by nature to be governed, will not submit; for war of such kind is naturally just”*²⁷. Justice in warfare would be for Aristotle, some kind of return to the “natural order” through the use of force: there are those who should rule and those who should be ruled. War simply represents the means of returning to what is just and the natural order of things.²⁸

It was not before the emergence of the Roman Empire that normative standards started to be developed and where a formal procedure was created in order to justify starting a war on *just grounds*. The Romans defined these standards in their legal literature²⁹ and created two distinct categories of wars. These categories were respectively the wars of “*ratio naturalis*” and the “*individual wars*” as we shall see below.

b. The Fetiales

Wars of “*ratio naturalis*”, in short, are wars waged in order to remedy an injury suffered. This whole process requires the intervention of the *Fetiales*³⁰

²⁷ ARISTOTLE, NICHOMEDIAN ETHICS, Book X, Ch. VI, XVII, 6; POLITICS, VII, 14.

²⁸ JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY 71 (1981).

²⁹ Robert J. Delahunty, “*From Just War to False Peace*”, 13 CHI. J. INT’L L. 1, 7 (2012). See *generally*: CICERO, DE OFFICIIS, Book I, P 11 (Little, Brown 1887) (Andrew P. Peabody, trans.) and CICERO, ON THE COMMONWEALTH, in MARCUS TULLIUS CICERO, TUSCULAN DISPUTATIONS, at P 37 (Harper 1899) (C.D. Yonge, trans).

³⁰ The exact definition of the *Fetiales* can be found in Adolf Berger’s Roman dictionary. Adolf Berger defines the *Fetiales* as : “*a group of twenty priests who from the earliest times were*

(members of the *Collegium Fetialium*) who will determine whether or not it would be just for the Empire to go to war.³¹ The *Fetiales* were a group of priests who approved such a use of force.³² The proceedings gave nonetheless the appearance of a modern day trial where the *Fetiales*³³ would ask the wrongful party (the other nation) to atone for its conduct. If the wrongful party admitted its wrongful conduct and took timely steps to rectify the wrong, the conflict between the two could possibly be avoided.³⁴

On the other hand, if the antagonist demurred from taking any action and refused to atone for the harm caused to the aggrieved party, the *Fetiales* would demand that the Empire (and before that the Republic) rectify the wrongful conduct by waging a military intervention that would be just.³⁵ This represents a

charged not only with religious functions, but also with public service, in particular in international relations with other states. Their duty was to observe whether or not the terms of international treaties were being fulfilled. They were involved in the concluding of treaties, in affairs of extradition, and were representatives of Rome in serving official declaration of war. In their missions abroad they were headed by one of them whose official title as the speaker of the delegation was "pater patratus". ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW, (Transactions of the American Philosophical Society, New Series, Vol. 43, No. 2, 1953) at p. 470.

³¹ CICERO, DE OFFICIIS, Book I, Para. XI, 36 (Loeb Classical ed. 38-9 (W. Miller trans., 1913)). See also CICERO, DE RE PUBLICA, Book III, Para. XXIII, 35 (Loeb Classical ed. 212-13 (C. W. Keyes trans., 1928)).

³² The Fetiales were also known as the "*Poultry Minders*". Such a denomination originates from their main occupation which was to take care of the birds that were to be sacrificed. The Fetiales would sacrifice birds in order to read omens and determine whether the gods were willing to support a military enterprise. MARTIN VAN CREVELD, THE CULTURE OF WAR, (New York: Ballantine Books, 2008) at p. 89.

³³ ALAN WATSON, INTERNATIONAL LAW IN ARCHAIC ROME at p. 2-3 (Johns Hopkins 1993) (quoting Dionysus of Halicarnassus).

³⁴ C. PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, II, 329-39 (1911).

³⁵ COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, at p. 339 (Macmillan 1911).

shift from the Greek position which tended to view the just war as a return to a natural order where some rule and others are to be ruled. This assessment as to what the natural order is was made by men who could debate the issue. On the other hand, the Romans introduced a divine aspect as to what was a just war, making the “gods” arbiter. Deference to the “gods” elevates the discussion of whether the war is just to a level where mere humans are left out of the equation since their arguments cannot by nature compete with those of the “gods”.

The whole proceeding also could not be carried out without the intervention of the “gods”. Some “gods” would support the Empire since the war was *just*; while others would support the opponent. Human beings are here considered as pawns for the “gods” to amuse themselves with. Arthur Nussbaum very pertinently observes that far from being a legalistic proceeding, this process undertaken by the *Collegium Fetialium* had the external appearance of a legal formal due process.³⁶ Whereas on the other hand substantially no such process existed since a few priests could decide whether a war was to be started, without any further explanation than that the “*gods decided so*”³⁷. This apparent lack of legal substance in the deliberations,³⁸ strictly speaking, could lead us to the conclusion that neither equity nor fairness were at the center of the *Fetiales*’s deliberations. This could have indeed been the case because these deliberations

³⁶ LIVY, *AB URBE CONDITA*, Book I, Para. XXII (1 Loeb Classical ed. 114-19 (B.O. Foster trans., 1919)).

³⁷ Arthur Nussbaum, *Just War: A Legal Concept?* 42 MICH. L. REV. 454 (1943).

³⁸ Thomas Wiedmann describes the evolution of the religious-superstitious rite carried out by the *Fetiales* in order to determine whether the “gods” had authorized the Roman Republic and then Empire to start hostilities and declare war. Thomas Wiedemann, *The Fetiales: A reconsideration*, 36 CLASSICAL 478 (1986) at pp. 478-490.

were based on Roman religious concepts of law rather than positive non-religious based laws as we know nowadays.³⁹ Thomas Wiedmann supports this argument even though a large number of early 20th Century scholars declared and emphasized that the *Collegium Fetialium* was not an institution that would rubber stamp wars of aggression and that they authorized military action only if they thought they were the aggrieved party.⁴⁰

A more traditional explanation for the purpose of the *Collegium Fetialium* is offered by W.V. Harris who holds that the *Fetiales* were an assembly of priests who were the Republic or Empire's "spin doctors". They would find justifications in order to attack Rome's adversaries without having to bear the burden of psychological guilt that usually arises when waging a war of aggression.⁴¹ Such an assertion can be supported by the fact that there was a clear collusion or even unity between the *Fetiales* and the executive power of the time. A clear example of this, is the fact that individuals such as Octavian (the future emperor Augustus) were themselves *Fetiales*.⁴²

In GLOBAL WAR AND THE LAW OF NATIONS, Gerhart Husserl furthermore affirms that Rome, as an empire, aspired to impose its values and civilization on

³⁹ DAVID J. BEDERMAN, *THE INTERNATIONAL LAW IN ANTIQUITY*, at p. 33-34 (Cambridge 2001).

⁴⁰ H.H. SCULLARD, *FROM THE GRACCHI TO NERO*, at p. 2 (Methuen & Co. London, 1959): "*Fought only if they felt they were the aggrieved party*".

⁴¹ WILLIAM.V. HARRIS, *WAR AND IMPERIALISM IN REPUBLICAN ROME* (Clarendon Paperbacks ed., Oxford University Press, 1979) at p. 171: "*The significance of the fetial procedure for declaring war was solely psychological*".

⁴² Thomas Wiedmann shows us in *THE FETIALES: A RECONSIDERATION*, how Octavian initiated the ceremony as a *Fetiales* that purposed the declaration of war against Cleopatra and Marc-Anthony. *Ibid.* 38 at 482.

foreign barbaric states. Rome resorted to use war as an instrument of foreign policy and self-sustenance⁴³. He asserts thereafter that one of Rome's purposes while dealing with foreign nations was to impose its values and civilization on the latter.⁴⁴ Refusal on the part of the foreign nation to abide by the Roman Empire's "suggestions" (embracing the Roman way of life and dominance) was by itself a just cause for war, since such a refusal was considered as a wrong.⁴⁵

Husserl might have a point here since one can observe a similar pattern when it comes to the behavior of the Spanish Conquistadores when they arrived in South America. The latter demanded that the indigenous populations convert to the Roman Catholic faith, knowing well that such a thing was impossible. This raises the important question of why such procedures were taken in the first place. Obviously, these so-called processes fooled no one. Whether these ceremonious processes were pursued by the Greeks, the Romans⁴⁶ or the

⁴³ Gerhart Husserl, *Global War and the Law of Nations*, 30 VA. L. REV. 572 (1944) at p. 572. "There is no gainsaying the fact that more often than not Rome has resorted to war as an instrument of national policy. A long-range view of Rome's history reveals to us a deeper purpose behind the numerous wars which Rome has waged in the course of establishing and maintaining the Roman Empire. The ultimate purpose of Rome's exercise of force on the international scene throughout the centuries was this: to force non-Roman states and sovereignties into the realm of Greco-Roman civilization".

⁴⁴ WILLIAM V. HARRIS, *WAR AND IMPERIALISM IN REPUBLICAN ROME 327-70 B.C.* at p. 163-75 (Oxford 1979).

⁴⁵ *Ibid* 38. "Refusal on the part of a foreign state to permit itself to be incorporated in the Roman Empire provides Rome, in the eyes of Rome's leaders and its people, with a just cause for taking up arms against that state. From the Roman point of view, the latter state has no good reason to resist Rome's recourse to war. Rome interprets the unwillingness of the particular state to become a subordinate part of the Empire as a challenge, if not to the Greco-Roman world, then to the authority of the "Populous Romanus" to represent this world in political reality".

⁴⁶ A.S. Hershey, "The History of International Relations during Antiquity and the Middle Ages", 5 AM. J. INT'L. L. 901, 920 (1911).

Conquistadores, they hardly had any real substance and seemed to be intrinsically self-serving.

2. Christian Influence on Justice in War

The Classical approach to *justice* in war is for the most part devoid of any substance if seen through the eyes of a Twenty First Century constitutionalist. It places the emphasis on procedures (*Collegium Fetialium* in Rome) to be followed in order to authorize the use of force against an adversary. These “due” processes and procedures to be followed hardly veiled the fact that *justice* in the use of force was not considered as a legal standard of any kind. This leads us to the question of why did they go out of their way by performing these rituals. Some would argue that leaders have always wanted to exhibit decorum before going to war.⁴⁷ *Justice* then was simply used as a legal means to engage in an armed conflict and restoring the natural state of things. Force could also have been resorted to in retaliation to an alleged wrong committed by a foreign nation (the alleged wrong being the refusal to adopt the ways and dominance of the Roman civilization). *Justice* meant that superior cultures had a duty to civilize

⁴⁷This is actually the point Martin Van Creveld makes when he notes that even Hitler adhered to the time to officially declare war against the USSR as he was attacking: “*To preserve surprise, many states have formally declared war only after launching their attack, and some have even dispensed with any declaration whatsoever. Yet none of this necessarily means that such things were not considered important. In fact, the opposite may be the case. On June 22, 1941, Adolf Hitler launched the largest surprise attack of all time. Even as the guns opened fire, he had his foreign minister, Joachim von Ribbentrop, and his ambassador in Moscow, Friedrich von der Schulenburg, follow the prescribed procedure and declare war. Hitler was one of the most powerful and most cynical dictators of all time, and surely at that moment he had other things to think of. If he acted as he did, he must have had his reasons*”. MARTIN VAN CREVELD, *THE CULTURE OF WAR*, (New York: Ballantine Books, 2008) at p. 90.

inferior ones. Peoples from “inferior cultures” would then be compelled to embrace these superior cultures. Furthermore, any resistance to these efforts to civilize would be seen as unjust and considered as a wrong.

This Classical approach was replaced at the end of the Roman Empire by one that found its inspiration in Christianity. Readers should note that the Roman Empire started to adopt Christianity around 312 of the Common Era (CE) and normalized Christianity as one of the main religions with the Edict of Milano in 313 CE.

This reform was pushed forward by the Roman Emperor Constantine who himself converted in 337 CE while he was on his death bed.⁴⁸ Before the reign of Constantine, Christians had been persecuted by the successive Roman Emperors. The Roman Emperors were perceived as being pagan oppressors. Christians abhorred violence and consequently refused to enlist in the Roman army. The conversion of Constantine to Christianity paved the way to the implementation of the religious reforms that were favorable to the Christians.⁴⁹ The Christians’ approach towards war also changed⁵⁰, and what constituted

⁴⁸ Constantine was apparently a religious man during his life. The apparent purpose of being baptized on one’s deathbed, contrary with what is widely assumed, was to avoid having to answer for too many sins in the afterlife.

⁴⁹ FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES*, at p.12-15 (Cambridge 1975).

⁵⁰ THOMAS L. PANGLE AND PETER J. AHRENSDORF, *JUSTICE AMONG NATIONS: ON THE MORAL BASIS OF POWER AND PEACE*, at p. 73 (Kansas 1999).

justice during and before going to war evolved in a similar fashion.⁵¹ War from now on is not regarded by the Christian authorities as being exclusively something negative, and is condoned when undertaken under defined circumstances. This led to the emergence of what we now know as the *Just war Theory*.

The *Just war* theory was developed mainly by theologians during and after the fall of the Roman Empire. For these theologians, there were three main reasons for a *Just war*. These reasons consisted of (1) self-defense, (2) the recovery of property and (3) punishment.⁵² Any acts of resistance or of defense on the part of the “wrongful” party would constitute a further wrong⁵³.

Catholic Christian doctrine regards war as being legitimate if it is *just*. The determination of whether a military action is *just* was developed by thinkers such as Augustine⁵⁴ and Aquinas⁵⁵. The former defined the concept of *Just war*

⁵¹ M. H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES*, at p. 8 (Routledge 1965).

⁵² JAMES A. BRUNDAGE, *HOLY WAR AND THE MEDIEVAL LAWYERS*, (Thomas P. Murphy, ed.) at pp. 99, 106-09 (Ohio 1976).

⁵³ Partel Piirimae, *Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War*, 45 *HISTORICAL JOURNAL* 499 (2002) at p.510.

⁵⁴ JOHN MARK MATTOX, *SAINT AUGUSTINE AND THE THEORY OF JUST WAR* at p. 1-2 (Continuum Books 2006).

⁵⁵ It is needless and repetitive to explain why Aquinas went at lengths to describe the requirements for a *Just War to be waged*. He voluntarily omitted to describe in such similar details the *Jus in Bello* that composes the second panel of this diptych [Ayala, while mentioning the *just cause* for war implicitly exposes this dichotomy by underlining the *just cause* for war but also stating that the latter concept had no legal effect on the conduct of war: “...our remarks so far about the just causes of war deal rather with considerations of fairness and goodness and propriety, and not with the character of the legal result which is produced”. BALTHAZARIS AYALA, *DE JURE ET OFFICIS BELLICIS ET DISCIPLINA MILITARI LIBRI III* AT P. 22 (The Classics of International Law, ed. by Westlake, Latin Text and English trans.) (1582)

whereas the latter codified the requirements to be met in order to wage a *Just war*.

These early *Just war* theologians helped structure the way the concept of *Just war* was to be interpreted in order to avoid likely and foreseeable abuses. Augustine, who lived in the last years of the Roman Empire and who had seen the rise of Christianity as the dominant religion within it, had to find a way to reconcile the use of force on the one hand with the Christian principles of the time which abhorred violence and war on the other.⁵⁶ Augustine thus managed to combine these two apparently irreconcilable views by adopting a formula that would allow the use of force under certain circumstances but not as a tool of foreign policy. Furthermore, he states that were it not for the wrongful act of the aggressor, the victim would not be forced to take counter-measures in self-defense or to rectify the wrong suffered.⁵⁷

As we see, Augustine⁵⁸ was a crucial player in setting forth the idea that a war had to be *just* in order to be waged. Defying such an order would be regarded as a severe wrong, bearing dire consequences in the afterlife.

Such a two-paneled view of the *Just War* could be compared with international conventions and their protocols like the Hague and Geneva Conventions. The respective elements of the *Jus ad Bellum* and *Jus in Bello* can be identified such as rules regarding the start of hostilities, the obligations of parties to a conflict to protect civilian populations or the duties they have towards prisoners of war.

⁵⁶ ALEX J. BELLAMY, *JUST WARS: FROM CICERO TO IRAQ* at p. 26 (Polity Press 2006).

⁵⁷ "*For it is the iniquity of the opposing side that imposes upon the wise man the duty of waging wars*". AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS*, (Robert Dyson: Cambridge ed., 1998), book XIX, chapter 7.

⁵⁸ LOUIS J. SWIFT & LOUIS SWIFT, *EARLY FATHERS ON WAR AND MILITARY SERVICE* , at p. 110 (Michael Glazier, Inc. 1983).

Augustine not only defined the characteristics used to consider the use of force, he furthermore announced the appropriate behavior to have while fighting a *Just war*.⁵⁹ This behavior bears three main characteristics. (1) The *Just war* has to be waged discriminatorily. What we have to understand here, far from our 21st Century understanding of classic discrimination regarding ethnicities, genders, age etc., is that military action has to be inflicted against fighters and their commanders only, excluding non-combatants. (2) The principle of proportionality has to be followed. During the course of a *Just war*, the harm inflicted to the enemy must not dramatically outweigh the harm suffered. (3) Apart from being used proportionally the use of force must be minimal and unnecessary violence has no reason to be. The only force allowed is the one necessary to lead a successful war, meaning that the war will not be considered as *just* if it appears from the start that it cannot be won.

Thomas of Aquino (1225-1274 CE) for his part was instrumental in codifying and clarifying what a *Just war* was and what were the requirements to be met before engaging in such a war (*Jus ad Bellum*)⁶⁰. One interesting aspect

⁵⁹ Ibid. and EPISTULA CXXXVI

⁶⁰ Our research will focus mainly on the *Jus ad Bellum* since the scope of this study, consisting of anticipatory self-defense, focuses on actions undertaken by states before the start and leading to hostilities. The *Jus in Bello* offers hardly any interest to us since the time factor – anticipation – has become irrelevant. It remains nonetheless important to stress the primary differences between the *Jus ad Bellum* and the *Jus in Bello* in order to contemplate with a sharpened accuracy the scope of what is known as the *Just War*. *Jus ad bellum* can be considered as having six major characteristics. (1) The cause of the war must be just; that is to say war must be waged to correct a great evil. (2) The authorization to go to war must be issued by a legitimate authority. (3) While going to war, one must have the *right intentions*; or to put it in another way, one must ensure that the motivation for fighting a war is to correct an evil. (4) War needs to be considered on a cost-benefit approach. That is to say, the injustice caused to the wrongful party has to be significantly outweighed by the relief caused by war to the rightful party [Dr. Rice expresses her belief that this cost-benefit approach is one of the

of the *Just war* theory as we know it from the Scholastics was that it also demanded that the party which initiated the Just war naturally carry out the war with the right intentions (in the *Jus in Bello*). Aquinas liked to emphasize the importance of law that he saw as a pedagogical instrument that would guide men⁶¹. He defines law as *“nothing else than an ordinance of reason for the common good, made by him who has care of the community and promulgated.”*⁶² Reasserting the foundations upon which the laws are drafted brings support to any future law that will be passed by the sovereign and hence reaffirms the law’s legitimacy.⁶³

Aquinas appears to be a supporter of the idea that law has positive functional purposes such as restraining wicked individuals or training men to do

conditions for the use of prevention, cf. Dr. Condoleezza Rice Discusses President’s National Security Strategy, Wriston Lecture, Waldorf Astoria Hotel (Oct. 1st 2002), available at www.whitehouse.gov/news/releases/2002/10/20021001-6.html.(5) A major component of the “just war” is that it has to be waged successfully. The use of force must not be resorted to in cases where certain defeat is expected; the result of such an enterprise would obviously result in an unnecessary slaughter. (6) Last but not least, war has to be considered and used only as a last resort. In her speech, Dr. Rice states that preventive war is to be used in last resort.

⁶¹ *“In order that man might have peace and virtue, it was necessary for human law to be framed”.*

SUMMA THEOLOGICA (95.1). A longer explanation can be found in the following words found in the same passage of Summa Theologica (95.1): *“But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least they might desist from evil doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment, is the discipline of laws. Therefore, in order that man might have peace and virtue, it was necessary for laws to be framed”.*

⁶² THOMAS OF AQUINAS, SUMMA THEOLOGICA, (“Dominican Fathers” trans., London: R. & T. Washbourne, Ltd., 1813-25, 21 vols.).

⁶³ SAINT THOMAS AQUINAS, POLITICAL WRITINGS 240 (R.W. Dyson, ed. & trans., Cambridge University Press 2002).

good.⁶⁴ This “human law” nonetheless remains derived from interpretations of the “natural law”⁶⁵ and more specifically extracted “*through understanding the Divine Commandment*”.⁶⁶ Natural law⁶⁷ is interpreted as a set of universal principles that men are naturally inclined to follow. It is defined by using deductive logic⁶⁸; the understanding being that such law is what the Eternal One desires men to follow⁶⁹. It is with this in mind that Aquinas codified and preconditioned any use of force to certain requirements that had to be met. We should remember that Thomas of Aquino is driven by virtue and the Christian notion of charity when he defines these rules on *Just war*, and more precisely the ones pertaining to the *Jus ad Bellum*.

Three essential prongs are required in Aquinas’s mind, so as to allow a party to engage in a war that would then be considered as *just*. These three

⁶⁴ Ibid. “*In order that man might have peace and virtue, it was necessary for [human] law to be framed*”.

⁶⁵ Jack Donnelly, “*Natural Law and Right in Aquinas’s Political thought*”, THE WESTERN POLITICAL QUARTERLY, Vol. 33, No. 4 at p. 521 (1980).

⁶⁶ SUMMA THEOLOGICA, (93.5).

⁶⁷ Sean D. Magenis, “*Natural Law as the Customary International Law of Self Defense*”, 20 B.U. INT’L L. J. 413, 414-15 (2002).

⁶⁸ Ibid. 65 at 523.

⁶⁹ “*This participation of the eternal law in the rational creature is called the natural law...the light of natural reason, whereby we discern what is good and what is evil, which is the function of natural law, is nothing else than an imprint on us of the divine light*”. SUMMA THEOLOGICA (91.2)

essential requirements could be summarized⁷⁰ as: (1) the authority to act, (2) a *just cause* and (3) acting with the right intention.⁷¹

Even if Thomas of Aquino did not leave us any norm regarding the law during war (the *Jus in Bello*)⁷², he left an astounding legacy that has influenced the evolution of public international law centuries after his passing.

⁷⁰ WILLIAM V. O'BRIEN, JUST WAR AND JIHAD: HISTORICAL AND THEORETICAL PERSPECTIVES ON WAR AND PEACE IN WESTERN AND ISLAMIC TRADITIONS 163, 165 (John Kelsay & James Turner Johnson eds., 1991).

⁷¹ Thomas of Aquino, SUMMA THEOLOGICA II-II 40.1: (1) "*It must be conducted on the **authority of the sovereign**, since care of the commonweal is the responsibility of the sovereign who is the only authority competent to decide when such cases require recourse to the sword in defense against internal and external strife.* (2) *It must have a **just cause**, since those attacked should deserve the attack on account of some fault (list from Augustine; avenging wrongs, punishing a nation, restoring what has been seized unjustly).* (3) *It must be **conducted with rightful intention**, since we must intend to advance the good and to avoid the evil (Augustine; securing peace, punishing evildoers, uplifting the good)*". [emphasis added]

For Aquinas, being *just* does not mean that innocent individuals will not suffer any harm; it means that the parties waging a war must fight it with *just intentions* in order to fulfill a *just objective*. If a war is waged in such a manner, the killing or harm caused to the *innocents* will not be attributable to the party which is the proponent of the *Just War*. "*Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention*" – SUMMA THEOLOGICA II-II 64.7. By this means, Aquinas, excuses collateral damage just as long as no intention to deliberately harm *innocents* was present and that the objective of the war indeed was *just*.

⁷² We can indeed be surprised by the fact that Thomas of Aquinas, in all his wisdom, did not mention the requirements to be followed during *Jus in Bello*. Would this mean that parties to a conflict only bear obligations towards each other before entering into a conflict and that the way in which the conflict is waged is of no importance? This proposition would be ludicrous and blatantly undermine the whole concept of *Just War* and of *charity*, to which Aquinas and other thinkers before him were dedicated to. This is why it is necessary to understand that, for Aquinas to define rules on *Jus in Bello* would have been in his eyes a redundant exercise since such rules were implied and could furthermore be deduced from the concepts of "charity" and "virtue". "Charity" is for Aquinas the ultimate goal of life and that "virtue" is attained by doing virtuous acts, so as to say; nothing comes free and hard labor is required in order to perfect ourselves. This is why it is displaced to conclude from the omission, by Aquinas, of the *Jus in Bello* that there should be none. *Jus in Bello* is primarily defined by then-existing standards set by the mores of chivalry and the *jus gentium*, which both found their sources in Canon Law.

Commentators such as Bartolus de Saxoferrato (1314-1357) and more specifically Baldus de Ubaldis (1327-1400) affirmed that: “*only the Emperor and the Pope had authority to wage a war, and that other belligerent princes should be treated simply as brigands not entitled to the benefits of the law with respect to prisoners of war, booty, etc.*”⁷³; which could be understood as being a restatement of Aquinas’s first requirement regarding “*authority of the sovereign*”.

Augustine and Aquinas were not the only thinkers who inquired as to what the term *just* meant. Other thinkers have attempted to explore the notion of *Just war*, often investigating this notion through the scope of Christianity. *Justice* in war now meant fighting heresy. The Benedict monk Gratian understood for instance the fight against heretics was a *just use of warfare*, condoning at the same time the seizure and appropriation of the captured property⁷⁴ whilst fighting them. In this context, *Just war* is a means to sanction religious torts committed by “heretics” or some other religious opponent or dissenter.

a. The Divine Mandate

⁷³ JOSEPH SALVIOLI, LE CONCEPT DE LA GUERRE JUSTE, (Paris, 1918) quoting Baldus. Darrel Cole, *Thomas Aquinas on Virtuous Warfare*, THE JOURNAL OF RELIGIOUS ETHICS, Vol. 27, No.1 (1999) at p. 69. Furthermore, it should be noted that Aquinas referred to other scholars’ works such as Ambrose’s DE OFFICIIIS with regards to the attitudes to follow while fighting a *Just War*.

⁷⁴ SUAREZ, DE BELLO (Vanderpol trans. in LA DOCTRINE SCHOLASTIQUE DU DROIT DE LA GUERRE, Paris, A Pedone, 1919) (1621) at pp. 290-300.

Just warfare would thus be waged against such parties and would supposedly be supported by divine providence. According to this view, what is *just* cannot emanate from anything else than the Eternal One. Victory or defeat is interpreted as divine signs of approval or disapproval for the pursued cause; where war is a means used to punish the sinful world.⁷⁵

Thinkers that came after Augustine and Aquinas helped the development and elaboration of the *Just war* theory, and more specifically on the permissibility of the use of armed force. For instance, Giovanni de Legnano understands war as being:

*“(1)... an institution of the general law of the Empire; (2) in connection with reprisals as an extraordinary remedy. War originally rests upon Divine Law; for its end is peace and tranquility, and everything that tends to the good proceeds positively from God.”*⁷⁶

Through this prism Legnano sees war as a means to fight against the *infidels* and others who rebel against divine will. This is done in order to reestablish peace and tranquility. War is thus not interpreted as something

⁷⁵ War is understood under Christian doctrine as being some sort of “*police action taken by the Sovereign Judge to restore order and to lead the people back to the obedience of the law*”. GUSTAVE COMBES, *LA DOCTRINE POLITIQUE DE SAINT AUGUSTIN* (Paris: Plon, 1927) at p. 269.

⁷⁶ Joachim von Elbe, *Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665 (1939) at p. 672, quoting GIOVANNI DE LEGNANO IN *TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO* (James Brown Scott ed., Oxford: The Classics of International Law, 1917) (1360).

negative in itself but as something created by divine providence in order to purge the world of its *diseases* etc... Legnano emphasizes how war, peace and *justice* interplay. Peace is in itself an emanation of justice, which later on finds itself reestablished at times by wars which have to be fought in a *just* manner. Legnano seems to make a distinction between two types of parties that engage in forceful conflicts. The first of these parties is the head of the Catholic Church (the Pope), who is seen as the direct representative of the Eternal authority on Earth. Such representation enables the Bishop of Rome to define what kind of war is *just* (mainly wars against “infidels” and other wars to regain the Holy Land). The second of these parties consist of ordinary sovereigns who have to justify war through a *just cause*.⁷⁷ The sovereigns cannot determine on their own⁷⁸ whether a war is just, and have to argue that the war was waged for a *just* reason. This marks a stark contrast the authority afforded to the Pope who can determine on his own whether a war is just.⁷⁹

⁷⁷ Victoria holds that the sole *just cause* for war emanates from the harm received, or in his own words the “*Injuria Accepta*”. VITORIA, DE JURE BELLI (James B. Scott ed., trans. in 279 Classics of International Law, 1917) (1538) at p. 170. The victim of the aggression has the exclusive right to redress herself the wrong committed. The victim can and should ask that the aggressor compensate the damages committed. In case of the latter’s refusal, armed force will then be considered as a tool of choice in order to obtain by force, and in a *just* manner, compensation for the wrong committed. Victoria follows Legnano’s logic and thus illustrates how a *just cause* for war arises as a two step process, seeking first of all compensation peacefully but keeping the option of taking up arms in the case the latter scenario proves to be inefficient. GIOVANNI DE LEGNANO IN TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO (James Brown Scott ed., Oxford: The Classics of International Law (129), 1917) (1360) at Chapter 76.

⁷⁸ Antonio Cassese, “*Realism v. Artificial Theoretical Constructs: Remarks on Anzilotti’s Theory of War*”, 3 EUR. J. INT’L. L. 149, at p. 149-50 (1992).

⁷⁹ GIOVANNI DE LEGNANO IN TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO (James Brown Scott ed., Oxford: The Classics of International Law at p. 234 (1917) (1360).

In a similar fashion Francisco Suarez, a scholastic, adhered to the view which supported the idea that the righteous party waging the *Just war* had received a divine mandate to punish the sinful one.⁸⁰ It seems obvious that with such a concept of *Just warfare*, one party is being punished whereas the other is the tool used by the divine to punish the other. Consequently, only one of the parties could be fighting a *just war*.⁸¹

This answers the question as to whether a war could be *just* on both sides. This opinion is supported by Francisco Vitoria who equally holds that war cannot be *just* on both sides, but that the party that erroneously believes to be fighting a *Just war* is actually the victim of a *demonstrable* or *invincible ignorance*. Alberico Gentili on the other hand seems ready to distinguish between two conceptions of *justice*; objective and subjective justice. This would be the reason for him why, neither party to a conflict can be called *unjust*:

“It is the nature of both sides to maintain that they are supporting a just cause. In general, it may be true in nearly every kind of dispute, that neither of

⁸⁰ SUAREZ, DE BELLO at pp. 365, 380 (Vanderpol trans. in LA DOCTRINE SCHOLASTIQUE DU DROIT DE LA GUERRE, Paris, A Pedone, 1919) (1621).

⁸¹ The question of whether a war can be *just* on both sides has been preoccupying Christian *Just War* theorists since the affirmative proposition would severely undermine the “divine punishment” rationale where one party is used to punish another. This affirmation is supported by Vitoria, who asserts that only one party can be *just* and that the other party, at best, commits an act of “demonstrable” or “invincible ignorance”. VITORIA, DE JURE BELLII (James B. Scott ed., trans. in Classics of International Law, 1917) (1538) at p. 154.

the two disputants is unjust... if it is doubtful on which side justice is, and if each side aims at justice, neither can be called unjust".⁸²

Christian Wolff makes a different dichotomy affirming that war could be considered as *just* on both sides since each party could have good reasons for engaging in such a conflict.⁸³ The idea that both parties to a war may be *just* emanates from the fact that it may appear that they both have apparently fair grievances or ambitions. Neither party's claim would be superior nor inferior to the other's since this would mean that one of them is acting as a judge.⁸⁴ This *subjective* approach remains however highly controversial and furthermore undermines the whole idea of placing any objective normative system that would regulate and attempt to define what being *just* is. This does not mean that *subjective justice* would not necessarily mirror *objective justice*. Indeed, one party to a conflict may be objectively just. Consequently that party's subjective justice in that conflict will most likely be objectively just at the same time.

Emphasizing *subjective justice*, was unlikely to lead towards the creation of a normative system. On the contrary, this could have promoted bellicose behaviors, under the cover of being *just subjectively*. Francisco Suarez supports

⁸² ALBERICO GENTILI, DE JURE BELLII, (The Classics of International Law, 1933) (1588), book I, chapter 6.

⁸³ CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Joseph H. Drake trans., James Brown Scott ed. in The Classics of International Law, Oxford, 1934) (1749), Chapter 7, Section 887.

⁸⁴ Arthur Nussbaum, *Just War: A Legal Concept?*, 42 MICH. L. REV. 454, 470 (1943).

this latter affirmation and calls the situation where two parties could be *just* as totally absurd: “*For two rights contrary to each other cannot both be just*”.⁸⁵

Just war was not considered by the Christian thinkers as simply being a matter of formal “due process” as the Romans tended to view it. These thinkers established that the infliction of a wrong had to precede any military action.⁸⁶ Wars are perceived now as a tool used by the aggrieved party, in order to return to the “*status quo ante bellum*”. In other words, a return to how things were before the offense had taken place. A *Just war* had to be motivated by the will to either exert punitive action or, to recover damages arising from a previous injury.

Pierino Belli, another thinker who developed the *Just war* theory illustrates what we found in Legnano’s reasoning in terms of interactions between war, peace and *justice*. The use of force here again will be justified if a *just cause* exists [e.g. peace] taking into consideration that peace cannot be dissociated from *justice*: “*In war there is no other objective than peace, and there is no peace apart from justice*”.⁸⁷ He also notes that self-defense is considered as a *just cause* for war

⁸⁵ Francisco Suarez, LES THEOLOGIENS ESPAGNOLS DU XVIEME SIECLE, 43 Rec. des Cours de l’Academie de Droit International, p. 293.

⁸⁶ Augustine, DE CIVITATE DEI, CONTRA FAUSTUM and EPISTULA AD BONIFACIUM, translated by Beaufort, p. 21 ff: “*It is the crime of others which constitutes the justifying reason for war [...] this central and predominant idea that war can be justified only by the injustice of another*”.

⁸⁷ PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS at p. 279 (trans. in The Classics of International Law, No. 18, Oxford, 1936) (1536): “*Peace is nothing else than a duly established concord*”.

since “a war is just that is undertaken for the defense or the enforcement of one’s rights”.⁸⁸

b. To Repair and Punish

Emmerich de Vattel and other thinkers developed the idea that parties which wage an unjust war have the obligation to repair the harm done to the offended party. Furthermore the former must submit to, and accept a fair punishment for purposes of atonement and repentance.⁸⁹ Wars of conquest that used to be justified as we have previously seen by Greek philosophers or the *Fetiales*; were now considered by Augustine and others, as being actions of “*Grande Latrocinium*”. This crime is also commonly known as grand larceny.⁹⁰

As we saw with Pufendorf, who developed Grotius’s concept of *Just war*, thinkers from the 16th and 17th Centuries have also restricted the use of *punitive action* and *war*.⁹¹ One of these philosophical jurists named Johann Gottlieb

⁸⁸ Ibid. at pp. 8, 61, 78.

⁸⁹ The offending party must “*submit to punishment, if that be necessary as an example, or as an assurance, to the injured party or to human society, of his future good conduct*”. EMMERICH DE VATTEL, *DROIT DES GENS* (trans. in *Classics of International Law* 302, 1916) (1758).

⁹⁰ Ibid at p. 23.

⁹¹ Punitive wars and actions have lost some of their credibility mainly after the Second World War where massacres were organized, leaving bad memories in the minds of the drafters of the United Nations Charter. However, we should note that this state of affairs should be regarded more as an exception to the rule. Recall the famous verse from the Bible that states: “An eye for an eye, a tooth for a tooth” that calls for proportionality between the harm received and the harm to be inflicted. (The common understanding of this verse usually refers

Heineccius (1681-1741), argued that *punitive action* and *war* had to be directed towards the “adequate”⁹² party; that is to say the aggressor, in order to be just.⁹³ We should note that punitive actions were widely accepted as a way of “getting even”, restoring one’s rights and establishing *justice* by means of revenge. The philosopher Immanuel Kant takes a different stance with regards to *punitive war*. He asserts that such a war is outright unjust because so as to punish a master-servant relationship must have preexisted between the two parties. Since states are considered independent sovereigns⁹⁴, such a relationship cannot exist. A consequence flowing from this fact being that *punitive wars* are wrong.⁹⁵

to the principal of proportionality according to which one may not inflict more harm than received. The genuine understanding of this verse, which establishes a compensatory system according to Jewish Law and not a “proportionality-in-harm done or authorized”, has seen itself disregarded by international uses and customs for centuries.) This serves as a means of limiting quantitatively the reprisals against one’s enemy. The question we now have to ask is whether punitive actions have always been regarded and analyzed as being possibly reprehensible and unjust acts.⁹¹ In order to answer this question we might have to investigate the thought of classical writers who were well versed on this issue.

⁹² Victoria supported the idea of taking revenge or punishing the aggressor once the victim had managed to overcome the initial aggression. He states that “*Even after victory has been won, and things have been recovered, and peace and security restored, it is lawful to avenge the injury inflicted by the enemy; to take retributive measures against the enemy (animadvertere in hostes), and exact punishment from him for the wrongs he has committed*”. VICTORIA, DE JURE BELLI, No. 19. (Classics of International Law).

⁹³ JOHANN GOTTLIEB HEINECCIUS, TREATISE ON THE ELEMENTS OF THE LAW OF NATURE AND THE LAW OF NATIONS, (Halle, 1738) section 196. Wolff who was one of his contemporaries also expressed the idea that *punitive wars* are *legal* if they are initiated by the victimized party: “*punitive war is not legal except for one who has received irreparable injury...for no one has a right of war except one to whom a wrong has been done*”. CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Joseph H. Drake trans., James Brown Scott ed. in The Classics of International Law, Oxford, 1934) (1749) at p. 325.

⁹⁴ This statement also raises the issue of who has the authority to declare whether a party is waging a just war, or not.

⁹⁵ EMMANUEL KANT, PHILOSOPHY OF LAW, (Hastie trans., Edinburgh, 1887) (1796) at p. 219: “*No war of independent states against each other can rightly be a war of punishment (bellum punitivum). For punishment is only in place under the relation of a Superior (imperantis) to a Subject (subditum); and this is not the relation of the States to one another*”.

Christian doctrinaires like Francisco de Vitoria believed that waging an improper war would bear negative consequences in the afterlife. This is one of the main reasons why warfare had to be carried out in a *just* manner. Determining whether a war was *just* became of prime importance for scholastic theologians but also to rulers in Europe who at times asked the scholastics whether the conflict that was about to be launched was *just*.⁹⁶

Furthermore, Vitoria reasserted that the ruler of a state had to decide whether a wrong was committed against that state and, if this had been the case, what punishment would be appropriate. We must note here that Vitoria excludes the interference of foreign or intermediary parties in this process. He did not believe in a supranational system that would allow or disallow military action beforehand. The prince or ruler is at the same time victim, judge and prosecutor.⁹⁷

We can easily see how such a state of affairs can lead to abuses since individuals and states often react with passion after they have been attacked and

⁹⁶ Arthur Nussbaum, *Just War: A Legal Concept?*, 42 MICH. L. REV. 454 (1943) at p 461. “Nor was there with Vitoria’s system any difficulty in dealing with a notion as vague as “Just War” – the church, in each particular case, would render the decision through her priest. And all this was not the phantasmagoria of an infatuated ecclesiastic. There is at least one recorded instance where Spanish authorities, before beginning a war, consulted the clergy on the question of its justness. Vitoria himself served occasionally as advisor to Charles V”.

⁹⁷ VITORIA, DE JURE BELLII (James B. Scott ed., trans. in *Classics of International Law*, 1917) (1538), at p. 177: “princes are judges in their own cases, inasmuch as they have no superior”.

usually are more inclined to make excessive demands. In order to remedy this issue, Vitoria (Victoria) supported the placement of checks that had some attributes of due process which consisted of a close examination of the causes and justice of the war.⁹⁸ He suggests that decision takers ought to take into consideration outside critics that might raise some objections. The rulers or princes hence should take their decision in a consensus-like way and not individually: “*The judgment ought not be made on the sole judgment of the King, nor, indeed, on the judgment of a few, but on that of many, and their wise and upright men*”.⁹⁹

For instance, could a war that started as a just war because there was a *just cause*, lose its status of *Just war* because of acts or other behaviors on the part of the *just party* that are contradictory the notion of *just cause*? For example, would a *Just war* tolerate on the part of the side which has initiated it, that the latter (the *just party*) pillage the resources of the *unjust party*, or any other horrendous act? Belli, seeing the various possible abuses that the notion of *Just war* entails, teaches us that fighting on the right side of the *Just war* is not a blank check that enables the *just party* to do whatever it wants: “...*even if declared on*

⁹⁸ VICTORIA, DE INDIS ET DE JURE BELLI RELECTIONES, at p. 125 (Classics of International Law ed., J.P. Bate trans., 1917).

⁹⁹ Ibid. at 97, p. 173.

*just grounds, a war may become unlawful if it is subsequently waged in a spirit of vengeance or for immoderate gains”.*¹⁰⁰

Belli was not the only one to imagine the possible abuses that could occur in times of war such as the creating pretexts that would justify a military action. Pretexts could also be manipulated or “discovered” at will for instance by placing an emphasis on certain details in order to justify resorting to armed force proclaiming without further investigation that such a use would be *just*. Jurists like Victoria¹⁰¹ were ardent critics of Charles the Vth of Spain, the latter having taken up the habit of “*discovering*” *just causes* that would justify his policy of territorial conquest in Europe and the New World. Joachim von Elbe describes it in the following lines:

*“He undertook to examine the right of war for the practical purpose of protecting the ‘Indians recently discovered’ against the cruel treatment inflicted upon them by his Spanish fellow-countrymen; he was furthermore actuated by the desire to denounce as vain pretexts the various ‘just causes’ for which Charles V pursued his policy of conquest and oppression throughout the world”.*¹⁰² For Victoria, a state will be able to use force only in cases where it has received a prior injury, placing the

¹⁰⁰ Ibid 87 at p. 60.

¹⁰¹ CHRISTOPHER ROSSI, *BROKEN CHAIN OF BEING: JAMES BROWN SCOTT AND THE ORIGINS OF MODERN INTERNATIONAL LAW* 129 (1998).

¹⁰² Joachim von Elbe, “*Evolution of the Concept of the Just War in International Law*”, 33 AM. J. INT’L L. 665, 674 (1939).

“trigger” of the *just cause* on the commission of the wrongful act.¹⁰³ This excludes at the same time wars waged on the grounds of “*religion, not the expansion of empire nor the promotion of the personal glory of the ruler may justify resort to war*”.¹⁰⁴

c. Man as Creator of Justice

Hugo Grotius¹⁰⁵ was one of the major war theorists of the 17th Century¹⁰⁶ and contributed to the shift that occurred in the minds of the doctrinaires of his time regarding the concept of *justice in war*.¹⁰⁷ With Grotius we see a transition from a *justice* that emanated from the divine, to a *justice* that found itself derived from human conscience. This placed man in the center of the determination of what *justice* meant.¹⁰⁸ Grotius’s approach appeared to be singular and different from his other contemporaries since most of them were mainly influenced by

¹⁰³ VICTORIA, DE JURE BELLII, at pp. 279, 170 (No 13, Classics of International Law): “*There is a single and only cause for commencing a war, namely, a wrong received*”.

¹⁰⁴ Ibid. at p. 37.

¹⁰⁵ EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS (Cambridge 2002).

¹⁰⁶ David J. Bederman, “*Reception of the Classical Tradition in International Law: Grotius’ De Jure Belli ac Pacis*”, 10 EMORY INT’L. L. REV. 1 (1996).

¹⁰⁷ Jacob Knepper, “*The National Security Strategy and Just War Theory*”, 2 GEO. J.L. & PUB. POL’y 697, 700 (2004).

¹⁰⁸ Gentili (1552-1608) had expressed before Grotius that natural law was the source of the law on war and not canon law or any other law, even though it could have had a divine origin. ALBERICO GENTILI, DE JURE BELLII, (The Classics of International Law, 1933) (1588).

catholic doctrine, whereas he was a protestant. The latter fact however did not bring him to further his religious views in opposition to the catholic ones.¹⁰⁹ War for him is not necessarily a tool used by the Eternal One to punish people in his view, even though this fact remains highly debated among scholars.¹¹⁰

The main revolutionary theme launched by Hugo Grotius, was that the laws of war and more specifically the laws on whether a war was *just* or not¹¹¹ did not find their origin with the divine but were derived from men.¹¹² By so doing, he took away the divine aspect of what is meant by being *just* in war. This marked a major shift from what previous scholars such as Aquinas and Augustine had advocated which was that *peace* stands for *justice* and that only the Eternal knows what *justice consists of*, the Eternal reestablishing *justice* by using a *Just war*. This proposition most assuredly must have shocked a number of scholars at the time who might have considered this assertion as being heresy.

We should remember, as we investigate Grotius's view on *Just war*, that he lived in the 16th and 17th Centuries and that he found the wars of religion he

¹⁰⁹ Arthur Nussbaum, *Just War: A Legal Concept?*, 42 MICH. L. REV. 454 (1943) at p. 465: "The very fact of Grotius's Protestantism carried with it a new vision to the subject matter. To Grotius, the individual conscience is the touchstone of justness rather than the judgment of the priest or the canons of the church. And he distinguishes himself even from contemporaneous and later protestant writers in that his religious views are definitely nonsectarian".

¹¹⁰ CORNELLS VAN VOLLENHOVEN, GROTIIUS AND GENEVA, (Bibliotheca Visseriana Dissertationum Ius International Illustrantium, 1926) and LEO JOSEPHUS CORNELIUS BEAUFORT, LA GUERRE COMME INSTRUMENT DE SECOURS OU DE PUNITION (Nijhoff, 1933).

¹¹¹ Steven Forde, "Hugo Grotius on Ethics and War", 92 AM. POL. SCI. REV. 639, 644-45 (1998).

¹¹² HUGO GROTIIUS, DE JURE BELLII AC PACIS, (A.C. Campbell trans., London, 1814) (1646), "Prolegomena", IX: "even if there is no God or if the affairs of men are of no concern to Him".

had witnessed to be causeless: “*Throughout the Christian world, I observed a lack of restraint on relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes or no causes at all*”.¹¹³

Grotius defined what he considered *Just wars* to be and more precisely *just causes* as being primarily “*defense, recovery of property, and punishment*”.¹¹⁴ He also lists *unjust causes* as the “*desire for richer land, the desire for freedom on the part of a state in political subjection, or the wish to rule others against their will on the pretext that it is for their good*”.¹¹⁵ Wars that would be fought for *unjust causes* would thus be deemed *unjust*. He further questions the idea whether wars could be *just* for both parties? As we have previously seen, Grotius and some other thinkers before him determined that this case scenario could not be possible since in a *Just war* only one party can be *just*. It could be that one party thinks of itself as fighting a *Just war*, but what actually occurs is that this party wages a war on an *unjust cause*. The latter party is in fact blinded¹¹⁶ by what is called a *good faith excusable ignorance*.¹¹⁷

¹¹³ HUGO GROTIUS, DE JURE BELLI AC PACIS, Prolegomena 28, 20 (A.C. Campbell trans., London, 1814) (1646).

¹¹⁴ Ibid. Bk. II, Ch. I, sec. II, 2.

¹¹⁵ Ibid. Bk. II, Ch. XXII, sections VIII-XII.

¹¹⁶ OLIVER O'DONOVAN, THE JUST WAR REVISITED, at p. 22-23 (Cambridge 2003).

¹¹⁷ Ibid. Bk. II, Ch. XIII, section XIII: “*In the particular sense and with reference to the thing itself, a war cannot be just on both sides, just as a legal claim cannot*”.

War, according to Grotius, ought to be avoided and should be resorted to only under “*supreme necessity*”. This means that the conflict between the two parties will be a result from the fact that the issue cannot be settled by any other means such as one’s reputation, deterrence or diplomacy.¹¹⁸ It is fascinating to see how Grotius sponsored this “revolution” around the concept of *Just war* by making the whole process human-faced. His transformation of the *Just war* concept is furthermore enhanced by the fact that the resort to war must be one of absolute necessity, making war a quasi-sacred instrument.¹¹⁹

Samuel von Pufendorf¹²⁰ (1632-1694), who was one of Grotius’s followers, agreed with Grotius with regards to the fact that war was hardly a matter that could be taken lightly.¹²¹ He supported Grotius’s affirmation that the use of physical force had to be undertaken only under a *supreme necessity*. Even though he did not use the exact same words as those of Grotius, Pufendorf asserts that states have a duty not to “*rashly to advance any vague claim*”¹²² as

¹¹⁸ HUGO GROTIUS, *DE JURE BELLI AC PACIS*, (A.C. Campbell trans., London, 1814) (1646). Bk. II, Chapter XXIV, section IX.

¹¹⁹ The fact that war is to be resorted to in cases of absolute necessity is somehow interesting since this could mean that a shift has taken place in the mind of some 16th and 17th Century scholars by displaying war as a negative means of resolving conflicts. If this had not been the case, why would war not be considered as a first-choice means of conflict resolution instead?

¹²⁰ Victoria Kahn, “*Early Modern Rights Talk*”, 13 *YALE J.L. & HUMAN.* 391, 394 (2001).

¹²¹ SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE* (Ian Hunter & David Saunders eds., Andrew Tooke trans., Liberty Fund 2003) (1691).

¹²² SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO*, at p. 1295 (Oxford: The Classics of International Law, 1934) (1672).

cause. This is clearly an indication that the use of force cannot be based on a fictitious claim or as previously seen, on doubtful pretexts.

We ought to compare Pufendorf's statement that a state should not "*fly at once to arms*"¹²³ with Grotius's view that war should be used only when it is unavoidable or absolutely necessary. Furthermore, parties should try "*one of three courses in order to prevent the affair from breaking out into open war, to wit, either a conference between the parties concerned or their representatives; or an appeal to arbitrators, or finally, the use of the lot*".¹²⁴ Pufendorf restates Grotius's concerns on the abusive use of force and seems to go one step further when he argues that states who are not parties to a conflict should refrain from becoming involved in such a conflict and remain neutral by taking both passive and active measures.¹²⁵ Pufendorf thus develops in his own specific way Grotius's notion of *Just war*, recognizing a war as *just* so long as it is (1) fought either in self-defense¹²⁶, or (2) for the "*settlement of rightful claims that the debtor refuses to meet*" (3) or for "*reparations for losses which we have suffered by*

¹²³ Ibid.

¹²⁴ Ibid. at p. 356

¹²⁵ Ibid. at p.356. We can clearly understand why Pufendorf would require neutral parties to abstain from allowing belligerents from using their territory as a base or for any other offensive purpose, however we ask ourselves whether the omission to act could not also be understood as aiding the other party to the conflict and thereby making the "neutral" party a passive actor in the conflict by omission? See *Generally* TEXTOR, SYNOPSIS JURIS GENTIUM, Para. XVII, at p. 37 (2 Classics of International Law ed., J.P. Bate trans., p. 178 (1925)).

¹²⁶ Bynkershoek, who was one of Pufendorf's followers agreed both with him and Grotius that a *just cause* for war arose for purposes of the defense and the recovery of "*one's own*". CORNELIUS VAN BYNKERSHOEK, QUAESTIONES IURIS PUBLICI LIBRI DUO, (The Classics of International Law, Oxford, 1930) (1737) in Vol. II at p. 15.

injuries and demand security for the future".¹²⁷ He furthermore adds to Grotius's requirement of *absolute necessity* the obligation on the part of neutral states to remain totally foreign to conflicts in which they are not a party to by refusing to give any assistance. Both Grotius and Pufendorf understood *Just war* as a limiting concept that would geographically restrict a conflict rather than let it expand.

The Just War Theory is not a theory that belongs exclusively to Classical or Renaissance thinkers. While the Just War Theory has seen its place¹²⁸ within international normative frameworks diminish¹²⁹, some thinkers¹³⁰ have developed it further and adapted it to modern evolutions of warfare.¹³¹ Bearing such evolutions in mind, modern Just war theorists developed their criteria in order to determine whether a war is just or not. Their positions as to what kind of war is just can be contrasted to the ones taken by the aforementioned thinkers. Michael Walzer who is a famous modern Just war thinker, has done extensive research on the just war and has mainly identified three cases of Just wars (one of these cases could be seen as being more incidental than anything else since it results

¹²⁷ SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO*, (Oxford: The Classics of International Law, 1934) (1672).

¹²⁸ G. B. DAVIS, *THE ELEMENTS OF INTERNATIONAL LAW*, at p. 272 (G.E. Sherman ed., 4th ed., 1916).

¹²⁹ J.L. Brierly, "*International Law and Resort to Armed Force*", 4 *CAM. L. J.* 308 (1930).

¹³⁰ H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW*, at p. 28-9 (1st ed., 1952).

¹³¹ A. Shaw, "*Revival of the Just War Doctrine*", 3 *AUCK. ULR* 156, 170 (1976).

from the international security system which creates a means for states to support other states that are the victim of an aggression).

Here is a summary of Michael Walzer's¹³² *Just war* theory as seen in his writings:

- *"There exists an international society of independent states"*.
- *"This international society has a law that establishes the rights of its members – above all, the rights of territorial integrity and political sovereignty"*.
- *"**Any use of force or imminent threat [emphasis added] of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act"***.
- *"Aggression justifies two kinds of violent response: **a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society [emphasis added]**."*
- *"Nothing but aggression can justify war"*.
- *"Once the aggressor has been militarily repulsed, it can also be punished."¹³³*

The first circumstance of *Just war* is one that arises from a act of self-defense taken by a state which is attacked by another (or any other entity). This hardly leaves us surprised; self-defense has been understood as being a *just cause* for the use of force for centuries. The second circumstance of *Just war*

¹³² MICHAEL WALZER, *JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS*, (Basic Books, 4th ed. 2006) (1977) at pp. 61-62.

¹³³ *Ibid.* at p. 62.

arises in cases in which an imminent threat of attack exists. This requirement must be coupled with the fact that the only way to avoid or minimize harm would be to resort to force. This statement again seems obvious but should not be taken for granted since there have been long lasting disputes on whether the *victim* should wait for the aggressor to commit a wrong, or whether the *victim* could be allowed to preempt or even prevent such a wrongful use of force, before being able to respond forcibly. The last *Just war* concerns what we understand as being the assistance provided to the victim of another party's attack by another state.¹³⁴

We should note that the notion of *Just war* set above mentioned and developed by Walzer does not address the question of the "*right intentions*" that had been previously set forth by Augustine, Aquinas and others. It would be an error to cite this omission to say that Aquinas's or Augustine's achievements have become irrelevant with time. We indeed still rely on requirements they have set forth, such as the *just authority* or *cause*¹³⁵ when trying to determine whether a war is *just* or legal. We ought to note nonetheless that the *just authority* or *cause*¹³⁶, have also seen their meaning and scope evolve.

¹³⁴ This situation could occur in the context of defense alliances such as NATO.

¹³⁵ Antonio F. Perez, "*The Modern Relevance of Legitimate Authority and Right Intention in the Just War Tradition*", 51 CATH U. L. REV. 15 (2001).

¹³⁶ Emmanuel Kant stresses this point as being the "ultimate test" in order to determine whether a war is *just* or whether the intentions behind the use of force were perverted, leading to further injustice : "*the primary test of the justness or otherwise of war might, perhaps, well be found in the answer to the question, is the state at war bona fide endeavouring to restrain the use of physical force by another or is it endeavouring to make use of force to impose its will on others...?*". This proposition is related in PITT COBBETT,

Now that we have seen how different Just war theorists framed the parameters of Just wars at various points in history, contemplating not only concrete criteria but also the intentions of the parties to the conflict, we should ask and succinctly answer the question as to who should assess whether a war is just and whether this is possible. We often hear politicians, news men or other individuals expressing their views on whether such and such a conflict is *just*. By doing so, such individuals or entities cast a judgment over a conflict between two or more states. A question arises as to whether this entity or individual has the authority to judge such a conflict. Currently there is an international system where states' behaviors in times of war are assessed by international organizations that also analyze the specific case in legal terms. This state of affairs seems to be recent since legal theorists such as Vattel asserted in their time, that states are independent sovereigns that cannot pass judgment over the actions of other independent states.¹³⁷ This line of thought was also shared by Kant regarding *punitive wars*. Doing so would remove the whole "*raison d'être*" behind the *Just war* theory since sovereigns will always have a tendency to see justice as being on their side. Vattel foresaw abuses, due to the fact that no exterior and impartial judge would be able to assess the *justness* of the war. He

CASES ON INTERNATIONAL LAW, Volume II at p. 8 (5th edition by W.L. Walker, London, Sweet & Maxwell; Toronto, The Carswell Company, 1937).

¹³⁷ EMMERICH DE VATTEL, LAW OF NATIONS, (Joseph Chitty Ed. 1883) (1758), p. 305: "*Since nations are equal and independent and cannot claim a right of judgment over each other, it follows that in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful*". See also W.B. GALLIE, PHILOSOPHERS OF PEACE AND WAR: KANT, CLAUSEWITZ MARX, ENGELS, TOLSTOY at p. 8 (Cambridge 1978)

advocated the repudiation of the *Just war* theory as allowing abuses by both parties.¹³⁸ This reason might help us understand why a transition from *justice* to *law* had become for some unavoidable.

The *Just war* theory was not carved in stone and varied according to geopolitical circumstances at given times, as interpretations of what *just causes* were defined. This is even more the case with regards to the *right intention* requirement that is considered as mandatory by some *Just war* theorists but not by others. What remains on the other hand unchanged and “written in stone” is the dichotomy that exists concerning the *Jus ad Bellum* and the *Jus in Bello*.

Augustine had tried to define what he would consider a *just war*.¹³⁹ His definition of what the *just war* is; a war waged in accordance to the precepts of natural law, can be summarized as having two sets of criteria. The first set regards the law before the war is waged (*jus ad bellum*) while the second on the other hand focuses on the law of war while it is being fought (*jus in bello*). This dichotomy serves different purposes; one among others would be the attempt to restrain occurrences of acts of barbarity or other odious behavior emanating from parties to a conflict. This is done by trying to understand the constraints of war without necessarily giving in to horrendous actions.

¹³⁸ Ibid at pp. 54-55: “each party asserting that they have justice on their won side, will arrogate to themselves all the rights of war, and maintain that their enemy has none, that his hostilities are so many acts of robbery, so many infractions of the law of nations, in the punishment of which all states should unite ... the quarrel will become more bloody, more calamitous in its effects, and also more difficult to terminate. Nor is that all: the neutral nations themselves will be drawn into the dispute and involved in the quarrel”.

¹³⁹ See Generally Augustine, DE CIVITAS DEI, (THE CITY OF GOD), CONTRA FAUSTUM, DE LIBERO ARBITRO (OF FREE WILL).

This brief overview of the perception of what was a *Just war* ranging from the classical times through the 18th Century has enabled us to understand that “*justice in warfare*” is hardly a concept carved in stone. This notion evolves with time and has been mainly punctuated by political, religious and strategic interests. Unfortunately, these interests have at times, influenced in a negative manner the concept of *Just war*. This has had as an effect to deprive such procedures of any purpose, pertaining to engaging in a *Just war* (e.g. wars of conquest under Rome). We should further investigate the evolution of the *Just war* theory in order to perceive fully the transformations that this theory has forced upon our modern conception of what is *just* before and during war.

B. Justice, Religion and Legality: Rationalizing the Norms

We have previously mentioned the views of some legal philosophers and other jurists concerning the place of religion in law. Grotius for instance started a

revolution¹⁴⁰ that supported the replacement of the divine intervention by rules that found their origin in man so as to determine whether a war was *just* or not. A point that was not previously mentioned and which holds some interest while analyzing the *Just war* could be summarized in the following question: “why do we need war to be *just* in the first place?”

Human nature can be vile and brutal, why should we try and change this state of nature? Why couldn't we simply state that war is simply war? People are wounded, others die, others are victims of horrible crimes, and unarmed civilians are being taken advantage of before being killed. Why should we appear shocked or make a fuss about it? War has always been part of our lives and always will be because this is part of human nature and our history – as stated by Thucydides.¹⁴¹ These questions go to the heart of what a legal system is and ask challenging questions at different levels. These questions need to be pondered upon since they are key to understanding the purpose played by the rule of law and the necessity of having order.

¹⁴⁰ HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* at p. 247 (1983).

¹⁴¹ THUCYDIDES, “HISTORY OF THE PELOPONNESIAN WAR: HISTORY OF THE WAR BETWEEN THE PELOPONNESIANS AND THE ATHENIANS” (Bibliothèque de la Pleiade, Gallimard 1964) Chapter I, 22 at p. 706: “*Il se peut que le public trouve peu de charme à ce récit dépourvu de romanesque. Je m'estimerai pourtant satisfait s'il est jugé utile par ceux qui voudront voir clair dans les événements du passé, comme dans ceux, semblables ou similaires, que la nature humaine nous réserve dans l'avenir.*” This is commonly translated as: “*This history may not be the most delightful to hear, since there is no mythology in it. But those who want to look into the truth of what was done in the past-which, given the human condition, will recur in the future, either in the same fashion or nearly so-those readers will find this History valuable enough, as it was composed to be a lasting possession and not to be heard for a prize at the moment of a contest.*” See generally DONALD KAGAN, *THUCYDIDES: THE REINVENTION OF HISTORY* (Penguin 2009).

Some writers have argued that the concept of *Just war* was not so much a goal in and of itself, but more a means to an end which was not necessarily *justice*. This argument is presented by Inis L. Claude Jr. when he introduced the idea that the *Just war* doctrine was: “*Aimed less at the ruler than at his individual subjects, who needed advice about how to reconcile their religious commitments with their civic obligations; it was designed not so much to inhibit the launching of unjust half-wars as to save Christians from incurring a fate worse than death by taking part in them*”.¹⁴²

The *Just war* theory served as a means of legitimizing, before the general population of a state but also the international community¹⁴³, the use of force by the ruler; reconciling it with religious practice. This idea is somewhat cynical and uses mass manipulation as a means to justify war, the *Just war* theory playing the role of some kind of *anti-depressant* for the global conscience.

Seeing the *Just war* through this prism would amount to nothing more than a public relations “spin” to justify at times actions before one’s own population but also before international partners. For instance, this was the case during the Thirty Years war. During this war the King of Sweden sought to justify his use of

¹⁴² Inis, L. Claude, Jr., “*Just Wars: Doctrines and Institutions*”, POLITICAL SCIENCE QUARTERLY, VOL. 95, NO. 1. (1980) at p. 92.

¹⁴³ Francis Bacon noted that the *just* character of a war had both to be proved to one’s subjects but also to the rest of the world: “*there must bee a care had that the motives of Warre bee just an honorable: for that begets an alacrity, aswel in the Souldiers that fight, as in the people that afford pay: it draws on and procures aids, and bring manie other commodities besides*”. FRANCIS BACON, PERSEUS, SIVE BELLUM, IN DE SAPIENTIA VETERUM (1609), (Sir Arthur Gorges trans. New York and London, 1976) (1619), at p. 41.

force, before the international community of the time, as being a *Just war*.¹⁴⁴ This statement on the part of the Swedish ruler was nothing less than self-serving. It was part of the *Manifesto*¹⁴⁵ that had been drafted in order to justify Sweden's military intervention in Germany against the counter-reform movement. However after examining the arguments provided in the *Manifesto* one could easily conclude that these were weak by any standard and fell short of providing any just cause for war:

*“If Sweden really intended the attainment of general peace, they should not assist the ‘rebels’ but leave Germany. Thus the Swedish intervention was, as the final decision of the Regensburg Electoral meeting put it, ‘an unjustified and hostile attack’ against the Empire as a whole”.*¹⁴⁶

¹⁴⁴ “Can it be regarded as a Just War on our side, so that we can not only wage it with good conscience but can also justify it to the whole world?” Partel Piirimae, *Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War*, 45 HISTORICAL JOURNAL 499 (2002) at p. 504.

¹⁴⁵ The *Manifesto* was a pamphlet mainly designed as a propaganda tool for furthering the idea that Sweden's military intervention was justified, acting as the protector of the reformists (protestants) against the counter-reform movement. This state of affairs hardly was unusual since each conflict that had been waged had always been accompanied par a war of ideas: “Consequently, an early modern ‘contest of arms’ was always accompanied by a propaganda war, a ‘bataille de la plume’. War-prone early modern Europe, where most states were at war for more than half of the period from 1618 to 1721, was flooded with all sorts of vindictory texts such as official declarations and manifestos, pamphlets, published correspondence, eulogies and historical accounts”. Ibid. at p. 500.

¹⁴⁶ Ibid. at p. 507.

This interpretation of the *Just war* theory leaves us questioning the *just* aspect of it. The question we ask ourselves is whether the concept of *justice* is one that can be used as we see fit, or whether it is one that stands out by itself; being maybe a light for nations to aspire to? The answer to this question presents complexities due to the fact that the notion of *Justice* is abstract.¹⁴⁷

The major difference that exists nowadays is that manmade rules appealing to reason have replaced the notion of divine-originating *justice* since institutionalized religion has lost some of its influence on public affairs. The legal process finds itself now inverted, instead of being derived from religion and imposed in a vertically descending manner. Rules of positive law are elaborated by men based not on religion, but on reason, logic, custom, culture etc... This creates a vertically ascending motion instead of a descending one where religion finds itself to be excluded (even though religion can claim some influence over such rules).

The result of the second process, which is common to most democratic societies and institutions of our time, is what is known as the rule of law elaborated by men. The international rule of law has seen its scope widening during the 19th and 20th Centuries, with the creation of institutions that were

¹⁴⁷ Yoram Dinstein, "*The Interaction of International Law and Justice*", 45 AM. J. INT'L. L. 528, 532 (1951).

intended to supposedly maintain peace and promote world stability.¹⁴⁸ This transformation has seen the shift in the perception of the *just cause* for the *Just war*, in the international arena. Leading this effort are to be found for instance Articles 2.4 and 51 of the United Nations Charter (UNC) which mainly restrict wars to uses of force for self-defense. Wars waged in self-defense according to the UNC are now qualified as *legal* and not *just*, even though the two terms are not self-exclusive, they do not necessarily go hand in hand.

A question we ask ourselves is whether the preservation of peace nowadays has become the “ruling standard” in international relations and law, at the expense of *equity*, or even law or justice?

1. Expanding the use of force: the Caroline case and Anticipatory Self-Defense

During the Canadian rebellion of 1837, some Canadian rebels aided with American volunteers used the *Caroline*¹⁴⁹ (a ship) to transport men, weapons and other similar material between the United States and Navy Island, the latter being situated on the Canadian side of the US-Canadian border.¹⁵⁰

¹⁴⁸ The track records of the League of Nations or of the United Nations have not shown to be specifically impressive, considering the inability to avoid the Second World War, or other exactions that occurred later on during the 20th Century.

¹⁴⁹ T. M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS*, at p. 97 (2002).

¹⁵⁰ Timothy Kearley, “*Raising the Caroline*”, 17 *WIS. INT’L L.J.* 325, 328 (1999).

The British government decided to take action against this ongoing state of affairs¹⁵¹ and ordered its troops, which were stationed in Chippewa, to neutralize the threat created by the use of the *Caroline*.¹⁵² During the night of December 29th 1837, Colonel Allan McNab and Captain Andrew Drew of the Royal Navy conducted an attack on the *Caroline*. At that time, the *Caroline* had been docked in the port of Schlosser, New York. The ship was set on fire and allowed to drift down the Niagara Falls.¹⁵³

Two exchanges then followed. The first one of lesser importance regarded Mr. John Forsyth's and Mr. Henry S. Fox's correspondence. This first exchange between these two individuals, who respectively were the American Secretary of State and the British Minister at Washington, was not productive and did not lead to any kind of understanding between the two parties.

Mr. Fox dismissed Mr. Forsyth's requests for reparation on the basis that the British forces had rightfully destroyed the *Caroline*. He supported this affirmation by stating that the *Caroline* and its crew were engaged in acts of piracy¹⁵⁴ and that the ordinary laws of the United States were not enforced within

¹⁵¹ J.P. Paust, "Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions", 79 N.D.L.R. 1335, at p. 1345 (2003).

¹⁵² JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 409-14 (1906).

¹⁵³ KAROL WOLFKE, CUSTOM PRESENT IN INTERNATIONAL LAW, at 53 (2d. rev. ed. 1993). See also JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW at 24 (2005).

¹⁵⁴ "The piratical character of the steam boat "*Caroline*" and the necessity of self-defence and self-preservation, under which Her Majesty's subjects acted in destroying that vessel, would seem to be sufficiently established". R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L., 85 (1938).

the frontier district of the State of New York.¹⁵⁵ The second argument made regarded that of “self-defense and self-preservation.”¹⁵⁶

Mr. Forsyth was replaced several years later by Secretary of State Daniel Webster. It was not until the arrest of Alexander McLeod in the State of New York; an individual who had boasted to have taken part in the destruction of the *Caroline*, that the matter was addressed seriously by the two parties. McLeod’s arrest was the catalyst for the resolution of this ongoing conflict between the United States and the United Kingdom. The latter having no incentive to reconsider its position on the *Caroline* case.

Secretary Webster wanted first of all to clarify what piracy consisted of. He did this in order to rebut the accusation that American citizens who had volunteered to fight with the Canadian Rebels were pirates. This accusation seemed for Webster to be outright scandalous – an insult – and ridiculous on the part of the United Kingdom. The reason behind this was that previous conventions defined what the crime of piracy consisted of:

“Their offence, whatever it was, had no analogy to cases of piracy.

Supposing all that is alleged against them to be true, they were taking a part in

¹⁵⁵ Ibid. “*At the time when the event happened, the ordinary laws of the United States were not enforced within the frontier district of the States of New York. The authority of the law was overborne, publicly, by piratical violence. Through such violence, Her Majesty’s subjects in Upper Canada had already severely suffered; and they were threatened with still further injury and outrage*”.

¹⁵⁶ Ibid. “*This extraordinary state of things appears, naturally and necessarily, to have impelled them to consult their own security, by pursuing and destroying the vessel of their piratical enemy, wheresoever they might find her*”.

*what they regarded as a civil war, and they were taking a part on the side of the rebels. Surely England herself has not regarded persons thus engaged as deserving the appellation which Her Majesty's Government bestows on these citizens of The United States".*¹⁵⁷

Secretary Webster's straightforward answer to Mr. Fox's assertions regarding piracy leaves us perplexed as to whether these assertions were expressed in good faith to start with:

*"But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands in the territory of the Government, against which the standard of revolt is raised, cannot be denominated pirates, without departing from all ordinary use of language in the definition of offences..."*¹⁵⁸

Secretary Webster had emphasized in an earlier correspondence¹⁵⁹ what self-defense consisted of, and that any use of force could be legitimized if:

¹⁵⁷ British Parliamentary Papers, Vol. LXI, (1843); British & Foreign State Papers, Vol. 29, p. 1129.

¹⁵⁸ Ibid.

¹⁵⁹ Secretary Webster sent a note on July 27th 1842 which included the copy of the April 24th 1841 letter purporting to the standard to adopt for alleged cases of self-defense.

"A necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep in board, killing some and wounding others, and then towing her into the current, above the cataract, setting her on fire, and careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed".¹⁶⁰

Secretary Webster sets the standard to be applied in cases involving anticipatory self-defense surprisingly high regarding the destruction¹⁶¹ of the

¹⁶⁰ 29 B.F.S.P., p. 1129 at p 1138.

¹⁶¹ T. Kearley, "Raising the Caroline", 17 W.I.L.F. 325, at p. 330 (1999).

Caroline.¹⁶² He also exhaustively lists all the requirements to be met in order to show a “*necessity of self-defense*” which leave us questioning the motivations of such a listing. Was he actually trying to define a normative standard or trying to negotiate some kind of arrangement with Lord Ashburton? Or was he simply annoyed by the previous exchanges between the American and British government officials where Mr. Fox accused American and Canadian citizens of piracy?

Lord Ashburton, who represented the interests of the British Crown at the time, agreed with Secretary Webster as to the standard to be adopted with regards to self-defense. He asserted that the activities undertaken by British and Loyalist troops in December 1937 had met each and every prong¹⁶³ set forth by Secretary Webster, and that such action had been necessary in order to prevent further attacks on Canadian soil by individuals finding refuge on the US side of the US-Canadian border:

“Supposing a man standing on ground where you have no legal right to follow him has a weapon long enough to reach you, and is striking you down and

¹⁶² Secretary Webster while defining his standard sets forth the fact that in order to show that self-defense was necessary; it must be *instant, overwhelming, leaving no choice of means, no moment for deliberation*, that such action was *authorized* by proper *authorities*, that such action was not *unreasonable or excessive* etc...

¹⁶³ For instance, we can note Lord Ashburton’s response with regards to the “deliberation” prong; which consisted of stating that such deliberation or premeditation did not in fact exist since the manner in which the Caroline was destroyed resulted more from improvising than anything else. *“I mention this circumstance to show also that the expedition was not planned with a premeditated purpose of attacking the enemy within the jurisdiction of The United States, but that the necessity of so doing arose from altered circumstances at the moment of execution”*. Lord Ashburton to Mr. Webster, July 28th 1842. Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 195.

*endangering your life, How long are you bound to wait for the assistance of the authority having the legal power to relieve your or, to bring the facts more immediately home to the ease, if cannons are moving and setting up in a battery which can reach you and are actually destroying life and property by their fire, If you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself, should you have no other means of doing so, than by seizing your assailant on the verge of a neutral territory?"*¹⁶⁴

By replying to Secretary Webster's letter defining the bounds of anticipatory self-defense and by defending the Crown's position on that same definition, so to say; in a formal and not substantive way, Lord Ashburton concedes that a standard limiting the use of force to certain instances of anticipatory self-defense is necessary. The concession furthermore recognizes the standard adopted by Webster as valid. This can be inferred from Lord Ashburton's lack of protest when asked by Secretary Webster to show that the British and Loyalist forces, that had attacked the *Caroline*, had acted in compliance to that standard.

Two main criteria can be expounded from this standard; the first one being *necessity* and the second one being *proportionality*. A third criterion that could be added and which nowadays shows increased relevance is the question of the *burden of proof*. Secretary Webster demands in his correspondence that

¹⁶⁴Letter from Lord Ashburton to Secretary Webster dating back to July, 28th 1842. http://avalon.law.yale.edu/19th_century/br-1842d.asp

Lord Ashburton show that the use of force under the motive of anticipatory self-defense be proved by the proponent of such a use of force. The burden of proof placed on the party that has used force in cases of self-defense between two states can also be contrasted with the criminal burden of proof used in domestic matters. In such matters, the offender is required to show usually by a preponderance of the evidence that he has acted in such a fashion because an unlawful use of force was going to be applied to him and that a forceful reaction on his part was necessary to prevent serious injuries or loss of life (self-defense is an affirmative defense that has to be proved by a preponderance of the evidence by the party who claims self-defense) whereas the State has to prove. Once again, we should note that proportionality is a compulsory requirement since one should use force strictly in a manner that is necessary in order to avoid suffering injury. This means that an individual or any other entity should not take advantage of an aggression in order to inflict substantially more pain and suffering than what is necessary to protect oneself against an unlawful use of force.

In order to understand the entire scope of this affair from an anticipatory self-defense point of view, a few observations ought to be made regarding the motivations of both parties in the Caroline affairs. The British stance purported to justify the use of force on grounds of “self-defense” and “self-preservation”, and that the use of force under these concepts had been made absolutely necessary in order to avoid sustaining any further attack by the Rebels in the Canadian Provinces. The Law Officers, in their March 25th 1839 report stated:

“We feel bound to suggest to your Lordship that the grounds on which we consider the conduct of the British Authorities to be justified is that it was absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past. What had been done previously is only important as affording irresistible evidence of what would occur afterwards. We call your Lordship’s attention to this distinction as it is very important to be alluded to in any communication which your Lordship may make to the American Minister”.¹⁶⁵

One may be intrigued by what was the Law Officers’ understanding as to the following words: *“precaution for the future”*. While one could conceivably concede that the second underlined passage appears to be reasonable and logical, in terms of evidence of a possible recurrent pattern of future wrongful actions. One can only remain astonished by the breadth and vagueness of the first underlined statement. The vagueness of these terms can only further the argument that there was no clearly defined legal concept of anticipatory self-defense applicable when force was used by the British Government against the *Caroline*. This concept must have been a political one. This idea could be supported by the fact that on January 13th 1838, Mr. Fox sent Mr. Palmerston a letter where self-defense and self-preservation were named as the motivation for the use of force: *“But I am persuaded that when the whole case is examined, it*

¹⁶⁵ J. Dobson, I. Campbell, R. M. Rolfe. F. O. 83. 2207 (emphasis added).

will receive a full justification; if not according to strict law as applicable to ordinary cases, at least upon the principle of self-defense and self-preservation".¹⁶⁶

It is somehow interesting to note that the concept of anticipatory self-defense which is mentioned by Mr. Fox to justify the said use of force, will actually be defined in legal terms several years later during the negotiations between the US and British governments, following the arrest of McLeod. This furthermore bears consequences as to the substance of what is meant by the words "*precaution for the future*". These words are articulated in a way that lends them the appearance of being legal standards; however upon close examination one realizes that they bear no such substance.

We can now better understand the American position, supported by Secretary Webster which was that the laws of war, and more precisely the standard concerning the use of force under anticipatory self-defense, obviously intended to create a limitation on the concept of *self-defense*. International treaties¹⁶⁷ or customary international law nowadays delimit the bounds of self-defense. Anticipatory self-defense however was not viewed so much as an inherent legal right standing on its own as it is now, but was rather understood as belonging and associated with a broader notion of *self-preservation*.¹⁶⁸

¹⁶⁶ R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L., 85 (1938) at p. 86.

¹⁶⁷ For instance, the United Nations Charter refers to an inherent right of self-defense in Article 51.

¹⁶⁸ H.W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 57 (J. B. Lippincott & Co. 1874).

2. A word on Self-Preservation

“*Self-preservation*” and “*self-defense*” appear to have been interchangeably used throughout the correspondence between Lord Ashburton and Secretary Webster. This also seems to have been the case with regards to their respective predecessors. Whereas we clearly understand what “*self-defense*” exactly means¹⁶⁹, it is however more difficult to grasp the definition and scope of the notion of “*self-preservation*”.

Self-preservation, just like *self-defense* refers to oneself (*self*). However the term *preservation* is not as clear in its intentions as *defense*. What does *preservation* mean? Does *self-preservation* mean safeguarding a *status quo ante* or a right to a response by which security will be ensured? Would it allow parties to take any action in order to preserve themselves or their status within the international community of nations?

Emmerich de Vattel describes the concept of *self-preservation* as the *right to security*. This *right to security* is understood by Vattel as:

¹⁶⁹ Black’s Law Dictionary (8th ed. 2004) defines “self-defense” as: “*the use of force to protect oneself, one’s family, or one’s property from a real or threatened attack. Generally, a person is justified in using a reasonable amount of force in self-defense if he or she believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger*”.

*“A right to prevent other nations from obstructing her preservation, her perfection, and happiness, - that is, to preserve herself from all injuries: and this right is a perfect one, since it is given to satisfy a natural and indispensable obligation: for, when we cannot use constraint in order to cause our rights to be respected, their effects are very uncertain. It is this right to preserve herself from all injury that is called the right to security. It is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make us of force an every honorable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor”.*¹⁷⁰

Vattel gives us the opportunity to have a better insight at the very notion of “*self-preservation*” as an obligation – a duty of care – on the part of every nation to advance its own perfection and happiness. Advancement of one’s perfection and happiness and prevention of injury is for a country, according to Vattel, the core purpose and obligation¹⁷¹ behind the notion of “*self-preservation*”; without which such goals would be unattainable.¹⁷² He elevates this concept of “*self-*

¹⁷⁰ EMMERICH DE VATTEL, LAW OF NATIONS, (Joseph Chitty Ed. 1883) (1758) at pp. 154-155 (Emphasis added).

¹⁷¹ “*In vain does nature prescribe to nations, as well as to individuals, the care of self-preservation...*” Ibid at 155.

¹⁷² Ibid. “[...] for, when we cannot use constraint in order to cause our rights to be respected, their effects are very uncertain.” Ibid.

preservation” to be a “*moral power of acting*”, which in his own words consists of “*the power of doing what is morally possible – what is proper and comfortable to our duties*”.

Vattel eventually gives us a hint of what the concept of “*self-preservation*” basically consists of when he states, at the end of the first paragraph of Chapter IV, Book 2 of THE LAW OF NATIONS:

“It is this right to preserve herself from all injury that is called right to security” (emphasis added).

This “*right to security*” has vocation to apply itself in circumstances where other nations would jeopardize a country’s preservation. Vattel furthermore explores this right of self-preservation as applied to future threats (“*it is safest to prevent evil when it can be prevented*”¹⁷³). He affirms the right and duty of nations to defend themselves and anticipate other nations’ actions for the purpose of “*self-preservation*”.

Vattel, while giving nations victim of future attacks by other nations, a right to take advantage of the period of time before such attacks in order for themselves to attack the wrongdoer; recognizes that such a right to anticipatory self-defense has to bear some limitations.

¹⁷³ “*Prevented*” in this context does not refer to the notion of prevention directly. It should be noted that in the lines following the term “*prevented*”, Vattel explains that a nation has both the right to “*resist an injurious attempt*”; referring to self-defense, and the right to “*anticipate his [whosoever is opposed] machinations*” referring to anticipatory self-defense.

Two limitations are set forth in Vattel's writing whose purpose is the curbing of abuses done by potential "victims". The first such limitation concerns the accuracy of the suspicions that require the attack. If the suspicions are unfounded, vague or uncertain, the "victim" would then become the aggressor. The second limitation set forth would be the criterion of necessity. This criterion can be found also in the definition of anticipatory self-defense bolstered by Secretary Webster in the Caroline affair. This means that the use of force would be the only way to resolve a conflict between two states:

*"They may even, if necessary, disable the aggressor from doing further injury".*¹⁷⁴

After surveying the meaning of "*self-preservation*" and the context in which it was used, the understanding of what consists of "*precaution for the future*" can be perceived with greater accuracy. Understanding what Vattel meant by "*self-preservation*" is crucial when discussing broad notions such as "*precaution for the future*" and the British position during the Caroline affair.

While reading the facts and the exchanges that occurred at the time, we can only be surprised to see the apparent agreement between the two parties with regards to the law to be applied to the case. We would have expected a clash of ideas and long debates between the parties but this was not explicitly the case. The two parties seemed to have agreed on the standard to be applied

¹⁷⁴ Ibid. 170 at p. 155.

with regards to use of force under “*anticipatory self-defense*” when Lord Ashburton confirms Secretary Webster’s prongs.

However, while reading the Law Officers’ report through Vattel’s lens, the two notions set forth in the first exchanges were quite different. The British version of “anticipatory self-defense” (a precaution for the future) is far broader than the American version since there is no indication with regards to the critical “time factor”. Secretary Webster introduces a limitation that was not present in the British notion of “anticipatory self-defense” when he requires that the use of force be carried out in an “*instant manner, leaving no choice of means and no moment for deliberation.*”

Such a definition strikes a blow to Vattel’s extended concept of “*self-preservation*” as well as Great Britain’s, since it restricts the use of force under “anticipatory self-defense” in cases of imminent threats; not anticipated “machinations” nor “precautions for the future”.

Since then, the standard adopted in the Caroline affair and agreed upon by the two contending parties has been reaffirmed in several affairs, and is part of customary public international law. This standard was reaffirmed during the Nuremberg Trials where it was ruled that the German attack on Poland and Norway during World War II. The Nuremberg Trials stated that:

“It must be remembered that preventive action in foreign territory is justified only in case of an instant and overwhelming necessity of self-defense, leaving no choice of means, and no moment of deliberation”.¹⁷⁵

The Tribunal thought that it was necessary to reaffirm this principle since the German party had tried to justify the use of force exerted on Poland and Norway¹⁷⁶ as acts of “anticipatory self-defense”. It was later shown that Germany had not acted at all in “anticipatory self-defense” and had planned both invasions and used pretexts in order to invade these two countries. Germany had for instance staged the Gleiwitz border post incident, where prisoners were dressed up as Polish soldiers and then executed in order to fake a Polish attack or to prevent future acts of defense on the part of the allies:

“When the [German] plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that might prevent an Allied occupation at some future date”.¹⁷⁷

¹⁷⁵ 1 I.M.T. 171, 207 (Nuremberg).

¹⁷⁶ *“Documents which were subsequently captured by the Germans are relied on to show that the Allied plan to occupy harbours and airports in Western Norway was a definite plan, although in all points considerably behind the German plans under which the invasion was actually carried out. These documents indicated that an altered plan had been finally agreed upon on March 20, 1940, that a convoy should leave England on April 5, and that mining in Norwegian waters would begin the same day; and that on April 5 the sailing time had been postponed until April 8”*. I.M.T. (Nuremberg) (1945): France, USSR, UK, USA v. Hermann Goering and others

¹⁷⁷ *German Major War Criminals Case*, 1 I.M.T. 171 (Nuremberg) (1946) at p. 207.

Here again we see an application of the Caroline doctrine since the Nuremberg Tribunal required that the defendants show that their actions were necessary to deal with an imminent threat rather than a possible future one. Since Germany was unable to show that its actions were not necessary to prevent an imminent unlawful use of force it was held to have committed an aggression against Norway.¹⁷⁸

II. PREVENTIVE FORCE, GOING A STEP FURTHER

“It is still not entirely clear why Roosevelt, a man of peace and good-neighborliness who had long campaigned to get aerial bombing

¹⁷⁸ Germany could also have argued that it had waged a preemptive attack against the Soviet Union because the latter was also contemplating a possible preemptive attack against Germany.

outlawed by international agreement, should have become so enthusiastically committed not just to air power but to its unlimited use against civilians. But there seems little doubt that this is what happened. His confidant Harry Hopkins reported in August 1941 that the President was "a believer in bombing as the only means of gaining a victory". Roosevelt told his Treasury Secretary, Henry Morgenthau, that "the only way to break the German morale" was to bomb every small town, to bring war home to the ordinary German.

Closer examination shows that Roosevelt had been influenced for some time by the scaremonger's view of bombing. At the time of Munich, and to the horror of his Cabinet colleagues, he cursed Chamberlain for not circling Germany with bombers and threatened to smash her cities if Hitler did not see sense".¹⁷⁹

Part I ended with the Caroline affair. The Caroline affair was a decisive precedent not only due to the fact that it represented the culmination of political, theological, ethical and legal debates that had been ongoing regarding the *jus ad bellum* for close to two millennia, but more importantly because it set down rules on anticipatory self-defense that remain valid to this day. The 20th Century has repeatedly shown that the Caroline standard was the litmus test states had to meet in order to determine the validity of a use of anticipatory self-defense. While

¹⁷⁹ RICHARD OVERY, *WHY THE ALLIES WON*, (New York: W. W. Norton 1997) at p. 109-110. We could further ponder on whether it would have been legal for the United Kingdom or France to have attacked Hitler and destroyed Germany's weaponry in 1938.

some states have used traditional anticipatory self-defense, also known as preemption, others have argued that the definition of anticipatory self-defense had to be expanded in order to meet the challenge presented by states seeking to develop weapons of mass destruction with the intent to use them in a nefarious manner. Such an expansion of anticipatory self-defense is known under the name of prevention. While preemption has been recognized as a valid means of self-defense, this cannot necessarily be said about prevention.

Part II will deal mainly with the common features and differences between them. We shall delve into the definitions offered by philosophers and lawyers in order to define these terms. Later real life examples such as the 1962 Cuban Missile Crisis, the 1967 Six Day War, the Osirak Strikes, the 2003 Gulf War, as well as other incidents of lower intensity, shall be used to aid the reader grasp the differences between these two notions from both a practical and legal perspective.

A. Distinguishing Prevention from preemption – Stressing the similarities and main points of divergence

1. Initial description

“Preemption” and “prevention” are similar concepts that stem from the same idea of anticipatory self-defense. Self-defense usually occurs when an individual or entity is faced with a situation where an aggressor will use acts of violence in order to cause harm to that said individual or entity. The defending party when confronted with these acts of violence would usually then react in a similar fashion in order to protect itself (if this is still possible). Usually individuals and states are aware of who their enemies are. This fact would enable defending parties to assess early on the strategies that would be contemplated by their adversaries were they to ever become one day adversaries in a conflict.

The defending party might also want to consider other avenues of defense which would minimize its exposure to losses, whether they be physical or tactical. The defending party could for example decide to attack first. Such an attack would not be the result of a deliberate choice, but simply the direct and inescapable consequence of the other party’s actions taken in furtherance of an imminent aggression. Such a scenario would present the conditions of what is known as preemptive force. On the other hand, the rationale behind preventive force is quite different from that of preemption. Prevention hinges on the idea that by taking preventive action now would result in either avoiding a future conflict or see such a future conflict’s consequences mitigated.

The defending party could also decide that acting preemptively, that is to say moments before the imminent attack, would be too dangerous due to the type of weapons the aggressor would use. We are of course talking about

“Weapons of Mass Destruction” which are more widely known as WMDs. WMDs present characteristics that conventional weapons don’t possess. They can be delivered quasi-instantly when using missiles and are highly destructive, having the potential of killings hundreds of thousands of people within minutes.

Considering these factors and specifically the fact that these weapons have basically short-circuited the imminence factor that was applicable to preemption, it has been argued that defensive actions should be taken prior to the materialization of the imminent threat. In other words, this would mean that the imminent threat contemplated through the lens of preventive force is a “rising danger” or an “accretion of power” carried out by a future aggressor. This would eventually lead to an imminent threat as understood under the concept of preemptive force but which had become now unstoppable.

The notion of preventive force raises quite a number of legitimate concerns. We have to realize that much of the assessment made prior to launching a preventive action is guesswork. The “probability game” that is being played here is whether a party with such WMDs would launch an attack, or use these weapons in a malign fashion once it obtains these weapons. This basically boils down to determining the potential aggressor’s intentions once it is empowered.

That being said there are methods to determine what the potential aggressor’s will and probable use of these weapons would be. One could for instance look at that entity’s prior bad acts if any, and whether it proves itself to

be ruthless and cruel. Cynics could use the notion of preventive force in order to justify their acts of aggression as it was the case in 1941 where Germany attacked the Soviet Union because it saw a conflict with the USSR as unavoidable and would rather fight it on its terms rather than wait for the war to “naturally” erupt at a time less propitious.¹⁸⁰

These powerful notions have been examined by scholars throughout the ages who have pondered on both their advantages and disadvantages and on whether such uses of force were just or legal. These notions present difficult challenges, not only conceptually but also practically. Dire consequences can be

¹⁸⁰ It was also reported that the Soviet Union had plans to launch a preemptive strike against Germany before it was attacked. *“The title of the document is “Reflections on a Plan for the Strategic Deployment of the Armed Forces of the Soviet Union in the Event of War with Germany and Her Allies.” It is addressed to Stalin. The authors devote fifteen pages of text to discussing plans for a surprise attack on Germany. “At present,” they say, “Germany and its allies can field 240 divisions against the USSR.” They therefore suggest “forestalling the enemy in deploying our forces and attacking... Our armies would be set the strategic objective of smashing the main forces of the German army... and emerging by the thirtieth day of the operation along a front from Ostrolenka to Olomouc... To ensure the realization of the plan set out above it is necessary (1) to carry out a secret mobilization of our forces, representing it as a call-up of reserve officers for training; (2) to carry out the secret concentration of troops nearer to the Western frontier, on pretense of moving them to summer camps; (3) to bring aircraft in secretly from outlying areas and concentrate them on forward airstrips, and to begin establishing rear services for the air force immediately.’ [...] ‘Many political officers,’ they were told, ‘have forgotten Lenin’s well-known statement that ‘just as soon as we are strong enough to defeat capitalism as a whole, we shall take it by the scruff of its neck.’ ‘The same directive explained that a false distinction is sometimes drawn between ‘just’ and ‘unjust wars’: ‘If a particular country is the first to attack, its war is considered an unjust one, whereas if a country is the victim of attack and merely defends itself, its war must be considered a just one. The conclusion drawn is that the Red army is supposed to wage only defensive war: this is to forget that any war waged by the Soviet Union will be a just one.’ It could not be put more clearly.” EDVARD RADZINSKY, STALIN: THE FIST IN-DEPTH BIOGRAPHY BASED ON EXPLOSIVE NEW DOCUMENTS FROM RUSSIA’S SECRET ARCHIVES, (DOUBLEDAY, 1996) at pp. 455-456.*

the result of the use, misuse or absence of use of these notions which can either provoke or serve to avoid greater dangers.

2. Prevention, Preemption and Vattel

Emmerich de Vattel was an 18th Century political philosopher who was and remains a leading authority on the Just War theory. His work, the “Law of Nations”, remains unequalled making him a highly regarded expert in the fields of self-defense and the Just War theory.

Vattel takes a rather hawkish position when it comes to both preemption and prevention as he explains in his “Law of Nations”.¹⁸¹ Vattel would be unfairly served were we solely to provide the reader with his standing on both prevention and preemption without providing his rationale or further inquiry into his understanding of anticipatory self-defense. Vattel first of all presents the issue at hand in the following statement:

“No injury has been received from that power (so the question supposes); we must, therefore, have good grounds to think ourselves threatened by him, before we can lawfully have recourse to arms. Now, power alone does not threaten an injury; it must be accompanied by the will. It is, indeed, very unfortunate for mankind, that the will and inclination

¹⁸¹ EMMERICH DE VATTEL, LAW OF NATIONS, (Joseph Chitty Ed. 1883) (1758), Book III, Chapter III, section 44 “*How the appearances of danger give that right*”.

to oppress may be almost always supposed, where there is a power of oppressing with impunity".¹⁸²

In these few but nonetheless powerful lines, Vattel highlighted the critical points that have to be analyzed with regards to both preemption and prevention. He starts by establishing the context in which these two concepts would be applied, which is, in our case the realm of self-defense. He then articulates several hypothetical cases where anticipatory self-defense would not only be authorized, but necessary as the ruler's duty to his country. Vattel not only considers preemption as a valid option for self-defense, he further recognizes prevention just as good an option.¹⁸³

Preventive use of force must nonetheless be conditioned to two prongs which are (1) a possible threat emanating from (2) a "vicious" nation.¹⁸⁴ These two criteria consist of what he calls "power and will". For Vattel, power by itself is not so much of an issue since states can use it in various ways to their advantage without necessarily causing harm to others. However for Vattel, power coupled with the will to harm other nations, or in his own words "the power of oppressing with impunity", triggers the right of other states to use anticipatory self-defense.

¹⁸² Ibid. at p. 309.

¹⁸³ Ibid.

¹⁸⁴ *"When once a state has given proof of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of suspicion to her neighbors, whose duty it is to stand on their guard against her. They may come upon her at the moment when she is on the point of acquiring a formidable accession of power, may demand securities, and, if she hesitates to give them, may prevent her designs by force of arms"*. Ibid.

A question that has to be asked now regards the timing of the forceful intervention. When can the anticipator strike? Should it be shortly before being attacked itself – as in western movies where the “bad guy” tries to shoot first but ends up being shot first by the “good guy” as the latter is defending himself? Or could the anticipator attack as the means of the threat are in the process of being created? This latter approach would consist of a preventive action.

From Vattel's writings we can understand that the first issue which is relative to preemption is hardly intellectually challenging. He thus creates the typical self-defense hypothetical where he describes himself wandering in the woods when he observes a man taking his rifle and pointing it towards him.¹⁸⁵ Vattel then tells us, with a sense that the answer here is obvious, that anticipating the attack and striking him first is just common sense: “*What reasonable casuist will deny me the right to anticipate him*”.¹⁸⁶ Vattel's description of this scenario is typical of a case of preemption, where the defending party, seeing that an attack is about to occur attacks first. We can also detect in Vattel's choice of words a certain irony or maybe even exasperation, when he contemplates the idea that the person actually raising and aiming the rifle – the “alleged” aggressor – did not really mean to shoot him but merely scare him, or scare the birds etc. Vattel does make it clear that the anticipator is not here to ponder and meditate intensely while he is being aimed at, that is to say when the ultimate preparations to the

¹⁸⁵ Ibid. 181 at p. 310. :“*If a stranger levels a musket at me in the middle of a forest, I am not yet certain that he intends to kill me: but shall I, in order to be convinced of his design allow him to fire?*”

¹⁸⁶ Ibid.

aggressor's attack are underway. Vattel would neutralize such a threat by preempting the aggressor.

The second issue relative to prevention is far more thought provoking. For instance, one could ask Vattel whether he would authorize the use of force in the following scenario:

Emmerich de Vattel lives peacefully in a small town in Switzerland. Vattel's neighbor, Mr. Nasty does not like him and never misses an opportunity to insult him. Mr. Nasty has been screaming at Vattel things such as "*I'm gonna get you!*", who took it pretty seriously.

Vattel also knows that Mr. Nasty has a prior criminal record including aggravated batteries committed with deadly weapons and acts domestic violence (he often hits his wife and children to "*keep them from going astray*" and to make it a point that "*he's the boss, the man of the house*"). Last week, Vattel overheard Mr. Nasty mumbling that he's starting his personal production of an AK-47 variation because "*that's going to get the job done*" and that "*It'll teach that piece of Swiss cheese a lesson*". Emmerich, having been himself in the army knows that once the production of a barrel and a receiver has been completed, it would be a matter of minutes to assemble the rifle and make it an operational weapon.

Emmerich also remembers from his engineering classes that making the barrel does take time. One needs to buy a special type of steel that has to withstand the high pressures of the Kalashnikov round and that the whole process could take up to a year for one man to produce all the parts for that

weapon. Emmerich does not want to wait to find out and see whether Mr. Nasty will come and attack him since he knows that by that time it might very well be too late.

Furthermore, he has noticed that instead of working alone as he expected, Mr. Nasty was receiving some additional help from another of his neighbors who provided him with additional funding to buy better machines. Emmerich even spotted last week a series of 16 inch tubes in Mr. Nasty's garage and is becoming extremely anxious at that whole situation and wants to know whether he can storm the garage and destroy the machines and other equipment therein now. He furthermore does not know whether this act will be sufficient to stop the production of these machines since Mr. Nasty might still have the intent to kill him and possibly have this latter intent reinforced after the attack and will potentially resume rebuilding his machines after it.

The questions revealed by this scenario expose some of the considerations that will be encountered while deciding whether preventive use of force is allowable. Vattel outlines for us some of the answers to the questions presented above noting that these are numerous, complex and that any answer given would need further research.

With regards to prevention, Vattel asks the question of whether a simple accretion of power would be sufficient to trigger the right of another to attack under the theory of self-defense. To this question he answers no, arguing that power alone does not justify anticipatory self-defense provided this accretion of

power is not made at another state's expense¹⁸⁷ (or prejudicial in Vattel's words). The obvious question following this statement is; which kind of power accretion would be considered as coming to another's prejudice? In order to answer this new question, one would have to go back to what Vattel had announced with regards to the "vicious" character of a state.

According to Vattel this power accretion has to be undertaken with the intent to harm other nations in the future: "*Now, power alone does not threaten an injury: - it must be accompanied by the will.*"¹⁸⁸ As it was the case with regards to preemption the intent of the alleged aggressor has to be determined in order to assess whether the intentions are malicious or not.

In contrast to preemption, where the assessment as to intent is to be made instantly since the "accretion of power" has already been made; the assessment period relative to prevention is far longer since the timeframe can often extend up to several years. What are the tools at our disposal in order to determine intent where preventive use of force is contemplated?

Defining intent is often understood as being analogous to a complex guesswork. This guesswork can nonetheless be eased when using certain factors. Vattel indeed cites these factors as "*injustice, rapacity, pride, ambition, or*

¹⁸⁷ Ibid. 181 at pp. 309-310: "*But then, if two independent nations think fit to unite, so as afterwards to form one joint enterprise, have they not a right to do it? And who is authorized to oppose them? I answer thy have a right to form such a union, provided the views by which they are actuated be not prejudicial to other states.*"

¹⁸⁸ Ibid.

an imperious thirst of rule".¹⁸⁹ These factors, forming general intent, combined with an impending accession to a formidable power would then trigger a nation's right to demand that the potential aggressor clarify its position or to "give securities", as Vattel clarifies it. Nonetheless, we should then ask the question of what credit should be given to securities offered by a state that indulges in "*injustice, rapacity, pride, ambition or an imperious thirst of rule*"? We should note that these terms are fairly vague when applied to states. Furthermore, would an ambitious and rapacious nation allow any kind of control mechanism in order to verify the tangible nature of these securities, or would it even offer any securities to start with?

The fact that Vattel failed to spare time on the issue of securities could lead us to the conclusion that he foresaw that offering such securities would either be worthless (i.e. the alleged aggressor acts in bad faith) or ineffectual. Vattel further reinforces this idea when he reminds us that state leaders cannot allow themselves to be weak. One consequence of this being that leaders have to disregard their own tendencies pertaining to kindness and clemency so as not to be positively prejudiced by them at a critical time when serious decisions have to be taken.¹⁹⁰

Lastly, Vattel additionally conditions the preventive use of force to a weighing of probabilities. On the one hand he places the probability of the threat

¹⁸⁹ Ibid.

¹⁹⁰ Ibid. "*The interests of nations are, in point of importance, widely different from those of individuals: the sovereign must not be remiss in his attention to them, nor suffer his generosity and greatness of should to supersede his suspicions*".

materializing itself whereas on the other he places the greatness of the “evil threatened”.¹⁹¹ Hence, we can deduct from this that preventive use of force will be considered just if both the odds of being attacked one day, and the consequences suffered by the anticipator are high.

The legal world being one of rules, exceptions and conditions, a further condition has to be added to the above mentioned standard. The latest condition flows directly from the “weighing of probabilities”, being possibly a redundancy or the result thereof. This last condition considers the notion of supportability of the threat. For a threat to be prevented it must also be of an insupportable nature,¹⁹² that is the threatened loss be of a substantial nature.¹⁹³ We might then conclude that according to Vattel, a state would be able to prevent another if the threat that could be suffered would jeopardize that state’s safety.

The last issue that has to be addressed is that of the timing of the attack. When can the anticipator strike in cases of preventive use of force? This question is raised in Vattel’s words when he states that: *“They may come upon her at the moment when she is on the point of acquiring a formidable accession of power, -*

¹⁹¹ Ibid. *“A nation that has a neighbor at once powerful and ambitious, has her all at stake. As men are under a necessity of regulating their conduct in most cases by probabilities, those probabilities claim their attention in proportion to the importance of the subject: and (to make use of a geometrical expression) their right to obviate a danger is compound ratio of the degree of probability and the greatness of the evil threatened”.*

¹⁹² Ibid. *“If the evil in question be of a supportable nature, - if it be only some slight loss, matters are not be precipitated: there is no great danger in delaying our opposition to it, till there be a certainty of our being threatened.”*

¹⁹³ Ibid. *“If the evil in question be of a supportable nature, - if it be only some slight loss, matters are not to be precipitated: there is no great danger in delaying our opposition to it, till there be a certainty of our being threatened. But if the safety of the state lies at stake, our precaution and foresight cannot be too far.”*

may demand securities...". Preventive use of force according to Vattel would thus consider as just, a preventive strike made by the anticipator on the alleged offender before the latter constitutes a threat since "they [the anticipator] may come [...] prior to [emphasis added] [...] acquiring a formidable accession of power". This characteristic once again differentiates preemption and prevention, which highlights the complex nature of the latter notion. The standard chosen by Vattel in terms of the timing of the anticipator's attack is not the planned attack by the aggressor (typical in a case of preemption) but the latter's bringing into being of the instruments of a future, highly plausible attack which places the defending state's safety in great peril.¹⁹⁴

3. Modern Writings on these Concepts

¹⁹⁴ Vattel further goes into great detail while justifying preventive attacks in cases of accretion of power as it was the case during the war waged against Louis XIV of France relative to the Spanish Succession, even though he concedes that such use of force was misguided due to states becoming overly-suspicious: "*But presumption becomes nearly equivalent to certainty, If the prince who is on the point of rising to an enormous power has already given proofs of imperious pride and insatiable ambition. In the preceding supposition, who could have advised the powers of Europe to suffer such a formidable accession to the power of Louis the Fourteenth? Too certain of the use he would have made of it, they would have joined in opposing it: and in this their safety warranted them. To say that they should have allowed him time to establish his domain over Spain, and consolidate the union of the two monarchies, - and that, for fear of doing him an injury, they should have quietly waited till he crushed them all, - would not this be, in fact depriving mankind of the right to regulate their conduct by the dictates of prudence, and to act on the ground of probability? Would it not be robbing them of the liberty to provide for their own safety, as long as they have not mathematical demonstration of its being in danger? It would have been in vain to have preached such a doctrine. The principal sovereigns of Europe, habituated, by the administration of Louvois, to dread the views and power of Louis XIV carried their mistrust so far, that they would not even suffer a prince of the house of France to sit on the throne of Spain, though invited to it by the nation, whose approbation had sanctioned the will of her former sovereign. He ascended it, however, notwithstanding the efforts of those who so strongly dreaded his elevation; and it has since appeared that their policy was too suspicious.*" Ibid. 181 at p. 310.

Modern writings on the question of anticipatory self-defense have mainly flowed from the 1967 Six Days War where preemptive force was used on the part of the Israelis. Anticipatory self-defense seemed to have been rediscovered and questioned at the time. The reason for this could have more to do than anything else with the fact that slightly more than two decades had passed since the end of the Second World War where campaigns of aggression had been waged by the Axis powers on claims of self-defense.

Among these modern writers is Michael Walzer, a highly regarded political philosopher. Walzer is regarded as an authority with regards to war and the just war theory. Walzer describes in his book *“Just and Unjust Wars: A Moral Argument with Historical Illustrations”* what he calls *anticipations* where he seems at first fixated on the Spanish War of Succession that was previously mentioned¹⁹⁵, his main point being that preventive wars are fought purely in order to maintain a balance of powers¹⁹⁶, even though witnessing such a balance of

¹⁹⁵ FRIEDRICH VON GENTZ, FRAGMENTS ON THE BALANCE OF POWER IN EUROPE 64 (M. PELTIER 1806); SIR FRANCIS BACON, OF A WAR WITH SPAIN, in WORKS OF FRANCIS BACON, LORD CHANCELLOR OF ENGLAND 204 (CAREY 1841) (BASIL MONTAGU, ED).

¹⁹⁶ MICHAEL WALZER, JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, (Basic Books, 4th ed. 2006) (1977) at p. 76-77. Walzer further reflects on the trade-offs the European leaders of the time had to consider before waging war against the Kingdoms of France and Spain. These considerations included the facts that the actual balance of power should be preserved since the alternate situation (i.e. France and Spain uniting) would be highly detrimental to the other states' independence, and that attacking early on would reduce the costs and magnitude of the future conflict: *“The argument is utilitarian in form; it can be summed up in two propositions: (1) that the balance of power actually does preserve the liberties of Europe (perhaps also the happiness of Europeans) and is therefore worth defending even at some cost, and (2) that to fight early, before the balance tips in any decisive way, avoiding war (unless one also gives up liberty) but only fighting on a larger scale and at worse odds”*.

powers¹⁹⁷ would be by the end of the day a pure fiction since power gains and losses are a constant in the realm of international relations.¹⁹⁸ One could agree or disagree with Walzer's perception that preventive use of force necessarily implies preserving a determined balance of powers for the sake of such or such a state's comfort or solely for the preservation of a balance of powers in itself. As Walzer mentions, power gains and losses are an integral part of international relations. Nonetheless, such a fluctuation in power could very well occur due to a various number of circumstances such as economic, demographic decline or growth and so forth; just as it could in the case of acts of aggression. Following this logic, preventive force could be employed either in cases of power shifts arising from aggression or from other non-military factors. However, our concern in this research will focus on the relation between cases of military aggression and anticipatory self-defense, and will not address other causes of power accretion which have also been visited by Vattel, amongst others.¹⁹⁹

¹⁹⁷ Paul W. Schroeder, "Did the Vienna Settlement Rest on a Balance of Power?", 97 AM. HIST. REV. 683, 684-90, (1992). See also Robert Jervis, "A Political Science Perspective on the Balance of Power and Concert", 97 AM. HIST. REV. 716, 718-23 (1992).

¹⁹⁸ "The argument is plausible enough, but it is possible to imagine a second-level utilitarian response: (3) that the acceptance of propositions (1) and (2) is dangerous (not useful) and certain to lead to 'innumerable and fruitless wars' whenever shifts in power relations occur; but increments and losses of power are a constant feature of international politics, and perfect equilibrium, like perfect security, is a utopian dream". Ibid. 196 at p. 77.

¹⁹⁹ Vattel in his *Law of Nations* addressed this issue and suggested that other means were available in cases of a power increase of a peaceful nation in order to preserve a certain balance of power: "But force of arms is not the only expedient by which we may guard against a formidable power. There are other means, of a gentler nature, and which are at all times lawful. The most effective is a confederacy of the less powerful sovereigns, who, by this collation of strength, become able to hold the balance against that potentate whose power excites their alarms. Let them be firm and faithful in their alliance; and their union will prove the safety of each." EMMERICH DE VATTEL, *LAW OF NATIONS*, (Joseph Chitty Ed. 1883) (1758), Book III, Chapter III, section 44 "How the appearances of danger give that right" p. 311.

Michael Walzer's main contribution has been to recognize that anticipatory self-defense, and more specifically preventive use of force has shifted the moment where the defending party will use force, from a short period of time before the imminent attack (the *Webster* standard) to the creation by the alleged aggressor of a *sufficient threat*.²⁰⁰ Recognizing that the standard to be used has become the *sufficient threat* instead of imminence would bear, as a direct consequence, the fact that any counter-measure taken by the defending party be undertaken at a much earlier time. Walzer further describes what he understands as being a sufficient threat as:

“(1) *A manifest intent to injure, (2) a degree of active preparation that makes that intent a positive danger, and (3) a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk*”.²⁰¹

Walzer further explains that by creating such a threat, one would force the defending party to fight and that at that point it becomes then irrelevant whether the defending party strikes first, since it is itself the victim of an aggression – the “*sufficient threat*”. In other words, every action taken by the aggressor, that is to say in our case the creation of a sufficient threat would provoke a reaction on the part of the defending party which would then seek to defend itself from the said threat at a time that minimizes its losses. The aggressor would then commit an aggression on the defending party by creating a sufficient threat that meets the

²⁰⁰ Ibid. 196 at 81: “*The line between legitimate and illegitimate first strikes is not going to be drawn at the point of imminent attack but at the point of sufficient threat.*”

²⁰¹ Ibid.

three above-mentioned criteria, thus forcing the defending party to use anticipatory force or, as Walzer interjects: *“A state under threat is like an individual hunted by an enemy who has announced his intention of killing or injuring him. Surely such a person may surprise his hunter, if he is able to do so [...] we are acknowledging that there are threats with which no nation can be expected to live. And that acknowledgment is an important part of our understanding of aggression.”*²⁰² Walzer eventually sets out what could be interpreted as his personal standard the following formula which would allow the use of anticipatory self-defense that states that: *“states may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence. Under such circumstances it can fairly be said that they have been forced to fight and that they are the victims of aggression.”*²⁰³

²⁰² Ibid. at p. 85

²⁰³ Ibid.

B. Examples illustrating both preemption and prevention

1. The 1962 Cuban Missile Crisis

The 1962 Cuban Missile crisis provides us with an interesting case of anticipatory self-defense. In 1958 Cuban rebels headed by Fidel Castro and Ernesto Guevara led an insurgency against Cuban governmental authorities and its president, Fulgencio Batista. After a series of military defeats against the insurgents, Fulgencio Batista lost power and fled Cuba. A new Cuba arose behind Castro and Guevara who held that a socialist Cuba would provide freedom to the Cuban people as well as a bright future.²⁰⁴ In this vein, and for other political reasons, the Soviet Union suggested to Cuba in 1962 that deploying ballistic missiles armed with nuclear warheads might both advance the cause of socialism in South America as well as deter future US attacks against Cuba.²⁰⁵ Both parties agreed to build tactical missile launch sites in Cuba and

²⁰⁴ AVIVA CHOMSKY, *A HISTORY OF THE CUBAN REVOLUTION* (John Wiley & Sons, United Kingdom) (2011) at p. 37: *“For both Che and Fidel, socialism was not simply a matter of developing a new way of distribution. It was a question of freeing people from alienation at the same time.”*

²⁰⁵ SERGO MIKOYAN AND SVETLANA SAVRANSKAYA, *THE SOVIET CUBAN MISSILE CRISIS: CASTRO, MIKOYAN, KENNEDY, KHRUSHCHEV, AND THE MISSILES OF NOVEMBER* (Stanford University Press) (2012), THE NATIONAL SECURITY ARCHIVE, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB393/> *“The new Soviet documents show that Khrushchev decided to place the missiles in Cuba because he was under the impression that a US invasion was just a question of time, and he was not willing to lose his new Cuban ally, which constituted forward base of socialism in the Western hemisphere. He felt humiliated by the US missiles in Turkey virtually on the border of the USSR. He was also concerned by the enormous gap between the US and Soviet deliverable nuclear firepower. Fidel Castro objected to a deployment that would have made him look like a Soviet puppet, but was persuaded that missiles in Cuba would be in the interests of the entire socialist camp.*

started their construction. The building of the launch sites and the deployment of the missiles were to remain a secret.²⁰⁶ However, on October 14, 1962 an American U2 spy plane took pictures of the sites and offered them to President Kennedy as proof that the Soviet Union was deploying tactical nuclear missiles on Cuban territory.

The building of these sites placed the United States in a considerable disadvantage since its own territory would now be under the threat of a nuclear attack on the part of the Soviet Union. President Kennedy promptly demanded that the Soviet Union remove its missiles from Cuba. This created a crisis which lasted thirteen days, whereby the Soviet Union and the United States found themselves on the brink of war against each other. The United States decided to interdict Soviet ships²⁰⁷ that were heading to Cuba to prevent additional transfers of weapons to Cuba by creating a maritime blockade.²⁰⁸ This maritime

²⁰⁶ James H. Hansen, *Learning from the Past: Soviet Deception in the Cuban Missile Crisis*, CENTER FOR THE STUDY OF INTELLIGENCE - CENTRAL INTELLIGENCE AGENCY, available at: <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol46no1/pdf/v46i1a06p.pdf> : “*The Russians began to dispatch officers and specialists covertly to Cuba by air. On 10 July, Gen. Issa Pliyev, traveling under the name “Pavlov”, arrived in Cuba to command the Soviet contingent. Two days later, 67 specialists touched down. They journeyed as “machine operators,” “irrigation specialists,” and “agricultural specialists.” Their covers, however, could not have withstood probing – they had been assigned to occupations about which they knew nothing. They were urged to consult the few genuine specialists traveling with them to gain some rudimentary knowledge of the ostensible jobs.*”

²⁰⁷ Douglas Guilfoyle, “*The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?*”, 29 MELBOURNE U. L.R. 733,745 (2005): “*Simply put, on discovering Soviet nuclear missile launch facilities under construction in Cuba, on 24 October 1962, President Kennedy declared a defensive quarantine’ of Cuba to be enforced by naval interdiction of shipping carrying military materiel, which resulted in a number of ships being visually inspected’ or boarded before being allowed to proceed.*”

²⁰⁸ Ernest R. May, *John F Kennedy and the Cuban Missile Crisis*, BBC HISTORY, February 17, 2011 available at: http://www.bbc.co.uk/history/worldwars/coldwar/kennedy_cuban_missile_01.shtml#three “*In*

“quarantine” was undertaken with the agreement of the Organization of American States.²⁰⁹ The United States went before the United Nations Security Council and accused the Soviet Union of creating a nuclear arms build-up in Cuba, supporting these assertions with photographic evidence.²¹⁰ October 28, 1962 an agreement was reached between the United States and the Soviet Union which made the prospects of nuclear war fade away. This agreement included the withdrawal of the missiles that were deployed in Cuba as well as the dismantling of launch sites, in exchange for an assurance that Cuba would not be attacked by the United States, and that it would withdraw its nuclear missiles aimed towards the Soviet Union in Turkey and Italy.

the first day's debates, everyone favored bombing Cuba. The only differences concerned the scale of attack. Kennedy, Bundy, and some others spoke of a 'surgical strike' solely against the missile sites. 'It corresponds to "the punishment fits the crime" in political terms', said Bundy. Others joined the chiefs of staff in insisting that an attack should also take out air defense sites and bombers, so as to limit losses to US aircraft and prevent an immediate air reprisal against US bases in Florida. By the third day, 18 October, another option had come to the fore. The under secretary of state, George Ball, had commented that a US surprise attack in Cuba would be 'like Pearl Harbor. It's the kind of conduct that one might expect of the Soviet Union, It is not conduct that one expects of the United States.' Robert Kennedy and Secretary of State Dean Rusk concurred, Rusk observing that the decision-makers could carry 'the mark of Cain' on their brows for the rest of their lives. To meet this concern and to obtain time for gaining support from other nations, there developed the idea of the President's publicly announcing the presence of Soviet missiles in Cuba, ordering a blockade to prevent the introduction of further missiles, and demanding that the Soviets withdraw the missiles already there. (Both for legal reasons and for resonance with Franklin Roosevelt's 'Quarantine Address' of 1937, the term 'quarantine' was substituted for 'blockade'.)

²⁰⁹ Major J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty after Bosnia and Kosovo*, 160 MIL. L. REV. 1, 37 (1999): “During the Cuban missile crisis, the United States sought and received the backing of the Organization of American States to establish a partial blockade of the island. Only U.S. vessels carried out the “quarantine” of Cuba, however. Of course, no ground troops were sent to the island.”

²¹⁰ Matthew C. Waxman, *The Use of Force Against States that might have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1, 20 (2009): “For all of these reasons, WMD capability intelligence will likely remain as it is now: highly murky and uncertain. As a result, in future crises we cannot confidently expect moments like during the 1962 Cuban Missile Crisis, when U.S. Ambassador to the United Nations Adlai Stevenson presented “incontrovertible” photographic evidence of Soviet missiles being assembled in Cuban territory to both the U.N. Security Council and a live television audience.”

An interesting point to be investigated regarding the Cuban Missile Crisis case concerns the characterization of the United States' actions when it enforced the blockade against Cuba, as well as the legal arguments it set forth in order to justify it.

First and foremost, it should be noted that the United States was not under the threat of an imminent attack by the Soviet Union or by Cuba, according to the criteria set forth in the *Caroline* case.²¹¹ The ships that were being interdicted were not about to attack the United States²¹², even though they were transporting nuclear weapons to Cuba that could later be used to target the United States.²¹³ This is perhaps why the United States decided not to officially justify its blockade with anticipatory self-defense²¹⁴ arguments when it sought prior approval with

²¹¹ 1 I.M.T. 171 at p. 207 (Nuremberg) : *"It must be remembered that preventive action in foreign territory is justified only in case of an instant and overwhelming necessity of self-defense, leaving no choice of means, and no moment of deliberation."*

²¹² Matthew Allen Fitzgerald, "Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter", 49 VA. J. INT'L L. 473, 499 (2009): *"A perceived lack of "imminence" in the threat to the United States constituted the greatest criticism of the American action. Critics believed that the simple emplacement of missiles in Cuba, while clearly an aggressive move, did not signal any imminent launch."*

²¹³ William C. Bradford, *"The Changing Laws of War: Do we Need a New General Regime after September 11?: "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War"*, 79 NOTRE DAME L. REV. 1365, 1404 (2004): *"During a heated debate within the Kennedy Administration, senior officials of the Departments of Justice and State urged the United States to claim anticipatory self-defense as the legal justification for the blockade and subsequent air strikes, and others, led by State Department Legal Adviser Abram Chayes, counseled that to mount such an argument on the basis of the facts, which in their estimation could not support a claim that an "armed attack" had occurred or that a threat to the United States was imminent, would be to stretch the definition of anticipatory self-defense beyond reasonable bounds and "trivialize the whole effort at legal justification"."*

²¹⁴ *Ibid.* at p. 1404: *"Although opponents of anticipatory self-defense could not convince President Kennedy that the presence of missiles in Cuba did not constitute an imminent threat to U.S. security as a matter of policy, they prevailed on the question of legal justification, and the United States characterized the blockade not as an act of anticipatory self-defense under Article 51 but rather as regional action authorized by the Organization of American States (O.A.S.)."*

states member²¹⁵ of the Organization of American States (OAS). Instead, the United States asserted that its quarantine was legitimate under Article 53 of the United Nations Charter²¹⁶ which relates to maintaining international peace and security through the agency of regional arrangements²¹⁷, and not Article 51²¹⁸ even if such arguments were proposed.²¹⁹ Under Article 53, any enforcement action has to be authorized by the Security Council. However, in the Cuban Missile Crisis case, the United States argued that its actions did not constitute an enforcement action²²⁰ because the quarantine was not binding on the members

²¹⁵ Id. 209 at p. 37: *“During the Cuban missile crisis, the United States sought and received the backing of the Organization of American States to establish a partial blockade of the island. Only U.S. vessels carried out the “quarantine” of Cuba, however. Of course, no ground troops were sent to the island.”*

²¹⁶ Article 53 of the United Nations Charter, available at: <http://www.un.org/en/documents/charter/chapter8.shtml>. Article 53 of the Charter does provide that any enforcement action has to be authorized by the United Nations Security Council: *“The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...”*

²¹⁷ Ibid 213 at p. 1404: *“The action was specifically taken under the auspices of the Organization of American States acting as a Chapter VIII regional organization. The United States argued that the quarantine was not an enforcement action and therefore required no Security Council blessing. Alternately, the United States said even if the action could be classified as enforcement the Security Council had implicitly endorsed the action by failing to adopt a draft Soviet resolution condemning the quarantine.”*

²¹⁸ Q. Wright, *“The Cuban Quarantine”*, 57 A.J.I.L. 546, 560 (1963).

²¹⁹ M.S. Mc Dougal, *“The Soviet-Cuban Quarantine and Self-Defense”*, 57 A.J.I.L. 597-604 (1963).

²²⁰ Ibid 207 at p. 745: *“At the time, the US State Department argued that the quarantine’ was authorized by the Organization of American States (‘OAS’) as a Charter regional security arrangement acting under Chapter VIII. The OAS had recommended that members take all necessary measures, including the use of armed force, to ensure that Cuba [could not] . . . receive . . . military material . . . threaten[ing] the peace and security of the Continent’. As one US official admitted subsequently, this requires a strained interpretation of the quarantine’ as something other than enforcement’, given the Article 53 requirement that Chapter VIII organizations not conduct enforcement action without Security Council approval.”*

of the OAS.²²¹ However, it appears that the United States could also have argued that the enforcement action had been implicitly authorized by the UN Security Council when the latter refused to pass a Soviet draft condemning the US quarantine of Cuba.²²² While the quarantine could be characterized as a preventive measure against a Soviet arms build-up in Cuba and not as a preemptive measure²²³, the US Government decided to rely mainly on the argument grounded in Article 53 rather than on that of anticipatory self-defense. The reason for this might to be found in the fact that had the United States overtly stated that it was using anticipatory self-defense as justification for the quarantine, the Soviet Union could have used this same justification as a pretext to preemptively attack US nuclear missile sites in Turkey or Italy.²²⁴

American missiles in Turkey were in fact deployed and not “en route” on ships, making this threat to the Soviet Union even more “imminent” than the one caused by the Soviet missiles in Cuba. The USSR could in turn have considered

²²¹ Cristian DeFrancia, *“Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures”*, 45 VAND. J. TRANSNAT’L L. 705, 761 (2012): *“The analysis hinged on a memorandum of the State Department Legal Advisor’s Office that the authorization of the quarantine by the Organization of American States was not an “enforcement action” under Article 53 of the UN Charter because it was not mandatory upon member states.”*

²²² Ibid 209 at p. 38: *“Alternately, the United States said even if the action could be classified as enforcement the Security Council had implicitly endorsed the action by failing to adopt a draft Soviet resolution condemning the quarantine.”*

²²³ W. Michael Reisman and Andrea Armstrong, *Centennial Essay: The Past and Future of the Claim of Preemptive Self-Defense*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 100 A.J.I.L. 525, 527 (2006): *“One possible forerunner of the U.S. unilateral claim to preemptive self-defense would be the Cuban missile crisis, but that was marked by preventive nonmilitary action that shifted the option of an overt military response to the other party.”*

²²⁴ Ibid 207 at p. 745: *“However, this was thought preferable to asserting a right of preemptive self-defense, which would have allowed the USSR to strike at US missile installations in Turkey.”*

that these ballistic missiles constituted a threat of an imminent nature and use the United States' argument to justify strikes.

On the other hand, had the nuclear weapons been deployed and created an imminent threat to the United States, it could then have legally launched an attack against the nuclear sites as long as it followed the criteria set forth in the *Caroline* case. However, this was not the case here since there was no direct imminence.²²⁵ The 1962 Cuban Missile Crisis is an extremely interesting case due to the fact that the United States skillfully and effectively used non-military preventive force, in the sense that it did not bomb Cuba or sink the Soviet ships, grounding such force not on an anticipatory self-defense argument (since this would open the door to Soviet preemptive strikes in Europe) but on Article 53 of the UN Charter.²²⁶

²²⁵ Daniel Schwartz, "Just War Doctrine and Nuclear Weapons: A Case Study of a proposed attack on Iran's nuclear facilities from an American and Israeli Perspective", 18 S. CAL. INTERDIS. L.J. 189, 211 (2008): "In light of the fact that MAD rendered neither the Soviet Union nor the United States willing to attack the other directly prior to the Cuban Missile Crisis, there seems to be no reason now to believe this doctrine obsolete. Furthermore, the placement of nuclear weapons in Cuba would not have placed the United States under the continuous threat of war, since the Soviets were interested in a strategic advantage, not nuclear war. Thus, under the preemption test, any attempt to destroy the nuclear weapons in Cuba would be preventive and therefore unjustified, since the goal would be to prevent a change in the balance of power, and not to preempt a probable attack."

²²⁶ Ruth Wedgwood, "Future Implication of the Iraq Conflict: The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-defense, 97 A.J.I.L 576, 585 (2003): "Indeed, one may reread President John F. Kennedy's handling of the Cuban missile crisis in the same light--as a celebrated example of the prudent use of defensive force to prevent a dangerous change in capability. The introduction of nuclear weapons into Cuba, reducing Soviet launch time to seven minutes, would have destroyed any adequate interval for the assessment of nuclear warnings, imperiling American-Soviet stability and putting at risk thousands of innocent lives. The United States imposed a "defensive quarantine," blocking the movement of Soviet ships to Cuba and forcing Soviet submarines to surface. This action was not in response to an armed attack, within the central language of Article 51, or even in response to a concrete Soviet war plan, but in recognition of the danger of a sudden change in capability. The United States bypassed the Security Council to avoid a Soviet veto, and took shelter in a "recommendation" of the Organization of American States. Law professors

2. The 1967 Six Day War

The canonical case regarding the use of preemption in our modern days remains the 1967 Six Days War. In this case the State of Israel, which lacks strategic depth, acted preemptively to protect itself from an imminent threat.²²⁷ This threat consisted of a number of enemies numerically superior that had already amassed their forces against Israel's borders, ready to attack. Had Israel waited until it had been struck first in order to act in self-defense, in the strictest sense of the term the result of the war might have been quite different for her.

The following description of the war and of the events leading to the war will illustrate the concept of preemption and are hardly superfluous. This description is necessary to understand the reasons why the war erupted and determine the intentions of the parties before and while they resorted to use armed force.

have enjoyed teaching the missile crisis ever since as a case study in casuistry--because the procedural rationales offered by the participating lawyers demonstrably did not work. Most notably, a recommendation by a regional organization such as the OAS was insufficient basis, in the classic view of the Charter, to warrant member states to go beyond the limits of Article 51 self-defense. Thus, one had to read Article 51 as permitting preemption of capability, or else consign the U.S. response to legal twilight. The U.S. defensive quarantine against the Soviet missiles was widely accepted as legitimate, yet can only be frankly described as an early and successful use of a doctrine of preventive force against a missile threat that presented a clear danger to nuclear stability."

²²⁷C.C. Joyner and M.A. Grimaldi, "The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention", 25 V.J.I.L. 621, at pp. 659-660 (1984).

a. The facts

The 1967 Six Day War was perceived by Israel and her citizens as a war of extermination led by her Arab neighbors²²⁸, notably Egypt, Syria and Jordan.²²⁹ These three states were the main actors and contributors to the war against Israel proclaiming out loud that they will be waging a war²³⁰ of annihilation²³¹ that would seek to “*wipe Israel off the map*”.²³² The motivations behind the war were twofold. The first reason mainly regarded water related issues regarding the Egyptian embargo²³³ on Israeli ships going through the Straits of Tiran²³⁴ and the Syrian interference with the Jordan River that had as a

²²⁸YEHOHADAT HARKABI, ARAB ATTITUDES TOWARDS ISRAEL, at P. 27 (Jerusalem: Keter Publishing, 1972).

²²⁹ Amos Shapira, “*The Six Days War and the Right of Self-Defence*”, 6 ISR. L. REV. 65, 67 (1971). See also Charles Pierson, “Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom”, 33 DENV. J. INT’L L. & POL’Y 150, 166 (2004).

²³⁰ SAMUEL KATZ, BATTLEGROUND-FACT AND FANTASY IN PALESTINE, at pp. 10-11 (NY: Bantam Books).

²³¹ Cairo Radio statement, May 19, 1967: “*This is our chance Arabs, to deal Israel a mortal blow of annihilation, to blot out its entire presence in our holy land*”. See also, NETANEL LORCH, ONE LONG WAR, at p. 110 (Jerusalem: Keter Publishing, 1976). See also E. Miller, “*Self-Defense, International Law, and the Six Day War*”, 20 IS. L. REV. 49, 58-60 (1985).

²³² Cairo Radio statement, May 22 1967: “*The Arab people is firmly resolved to wipe Israel off the map*”. A similar statement was given by Present Abdel Rahman Aref of Iraq on May 31, 1967, who stated that: “*The existence of Israel is an error which must be rectified. This is our opportunity to wipe out the ignominy which has been with us since 1948. Our goal is clear – to wipe Israel off the map. We shall, God willing, meet in Tel Aviv and Haifa*”.

²³³ ABBA EBAN, ABBA EBAN, at p. 358 (NY, Random House, 1977).

²³⁴ YEHUDA LUKACS, DOCUMENTS ON THE ISRAELI-PALESTINIAN CONFLICT 1967-1983, at pp. 17-18 (Cambridge University Press, 1984).

consequence serious water-management problems in Israel.²³⁵ The second reason was the Arab world's inability to conceive a non-Arab; non-Muslim people establish itself as an independent and sovereign state and to see Jews and non-Muslims as *Dhimmis*.²³⁶

During the year of 1967, clashes occurred between Syria and Egypt on the one side and Israel on the other side, which led to an alliance treaty between Syria and Egypt. Both countries were eager to rid themselves of the Jewish state, which they believed as illegitimate. During spring and more specifically May 1967, Egypt under Nasser²³⁷ started to strategically move its armed forces towards the Sinai so as to prepare the invasion of Israel. At the eve of the conflict (from May until the 4th of June 1967) Egypt had grouped seven divisions on Israel's border, constituting around 100,000 ground troops and more or less 1,000 tanks. Israel, on the other hand had managed to amass around 45,000 ground troops and 650 tanks in an attempt to match this surge in troops on the Egyptian border. Having no time to prepare for a direct assault against the Egyptian forces, the Israeli Defense Forces (IDF) decided to gain a strategic advantage by launching an airstrike that would paralyze the would-be aggressor,

²³⁵ Arab countries were concerned that Israel would try to irrigate the Negev desert in an attempt to develop it. Syria attempted to divert the Banyas River which is one of the three tributaries of the Jordan River in September 1964. Israel took countermeasures and raided the place where the tributaries' diversion originated. This ongoing water dispute between Israel and Syria, that also had consequences with regards to the Hashemite Kingdom of Jordan, furthermore accelerated the outbreak of the war. ICE Case Studies, Case Number: 6, Jordan, The Jordan River Dispute by Lilach Grunfeld, Spring 1997 available at : <http://www1.american.edu/TED/ice/JORDAN.HTM>.

²³⁶ *Dhimmis* are second-class individuals who are subjected to the Jizya (poll tax). Quran 9:29.

²³⁷ CHAIM HERZOG, THE ARAB-ISRAELI WARS, at p. 149 (NY, Random House, 1982).

namely by destroying Egypt's air force that would have provided tactical support for its ground assault. At 7:45 AM on June 5th 1967, the Israeli Air Force (IAF) bombed all of Egypt's military air fields by successive air raids that lasted for two hours and a half. The ground assault was then conducted by Generals Sharon, Tal and Yoffe; securing Israel a victory over Egypt that took 96 hours to accomplish.

Egypt was considered at the time to have one of the best armies in the Arab world but so was Jordan. Jordan's army constituted what was named the "Arab Legion". The "Arab Legion" had been trained mainly by the British and was considered to be mainly a professional highly skilled army. Jordan had a position in sharp contrast to Syria's or Egypt's with regards to waging war against Israel. Jordan was more reluctant to join in the fighting and did so mainly when it was misled by Egypt into intensifying the shelling of Jerusalem and other places in Israel, when Egypt affirmed on June 5th that it had destroyed 75% of the IAF, and that it was continuing their "counter-attack" in the Negev desert. Until then, the Israeli position had been to hold back-stage offers with Jordan so as to convince Jordan not to attack Israel. As a result of Jordan's ongoing aggression on the Israeli posts and the increasing intensity of the shelling on Jerusalem and other cities and bases bordering the 1949 armistice line, the Israelis launched several assaults, namely on the Latrun Bulge, Jenin and the roads leading to Mount Scopus since these objectives were of strategic importance to the Jordan army.

By the end of the day, on June the 7th 1967, Jordanian forces had been expelled from the areas it had annexed in 1949 and Jerusalem was reunited.²³⁸

Three fronts had been opened during the Six Days War, the Egyptian, the Jordanian and the Syrian. The Syrian front was the second most important front for mainly two reasons. Syria had used for many years its position on high plateaus such as the Golan to shell Israeli villages. Syria was also seen as being the Soviet proxy in the region, the latter having fed both the Egyptians and Syrians with false information in order to push them to war,²³⁹ with the hope of destabilizing the region to their advantage. Syria's air force attacked localities within Israel on June 5th in the hope of taking out its refineries, this attempt however failed. On June 6, Syria concentrated its fire on the civilian population of kibbutzim close to the border such as the kibbutz Tel Dan. These attacks were repelled and Syrian forces were driven back across the border. A UN cease-fire was declared on the 8th and partially respected by both parties for a few hours. This state of affairs was short-lived and came to a term when Syria decided to re-engage in the shelling of Israeli positions from the Golan (which had been heavily fortified). In response to this renewed belligerency, Israel decided to counterattack and eventually managed, at a very high cost, to take major Syrian

²³⁸ The Six Day War: Background and Overview, THE JEWISH VIRTUAL LIBRARY: JUNE 5-10, 1967, available at: http://www.jewishvirtuallibrary.org/jsource/History/67_War.html

²³⁹ While visiting Moscow, Anwar Al-Sadat received reports that the Israelis were going to attack Syria between the 16th and 22nd of May 1967. Ambassador DORE GOLD, "THE TOWER OF BABBLE: HOW THE UNITED NATIONS HAS FUELED GLOBAL CHAOS" (New York: Crown Forum, 2004) at p. 93 states that the USSR was not actually looking for a peaceful way to defuse the situation. It threw fuel on the fire by providing deliberately false information to the Syrians and Egyptians. Prime Minister Levi Eshkol even offered General Odd Bull the opportunity to disprove assertions that the Israeli army had massed troops along its northern border in order to show that it did not have bellicose views towards its neighbors.

positions such as Tel Fakhir, Banias and Masada. By nightfall on the 10th of June 1967, the Syrian forces had been totally withdrawn from the Golan Heights, marking the end of the Six Day War.²⁴⁰

b. Analyzing the conflict

As we have been able to see in the above description of the facts recounting this war and the events leading to it, the question of knowing who was considered to be the aggressor and the victim became of prime importance in order to determine the legality of the actions taken by both parties.

In this specific instance, the United Nations Security Council (UNSC) was the international body charged with assessing the legality (and not necessarily the “*justness*”²⁴¹) of the use of force undertaken by Israel and by the other states that were party to the Six Day War. After more than five months of intense debates²⁴² between the United States and the Soviet Union, Resolution 242 was

²⁴⁰ MICHAEL WALZER, *JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS*, (Basic Books, 4th ed. 2006) (1977) at pp. 82-85.

²⁴¹ Yoram Dinstein, “*The Rule of Law in Conflict and Post-Conflict Situations: Comments on War*”, 27 HARV J.L. & PUB. POL’Y 877, 879-80 (2004).

²⁴² Security Council Resolution 242 was a highly controversial document between the United States and the USSR when it was passed and still remains so within some international circles. The Arab Coalition’s position, after having lost the war and seen their arsenals that had been stacked up at the Israeli border destroyed, was that Israel was the primary aggressor. This interpretation was also shared by the Soviet Union which used its position in the Security Council to project its influence in the Middle East and consistently attempt to destabilize the region to its advantage.

passed on November 22nd 1967.²⁴³ Resolution 242 in its format is similar to any other Security Council Resolution that is passed during or after the cessation of hostilities. The UNSC stressed its concerns for “*the situation in the Middle East*”, referring itself to Article 2ⁱ of the UN Charter (see endnote for the full text of Article 2). Article 2 of the UN Charter provides that member states refrain from using force when confronted with disputes that arise between them. Furthermore, the article sets forth the idea that states are sovereign entities which all have designated territories that are inviolable (also named territorial integrity).

Articles 2.4 and 51ⁱⁱ provide the basic legal framework and understanding around which the use of force revolves in the United Nations (see endnote for the full text of Article 51). The former article sets out the prohibition against the use of force or any other overt action that would destabilize another state. The latter article on the other hand recognizes the right to individual and collective self-defense for states that have been attacked.

First and foremost, what needed to be determined after the cessation of the hostilities was which party had triggered the hostilities – *who broke the peace?* As detailed in the above narrative regarding the Jordanian and Syrian fronts, both Syria and Jordan had attacked Israel without having been previously attacked by it. These were pure and simple cases of aggression where two states attacked a third without provocation or without any manifestation of an impending attack.

²⁴³ R. Lapidoth, “*The Security Council in the May 1967 Crisis: A Study in Frustration*”, 4 Is. L. REV. 534-50 (1969).

The Egyptian scenario is far more interesting in terms of developing international law and anticipatory self-defense.²⁴⁴ Going back to the facts and focusing on the military exchanges between Egypt and Israel, we see that it was the state of Israel that used force first. The Israeli Air Force (IAF) destroyed the Egyptian air force while it was still on the ground on the 5th of June at 7:45 am. This attack would presuppose that Israel was the aggressor, as it was argued by the USSR, Egypt and other Arab states. This argument, however proved to be unconvincing for the UN Security Council when it drafted Resolution 242. Furthermore, one should note that Egypt had imposed on May 23, 1967 a maritime blockade on Israel by closing the Straits of Tiran²⁴⁵, which by itself is an act of war. This argument is often forgotten, and it provides a further indictment of Egypt's aggressive policy and aggression at that time.²⁴⁶

UN Security Council Resolution 242 is interesting both by what it says and what it fails to say. First of all, whilst reading Resolution 242 one notices that the Security Council never condemned either side to the hostilities. We could have expected the Security Council to firmly state that such or such a country was responsible for the war instead of adopting a neutral position which calls all the

²⁴⁴ G.K. Walker, "Anticipatory Collective Self-defense in the Charter Era: What the Treaties Have Said", 72 I.L.S. 365, 393 (1998).

²⁴⁵ UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, at pp. 132-134 (Geneva, UN Publications, 1958).

²⁴⁶ Yoram Dinstein, "The Legal Issues of 'Para-War' and Peace in the Middle East", 44 S.J.L.R. 469-70 (1970).

parties to the conflict to comply with Article 2 of the UN Charter.²⁴⁷ The Council nonetheless alludes to “*its continuing concern with the grave situation in the Middle East*”.²⁴⁸ This wording chosen by the drafters of Resolution 242 could be compared with other Council resolutions which expressly condemn parties that have allegedly violated the UN Charter.²⁴⁹ One could perhaps infer from the Security Council’s omission to blame Israel for the outbreak of the war that preemption is a legitimate form of self-defense.

3. The 1981 Osirak Strike

The 1967 Six Day’s War provided us with a perfect example of preemption. The 1981 Osirak strike on the other hand gives us an insight as to what constitutes preventive use of force. The reader will be able to apprehend

²⁴⁷ “*Emphasizing further that all member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter...*” S.C. Res. 242, U.N. Doc. S/RES/242 (November 22, 1967).

²⁴⁸ Ibid.

²⁴⁹ For instance, Security Council Resolution 111 of January 1956 makes it a point to condemn the Government of Israel after an attack was committed on 12/11/1955 by Israel against Syrian forces: “...3. *Condemns the attack of 11 December 1955 as a flagrant violation of the cease-fire provisions of its resolution 54 (1948), of the terms of the General Armistice Agreement between Israel and Syria, and of Israel’s obligations under the Charter of the United nation...*” On a similar note, one needs not go that far back in UN Security Council Resolutions to discover similar language, and could just note that other Resolutions such as Security Council Resolution 1718 (2006) equally condemns the named party: “*Expressing the gravest concern over the claim by the Democratic People’s Republic of North Korea (DPRK) that it conducted a nuclear weapon test, the Security Council this afternoon condemned that test and imposed sanctions on the DPRK, calling for it to return immediately to multilateral talks on the issue*”. Available at: <http://www.un.org/News/Press/docs/2006/sc8853.doc.htm>. S.C. Res. 111, U.N. Doc. S/RES/111 (January 19, 1956).

the main distinctions between the notions of preemption and prevention by comparing the 1967 war with the 1981 strike.

a. Factual background: Plutonium, the Iran-Iraq War and Israel

Osirak was the name of a light-water reactor that had been built in Iraq by the French during the 1970s and early 1980s. Iraq had started its nuclear program in the 1960s and had sought the assistance of foreign nuclear power – notably France. Iraq had originally sought to purchase a graphite nuclear reactor from France. Iraq however was unable to do so since graphite reactors were obsolete and therefore were not manufactured by France anymore. Graphite reactors were also known to produce weapons-grade plutonium (Pu^{239})²⁵⁰ in larger quantities than other reactors existing at that time.²⁵¹ Plutonium is a byproduct created when operating a nuclear reactor and is one of the two prime elements used to assemble fission bombs. Seeing that the prospects of obtaining a graphite reactor were close to nil, Iraq opted towards purchasing a research reactor for “civilian” use. The latter reactor types produce less Pu^{239} and are considered “cleaner” than graphite-moderated reactors. Osirak was to be

²⁵⁰ More specifically, Plutonium 239 (Pu^{239}) which is relatively stable compared to other plutonium isotopes.

²⁵¹ ***“A useful rule of thumb for gauging the proliferation potential of any given reactor is that 1 megawatt-day (thermal energy release, not electricity output) of operation produces 1 gram of plutonium in any reactor using 20-percent or lower enriched uranium; consequently, a 100 MW(t) reactor produces 100 grams of plutonium per day and could produce roughly enough plutonium for one weapon every 2 months (emphasis added). Light-water power reactors make fewer plutonium nuclei per uranium fission than graphite-moderated production reactors.”*** Excerpt from a Federation of American Scientists report available at <http://www.fas.org/nuke/intro/nuke/plutonium.htm>

supervised by French technicians who would monitor the reactors (Osirak and Isis) until 1989.²⁵² Iraq's neighbors saw this development with great concern since Iraq under Saddam Hussein's rule had been engaged in a ruthless war of aggression against Iran where Hussein used chemical weapons (the Iran-Iraq war).

Iraq had launched an aerial attack against Iran on September 22, 1980 on the pretext that Iran had tried to assassinate Tariq Aziz who was Iraq's Vice Prime-Minister at the time.²⁵³ Pretexts being what they are what they are they seem grossly insufficient as to explain Iraq's behavior. The reasons behind Iraq's aggression could possibly have been the fear that its mostly Shiite population would rally to the Iranian revolutionaries causing internal strife and tension. Furthermore, Iraq incorrectly assumed that Iran would be an easy target to deal with due to the 1979 Islamic revolution. Iraq would have had the opportunity to become the most influential Gulf state while possibly annexing Khuzestan; a region with numerous waterways and ports critical to international trade. Saddam

²⁵² *"In principle, Osirak might have supplied weapons-grade material both by diversion of the reactor fuel and by production of plutonium. Yet in practice, neither scenario was likely, given the safeguards on the Iraqi reactor, including regular visits by IAEA officials and a permanent presence of French technicians until 1989."* Lucien S. Vandenbroucke, *"The Israeli strike against Osirak, the dynamics of fear and proliferation in the Middle East"*, AIR UNIVERSITY REVIEW, September-October 1984, available at: <http://www.globalsecurity.org/wmd/library/report/1984/vanden.htm>.

²⁵³ *"Relations deteriorated rapidly until in March 1980, Iran unilaterally downgraded its diplomatic ties to the charge d'affaires level, withdrew its ambassador, and demanded that Iraq do the same. The tension increased in April following the attempted assassination of Iraqi Deputy Prime Minister Tariq Aziz and, three days later, the bombing of a funeral procession being held to bury students who had died in an earlier attack. Iraq blamed Iran, and in September, attacked."* Gregory S. Cruze, *Iran and Iraq Perspectives in Conflict*, USMC Command and Staff College, Spring 1988, available at: <http://www.globalsecurity.org/military/library/report/1988/CGS.htm>.

Hussein made no mystery of his intentions of expanding Iraq's influence militarily by developing both conventional and non-conventional forces, and by using them. Iraq indeed used repeatedly chemical warfare agents against Iran, including asphyxiating, blister and nerve gasses.²⁵⁴

Iran was not the only nation that was worried at the sight of Iraq developing, even remotely, nuclear weapons. The State of Israel, headed at the time by Menachem Begin, saw this also with great concern. Iraq had been sponsoring and hosting Arab terrorism against Jews in Israel and offered cash rewards (disproportionately more than any other Arab state) based on the quality of the terrorist attack (i.e. whether the attack was reported in the news, the magnitude of the attack or how many Jews were killed etc.). Iraq had also fought several wars of aggression against Israel be it in 1948, 1967 or 1973.²⁵⁵ Furthermore Saddam Hussein also fueled animosity towards Israel by his statements (which continue to be popularly echoed as of this day) such as: *"Iraq's main campaign is against the Zionist enemy, and not against Iran."* One cannot but appreciate Saddam Hussein's words with a highly developed sense of

²⁵⁴ *"During the Iran-Iraq War, Iraq developed the ability to produce, store, and use chemical weapons. These chemical weapons included H-series blister and G-series nerve agents. Iraq built these agents into various offensive munitions including rockets, artillery shells, aerial bombs, and warheads on the Al Hussein Scud missile variant. During the Iran-Iraq war, Iraqi fighter-attack aircraft dropped mustard-filled and tabun-filled 250 kilogram bombs and mustard-filled 500 kilogram bombs on Iranian targets. Other reports indicate that Iraq may have also installed spray tanks on an unknown number of helicopters or dropped 55-gallon drums filled with unknown agents (probably mustard) from low altitudes". Lessons Learned: Iran-Iraq War, MARINE CORPS HISTORICAL PUBLICATION, FMFRP 3-203 - December 10, 1990, available at: <http://www.globalsecurity.org/military/world/war/iran-iraq.htm>*

²⁵⁵ U. Shoham, *"The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense"*, 109 MIL. L. REV. 191, 206 (1985).

humor, knowing that this statement was issued one week²⁵⁶ after the beginning of the Iraq-Iran War.²⁵⁷

Bearing this short background in mind, one has to be extremely naïve to believe that had Iraq started to operate the Osirak and Isis reactors, it would not have sought to divert some of the Plutonium. This diversion could have had as a purpose the development of a fission weapon or maybe a “dirty bomb”, the latter having the potential to irradiate, de facto poisoning, anything that came into contact with the radioactive material. Faced with this situation Iran and Israel respectively had to assess whether the risk posed by Iraq potentially developing fission weapons outweighed the cost of taking military action against the Osirak facilities.

Planning for military strikes or the like is hardly an easy task and requires intensive preparation and debate; as it was the case for the Israeli strike on Osirak. Few elements of information as to the state of mind of both the Iranian and Israeli rulers are available with regards to their respective strikes on Osirak. For instance intense debates arose in the Knesset (Israeli parliament) prior to the decision to strike Osirak where Shimon Peres expressed his concerns that Israel

²⁵⁶ The Washington Post, 9/30/1986, referring to one of Saddam Hussein’s 1980 statement published one week after he attacked Iran. Available at: <http://www.globalsecurity.org/military/library/report/1988/CGS.htm>, Statement available in Chapter 4.

²⁵⁷ The Military of Iraq, a Threat to Israel, Israeli Governmental Background Paper, March 1986. Available at: <http://www.globalsecurity.org/military/library/report/1988/CGS.htm>, Statement available in Chapter 4.

would become a “*thistle in the wilderness*”²⁵⁸ after the attack. Others on the other hand were more inclined to launch a preventive attack since the risks of allowing Iraq develop “civilian” nuclear energy or experiments would ultimately lead to the production of bomb-grade plutonium that would possibly lead to the development of a fission bomb or “dirty bomb”.

This risk was deemed unbearable for both the Iranian and Israeli governments of the time. This is why Iran decided to strike Osirak (Operation Scorch Sword) on September 30, 1980, where two Phantom F4 planes bombed Osirak with MK 82 bombs,²⁵⁹ which was followed by Israel’s on June 7, 1981.²⁶⁰

b. Legal analysis

The legal elements we currently possess regarding the Osirak preventive strikes regard the Israeli strike on the nuclear reactors. The Iranian strike, in comparison with the Israeli one was hardly mentioned or condemned by international actors.²⁶¹ On the other hand, the Israeli strike provoked uproar

²⁵⁸ Yitzhak Shamir, “*The Failure of Diplomacy, Israel’s Strike Against the Iraqi Nuclear Reactor*” JUNE 7, 1981, (JERUSALEM, MENACHEM BEGIN HERITAGE CENTER, 2003) at p. 15-16.

²⁵⁹ Tom Cooper & Farzad Bishop, “*Target: Saddam’s Reactor*”, GLOBALSECURITY.ORG, March/April 2004, Issue 110, available at <http://www.globalsecurity.org/military/world/war/iran-iraq.htm>

²⁶⁰ Ibid. 254.

²⁶¹ To be more precise, no Security Council resolution ever condemned Iran’s action against Iraq’s Osirak reactors. One could then argue or even conclude that Iran was justified to attack the Osirak reactors since Iraq had attacked her and that this was a justifiable military target. We can take this argument even further and ask the question relative to Iraq’s original aggression of September 22, 1980 and whether such a war of aggression, where chemical weapons were widely used, had been condemned by the same instances that condemned Israel’s military strike nine months later? While delving into the UN Security Council resolutions of the time, and more specifically Security Council Resolution 479 relative to the

within the international community and more specifically the United Nations Security Council that condemned the act.

Israel had indeed asserted that its strike on Osirak was an act of self-defense that fell within Article 51 of the UN Charter.²⁶² From Israel's perspective, Iraq had initiated the attack not by overtly aggressing it as it was the case for Iran, or by preparing for an imminent attack as it was the case in the 1967 war; but by having built nuclear reactors that were about to be fueled.²⁶³ This was understood as being the point of "no-return" which provoked the strike. The condemnation from the UN Security Council was unanimous showing that such a preventive action was utterly unacceptable and beyond the scope of Article 51 of the Charter relative to the inherent right of self-defense.

As previously mentioned, Article 51 provides that any Member State can defend itself against armed attacks by other states.²⁶⁴ This right to self-defense was recognized to further include acts of self-defense undertaken by the defending party against the aggressor while the aggression was imminent. This

Iraq-Iran war in its early stages, one cannot but notice the absence of any condemnation on the Security Council's part of Iraq's aggression. The Security Council did call for the parties to refrain from further use of force and to settle their dispute peacefully.

²⁶² U.N. SCOR, 36th Sess., 2288th meeting. Pp 190, U.N. Doc S/PV.2288 (June 19, 1981).

²⁶³ RAFAEL EITAN, THE RAID ON THE REACTOR FROM THE POINT OF VIEW OF THE CHIEF OF STAFF, ISRAEL'S STRIKE AGAINST THE IRAQI NUCLEAR REACTOR 7 JUNE, 1981, (Jerusalem: Menachem Begin Heritage Center, 2003) at pp. 31-32. The author relates that a shipment of 90 kilograms of enriched uranium fuel rods was expected to be shipped imminently from France to Iraq.

²⁶⁴ See W.E. BECKETT, THE NORTH ATLANTIC TREATY, THE BRUSSELS TREATY AND THE CHARTER OF THE UNITED NATIONS at p. 13 (1950). See also L. OPPENHEIM, INTERNATIONAL LAW, II at p. 156 (H. Lauterpacht ed. 7th ed., 1952); K. SKUBISZWEWSKI, USE OF FORCE BY STATES. COLLECTIVE SECURITY. LAW OF WAR AND NEUTRALITY. MANUAL OF PUBLIC INTERNATIONAL LAW at pp. 739, 767 (M. Sorensen ed. 1968).

rule relative to preemption was both defined and tacitly affirmed respectively in the *Caroline Affair* and the 1967 use of preemption in the 1967 Six Day War. In these two cases, the notion of imminence of appears to have played a critical role when it came to determine the legality over the military action. Imminence coupled with necessity are the two main factors that need to be assessed while determining whether a given use of force meets the anticipatory self-defense test.

The 1980 Iranian strike which was undertaken eight days after Iraq had launched a war of aggression against it might not offer a prime example of preventive use of force. The fact that Iraq and Iran were at war renders such an attack hardly preemptive, but merely a strike on one of the enemy's assets. Other concerns could have arisen were the nuclear reactors operational. Had the latter been the case, other concerns would have had to be taken into consideration relative to military necessity and striking a target which could possibly release toxic radiation. One could possibly argue that Iran's strike was preventive, pleading that Iran struck Iraq's reactors in order to prevent the latter from possibly developing plutonium a few years down the road, were the plutonium to be military grade or not.

On the other hand, the June 1981 Israeli raid is a more striking example of preventive force. The air strike performed by the IAF was not carried out in response to Iraq's aggression, nor was it undertaken in anticipation of an imminent attack from Iraq's part. The estimates given to the Israeli leadership at

the time relative to the amount of time required for Iraq to start producing nuclear weapons ranged from one or two years to a maximum of ten years.²⁶⁵

The threat was thus not imminent²⁶⁶ since the possible threat to Israel's security was to occur within a time frame of two to ten years. The 1981 strike hence fails to meet the imminence²⁶⁷ criteria given in the Caroline Affair by being too remote.²⁶⁸ The 1967 case, in comparison, was a clear cut case where the Arab coalition troops were close to the border and had premeditated an attack against Israel. But for Israel's intelligence services that lead to a last-minute strike, they would have had higher chances of success.

The second Caroline prong, relative to the fact that the imminence of the threat would not leave any "*choice of means and no moment for deliberation*"²⁶⁹ can hardly be said to have been fulfilled either. The threat created by Iraq's reactors was hardly imminent, as mentioned above, possibly coming into existence a few years down the road since processing military grade plutonium

²⁶⁵ Joseph Cirincione, "*No Military Options*", CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, January 19, 2006, available at : <http://www.carnegieendowment.org/npp/publications/index.cfm?fa=view&id=17922>.

²⁶⁶ THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS*, at p. 106 (2002). Franck notes that Israel's case before the Security Council failed due to the fact that there was no imminent threat from Iraq against it: "[Israel was] *not able to demonstrate convincingly that there was a strong likelihood of an imminent nuclear attack by Iraq*." See also Allen S. Weiner, "*The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*" 59 STAN. L. REV. 415, 440 (2006).

²⁶⁷ A. D'Amato, "*Israel's Air Strike upon the Iraqi Nuclear Reactor*", 77 A.J.I.L. 584, 588 (1983).

²⁶⁸ Iraq could have indeed decided in July 1981 that it did not want plutonium after all, it could have also shut down its nuclear program in 1985, 1986... It could also have detonated a nuclear device on Tel Aviv in 1991 or on Tehran. One could indeed speculate endlessly on what Iraq could have done or not with its nuclear program.

²⁶⁹ 29 B.F.S.P., p. 1129 at p. 1138.

does not happen overnight and its weaponization (i.e. creating a weapon out of the plutonium) is a complex matter that requires the assistance of skilled scientists.²⁷⁰ From what was just said it can be concluded that the threat created by the construction of the Iraqi reactors was not imminent. Iraq was not going to create a weapon overnight, in a fortnight or even within six months at that time. Israel, as well as other parties who were concerned with Iraq possibly developing nuclear weapons, could possibly have had other options available to them in order to impede Iraq's development of nuclear weapons. Failing to adhere to both the Caroline criteria and to the 1967 precedent set by the Six Day War, Israel's use of force was illegal from the stand-point of self-defense. The UN Security Council further condemned Israel's use of force in Security Council Resolution 487 condemned Israel's preventive use of force.²⁷¹ Yoram Dinstein holds that preventive force was not a valid legal justification for striking the Osirak nuclear reactor, asserting the fact that Iraq and Israel had de fact been in a state of war since 1948 was the "*only plausible legal justification*".²⁷²

²⁷⁰ Obtaining weapon grade plutonium or uranium or even both is simply one of a number of steps necessary for the creation of a weapon. The radioactive material has to be "weaponized", or in other words, integrated into an explosive device that will trigger a chain reaction. Once the initial weaponization of the bomb has been achieved, a delivery system for the weapon has to be developed. Two main delivery systems are currently being used by nuclear-weapon states which are aerial drops on one hand and missiles on the other (were they to be submarine-launched or launched from silos or mobile launching stations).

²⁷¹ United Nations Security Council Resolution 487: "*The Security Council [...] strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international law.*"

²⁷² "*The only plausible legal justification for the bombing of the reactor is that the act represented another round of hostilities in an on-going armed conflict. In 1991 – in the course of the Gulf War – Iraq launched dozens of Scud missiles against Israeli objectives (mostly, centers of population), despite the fact that Israel was not a member of the American-led Coalition which had engaged in combat to restore the sovereignty of Kuwait [...] the Iraqi missile offensive against Israel must be observed in the legal context not of the Gulf War but*

c. Osirak's aftermath

The direct consequences of the military strike against Osirak were its destruction and the unequivocal condemnation of Israel's behavior. Contracts between the US and Israel relative to the sale of military aircraft were also temporarily suspended.

Although the Israeli strike was condemned at the time of the attack,²⁷³ it did prove to have been of strategic importance in the 1991 Gulf War.²⁷⁴ Had Saddam Hussein possessed nuclear weapons at the time, the Scuds that fell on Saudi Arabia and Israel during that conflict might very well have been loaded with

of the war between Iraq and Israel which started in 1948. That war was still in progress in 1991, unhindered by its inordinate prolongation since 1948, for hostilities flared up intermittently." YORAM DINSTEIN, "WAR, AGGRESSION AND SELF-DEFENSE" at pp. 48, 186 (Cambridge University Press, 2005) (1988). See also L.R. Beres, "After the Gulf War: Israel, Pre-Emption, and Anticipatory Self-Defense", 13 H.J.I.L. 259 (1990). P. Bretton, "Remarques sur le Jus in Bello dans la Guerre du Golfe", 37 A.F.D.I. 139, 149 (1991).

²⁷³ The United States agreed to condemn Israel at the United Nations Security Council Resolution 487 "based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute." Statement by the Representative at the United Nations (Kirkpatrick) before the U.N. Security Council (June 19, 1981) in American Foreign Policy Current Documents 1981, 689, 690.

²⁷⁴ John Yoo, "Using Force", 71 U. CHI. L. REV. 729, 765 (2004): "Applying our reconceived imminence test to the Israeli air strike highlights the relevance of important factors that may be uncertain at the time of an attack. In hindsight, we may believe that the Israeli air strikes made sense in light of Saddam Hussein's subsequent use of chemical weapons against Iran and his own civilian population, his invasion of Kuwait, his launching of missiles against Israel during the Gulf War, and the evidence discovered during the 1991-1998 UN inspections regime indicating that Iraq had come close to secretly constructing a nuclear weapon. If the Israelis had not destroyed the Osirak reactor, Iraq might have developed a nuclear weapon before its 1990 invasion of Kuwait, making the 1991 effort to expel it from Kuwait almost impossible. In 1981, however, Iraq appeared to be in compliance with international treaties governing civilian nuclear technology and had not made any efforts, yet, to invade its neighbors. Despite its hostility toward Israel, there was no indication at the time that Iraq planned to attack Israel in the near future. The probability that an attack would occur, given that development of a nuclear weapon would still have required several years, depended critically upon the hostile intentions of Saddam Hussein."

nuclear warheads.²⁷⁵ Any assistance to Kuwait would have been impossible, Iraq having created a nuclear shield that would effectively enable it to commit ongoing acts of blackmail and extortion. Actions against Iraq would then have had to be taken bearing in mind that Iraq might very well send missiles (as it did) with nuclear payloads against one's allies.²⁷⁶ Iraq under Saddam Hussein furthermore had a ghastly track record of viciousness including but not limited to the gassing of thousands of Iranians and of its own citizens. Saddam Hussein, who made it a point to visit Stalin's dachas while visiting the Soviet Union,²⁷⁷ had no scruples when it came to executing his friends and relatives and saw himself as a "*man who would make history*". Bearing this in mind one can further appreciate the risk Israel had to consider before striking Osirak, gambling between having a nuclear-

²⁷⁵ "Israel's citizens, together with Jews and Arabs, American, and other coalition soldiers who fought in the Gulf War may owe their lives to Israel's courage, skill, and foresight in June 1981. Had it not been for the brilliant raid at Osirak, Saddam's forces might have been equipped with atomic warheads in 1991. Ironically, the Saudis, too, are in Jerusalem's debt. Had it not been for Prime Minister Begin's resolve to protect the Israeli people in 1981, Iraq's SCUDs falling on Saudi Arabia might have spawned immense casualties and lethal irradiation." Louis Rene Beres, Tsiddon-Chatto, Col. (res.) Yoash: "Reconsidering Israel's Destruction of Iraq's Osirak Nuclear Reactor," TEMPLE INTERNATIONAL AND COMPARITIVE LAW JOURNAL 9 (2), 1995. Reprinted in "Israel's Strike Against the Iraqi Nuclear Reactor 7 June, 1981", Jerusalem: Menachem Begin Heritage Center: 2003, p. 60.

²⁷⁶ T.L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR, at pp. 295-302 (1996).

²⁷⁷ Saddam Hussein was known to admire Joseph Stalin and aspired to rule Iraq just as Stalin had ruled over the Soviet Union. Saddam Hussein made pilgrimages to Stalin's dachas in Abkhazia and had his own personal collection of works on Stalin. It was hardly a secret to anyone that he admired Stalin and employed similar tactics in order to remain in power. Simon Sebag Montefiore for instance wrote Stalin's biography where he describes the similarities between the two tyrants. The following article retrieved on the Sunday Times website highlights them: <http://www.timesonline.co.uk/tol/news/article453130.ece>

armed Iraq ruled by Saddam Hussein on the one hand and possibly having to bear any or all the consequences of the military strike.²⁷⁸

Last but not least, it should be added that the US administration publicly thanked²⁷⁹ Israel for the 1981 strike in June 1991 when it gave the IAF chief of the time, David Ivry, a satellite photograph of the destroyed reactors reading: *“For General David Ivry, with thanks and appreciation²⁸⁰ for the outstanding job he did on the Iraqi Nuclear Program in 1981, which made our job much easier in Desert Storm.”*²⁸¹

²⁷⁸ STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW*, (Kluwer Law International, The Hague) (1996) at p. 161: *“All members of the Security Council disagreed with the Israeli interpretation of Article 51 and supported without reservation the resolution which condemned “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of International conduct.” Thus, the Security Council issued a clear and unanimous condemnation of Israel’s military attack, accompanied most unusually by a statement of Iraq’s right to “appropriate reparations”.*

²⁷⁹ It is to be noted that the 1981 strike is still the object of discussion, some arguing that the strike forced Iraq’s nuclear program underground where it was amply funded and developed before its destruction following the 1991 Gulf War defeat.

²⁸⁰ MARK AMSTUTZ, *INTERNATIONAL ETHICS: CONCEPTS, THEORIES, AND CASES IN GLOBAL POLITICS* (Rowman & Littlefield Publishers, Inc. 3rd Ed. 2008) (1992) p. 122-123: *“Preventive war, by contrast, occurs at an earlier stage in the evolution of conflict, chiefly in response to a growing imbalance of military power or the development of military capabilities that might pose future security threats. Unlike preemption, however, preventive attack responds not to an imminent threat but to an adversary’s increasing military capabilities. The goal of preventive attack is to destroy the enemy’s ability to carry out aggression before it can mobilize that capability. This type of action was illustrated in June 1981, when Israel bombed and destroyed an Iraqi nuclear reactor that was about to become operational. It did so because it feared that if the reactor were used to generate nuclear fuel for a weapon of mass destruction; such a development would pose a grave security threat to Israel. Accordingly, Israel destroyed the Osirak nuclear reactor to prevent Iraq from acquiring a nuclear bomb. To the extent that preventive military action is consistent with the right of self-defense, this use of force was regarded as morally legitimate but contrary to international law because the attack involved a violation of Iraqi state sovereignty.”*

²⁸¹ Major General David Ivry, *“The Attack on the Osirak Nuclear Reactor – Looking Back 21 Years Later,” Israel’s Strike Against the Iraqi Nuclear Reactor 7 June, 1981*, Jerusalem: Menachem Begin Heritage Center: 2003, 35. Available at: http://www.jewishvirtuallibrary.org/jsource/History/osirak1.html#_ftn20 retrieved on December 24, 2010.

4. The 2003 War in Iraq

The 2003 Iraq campaign remains to this day highly controversial. This is partly due to the arguments held in favor for operation Iraqi Freedom that appeared to be numerous and for some vague.²⁸² Strong legal and non-legal arguments existed and were made in favor of, or against the war. Nonetheless the apparent absence of “weapons of mass destruction” heavily contributed to stir criticism by several countries against the choice to go to war.

a. **Facts**

It is unnecessary to review once more Saddam Hussein’s sordid personality and regime as these are well established facts and have been clearly stated and evidenced in the lines above. Following Iraq’s aggression on Kuwait in 1990 the UN Security Council adopted various resolutions²⁸³, the last being Resolution 678 in order to compel Iraqi withdrawal. Resolution 678 was adopted under Chapter VII of the UN Charter thus authorizing the use of force as a means of implementing Resolution 660.²⁸⁴ Saddam Hussein’s Iraq once again thumbed

²⁸² The Bush administration had laid out a number of reasons why removing Saddam Hussein’s tyrannical regime would be not only a good idea, but something necessary.

²⁸³ Jutta Brunnee, “*The Use of Force Against Iraq: A Legal Assessment*”, 59 BEHIND THE HEADLINES, No. 4 (2002).

²⁸⁴ “*Acting under Chapter VII of the Charter, 1. Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so; 2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and*

its nose at international law and refused to peacefully withdraw its troops from Kuwait. The coalition aerial attack started on January 17th 1991, followed by the ground forces attack on the 23rd. The war between the Coalition and Iraq was brief, lasting less than a week. On April 3, 1991, the United Nations Security Council adopted, under Chapter VII, Resolution 687 which provided, among other things, that Iraq destroy its chemical and biological weapons arsenal²⁸⁵, its nuclear weapons program (including the weaponization of nuclear devices) and that it be subjected to a verification regime.²⁸⁶ The years following the passing of Resolution 687 were the theater of ongoing issues as to its enforcement. Iraq

al subsequent relevant resolutions and to restore International peace and security in the area". S.C. Res. 678, U.N. Doc. S/RES/678 (November 29, 1990).

²⁸⁵S.D. Murphy, "Missile Attacks Against Iraq", 93 A.J.I.L. 471, 472 (1999).

²⁸⁶ "7. Invites Iraq to reaffirm unconditionally its obligations under the Protocol for the prohibition of the Use in War of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, signed at Geneva on 17 June 1925, and to ratify the convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, of 10 April 1972; 8. Decides that Iraq shall unconditionally accept the destruction, removal or rendering harmless, under international supervision, of: (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto; (b) all ballistic missiles with a range greater than one hundred and fifty kilometers, and related major parts and repair and production facilities; 9. Decides also, for the implementation of paragraph 8, the following: (a) Iraq shall submit to the Secretary-General, within fifteen days of the adoption of the present resolution, a declaration on the locations, amounts and types of all items specified in paragraph 8 and agree to urgent, on-site inspection as specified below [...] 12. Decides that Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapon-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above; to submit to the Secretary-General and the Director General of the International Atomic Energy Agency within fifteen days of the adoption of the present resolution a declaration of the locations, amounts and types of all items specified above; to place all of its nuclear-weapon-usable materials under the exclusive control, for custody and removal, of the Agency, with the assistance and cooperation of the Special Commission as provided for in the plan of the Secretary General discussed in paragraph 9 (b); to accept, in accordance with the arrangements provided for in paragraph 13, urgent on-site inspection and the destruction, removal or rendering harmless as appropriate of all items specified above; and to accept the plan discussed in paragraph 13 for the future ongoing monitoring and verification of its compliance with these undertakings." S.C. Res. 687, U.N. Doc. S/RES/687 (April 3, 1991). Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/23/IMG/NR059623.pdf?OpenElement>.

refused access to inspectors to some and then all verification sites thus leading some states (mainly the US and UK) to bomb Iraq²⁸⁷ so as to enforce Resolution 687.²⁸⁸ Between the end of 1998 and 2002, Iraq's cooperation with UN inspectors was execrable if not null. This attitude seemingly changed in late 2002²⁸⁹, possibly due to American and British saber-rattling signals of 2002 that Saddam Hussein's Iraq started cooperating again with the UN. Unfortunately for the former, by the time Iraq started to resume cooperation with the UN inspectors a decision regarding Saddam Hussein's fate had already reached (maybe as far back as 1998)²⁹⁰, calling for his regime's removal and the support of a democratic regime in its stead.

²⁸⁷ Ruth Wedgwood, *"The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction"*, 92 A.J.I.L. 724, 726 (1998).

²⁸⁸ A good illustration of these enforcement actions could be Operation Desert Fox where the United States and the United Kingdom attempted to degrade Iraq's potential for manufacturing weapons of mass destruction. Secretary Albright stated with regards to this military intervention that: *"The purpose of the use of force here is to degrade Saddam Hussein's weapons of mass destruction, and his ability to continue to threaten his neighbors. So the targets are related to that. They are those to do with weapons of mass destruction facilities with a security command and control."* Secretary Madeleine Albright, PBS.ORG, December 17, 1998, available at: http://www.pbs.org/newshour/bb/middle_east/july-dec98/albright_12-17.html.

²⁸⁹ Stephanie Bellier, "UNILATERAL AND MULTILATERAL PREVENTIVE SELF-DEFENSE" 58 Me. L. Rev. 507, 510 (2006): *"President Bush exhorted world leaders to act in order to compel Iraq to live up to its responsibilities. He called on Saddam Hussein to "immediately and unconditionally foreswear, disclose and remove or destroy all weapons of mass destruction." On September 16, 2002, a few days after this directive, in a letter to the United Nations Secretary General, Iraq announced that it accepted unconditionally the return of United Nations arms inspectors. But on September 24, 2002, British Prime Minister Tony Blair made public a British secret service report according to which the Iraqi regime "continues to develop weapons of mass destruction" and would soon be able to build a short-range nuclear weapon."*

²⁹⁰ The "Iraq Liberation Act of 1998" was signed into law by President Clinton on October 31, 1998. This act begins by establishing Saddam Hussein's Iraq's rap sheet by stating prior instances of criminal behavior from 1980 onwards. It is further noted in the act that the United States would support its Iraqi democratic allies and that Iraq should aspire to become a democracy once Saddam Hussein is gone. H.R.4655. (105th), IRAQ LIBERATION ACT (1998).

b. Legal analysis

The critical UN resolution which preceded the Iraq War of 2003 was UN Security Council Resolution 1441 which was adopted on November 8, 2002. This resolution was deemed to be the “last chance resolution”, meaning that a point of no return would have been reached were Iraq to commit further material breaches. Resolution 1441 furthermore was a hotly debated text at the time it was drafted. Resolution 1441 at first recalls all the prior UN Security Council resolutions that were adopted in an effort to disarm Iraq and to make it a law-abiding international partner.²⁹¹ The resolution then continues and makes an inventory of all the instances where Iraq had breached prior Security Council resolutions motivating the cause of the breach (e.g. expulsion of weapons inspectors, ballistic missiles with a range longer than 150 kilometers *et caetera*).²⁹² The resolution then sets forth the obligations Iraq will have to meet in order to be in compliance with prior resolutions. Most importantly, it further lists a set of actions that would be considered as an additional material breach on Iraq’s

²⁹¹ “*The Security Council, Recalling all its previous relevant resolutions, in particular its resolutions 661 (1990) of 6 August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991, 687 (1991) of 3 April 1991, 688 (1991) of 5 April 1991, 707 (1991) of 15 August 1991, 715 (1991) of 11 October 1991, 986 (1995) of 14 April 1995, and 1284 (1999) of 17 December 1999, and all the relevant statements of its President...*”. UN Security Council Resolution 1441, Introductory paragraph.

²⁹² *Ibid.* at 1-2.

part and that any shortcoming would be immediately reported to the Security Council in order to *consider* the situation.²⁹³

The word “*consider*” happened to be at the center of a controversy as to what the use of this term meant. Would “consider” mean that the Security Council would have to assess whether a shortcoming on Iraq’s part would qualify as a material breach, or whether the Security Council’s consideration should be deemed simply as purely formal process since the determination of whether a material breach occurred is a matter of fact that can be determined by each state in its own capacity. This question basically summarizes one of the major issues that were raised in the UN Security Council prior to the military intervention in Iraq.

The position of the United States on this issue was that the word “consider” referred itself to a further discussion which would not have any bearing as to whether a material breach occurred. Such interpretation would also bar the necessity for any further Council resolution to be adopted in order to authorize force since it would imply that only a discussion is mandated, and nothing else. This position was challenged by France, China and Russia who argued that the use of the word “consider” meant that a further Security Council resolution would be required in order to authorize force against Iraq and that there was “no

²⁹³ “12. Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.” Ibid. at p. 5.

automaticity in the use of force".²⁹⁴ This view was shared by some legal scholars.²⁹⁵ The US Ambassador to the United Nations, John Negroponte similarly held that Resolution 1441 did not contain any "*hidden triggers*" or "*automaticity*" in its language; however he also added that the United States would act if the Security Council failed to take decisive measures if further violations by Iraq were reported.²⁹⁶

First of all, it would seem unwise on the part of the French and Russian delegations to have agreed to integrating the word "consider" in Security Council

²⁹⁴ France, China and Russia declared that Resolution 1441 excluded any automaticity in the use of force if Iraq failed to live up to its terms and of that of prior resolutions. "Iraq, Joint Statement from the Popular Republic of China, the Federation of Russian and France" (11/8/2002) available at: http://www.un.int/france/documents_anglais/021108_cs_france_irak_2.htm "*Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. In this regard, we register with satisfaction the declarations of the representatives of the United States and the United Kingdom confirming this understanding in their explanations of vote and assuring that the goal of the resolution is the full implementation of the existing Security Council resolutions on Iraq's weapons of mass destruction disarmament. All Security Council members share this goal. In case of failure by Iraq to comply with its obligations, the provisions of Paragraphs 4, 11 and 12 will apply. Such failure will be reported to the Security Council by the Executive Chairman of UNMOVIC or by the Director general of the IAEA. It will be then for the Council to take a position on the basis of that report. Therefore this resolution fully respects the competences of the Security Council in the maintenance of international peace and security, in conformity with the charter of the United Nations.*"

²⁹⁵ R. Wolfrum, "*The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is there a Need to Reconsider International law on the Recourse to Force and the Rules in Armed Conflict*", 7 M.P.Y.U.N.L. 1, 15-18 (2003). See also R. Hofman, "*International Law and the Use of Military Force against Iraq*", 45 G.Y.I.L. 9, 25-28 (2002).

²⁹⁶ U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/PV.4644 (Nov. 8, 2002), Statement of Ambassador Negroponte to the UN Security Council, November 8, 2002, available at: <https://www.un.org/webcast/usa110802.htm>: "*As we have said on numerous occasions to Council members, this Resolution contains no "hidden triggers" and no "automaticity" with respect to the use of force. If there is a further Iraqi breach, reported to the Council by UNMOVIC, the IAEA, or a member state, the matter will return to the Council for discussions as required in paragraph 12. The Resolution makes clear that any Iraqi failure to comply is unacceptable and that Iraq must be disarmed. And one way or another, Mr. President, Iraq will be disarmed. If the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN resolutions and protect world peace and security.*"

Resolution 1441 without actually specifying what their interpretation of this word implied.²⁹⁷ That being said, the British Attorney General's memorandum dated March 7, 2003 gives us a different insight as to the inner dealings regarding the drafting of Resolution 1441 and more specifically as to the interpretation of the word "consider". In his memorandum, Attorney General Goldsmith reports that France and Russia knew exactly what they approved when they voted in favor of Resolution 1441:

"[...] in either event, the Council must meet (OP12) "to consider the situation and the need for full compliance with all the relevant Council resolutions in order to secure international peace and security", but the resolution singularly does not say that the Council must decide what action to take [emphasis added]. The Council knew full well, it is argued, the difference between "consider" and "decide" and so the omission is highly significant. Indeed, the omission is especially important as the French and Russians made proposals to include an express requirement for a further decision, but these were rejected precisely to avoid being tied to the need to obtain a second resolution. On this view, therefore, while the Council has the opportunity to take a further decision, the

²⁹⁷ Security Council Resolutions are replete with examples where semantics played an indispensable part in the drafting of resolutions. One could cite for instance Resolution 242 which demanded that parties "*withdraw from territories*", instead of "*withdraw from **the** territories*" (emphasis added). This choice of words was previously explained in the part referring to the 1967 Six Day War. S.C. Res. 242, U.N. Doc. S/RES/242 (November 22, 1967).

*determinations of material breach in Ops 1 and 4 remain valid even if the Council does not act.*²⁹⁸

Attorney General Goldsmith's memorandum to the Prime Minister is probably the best legal material available to us with regards to the legality of the use of force under Resolution 1441 as it was directly relied on by the United Kingdom to justify the 2003 Iraq campaign. When he presented his memorandum, Goldsmith agreed that the use of force against Iraq would be legal based solely on Resolution 1441 since it would revive the authorization to use force contained within Resolution 678 if there are strong facts on the ground showing that Iraq has failed to "take the final opportunity". Nonetheless he still recommended that a further Security Council Resolution be adopted in order to re-authorize force. Goldsmith stressed the point that the "revival" argument was hardly a novel idea and that it had already been used in the 1990s.²⁹⁹ Consequently, any further material breach on Iraq's part would revive the authorization to use force under Resolution 678.

The question then becomes: "who makes the assessment of whether a material breach has occurred?" To this question the Attorney General replies that it has to be made by the Security Council because "*only the Council can decide if*

²⁹⁸ Attorney General Goldsmith of the United Kingdom, Memorandum to the Prime Minister regarding Resolution 1441 on Iraq, March 7, 2003.

²⁹⁹ Ibid. at 3. "*In reliance on this argument [the revival theory], force has been used on certain occasions. I am advised by the Foreign Office Legal Advisers that this was the basis for the use of force between 13 and 18 January 1993 following UN Presidential Statements on 8 and 11 January 1993 condemning particular failures by Iraq to observe the terms of the cease-fire resolution. The revival argument was also the basis for the use of force in December 1998 by the US and UK (Operation Desert Fox). This followed a series of Security Council resolutions, notably resolution 1205 (1998).*

a violation is sufficiently serious to revive the authorization to use force". This position was not shared by the United States since the latter believed that a violation of the rules set forth in Resolution 1441 would automatically result in a material breach leading the way to a possible use of force since further consideration by the Council would simply be a review according to this position. Furthermore, the British Attorney General notes that the standard used in order to determine the legality of a military action was that of a "reasonably arguable case".³⁰⁰

After having mentioned the legal grounds on which force could be used under Resolution 1441, the Attorney General does mention in his memo that "regime change" is not a legal ground on which Saddam Hussein could be removed, pointing out that this should be kept in mind while considering a list of military targets. Such a statement could possibly have been made due to the fact that it has been a policy of some western nations (the US for instance) not to personally target enemy leaders during hostilities.³⁰¹

On the other hand, the United States had adopted in 1998 the "Iraq Liberation Act". This act details that the US policy towards Iraq should focus on

³⁰⁰ Ibid. at p. 11. *"In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable."*

³⁰¹ Ibid. at p. 13. *"That is not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action. This should be borne in mind in considering the list of military targets and in making public statements about any campaign."*

regime change.³⁰² This would include not only removing Saddam Hussein from power, but also supporting a democratic type of regime.³⁰³ While there is nothing intrinsically wrong with regards to supporting the establishment of a different regime, regime change as a legal basis for military intervention is generally illegal.³⁰⁴

The US position with regards to the interpretation of Resolution 1441 was made partially clear in the British Attorney General's memorandum. John Bolton, who was the US Undersecretary for Arms Control and International Security in 2003, affirms that Security Council Resolution 678 provided the authorization to use force and that Resolution 687 imposed a set of conditions that had to be met in order to suspend the said use of force, creating at the same time a cease-fire.³⁰⁵ The resumption of hostilities would be nothing else than the consequence

³⁰² *"It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime"*. Iraq Liberation Act of 1998, page 3. H.R.4655. (105th), IRAQ LIBERATION ACT (1998).

³⁰³ President George Walker Bush in his September 12, 2002 address to the UN General Assembly confirmed the US policy to support a democratic regime in Iraq, as in other places of the world: *"If we meet our responsibilities, if we overcome this danger, we can arrive at a very different future. The people of Iraq can shake off their captivity. They can one day join a democratic Afghanistan and a democratic Palestine, inspiring reforms throughout the Muslim world. These nations can show by their example that honest government, respect for women, and the great Islamic tradition of learning can triumph in the Middle East and beyond. We will show that the promise of the United Nations can be fulfilled in our time"*.

³⁰⁴ This argument purporting to the illegality of the use of force based on "regime change" can be misleading and possibly hypocritical since other legal grounds can be used in order to support a military intervention such as a "humanitarian intervention", causing by the end of the day the desired regime change in a legal way (c.f. Kosovo in 1999 or Libya in 2011).

³⁰⁵ *"Let me say immediately, for those who wonder, that we had ample Security Council authority under Resolution 678, which authorized the use of all necessary means to uphold the relevant Security Council resolutions and to restore international peace and security in the region. Resolution 687 provided for a formal cease-fire but imposed conditions on Iraq, material breaches of which left member states with the responsibility to enforce those conditions operating consistently with the underlying authorization contained in 678"*. John R.

of Iraq's repeated violation of the cease-fire conditions outlined in Resolution 687.³⁰⁶ Furthermore, he also argues that notwithstanding Resolutions 678 and 687,³⁰⁷ Security Council Resolution 1441 authorizes the use of force against Iraq if the latter continued to be in material breach of its disarmament obligations, giving Iraq a last chance to comply with its international obligations.³⁰⁸

Yoram Dinstein, a leading authority in international law, however disagrees with the argument set forth by the British Attorney General with regards to the argument according to which Security Council Resolution 678 authorized force against Iraq during the 2003 campaign. His argument is that Resolution 678 pertained solely to the 1991 campaign against Iraq.³⁰⁹

Bolton, Undersecretary for Arms Control and International Security, Remarks to the Federalist Society, Washington D.C., November 13, 2003.

³⁰⁶ A.E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 I.Y.H.R. 165, at p. 188 (2002).

³⁰⁷ One could ask the question of why the United States agreed to go forward with Security Council Resolution 1441 if it found ample justification to go to war based on Resolutions 678 and 687. Michael T. Wawrzucki, *The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony*, 14 TUL. J. INT' L & COMP. L. 579, 607 (2006): "Logically, the United States would not have sought a new Security Council resolution had it been confident that the use of force was justified under past resolutions. 192 It is unsurprising, then, that a thorough examination of the facts shows that the case for war was not what the United States represented it to be, and thus the use of force against Iraq should not be considered as validly employed pursuant to Security Council resolutions." Thomas Stilson, *Former UN Ambassador John Bolton Talks US Sovereignty at Law School*, THE STANFORD REVIEW, May 1, 2009, available at: <http://stanfordreview.org/article/former-un-ambassador-john-bolton-talks-us-sovereign/> An answer to this question could be provided by Former Ambassador John Bolton: "Throughout his speech, Bolton was quick to defend the Bush Administration's policies, most notably the decision to use force in Iraq. When asked why Bush sought UN support for Iraq with UN Resolution 1441, Bolton explained that it was at the request of Tony Blair and out of respect for our allies."

³⁰⁸ Ibid. 305 "Resolution 1441 contains the Council's specific decision that Iraq was and remained in material breach, and provided a final opportunity, which Iraq clearly failed to avail itself of".

³⁰⁹ "It is wrong to argue (as was done by the UK) that the legality of the Coalition's right to use force against Iraq in 2003 hinged on a revival of Security Council Resolution 678. Resolution

Nonetheless, Dinstein still holds that the 2003 campaign against Iraq was legal and that its legality was based on Security Council Resolution 1441 since Iraq had failed to comply with its obligations³¹⁰ as detailed in the said Resolution which was considered as an additional material breach.³¹¹ He further implies that the British Attorney General was wrong in his conclusion that legally it might be preferable to secure a further resolution explicitly authorizing force. Dinstein states that such an additional resolution might at best have been politically sound, but by the end of the day and with a legal perspective such a “confirmatory” Resolution would not have been necessary at all since resolution 1441 authorized force against Iraq if the latter failed to abide to its substance.³¹²

678 gave the blessing of the Security Council to the military action taken in 1991, and evidently it had nothing to do with operations conducted a dozen years later under totally different circumstances. However, there was no need for a revival of Resolution 678 in 2003, as there was no strict need for its original adoption in 1990. Both in 1991 and 2003, the Coalition acted on the basis of the right of self-defense with which it was directly vested by Article 51 of the Charter and by customary International law. The exercise of that right could not be terminated by a cease-fire YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE*, (Cambridge: Cambridge University Press, 4th Edition, 2005) (1988). at pp. 298-300.

³¹⁰ Ibid. p. 298: “*Of the manifold obligations imposed on Iraq in the cease-fire of 1991, the one that it found most onerous was the requirement to disarm itself of weapons of mass destruction (WMD). Huge quantities of chemical weapons agents, and a variety of biological weapons production equipment and materials , were subsequently destroyed under the supervision of UN inspectors. Bur reports about continuous violations by Iraq of its disarmament obligation persisted. The fact that no WMD were found in Iraq in 2003 is irrelevant: on the eve of the resumption of hostilities, everybody – including the UN inspectors – believed that Iraq had not fully observed its disarmament undertakings. Iraqi refusal to cooperate unreservedly with UN inspectors led to a series of Security Council resolutions; these climaxed with Resolution 1441 (2002), determining (under Chapter VII) that Iraq was in ‘material breach’ of its disarmament obligations*”.

³¹¹ C. Greenwood, “*International Law and the Pre-Emptive Use of Force: Afghanistan Al Qaeda and Iraq*”, 4 S.D.I.L.J.F. 7, 31-32 (2003).

³¹² Ibid. “*Many commentators maintain that – subsequent Resolution 1441 – the Coalition could not take military action against Iraq in 2003 without obtaining a specific go-ahead signal from the Security Council to resort to resort to force. The fact that the Coalition failed to persuade the Security Council to adopt a further resolution expressly authorizing – in the vein of Resolution 678 – ‘all necessary means’ (i.e. the use of force) against Iraq was regrettable from a political standpoint. But, legally speaking, such an additional resolution was not*

On the other hand, lawyers such as Thomas Franck have argued that the military intervention in Iraq violated the UN Charter. Franck's first argument pertains to self-defense, whereas the second relates to the use of Resolutions 678, 687 and 1441.³¹³ On the first point, Franck notes that the facts of the situation in Iraq of 2003 hardly appealed to the notion of imminence³¹⁴ which was a prerequisite to taking anticipatory self-defense measures (possibly making a reference to the Caroline case and the Six Days War). Furthermore, while this argument was not made explicitly at the UN, Franck's second argument proves to be more to the point of the actual legal debates that arose prior to the 2003 campaign against Iraq. Franck, first of all, states that the 2003 action against Iraq cannot be based on the combined effect of Resolutions 678 and 687 since these resolutions were passed within the narrow context of Iraq's 1990 aggression against Kuwait.³¹⁵ This argument is shared by Dinstein as we have seen above.

required. Even those contending that Resolution 1441 'does not contain any "automaticity" as concerns the potential use of force have to concede that the text lends itself to a different interpretation. It assuredly does not prescribe – or even necessarily imply – that, prior to recourse to force, the Coalition must return to the Security Council for a second (confirmatory) resolution".

³¹³ Thomas Franck, *What Happens Now: The Future of the United Nations after Iraq*, 97 AM. J. INT'L L. 610 (2003) at p. 611.

³¹⁴ Ibid. "The problem with that rationale is that, even if it were agreed that the right of self-defense "against an armed attack" (chapter, Art. 51) had come, through practice, to include a right of action against an imminent (as opposed to an actual) armed attack, the facts of the situation that existed in March 2003 are hard to fit within any plausible theory of imminence. This was a time, after all, when UN and International Atomic Energy Agency inspectors were actively engaged in situ in an apparently unrestricted search for weapons of mass destruction (WMDs) undertaken with full authorization by the Security Council. Whatever the inspectors did or did not learn about Iraqi WMDs, nothing in their reports lends any credibility to the claim of an imminent threat of armed aggression against anyone. Indeed, the memorandum of the attorney general of the United Kingdom, while supporting the right to use force, wisely omits all reference to this rationale for its exercise."

³¹⁵ Ibid. at 612. "This sequence readily demonstrates that the restoration of Kuwaiti sovereignty was the leitmotif of Council action. That the authorization of collective measures

Dinstein and Franck would nonetheless disagree as to what Resolution 1441 sought to authorize. Franck holds that Resolution 1441's purpose was to solely *"purchase unanimity for the return of the inspectors by postponing to another day [...] the argument as to whether Resolutions 678 and 687 had authorized further enforcement as the sole discretion of one or more of the Council's members."* In other words, a further meeting of the Council would have been required in order to authorize force against Iraq.³¹⁶ Lastly, both Professors Franck and Dinstein would agree that the use of justifying the Iraq war on preventive force grounds would be illegal as failing to comply with Article 51 of the UN Charter.³¹⁷

What is interesting to note relates to the anticipatory self-defense argument which was not made explicitly at the UN Security Council. Some³¹⁸ have considered this argument to be purely rhetorical.³¹⁹ President George W.

by Resolution 678 additionally refers to the restoration of "international peace and security in the area" does not connote some expansive further mandate for contingent action against Iraq at the discretion of any individual member of the collation of the willing. President George Bush Sr. acknowledged as much in explaining why the American military had not pursued Saddam Hussein's defeated forces to Baghdad."

³¹⁶ Ibid. at 614 *"This conclusion is at best a creative interpretation. In fact, what Resolution 1441 did was to purchase unanimity for the return of the inspectors by postponing to another day, which the sponsors hoped might never be reached, the argument as to whether Resolutions 678 and 687 had authorized further enforcement at the sole discretion of one or more of the Council's members."*

³¹⁷ YORAM DINSTEIN, *"WAR, AGGRESSION AND SELF-DEFENSE"* at p. 187 (Cambridge University Press, 2005) (1988).

³¹⁸ W.H. Taft and T. F. Buchwald, *"Preemption, Iraq, and International Law"*, 97 A.J.I.L. 557, 563 (2003): *"Was Operation Iraqi Freedom an example of preemptive use of force? Viewed as the final episode in a conflict initiated more than a dozen years earlier by Iraq's invasion of Kuwait, it may not seem so."*

³¹⁹ D. Kritsiotis, *"Arguments of Mass Confusion"*, 15 E.J.I.L. 233, 248-249 (2004): *"By this lone reference, was the right of pre-emptive self-defense officially proclaimed and invoked by the United States for Operation Iraqi Freedom in March 2003, or was its mention mere*

Bush hinted in a speech on September 12, 2002 before the UN General Assembly, that he would not allow a tyrannical regime such as Iraq to give weapons of mass destruction to terrorists.³²⁰ From these words we can deduce that President Bush was at that time possibly talking about taking preventive action against Iraq when read in connection to the previous sentence.³²¹ Nonetheless, we can also note that President Bush also mentions that Iraq had a clear choice at that time which was either to comply fully with UN Resolutions on the one hand, or to bear the consequences of its non-compliance. This argument was widely rejected by several nations and by most of legal academia.³²²

rhetoical flourish on the part of the Bush Administration? [...] But it is also conceivable that the United States had here advanced pre-emptive self-defense as part of its legal justification for Operation Iraqi Freedom”.

³²⁰ Iraq at that time was a sponsor of terrorism and provided “stipends” to terrorist and their families when committed attacks in countries such as Israel. Saddam Hussein and Yasser Arafat had an agreement according to which Iraq would grant \$25000 to the family of a suicide bomber if the latter had performed successfully. <http://news.sky.com/skynews/Home/Sky-News-Archive/Article/200806412041096> Kenneth Timmerman provides a further breakdown of the “bonuses” awarded by Arab countries to the families of suicide bombers: “*The Saudis contributed payments of \$5000 to the families of suicide bombers. Arafat’s PA gave \$2000, and the governments of the United Arab Emirates and Qatar kicked in \$500 each. But the lion’s share of the blood money came from the government of Saddam Hussein, which awarded a “bonus” of \$25000 to the families of suicide bombers who carried out “quality operations,” a euphemism for a suicide attack that killed Jews. In the hierarchy of mayhem, families of less successful murderers were rewarded with checks from Baghdad for \$15000, \$10000, or \$5000 depending on the number of victims and whether the perpetrator died inadvertently or by intentional suicide during the attack. The higher payments were clearly intended to encourage suicide attacks, the captured documents show.*” KENNETH TIMMERMAN, PREACHERS OF HATE, (New York: Crown Forum, 2003), at page 202.

³²¹ Ibid. 303: “*If we fail to act in the face of danger, the people of Iraq will continue to live in brutal submission. The regime will have new power to bully, dominate and conquer its neighbors, condemning the Middle East to more years of bloodshed and fear. The region will remain unstable, with little hope of freedom, and isolated from the progress of our times. With every step the Iraqi regime takes towards gaining and deploying the most terrible weapons, our own options to confront that regime will narrow. And if an emboldened regime were to supply these weapons to terrorist allies, then the attacks of 11 September would be a prelude to far greater horrors.*”

³²² John Yoo, “*Using Force*”, 71 U. CHI. L. REV. 729, 790 (2004): “*Nonetheless, self-defense as a justification proved extremely controversial, and as a result the United States argued*

Furthermore, some legal scholars have suggested that the Bush Administration failed to explore avenues other than conflict regarding Iraq. Such other avenues would have included a multilateral disarmament approach combined containment, with “aggressive human rights intervention which could eventually lead to the possible exile of Saddam Hussein and his clique.”³²³

So as to further explore the argument pertaining to prevention, one has to look back at documents such as the National Security Strategy of the United States of 2002 (NSS) in order to grasp what the US prevention doctrine consists of.³²⁴ The NSS does not mention anywhere the term “prevention”, it nonetheless introduces it implicitly under the notion of “acting preemptively”.³²⁵ This statement

that it was primarily enforcing previous Security Council resolutions designed to contain Saddam Hussein. Several nations, including three of the five permanent members of the Security Council, opposed this justification and argued that an invasion of Iraq would be illegal. While the dispute over the war’s legality continues, with almost the entire international legal academy against it, the Security Council has enacted three resolutions recognizing the occupation of Iraq.”

³²³ Harold Hongju Koh, “On American Exceptionalism”, 55 STAN. L. REV. 1479, 1519 (2003). *“But much of the blame must also go to the Bush Administration’s decision to frame the issue in bipolar terms -either attack, or accept a status quo in which Saddam builds unconventional weapons and brutalizes his own citizens without sanction. By flattening the issue in this way, the Bush Administration discouraged examination of a meaningful third way: to disarm Iraq without attack through a multilateral strategy of disarmament plus enhanced containment plus more aggressive human rights intervention. That strategy would have supported continuation of the initial Bush approach of diplomacy backed by threat of force: restoring effective U.N. weapons inspections, disarming and destroying Iraqi weapons of mass destruction, and cutting off the flow of weapons and weapons-related goods into Iraq. At the same time, however, this strategy would have also pressed more aggressively for the insertion of human rights monitors, supporting the forces of peaceful democratic opposition in Iraq, as well as developing the “Milosevic-type” possibility of diplomatically driving Saddam and his top lieutenants into exile and bringing them to justice before an appropriate international tribunal.”*

³²⁴ C. Henderson, “The Bush Doctrine: From Theory to Practice”, 9 J.C.S.L. 3, at p. 8-13 (2004).

³²⁵ National Security Strategy of the United States of America (NSS) 2002, available at: <http://www.state.gov/documents/organization/63562.pdf> at page 6 : “[...] defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if

is further supported by the fact that the NSS memorandum mentions that the notion of preemption³²⁶, as it has been known for centuries³²⁷, has to be adapted to modern day challenges³²⁸ which consist of terrorism and rogue states that would use non-conventional means of warfare.³²⁹ This issue is taken a step further when the NSS adds in that already complex matter the ingredient of “imminence” which, under these circumstances, would become irrelevant since weapons of mass destruction could be used both covertly and without warning.³³⁰ Furthermore, these entities would be immune from traditional concepts pertaining to deterrence and could not be contained either due to the fact that we now live in a world of immediacy, where foreign travel is not what it used to be twenty years ago.³³¹

necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country...”

³²⁶ Preemptive force has long been a part of US military doctrine: “*Annotated Supplement of the Commander’s Handbook on the Law of Naval Operations*”, 73 I.L.S. 263 (A.R. Thomans and J.C. Duncan, 1999).

³²⁷ Ibid. 325 at 19. The NSS mentions that the use of preemption had to be conditioned on the “*existence of a material threat – most often a visible mobilization of armies, navies, and air forces preparing to attack* “. This definition refers itself to the *Caroline* prongs relative to imminence or to the use of preemption during the 1967 Six Days war where enemy armies were massed at Israel’s borders and about to attack.

³²⁸ Thomas C. Wingfield, “*The Convergence of Traditional Theory and Modern Reality: Just War Doctrine and Tyrannical Regimes*”, 2 AVE MARIA L. REV. 93, 121 (2004).

³²⁹ Ibid. 325: “*We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning*”.

³³⁰ Ibid.

³³¹ Deterrence would only produce effects on organizations and states that would react to deterrence. If states or organizations have no regard as to having their members killed, the effect sought by deterrence; that is to say the inhibition of taking aggressive actions, would

Traditional preemption would consequently not be a practical option due to the fact that there would be no time to preempt the aggressor, and that the consequences of waiting for a first strike are hardly acceptable. Such threats would consist for instance of missiles launched by an enemy country containing weapons of mass destruction, or the case of a terrorist organization detonating a bomb or flying airplanes into skyscrapers. This would be the reason why an updated³³² or newer version of preemption; that is to say prevention, has to be adopted and framed in a way that would deal with the imminence issue by removing it since modern arms and tactics, combined with a high death-toll have rendered the classical idea of preemption inadequate to face such challenges.

It appears as though the characterization of “grave and gathering danger”³³³ replaced the imminence factor³³⁴, when the US President addressed

thus be reduced. Additionally, if these organizations and states promote as a tactic the use of suicide missions where individuals would blow themselves up for their “higher cause” (crashing planes in aircraft carriers in the case of Japan or going to heaven for Islamic terrorists, or hastening the coming of the 12th Imam with regards to Shiite Muslim fundamentalists) then this sends a strong message that actually dying is not such a big problem. Death reveals either the “true life”, it becomes a means to an end or it is seen as a means to escape a changing reality as an ultimate act of recklessness (Hitler ordering in April 1945 to kill Germans who refuse to fight regardless of the fact that the war was lost, or, Goebbels killing his children). We often assume that people would make logical and rational judgments when making decisions concerning themselves or others, however we ought to note that this is not an absolute truth and that history has proved that assertion to be partially untrue.

³³² A.E. Wall, “*International Law and the Bush Doctrine*”, 34 I.Y.H.R. 193, 196-197, 212 (2004).

³³³ “*The history, the logic and the facts lead to one conclusion: Saddam Hussein’s regime is a grave and gathering danger. To suggest otherwise is to hope against the evidence. To assume this regime’s good faith is to be the lives of millions and the peace of the world in a reckless gamble, and this is a risk we must not take.*” President’s Bush address to the UN General Assembly, September 12, 2002.

³³⁴ United States Army, JUDGE ADVOCATE GENERAL’S LEAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK, at p. 75 (2004).

the UN General Assembly in September 2002 describing Saddam Hussein's activities as a grave and gathering danger. The replacement of the "imminence" factor has had as an effect of shifting the anticipatory self-defense paradigm from preemption to prevention, confirming that prevention, and not preemption, was used against Iraq in 2003. Some scholars assert that the use of preventive force goes beyond the scope of self-defense contemplated by Article 51 of the United Nations Charter³³⁵ and consequently illegal.³³⁶

Since preemption is not an option anymore within the narrow context of WMDs held by terrorists or rogue states, the only choice that is left is to act before the threat materializes. That is to say at a time when the instruments of the threat constitute a gathering danger, but not a direct threat. As this gathering danger also grows exponentially with time as we are told, eventually reaching its apex in the development of a weapon, the more time we wait the higher the price of inaction will be.³³⁷ This last argument pertaining to the high price of inaction is reminiscent to Vattel's argument on the use of prevention in the framework of the Just War when Vattel states:

³³⁵ D. Rezac, "President Bush's Security Strategy and Its 'Pre-Emptive Strikes Doctrine' – A Legal Basis for the War Against Iraq?" 7 ARIEL 223, 227 (2002).

³³⁶ H. Neuhold, "Law and Force in International Relations – European and American Positions", 64 H.J.I.L. 263, 273 (2004).

³³⁷ Ibid. "The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United State will, if necessary, act preemptively".

*“When once a state has given proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of suspicion to her neighbors, whose duty it is to stand on their guard against her. They may come upon her at the moment when she is on the point of acquiring a formidable accession of power, may demand securities, and if she hesitates to give them, may prevent her designs by force of arms. [...] As men under a necessity of regulating their conduct in most cases by probabilities, those probabilities claim their attention in proportion to the importance of the subject: and (to make use of a geometrical expression) their right to obviate a danger is in a compound ratio to the degree of probability and the greatness and the evil threatened.”*³³⁸

c. Criticism of the 2003 Iraq War and of “Pattern” Based Arguments

As seen above, the 2003 Iraqi Campaign was partly justified by its proponents as being an action to prevent the Saddam Hussein regime in Iraq from developing³³⁹ and using³⁴⁰ its WMD capabilities. The Bush administration

³³⁸ EMMERICH DE Vattel, LAW OF NATIONS, (Joseph Chitty Ed. 1883) (1758), Book III, Chapter III, section 44 *“How the appearances of danger give that right”*, p. 309.

³³⁹ Colin Powell, U.S. Secretary of State, *Colin Powell Addresses the U.N. Security Council* (Feb. 5, 2003), available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030205-1.html> :*“Under the guise of dual-use infrastructure, Iraq has undertaken an effort to reconstitute facilities that were closely associated with its program to develop and produce chemical weapons [...] Since 1998, his efforts to reconstitute his nuclear program have been focused on acquiring the third and last component, sufficient fissile material to produce a nuclear explosion. To make the fissile material, he needs to develop an ability to enrich uranium.”*

advocated in its 2002 National Security Strategy that it would extend traditional notions of self-defense to include anticipatory self-defense in order to respond to the challenges posed by adversaries seeking weapons of mass destruction.³⁴¹

While this updated view of self-defense seems to address the case of preemptive actions, a closer reading of the words chosen by President Bush reveals that preventive actions were actually contemplated instead: *“the greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time*

³⁴⁰ Ibid: *“Saddam Hussein’s intentions have never changed. He is not developing the missiles for self-defense. These are missiles that Iraq wants in order to project power, to threaten, and to deliver chemical, biological and, if we let him, nuclear warheads.”* It has been argued that Iraq actually led a campaign to deceive the international community that it did in fact possess weapons of mass destruction. It appears that in Saddam Hussein’s Iraq even the highest ranking generals were unaware that Iraq did not possess new stocks of WMDs. The purpose for such deception was to deter both Iran and the Iraqi Shiite population from attempting to overthrow Saddam Hussein and his government. Michael R. Gordon and Bernard E. Trainor, *Even as U.S. Invaded, Hussein Saw Iraqi Unrest as Top Threat*, THE NEW YORK TIMES – INTERNATIONAL, March 12, 2006 available at: http://www.nytimes.com/2006/03/12/international/middleeast/12saddam.html?pagewanted=all&_r=0 : *“Seeking to deter Iran and even enemies at home, the Iraqi dictator’s goal was to cooperate with the inspectors while preserving some ambiguity about its unconventional weapons — a strategy General Hamdani, the Republican Guard commander, later dubbed in a television interview “deterrence by doubt.” That strategy led to mutual misperception. When Secretary of State Colin L. Powell addressed the Security Council in February 2003, he offered evidence from photographs and intercepted communications that the Iraqis were rushing to sanitize suspected weapons sites. Mr. Hussein’s efforts to remove any residue from old unconventional weapons programs were viewed by the Americans as efforts to hide the weapons. The very steps the Iraqi government was taking to reduce the prospect of war were used against it, increasing the odds of a military confrontation.”*

³⁴¹ National Security Strategy of the United States of America (NSS) 2002, available at: <http://www.state.gov/documents/organization/63562.pdf> at page 15: *“The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”*

and place of the enemy's attack."³⁴² While preemptive actions would be directed at an actual and imminent attack, the use of force targeted here addresses attacks that remain uncertain as to their time and place.

The case for a preventive use of force against Iraq was beefed up by what the United States called a pattern of disregard for international law³⁴³, of deception and of contempt.³⁴⁴ The United States and its allies displayed on the international scene Iraq's past of violence and persecution against its own people which included the use of chemical weapons.³⁴⁵ What was implied here was that Iraq was a violent repeat offender. It had previously used WMDs and it was developing additional ones in order to use them in the future against enemies or

³⁴² Ibid.

³⁴³ Lucy Martinez, "September 11th, Iraq and the Doctrine of Anticipatory Self-Defense", 72 UMKC L. REV. 123, 190-191 (2003): "As President Clinton stated in 1993, in relation to the bombing of Iraq after the foiled assassination plot against former President Bush, "Based on the Government of Iraq's pattern of disregard for international law, I conclude that there was no reasonable prospect that new diplomatic initiatives or economic measures could influence the current Government of Iraq to cease planning future attacks against the United States." In light of this ongoing lack of good faith by Iraq, the United States was probably justified in arguing that further attempts at diplomacy would be impracticable or to no avail in this case, especially if weapons inspectors were not given unfettered access."

³⁴⁴ Ibid. 339: "What you will see is an accumulation of facts and disturbing patterns of behavior. The facts on Iraqis' behavior – Iraq's behavior demonstrate that Saddam Hussein and his regime have made no effort – no effort – to disarm as required by the international community. Indeed, the facts and Iraq's behavior show that Saddam Hussein and his regime are concealing their efforts to produce more weapons of mass destruction [...] As the examples I have just presented show, the information and intelligence we have gathered point to an active and systematic effort on the part of the Iraqi regime to keep key materials and people from the inspectors in direct violation of Resolution 1441. The pattern is not just one of reluctant cooperation, nor is it merely a lack of cooperation. What we see is a deliberate campaign to prevent any meaningful inspection work [...] Underlying all that I have said, underlying all the facts and the patterns of behavior that I have identified as Saddam Hussein's contempt for the will of this council, his contempt for the truth and most damning of all, his utter contempt for human life. Saddam Hussein's use of mustard and nerve gas against the Kurds in 1988 was one of the 20th Century's most horrible atrocities; 5,000 men, women and children died."

³⁴⁵ Ibid.

for blackmail purposes.³⁴⁶ The United States argued that preventive force was necessary in Iraq due to the fact that Iraq had WMDs and was developing nuclear weapons.³⁴⁷ The imminence of the Iraqi threat was redefined in view of Iraq's previous pattern of egregious acts as well as its alleged WMD potential.³⁴⁸

The right invoked by the United States and its allies to expand anticipatory self-defense to include preventive force received a mixed response. This variation of anticipatory self-defense was rejected and condemned in the United Nations General Assembly 2004 Report as being adventurous and dangerous.³⁴⁹

³⁴⁶ Ibid.

³⁴⁷ John Yoo, "Future Implications of the Iraq Conflict: International Law and the War in Iraq", 97 A.J.I.L. 563, 575 (2003): "On the other hand, Iraq could be said, unfortunately, to represent the coming challenges to international peace and stability as a rogue state that has WMD and supports terrorism. In this type of security environment, the United States and its allies may well have to rely exclusively upon their right to anticipatory self-defense in order to use force against such nations. In order to address the challenge posed by this new threat, the international legal system will have to adapt to take into account the probability of an attack, the magnitude of the possible harm, and the windows of opportunity within which proportionate force may be used. The use of force in anticipatory self-defense against terrorist groups armed with WMD, or against the rogue nations that support them, will depend on three factors that go beyond mere temporal imminence. First, does a nation have WMD and the inclination to use them? In the case of Iraq, the record made clear that Saddam Hussein both possessed WMD and had used them against external enemies (Iran) and his own citizens. In future cases, the possession of WMD and signs of hostile intent must be taken into account in deciding whether to use force preemptively. That decision will rely, in part, on intelligence about rogue nations' WMD programs, their ability to acquire components and technical knowledge, and their ability to assemble a weapon."

³⁴⁸ President's Remarks at the United Nations General Assembly, September 12, 2002, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html> : "We know that Saddam Hussein pursued weapons of mass murder even when inspectors were in his country. Are we to assume that he stopped when they left? The history, the logic, and the facts lead to one conclusion: Saddam Hussein's regime is a grave and gathering danger. To suggest otherwise is to hope against the evidence. To assume this regime's good faith is to bet the lives of millions and the peace of the world in a reckless gamble. And this is a risk we must not take."

³⁴⁹ United Nations General Assembly Report, December 5, 2004, available at: <http://www.un.org/secureworld/report.pdf> p.54-55 "189. Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defense, not just preemptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)? Those who say "yes" argue that the potential harm from 55 A/59/565 some threats (e.g., terrorists armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier. 190. The

France for instance pointed out to the apparent flaws of preventive force, as well as possibly creating a dangerous precedent: *“We do not oppose the use of force. We are only warning against the risks of pre-emptive strikes as a doctrine. What examples are we setting for other countries? How legitimate would we feel such an action to be? What are our limits to the use of such might? In endorsing this doctrine we risk introducing the principle of constant instability and uncertainty.”*³⁵⁰ In the days prior to the 2003 Iraqi campaign, France proved to be an assertive opponent to any unilateral military action³⁵¹ which was not sanctioned by the UN Security Council. France also added that it believed that in the case of Iraq no military action was necessary at that point.³⁵² French

*short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment — and to visit again the military option. 191. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non - intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all. 192. **We do not favor the rewriting or reinterpretation of Article 51.**”*

³⁵⁰ Alan Cowell, “A Nation at War: Overture from Paris; France Holds Out a Tentative Olive Branch, With Thorns, to the U.S.”, THE N.Y. TIMES, Mar. 28, 2003, at B10. See Generally John Alan Cohan, “The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law”, 15 PACE INT’L L. REV. 283, 301 (2003).

³⁵¹ Stephanie Bellier, “UNILATERAL AND MULTILATERAL PREVENTIVE SELF-DEFENSE” 58 Me. L. Rev. 507, 512 (2006): “France firmly rejected the idea of military intervention in Iraq, considering that even if Iraq had to be disarmed, the country posed no direct threat to international peace and security. Moreover, even if France were mistaken about the danger posed by Iraq, only the Security Council was authorized to use force against it.”

³⁵² President Jacques Chirac, PRESS RELEASE STATEMENT, February 17, 2003: “My position is that whatever the circumstances may be, France will vote no because it considers that there is no good reason to wage a war to obtain the objective to which we are committed.” See generally CONFERENCE DE PRESSE DE M. JACQUES CHIRAC, PRESIDENT DE LA REPUBLIQUE A L’ISSUE DE LA REUNION INFORMELLE EXTRAORDINAIRE DU CONSEIL EUROPEEN, BRUXELLES – BELGIQUE, February 17, 2003, available at: <http://www.monde-diplomatique.fr/cahier/europe/conf-chirac>.

diplomats also rejected the notion that a “coalition of the willing”³⁵³ could replace Security Council sanction and that any attempt to bypass the Council would be regarded as illegal since only the Security Council bears international legitimacy³⁵⁴, and wrong.³⁵⁵

Some states such as Australia and ³⁵⁶ Israel³⁵⁷ have come to support preemptive and preventive actions.³⁵⁸ One should be careful to note however

³⁵³ Jean-Davide Levitte, Speech to the U.N. Security Council, 5 U.N. Doc. S/PV.4625 (Oct. 17, 2002). Stephanie Bellier, “*Unilateral And Multilateral Preventive Self-Defense*”, 58 ME. L. REV. 507, 512 (2006).

³⁵⁴ Dominic de Villepin, SPEECH TO THE U.N. SECURITY COUNCIL, 6 U.N. Doc. S/PV.4721 (Mar. 19, 2003). Ibid.

³⁵⁵ This view is shared by Harold Koh, who holds that the Iraqi campaign jeopardized diplomatic efforts made by the United States in other areas of the Middle East, degrading the perception of “honest broker” the US had until then. “*And even while now finally committing itself to a new ‘road map’ for negotiations, the United States has engaged in an ambitious military assault on Iraq that threatens to turn much of the Middle East against us and perhaps to disable us from playing the indispensable role of honest broker in a Middle East peace process. So again, the irony: Even as the United States directs exceptional energy toward Iraq, the greater danger is that that effort will undermine our capacity to do enough elsewhere in the Middle East.*” Harold Hongju Koh, “*On American Exceptionalism*”, 55 STAN. L. REV. 1479, 1491 (2003).

³⁵⁶ Defense Minister Robert Hill, John Bray Memorial Oration, at the University of Adelaide (Nov. 28, 2002), available at: <http://www.minister.defence.gov.au/HillSpeechpl.cfm?CurrentId=2121>: “*Is it clear that, when an armed attack against a State is imminent, that State is not compelled to wait until the first blow has been struck. But what action can a State legitimately take when that attack is to be launched by a non-state actor, in a non-conventional manner, operating from a variety of bases in disparate parts of the world? There are no tell-tale warning indicators such as the mobilization and pre-deployment of conventional forces. Whilst the U.N. adopted not dissimilar language (Article 51 permits the use of self-defense “if criminal attack occurs”), it has not settled the debate between those who adopt a literal interpretation and those who argue that contemporary reality demands a more liberal interpretation. Again, the jurisprudence of the International Court of Justice does not include a definitive statement on the scope of the law of anticipatory self-defense under the Charter, States act according to their interpretation, no doubt informed by the interpretations of others [...] But diplomacy and international cooperation will not always, succeed: the Australian Government may need to consider future requests to support collation military operations to prevent the proliferation of WMD, including to rogue states or terrorists, where peaceful efforts have failed.*” See generally Australian Ministry of Defense, “*Australia’s National Security: A Defence Update*” (2003), available at: <http://www.defence.gov.au/ans2003/Report.pdf>.

³⁵⁷ Amended Disengagement Plan, Annex A, section 3.A.3, May 28, 2004, at: <http://www.pmo.gov.il/PMO/Communication/hitntkut/mesht280504.htm>. “*The State of Israel*

that some states that have come out as supporting theoretically preventive force have done so after having been themselves the victims of terrorist attacks. This could explain why Russia, who most strongly condemned the US led invasion of Iraq, supports using preventive force against terrorists.³⁵⁹ Additionally, states such as North Korea have stated that the United States did not own the

reserves the fundamental right to self-defense, including the taking of preventive measures, and responsive acts using force against threats emanating from the Gaza Strip.”

³⁵⁸MICHAEL SCHMITT AND JELENA PEJIC, INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES, ESSAYS IN HONOR OF YORAM DINSTEIN, (Martinus Nijhoff publishers 2007) at p. 107 for France’s position supporting preemptive and preventive force: “*Outside our borders, within the framework of prevention and projection-action, we must be able to identify and prevent threats as soon as possible. Within this framework, possible pre-emptive action is not out of the question, where an explicit and confirmed threat has been recognized. This determination and the improvement of long range strike capabilities should constitute a deterrent threat for our potential aggressors, especially as transnational terrorist networks develop and organize outside our territory, in areas not governed by states, and even at times with the help of enemy states...Prevention is the first step in the implementation of our defense strategy, for which the options are grounded in the appearance of the asymmetric threat phenomenon.*” See generally Government of France, Ministry of Defense, “2003-2008 Military Program”. Ibid at p. 105 with regards to India’s position: “*Federal Finance Minister Jaswat Singh has said every country has a right to preemptive strikes as an inherent part of its right to self-defense and it was not the prerogative of any one nation. “Preemption or prevention is inherent in deterrence. Where there is deterrence there is preemption. The same thing is there in Article 51 of the UN Charter which calls it ‘the right of self-defense.’*” Ibid 106-107 with regards to the North Korean position: “*In February 2003, in the context of continuing discussions on North Korea’s alleged nuclear program, the North Korean Foreign Ministry declared that North Korea was entitled to launch a pre-emptive strike against US forces rather than wait until the American military was finished with Iraq. The deputy director states, “The United States says that after Iraq, we are next, but we have our own counter-measures. Pre-emptive attacks are not the exclusive right of the US.” Similarly, in September 2004, Yang Hyong-sop, vice-president of the Presidium of the Supreme People’s Assembly, stated that “[a] pre-emptive attack is not a monopoly of the US.”*” See generally: North Korean Official Says Pre-emptive Attack Not a Monopoly of the U.S., GLOBAL NEWSWIRE, September 10, 2004. Ibid 105 regarding Russia’s support for preventive force: “*Following the seizure of a school in Beslan by Chechen militants, the Russian government indicated its willingness to strike at terrorists preemptively. President Vladimir Putin declared on September 17, 2004, that “today in Russia, we are seriously preparing to act preventively against terrorists... This will be in strict respect with the law and constitution and on the basis of international law.” The defense minister has pro-claimed that Russia claims a right of preemptive strikes against terrorists anywhere in the world. At the same time, Russian officials have noted that their preemptive strikes will not include the use of nuclear weapons.*”

³⁵⁹ Ibid.

monopoly of preventive force and that it was equally eligible to use “pre-emptive” force (to be understood as preventive force).³⁶⁰

The United States and its allies partially based the 2003 Iraqi Freedom military Campaign on the grounds that Iraq had acted according to a pattern of aggression, deception, contempt for international law and that it would repeat such actions and pattern in the future. Therefore, by striking now, the United States and its allies would break this pattern.

States have previously argued that a pattern of prior instances of willing reckless behavior on the part of some states justified using force against them in order to prevent further wrongdoing.³⁶¹ This argument for instance was used by the United States regarding its bombing of Libya in 1986.³⁶² The United States decided to bomb Libya after it was determined that it was responsible for the bombing of the “*La Belle*” club in West Germany. The United States also possessed evidence of further plans that Libya would commit additional acts of

³⁶⁰ Similarly, in September 2004, Yang Hyong-sop, vice-president of the Presidium of the Supreme People’s Assembly, stated that “[a] pre-emptive attack is not a monopoly of the US.” See generally: North Korean Official Says Pre-emptive Attack Not a Monopoly of the U.S., GLOBAL NEWSWIRE, September 10, 2004.

³⁶¹ It should be noted that some authors do not recognize the bombing of Libya an act of self-defense, rather than an act of reprisal. Michael J. Kelly, “*Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*”, 13 J. TRANSNAT’L L. & POL’Y 1, 13 (2003): “For example, the 1986 bombing of Libya is cited as a peacetime reprisal and not an act of self- defense. Therefore, while writers state emphatically that reprisals are illegal, state practice continues to resort to them on occasion, cloaking them in terms of self-defense while remaining careful to comply with Naulilaa criteria.”

³⁶² Ibid 347 at p. 573: “In the past two decades, the United States has used military force in anticipatory self-defense against Libya, Panama, Iraq, Afghanistan, and the Sudan. The United States justified the 1986 strikes against Libya in large part as necessary to forestall future terrorist attacks.”

terror³⁶³ targeted at the United States.³⁶⁴ At that time, Libya was using terror as an instrument of foreign policy.³⁶⁵

The United States sought to target specifically elements of the Qaddafi regime that were the responsible for the previous attacks in order to prevent future terrorist attacks by these elements.³⁶⁶ This thus constituted a preventive use of force since the United States used force against Libya at a time when Libya was not about to attack the United States, but presented a more remote danger. The Reagan administration stated that its strikes against Libya were “*necessary and appropriate*”³⁶⁷ to prevent further acts of terrorism and that they

³⁶³ Mark V. Vlasic, “Assassination & Targeting Killing – A Historical and Post-Bin Laden Legal Analysis”, 43 GEO. J. INT’L L. 259, 302-303 (2012): “Pursuant to Article 51 of the UN Charter, the United States report to the Security Council indicated that the attack was a legitimate self-defense operation in response to “an ongoing pattern of attacks by the government of Libya”, including the April 1986 bombing of La Belle Disco in Berlin. Intelligence sources had indicated that Libya was not only involved in the Berlin bombing, but was planning future attacks on up to thirty U.S. diplomatic facilities worldwide.”

³⁶⁴ UN SCOR, 2674th meeting, UN Doc S/PV.2674 17 (1986) (Statement of Vernon Walters, the U.S. Permanent Representative to the United Nations).

³⁶⁵ Jackson Nyamuya Maogoto, “Walking an International Law Tightrope: Use of Military Force to Counter Terrorism – Willing the Ends”, 31 Brooklyn J. Int’l L. 405, 434 (2006): “Terrorism has become another means of conducting foreign affairs. Such terrorists are agents whose association the state can easily deny. Use of terrorism by the country entails few risks, and constitutes strong-arm, low-budget foreign policy.” See generally Public Report of the Vice President’s Task Force on Combating Terrorism, Feb. 1986, at 2, available at http://www.population-security.org/bush_and_terror.pdf

³⁶⁶ Allen S. Weiner, “The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?” 59 STAN L. REV. 415, 436 (2006): “In 1986, following the bombing of a night club in West Berlin that resulted in the death of an American soldier and the wounding of a large number of other U.S. servicemen, the United States attacked “terrorist-related targets” in Libya.”

³⁶⁷ Matthew Allen Fitzgerald, “Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter”, 49 VA. J. INT’L L. 473, 494 (2009): “President Reagan, citing Article 51, called the raid a “necessary and appropriate” mission “designed to deter acts of terrorism by Libya.”

had been used after all other peaceful means had been exhausted.³⁶⁸ The United States also argued that its strikes were proportionate. The United States added that strikes could be aimed at Qaddafi³⁶⁹ himself due to his personal involvement in the terrorist attacks and plots³⁷⁰ as well as against targets that “*were carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians.*”³⁷¹

While the Reagan administration was given wide support for its actions in the United States,³⁷² other states reserved a somewhat mixed reaction at the international level. The United Nations Security Council did not condemn the American strikes on Libya with France, the United Kingdom, Australia and Denmark voting against a Resolution condemning the United States. On the other hand, the General Assembly³⁷³ adopted a Resolution condemning the

³⁶⁸ 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1986 406, 469 (GPO 1988).

³⁶⁹ Boyd M. Johnson, III, “*Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*”, 25 CORNELL INT’L L.J. 401, 404 (1992).

³⁷⁰ Abraham Sofaer, “*Terrorism, The Law, and the National Defense*”, 126 MIL L. REV. 89, 120 (1989): “[Qaddafi was not] personally immune from the risks of exposure to a legitimate attack. He was and is personally responsible for Libya’s policy of training, assisting and utilizing terrorists in attacks on United States citizens, diplomats, troops, and facilities. His position as head of state provided him no legal immunity from being attacked when present at a proper military target.”

³⁷¹ John Yoo, “*Using Force*”, 71 U. CHI. L. REV. 729, 767 (2004).

³⁷² Ibid 358 at p. 304: “*The domestic response, on the other hand, was overwhelming: bipartisan congressional support and seventy-seven percent approval rating. Favorable public opinion went so far as to spur House and Senate legislation that would have authorized the President “to undertake actions to protect United States citizens against terrorists and terrorist activity through the use of such antiterrorism and counter-terrorism measures as he deems necessary.*”

³⁷³ Ibid. 343 at p. 141: “*The necessity and proportionality of the U.S. action was questioned, as was whether peaceful means had been exhausted and whether there was an imminent attack aimed at the United States. A proposed resolution in the U.N. Security Council condemning the U.S. action was vetoed by France, the United Kingdom and the United States; negative votes were also cast by Australia and Denmark, while Venezuela abstained. However, the U.N. General*

United States stating that its actions were against international law and that it created a serious threat to peace and security in the region.³⁷⁴

While the military strikes undertaken by the United States against Libya in 1986 received a mixed response from international actors, this had not been the case in 1985 when Israel launched a military strike in Tunisia against the Palestinian Liberation Organization's (PLO) headquarters. This 1985 Tunis bombing was the result of a series of clashes between Israel and the PLO. The PLO had killed Israelis in Cyprus days before the October 1st strike on the PLO headquarters in Tunisia.³⁷⁵ In response to this ongoing threat caused by the PLO, the Israeli government decided to launch a strike at its nerve center in order to disrupt and prevent possible future attacks planned by Arafat in Tunisia.³⁷⁶ The Israeli justification for its attack was essentially one of preventive self-defense since it was not aware that an imminent attack would take place. Due to the PLO's past pattern of aggression and acts of terror, Israel concluded that additional terrorist attacks were going to occur. Israel stated that striking the PLO in Tunisia was a lawful use of force in self-defense under Article 51 of the UN Charter because it sought to prevent further attacks by the PLO against Israel, its

Assembly adopted a resolution censuring the United States by seventy-nine votes, with twenty-eight against and thirty-three abstentions."

³⁷⁴ G.A. Res. 41/38, 41st Sess., 78th plenary meeting (1986); available at <http://www.un.org/documents/ga/res/41/a41r038.htm>

³⁷⁵ William V. O'Brien, "Reprisals, Deterrence and Self- Defense in Counter-terror Operations", 30 VA. J. INT'L L. 421, 460 (1990).

³⁷⁶ Ibid. "we decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist activities."²

interests or citizens.³⁷⁷ However, the international response to this strike was not favorable to Israel's claim that it had acted in self-defense.³⁷⁸ It was condemned by the United Nations Security Council in Resolution 573.³⁷⁹ The Security Council condemned "*vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct*" and that "*Tunisia has the right to appropriate reparations as a result of the loss of human life and material damage which it has suffered and for which Israel has claimed responsibility.*"³⁸⁰ What is interesting to note here is that the Security Council condemned Israel³⁸¹ for having violated Tunisian sovereignty but not for having targeted the PLO headquarters there. This Resolution could mean that the Security Council refused to endorse Israel's interpretation of Article 51 of the Charter to include such use of preventive force because it had violated another country's

³⁷⁷ Bernard Gwertzman, "U.S. Defends Action in U.N. on Raid", N.Y. TIMES, Oct. 7, 1985, at A3.

³⁷⁸ Gregory E. Maggs, "A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy: How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities under the UN Charter", 57 Syracuse L. Rev. 465, 474 (2007): "*The Security Council apparently did not see the terrorist strike in Cyprus as an "armed attack" on Israel, and did not think that Israel could act preemptively under Article 51 merely because it feared future attacks.*"

³⁷⁹ S.C. Res. 573, 1, U.N. Doc. S/RES/573 (Oct. 4, 1985) available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/573\(1985\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/573(1985))

³⁸⁰ Ibid.

³⁸¹It is to be noted that the United States supported Israel's use of force, but abstained from vetoing the Resolution because it was fearful of jeopardizing its ties with Tunisia. Gregory E. Maggs, "*The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States can do about it*", 4 REGENT J. INT'L L. 149, 161 (2006): "*Reagan and other high officials had considerable sympathy for the Israeli action . . . but there was overwhelming information suggesting that a United States veto would . . . unleash leftist students and other groups into the streets in Tunisia, perhaps to destroy the American Embassy and perhaps to overthrow the Government of President Habib Bourguiba.*"

sovereignty.³⁸² It could be an expression of the Security Council's disavowal of preventive self-defense altogether where patterns of aggression are present. On the other hand some argue that such use of force could have been approved, had it not violated the sovereignty of another state.³⁸³ The 1985 Tunis bombing is only a sample of numerous clashes that occurred between Israel and Arab organizations, where Israel would justify the bombing of terrorist elements in foreign countries based on the argument that doing so would prevent future attacks even though Israel.³⁸⁴ These "preventive" actions earned Israel split international responses regarding their lawfulness, some states supporting them while others rejected them.³⁸⁵

A somewhat similar scenario was addressed by the International Court of Justice (I.C.J.) when it considered Iran's claim against the United States in the

³⁸² Ibid 361 at p. 435: "*The Council's reference to aggression "against Tunisian territory" appears to reflect the view that even though Israel's attack was directed at the PLO, and not at Tunisian state institutions, it was nevertheless a violation of Tunisia's inviolability and Tunisia's right not to be subject to the use of force.*"

³⁸³ Ibid 360 at p. 433: "*U.S. Ambassador Vernon Walters' explanation of the U.S. abstention in the Security Council Resolution condemning Israel's bombing in Tunis is instructive: We recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks. This is an aspect of the inherent right of self-defense recognized in the United Nations Charter.*"

³⁸⁴ On a different and more recent note, the International Court of Justice in its Advisory Opinion relative to the construction of the separation wall between Israel and the West Bank stated that Israel's separation wall was unlawful since force could only be used against state actors. Since terrorist organizations were not state actors, force could not have lawfully been used against them. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ADVISORY OPINION, 2004 I.C.J. 136, 194-195 (July 9, 2004).

³⁸⁵ Ibid 361 at p. 436: "*Even after September 11, 2001, the international community has continued to express considerable doubt about claims that the right of self-defense entitles states to use force against terrorists in another state's territory. In October 2003, following a terrorist suicide bombing at a beachfront restaurant in Haifa, Israel attacked an alleged terrorist training camp at Ein Saheb, Syria, with guided missiles. During the Security Council discussion, ten of the fifteen Council members condemned or characterized Israel's attack as a violation of international law, of Syria's sovereignty, or of acceptable standards of behavior.*"

Oil Platforms case.³⁸⁶ The facts of this case mirror that of other cases involving preventive force that were mentioned above. On October 16, 1987 an attack on the *Sea Isle City*, navigating under US flag, was struck by a missile allegedly shot by Iran from an oil platform. The United States then destroyed the oil platform which was deemed at the origin of the attack on the tanker. Six months later, on April 14, 1988 a US warship hit a mine in international waters which was claimed by the United States to have been laid there by Iranian submarines.³⁸⁷ The US retaliated³⁸⁸ shortly thereafter by destroying Iranian oil platforms.³⁸⁹

Reprisals against Iran were not the only goal sought after by the United States when it struck the Iranian oil platforms.³⁹⁰ The United States also wanted

³⁸⁶ *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 available at: <http://www.icj-cij.org/docket/files/90/9715.pdf>.

³⁸⁷ David Hoffman & Lou Cannon, "U.S. Retaliates, Hits Iran Oil Platforms in Gulf", WASH. POST, Apr. 18, 1988, at A1.

³⁸⁸ John H. Cushman Jr., "U.S. Strikes 2 Iranian Oil Rigs and Hits 6 Warships in Battles Over Mining Sea Lanes in Gulf", THE N.Y. TIMES, Apr. 19, 1988, at A10. President Reagan stated that the strikes against the platforms had been launched "to make certain the Iranians have no illusions about the cost of irresponsible behavior".

³⁸⁹ William V. O'Brien, "Reprisals, Deterrence, and Self-Defense in Counter-terror Operations", 30 VA. J. INT'L L. 421, 427 (1990): "There was no Security Council debate on these hostilities. In some cases, the U.S. forces clearly acted in self-defense. In other cases, as in the retaliatory strikes of October 19, 1987 and April 18, 1988, U.S. attacks were not immediate. These actions could easily be characterized as preventive, deterrent measures and, just as readily, as punitive measures." See generally *ibid* 39 at p. 179: "Two specific attacks on shipping are of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker *Sea Isle City*, reflagged to the United States, was hit by a missile near Kuwait harbor. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked Iranian offshore oil production installations, claiming to be acting in self-defense. United States naval forces launched an attack against the *Reshadat* ["Rostam"] and *Resalat* ["Rakhsh"] complexes; the R-7 and R-4 platforms belonging to the *Reshadat* complex were destroyed in the attack. On 14 April 1988, the warship *USS Samuel B. Roberts* struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States, again asserting the right of self-defense, employed its naval forces to attack and destroy simultaneously the *Nasr* ["Sirri"] and *Salman* ["Sassan"] complexes."

³⁹⁰ Jackson Nyamuya Maogoto, "Walking an International Law Tightrope: Use of Military Force to Counter Terrorism – Willing the Ends", 31 BROOKLYN J. INT'L L. 405, 423 (2006): "There was no

to guarantee that such attacks originating from these platforms would not occur again, preventing any further attack there from.³⁹¹ It thus claimed to have struck these platforms in self-defense.³⁹²

On November 2, 1992 Iran decided to sue the United States before the I.C.J. for having materially breached its obligations under Article X Paragraph 1 of the 1955 “*Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran*” (the Treaty) by destroying its oil platforms.³⁹³ The United States argued that it had used force in self-defense and that Iran had violated numerous times the same Article X Paragraph 1 of the Treaty by engaging in offensive military activities.³⁹⁴ The United States stated that it had

Security Council debate on these hostilities. In some cases, the U.S. forces clearly acted in self-defense. In other cases, as in the retaliatory strikes of October 19, 1987 and April 18, 1988, U.S. attacks were not immediate. These actions could easily be characterized as preventive, deterrent measures and, just as readily, as punitive measures.”

³⁹¹ William H. Taft IV, “*Reflections on the ICJ’s Oil Platform Decision: Self-defense and the Oil Platforms Decision*”, 29 YALE J. INT’L L. 295, 297 (2004): “*The mining of the ship injured ten U.S. sailors and damaged the ship. Several days later, after concluding that Iran was responsible for the mine attack, U.S. naval forces, in an effort to prevent further attacks, took action against two Iranian offshore oil platform complexes. Once again, the United States gave the personnel at the facilities advance notice and time to evacuate, and once again it submitted a letter to the Security Council informing the Council of what had happened and explaining that the United States had acted in self-defense.*”

³⁹² Ibid 381 at p. 185: “*In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised the inherent right of self-defense under international law by taking defensive action in response to attacks by the Islamic Republic of Iran against United States vessels in the Persian Gulf...*” See generally “*Letter from the United States Permanent Representative of 19 October 1987, SI1921.*”

³⁹³ Ibid 381 at p. 161.

³⁹⁴ Ibid at p. 176: “*The counter-claim of the United States is however not limited to those attacks; according to the United States, Iran was in breach of its obligations under Article X, paragraph 1, of the 1955 Treaty, “in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran”. According to the United States, Iran conducted an aggressive policy and was responsible for more than 200*

acted in compliance with Article XX (1) (d) of the Treaty which provided that: “*The present Treaty shall not preclude the application of measures: [...] (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.*”³⁹⁵ In determining whether the United States had violated Article XX (1) (d) of the Treaty, the ICJ decided to inquire whether the United States had been the victim of a use of force by Iran, and if so, whether such use of force against it amounted to an armed attack under Article 51 of the UN Charter.³⁹⁶ The ICJ further noted that the United States had to show that it had been the victim of an armed attack in order to claim that its use of force was undertaken as an act of self-defense, citing the “*Military and Paramilitary Activities in and against Nicaragua*” case.³⁹⁷ Additionally, the Court stressed that the United States would have to show that its use of force was necessary and proportionate³⁹⁸ to the armed attack it suffered.³⁹⁹

attacks against neutral shipping in international waters and the territorial seas of Persian Gulf States.”

³⁹⁵ Ibid at p. 178-179.

³⁹⁶ Ibid at p. 187: “*Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as “armed attacks” within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.*”

³⁹⁷ “*Military and Paramilitary Activities in and against Nicaragua*”, I. C. J. REPORTS 1986, p. 101, paragraph. 19 available at: <http://www.icj-cij.org/docket/files/70/6503.pdf>.

³⁹⁸ A. Mark Weisburd, “*The International Court of Justice and the Concept of State Practice*”, 31 U. PA. J. INT’L L. 295, 325-326 (2009): “*With respect to each American use of force, the Court asked, first, whether the United States had proven that Iran had previously launched an attack, second, whether the attack could be considered an “armed attack” on the United States, and finally, whether the American responses could be said to satisfy tests of necessity and proportionality.*”

After analyzing the evidence submitted by both parties, the ICJ noted that the United States had failed to show⁴⁰⁰ that Iran was indeed the party responsible for the attack on the *Sea Isle City*.⁴⁰¹ Furthermore, the Court stated that the “*alleged pattern of Iranian use of force*”⁴⁰² could not be used by the United States as an aggravating factor justifying the destruction of the Iranian oil platforms in self-defense. The reason for this was that the “*alleged pattern of Iranian use of force*” was not targeted specifically at the United States and therefore did not constitute an armed attack against the United States.⁴⁰³ The ICJ also noted that

³⁹⁹ Ibid 381 at p. 187.

⁴⁰⁰ Ibid at p. 189: “*In short, the Court has examined with great care the evidence and arguments presented on each side, and finds that the evidence indicative of Iranian responsibility for the attack on the Sea Isle City is not sufficient to support the contentions of the United States. The conclusion to which the Court has come on this aspect of the case is thus that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the Sea Isle City, has not been discharged.*”

⁴⁰¹ Judge Buergenthal interestingly notes in his separate opinion that the Court never addressed what the burden of proof that had to be met by the United States was in the *Oil Platforms* case: “*One might ask, moreover, where the test of “insufficient” evidence comes from (see para. 39, supra) and by reference to what standards the Court applies it? What is meant by “insufficient” evidence? Does the evidence have to be “convincing”, “preponderant”, “overwhelming” or “beyond a reasonable doubt” to be sufficient? The Court never spells out what the here relevant standard of proof is. Moreover, it may well be that each of the pieces of proof the United States adduces, if analyzed separately, as the Court does (see, for example, Judgment, paras. 58 et seq.) may not be sufficient to prove that the missile was fired by Iran. Taken together, however, they may establish that it was not unreasonable for the United States to assume that it was fired by Iran, particularly since Iran, in the face of overwhelming evidence that it was responsible for at least some attacks on neutral shipping, denied all such responsibility. A proper application of Article XX, paragraph 1 (d), of the Treaty would have required the Court to take these considerations into account.*” *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, 287, Separate Opinion of Judge Buergenthal, available at: <http://www.icj-cij.org/docket/files/90/9729.pdf>.

⁴⁰² Ibid 381 p. 191.

⁴⁰³ Ibid at p. 192: “*There is no evidence that the mine laying alleged to have been carried out by the Iran Ajr, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the Bridgeton was laid with the specific intention of harming that ship, or other United States vessels. Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a “most grave” form of the use of force.*”

the United States had failed to prove that its actions were necessary and proportional to respond to the incidents allegedly caused by Iran. The Court held that the US strikes against the oil platforms were not necessary because the US had failed to complain first to Iran about its military activities on the platforms, as it had with regards to the mine-laying.⁴⁰⁴

Concerning proportionality, the Court held that the first American strike on the oil platforms could have been proportional had it been necessary. However, it held that the second strike performed in April 1988 was patently disproportionate. The Court ruled that the strike was part of a US led military operation (“Operation Praying Mantis”) against Iranian combat forces undertaken in “*response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life.*”⁴⁰⁵

In the *Oil Platforms* case, the International Court of Justice adopted a restrictive view of the right of self-defense.⁴⁰⁶ The Court held that a state could

⁴⁰⁴Ibid at p. 197: “*In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of mine-laying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a “target of opportunity”, not one previously identified as an appropriate military target*”.

⁴⁰⁵Ibid at p. 198.

⁴⁰⁶ Ruth Wedgwood, “*ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: The ICP Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*”, 99 A.J.I.L 52, 57 (2005): “*In Oil Platforms, the Court seemed to suggest in obiter dictum that a direct attack must rise to a significant level of severity before being cognizable under Article 51 of the Charter. Taken uncharitably, the Oil Platforms opinion could be read to support a hazardous asymmetry: an aggressor’s attack may not be sufficient to trigger the Article 51 right to use force in self-defense, remitting the victim to pacific countermeasures and possible recurrence of the attack. Without explanation, the Oil Platforms Court seemed to assume that the more general*

only exercise its right of self-defense against another state when it suffered an armed attack which had specifically targeted that state.⁴⁰⁷ The Court did not explicitly address the question of the legality of anticipatory self-defense⁴⁰⁸; however one could conclude from this present ruling that such use of force would be unlawful⁴⁰⁹ since only armed attacks⁴¹⁰ that would reach a certain level of

restriction on the use of force in Article 2(4) would not have a comparable threshold requirement. But this purported rule, unprecedented in international law, would have been hard to sustain on the facts here [referring to the decision on the separation wall between Israel and the West Bank].”

⁴⁰⁷ Ibid 393 at p. 357: *“In the Oil Platforms Case, as noted above, the Court in effect asserted that 1) a state is the victim of an armed attack only if the attack is directed specifically at it; indiscriminate attacks do not count; 2) an armed action by the armed forces of one state against those of another is not necessarily an armed attack; whether it is depends on its gravity; 3) an action taken in self-defense cannot satisfy the necessity requirement unless it is preceded by a formal complaint by the ostensibly defending state, however pointless the making of such a complaint might be; and 4) the proportionality criterion in the law of self-defense is evaluated in terms of the harm already inflicted, not that to be avoided. The Court provided no authority for any of these propositions, nor did it otherwise explain their derivation.”*

⁴⁰⁸Such a position was not shared by Judge Schwebel in the Nicaragua case where he asserted that the use of self-defense is not dependent solely on the occurrence of an actual armed attack. CASE CONCERNING MILITARY AND PARAMILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (1986) I.C.J. Rep. 14 at p. 347.

⁴⁰⁹Robert J. Delahunty, *“Self-Defense and the Failure of the United Nations Collective Security System”*, 56 CATH. U.L. REV. 871, 915 (2007):*“The court’s opinions thus far have tilted heavily in favor of the restrictive view of anticipatory self-defense--or, at least, in favor of what might be called a ‘restrictive plus’ view, in which the right of anticipatory self-defense, even if ‘preserved’, is only vestigial. First, the ‘gravity’ test for determining whether an armed attack has occurred, laid down in Nicaragua and affirmed in Oil Platforms, may often make it difficult to characterize an anticipatory measure in response to an imminent threat as lawful ‘self-defense’, because until the threat actually materializes, it can be hard to demonstrate its likely scale and effects. Second, Oil Platforms’ requirement for clear and convincing proof of an armed attack – even in the context of actual, repetitive military operations against a defending state--also makes it difficult to demonstrate that an anticipatory measure is lawful self-defense. Characterizing an attack as ‘imminent’ requires a determination of the threatening actor’s intent, a determination that is nearly always extremely difficult to make, because an aggressor’s war plans are usually heavily concealed. By both placing the burden of proof on the defending state and making the evidentiary standard very high, the ICJ has effectively precluded much anticipatory self-defense.”*

⁴¹⁰Gregory E. Maggs, *“The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States can do about it”*, 4 REGENT J. INT’L L. 149, 163 (2006): *“From this case comes the principle that a nation cannot defend itself under Article 51 unless, and until, it has some high degree of proof of the identity of the perpetrator. This second restriction, like the first, has terrible practical effects. It is likewise wrong as a legal matter. The practical consequences of this restriction are easy to see. How is a*

gravity could trigger the right to use self-defense.⁴¹¹ Such a conclusion however might be considered by some to be contrary to generally accepted state practice and precedents. The UN Secretary General shares that opinion.⁴¹² The Court also pondered as to whether a series of attacks allegedly initiated by Iran over a certain amount of time could be considered as an armed attack.⁴¹³ The Court

nation supposed to come up with clear proof? Iran certainly did not photograph the firing of the missile or admit responsibility. No perpetrator of such an act would do that. Consider the attacks of September 11. Did the United States have clear and convincing proof that Bin Laden was responsible when the United States sent forces to Afghanistan? The United States did not acquire the videotape of Osama bin Laden bragging about the incident until weeks later. But it never would have gotten that evidence if it had not counterattacked. Indeed, nations that follow the Oil Platforms decision hardly ever will be able to use Article 51 to mount an immediate counterattack when struck by terrorists.”

⁴¹¹ Ibid 381 at p. 187 : “As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it is necessary to distinguish “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms” (1. C. J. Reports 1986, p. 101, para. 191), since “In the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack.” [emphasis added].

⁴¹²The Secretary-General, “*In Larger Freedom: Towards Development, Security and Human Rights for All*”, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) at p. 124-125: “Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened. . . . Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.”

⁴¹³ Ibid 381 at p. 191: “Before the Court, it has contended that the missile attack on the Sea Isle City was itself an armed attack giving rise to the right of self-defense; the alleged pattern of Iranian use of force, it is said, “added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response”. The United States relies on the following incidents involving United States-flagged, or United States-owned, vessels and aircraft, in the period up to 19 October 1987, and attributes them to Iranian action: the mining of the United States-flagged *Bridgeton* on 24 July 1987; the mining of the United States-owned *Texaco Caribbean* on 10 August 1987; and firing on United States Navy helicopters by Iranian gunboats, and from the *Reshadat* oil platform, on 8 October 1987. The United States also claims to have detected and boarded an Iranian vessel, the *Iran Ajr*, in the act of laying mines in international waters some 50 nautical miles north-east of Bahrain, in the vicinity of the entrance to Bahrain’s deep-water shipping channel. Iran has denied any responsibility for the mining of the *Bridgeton* and the *Texaco Caribbean*; as regards the *Iran Ajr*, Iran has admitted that the vessel was carrying mines, but denies that they were being laid at the time it was boarded, and claims that its only mission was to transport them by a secure route to a quite different area.”

held that it did not consider that these attacks, taken cumulatively,⁴¹⁴ to amounted to a “*most grave*” armed attack as defined in the in the *Nicaragua* case.⁴¹⁵

5. The 2008 Georgian War

The Georgian-Ossetian 2008 war was only the last incident in a long list of clashes that opposed these two peoples throughout history. Georgia is a small country located in the Caucasus which borders Russia, Armenia, Azerbaijan and Turkey. Ethnic Georgians and Ossetians, who live in South Ossetia which is a northern province in Georgia have had their share of differences throughout the 20th Century. During the Russian Revolution, while the Georgians followed Martov’s Mensheviks, the Ossetians supported the Bolsheviks. The Bolsheviks, who eventually acceded to power at the end of the Russian civil war, rewarded the Ossetians for their support by giving them an autonomous region within the now Soviet Socialist Republic of Georgia. This guaranteed them a certain level of autonomy from Georgian Soviet authorities.

⁴¹⁴ Jean D’Aspremont, “*Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*”, 31 U. PA. J. INT’L L. 1089, 1111 (2010): “*In the Oil Platforms case, for instance, the I.C.J. was confronted with the question of whether a series of minor attacks cumulatively amounted to an armed attack – an argument, often called the accumulation doctrine, that has long been advocated by some States – but failed to provide an answer.*” R. Ago, “*Addendum to Eighth Report on State Responsibility*”, [1980] II (1) ILC Ybk 13, 69-70. See generally YORAM DINSTEIN, “WAR, AGGRESSION AND SELF-DEFENSE” (Cambridge University Press, 2005) (1988) at p. 231.

⁴¹⁵ Ibid 381 at p. 192: “*Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a “most grave” form of the use of force (see paragraph 51 above).*”

After the collapse of the Soviet Union, the Ossetians decided that they would now want to become recognized as an independent state and resorted to armed force in order to achieve this goal. A civil war ensued in Georgia, opposing South Ossetian forces (as well as Abkhazian forces) against Georgian governmental forces. It was not until June 24, 1992 that peace returned to Georgia when a cease-fire was brokered between Russia and Georgia concerning South Ossetia (July 27, 1993 regarding the date of the cease-fire for Abkhazia). The cease-fire agreement is known as the "Sochi Agreement".⁴¹⁶ The "Sochi Agreement" also provided for the terms of the cease-fire regarding Abkhazia.⁴¹⁷ This agreement provided the establishment of a peace-keeping force composed of Georgian, Russian and Ossetian soldiers in order to maintain peace and stability within the region. The peace and stability that ensued however was relative and interspersed with low-intensity clashes between Ossetian and Georgian forces.⁴¹⁸ During the night of August 7, 2008, Georgia

⁴¹⁶ *Agreement on Principles of Settlement of the Georgian-Ossetia Conflict of 24 June 1992*, in TAMAZ DIASAMIDZE, REGIONAL CONFLICTS IN GEORGIA (Tbilisi, 2008), p. 110.

⁴¹⁷ *Agreement on Principles of Settlement of the Georgian-Ossetia Conflict of 24 June 1992*, available at: <http://peacemaker.un.org/georgia-sochi-agreement92#>

⁴¹⁸ *Independent International Fact Finding Mission on the Conflict in Georgia*, Volume I (September 2009) at p. 11, available at: http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf. "The shelling of Tskhinvali by the Georgian armed forces during the night of 7 to 8 August 2008 marked the beginning of the large-scale armed conflict in Georgia, yet it was only the culminating point of a long period of increasing tensions, provocations and incidents. Indeed, the conflict has deep roots in the history of the region, in peoples' national traditions and aspirations as well as in age-old perceptions or rather misperceptions of each other, which were never mended and sometimes exploited. While the region had also known a long tradition of peaceful cohabitation of different nations and creeds, there were among its smaller nations underlying feelings of deprivation and of having been relegated to inferior status. Soviet federalism did not help to overcome latent antagonisms, and the chaotic period that followed the break-up of the Soviet Union further added to a pattern of mutual mistrust and even hostility in the region. The wave of newly-found self-consciousness that followed political changes in Georgia since the end of 2003 clashed with another wave of

launched an attack against South Ossetian positions and towns,⁴¹⁹ in response to Ossetian alleged separatist actions.⁴²⁰ The reasons set forth by Georgia to justify a military campaign consisted of (1) the necessity for Georgia to “restore its constitutional order” on its internationally recognized territory⁴²¹, or alternatively (2) to preempt an attack from the Russian Federation which was imminent⁴²², if it had not yet begun.⁴²³

assertiveness emanating from the Russian Federation, which tried to establish a privileged zone of interest in its “near abroad”, where developments and events thought to be detrimental to Russia’s interests were not easily accepted.”

⁴¹⁹ *Independent International Fact Finding Mission on the Conflict in Georgia*, Volume II (September 2009) at p. 19, available at: http://www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf. “Open hostilities began with a large-scale Georgian military operation against the town of Tskhinvali and the surrounding areas, launched in the night of 7 to 8 August 2008. Operations started with a massive Georgian artillery attack.”

⁴²⁰ Tyler B. Musselman, *Skirmishing for Information: The Flaws of the International Legal System as Evidenced by the Russian-Georgian conflict of 2008*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 317, 340 (2010): “Georgia’s claim of self-defense rests on its official position that the conflict started as a civil matter. It asserts that the government sent minimal troops into the troubled regions to deal with the shelling of Georgian villages by separatists. Georgian troops were under a unilateral ceasefire order until the Russian army entered the region with troops and armor Georgia alleges that only after the Russian invasion did these troops become active.”

⁴²¹ *Georgia Decided to Restore Constitutional Order in S. Ossetia – MoD Official*, CIVIL GEORGIA, Tbilisi, August 8, 2008 available at: <http://www.civil.ge/eng/article.php?id=18941>: “Mamuka Kurashvili, an MoD official in charge of overseeing peacekeeping operations, told journalists late on August 7 that the South Ossetian side had rejected Tbilisi’s earlier decision to unilaterally cease fire and had resumed shelling of Georgian villages in the conflict zone. “So the Georgian side has decided to restore constitutional order in the entire region,” he said.”

⁴²² *Russia and Georgia in verbal war*, BBC NEWS, August 6, 2009, available at: <http://news.bbc.co.uk/2/hi/europe/8188532.stm> : “Georgia and Russia have stepped up a propaganda battle, each accusing the other of starting their war over South Ossetia, on the eve of the anniversary. Georgia has repeated its claim that its assault on South Ossetia was a response to a secret Russian invasion [...] Some days after the war broke out, Georgia said its attack was a response to a “large-scale Russian invasion” earlier in the day by Russian tanks and armored vehicles through the Roki tunnel between South Ossetia and Russia. It released a report on Thursday including evidence like phone intercepts that it said proved its case. It said the alleged Russian assault was “premeditated” and the “violent climax of policies pursued by Russia against Georgia over many years.” The claim has received little support from Georgia’s allies, the US and Nato.”

These last assertions have however come under scrutiny due to the indiscriminate shelling by Georgia of the South Ossetian capital of Tskhinvali⁴²⁴ with GRAD systems (the modern equivalent of Katyushas). Russia retaliated against Georgia for its attack on South Ossetia and its peacekeepers on August 8 by launching an artillery barrage against the Georgian positions and conducting air raids over Georgian territory. Russia justified its intervention on the grounds that it was protecting its citizens and preventing genocide against the Ossetian people.⁴²⁵ While Georgia's assertions relative to the claim it acted in self-defense

⁴²³ Ibid. 419 at p. 20: *"The Georgian allegations of a Russian invasion were supported, inter alia, by claims of illegal entry into South Ossetia of a large number of Russian troops and armor, prior to the commencement of the Georgian operation. According to Georgian answers to the Mission's questions, the process of building-up Russian forces in South Ossetia had started in early July 2008, continued in the course of August and included troops and medical personnel, tents, armored vehicles, tanks, self-propelled artillery and artillery guns. This process allegedly intensified in the night of 6 to 7 August and in the late evening of 7 August. Georgian allegations of Russian military build-up in South Ossetia prior to 8 August 2008 were denied, however, by the Russian side. According to the Russian information provided to the Mission, the first Russian units entered the territory of South Ossetia, and Russian air force and artillery began their attacks on Georgian targets at 14:30 on 8 August, i.e., immediately after the decision for an intervention was made by the leadership of the Russian Federation."*

⁴²⁴ C.J. Chivers and Ellen Barry, *Georgia Claims on Russia War Called into Question*, NEW YORK TIMES, November 6, 2008, available at: <http://www.nytimes.com/2008/11/07/world/europe/07georgia.html> *"Newly available accounts by independent military observers of the beginning of the war between Georgia and Russia this summer call into question the longstanding Georgian assertion that it was acting defensively against separatist and Russian aggression. Instead, the accounts suggest that Georgia's inexperienced military attacked the isolated separatist capital of Tskhinvali on August 7 with indiscriminate artillery and rocket fire, exposing civilians, Russian peacekeepers and unarmed monitors to harm [...] President Mikheil Saakashvili of Georgia has characterized the attack as a precise and defensive act. But according to observations of the monitors, documented August 7 and August 8, Georgian artillery rounds and rockets were falling throughout the city at intervals of 15 to 20 seconds between explosions, and within the first hour of the bombardment at least 48 rounds landed in a civilian area."*

⁴²⁵ Vladimir Radyuhin, *Medvedev, Putin accuse Georgia of Genocide*, THE HINDU, August 11, 2008, available at: <http://www.hindu.com/2008/08/11/stories/2008081156011500.htm>: *"Russia's President Dmitry Medvedev has accused Georgia of committing "genocide" against the people of South Ossetia and vowed to continue the Russian military operation in the region. "Georgia launched a cruel, cynical aggression against South Ossetia; our citizens died – residents and peacekeepers" said Mr. Medvedev on Sunday. "The form this aggression took is nothing less than genocide because Georgia committed heaviest crimes – civilians were torched, sawed to pieces and rolled over by tanks," he added."*

came under scrutiny, Russia's claims have also raised some concerns.⁴²⁶ The war ended on August 16 after Georgia and Russia agreed to a cease-fire.

As a result of the conflict, Georgian forces were expelled from both South Ossetia and Abkhazia. Having expelled Georgian forces from these two provinces, Russia subsequently recognized these provinces as sovereign states.⁴²⁷ The 2008 Georgia-Russia conflict is of particular interest to this research, in that Georgia claimed, albeit unsuccessfully, a right to defend itself from an imminent Russian aggression.⁴²⁸ The Georgian leadership furthermore suggested that it was the Russians themselves who had bombed Tskhinvali.⁴²⁹ Nonetheless, the main argument set forth by Georgia was that its military campaign was prompted by an imminent Russian invasion through the Roki

⁴²⁶ Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 69: "To take a recent example - did Russian troops enter Georgia, as Russia says, to protect the people of South Ossetia from atrocities perpetrated by the Georgian military in its effort to retake that province or, as Georgia says, to annex the pro-Russian breakaway provinces of South Ossetia and Abkhazia?"

⁴²⁷ Christian Henderson, *Contested States and the Rights and Obligations of the Jus ad Bellum*, 21 CARDOZO J. INT'L & COMP. L. 367, 370 (2013). *Russia recognizes Georgia's breakaway republics*, RIA NOVOSTI, August 26, 2008, available at: <http://en.rian.ru/russia/20080826/116291407.html>

⁴²⁸ Spiegel staff, *Did Saakashvili Lie? The West Begins to Doubt Georgian Leader*, DER SPIEGEL, September 15, 2008 available at: <http://www.spiegel.de/international/world/did-saakashvili-lie-the-west-begins-to-doubt-georgian-leader-a-578273.html> "The Georgian government continues to maintain that the war began on Thursday August 7, at 11:20pm. According to its account, it was at this time that it received several intelligence reports that approximately 150 Russian army vehicles had entered Georgian territory, in the separatist republic of South Ossetia, through the Roki Tunnel, which passes under the main Caucasus ridge. Their objective, say the Georgians, was Tskhinvali, and additional military columns followed beginning at 3 am. "We wanted to stop the Russian Troops before they could reach Georgian villages." Saakashvili told Spiegel recently, explaining the marching orders that were given to his army. "When our tanks moved toward Tskhinvali, the Russians bombed the city. They were the ones – not us – who reduced Tskhinvali to rubble." But reports by the OSCE describe a different situation in those critical hours."

⁴²⁹ Ibid.

tunnel, and that it needed to act before Russia was in a position to attack Georgian villages.⁴³⁰ This version however presented tangible flaws since Georgia failed to produce any evidence in support of this preemptive self-defense argument.⁴³¹ Had Georgia been able to prove that it had been attacked by Russia, or that a Russian attack was imminent⁴³², its actions would have been legal. However this was not the case for Georgia as facts did not support this scenario.⁴³³ Indeed, the Independent International Fact Finding Mission found

⁴³⁰ Ibid.

⁴³¹ Ibid. 424: “Neither Georgia nor its Western allies have as yet provided conclusive evidence that Russia was invading the country or that the situation for Georgians in the Ossetian zone was so dire that a large-scale military attack was necessary, as Mr. Saakashvili insists.”

⁴³² *Independent International Fact Finding Mission on the Conflict in Georgia*, Volume I (September 2009) at p. 20, available at: http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf. Georgia made the claim that the Russian invasion was imminent due to its troop build-up in South Ossetia: “The Georgian allegations of a Russian invasion were supported, inter alia, by claims of illegal entry into South Ossetia of a large number of Russian troops and armor, prior to the commencement of the Georgian operation. According to Georgian answers to the Mission’s questions, the process of building-up of Russian forces in South Ossetia had started in early July 2008, continued in the course of August and included troops and medical personnel, tents, armored vehicles, tanks, self-propelled artillery and artillery guns. This process allegedly intensified in the night of 6 to 7 August and in the late evening of 7 August. Georgian allegations of Russian military build-up in South Ossetia prior to 8 August 2008 were denied, however, by the Russian side. According to the Russian information provided to the Mission, the first Russian units entered the territory of South Ossetia, and Russian air force and artillery began their attacks on Georgian targets at 14.30 on 8 August, i.e. immediately after the decision for an intervention was made by the leadership of the Russian Federation.”

⁴³³ Timothy William Waters, *Plucky Little Russia: Misreading the Georgian War Through the Distorting Lens of Aggression*, 49 STAN. J INT’L L 176, 209 (2013): “Preparations can provide the basis for a claim of anticipatory self-defense if they are of a sufficiently threatening nature, along the lines of the 1967 Six Day War. In Georgia’s case, applying the traditional Caroline test this would have required a credible belief that Russia was preparing an imminent invasion. It is plausible to characterize Georgia’s actions in early August as anticipating an impending Russian invasion, but equally plausible to characterize Russia’s actions as anticipating an impending Georgian attack. Again we descend into the thicket of facts -facts whose best available interpretation favors the Russian claim or, if things are truly ambiguous, counsels against accusations of illegality. Similarly, the speed of Russia’s response does not change its plausible factual and legal character as a legal response rather than a first wrongful use. After all, Georgia’s own version of events requires one to believe that it counter-attacked with at least equal speed.”

that the proximate cause of the 2008 war was not a Russian imminent attack which could have justified a Georgian preemptive military strikes on Russian forces or its armed allies, but Georgia's massive artillery attack on South Ossetia and its targeting of Russian peacekeepers.⁴³⁴ The fact finding mission made this point clear when it discussed Georgia's preemptive self-defense argument based on an imminent Russian attack:

“There were signs of an abstract danger that Russia might carry out its repeated threats of use of force, but no concrete danger of an imminent attack. Despite all the tensions between the conflicting parties in the night of 7 to 8 August, which had been deployed there for the “Kavkaz 2008” exercise, it could not be verified that they were about to launch an attack on Georgia. Neither could an alleged “large-scale incursion of Russian troops into Georgian territory” starting already in the morning of 7 August 2008 be verified by the Mission, although there are strong indications of some Russian military presence in South Ossetia beyond peacekeepers prior to 8 August 14:30pm.”⁴³⁵

⁴³⁴ Ibid. 432 at p. 19: *“Open hostilities began with a large-scale Georgian military operation against the town of Tskhinvali and the surrounding areas, launched in the night of 7 to 8 August 2008. Operations started with a massive Georgian artillery attack. At the outset of the operation the Commander of the Georgian contingent to the Joint Peacekeeping Forces (JPKF), Brigadier General Mamuka Kurashvili, stated that the operation was aimed at restoring the constitutional order in the territory of South Ossetia.”*

⁴³⁵ *Independent International Fact Finding Mission on the Conflict in Georgia*, Volume II (September 2009) at p. 254-255, available at: http://www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf.

6. The 2007 Syria Strike and the 2010 Stuxnet Attack

In order to further single out preventive force, we can attempt to identify other recent examples of this type of anticipatory self-defense. Two recent military operations will be studied In order to illustrate possible scenarios where preventive use of force was used. These cases involve the September 2007 Israeli strike against Syria and the 2010 cyber-strike against Iran's nuclear program.

The facts surrounding the 2007 strike on Syria are not widely known due to the covert nature of the bombing, the secret operations that took place on the ground and official censure in Israel which hinders in-depth examination of the case. The 2007 strike on a Syrian nuclear reactor was allegedly carried out by the Israeli Air Force on September 6th under the code name "Operation Orchard".⁴³⁶

The main actors in this operation comprised of Israel on one side and of Syria on the other, who was financially and materially supported by Iran and North Korea in its endeavor. It appears that Iran had helped to finance the project by providing one billion dollars to fund it.⁴³⁷

⁴³⁶ Erich Follath and Holger Stark, "The Story of 'Operation Orchard': How Israel Destroyed Syria's Al Kibar Nuclear Reactor, Spiegel Online, November 2, 2009. <http://www.spiegel.de/international/world/the-story-of-operation-orchard-how-israel-destroyed-syria-s-al-kibar-nuclear-reactor-a-658663.html>

⁴³⁷ Noah Klieger, *A strike in the Desert*, YNETNEWS, Februar 11, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3799227,00.html>.

Briefly, the Israeli government had been conducting surveillance operations on high ranking Syrian officials in order to gather intelligence on possible Syrian nuclear ambitions. It had previously been reported that North Korea had been selling nuclear know-how to anyone who would pay for it. In December of 2006 intelligence was recovered from a Syrian official in London that described in detail the nature of the Syrian-North Korean nuclear joint venture.⁴³⁸ In the early months of 2007 Mossad officers were of the opinion that this nuclear facility located in Kibar had to be destroyed. The fact that a North-Korean, Persian and Syrian nuclear joint-venture had been underway in Kibar was further confirmed by Iranian General Ali Resa Asgari who defected to the United States.⁴³⁹

In August 2007 a team of Israeli Special Forces operatives who had infiltrated Syria managed to collect some soil from Kibar which later revealed that nuclear activity was taking place there.⁴⁴⁰ Different theories arose as to the purpose of gathering these soil samples. Some argue that this was done in order to verify prior intelligence received that the facility was indeed a nuclear one.⁴⁴¹

⁴³⁸ Duncan Gardham, *Mossad carries out daring London raid on Syrian official*, THE TELEGRAPH, May 15, 2011 available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/8514919/Mossad-carries-out-daring-London-raid-on-Syrian-official.html>.

⁴³⁹ Ibid. 437.

⁴⁴⁰ Daniel H. Joyner, "*Jus Ad Bellum in the Age of WMD Proliferation*", 40 GEO. WASH. INT'L L. REV. 233, 235 (2008).

⁴⁴¹ Ibid.

Others could argue that the United States would not have supported the action without material proof of an illegal nuclear enterprise by Syria.

In the days following the bombing, Syria made every attempt possible to erase any trace of the nuclear compound. In an interview given to Reuters, the former CIA director Michael Hayden asserted that the Syrian nuclear reactor bombed by Israel was similar to North Korea's Yongbyon reactor⁴⁴² and that it could produce up to two plutonium atomic bombs per year.⁴⁴³ Hayden further added that it was a matter of weeks or months before the reactor would have been completed. Unlike the raid on Osirak in 1981, Israel's action was not condemned by the UN or any other nation (apart from Syria and North Korea). The United States House of Representative supported this action expressing its "unequivocal support" to "Israel's right to self-defense in the face of an imminent nuclear or military threat from Syria".⁴⁴⁴

While Israel received a mixed response⁴⁴⁵ from various United States government officials,⁴⁴⁶ the absence of any international condemnation – even

⁴⁴² Steven Erlanger, *Israel silent on reports of bombing within Syria* — NEW YORK TIMES, October 14, 2007, available at: <http://www.nytimes.com/2007/10/15/world/middleeast/15mideast.html>

⁴⁴³ Randall Mikkelsen, *Syrian reactor capacity was 1-2 weapons per year – CIA*, REUTERS, April 29, 2008, available at: <http://uk.reuters.com/article/2008/04/29/korea-north-usa-idUKN2820597020080429>.

⁴⁴⁴ H. Res. 674 [110th], September 24, 2007 available at: <http://www.govtrack.us/congress/billtext.xpd?bill=hr110-674>

⁴⁴⁵ GEORGE W. BUSH, DECISION POINTS (Crown Publishers, New York) (2010) at pp. 421-422: "Mike's [Michael Hayden, CIA Director] report clarified my decision. "I cannot justify an attack on a sovereign nation unless my intelligence agencies stand up and say it's a weapons

from Arab states⁴⁴⁷ – of this use of force seems at first benign.⁴⁴⁸ However, bearing in mind the international condemnation of the 1981 Osirak strike⁴⁴⁹, it could be a statement that some cases of preventive uses of force are possibly acceptable, since the 2007 strike was a clear case of preventive self-defense.

The facts of the 2007 strike case are hardly analogous to the Caroline or 1967 standards of imminence but seem to present similarities with the 1981 Osirak strike. At the time of the strike Syria was not about to attack Israel or its allies, nor did it possess a nuclear weapon that would have been used against

program,” I said to Olmert. I told him I had decided on the diplomatic option backed by the threat of force. “I believe the strategy protects your interests and your state, and makes it more likely we can achieve our interests as well.”[...] Prime Minister Olmert’s execution of the strike made up for the confidence I had lost in the Israelis during the Lebanon war. I suggested to Ehud that we let some time go by and then reveal the operation as a way to isolate the Syrian regime.”

⁴⁴⁶ David E Sanger and Mark Mazzetti, *Israel struck Syrian nuclear project, analysts say*, NEW YORK TIMES, OCTOBER 13, 2007, available at: <http://www.nytimes.com/2007/10/14/washington/14weapons.html?fta=y> “The officials did not say that the administration had ultimately opposed the Israeli strike, but that Secretary of State Condoleezza Rice and Defense Secretary Robert M. Gates were particularly concerned about the ramifications of a pre-emptive strike in the absence of an urgent threat.”

⁴⁴⁷ “Fourth, the tepid reaction by the regional Arab governments to the alleged Israeli air strike underscores the extent to which Syria’s past interference in Lebanon, ties to Iran, and other foreign policies have alienated the current Syrian regime from Sunni Arab regimes. This isolation might have encouraged Syrian officials to seek to bolster their country’s defense capacities through the pursuit of nuclear weapons.” Richard Weitz, *Israeli airstrike in Syria: International reactions*, JAMES MARTIN CENTER FOR NONPROLIFERATION STUDIES, November 1, 2007 available at: <http://cns.miis.edu/stories/071101.htm>.

⁴⁴⁸ The United States President at the time wrote that Syria would have accused the Israeli government at the United Nations of bombing its research lab. See *Id.* 445 at p. 422: “While I was told that our analysts had only low confidence that the facility was part of a nuclear weapons program, surveillance after the bombing showed Syrian officials meticulously covering up the remains of the building. If the facility was really just an innocent research lab, Syrian President Assad would have been screaming at the Israelis on the floor of the United Nations.”

⁴⁴⁹ The Osirak strike was condemned by the UN Security Council in Resolution 487 of June 19, 1981 whereas the 2007 strike was not even mentioned by the Council.

Israel or to support terrorism. Israel struck Syria prior to the completion of the nuclear reactor which we know would have produced plutonium that could have been used for up to two fission bombs. This strike was carried out not as a response to an imminent threat of attack against Israel. The imminent threat in this case consisted of Syria, aided by North Korea and Iran, acquiring within a matter of weeks or months a nuclear reactor that would produce plutonium.

The 2007 Syria strike's ramifications, might further confirm a trend that was previously observed which was to recognize that the tools, or instruments of a future threat constitute a present imminent threat. This present imminent threat would then trigger the preventer's right of self-defense within the narrow context of weapons of mass destruction. On the other hand, one could also argue that the international community's silence as to the 2007 strike was not a step forward towards legitimizing preventive force, but simply a means to sanction Iran and North Korea in their effort to develop nuclear weapons.

Since the 1981 Osirak strike it appears that the general perception regarding preventive force has evolved towards making such use of force more acceptable. States have possibly recognized (or maybe started to address a well-known problem), probably following the terrorist attacks against the United States and Europe after the turn of the century, that weapons of mass destruction present totally different set of challenges when placed in contrast with conventional weapons. The medieval catapults loaded with incendiary shells or

plague-stricken corpses have little in common with Scud missiles weaponized with biological or chemical agents although they might seem analogous.

The 1981 strike was widely condemned because preventive use of force was regarded at that time as going beyond the scope of traditional self-defense or preemption. By late 2007 that interpretation might very well have changed when contemplating either the support received for the attack⁴⁵⁰ or witnessing the unusual silence of the Arab world.⁴⁵¹ This reaction could possibly tell us that preventive strikes are acceptable, and maybe even legal, when undertaken against an oppressive state that runs an illegal nuclear weapons program with the help of states known for their persevering criminal endeavors.⁴⁵² Furthermore, it should be added that Israel had a convincing case containing both electronic data and soil samples that proved that Syria was actively seeking to develop nuclear material and weapons for itself or one of its associates. On the other hand, such a conclusion could be seen as speculative since there has

⁴⁵⁰ Ibid. 444

⁴⁵¹ Ibid. 447

⁴⁵² Leah Schloss, "The Limits of the Caroline Doctrine in the Nuclear Context: Anticipatory Self-Defense and Nuclear Counter-Proliferation", 43 GEO. J. INT'L L. 555, 585-586 (2012): "There is clearly momentum for change, as exhibited by the shifting opinions of scholars and the international silence in the face of the recent Israeli strike on the Syrian nuclear reactor. Failure to capitalize on this momentum will result in international law that is inconsistent with state practice. If Israel feels that its security is sufficiently threatened that a military strike on Iran is necessary, an out-dated and inflexible international law standard will not stop it. Furthermore, considering the fears of the rest of the Arab world regarding a possible nuclear-armed Iran, it is not clear that any such strike, if it did occur, would be met by any more international condemnation than the 2007 strike in Syria. Thus, rather than resulting in a continuation of the current standard, failure to proactively address the shifting tides will result in further delegitimization of international law's restrictions on the use of force, and with it, one of the primary goals of the UN system."

not yet been any official recognition that preventive use of force is a valid means of self-defense.

Non-military strikes also appear to be valid options when facing a rising threat. This was further underlined by Vattel who made it a point that there existed means of defense other than military strikes.⁴⁵³ This is maybe what was witnessed during the 2010 alleged attack on Iran's nuclear enrichment facility in Natanz when a Stuxnet worm virus disrupted the enrichment of uranium and critically damaged a number of centrifuges.⁴⁵⁴

There is a great deal of speculation as to who attacked Iran, however it seems that this attack was state-sponsored.⁴⁵⁵ Most point the finger towards Israel due to the obvious security issues an Iranian nuclear program would cause to Israel (and to the world) and the repetitive "death threats" Israel has received

⁴⁵³ EMMERICH DE VATTEL, LAW OF NATIONS, (Joseph Chitty Ed. 1883) (1758), Book III, Chapter III, section 46 "*Other allowable means of defense against a formidable power*" p. 311. "*But force of arms is not the only expedient by which we may guard against a formidable power. There are other means, of a gentler nature and which are at all times lawful.*"

⁴⁵⁴ Supra 456.

⁴⁵⁵ The anti-virus company Symantec lists a number of entities who could theoretically have the means to launch such an attack that lists as probable point of origin for the attack a state: "*We have seen recent cases where governments have been accused of sanctioning hacking outside of their borders. A government may be trying to steal state or military secrets. If this attack was state-sanctioned, their motives may be similar to commercial competitors, including potentially gaining military secrets. The complexity and quality of the attack assets lead some to believe only a state would have the resources to conduct such an attack. However, the usage of the second digital certificate is a bit odd. One could make the case that once the first attack succeeded, a state would take cover and not waste the second digital certificate. Instead, by signing a very similar binary, security companies were immediately able to detect the second stolen certificate, making it useless in further compromises.*" Patrick Fitzgerald, *The Hackers behind Stuxnet*, July 21, 2010, SYMANTEC CONNECT, available at: <http://www.symantec.com/connect/blogs/hackers-behind-stuxnet>.

over the years combined with the carrying out of terrorist operations by Iran and its active support to terrorist organizations.

Provided that the Stuxnet strike was genuinely a strike aimed at disrupting the enrichment of uranium, such a strike would be considered as a preventive cyber-strike. Cyber-attacks just like terrorism are part of asymmetrical warfare, both offering a whole new dimension to warfare. Cyber-attacks were classically seen in movies where gangsters hacked bank accounts for their own personal enrichment. Such Hollywood scenarios pale into insignificance when imagining the consequences of a cyber-attack on a national power grid, cutting off electricity from hospitals, communication centers, disrupting mechanisms that control dams, nuclear plants and so-forth. Cyber-attacks are extremely serious attacks that conceal their viciousness due to the fact that no-one appears to be hurt. Nonetheless, such attacks can be used in order to create nuclear accidents and humanitarian crises, not to mention the strategic dimension in the case of such a strike being coupled with a military attack.

The Stuxnet attack was aimed principally at destroying centrifuges at Natanz by increasing and then decreasing repeatedly the frequency of rotation of the said centrifuges. This resulted in the destruction of a substantial amount of centrifuges and related parts.⁴⁵⁶ Centrifuges are of critical importance when enriching uranium so that it can later be used in a reactor or for a weapon.

⁴⁵⁶ The Institute for Science and International Security has issued a report that delves into the issues caused by the Stuxnet virus in Natanz which is highly interesting and helpful in understanding how the virus worked and what it destroyed. David Albright, Paul Brannan & Christina Walrond, *Did Stuxnet Take Out 1,000 Centrifuges at the Natanz Enrichment Plant?*,

Analyzing this strike through the lens of preventive force would somewhat be difficult since no one claimed the attack and no single party was identified outright as being the perpetrator thereof. Such a scenario where preventive force was used would only work in cases where the party using preventive force is an enemy of Iran since Iran would be the future aggressor. This would include for instance Israel (the Small Satan), the United States (the Great Satan) and Arab states. Once the initial parameters have been set, the question that has to be asked is whether the 2010 Stuxnet attack on Iran was a preventive strike?

The answer to this question has to be once again affirmative. The Stuxnet attack was a preventive cyber-strike because it did not seek to halt an incoming imminent attack but a future threat that had been materializing itself for some years now. The nuclear enrichment facility of Natanz was understood as being one of a number of instruments necessary for the enrichment of uranium to levels sufficient for the production of a fission bomb. Iran possessing nuclear weapons not only constitutes an imminent threat towards its adversaries, due to its stated goals and its track record in furthering them, it furthermore places the latter in a position where they would not be able to defend themselves and be at the mercy of a ruthless power.

The real imminent threat in the case of Iran would regard the actions it undertakes prior to obtaining a nuclear device and in furtherance of obtaining such a device. Once it possesses such a weapon, it could either blackmail other

states just as North Korea does, while selling to the highest bidder nuclear technology, or it could decide to take a more aggressive approach and decide to use these weapons or delegate their use to its proxies.

Once again, as it was the case in relation to the 2007 Syrian strike, no general outcry was heard from the international community condemning the 2010 Stuxnet strike. This could be an additional signal confirming a trend that suggests that preventive strikes could possibly be legitimate when undertaken against states that seek to develop nuclear weapons illegally and that have shown their propensity to behave in cruel manners. Others also suggest that this might not be a growing trend, and that the silence that followed the 2007 strike was due to a lack of public information. Preventive force would then be legitimate if it is used to meet the “immediate future threat” emanating from a vicious party, recalling Vattel’s following lines:

“When once a state has given proof of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of suspicion to her neighbors, whose duty it is to stand on their guard against her. They may come upon her at the moment when she is on the point of acquiring a formidable accession of power, may demand securities, and, if she hesitates to give them, may prevent her designs by force of arms.”⁴⁵⁷

⁴⁵⁷ Emmerich de Vattel, Law of Nations. Book III, Chapter III, section 44 “*How the appearances of danger give that right*” p. 309.

7. Does a case exist against Iran?

The Islamic Republic of Iran has gained notoriety by issuing openly anti-Semitic and anti-Israeli statements and threats for the past thirty years.⁴⁵⁸ Aside from its calls that Israel be “*wiped off the map*”⁴⁵⁹ (translation that captures the spirit of the expressed threat), Iran is a direct supporter of terrorist organizations and has been implicated in numerous terrorist attacks against Israelis⁴⁶⁰ and Jews⁴⁶¹ throughout the world. Iran’s violence is not exclusively focused on Jews

⁴⁵⁸For example, a sample of such vitriolic diatribes comparing Israel with cancer, would be the following: “*The Zionist regime and the Zionists are a cancerous tumor. Even if one cell of them is left in one inch of (Palestinian) land, in the future this story (of Israel's existence) will repeat.*” Mahmud Ahmadinejad, JPOST STAFF, US: Ahmadinejad’s anti-Israel Tirade ‘Hateful and Divisive’, THE JERUSALEM POST, August 17, 2012, available at: <http://www.jpost.com/Iranian-Threat/News/US-Amhadinejads-anti-Israel-tirade-hateful-and-divisive>.

⁴⁵⁹Mahmud Ahmadinejad, Text of Mahmud Ahmadinejad’s Speech of October 26, 2005, translation by Nazila Fathi, THE NEW YORK TIMES, October 30, 2005 available at: <http://www.nytimes.com/2005/10/30/weekinreview/30iran.html?ex=1161230400&en=26f07fc5b7543417&ei=5070&r=0>: “*Our dear Imam said that the occupying regime must be wiped off the map and this was a very wise statement. We cannot compromise over the issue of Palestine. Is it possible to create a new front in the heart of an old front. This would be a defeat and whoever accepts the legitimacy of this regime [Israel] has in fact, signed the defeat of the Islamic world. Our dear Imam targeted the heart of the world oppressor in his struggle, meaning the occupying regime. I have no doubt that the new wave that has started in Palestine, and we witness it in the Islamic world too, will eliminate this disgraceful stain from the Islamic world.*” The original statement made by President Ahmadinejad was different in form but contained the same substance: “*جمله این شود م جو روزگار صفحه از باید قدس اشغالگر رژیم این که فرمودند ما عزیز امام و “است حکیمانه بسیرار*” translated as: “*Our dear Imam [Khomeini] ordered that this Jerusalem-occupying regime [Israel] must be erased from the page of time. This was a very wise statement.*” Professor Joshua Teitelbaum & Lt. Col. (ret.) Michael Segall, “*The Iranian Leadership’s Continuing Declarations of Intent to Destroy Israel 2009-2012*”, JERUSALEM CENTER FOR PUBLIC AFFAIRS (2012) available at: <http://jcpa.org/wp-content/uploads/2012/05/IransIntent2012b.pdf>

⁴⁶⁰ Isabel Kershner, “*Israel Rebukes Argentina for Deal with Iran to Investigate 94’ Attack*”, THE NEW YORK TIMES, January 29, 2013, available at: http://www.nytimes.com/2013/01/30/world/middleeast/israel-angry-over-argentina-iran-accord-on-1994-bombing-inquiry.html?_r=0 : “*Israel has said the Tehran government was behind attacks on Israeli Embassy personnel in India and Georgia last February. Israeli and American officials then accused Hezbollah, the Lebanese Shiite group with ties to Iran, of responsibility for an attack on a bus of Israeli vacationers in the Bulgarian resort of Burgas in July.*”

⁴⁶¹*Iran Charged over Argentina Bomb*, BBC NEWS, October 25, 2006 available at: <http://news.bbc.co.uk/2/hi/americas/6085768.stm>: “*The Iranian government and Lebanese militia*

foreign policy of expansion.⁴⁶⁵ Were Iran to successfully develop nuclear weapons, some have argued that it would use them against its designated enemies directly or through the channel of its allies, provide cover for its illegal activities or to its terrorist friends who would be able to operate with impunity, and blackmail its neighbors or the international community.

Some foresee that Iran's neighbors and enemies⁴⁶⁶ would obtain or develop their own nuclear capabilities, or simply purchase those from third countries, were Iran to obtain such weapons.⁴⁶⁷ This argument would have states such as Turkey, Egypt or Saudi Arabia⁴⁶⁸ chose to obtain nuclear weapons in order to

⁴⁶⁵Dore Gold, "Understanding the Current State of the Iranian Nuclear Challenge", THE JERUSALEM CENTER FOR PUBLIC AFFAIRS, No. 595, May-June 2013, available at: <http://jcpa.org/article/understanding-the-current-state-of-the-iranian-nuclear-challenge/>: "*Iran is not a status quo power. A few years after he assumed the position of Supreme Leader of Iran, Ayatollah Ali Khamenei gave a revealing interview to the Iranian daily Ressalat, in which he asked a rhetorical question: 'Do we look to preserve the integrity of our land, or do we look to expansion.' He then answered himself, saying: 'We must definitely look to expansion.' This world view is still sustained to this day. Khamenei's senior adviser on military affairs, Major General Yahya Rahim Safavi, who was the previous commander of the Revolutionary Guards, described Iran in 2013 as "the regional superpower" in the Middle East.*"

⁴⁶⁶ Israel is also rumored to have been possessing nuclear weapons for several decades. Israel's alleged possession of nuclear weapons has not led its neighbors to develop nuclear weapons. This argument could be made by some to assert that this would also be the case with regards to Iran.

⁴⁶⁷Avner Golov and Amos Yadlin, "A Nuclear Iran: The Spur to a Regional Arms Race?", INSTITUTE FOR NATIONAL SECURITY STUDIES, April 5, 2013 available at: <http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=162351&tabid=1454238763&contextid774=162351&contextid775=162349>: "*However, Saudi Arabia also has alternatives to its own technological capabilities. If the Saudi regime decides to achieve military nuclear capability, it can simply purchase it. The royal house's close connections with the regime in Pakistan have prompted a number of reports on Saudi involvement in funding Pakistan's nuclear program. Saudi Arabia can take advantage of these connections in order to purchase ready-made weapons.*"

⁴⁶⁸Con Coughlin, "Saudi Arabia Throws Down a Gauntlet by Targeting Missiles at Iran and Israel", THE TELEGRAPH, July 11, 2013, available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/10173776/Saudi-Arabia-throws-down-a-gauntlet-by-targeting-missiles-at-Iran-and-Israel.html> "*The disengagement of President Barack Obama's America from the Middle East has forced the kingdom to square up to Iran and Israel [...]The fact that the Saudis find it necessary to point missiles at Israel is itself an*

even out the actual or perceived imbalance vis-à-vis Iran.⁴⁶⁹ While these states could decide to acquire weapons, some commentators have also expressed the idea that a Middle East arms race is unlikely to occur.⁴⁷⁰

Furthermore, military doctrines such as deterrence or containment would possibly show limited results when used against Iran. In order to deter an enemy, that enemy needs to be one that responds to deterrence in that it is deterred from attacking. Deterrence with regards to Iran would mean that once Iran possesses nuclear weapons, it would realize that using them or threatening to use them, in any way, would expose it to nuclear reprisals.⁴⁷¹

alarming indictment of the Obama administration's decision to turn its back on an erstwhile ally. If America were fully engaged in taking care of its allies, then there would be no need for the Saudis to target Israel. After all, as the recent WikiLeaks disclosures revealed, the Saudis share the same strategic objective as Israel: persuading the US to launch military action to destroy Iran's nuclear program – or, as one Saudi diplomat elegantly put it, to “cut off the head of the snake”. But with the Obama administration absent, the Saudis believe they have no option but to defend themselves against potential Israeli aggression.”

⁴⁶⁹Chemi Shalev, “*Denis Ross: Saudi King Vowed to Obtain Nuclear Bomb after Iran*”, HAARETZ, May 30, 2012 available at: <http://www.haaretz.com/news/diplomacy-defense/dennis-ross-saudi-king-vowed-to-obtain-nuclear-bomb-after-iran-1.433294> : “*If they get nuclear weapons, we will get nuclear weapons,” Abdullah told Ross during a meeting between the two in April 2009. Ross said he responded to the King's assertion with a lengthy appeal against nuclear proliferation, but after hearing him out, the king responded by repeating the same line: “If they get nuclear weapons, we will get nuclear weapons.”*”

⁴⁷⁰Steven A. Cook, “*Don't Fear a Nuclear Arms Race in the Middle East*”, FOREIGN POLICY, April 2, 2012 available at: http://www.foreignpolicy.com/articles/2012/04/02/don_t_fear_a_nuclear_arms_race?page=0,1 : “*Despite its flimsiness, it is hard to ignore the utility of the Middle East's nuclear dominoes theory. For those who advocate a preventive military strike on Iran, it provides a sweeping geopolitical rationale for a dangerous operation. But the evidence doesn't bear this argument out: If Washington decides it has no other option than an attack, it should do so because Iran is a threat in its own right, and not because it believes it will thwart inevitable proliferation in places like Turkey, Egypt, and Saudi Arabia. It won't, for the simple reason that there is no reason to believe these countries represent a proliferation risk in the first place.*”

⁴⁷¹David Slungaard, “*Deterring Iran – The Best Option?*”, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, March 27, 2012 available at: <http://csis.org/blog/deterring-iran-best-option>: “*As a concept, nuclear deterrence was first employed following the end of the U.S. nuclear monopoly over the Soviet Union. In its most basic construction, nuclear deterrence rests on one*

A second fundamental point that is argued by some is whether Iran can be successfully deterred from nuclear aggression. If one looks back at recent 20th Century history, one could assume that deterrence could work with Iran as it had worked with the Soviet Union.⁴⁷² Applying this strategy towards Iran could prove successful as it did with the Soviet Union. Some have argued that Iran has fundamentalist Shiite Islamic leaders who strongly believe that life in the afterworld is just as real if not better than life in this world,⁴⁷³ and is the ultimate goal to be reached.⁴⁷⁴ They claim that this has to be placed in stark contrast to

state's ability to successfully influence the actions and thoughts of an adversary. Thomas Schelling defines deterrence as "a threat... intended to keep an adversary from doing something." A critical component of this strategy is threat credibility, or the perception that a party will follow through on its threat of nuclear force with 'unacceptable damage.'

⁴⁷²Ibid: "During the Cold War, nuclear weapons and the imagined threat of their use provided the strategic backdrop for U.S.-Soviet relations. The assurance of 'MAD' (Mutually Assured Destruction) was a principal driver of stability between the two states and helped to prevent the escalation of nuclear conflict. As Zakaria notes, "Then came nuclear weapons, and there has not been a war in between great powers since 1945 – the longest period of peace between great powers in history." However, reliance on deterrent strategies also contributed to numerous crises (e.g. the Cuban Missile Crisis) as well as motivating military adventurism in the form of low-level proxy conflicts (see, Korea, Afghanistan, and the Kargil crisis). Indeed, the combined effort in balancing effective deterrent practices nearly led to full-scale tragedy on several occasions. Prioritizing nuclear deterrence also catalyzed an arms race between the Soviet Union and the U.S. that led to the continuous introduction of new arms technologies with increasing lethality. The result has been a massive nuclear arms complex which still exists today."

⁴⁷³ "Is Iran Suicidal or Deterrable?" THE ECONOMIST, November 14th, 2007 available at: <http://www.economist.com/blogs/democracyinamerica/2007/11/is-iran-suicidal-or-deterrable> : "We do not worship Iran, we worship Allah. For patriotism is another name for paganism. I say let this land [Iran] burn. I say let this land go up in smoke, provided Islam emerges triumphant in the rest of the world." (Statement from the Ayatollah Khomeini.)

⁴⁷⁴ MOHAMMAD ALI AMIR-MOEZZI, "ISLAM IN IRAN VII. THE CONCEPT OF MAHDI IN TWELVER SHI'ISM", Encyclopedia Iranica, 2012 (2007) available at: <http://www.iranicaonline.org/articles/islam-in-iran-vii-the-concept-of-mahdi-in-twelver-shiism>. "The end of time and rising of the Mahdi [...] The "end of time" or, in other words, the date of the final advent of the Hidden Imam, is unknown and believers are urged to await deliverance (*faraj*) patiently and piously. The future coming of the Savior is the most frequently cited subject in predictions made by the Prophet, Fāṭema, and the Imams: entire lengthy chapters are dedicated to the topic in the sources. This coming is heralded by a number of signs (*alāmāt*). The universal signs are the widespread invasion of the earth by Evil, the overcoming of knowledge by ignorance, and the loss of a sense of the sacred and all that links man to God and his neighbors. These, in some measure, require the manifestation

Soviet atheism where life in this world was all there really was. Furthermore, for Iran's "Twelve" Shiites, nuclear war might actually be something to be actively pursued in order to reveal the coming of days.⁴⁷⁵ Several authorities hold that chaos and war are perceived by some in Iran as positive events that will precipitate the coming of the *Mahdi*. According to these authorities, this would be the reason why nuclear war is desirable⁴⁷⁶, consequently invalidating deterrence as a strategy against Iran.⁴⁷⁷

(zohur) and the rising (koruj, qiām) of the Qā'em, or else humanity will be overwhelmed by darkness. [...] The Mahdi thus becomes manifest, all the while having miraculously maintained his youth. He fights and definitively uproots Evil and pervasive ignorance, re-establishing the world to its original pure state (Amir-Moezzi, 2000, passim). [...] The Savior will thus not only re-establish Islam, but all religions, to their purity and original integrity, making "submission to God" (Ar. eslām) the universal religion. He will also bring wisdom to mankind by revealing the esoteric secrets of sacred Scriptures (Amir-Moezzi, 1992, pt. IV-3). In this final battle against the forces of Evil, the Qā'em is obviously not alone. First, he will be accompanied by certain important characters from the sacred history of humanity; thus, according to different hadiths one finds various prophets of the past such as Jesus and the Prophet Moḥammad, and various Imams [...] The Savior will no doubt triumph, and the entire world will be brought to submission. Forces of injustice and ignorance will once and for all be exterminated, the earth embellished with justice and wisdom, and humanity revived by knowledge. The Mahdi thus prepares the world for the ultimate trial of the final resurrection of the Last Judgment. According to some traditions, he will reign upon the earth for some time (7, 9, 19 . . . years), after which occurs the death of all humanity just prior to the Judgment."

⁴⁷⁵DORE GOLD, THE RISE OF NUCLEAR IRAN: HOW TEHRAN DEFIES THE WEST (Regnery Publishing, Inc.) (2009) at p. 212: "On another occasion he said [Ahmadinejad] that it was his mission to hand over Iran to the Mahdi at the end of his presidency. He completely rejected the view of his critics, who said that the arrival of the Mahdi was a matter for the distant future: 'It is very bad to say that the imam will not emerge for another few hundred years; who are you to say that?' Second, under conditions of global conflict and even chaos, the Mahdi's arrival can be brought forward. For example, in a meeting with French Foreign Minister Philippe Douste-Blazy and two other EU foreign ministers in New York on September 15, 2005, Ahmadinejad shifted the focus of their conversation unexpectedly and asked the European diplomats: 'Do you know why we should wish for chaos at any price?' He then answered his own rhetorical question: 'Because after chaos, we can see the greatness of Allah'."

⁴⁷⁶Bernard Lewis, a world renowned historian on the Middle-East interjects the following: "Particularly alarming is the apocalyptic mood, which we see in Iran now. This is something which Jews in particular should be able to understand very well. The messiah is coming. There is a well-known scenario of the course of events, the battle of Gog and Magog and so on and so forth. There is a final struggle ending with the final victory. Muslims generally believe that one can

After having considered the above lines, what solutions could be offered under the current legal regime to address the current Iranian nuclear issue? One could start by addressing whether self-defense arguments can be successfully made in order to prevent Iran from developing or acquiring nuclear weapons.

International law forbids the use of force or the threat to use force between states: *“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”*⁴⁷⁸

This Charter article would consequently forbid any use of armed force against Iran, making any use of force or threat of force an act of aggression which is illegal. As we know, the UN Charter recognizes that states possess an *“inherent*

somehow expedite the process. I have no doubt at all, and my Iranian friends and informants are unanimous on this, that Ahmadinejad means what he says, and that this is not, as some people have suggested, a trick or device. He really means it, he really believes it and that makes him all the more dangerous. MAD, mutual assured destruction, [was effective] right through the Cold War. Both sides had nuclear weapons. Neither side used them, because both sides knew the other would retaliate in kind. This will not work with a religious fanatic. For him, mutual assured destruction is not a deterrent, it is an inducement. We know already that they do not give a damn about killing their own people in great numbers. We have seen it again and again. In the final scenario, and this applies all the more strongly if they kill large numbers of their own people, they are doing them a favor. They are giving them a quick free pass to heaven and all its delights, the divine brothel in the skies. I find all that very alarming. We turn now to the encouraging signs, the good news, such as it is. I would put it at two levels. One is that a number of Arab governments are coming to the conclusion that Israel is not their most serious problem and not their greatest danger.” Tovah Lazaroff & David Horovitz, *“The Iranian do not Expect to be Attacked”*, THE JERUSALEM POST, January 31, 2007 available at: <http://www.jpost.com/Features/The-Iranians-do-not-expect-to-be-attacked>.

⁴⁷⁷Former Iranian President Rafsanjani summarized the implications of a possible Israeli strategy of deterrence in the following statement: *“If a day comes when the world of Islam is duly equipped with the arms Israel has in possession, the... application of an atomic bomb would not leave anything in Israel, but the same thing would just produce damages in the Muslim world.”* Yaakov Lappin, *“Eight Reasons why Containment is not an Option with Iran”*, THE JEWISH PRESS, September 4, 2012 available at: <http://www.jewishpress.com/indepth/opinions/eight-reasons-why-containment-is-not-an-option-with-iran/2012/09/04/>

⁴⁷⁸ United Nations Charter Article 2 (4) available at: <http://www.un.org/en/documents/charter/chapter1.shtml>.

right of individual or collective self-defense” in Article 51 of the Charter.⁴⁷⁹ However, when can a state or states invoke their inherent right? Article 51 continues by stating that this “*inherent right of individual or collective self-defense*” arises if “*an armed attack occurs against a Member of the United Nations*”.⁴⁸⁰ The literal meaning of Article 51 of the Charter would condition any act of self-defense by one state to an armed attack by another state.⁴⁸¹ Such a reading would forbid any type of anticipatory self-defense,⁴⁸² were it to be preemptive or preventive. A different reading of Article 51, recognizes that states do not need to wait to receive the first blow before having recourse to their inherent right of self-defense. This interpretation of Article 51 is consistent with current state practice and has been part of customary international law since the early 19th Century with the *Caroline* case. The *Caroline* case defined under which circumstances preemptive self-defense could be used.⁴⁸³

⁴⁷⁹ United Nations Charter Article 51 available at: <http://www.un.org/en/documents/charter/chapter7.shtml>.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Military and Paramilitary Activities in and against Nicaragua*, I. C. J. REPORTS 1986, p. 117, paragraph. 249. Available at: <http://www.icj-cij.org/docket/files/70/6503.pdf> “*On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defense, a use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 21 1 above), produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.*”

⁴⁸² Yaniv Roznai, “*Let the Caroline Sink! Assessing the Legality of a Possible Israeli Attack on Iranian Nuclear Facilities and Why the Traditional Self-Defense Formula is Incompatible with the Nuclear Age*”, 18 CAL. INT. L.J. 18, 2, 24 (2010).

⁴⁸³ 29 B.F.S.P., p. 1129 at p 1138

Under the *Caroline* standard, a preemptive action could be legitimate if the action undertaken by the defending party is taken immediately before the attack by the aggressor. Furthermore, the defending party needs to show that the preemptive action is necessary to prevent the harm possibly done by the attacker, and that the actions undertaken are proportionate to the threat.⁴⁸⁴ The imminence standard addressed in the *Caroline* case was defined as: “A necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.”⁴⁸⁵ Under this standard, any strike against Iran would have to take place within a short period of time before an alleged Iranian attack in order to be legitimate. In our case, the *Caroline* standard would not help us with regards to a preventive strike on Iran because Iran does not pose an imminent threat of nuclear attack against another state.⁴⁸⁶ Preventive actions are inherently

⁴⁸⁴ Ibid. “A necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep in board, killing some and wounding others, and then towing her into the current, above the cataract, setting her on fire, and careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed.”

⁴⁸⁵ Ibid.

⁴⁸⁶ Tabassum Zakaria and Mark Hosenball, “Special Report: Intel Shows Iran Nuclear Threat not Imminent”, Reuters, March 23, 2012 available at: <http://www.reuters.com/article/2012/03/23/us-iran-usa-nuclear-idUSBRE82M0G020120323> : “The United States, European allies and even Israel generally agree on three things about Iran’s nuclear program: Tehran does not have a bomb, has not decided to build one, and is probably years away from having a deliverable nuclear warhead [...] There are also blind spots in U.S. and allied agencies’ knowledge. A crucial

different from preemptive actions in that they do not seek to address an immediate threat, but one that develops with a certain time. Any strike that would take place before Iran poses an immediate threat would consequently be considered as preventive and possibly illegal according to the *Caroline* immediacy standard.

Such a preventive strike against Iran's nuclear sites would still likely be deemed illegal when placed in comparison with more current state practice. For instance, the Security Council implicitly recognized a right to preemptive action after the 1967 Six Day War⁴⁸⁷ when it failed to condemn Israel for striking first,⁴⁸⁸ responding to a multi-fronted attack which was about to take place. However the facts of the 1967 war could not lend themselves to the type of preventive action states would now consider against Iran. Were Iran to be about to attack a nation with its conventional or unconventional forces, a state or states would likely be able to legally preempt its attack. This would imply that states wishing to defend themselves from a WMD attack from Iran would need to know with exactitude the

unknown is the intentions of Iran's Supreme Leader, Ayatollah Ali Khamenei. Another question is exactly how much progress Iran made in designing a warhead before mothballing its program. The allies disagree on how fast Iran is progressing toward bomb-building ability: the U.S. thinks progress is relatively slow; the Europeans and Israelis believe it's faster."

⁴⁸⁷ United Nations Security Council Resolution 242, November 27, 1967 available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/240/94/IMG/NR024094.pdf?OpenElement>

⁴⁸⁸ "This was a reversal of the USSR's traditional emphasis on the Security Council and was probably based on the expectation that the assembly would prove a more sympathetic vehicle for propaganda purposes. (On 14 June the Security Council failed to adopt a Soviet draft resolution condemning Israel and demanding that she withdraw her troops behind the armistice line." Central Intelligence Agency, Directorate of Intelligence, Intelligence Report: "Soviet Policy and the 1967 Arab-Israeli War", March 16, 1970, p. 24 available at: http://www.foia.cia.gov/sites/default/files/document_conversions/14/caesar-50.pdf

time of deployment of its nuclear missiles, their fuelling and so forth in order to preempt the attack. While such a preemptive strike would likely be legal, one could question whether this would leave enough time for the preempting party to preempt the attack.

More recent state practice could provide a basis for preventive force against Iran, however at this time it remains hard to tell whether such force would be recognized as legal by the international community. One could argue that the 1981 Osirak strike, combined with the 1991 Iraqi campaign might provide a reasonable ground for states to take preventive measures against Iran.⁴⁸⁹ The 1981 Israeli strike was widely condemned by the international community.⁴⁹⁰ However some have held that but for the 1981 preventive Israeli strike, Saddam Hussein's regime would have been allowed to continue to violate Kuwait's sovereignty – and maybe other states' – when it invaded Kuwait in 1990 due to possible threats of nuclear retaliation. While the Osirak strike was condemned by the UN Security Council⁴⁹¹, Israel was thanked ten years later by the United States which recognized that the coalition's action against Iraq would have been

⁴⁸⁹ Major General David Ivry, *"The Attack on the Osirak Nuclear Reactor – Looking Back 21 Years Later," Israel's Strike Against the Iraqi Nuclear Reactor 7 June, 1981*, Jerusalem: Menachem Begin Heritage Center: 2003, 35. Available at: http://www.jewishvirtuallibrary.org/jsourc/History/osirak1.html#_ftn20 retrieved on December 24, 2010.

⁴⁹⁰ United Nations Resolution 487, June 19, 1981, available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/418/74/IMG/NR041874.pdf?OpenElement>

⁴⁹¹ Ibid.

far more complicated if not impossible had Iraq possessed nuclear weapons.⁴⁹² Once again, every situation is different and the case against Iran in the 21st Century is not necessarily that of Iraq of the early 1990s. Another more recent preventive strike on which states could rely upon in order to launch a preventive action could be the 2007 Israeli strike on a Syrian nuclear reactor built by the North Koreans and financed by Iran.⁴⁹³ Israel was not condemned in the international arena, the legality of the bombing remaining an open question. One could nonetheless wonder, after having considered the recent and repeated uses of chemical weapons in Syria⁴⁹⁴, whether Israel's preventive strike in 2007 actions avoided the use of nuclear or radioactive weapons in Syria.

⁴⁹² Louis Rene Beres, Tsiddon-Chatto, Col. (res.) Yoash: *"Reconsidering Israel's Destruction of Iraq's Osirak Nuclear Reactor,"* TEMPLE INTERNATIONAL AND COMPARITIVE LAW JOURNAL 9 (2), 1995. Reprinted in *"Israel's Strike Against the Iraqi Nuclear Reactor 7 June, 1981,"* Jerusalem: Menachem Begin Heritage Center: 2003, p. 60 : *"Israel's citizens, together with Jews and Arabs, American, and other coalition soldiers who fought in the Gulf War may owe their lives to Israel's courage, skill, and foresight in June 1981. Had it not been for the brilliant raid at Osirak, Saddam's forces might have been equipped with atomic warheads in 1991. Ironically, the Saudis, too, are in Jerusalem's debt. Had it not been for Prime Minister Begin's resolve to protect the Israeli people in 1981, Iraq's SCUDs falling on Saudi Arabia might have spawned immense casualties and lethal irradiation."*

⁴⁹³ *"Report: Iran Financed Syrian Nuke Plans – Tip from Defector said to Lead to Israeli Strike on Suspected Reactor in '07,"* THE ASSOCIATED PRESS, March 19, 2009 available at: http://www.nbcnews.com/id/29777355/ns/world_news-mideast_n_africa/t/report-iran-financed-syrian-nuke-plans/#.Uhvng9l6BfY. *"Ali Reza Asghari, a retired general in Iran's elite Revolutionary Guards and a former deputy defense minister, "changed sides" in February 2007 and provided considerable information to the West on Iran's own nuclear program, said the article, written by Hans Ruehle, former chief of the planning staff of the German Defense Ministry. 'The biggest surprise, however, was his assertion that Iran was financing a secret nuclear project of Syria and North Korea," he said. "No one in the American intelligence scene had heard anything of it. And the Israelis who were immediately informed also were completely unaware'."*

⁴⁹⁴ Michael R. Gordon, Alan Cowell & Rick Gladstone, *"Kerry Accuses Syria of Chemical Weapons Attack,"* THE NEW YORK TIMES, August 27, 2013, available at: http://www.nytimes.com/2013/08/27/world/middleeast/syria-assad.html?pagewanted=all&_r=0 : *'Secretary of State John Kerry said Monday that the use of chemical weapons in attacks on civilians in Syria last week was undeniable and that the Obama administration would hold the Syrian government accountable for a "moral obscenity" that had shocked the world's conscience. [...] In an interview with the Russian newspaper Izvestia, published on Monday, Mr. Assad said*

Other legal recourses are available in order to use force against Iran, however these will likely fail. Iran is a state party to the Nuclear non-Proliferation Treaty (NPT) and as such has to abide by that treaty's rules. Unfortunately Iran has repeatedly failed to abide by its treaty commitments (more specifically the safeguards agreement).⁴⁹⁵ These instances of non-compliance are reported by the IAEA to the UN General Assembly and to the Security Council if the non-compliance involves security aspects that ought to be addressed by the Security Council.⁴⁹⁶ Accordingly, the IAEA reported to the Security Council Iran's instances of non-compliance with the safeguards agreement. The Council did adopt a series of binding Resolutions under Articles 40⁴⁹⁷ and 41⁴⁹⁸ of Chapter

such accusations were illogical and an "outrage against common sense." He warned the United States that military intervention in Syria would bring 'failure just like in all the previous wars they waged, starting with Vietnam and up to the present day.' Mr. Assad's choice of a Russian newspaper to air his views seemed to reflect Moscow's strong support for the Syrian leader after last week's attacks."

⁴⁹⁵ The IAEA found that: "Iran's many failures and breaches of its obligations to comply with its NPT Safeguards Agreement, as detailed in GOV/2003/75 [a November 2003 report from El Baradei], constitute non compliance in the context of Article XII.C of the Agency's Statute [...] that the history of concealment of Iran's nuclear activities referred to in the Director General's report [GOV/2003/75], the nature of these activities, issues brought to light in the course of the Agency's verification of declarations made by Iran since September 2002 and the resulting absence of confidence that Iran's nuclear program is exclusively for peaceful purposes have given rise to questions that are within the competence of the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security." IAEA Board Resolution (GOV/2005/77), September 24, 2005 available at: <http://www.fas.org/sgp/crs/nuke/R40094.pdf> at p. 8.

⁴⁹⁶ IAEA Statute, Article III (B) (4) available at: <http://www.iaea.org/About/statute.html#A1.12> : "[the IAEA shall] Submit reports on its activities annually to the General Assembly of the United Nations and, when appropriate, to the Security Council: if in connection with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security, and may also take the measures open to it under this Statute, including those provided in paragraph C of Article XII."

⁴⁹⁷ UN Security Council Resolution 1696, July 31, 2006, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/450/22/PDF/N0645022.pdf?OpenElement>

VII. No Resolutions were adopted under Article 42, which would have authorized the use of force.⁴⁹⁹ The Iranian nuclear dossier is a highly controversial one at the Security Council due to diverging positions between world powers. The United States for instance argues that Iran has violated the NPT⁵⁰⁰, while Russia holds the contrary.⁵⁰¹

A different path one could explore in order to justify the use of armed force against Iran would be to consider whether it's support of terrorist entities such as

⁴⁹⁸ UN Security Council Resolution 1737, December 27, 2006, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/681/42/PDF/N0668142.pdf?OpenElement>; Resolution 1747, March 27, 2007, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/281/40/PDF/N0728140.pdf?OpenElement>; Resolution 1803, March 3, 2008, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/257/81/PDF/N0825781.pdf?OpenElement> and Resolution 1929, June 9, 2010, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/396/79/PDF/N1039679.pdf?OpenElement>.

⁴⁹⁹ UN Charter, Article 42 available at: <http://www.un.org/en/documents/charter/chapter7.shtml> “*should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.*”

⁵⁰⁰“*The breadth of Iran’s nuclear development efforts, the secrecy and deceptions with which they have been conducted for nearly 20 years, its redundant and surreptitious procurement channels, Iran’s persistent failure to comply with its obligations to report to the IAEA and to apply safeguards to such activities, and the lack of a reasonable economic justification for this program leads us to conclude that Iran is pursuing an effort to manufacture nuclear weapons, and has sought and received assistance in this effort in violation of Article II of the NPT.*” *Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments*, DEPARTMENT OF STATE, August 2005, available at: <http://www.state.gov/documents/organization/52113.pdf>.

⁵⁰¹ “*Iran Committed to NPT Obligations : Putin*”, PRESS TV, June 12, 2013, available at: <http://www.presstv.com/detail/2013/06/12/308500/irans-nuclear-program-peaceful-russia/> : “In an interview with Russia Today on Tuesday, Putin reiterated the peaceful nature of Iran’s nuclear energy program, citing a recent report by the International Atomic Energy Agency (IAEA). ‘I [Putin] have no doubt that Iran is adhering to the rules in this area. Because there is no proof of the opposite.’”

Hezbollah or Hamas⁵⁰² could provide lawful grounds for a state victim of such attacks to use force against Iran.⁵⁰³ Several Security Council Resolutions exist that condemn the support or sponsor of terrorist organizations.⁵⁰⁴ The Security Council affirmed in Resolution 1377⁵⁰⁵ that international terrorism constitutes “one of the most serious threats to international peace and security in the twenty-first century”.⁵⁰⁶ Any use of force against Iran based on these grounds would require the Council to authorize force, arguing that Iran’s direct or indirect support, sponsorship or training of terrorists consisted of an armed attack which

⁵⁰²Keith A. Petty, “Veiled Impunity: Iran’s Use of Non-State Armed Groups”, 36 DENV. J. INT’L L. & POL’Y 191, 191-192 (2008): “Each of these groups - Hezbollah, Mahdi’s Army, and Hamas - is a non-state armed group that is financially, politically, and ideologically supported by Iran. As such, their actions may be attributed to Iran. Iranian support of non-state armed groups is not limited to the three groups listed above. In fact, Iran provides support to groups all over the world in what has become a cornerstone of its foreign policy. By supporting these groups, Iran seeks to accomplish multiple objectives, including: increasing Iranian influence in the Middle East while limiting Sunni Arab influence, destroying Israel, and limiting or eliminating U.S. influence in the region.”

⁵⁰³ Orde F. Kittrie, “A Nuclear Iran: The Legal Implications of a Pre-Emptive National Security Strategy: Emboldened By Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law”, 57 SYRACUSE L. REV. 519, 523 (2007): “Iranian violations of international law continued during the 1990s. In Argentina in March 1992, Hezbollah, in coordination with the Iranian Embassy, bombed the Israeli Embassy, killing twenty-nine. This attack violated the Israeli diplomats’ protections under international diplomatic law and Argentina’s rights under Article 2(4) of the U.N. Charter. 36 Article 2(4)’s applicability to such acts of terrorism was confirmed that very same month by Security Council Resolution, which stated as follows in the course of condemning the Libyan bombing of Pan Am 103: ‘Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force. The Security Council has yet to condemn or sanction Iran for its role in destroying Israel’s embassy in Buenos Aires.’”

⁵⁰⁴ For instance, Security Council Resolution 1373 provides that states “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists”. Resolution available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

⁵⁰⁵UN Security Council Resolution 1377 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/633/01/PDF/N0163301.pdf?OpenElement>.

⁵⁰⁶This was reaffirmed in Security Council Resolution 1624, October 8, 2004, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement>.

is a material breach of several Council Resolutions on the prohibition of supporting terrorism, including Resolution 1373. Resolution 1373 was adopted by the Security Council under Chapter VII of the UN Charter. The Council, upon finding that Iran does support terrorist groups such as Hamas or Hezbollah, or engages in terrorist activities itself could decide whether or not it wants to go further in addressing this issue by adopting a specific Resolution demanding that Iran cease its support under either Article 41 (non-forceful measures) or Article 42, which would allow the use of force.

As mentioned above, Iranian leaders have clearly and loudly expressed their distaste against the State of Israel (the Zionist entity) identifying it as a cancer⁵⁰⁷, and Jews, calling for their removal.⁵⁰⁸ These comments come in addition to

⁵⁰⁷ Such statements can be placed in contrast with other statements given by Nazi leaders which similarly compare Jews to a disease: *“And here is one thing that perhaps distinguishes us from you [Austrians] as far as our program is concerned, although it is very much in the spirit of things: our attitude to the Jewish problem. For us, this is not a problem you can turn a blind eye to-one to be solved by small concessions. For us, it is a problem of whether our nation can ever recover its health, whether the Jewish spirit can ever really be eradicated. Don't be misled into thinking you can fight a disease without killing the carrier, without destroying the bacillus. Don't think you can fight racial tuberculosis without taking care to rid the nation of the carrier of that racial tuberculosis. This Jewish contamination will not subside, this poisoning of the nation will not end, until the carrier himself, the Jew, has been banished from our midst.”* Adolf Hitler, Speech delivered on August 7-8, 1920 in Salzburg at a National-Socialist meeting. See generally D. IRVING, THE WAR PATH: HITLER'S GERMANY 1933-1939 (Papermac 1978) at p. XXI.

⁵⁰⁸ Lee Moran, “ ‘Kill All Jews and Annihilate Israel’ Iran’s Ayatollah Lays Out Legal and Religious Justification for Attack”, THE DAILY MAIL, February 8, 2012, available at: <http://www.dailymail.co.uk/news/article-2097252/Kill-Jews-annihilate-Israel-Irans-supreme-leader-lays-legal-religious-justification-attack.html> : *“A website with close ties to Iran's supreme leader Ayatollah Ali Khamenei has outlined why it would be acceptable to kill all Jews and annihilate Israel. Conservative site Alef has published a doctrine detailing why the destruction of the nation and the slaughter of all its people would be legally and morally justified. The doctrine, first reported by WND.com, warned that the chance to remove the 'corrupting material' of Israel must not be lost - and that it would only take nine minutes to wipe it out. And it said it was a 'jurisprudential justification' for Iran's Islamic government to then take the helm. The article, written by Khamenei's strategy specialist Alireza Forghani, is now being run on most state owned conservative sites, indicating it has the regime's support. The crux of dossier said Iran would be*

others by the former President of Iran denying the Holocaust as a myth⁵⁰⁹ invented by Jews⁵¹⁰ in order to unduly obtain concessions at the expense of others. Other senior leaders, including President Rouhani, have more recently recognized the Holocaust.⁵¹¹ However, such calls from Iranian leaders to remove Jews would likely be prohibited under the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (the Convention) to which it is a signatory.⁵¹² The Convention does not target states but individuals, meaning that any indictment by a competent court⁵¹³ would have to target physical persons

justified in launching a pre-emptive strike against Israel because of the threat the Jewish state's leaders are posing against its own nuclear facilities."

⁵⁰⁹Robert Tait and Luke Harding, "Iranian President Calls Holocaust a 'Myth' in live TV broadcast", THE GUARDIAN, December 14, 2005, available at: <http://www.theguardian.com/world/2005/dec/15/iran.israel>: "They have invented a myth that Jews were massacred and place this above God, religions and the prophets," he told an audience in the south-eastern city of Zahidan. "If someone were to deny the existence of God ... or prophets and religion, they would not bother him. However, if someone were to deny the myth of the Jews' massacre, all the Zionist mouthpieces and the governments subservient to the Zionists scream against the person as much as they can."

⁵¹⁰ Irwin Cotler, "The Human Rights Revolution and Counter-Revolution: A Dance of the Dialectic", 44 U.N.B. L.J. 357, 369 (1995): "The Holocaust denial movement, the cutting edge of anti-Semitism old and new as Bernie Vigod would put it, is not just an assault on Jewish memory and human dignity in its accusation that the Holocaust is a hoax, but it is an international criminal conspiracy to cover up the worst crimes in history. Here is the most tragic, bitter and ironic historiography of the Holocaust, a historiography in its ultimate Orwellian inversion. For we move from the genocide of the Jewish people to a denial that the genocide ever took place; then, in a classic Orwellian cover-up of an international conspiracy, the Holocaust denial movement whitewashes the crimes of the Nazis, as it excoriates the crimes of the Jews. It not only holds that the Holocaust was a hoax, but maligns the Jews for fabricating the hoax."

⁵¹¹ Mark Lander and Thomas Erdbrink, "Iran's Leader, Denouncing Holocaust, Stirs Dispute", September 25, 2013, THE NEW YORK TIMES, available at: <http://www.nytimes.com/2013/09/26/world/middleeast/for-irans-leader-time-is-not-yet-right-for-meeting-obama.html?pagewanted=all>

⁵¹²Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948 available at: [http://www.un.org/ga/search/view_doc.asp?symbol=a/res/260\(III\)](http://www.un.org/ga/search/view_doc.asp?symbol=a/res/260(III)).

⁵¹³Ibid. at Article VI: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

who responsible for such acts. The open threats by Iran against Jews and Israel could be violations of Article III⁵¹⁴ (b) (relative to the charge of conspiracy to commit genocide) and (c) (relative to the direct and public incitement to commit genocide). Under the Convention individuals such as Ayatollah Khomeini or former Presidents Rafsanjani⁵¹⁵ or Ahmadinejad could be indicted under these charges once the competent organ of the United Nations becomes seized with this matter.⁵¹⁶ While the Convention provides legal grounds to indict individuals that call the killing of a people, it does not provide legal grounds to use force against states in order to prevent such extermination. Threats of genocide made by high ranking Iranian officials also constitute a violation of Article 2(4) of the UN Charter as these threats support the use of force (use of nuclear weapons) against the territorial integrity of another nation. The Security Council has nonetheless not taken any sanctions against Iran for its calls to destroy Israel even though these statements were condemned by the Secretary General.⁵¹⁷

⁵¹⁴Ibid. 512 at Article III which states: “*The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity to in genocide.*”

⁵¹⁵Gregory S. Gordon, “*Redefining International Criminal Law: New Interpretations and New Solutions: Criminal Law: From Incitement to Indictment? Prosecuting Iran’s President for Advocating Israel’s Destruction and Piercing Together Incitement Law’s Emerging Analytical Framework*”, 98 J. CRIM, L. & CRIMINOLOGY 853, 859 (2008): “*Rafsanjani acted on his anti-Semitic rhetoric when he ordered the 1994 bombing of a Jewish community center in Buenos Aires that killed eighty-five people. In 2006, Argentina issued an indictment against him for his actions.*”

⁵¹⁶ Ibid. 512 at Article VIII: “*Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.*”

⁵¹⁷Kofi Annan, “*Annan Voices Dismay at Remarks about Israel Attributed to Iranian President*”, UN NEWS CENTRE, October 27, 2005, available at: <http://www.un.org/apps/news/story.asp?NewsID=16380&Cr=iran&Cr1=#.Uh6R49K2NfY>: “*Voicing dismay at remarks attributed to Iranian President Mahmoud Ahmadinejad reportedly calling for Israel to be wiped off the map, United Nations Secretary-General Kofi Annan today said the right*

Some political commentators on the other hand argue that Iran's vitriolic language towards Israel and Jews should not be taken at face value and consists of empty rhetoric⁵¹⁸ aimed at appeasing the Muslim world.⁵¹⁹

After having explored different avenues in order to determine whether force could be used against Iran, we can come to the conclusion that these avenues provide rather weak grounds for a lawful Israeli attack on Iran. The question of a possible preventive strike against Iran seems even more problematic, if not unlawful, since such a strike would not comply with the *Caroline* criteria or more recent accepted state practice. While Iran has made its intentions regarding Israel and the Middle East in general explicit, and is seeking to develop its nuclear weapons it would be noteworthy to see that the *Just War* theory could deem such a preventive strike as *just*.

of all States in the Middle East to live in peace will now top the agenda of his upcoming visit to Iran."

⁵¹⁸ "Iran's Empty and Damaging Rhetoric", THE GUARDIAN, October 27, 2005, available at: <http://www.theguardian.com/world/2005/oct/28/iran.israel> : "The appalling comments on Israel made by Iranian President Mahmoud Ahmadinejad (Israel should be wiped off map, October 27) are both empty rhetoric and highly damaging to the Palestinian cause". Statements of Dr. Nur Masalha, University of Surrey.

⁵¹⁹ "Iran's Anti-Israel Rhetoric Aimed at Arab Opinion", THE HUFFINGTON POST - INTER PRESS SERVICE, April 14, 2009, available at: http://www.huffingtonpost.com/2009/03/09/irans-anti-israel-rhetori_n_173305.html : "Serious Israeli and Iranian analysts of Iran's national security policy, however, have long viewed similar statements by Iranian leaders - and its assistance to Hamas and Hezbollah - as having nothing to do with ending the Israeli state, much less using military force to destroy it. The Iranian condemnation of Israel and embrace of the Palestinian cause, according to these analysts, have been largely a strategic ploy to turn Arab public opinion against the Sunni regimes' policies of hostility toward Iran."

Grotius defines two types of causes for wars; *just* ones which are fought mainly for “defense, recovery of property, and punishment” and *unjust* causes which are fought based on the “*desire for richer land, the desire for freedom on the part of a state in political subjection, or the wish to rule others against their will on the pretext that it is for their good.*”⁵²⁰ Grotius later adds that the use of armed force should only be exerted as a means of last resort after having exhausted other non-forceful means.⁵²¹ We could conclude from this that for Grotius, a war would be just if it was of a defensive nature and that the defending party had exhausted peaceful means first. Pufendorf follows in Grotius’ footsteps in that he confirms that resort to force should only be mandated once peaceful means of resolving the existing dispute have been exhausted.⁵²² A reasonable argument could be made based on Grotius’ definition of a *just war* that an Israeli preventive strike against Iran would be *just*, since a preventive action in this case would be solely defensive and that serious and substantial efforts have been made to resort to non-forceful means through the means of Security Council resolutions.

A stronger argument in furtherance of the *just* character of a possible Israeli preventive strike on Iran could be made if we were to rely on what Vattel calls a right to: “*prevent other nations from obstructing her preservation, her*

⁵²⁰HUGO GROTIUS, DE JURE BELLI AC PACIS, (A.C. Campbell trans., London, 1814) (1646), Bk. II, Ch. XXII, sections VIII-XII

⁵²¹Ibid. at Chapter XXIV, section IX,

⁵²²SAMUEL VON PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO, (Oxford: The Classics of International Law, 1934) (1672) at p. 1295.

*perfection, and happiness, - that is, to preserve herself from all injuries [...] It is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force an every honorable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.*⁵²³

Vattel's lines could provide a clear support for an Israeli preventive strike⁵²⁴ on Iran since he considers as *just* an "anticipation" of a state's machinations, which should be carried out when the evil can be safely prevented. He does note that such anticipation should not be based on "*vague and uncertain suspicions*" as this would constitute an unjust aggression. The *suspicions* in this case are very clear and hardly vague due to Iran's openness about its intentions. One could further argue that Iran's future possession of nuclear weapons constitutes that evil, mentioned by Vattel, which would no longer be prevented since the evil represented by these weapons is now in existence jeopardizing another nation.

The *Just War* theory in our case⁵²⁵ provides more flexibility than the current normative regime and offers Israel the possibility to take preventive

⁵²³EMMERICH DE VATTEL, LAW OF NATIONS, (Joseph Chitty Ed. 1883) (1758) at pp. 154-155.

⁵²⁴ Cornelius F. Murphy, Jr., "The Grotian Vision of World Order", 76 AM. J. INT'L. L. 477, 481 (1982).

⁵²⁵ John F. Coverdale, "An Introduction to the Just War Tradition", 16 PACE INT'L L. REV. 221 (Fall 2004).

strikes against Iran which would be deemed *just*, even though such strikes could likely be considered unlawful in the international arena. The *Just War* theory could provide the current international normative system an element of flexibility when considering the practice of some states to shield themselves behind allies and a restrictive legal system, which fails to address the case of “rogue states” seeking nuclear weapons in order to carry out their misdeeds.

III. GUIDELINES FOR NORMALIZING PREVENTIVE FORCE IN THE 21st CENTURY

The previous chapters mainly focused on how philosophers, politicians and lawyers interpreted justice and its relations to anticipatory self-defense. Part II

described the differences between preemptive and preventive self-defense giving examples of recent state practice, determining whether such uses of force were preemptive or preventive, and whether these were legal.

Part II concluded with the case of Iran asking whether a military strike against it, were it to be preemptive or preventive would be legal. Iran's development of nuclear weapons epitomizes the challenge created by unfriendly states that seek to develop unconventional weapons in order to threaten other states. Part III will start by describing what these unconventional weapons are, prior instances of use as well as the legal framework surrounding them, but also who the potential users could be. After having addressed these points, guidelines will be proposed in order to offer a solution concerning the possible use of preventive force by a state that feels threatened against another state which develops unconventional arms in order to use them in any way against the first state. These guidelines shall include a normative framework that will define when a state could use preventive force against a target state, and what conditions should be met in order to do so.

A. Instruments and Parties of the Threat

1. Defining the instruments of the threat – Weapons of Mass Destruction

We have often heard the word “WMD” in the press these past few years. However, the press did not specify really what these were or how they affected the environment with which they were brought in contact. It seems as though the word WMD was used and remains used as a “buzz” word that would describe some kind of apocalyptic weapon that would instantly wipe out entire nations and cities. As always, there is some truth in such categorical statements. Nonetheless a detailed analysis of such weapons proves that such “end of the world” statements are inaccurate and misleading.

There are three main categories of Weapons of Mass Destruction (WMD): Nuclear, Biological and Chemical weapons (NBC weapons). What should be recognized is the fact that WMDs do have specific characteristics uncommon to conventional weapons. Two major characteristics can be identified which are these weapons’ destructiveness and the imminence with which this destruction can be brought about.

Destructiveness

The first major characteristic regards a WMD’s unique ability to destroy and kill in magnitudes that were unseen, until the bombings of Hiroshima (13 KT) and Nagasaki (22KT). Nonetheless, these bombs caused a death toll of 90-166,000 people in Hiroshima and 60-80,000 in Nagasaki according to some

estimates.⁵²⁶ Nuclear weapons are perhaps the most destructive weapons. However biological and chemical weapons can similarly destroy life even if it may be to a lesser extent. One could recall the use of chemical weapons during World War I or during the Iran-Iraq war where it was alleged that close to 10,000 troops were killed in a single chemical weapons attack by Iraq in February 1986.⁵²⁷ Even if there has not been a recent offensive use of biological weapons, the 1979 Sverdlovsk accident witnessed the release of Anthrax spores. It was estimated that 70 people died after inhaling the anthrax emanating from the biological weapons manufacturing plant.⁵²⁸

Imminence

The second major characteristic of WMDs regards their imminence and ability to destroy. World War II witnessed of the rise of the use of planes to deliver explosive devices on the enemy. Bombs were thus at first dropped from bombers. This involved flying for several hours, usually under enemy fire for a part of the journey and then dropping bombs that would be scattered over large swaths of land. World War II also saw for the first time the use of rocket propelled

⁵²⁶ Radiation Effects Research Foundation, A COOPERATIVE JAPAN-US RESEARCH ORGANIZATION, available at: http://www.rerf.or.jp/general/qa_e/qa1.html

⁵²⁷ Other states have used chemical weapons such as Viet-Nam and Laos in Kampuchea in the 1970s : <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB61/Sverd21.pdf>

⁵²⁸ Defense Intelligence Agency cable available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB61/Sverd30.pdf> p. 9001381189

warheads. The Germans used V2 rockets to terrorize their enemies and especially the British people by launching them in British cities.

The V2 could fly at a speed of 3 545 miles per hour⁵²⁹, thus reducing the amount of time the warhead could be projected on the enemy. These V2 rockets could be programmed to hit their targets from their German base in a fraction of the time that regular bombers would need to deliver a similar strike on their target. The V2 rockets were not only an innovation for the Germans, but also as the symbol of bringing the battlefield to British cities. For the latter, the only option was to strike the V2 base before it could launch missiles, or sabotage it by other means such as bombing production factories.⁵³⁰

The Cold War led both antagonists and their respective military pacts to further develop missile capabilities in terms of speed, precision and payload. The Cold War saw the development of Inter-Continental Ballistic Missiles (ICMBs) such as the “Minuteman” (LGM-30) which had a speed of 15,000 miles per hour in its terminal phase. The current Minuteman III missile (LGM -30G) similarly travels at speeds of 15,000 miles⁵³¹ per hour but is additionally able to bear three warheads containing the W78 (335 kilotons) or W62 (170 kilotons) nuclear

⁵²⁹ <http://militaryhistory.about.com/od/artillerysiegeweapons/p/v2rocket.htm>

⁵³⁰ The V2 production factory of Peenemunde, essentially a slave camp where prisoners were worked to death in order to manufacture rockets, was bombed on August 25th, 1943. <http://www.globalsecurity.org/wmd/ops/peenemunde.htm>

⁵³¹ <http://www.af.mil/information/factsheets/factsheet.asp?id=113>

warheads.⁵³² These three warheads could target three different locations while in flight.

States on the other hand appear to have lost some of the exclusivity they had with regards to non-conventional weapons to non-state actors. Parallel entities have sought to produce and acquire WMDs. Most notably, here are a few recent cases of the use of biological and chemical weapons by non-state entities. On March, 20th 1995, the Japanese apocalyptic sect Aum Shinrikyo used Sarin gas (GB – a nerve gas) to terrorize the citizens of Tokyo.⁵³³ Sarin gas was simultaneously released in five different trains in Tokyo's subway system.⁵³⁴ Some individuals have also manufactured biological weapons in order to terrorize nations. For instance, shortly after the terrorist attacks of September 11, 2001, five anthrax filled letters were dispatched by regular mail to politicians and newscast companies.

A short technical description of each of these weapons' characteristics will prove helpful in understanding them and why they present challenges that are unmatched by conventional weapons. We shall start by reviewing the biological

⁵³² <http://nuclearweaponarchive.org/Usa/Weapons/Mmiii.html>

⁵³³ It should be noted that members of Aum Shinrikyo had already used chemical weapons (GB) on June 27th, 1994 against judges who were ruling on a case where Aum Shinrikyo was a party in order to resolve a real estate issues. Five individuals died and five hundred were injured by the release that day of sarin nerve gas. Olson KB., *Aum Shinrikyo: Once and Future Threat?*, CDC.GOV, August 1999, available from <http://wwwnc.cdc.gov/eid/article/5/4/99-0409.htm>

⁵³⁴ Ibid.

weapons before addressing chemical and nuclear weapons which present respectively higher “know-how” to produce, and complexities.

a. Biological Weapons:

i. Historical Perspective:

Biological warfare consists of the use of “*living organisms, or toxins produced by living organisms, as weapons against humans, animal or plants.*”⁵³⁵

Biological weapons could probably be the easiest weapon of the three to develop due to their relative inexpensiveness and ease to manufacture. Biological weapons have a history that go back thousands of years. Indeed, as far back as recorded history goes, it appears as though biological agents or poisons have been used for tactical or strategical gains. For example, Adrienne Mayor notes in her book “*Greek Fire, Poison Arrows and Scorpion Bombs: Biological and Chemical Weapons in the Ancient World*” various instances of use of biological agents as a method of warfare in Antiquity. For instance, she recounts how Hannibal in his fight against his enemies catapulted poisonous snakes on them.⁵³⁶

⁵³⁵ ERIC A. CRODDY AND JAMES J. WIRTZ (EDITORS), WEAPONS OF MASS DESTRUCTION: AN ENCYCLOPEDIA OF WORLDWIDE POLICY, TECHNOLOGY, AND HISTORY, VOLUME ONE, CHEMICAL AND BIOLOGICAL WEAPONS, (ABC-CLIO, 2005) at p. 50.

⁵³⁶ “Terrifying the enemy was the sole object of a catapulting incident in 207 BC, when the Romans hurled the head of the Cathaginian general Hasdrubal into the camp of his brother, Hannibal. Hasdrubal’s head probably carried nothing more contagious than lice (although lice can in fact carry typhus), but the act served to demoralize Hannibal, dashing his hopes of getting the reinforcements he needed to conquer Italy. Interestingly, Hannibal himself would

Even though catapulting venomous animals appears to be frightening at first for the individuals on the receiving end, it turns out to be child's play when placing such actions in contrast to what others have done. The Mongols on their part came up with an ingenious idea which consisted of catapulting "bubonic plague-ridden corpses" into their enemies' fortresses.⁵³⁷ Countless other occurrences of intentional use of biological agents have been recorded over the years. Nonetheless, it appears that the Mongols were the first innovators in the biological warfare field when they actively used contaminated bodies to infect their enemies. Other means of biological warfare included poisoning the drinking water used by an enemy's army or during the siege of a city.

One could recall how Alexander's army involuntarily poisoned themselves by drinking waters that had been polluted by its own soldiers who had died in them.⁵³⁸ On the other hand, the intentional poisoning of drinking water was also commonplace. This was the case for instance with regards to the siege of Kirrha where the leading general at the time (either Kleisthenes of Sicyon or Eurylochos) who poisoned the city's water with hellebore by introducing it in the

later use catapults to fling venomous vipers at a different enemy in Asia Minor.", ADRIENNE MAYOR, "GREEK FIRE, POISON ARROWS AND SCORPION BOMBS", (New York: Overlook Duckworth, 2003 at p. 119-120.

⁵³⁷ Ibid at p. 120. "One of the most oft-cited incidents in the early annals of biological warfare occurred in AD 1346. That year, the Mongols catapulted bubonic plague-ridden corpses of their own soldiers over the walls of Kaffa, a Genoese fortress on the Black Sea, thereby introducing the dreaded disease in Europe. This macabre incident occurred centuries before epidemiology was formally understood, but modern science shows that even if the cadavers themselves were not the main vector of flea-borne Black Plague, inhalation of airborne *Yersinia pestis* microbes remaining on the corpses or their clothing could cause the highly fatal respiratory form of the plague. To carry out an act of germ warfare like this, the Mongols only needed to know that proximity to corpses of people who had died of an epidemic would almost certainly lead to more deaths."

⁵³⁸ Ibid. at p. 100

city's water pipes. The city's inhabitants would then become so weakened that they would be unable to fight and resist the besieging army.⁵³⁹

These early examples of biological warfare give us a panoramic view of different uses and modes of production of biological weapons in their early stages. Moving fast forward to the present times, the development of biological weapons erupted mainly at the end of the 19th Century with the advent of the germ theory. The Japanese, during their invasion of China, were credited for the infection of Chuhsien residents with the bubonic plague by contaminating rice and delivering contaminated flies within the city in 1940.

⁵³⁹ Ibid. at p. 100-101. *"The earliest historically documented case of poisoning drinking water occurred in Greece during the First Sacred War. In about 590 BC, several Greek city-states created the Amphictionic League to protect the religious sanctuary of Delphi, the site of the famous Oracle of Apollo. In the First Sacred War, the League (led by Athens and Sicyon) attacked the strongly fortified city of Kirrha, which controlled the road from the Corinthian Gulf to Delphi. Kirrha had appropriated some of Apollo's sacred land and mistreated pilgrims to Delphi. According to the Athenian orator Aeschines (fourth century BC), the Amphictionic League consulted the Oracle of Apollo at Delphi about Kirrha's religious crimes. The Oracle responded that total war against the city was appropriate: Kirrha was to be completely destroyed and its territory laid waste. The League added a curse of their own, in the name of Apollo: the land should not produce crops, all the children should be monstrous, the livestock should also have unnatural offspring, and the entire "race should perish utterly." The biological disaster described in the curse evokes an eerie "nuclear winter" scene. Then, taking into their own hands Apollo's divine powers of sending sickness, the League destroyed the city of Kirrha by means of a biological stratagem. The event received a remarkable degree of attention from ancient historians. During the siege of Kirrha, someone "thought up a contrivance." Depending on whose account one reads, four different historical individuals were credited with variants of the plan. According to the military strategist Frontinus (writing in the first century AD), it was Kleisthenes of Sicyon, the commander of the siege, who "cut the water-pipes leading into the town. Then, when the townspeople were suffering from thirst, he turned on the water again, now poisoned with hellebore." The violent effects of the poison plant caused them to be "so weakened by diarrhea that Kleisthenes overcame them." In the account of Polyaeus (second century AD), "the besiegers found a hidden pipe carrying a great flow of spring water" into the city. Polyaeus says it was General Eurylochos who advised the allies "to collect a great quantity of hellebore from Anticyra and mix it with the water." Anticyra was a port east of Kirrha, where hellebore grew in great profusion. The Kirrhans "became violently sick to their stomachs and all law unable to move. The Amphictions took the city without opposition."*

The Cold War, as we all know, prompted a biological weapons race between the United States and the Soviet Union. The United States was said to have ended its offensive biological program in 1969, President Nixon later on taking the initiative to destroy American biological weapons stockpiles.⁵⁴⁰

On the other hand, such reciprocity was not observed on the Soviet Union's part which continued to produce biological weapons throughout its existence⁵⁴¹. It was not before the end of the Soviet Union that a more transparent overview of the genuine status of the Soviet Union's offensive biological weapons program was assessed. In a statement before the Joint Economic Committee in the US Congress on May 20, 1998, the former first deputy director of Biopreparat, Mr. Kenneth Alibek testified that the Soviet Biological Weapons program was quite extensive. It employed more than 60,000 people and possessed vast quantities of biological weapons stockpiles that included anthrax, glanders bacteria, tularemia bacteria and of course, like the Mongols; the bubonic plague! It appears that in that part of the world, the situation remains the same notwithstanding some efforts made early on by the Russians to destroy their program.⁵⁴²

⁵⁴⁰ JOSEPH CIRINCIONE, *DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION*, (Brookings Institution Press, 2002) at p. 48.

⁵⁴¹ In violation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Biological Weapons and on their Destruction or, in short the BWC.

⁵⁴² *"At its peak, the Soviet bacteriological weapon program supported massive quantities of dry-agent production annually, including; 1,500 metric tons of tularemia bacteria; 4,500 metric tons of anthrax; 1,500 metric tons of bubonic plague bacteria; and 2,000 metric tons of glanders bacteria. Former Russian President Yeltsin pledged to halt the development of offensive Biological Weapons capabilities in April 1992. Subsequently, Russia, the United States, and the United Kingdom agreed to a trilateral process of information sharing and*

ii. *Technical Aspects:*

A technical study of the preparation of biological weapons seems now to be in order so as to apprehend their development and different levels of lethality. Passed are the times when the Mongols (and others) catapulted plague-ridden bodies over the walls of enemy cities. Catapults are heavy machines that required several men to operate. Furthermore, handling diseased corpses would make the manning personnel prone to becoming contaminated with the agent. Lastly, catapulting corpses did not necessarily maximize the incapacitating effects of the biological agent. Indeed, bacteria, spores or viruses might not survive various factors such as heat or being hosted in a decomposing body and so forth.

Joseph Cirincione details in his book “Deadly Arsenals: Tracking Weapons of Mass Destruction” that there are mainly four different types of biological weapons. These agents include (1) bacterial agents, (2) Rickettsial agents, (3) viral agents and (4) biological toxins.⁵⁴³ The author not being an expert in biological weapons (or chemical or nuclear weapons for that matter), it would be wise to refer to Mr. Joseph Cirincione’s research and findings to describe these four different families of agents (*c.f.* end notes for a short description of these four types of biological agentsⁱⁱⁱ.)

mutual site visits to ensure the end of Russia’s illegitimate program. By 1994, however, Russia had stopped the exchange of on-site visits, closing numerous facilities to Western observers, which raised questions about the extent of Russia’s deactivation of the Soviet Biological Weapons complex”. Ibid. 540 at pp. 48-49.

⁵⁴³ Ibid. at p. 46.

In order to “weaponize” these four possible agents, one needs to adapt their current form into one that would favor their dispersion. That is to say one of these agents need to be transferred into a form that would maximize their destructive effects. This form also needs to be one where the agent would remain potent for a certain duration of time, dispersed over an area where enough contaminating particles of such an agent would be necessary to infect the targeted individual. In practical terms, this would mean that catapulting a plague-ridden corpse over a large field might not be as effective as catapulting one in a more confined area. The techniques having evolved since the times of the Mongols, these biological agents are now disseminated using aerosols where the agent consists of either a powder or fluid. The agent thus gains an airborne capacity it did not previously have.⁵⁴⁴ The process of transforming an agent from its natural form into a powder or fluid, and the ability of disseminating it in a way that it conserves its potency and lethality (or incapacitating effects) is the most complex part of the weaponization of a biological agent.

One should additionally note that each biological agent requires the inhaling (or other mode of contamination) of a sufficient number of contaminating particles and that this number of particles depends on the agent itself. For instance, whereas bubonic plague requires the inhaling of 100-500 organisms, the Ebola virus only requires the inhaling of 1-10 organisms.⁵⁴⁵

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid. at pp. 58-59.

The tables reproduced in the endnotes^{iv} illustrate various biological agents used in biological warfare describing their levels of lethality and the number of organisms and spores required to infect an individual.⁵⁴⁶

iii. International Agreements:

Over the years, two main international agreements have sought to normalize the research, development and use of biological agents in warfare. The first of these agreements is the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases and of Bacteriological Methods of Warfare, also known as the “Geneva Protocol”. The Geneva Protocol was signed on June 17, 1925 and was intended to ban both biological and chemical weapons from conflict. This had not been the first attempt to restrict certain types of weapons from being deployed on the battlefield, as other previous agreements such as the Hague Conference of 1899 purported to restrict the “*use of projectiles from flying balloons*”, the use of expansive ammunition and the use of projectiles [emphasis added] “*the sole object of which is diffusion of asphyxiating or deleterious gasses*”⁵⁴⁷. Projectiles would thus include any type of ammunition round that is projected upon a target, but not the release of gas from

⁵⁴⁶ Ibid. at pp. 57-61.

⁵⁴⁷ ERIC A. CRODDY AND JAMES J. WIRTZ (EDITORS), WEAPONS OF MASS DESTRUCTION: AN ENCYCLOPEDIA OF WORLDWIDE POLICY, TECHNOLOGY, AND HISTORY, VOLUME ONE, CHEMICAL AND BIOLOGICAL WEAPONS, (ABC-CLIO, 2005) at p. 140.

tanks and so forth, leaving the door opened to any other foreseen or unforeseen means of chemical and biological warfare.

The Geneva Protocol purported to ban the use of biological and chemical between signatory parties:

“The present Protocol will come into force for each signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications”.

This would mean, *a contrario*, that states that have not signed and ratified the Geneva Protocol would not be bound by its terms. Furthermore, it would also mean that states which have signed and ratified the Protocol could use biological weapons against non-signatory or non-ratifying parties.

Lastly, the Protocol fails to address the question pertaining to research, development, production and stockpiling of biological (and for that matter also – chemical) weapons. Additionally, the Geneva Protocol did not identify biological or chemical weapons *per se* since these types of weapons neither had been developed to their fullest potentials, nor had their effects or agents for that matter been discovered or understood at that point. The Protocol reads:

“Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world”.⁵⁴⁸

Due to the obvious short-comings of the 1925 Geneva Protocol another international agreement was signed that sought to remedy the Protocol’s perceived or actual defects. The United States officially renounced biological weapons in 1969 allegedly due to the technical problems they incurred, but also due to the risk a biological attack could cause on the United States.⁵⁴⁹ On September 28, 1971, the “Biological and Toxins Weapons Convention”, also known as the *“Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction”* was adopted and opened for signature on April 10, 1972 and came into effect on March 26, 1975. There are currently 165 parties to the Convention.

The Convention presents itself as the heir of the 1925 Geneva Protocol when in its preamble it recognizes *“the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed in Geneva on June 17, 1925, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war.”*

⁵⁴⁸ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

⁵⁴⁹ Ibid. 540 at p. 45.

Article I of the Convention clearly states that each State party to the Biological Weapons Convention (BWC) “*undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain (1) [biological agents or toxins] that have no justification for prophylactic, protective or other peaceful purposes; (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.*”

Article II of the BWC relates to the obligation by every State Party to the BWC to destroy or “*divert to peaceful purposes*” biological agents and toxins, along with weapons and delivery systems that are in its possession.

Article III of the BWC concerns proliferation issues pertaining to biological weapons, as it furthers the goal of restricting the access of biological weapons to any State, group of states or international organizations.

Article IV on the other hand addresses the issue of “internal proliferation” in that States Parties have to “*take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere*”.

Plainly, this would mean that States parties to the BWC have an affirmative duty not to tolerate any proliferating activity on their territory or

territory under their control.⁵⁵⁰ We ask the question as to who would enforce such a duty in the case of a weak state or a state unwilling to take any action against proliferators, whether this would be legal and under what circumstances it would be so.

Articles V and VI pertain to resolving issues relating to the implementation of the convention through bi-lateral and multi-lateral means (Article V), but also reporting to the UN Security Council of any suspicious activity or failure for State Parties to the BWC to comply with the latter (Article VI). Article VI would thus establish a verification system based on a State Party's individual complaint against another State Party which would have the obligation under paragraph 2 of Article VI of the BWC to cooperate with the UN Security Council in addressing the alleged violation.

One of the most important articles in the BWC is Article X. Article X enables States Parties to the BWC to exchange agents, toxins, equipment and knowledge for peaceful purposes which are regarded as legitimate. We can further now recall Article I that states that biological weapons, agents and toxins are banned, *except* for prophylactic, protective or other peaceful purposes. The capacity of States Party to the BWC to be able to retain biological agents for protective purposes would necessarily include the research into the creation and

⁵⁵⁰ This obligation can find an echo in the *Corfu Channel* case where the International Court of Justice (I.C.J) held that states have an affirmative duty not to allow their territory be used to commit acts against the rights of other states: "*Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ; the principle of the freedom of maritime communication ; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*". *Corfu Channel* (U,K, v. Alb.), 1949 I.C.J. 4, 22.

destruction of biological agents and how this works. The Second Review Conference of the BWC urges parties to share scientific and technical knowledge relative biological agents for peaceful purposes, stating that: “*States Parties to provide wider access to and to share their scientific and technological knowledge in this field on an equal and non-discriminatory basis, in particular with the developing countries, for the benefit of all mankind*”.⁵⁵¹ Whereas all mankind and developing countries in particular, would benefit from the eradication of diseases such as Ebola, the Plague, Smallpox and so forth, one can wonder whether such a sensitive knowledge pertaining to biological agents should be entrusted to any State Party to the BWC.

The BWC fails to have a strong verification process as seen in Article VI. There are no snap-inspections in order to control whether States Parties have actually destroyed their agents and weapons, whether they have any stockpiles or develop biological weapons programs. Article VI does provide for a referral to the UN Security Council when States Parties have claims that others fail to comply with their obligations under the Convention. Nonetheless, the BWC does give us a teaser as to what was envisioned when drafting the BWC with respect to chemical weapons, where in Article IX States Parties undertake “*to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition of their destruction [chemical weapons], and on*

⁵⁵¹ P. 19 of the BWC on Technology Transfer (i).

appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes.”⁵⁵²

b. Chemical Weapons:

i. Historical Perspective:

“Chemical weapons” will consist of the second panel that we will study here concerning weapons of mass destruction. Chemical weapons have been defined by the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction as meaning the following:

“together or separately:

(a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

(b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released of the employment of such munitions and devices;

⁵⁵² Article IX of the BWC.

(c) *Any equipment specifically designed for use directly in connection with the employment of munitions and devices in subparagraph (b).*⁵⁵³

Chemical weapons, just like biological weapons, have seen their development and use exponentially rise in the 20th Century. Furthermore, a natural and logical assumption would be that these weapons appeared in the 20th Century during World War I. Once again, nothing would be further from the truth. Chemical weapons, like biological weapons, have been around for millennia. World War I is often pictured as the turning point between “clean and fair” wars versus “dirty and unfair” wars. World War I indeed witnessed widespread use of blistering and asphyxiating agents. However, one should note that chemical weapons were already in use during antiquity.

Antiquity, as Adrienne Mayor notes in GREEK FIRE, POISON ARROWS AND SCORPION BOMBS, reviled the use of un-conventional weapons [biological and chemical agents]:

“The ancient tension⁵⁵⁴ between notions of fair combat and actual practice reveals that moral questions about biochemical weapons is not a

⁵⁵³ Article II of the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-219, 1974 U.N.T.S. 317 [hereinafter CWC]; U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 334-35 (2011), available at <http://www.state.gov/documents/organization/169274.pdf>.

⁵⁵⁴ One should note that this “ancient tension” is not exclusively of Greek origin. For instance, India similarly possessed rules that restricted the use of cruel means in order to achieve victory, placing such use of force in contrast with more righteous warfare as set forth in the “Law of Manu”. Paradoxically, cruel and unethical means could be also be used in order to defeat the enemy. Adversaries would then resort to using chemical agents, such as poisoned tipped arrows and gasses, as described in “Arthashastra”, a military manual of the time, to neutralize the other party. ADRIENNE MAYOR, “GREEK FIRE, POISON ARROWS AND SCORPION BOMBS”, (New York: Overlook Duckworth, 2003 at pp. 33-34.

*modern phenomenon, but has existed ever since the first war arrow was dipped in poison. Ethical revulsion for poison weapons did not arise in a vacuum but developed in reaction to real practices. Edward Neufeld, a scholar of ancient Mesopotamia, has suggested that the “deep aversion to this type of warfare” stemmed not from humanitarian philosophies, but was a moral judgment that flowed directly from “feelings evoked by experience” with egregiously cruel and brutal weapons”.*⁵⁵⁵

Antique use of chemical weapons involved the use of toxic fumes by Greek troops during the Trojan War by mixing sulfur and resin”.⁵⁵⁶

Modern use of chemical weapons was witnessed at Ypres in Belgium during World War I. On April 22nd, 1915, German forces were attacking French, British and Canadian forces with artillery shells when the latter saw a yellowish cloud advancing towards them. That cloud consisted of chlorine, a choking agent. It was estimated that 5,000 soldiers died and another 10,000 were injured during that attack. The Ypres attack was the first use of chemical weapons during World War I and dis-inhibited the parties to the conflict from using chemical weapons, leading to a “free for all” with respect to chemical weapon use. Both

⁵⁵⁵Ibid. at p. 30.

⁵⁵⁶ JOSEPH CIRINCIONE, DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION, (Brookings Institution Press, 2002) at p. 51.

sides to the conflict used chemical weapons thereafter, mainly chlorine and sulfur mustard gas.⁵⁵⁷

More recently, chemical weapons were widely used during the Iran-Iraq war, mainly by Iraq. Iraq had started to use from the very first years of the war chemical weapons once it was clear that a decisive victory could not be attained without resorting to unconventional weapons. Iraq mainly used blistering (H) and nerve agents (GA, GB and VX) against Iranian troops, using these weapons directly on the troops or on supply routes in order to cut off troop access to food and ammunition.⁵⁵⁸ In the February 1986 chemical attack on Al-Faw, mustard gas and tabun were used against Iranian troops, killing allegedly 10,000 soldiers. Iraq, as we all know, not only used chemical agents against Iran, but also against its own population. The March 1988 attack against Halabja with nerve and blistering agents killed around 5,000 civilians.⁵⁵⁹

The Cold War saw the largest production of nuclear, biological and chemical weapons to have ever been produced. The United States produced and stockpiled approximately 30,000 metric tons of chemical agents.⁵⁶⁰ With regards to the Soviet Union, no actual precise figures are available, however, the Russian

⁵⁵⁷ ERIC A. CRODDY AND JAMES J. WIRTZ (EDITORS), WEAPONS OF MASS DESTRUCTION: AN ENCYCLOPEDIA OF WORLDWIDE POLICY, TECHNOLOGY, AND HISTORY, VOLUME ONE, CHEMICAL AND BIOLOGICAL WEAPONS, (ABC-CLIO, 2005) at p. 340.

⁵⁵⁸ Each chemical agent has its own specificities and needs to be used accordingly in order to produce optimum results when deployed. For instance, VX or some kinds of mustard gas will remain on the surface of items it comes into contact with, making it impossible to use these items without risking of becoming contaminated.

⁵⁵⁹ Ibid. 556 at pp. 164-5.

⁵⁶⁰ Ibid. p. 51.

Federation did state that it actually possessed 40,000 metric tons including 32,300 tons of nerve gasses.⁵⁶¹

ii. Technical Aspects:

Chemical weapons, like biological weapons are divided in four main categories of agents. These four families include nerve agents, blistering agents, blood agents and asphyxiating agents. Joseph Cirincione's description of these four types of agents can once again be found in the end notes.^v The way chemical weapons work is somewhat similar to that of biological weapons in the sense that a chemical agent will need to be dispersed over a certain area. The dispersion of a chemical agent can be achieved using bombs, grenades, artillery shells or tanks similar to those used by crop-dusting planes. Furthermore, the agent needs to be dispersed in a way that will make it "airborne" in order to maximize the lethality of the weapon.

This leads us to the question of what is a chemical weapon made of? Would simply filling a shell with window cleaner be sufficient to create a working and lethal chemical weapon? The answer to this would be: it depends of what the window cleaner consists of. Chemical agents are made of certain chemicals

⁵⁶¹ Ibid.

(there are around 70 different chemicals to create chemical agents) known as precursors.⁵⁶² These precursors are then mixed together in order to produce the chemical agent. In the olden days, the agent would then be poured directly into the dispersing container, shell, bomb etc. This type of weapon configuration was called a unitary agent chemical weapon. Nowadays, in order to store weapons longer and make the whole process relatively safer,⁵⁶³ the mixing of the different agents is made once shortly before the detonation of the weapon and dispersion of the agent. This configuration is known as a binary chemical agent weapon.

Just as was done for biological weapons, tables reproduced in the endnotes^{vi} will detail some chemical agents showing in each case their main characteristics.⁵⁶⁴

iii. International Agreements:

There has been two major agreements passed during the 20th Century that have attempted to regulate and restrict the use, the proliferation and the destruction of chemical weapons. These two agreements are the 1925 Geneva

⁵⁶² Ibid 556 at 50.

⁵⁶³ Some chemical agents have shown a level of toxicity to such an extent that they actually corroded the rockets they were inserted into. "*Leakage of agent from a rocket, primarily because its aluminum casing becomes corroded by acid decomposition products of the agent*" (referring the effects of the GB agent (a.k.a. Sarin) on the M55 rocket). Committee on Review of Army Planning for the Disposal of M55 Rockets at the Anniston Chemical Agent Disposal Facility, U.S. National Research Council, Assessment of Processing Gelled GB M55 Rockets at Anniston, National Academies Press, 2003, p. 11.

⁵⁶⁴ JOSEPH CIRINCIONE, *DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION*, (Brookings Institution Press, 2002) at pp. 63-66.

Protocol and the 1992 “*Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction*” (CWC). It is unnecessary to re-explore the 1925 Geneva Protocol as we have previously addressed the issues it contained in our discussion above while discussing international agreements pertaining to biological warfare.

Article IX of the 1972 BWC was a clear sign that a similar convention restricting chemical weapons was at that time in everyone’s mind, even though restricting chemical weapons was not deemed then necessary. The CWC was drafted after the end of the cold war, in 1992, and was signed on January 13th, 1993, entering into force on April 29, 1997. Just as the BWC introduced the concept of having a convention on chemical weapons, the CWC in turn recognizes the positive contribution of both the 1925 Geneva Protocol and the 1972 BWC.⁵⁶⁵

Article I lists the general obligations of the parties to the CWC which include the prohibition of any development, use, stock-piling, transfer weapons or technology, or for any state to “engage in any military preparations to use chemical weapons”⁵⁶⁶ or retain the possession of chemical weapons on any part of its territory. Furthermore, the CWC also imposes a positive duty on signatory parties to destroy any chemical weapon that they have on their territory or in any

⁵⁶⁵ Preamble of the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-219, 1974 U.N.T.S. 317 [hereinafter CWC]; U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 334-35 (2011), available at <http://www.state.gov/documents/organization/169274.pdf>.

⁵⁶⁶ CWC, Article I available at: <http://www.opcw.org/chemical-weapons-convention/articles/article-i-general-obligations/>.

territory under their jurisdiction. The CWC thus seeks to banish⁵⁶⁷ chemical weapons from existing in any nation signatory to the convention. Article II defines what chemical weapons are, being composed of both “*toxic chemicals and their precursors*” and munitions or other devices “*specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a) [toxic chemicals and their precursors], which would be released as a result of the employment of such munitions and devices.*”⁵⁶⁸

The CWC also created a verification system which is stricter than the one afforded to biological weapons. For instance, Article III specifies that State Parties have to declare where their weapons are, where their production facilities are, whether any chemical weapon has been transferred to other states, in short, each State Party has to make a full inventory and account for every single chemical weapon it has produced. In conformity with its affirmative duty found in Article I, every State Party to the Convention must set a timetable within which it will destroy its chemical weapons and chemical weapons production sites (or a timetable for their conversion).⁵⁶⁹

Article III is supplemented by Articles IV and V that provide for on-site verifications and inspections where States Parties to the CWC have the duty to

⁵⁶⁷ The CWC in Articles X and XI that States Parties to the CWC that the production can still legitimately produce chemicals for purposes not prohibited in the CWC and that they must have access to technology that would enable them to defend themselves against a chemical attack.

⁵⁶⁸ Article II of the CWC available at: <http://www.opcw.org/chemical-weapons-convention/articles/article-ii-definitions-and-criteria/>

⁵⁶⁹ Article III of the CWC available at: <http://www.opcw.org/chemical-weapons-convention/articles/article-iii-declarations/>

provide access to chemical weapons and their production facilities. These articles create an “order of destruction” which is basically a schedule or sequence of destruction, agreed to between the State Party and the “Executive Council” stating when such and such weapon or piece of equipment is supposed to be destroyed.

Article VII and Article IV of the CWC both require that the States Parties take domestic measures to enforce the effects of the conventions (or the conventions themselves), that is to say not tolerate any production, stock-piling etc. of any chemical weapon by private parties. Article XII regards enforcement and compliance issues States Parties may have with the CWC. Article XII proposes a graded approach towards sanctions that would include a Member’s suspension of its rights and privileges under the CWC. The CWC also provides that collective measures be taken in conformity with international law, all the way to a referral in the gravest cases to the United Nations General Assembly and Security Council.

Overall the Chemical Weapons Convention appears to be stricter in terms of compliance and verification than the 1972 Biological Weapons Convention. This could be due to the fact that States Parties to the 1972 Biological Weapons Convention saw that the lack of on-site inspections and verifications led to a globally un-enforceable convention. Maybe the States Parties to the 1972 BWC were not really interested in having an enforceable treaty between themselves, or on the other hand this could have been a “confidence-building measure” on the part of the Nixon and Brezhnev administrations (this scenario would nonetheless

seems unlikely). One could also ask what had changed since 1972? Possibly the end of the Soviet Union enabled the representatives of the United States and of the Russian Federation to come to an understanding regarding chemical weapons that became embodied in the 1993 Chemical Weapons Convention, and that the major parties at that time were sincere in their will to adhere to the principles of the CWC. However, one has to recognize that the most powerful agent towards developing any weapons, were it to be nuclear, biological or chemical, is a state's or a private entity's will to do so; the rest being a matter of resources and knowledge that can always be bought from rogue states, on the black market or from former scientists who find themselves out of a job after the disintegration of their country (as it was the case for the Soviet Union).

c. Nuclear Weapons:

i. Historical Perspective

Joseph Cirincione defines nuclear weapons as a “*device with explosive energy, most or all of which derives from fission or a combination of fission and fusion processes. Explosions from such devices cause catastrophic damage due both to the high temperatures and ground shocks produced by the initial blast and the lasting residual radiation. Nuclear fission weapons produce energy by splitting the nucleus of an atom, usually highly enriched uranium or plutonium, into two or more parts by bombarding it with neutrons. Each nucleus that is split releases energy as well as additional neutrons that bombard nearby nuclei and*

*sustain a chain reaction. Fission bombs, such as those dropped on Hiroshima and Nagasaki, are the easiest to make, and they provide the catalyst for more complex thermonuclear explosions. In such weapons a fission explosion creates the high temperatures necessary to join light isotopes of hydrogen, usually deuterium and tritium, which similarly liberate energy and neutrons. Most modern nuclear weapons use a combination of the two processes, called boosting, to maintain high yields in smaller bombs.*⁵⁷⁰

The United States:

The person who could be considered by some as the father of nuclear weapons is Leo Szilard. Leo Szilard was born in the Austro-Hungarian Empire in 1898 and developed the idea of neutron induced nuclear chain reaction. His research and experiences with regards to nuclear chain reactions and graphite led to the first self-sustained nuclear chain reaction on December 2, 1942.⁵⁷¹ On August 2, 1939, he co-authored a letter with Albert Einstein known as the “Einstein-Szilard letter”. In this letter Albert Einstein and Leo Szilard detailed the potential of nuclear chain reaction when used as a weapon, and that the Nazis were actively working on developing such reactions. This letter made it clear that they were engaged in a race to develop an extremely deadly weapon. As a consequence thereof, the Manhattan Project was launched (the project under which nuclear weapons were developed).

⁵⁷⁰ JOSEPH CIRINCIONE, *DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION*, (Brookings Institution Press, 2002) at p. 5

⁵⁷¹ ERIC A. CRODDY AND JAMES J. WIRTZ (EDITORS), *WEAPONS OF MASS DESTRUCTION: AN ENCYCLOPEDIA OF WORLDWIDE POLICY, TECHNOLOGY, AND HISTORY, VOLUME TWO, CHEMICAL AND BIOLOGICAL WEAPONS*, (ABC-CLIO, 2005) at. 207.

The “Manhattan Project” was officially launched in September 1942 but was preceded by an “*Advisory Committee on Uranium*” called “S-1”⁵⁷² that had been created in October 1939.⁵⁷³ The committee emphasized most of its research on Uranium 235 (U235), an atom that could easily produce a controlled chain reaction and on Uranium 238 (U238) which in its natural form could not be used in a weapon, but which could be converted into Plutonium 239 (Pu239) that can be used in a nuclear weapon.

The next half of the 20th Century on the other hand was to witness a large scale race between the United States and the Soviet Union. This race mostly took place with regards to the number of weapons developed, the type of weapons involved (A or H⁵⁷⁴ bombs), their tonnage, their deployment status and so forth. While we will see the technical aspects of these weapons shortly hereafter, a short chronological overview of each parties’ military nuclear achievements is in order.

⁵⁷²On June 17, 1942, Dr. Vannevar Bush, who had headed the research committee up until then, informed President Roosevelt that U235 and Pu239 could be used in an atomic weapon. From September 1942 onwards, the newly created Manhattan Project’s supervision was entrusted to Brigadier-General Groves who concentrated his team’s efforts to create and produce a functioning nuclear weapon. While the ongoing research was starting to show results in terms of obtaining fissionable material, Germany’s program had previously suffered serious setbacks when its heavy water facility in Norway was sabotaged and then bombed in 1943 in Telemark. Furthermore, after Germany’s defeat in May 1945 the prospect of a nuclear armed Germany vanished. That was not the case with regards to Imperial Japan. Notwithstanding Germany’s unconditional capitulation, the Japanese empire was still fighting arduously against the allies. On July 16, 1945 a Pu239 bomb was detonated in Alamo-Gordo in New Mexico which proved successful. Two nuclear devices were then dropped on Japan on August 6 and 9, 1945 on Hiroshima (“Little Boy” – a U235 device) and Nagasaki (“Fat Man” – a Pu239 bomb). These two bombings brought Japan to surrender on September 2nd, 1945.

⁵⁷³ Ibid. 571 at 206.

⁵⁷⁴ Atomic or Hydrogen bombs.

The United States detonated its first nuclear bomb, an atomic bomb, on July 16, 1945. The US later detonated two additional bombs on Hiroshima and Nagasaki. These two bombs were the only ones to ever be detonated against another nation (as of this day). While A-Bombs were seen in their time as the most powerful weapon in existence, using the energy obtained in the detonation of an atomic bomb could be channeled to obtain an even larger and destructive nuclear device known as a “Hydrogen Bomb”.⁵⁷⁵ The credit for achieving the hydrogen bomb goes to Edward Teller and Stanislaw Ulam. President Truman ordered the development of a hydrogen bomb after the Soviet Union’s detonation of its first A-bomb in 1949.⁵⁷⁶ The first successful hydrogen bomb test took place on November 1, 1952 and reached a yield of 10.4 Mega Tons.⁵⁷⁷

The Soviet Union:

The Soviet Union on the other hand started its atomic weapons program later. It was not until 1942 that Igor Kurchatov, a nuclear physicist, urged Stalin to launch an atomic research project when he discovered that the Allies had been working on one. The soviet project was co-directed by Kurchatov and the NKVD, the latter being in charge of the weaponization of the nuclear device. The first soviet atomic bomb, known as *Pervaya Molniya*, was detonated on August 29,

⁵⁷⁵ G. A. Goncharov, *American and Soviet H-Bomb development Programmes: Historical Background*, PHYSICS – USPEKHI 39 (10) 1033-1044 (USPEKHI FIZICHESKIKH NAUK, RUSSIAN ACADEMY OF SCIENCES) (1996). Available at: <http://www.fas.org/nuke/guide/russia/nuke/goncharov-h-bomb.pdf>.

⁵⁷⁶ ERIC A. CRODDY AND JAMES J. WIRTZ (EDITORS), WEAPONS OF MASS DESTRUCTION: AN ENCYCLOPEDIA OF WORLDWIDE POLICY, TECHNOLOGY, AND HISTORY, VOLUME TWO, CHEMICAL AND BIOLOGICAL WEAPONS, (ABC-CLIO, 2005) at p. 163.

⁵⁷⁷ Ibid.

1949. Its yield was of 22 Kilo Tons (KT), compared with “Little Boy” that had a yield of 13 KT and “Fat Man” that had a yield of 21 KT. The Soviet Union also developed H-Bombs,⁵⁷⁸ the first being tested on November 22, 1955, named RDS-37 which had a yield of 1.6 Mega Tons.⁵⁷⁹

The technical aspects and developments of nuclear weapons are available in the endnotes^{vii} for in order to enlighten the reader as to both the history and capabilities of nuclear weapons.

ii. *International Agreements*

In view of the highly destructive nature of nuclear weapons (fission and fusion devices), international agreements to curtail the transfer of military oriented nuclear technology were deemed to somewhat place restrictions on the proliferation of nuclear weapon technology. On the other hand, civil nuclear technology, be it for scientific research or for electricity purposes, could be shared. These two main considerations led to the drafting of the Treaty of Non-

⁵⁷⁸ The father of the Soviet Hydrogen Bomb was no other than Nobel Peace Prize winner, Andrei Dmitrievich Sakharov. Sakharov was the man of the “Third Idea”. The Soviets had been unsuccessful in develop a working thermonuclear weapon up until Andrei Sakharov developed a two-staged nuclear charge characterized by the “*compression and initiation of the thermonuclear unit by radiation from the primary nuclear weapon*”. G. A. Goncharov, *American and Soviet H-Bomb development Programmes: Historical Background*, PHYSICS – USPEKHI 39 (10) 1033-1044 (USPEKHI FIZICHESKIKH NAUK, RUSSIAN ACADEMY OF SCIENCES) (1996). Available at: <http://www.fas.org/nuke/guide/russia/nuke/goncharov-h-bomb.pdf>

⁵⁷⁹ Ibid. at p.1043 Sakharov, evoking the successful test stated: “*The test was the culmination of many years of labor, a triumph that had paved the road to the development of a wide range of devices with diverse high-performance characteristics*”.

Proliferation Treaty of Nuclear Weapons (NPT).⁵⁸⁰ Attempts to regulate nuclear weapons prior to the NPT had been made. For instance, the United States and the Soviet Union signed in 1963 the “Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water”. The name of the treaty is self-explanatory.

The NPT was signed on July 1, 1968 and entered into force on March 5, 1970. The NPT could be understood as a “nuclear contract” whereby Nuclear Weapon States agree to a supervised transfer of nuclear technology to non nuclear weapon states. In exchange for this, non nuclear weapon states would agree not to acquire (or develop) nuclear weapons. The preamble of the treaty can be considered as idealistic in that it seeks to: *“achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament”*.⁵⁸¹

The NPT is composed of a preamble and eleven articles that define accepted and prohibited behavior by States Parties to the treaty. Articles I, II and IV basically lay down the foundation of the States Parties’ rights and obligations

⁵⁸⁰ “The NPT is a landmark international treaty whose objective is to prevent the spread of nuclear weapons and weapons technology, to promote co-operation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament and general and complete disarmament. The NPT represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States.” Review Conference of the Parties to the Treaty on the Non – Proliferation of Nuclear Weapons (NPT), May 3-28, 2010, NPT/CONF.2010/50 (Vol. I) available at: <http://www.un.org/en/conf/npt/2010/background.shtml>

⁵⁸¹ Treaty on the Non – Proliferation of Nuclear Weapons, Article I, available at: <http://www.un.org/en/conf/npt/2010/npttext.shtml>

in terms of transfer of any type of nuclear technology, were it to be for military or civilian use.

Article I forbids nuclear weapon states from transferring nuclear weapons to non nuclear weapon states and any technology relating to nuclear weapons. Such a restriction also prohibits assistance, encouraging or more generally providing any kind of help to non nuclear weapon states in developing nuclear weapons.⁵⁸² Article I's mirror image is Article II, which places similar restrictions on non nuclear weapon states. Non nuclear weapon states are forbidden from receiving military nuclear technology, as well as manufacturing nuclear weapons and components.⁵⁸³ The third part of this "nuclear contract" regards the inalienable right of States Parties to the NPT to acquire peaceful nuclear technology. This inalienable right is spelled out in Article IV which further states that States Parties have a right to exchange, purchase and acquire peaceful nuclear technology for scientific and energy purposes.

⁵⁸² "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices." Ibid.

⁵⁸³ "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices." Ibid. Article II.

These three articles could be understood as the foundation of this international “nuclear contract”. However, as in any contract, one has to be able to verify that its terms have not been violated by one of the parties to the agreement. This is why a verification process was created in Article III, placing the International Atomic Energy Agency (IAEA) at its center. The IAEA is in charge of controlling that the safeguards placed on non nuclear weapon states are respected and that they not obtain military grade fission material. This transfer of peaceful nuclear material to military grade material is referred to as “diversion” in Article III⁵⁸⁴:

“...The Statute of the International Atomic Energy Agency and the Agency’s safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.”⁵⁸⁵

The safeguard procedures are extremely far reaching since they include the inspection of any fissionable material wherever it might be in any state party to the NPT. The “safeguards” are supervised by the IAEA which reports to both the UN Security Council and the General Assembly. The second paragraph of Article III restricts transfers of fissionable material. However, it also creates an exception to that transfer ban if it is done under the auspices of the safeguard process.

⁵⁸⁴ Ibid. Article III.

⁵⁸⁵ Ibid.

This provision seems in contradiction to Article IV's inalienable right to peaceful nuclear technology in terms of the nature of the acquisition of peaceful nuclear technology. Can we consider this as being an inalienable right when states agree to submit to a verification schedule? Or, is it not a right but some kind of privilege granted by the verifying body after it has subjected this transfer to safeguards? Article IV understands peaceful nuclear technology as an inalienable right, whereas Article III forbids the transfer of peaceful nuclear technology, unless it is done under the "*safeguards required by this Article*".⁵⁸⁶ What we might understand here is that States Parties do have a right to access peaceful nuclear technology, but that this access is subject to an "authorization regime" in contrast to a "penal regime" (regime where parties are sanctioned once they have committed an infraction but where no prior authorization is required). It could also be argued that there is no contradiction between the inalienable right to peaceful civilian use of nuclear power and such an authorization regime, since any state would qualify for civilian nuclear power as long as it follows the safeguard process.

Lastly, we should note that Article X provides for a State Party's withdrawal from the NPT. The terms of such a withdrawal dictate that it be motivated by "*extraordinary events [...] that have jeopardized the supreme*

⁵⁸⁶ Ibid. "*Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.*"

interests of its country".⁵⁸⁷ This does seem to be a fairly high standard to meet. For instance, North Korea withdrew from the NPT on April 10, 2003 invoking "*extraordinary events that have jeopardized its supreme interests*".⁵⁸⁸ Nonetheless, the United Nations Security Council in Resolution 1718, acting under Chapter VII (Article 41) demanded that North Korea cease its nuclear weapons and ballistic missile testing. It further demanded that North Korea retract its withdrawal from the NPT, cease its development of nuclear weapons and missiles and that it dismantle its program. Acting in such a way, the UN Security Council did note that North Korea had withdrawn from the NPT, but still held North Korea bound by the treaty's terms, *de facto* cancelling North Korea's 2003 withdrawal. This Security Council Resolution also provides us with an insight as to sanctions available in case of breach of NPT terms or of wrongful withdrawal from it or from an outright despicable conduct.

The total elimination of nuclear weapons, as advocated by the NPT's preamble, seems to be wishful thinking, however, once the "genie is out of the bottle" it is extremely difficult to put it back in. This is why the contours of a policy based on nuclear arms and their delivery systems limitations and reduction appeared in the late 1960s and 1970s. This policy translated into different series of talks (Strategic Arms Limitations Talks I and II) that lead to the Anti-Ballistic

⁵⁸⁷ Ibid. Article X.

⁵⁸⁸ George Bunn and George Rhinelander, "*NPT Withdrawal: Time for the Security Council to Step In*" (Arms Control Association (May 2005) available at: http://www.armscontrol.org/act/2005_05/Bunn_Rhinelander)

Missile Treaty⁵⁸⁹ and other agreements such as the Strategic Arms Reduction Treaty⁵⁹⁰ (START I and II) that limited the number of deployed ballistic missiles and warheads.

2. Parties behind the Threat

The previous section delved into the different types of “Weapons of Mass Destruction” (WMDs). The nature of weapons of mass destruction, that is to say their potential to inflict a large amount of damage in a fairly short time, has revolutionized military doctrines contemplating these challenges and the normative framework surrounding the response to such threats. While states have generally been the exclusive holders of military force for a few centuries, we have started to notice non-state actors challenging this century old concept by waging conflicts against states, with weapons usually reserved (and generally banned by international conventions) to states.

a. States

i. The State as an Exclusive Military Force

⁵⁸⁹ The Anti-Ballistic Missile Treaty was signed in 1972 that purported to limit the United States and the Soviet possibility to protect their territory by installing Anti-Ballistic Missile systems.

⁵⁹⁰ The Strategic Arms Reduction Treaty was signed on July 31st, 1991, coming into force on December 5th, 1994.

States have as one of their main attributes the monopoly or centralization of armed force. That is to say, the state is the sole entity that has the exclusive privilege of asserting its sovereignty over the limits of its territory, if need be with armed force.⁵⁹¹ We ask ourselves why should there be such a need for such a monopoly of armed force? Why couldn't other entities be allowed to have a share of this exclusive prerogative? Would sharing that prerogative have adverse effects on state sovereignty?

All these questions are relevant to defining what a state is.⁵⁹² Military force is power, and power enables a state to assert its control over a designated area and population.⁵⁹³ If a state did not possess such a military potential it would be unable to assert itself as a state and would cease to exist de facto (exceptions to this rule also exist). The reason for this is that other parties would try and assert their rule and sovereignty over that designated area and population and enter in direct competition with the state's authority. Under such circumstances a state will likely lose the authority it has and be challenged on all or parts of its territory,

⁵⁹¹ Friedrich Meinecke, *MACHIAVELLISM: THE DOCTRINE OF RAISON D'ÉTAT AND ITS PLACE IN MODERN HISTORY* (Yale 1957) (Douglas Scott, trans.) See *generally* SIR HERBERT BUTTERFIELD, *RAISON D'ÉTAT: THE RELATIONS BETWEEN MORALITY AND GOVERNMENT: THE FIRST MARTIN WIGHT MEMORIAL LECTURE* (Apr 23, 1975)

⁵⁹² JONATHAN HASLAM, *NO VIRTUE LIKE NECESSITY: REALIST THOUGHT IN INTERNATIONAL RELATIONS SINCE MACHIAVELLI*, AT P. 15 (Yale 2002).

⁵⁹³ *"If 'modern' cannot be specified in terms of a single historical period, neither can 'modern' states be distinguished by a standard list of features equally applicable to all of them. Central features such as standing armies and – in Max Weber's terms – the generally successful claim to a 'monopoly of the legitimate use of physical force within a given territory' were also features of absolutist and many ancient states."* JAMES ANDERSON, *THE RISE OF THE MODERN STATE*, (Harvester Group, 1986) at p. 3.

as it is the case with Lebanon⁵⁹⁴ where Hezbollah⁵⁹⁵ controls de facto the southern part of the country in defiance to the central authority.⁵⁹⁶ The same can be said with regards to Afghanistan or similar states where there is no effective central armed authority.

While some states have successfully evolved beyond the feudal model, where lords give land to their vassals in exchange for some benefit; other states appear to be comfortable with such a system, such as Afghanistan.⁵⁹⁷

Understanding the fact that within a state there cannot be any other competitor in terms of a parallel military organization guarantees such a state's inner stability. On the other hand, armed groups within a state will do nothing more but challenge that state's authority and invite conflict.

⁵⁹⁴ Kathryn Westcott, "Who Are Hezbollah?", BBC NEWS ONLINE, Apr. 4, 2002, http://news.bbc.co.uk/2/hi/middle_east/1908671.stm.

⁵⁹⁵ AUGUSTUS RICHARD NORTON, HEZBOLLAH: A SHORT HISTORY at p. 34-35 (Princeton Univ. Press 2007).

⁵⁹⁶ Kevin Sites, "Positioning for Politics: Hezbollah Denies Terrorist Ties, Increases Role in Government", SCRIPPS HOWARD NEWS SERVICES, Jan. 14, 2006, available at: http://www.redding.com/redd/nw_columnists/article/0,2232,REDD_17528_4389698,00.html

⁵⁹⁷ HERTFRIED MUNKLER, THE NEW WARS, at p. 8 (Cambridge: Polity Press, 2005). Hertfried Munkler names this phenomenon as "state-disintegration" and explains how in Europe and North America wars led to the creation of states, whereas the opposite phenomenon can be observed nowadays in developing countries: "[...] *But the decisive difference between the two is that the state-building wars in Europe or North America (the War of Independence and the Civil War certainly qualify as such) took place under almost clinical conditions, with no major influences 'from outside', whereas this has not been the case with the state-disintegrating wars in the Third World or periphery of the First and Second Worlds. There, the wars leading to the collapse of young and still unstable states have been subject to constant political attempts from outside to influence the course of event, and above all have been linked into world market systems that make it impossible for them politically to control the development of their national economy.*"

The other question that needs to be addressed regards the voluntary relinquishment of armed force by states. This can be done for a variety of reasons such as the inability of a state to raise enough troops for war or to reduce the cost of having a standing army. Politicians can also enter into agreements with private organizations in order to keep a conflict on a low-key.⁵⁹⁸

ii. Use of WMDs in the past and legal ramifications

Nuclear weapons were used twice in the history of mankind. The nuclear bombings of Hiroshima and Nagasaki were the only instances of use of nuclear weapons. At that time, the question of whether these two strikes were legal was not considered or deemed relevant. Winning the war against Japan was the

⁵⁹⁸Relinquishment of military power to freelance entities constitutes a de facto relinquishment of a sovereign prerogative unto organizations motivated not by a "higher call", that is to say serving one's country, but for material gain. In the latter case, no real allegiance exists to any particular state, placing armed force on the marketplace. One could ask whether such a relinquishment of what was generally understood as being an exclusive state prerogative (states throughout history have resorted to the use of mercenaries) to parties that do not necessarily have an allegiance, is a wise decision. This question could be argued both ways. On the one hand, one could suggest that deferring the use of armed force to private parties will make its use more results-oriented and that clear goals can be set. This relationship between the hiring state on the one hand and the other contracting party could be seen as a contractual relationship whereby the non-fulfillment of an obligation could be understood as a breach of contract. One could say that there should be a minimal amount of collateral damage, and that contractors not engage in any reprehensible behavior etc. On the other hand, one could argue that states are failing to guarantee a major condition of their existence, that is to say protect its population and national interests. Furthermore, one could add that nothing assures us that ultimately the contractors would remain loyal to the state that hired them, and why would they? They are basically paid to fulfill a contract. Except if they were to receive a premium or continue to receive an allowance, there is no real reason why a service provided on the marketplace should remain exclusive *ad vitam aeternam*. Who can guarantee that the intelligence, skills or other sensitive information learned will remain in safe hands? Furthermore, would this be the first step down the slippery road towards a progressive abandonment by the state of its existential prerogative which justified its existence? Would this eventually lead to an implosion of the modern-state model?

ultimate goal. The atomic weapon was a means of bringing more quickly and with reduced military casualties Japan's surrender.

The question as to the legality of nuclear weapons arose after the end of the Cold War. The Cold War witnessed the stockpiling of vast arsenals of nuclear weapons by NATO countries on the one hand and of the USSR on another. Shortly after the end of the USSR, an advisory opinion from the International Court of Justice was requested relative to the "*Legality of the Threat or Use of Nuclear Weapons*"⁵⁹⁹, at the initiative of the United Nations General Assembly (UNGA). The International Court of Justice (ICJ) rendered its opinion on July 8th, 1996.

The ICJ, before really addressing the issue, lists factors to be taken into consideration such as whether the detonation of a nuclear device against another country could constitute genocide, or in what way nuclear weapons could be environmentally catastrophic and so forth. These are very interesting issues; however, they have less to do with the use or threat of use of nuclear force, than with intellectual speculation that border at times on quasi-prophetic and pseudo-scientific statements.

The ICJ eventually gets to the core of the discussion when it indirectly addresses the question of whether the simple possession of nuclear weapons would be unlawful:

⁵⁹⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. REPORTS 1996, p. 226.

“The court will now address the question of the legality or illegality of recourse to nuclear weapons in light of the provisions of the Charter relating to the threat or use of force.

The Charter contains several provisions relating to the threat and use of force. In Article 2, paragraph 4, the threat or use of force against the territorial integrity or political independence or another state or in any other manner inconsistent with the purposes of the United Nations is prohibited.

That paragraph provides: [...]

This prohibition of the use of force is to be considered in light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defense if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se,

*whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.”*⁶⁰⁰

This last paragraph thus warrants that nuclear weapons are to be regarded just like any other weapon and are submitted to the legal normative framework applicable to them. This would mean, in the context of nuclear weapons, that they would be subjected to the norms set forth in the Non-Proliferation Treaty and other treaties applicable to nuclear weapons (START, ABM or any other relevant treaty). Consequently, their possession would be defined by these treaties.

The ICJ determined that there was “*in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons [...] there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such*”.⁶⁰¹

The ICJ’s decision could be considered by some as rather sterile since it did not propose a model which would justify, or not, the use or threat of use of nuclear weapons. That being said, one should recognize that the ICJ did address the question of the use, or threat of use of nuclear weapons and the inherent

⁶⁰⁰ Ibid. at p. 244.

⁶⁰¹ Ibid. at p. 266

right of states to self-defense as defined by Article 51 of the United Nations Charter. Paragraphs 96 and 97 of the ICJ's decision addresses that issue, finding that in the specific case an extreme circumstance where a state's survival could be at stake, the ICJ could not reach a positive decision as to the legality of the use of a nuclear weapon:

“96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by

a State in an extreme circumstance of self-defense, in which its very survival would be at stake. [emphasis added]⁶⁰²

Even though the Court failed to give a clear standard relative to the use or threat of use of nuclear weapons, it did state in the quoted above lines that such a clear standard could not be determined in the case of “*extreme circumstances*” where a state’s “*very survival would be at stake*”. *A contrario*, this would mean that anything but “*extreme circumstances*” where a state’s “*very survival would be at stake*” would not suffice to trigger the use of nuclear weapons. If the lawfulness of the use or threat of use of nuclear weapons in the most extreme circumstances cannot be clearly ascertained, any use of nuclear weapons in cases where such circumstances do not exist would assuredly not be lawful.

Although the status of the legality of the use of nuclear weapons remains unclear, and thankfully untested since no nuclear weapon has recently been detonated by one country against another, the same cannot be said about other WMDs.

For instance, the United Nations Security Council (UNSC) condemned the use of chemical weapons in Resolution 612. Resolution 612 referred to the use of chemical weapons during the Iran-Iraq war. As we previously saw in the historical perspective relative to chemical weapons, chemical weapons were

⁶⁰² Ibid. at p. 263

mainly used by Iraq against Iran. Iraq used principally blistering and nerve agents against soldiers and civilians. The UN Secretary-General had ordered that an investigation take place so as to determine whether chemical weapons had been used by the parties to that conflict. The findings of the investigation revealed that chemical weapons had in fact been used during that conflict. Consequently, the Security Council condemned in Resolution 612 the use of chemicals by either party (even though Iraq was the prime offender), basing its condemnation on the 1925 Geneva Protocol:

“The Security Council [...] condemns vigorously the continued use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq contrary to the obligations under Geneva Protocol;

Expects both sides to refrain from the future use of chemical weapons in accordance with their obligations under the Geneva Protocol;

*Calls upon all States to continue to apply or to establish strict control of the export to the parties to the conflict of chemical products serving for the productions of chemical weapons...*⁶⁰³

iii. State Obligations regarding Terrorism: Recent Developments

Based on the premise that terrorist organizations need sanctuaries in order to train their members and to have bases, international law imposes a duty

⁶⁰³ S.C. Res. 612, U.N. Doc. S/RES/612 (May 9, 1988).

upon states to cooperate between each other in fighting terrorism in all its forms and wherever it may be. International organizations such as the United Nations have long held that terrorism was unacceptable and as such have adopted binding norms to proscribe it.

The United Nations Security Council (UNSC) adopted numerous resolutions both banning the use of terrorism by states, but also the sheltering and harboring of terrorist elements on their territory. For instance, Resolution 1267 (1999) condemned Afghanistan for its harboring of terrorist elements which provide the latter shelter to prepare their terrorist attacks:

*“Strongly condemning the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security...”*⁶⁰⁴

The Council went further in condemning acts of terrorism in Resolution 1269 when it unequivocally condemned *“all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular*

⁶⁰⁴ S.C. Res. 1267, U.N. Doc. S/RES/1267 (October 15, 1999).

those which could threaten international peace and security".⁶⁰⁵ This condemnation is fairly loose, and does not cite precisely what terrorism specifically consists of. However, the resolution also emphasizes the fact that States should cooperate and create norms in order to prevent and suppress terrorism:

"4. Calls upon all States to take, inter alia, in the context of such cooperation and coordination, appropriate steps to:

- Cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts;*
- Prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;*
- Deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;*
- Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not participated in terrorist acts;*

⁶⁰⁵ S.C. Res. 1269, U.N. Doc. S/RES/1269 (October 19, 1999).

- *Exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts...*⁶⁰⁶

Since Afghanistan, which was ruled at that time by the Taliban, failed to abide by the demands of the UNSC to halt its harboring of terrorist groups (most notably Al-Qaeda) and was engaged in various other illicit dealings, the UNSC adopted Resolution 1333 which imposed sanctions on Afghanistan. These sanctions included various prohibitions such as the sale of arms to Afghanistan, the transfer of some technologies and military assistance.

While these Security Council resolutions did impose certain restrictions on states that harbored terrorist entities, Security Council Resolution 1373 went far beyond what had been done before. Resolution 1373, passed shortly after September 11, 2001, furthered the cooperation between states in order to fight “international terrorism”, placing an emphasis on terror-finance. This Resolution meant that States have a duty to criminalize both active support, and membership in terrorist organizations. The Resolution also prohibited financially supporting these organizations as well as freezing their funds.

Security Council Resolution 1373 places on the shoulders of every nation the burden of taking active (e.g. the obligation to cooperate with other countries

⁶⁰⁶ Ibid. at p. 2

and coordinate criminal investigations, disclose financial information on a suspected individual or organization, take all necessary steps in order to disrupt terrorist threats from materializing) and passive actions (abstain from aiding, supporting or financing terrorism or suspected individuals or groups). Resolution 1373 was taken under Chapter 7 of the UN Charter and has thus binding force. It is noteworthy to see that this resolution goes even beyond cooperation. It also directs states to take domestic legal action in order to criminalize terrorism⁶⁰⁷, infringing then on their right of domestic sovereignty:

“1. Decides that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

*(b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts”*⁶⁰⁸

Furthermore, in order to verify the implementation of the resolution by each state, a new committee (the Counter Terrorism Committee) was established

⁶⁰⁷ It is also interesting to see that at the time UN Security Council Resolution 1373 was passed, no clear definition had been adopted by the UN. The only one available was the one found in the International Convention for the Suppression of the Financing of Terrorism of 1999 which came into force in 2002.

⁶⁰⁸ UN Security Council Resolution 1373 (2001), available at <http://www.state.gov/s/ct/index.cfm?docid=5108>

under Paragraph 6 of the Resolution.⁶⁰⁹ The CTC is assisted in its work by the Counter Terrorism Executive Directorate which is to:

*“Provide the CTC with expert advice on all areas covered by Resolution 1373. CTED was established also with the aim of facilitating technical assistance to countries, as well as promoting closer cooperation and coordination both within the UN system of organizations and among regional and intergovernmental bodies”.*⁶¹⁰

More precisely, the role of the CTED was understood as providing critical aid to states which lacked the capacity to comply with Resolution 1373:

*“CTED has developed a constant dialogue and cooperation with Member States, through visiting selected States, facilitating technical assistance and work to identify and help ensure that the priority needs of Member States can be met, and developing and drafting the Preliminary Implementation Assessments (PIA)”.*⁶¹¹

It is nonetheless interesting to recognize that up until now, the main tool used to sanction states which do not comply fully with Resolution 1373 was

⁶⁰⁹ J. Craig Barker, *The Politics of international Law-making: Constructing Security in Response to Global Terrorism*, 3 J. INT'L L. & INT'L REL. 5 (2007) at p. 3

⁶¹⁰ Security Council Counter-Terrorism Committee, Background to the CTC, available at <http://www.un.org/sc/ctc/>

⁶¹¹United Nations - Security Council: Threats to international peace and security caused by terrorist acts (New York), *Statement on behalf of the European Union by Ambassador Sanja Štiglic Permanent Representative of Slovenia to the United Nations, March 19th 2008*, available at: [http://www.eu2008.si/en/News and Documents/Statements in International Organisations/March/0319MZZ_Stiglic.html](http://www.eu2008.si/en/News_and_Documents/Statements_in_International_Organisations/March/0319MZZ_Stiglic.html)

“naming and shaming” only. For instance in November 2003 the Security Council “named and shamed” 58 states that did not report the progress they had made concerning compliance with the resolution.⁶¹²

Security Council Resolution 1566 was passed on October 8, 2004 in the aftermath of the Beslan school terrorist attack and the Australian embassy bombing in Jakarta. Resolution 1566 is the most important Security Council resolution on terrorism since it defines terrorism as:

“Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of an as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”⁶¹³

⁶¹² J. CRAIG BARKER, SEPTEMBER 11 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW? (New York: Ardsley, Transnational Publishers Inc., 2005) at p. 187.

⁶¹³ S.C. Res. 1566, U.N. Doc. S/RES/1566 (October 8, 2004).

This Resolution was unanimously passed and emphasized the fact that terrorism could not be excused in any way or form, and that states should cooperate in the fight against terrorism by adopting the “*draft comprehensive convention on international terrorism*” and the “*draft international convention for suppression of acts of nuclear terrorism*”.⁶¹⁴ Paragraph 9 of the said Resolution also purports to establish of a “working group” that will be in charge of studying new ways of penalizing terrorism which would including the freezing of assets belonging to terrorist entities, bringing terrorists to justice, preventing their movement in member states and so forth.

Last but not least, we may refer to Resolution 1624 which calls for the prohibition of the incitement of terrorist acts⁶¹⁵, the prevention of terrorist activities and international dialogue between states in terms of broadening the “*understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism...*”⁶¹⁶

⁶¹⁴ Ibid.

⁶¹⁵“*Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts; (b) Prevent such conduct; (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct*”. S.C. Res. 1624, U.N. Doc. S/RES/1624 (September 14, 2005).

⁶¹⁶ Ibid.

b. Terrorist Organizations

i. *Short history of terrorism: From Tyrannicide to Terror as a Strategy*

Terrorism as we know it today (as defined above in Resolution 1566), is a fairly new concept that was unheard of until the late eighteenth century. Terrorism's 'ancestor' appears to be tyrannicide, that is to say the killing of a tyrant.⁶¹⁷ In Ancient Greece, the killing of a tyrant – a populist and demagogue – was not necessarily seen as such a bad thing. It appears that tyrannicide, in both Ancient Greece and Rome was seen as a medium of restoring the status quo ante and preserving a constitutional system that was being threatened by the tyrant's actions.⁶¹⁸

For example, in Ancient Athens, the cradle of democracy, it had become inconceivable and was regarded as outright illegitimate for a single individual to rule as a monarch. A tyrant was seen as a despicable individual who was morally corrupt (according to the mores of Ancient Greece). Tyrannicide was also celebrated and its authors regarded as heroes. Randall Law discusses this point

⁶¹⁷ One should note that a tyrant in the classical Greece was not necessarily a wicked individual. The 'tyrant' would be a "*leader who came to power by force, typically by overthrowing a polis' traditional form of government, which in the eighth to sixth centuries BCE was monarchy or oligarchy. The typical Greek tyrant courted popular favor by persecuting aristocrats, canceling the debts of the poor, and putting commoners to work on public work projects.*" RANDALL D. LAW, *TERRORISM: A HISTORY*, (Polity Editions, 2009) at p. 17.

⁶¹⁸ It appears that this assertion was debated in Ancient Greece by politicians and philosophers such as Aristotle who claimed that a tyrant was not simply a tyrant by being the de facto sole ruler, but because the manner of his rule which could include debauchery, theft of private property, perversion, mentally "disordered" and so forth. Ibid. at p. 18.

in these following lines when he addresses the possibility of a tyrant overthrowing the Athenian democracy⁶¹⁹: *“The growth of Athenian democracy led citizens to view tyrants as usurpers, not just of the people’s political power, but also of their property and honor. Eventually, the growth of new legal institutions and norms led more Greeks to condemn tyranny as a violation of the natural order and illegitimate by definition.”*

In Ancient Rome it had become a tradition to murder kings while Rome was still a kingdom. When the kingdom was abolished to the benefit of a republic, Lucius Junius Brutus, who was one of the first consuls of the Republic, passed a series of acts in order to outlaw the creation of any kingdom in Rome. Brutus required of Romans that they *“swear a solemn oath never to allow any man to be king in Rome”*⁶²⁰ and that the killing of anyone who declared himself to be the king of Rome was justified.⁶²¹

⁶¹⁹ Ibid.

⁶²⁰ Ibid. at p. 19.

⁶²¹ Bearing this in mind, one can understand why the murder of Julius Caesar was not seen so much as an act of treason but an attempt to curb the imperial pretensions of Caesar, who had already been appointed by the senate as “dictator for life”: *“Many feared and hated him as a populist and demagogue: some for personal slights, others for his open contempt for the Republic’s obsolete rituals and institutions, some for his attacks on or simple avoidance of traditional senatorial privileges, still others for the idea that he aspired to be king. For some senators, the new title was the last straw. Marcus Junius Brutus – one of Caesar’s closest friends and the descendant of Lucius Junius Brutus, the author of the oath against tyranny – hatched a plot along with his brother – in – law Cassius Longinus. [...] What is known, though, is that the group of conspirators – who tellingly dubbed themselves “the Liberators” (Liberatores) – included about sixty men, all drawn from the Senate. Their plot was inspired by a mixture of patriotism and self-interest, but the goal was universal: to restore the power of the optimates, the conservative senatorial “constitutionalists”.* It also appears that Caesar’s murder was approved by Cicero as a justifiable murder since Caesar aspired to kingship and dispatch the senate: *“What more atrocious crime can there be than to kill a fellow-man, and especially an intimate friend? But if anyone kills a tyrant – be he never so intimate a friend – he has not laden his soul with guilt, has he? The Roman People, at all events, are not of that*

Terror's major evolution took place in the late 18th Century when it was used by state authorities to transform societies that were undertaking fundamental constitutional changes. One of the best examples of this was France. The French Revolution took place in 1789, a highlight of which was the capture of the "Bastille" on July 14th, 1789. Privileges afforded to the nobility and clergy were then abolished in 1792. It was not until September 1793 that drastic measures were taken in order to fight "counter-revolutionaries", or, as Randal Law states it, individuals who "*either by their conduct, their contacts, their words or their writings, showed themselves to be supported of tyranny ...or to be enemies of liberty*".⁶²² (It goes without saying that counter-revolutionaries were executed or detained. This is a recurring pattern that can be observed in numerous tyrannical regimes throughout the world).

"If the mainspring of popular government in peacetime is virtue, the mainspring of popular government in revolution is virtue and terror both: virtue, without which terror is disastrous; terror, without which virtue is powerless. Terror is nothing but prompt, severe, inflexible justice; it is therefore an emanation of virtue; it is not so much a specific principle as a

opinion; for all glorious deeds they hold such a one to be the most noble." (De Officiis, Book III, 19-20) Ibid. at p. 24-25. What we can retain from "antique terrorism" is that it was mostly directed at individuals who posed a direct challenge by their actions and behavior to the stability of an existing political order. However, as we shall see hereunder, terrorism later mutated into becoming itself a force challenging the established political order rather than preserving it.

⁶²² Ibid. at p. 62.

*consequence of the general principle of democracy applied to the homeland's most pressing needs".*⁶²³

This form of terror can also be seen during the Russian Revolution, and the civil war and purges that followed it. The Russian civil war lasted until October 1922 with a clear victory for the Bolshevik forces. Inspired by Robespierre's methods and ideals, the Bolsheviks had early on sought to uproot any counter-revolutionary movements and "enemies of the people", whomever these may be. An organization named the "Emergency Committee" (Всероссийская чрезвычайная комиссия) was promptly created in order to root out these "obstacles to the Revolution", headed by Felix Dzerzhinsky. This organization, known as the Cheka, had the broadest powers to weed out the

⁶²³Robespierre, "Virtue and Terror", p. 115. Maximilien de Robespierre went further than that and used terror to purge society from "impure" elements, or in other words people "*whose mere presence represented an obstacle to the creation of free and equal patriots*" (Ibid. at p. 63) (another common feature of totalitarian regimes). This statement by itself is a basically a blank check to legally commit any type of crime including mass murder against any type of individual who was different. One can only speculate how far his "terror" would have gone, had Robespierre not been executed himself. It was not until September of 1918 that the Bolsheviks decreed a state of "Red Terror" whereby the summary execution of counter-revolutionaries and other individuals accused of being "obstacles" was seen as a virtue, just as it had been in France during the French Revolution. The use of terror by the Cheka, and more broadly the Bolsheviks was used to create a new state by terrorizing the population into submission and acceptance of such a new social order: "*Terror is a system [...] a legalized plan of the regime for the purpose of mass intimidation, mass compulsion, mass extermination*" (quoting here Isaac Steinberg) [...] "*We must execute not only the guilty. Execution of the innocent will impress the masses even more*". (Ibid. at p. 164) The above statements speak for themselves. The Red Terror was not only used to dispatch political adversaries and other "obstacles" to the revolution, it was also used as a means of enslavement by the state and the Bolshevik party, of the population living beneath it. Even though Lenin and Trotsky had gone beyond Robespierre's dreams and his "terrorists", Stalin brought state terror to new heights.

undesirable elements of society⁶²⁴ and engaged in numerous acts of barbarity, torture and murder to reach these goals.

Stalin used show trials to rid himself of any potential competition emanating from either former personal adversaries or allies. Stalin, aided by the NKVD (successor of the Cheka) set up quotas for arrests and executions, whereby local Chekists would unveil “plots” by enemies of the state who were conspiring to bring the socialist state down.⁶²⁵

Under this theory, but for these “obstacles”, the socialist utopia could be achieved. Entire peoples were regarded as being obstacles to socialist ideals, and as such were persecuted and exterminated based either on their ethnic origin (e.g. the “Holodomor” where millions were starved to death mostly in Ukraine and other parts of the Soviet Union in 1932-33) or the mere fact of belonging to a defined social class (kulaks, non-communist intellectuals etc.).⁶²⁶

While Ancient Greece and Rome viewed individual acts of terror as a positive contribution that would attempt to stall the usurpation of power by strong-

⁶²⁴ Ibid. at p. 161. “*It was given sweeping authority to investigate, detain, try, and execute enemies of the new socialist state*”.

⁶²⁵ Ibid. at p. 166.

⁶²⁶ Entire peoples were deported to remote areas within the Soviet Union, millions were sent off to Gulags which were nothing less than slave camps where free and renewable labor was extorted from an exsanguinate population, whereas millions were summarily executed due to their being an obstacle to the achievement of a socialist state or simply to terrorize the population at large into submission.

men and aspiring dictators, more recent acts of terror such as those in Eighteenth Century France and Twentieth Century Russia were used by the state. Terror in these regimes was a well oiled strategy used to subjugate populations for the higher ideals.

Even if terror nowadays is still used in a number of authoritarian and totalitarian regimes in order to suppress their population, that is to say in a top to bottom direction, terror has lately emerged under a different form. Terror is now a means chosen by non-state actors, who are not necessarily representative of the population, as a spring-board in order to place themselves in a position of strength against a state's political integrity. Furthermore, terror is not directed towards an individual person per se, but towards perceived vital elements of the said state. Terror is not regarded so much as a great strategy than a tactic, or "stepping stone" used on the spectrum of warfare.

ii. Terrorism as a tactic

"The political offensive had been preceded by deliberate intellectual effort spanning a number of years to persuade the West to change its policies regarding terrorism. It was in the context of these efforts that the Jonathan Institute was founded. Named after my brother Jonathan, who had fallen while leading the Israeli force that rescued the hostages at Entebbe in 1976, its purpose was to educate free societies as to the nature of terrorism and the methods needed to fight it. The Jonathan

Institute's first international conference on terrorism, held in Jerusalem in 1979, stipulated that terror had become a form of political warfare waged against the Western democracies by dictatorial regimes. The participant at the conference, among them Senator Henry Jackson and George Bush, then a candidate for the US presidency, provided evidence of the direct involvement of the Eastern bloc and Arab regimes in spawning international terror. These revelations met with no small amount of resistance – so much that a correspondent covering the conference for The Wall Street Journal commented that 'a considerable number in the press corps covering the conference were much annoyed'. The idea that terrorism was not merely a random collection of violent acts by desperate individuals but a means of purposeful warfare pursued by states and international organizations was at that time simply too much for many to believe. (After the collapse of the Soviet Union, I had the opportunity to discuss this incredulity with a number of officials of the former Soviet bloc, and they expressed astonishment at the naïveté of Western journalists and government figures in this regard).⁶²⁷

Terrorism on the spectrum of asymmetric warfare and goals:

⁶²⁷ BENJAMIN NETANYAHU, *FIGHTING TERRORISM: HOW DEMOCRACIES CAN DEFEAT THE INTERNATIONAL TERRORIST NETWORK*, (New York: Farrar, Straus and Giroux, 2001) at p. 64. See also LT. GEN. ION MIHAI PACEPA (FORMER HEAD OF ROMANIAN INTELLIGENCE), *RED HORIZONS: THE TRUE STORY OF NICOLAE AND ELENA CEAUCESCU'S CRIMES, LIFESTYLE, AND CORRUPTION* (Regnery Gateway, 1990) (1987).

This past century has been witness of a misperception of what terrorism consisted of. This stems from entities justifying horrendous acts of violence against civilians by making it seem morally acceptable to those unfamiliar with terrorism; this is done by characterizing the acts as expressions of revolt and remedy against an injustice.⁶²⁸ Instances where aggrieved parties resort on their

⁶²⁸ Two leaders of international stature emphasized the threat posed by terrorism and the need for a clear line to be drawn that cuts it off from bearable or excusable behavior. Benjamin Netanyahu writes in *FIGHTING TERRORISM: "To achieve this goal [removing terrorism] we must first have moral clarity. We must fight terrorism wherever and whenever it appears. We must make all states play by the same rules. We must declare terrorism a crime against humanity, and we must consider the terrorists enemies of mankind to be given no quarter and no consideration for their purported grievances. If we begin to distinguish between acts of terror, justifying some and repudiating others based on sympathy with this of that cause, we will lose the moral clarity this is so essential for victory. This clarity is what enabled America and Britain to root out piracy in the nineteenth century. The same clarity enabled the Allies to root out Nazism in the twentieth century. They did not look for the "root cause" of piracy or the "root cause" of Nazism – because they knew that some acts are evil in and of themselves, and do not deserve any consideration or "understanding". They did not ask whether Hitler was right about the alleged wrong done to Germany in Versailles. That they left to historians. The leaders of the Western Alliance said something else: Nothing justifies Nazis.*" BENJAMIN NETANYAHU, *FIGHTING TERRORISM: HOW DEMOCRACIES CAN DEFEAT THE INTERNATIONAL TERRORIST NETWORK*, (New York: Farrar, Straus and Giroux, 2001) at xxi. On a similar note, the former Saudi ambassador to the United States, Prince Bandar bin Sultan bin Abdulaziz Al-Saud wrote quite bluntly in the Saudi government daily newspaper *Al-Watan*, that Muslim youths who have been misled [the terrorists] had to be dealt with in a drastic or efficient way. If this were not to be done, dire consequences would be suffered by those who refused to act thereupon: "*War means war. It does not mean Boy Scout camp. It is a war that does not mean delicacy, but brutality. This is [a] war that cannot be conducted based on calling those who deviate [from the religion] good people who were careless, but based on [called them] terrorists and aggressors with whom there can be no compromise. [...] [But] if we deal [with them] hesitantly, in hope that [the terrorists] are Muslim youths who have been misled, and that the solution [to the crisis] is that we call upon them to follow the path of righteousness, in hope that they will come to their senses – then we will lose this war. [...] We have a religious and national obligation not to be tempted into following those who have misled us, [trying] to persuade us that the flaw lies with us, as a state and a people, and that this terrorist phenomenon is the result of the cultural situation in which we are living, with its advantages and disadvantages. This is a word of truth that aims at lying. [Today's] deviants did not appear for the first time in our era. They appeared already during the era of the [four] Righteous Caliphs. The deviants did not appear because [our] nation has connections with America or with Christians and Jews, or because Israel's aggression against the Palestinian brethren, or because of events in Fallujah or Chechnya. They appeared for the first time during the era of the Companions of the Messenger of Allah. Similarly, [those who were] behind the Fitna [civil war following] the murder [of the Third Caliph] Uthman ibn'Affan [in the 7th century] were neither Christians nor Jews. They were the sons of the Companions of the Prophet. Enough blaming others when the reason lies within our own ranks! Enough demagoguery at this critical stage in our history! [...] If we do not carry out this directive of our Lord, and if we do not declare a general mobilization – we will*

own to terrorist tactics are extremely rare since even the smallest act of terrorism requires logistical and material support, which are usually available to organized groups rather than individuals.⁶²⁹ “Thinking outside the box” is required to free ourselves from preconceptions of what terrorism is and why it is used. Looking at the larger picture demonstrates that terrorism is a tool on the warfare spectrum. In other words, terrorism is a war tactic⁶³⁰ that was used in the past and that leads to success for parties waging asymmetrical warfare.⁶³¹

lose this war on terrorism.” Prince Bandar bin Sultan bin Abdulaziz Al-Saud, *A Diplomat’s Call for War*; THE WASHINGTON POST, June 6, 2004, Final edition, at B04.

⁶²⁹ This point is explained in fuller details in the following lines: “*Terrorist tactics employ violence primarily against noncombatants. Terror attacks generally require fewer personnel than guerilla warfare or conventional warfare. They allow insurgents greater security and have relatively low support requirements. Insurgencies often rely on terrorist tactics early in their formation due to these factors. Terrorist tactics do not involve mindless destruction nor are they employed randomly. Insurgents choose targets that produce the maximum informational and political effects. Terrorist tactics can be effective for generating popular support and altering the behavior of governments.*” U.S. ARMY – MARINE CORPS COUNTERINSURGENCY FIELD MANUAL: U.S. Army Field Army Manual No. 3-24, Marine Corps Fighting Publication No. 3-33.5, The University of Chicago Press, Chicago and London Published in 2007,p. 109 (point 3-103).

⁶³⁰ Terrorism has played an important role in conflicts known as protracted wars. The term of “protracted war” belongs mainly to Chinese and South-East Asian 20th Century conflicts waged by ill-equipped armies mainly against conventional forces. The U.S. ARMY – MARINE CORPS COUNTERINSURGENCY FIELD MANUAL states for instance in point 1-30 (p. 11) that: “*Protracted conflicts favor insurgents, and no approach makes better use of that asymmetry than the protracted popular war. The Chinese Communists used this approach to conquer China after World War II. The North Vietnamese and Algerians adapted it to fit their respective situations. And some Al Qaeda leaders suggest it in their writing today. This approach is complex; few contemporary insurgent movements apply its full program, although many apply parts of it. It is, therefore of more than just historical interest. Knowledge of it can be a powerful aid to understanding some insurgent movements*”.

⁶³¹ Ibid. 629 at p. 10, point 1-30. The U.S. ARMY – MARINE CORPS COUNTERINSURGENCY FIELD MANUAL entertains the idea that insurgency tactics employ different variations of armed force among which are terrorist acts, reaping then various benefits that ultimately advance their political objectives: “*Organizations like the Irish Republican Army, certain Latin American groups, and some Islamic extremist groups in Iraq have pursued an urban approach. This Approach uses terrorist tactics in urban areas to accomplish the following: Sow disorder. Incite sectarian violence. Weaken the government. Intimidate the population. Kill government and opposition leaders. Fix and intimidate police and military forces, limiting their ability to respond to attacks. Create government repression*”.

It is interesting to notice the part played by terrorism in the early stages of protracted war, where its main objective is to psychologically wear down the enemy forces and the civilian population. This three stepped military strategy is not rigid and allows for modifications as insurgents meet new challenges. This permits actors to adapt themselves to the different phases of this protracted war, shifting from “strategic counteroffensive” to “strategic defensive,” or vice versa.

The first step of this military strategy is called the “Strategic Defensive.” During the “Strategic Defensive”, insurgent elements understand that governmental forces could quickly and easily dispose of them were they to engage directly with the government in a conventional military manner. Therefore, it is preferable to engage the governmental authority on non-military theaters. The insurgents could lead propaganda and disinformation campaigns or terrorist strikes targeted at delegitimizing the government’s authority, while at the same time gaining legitimacy for itself and enlarging its popular support.⁶³²

⁶³²“Phase I, strategic defensive, is a period of latent insurgency that allows time to wear down superior enemy strength while the insurgency gains support and establishes bases. During this phase, insurgent leaders develop the movement into an effective clandestine organization. Insurgents use a variety of subversive techniques to psychologically prepare the populace to resist the government or occupying power. These techniques may include propaganda, demonstrations, boycotts and sabotage. In addition, movement leaders organize or develop cooperative relationships with legitimate political action groups, youth groups, trade unions, and other front organizations. Doing this develops popular support for later political and military activities. Throughout this phase, the movement leadership: ‘Recruits, organizes and trains cadre members. Infiltrates key government organizations and civilian groups. Establishes cellular intelligence, operations and support networks. Solicits and obtains funds. Develops sources for external support’. **Subversive activities are frequently executed in an organized pattern, but major combat is avoided. The primary military activity is terrorist strikes. These are executed to gain popular support, influence individuals, and sap enemy strength. In the advanced stages of this phase, the insurgent organization may establish a counter-state that parallels the established authority. (A counter-state [or shadow government] is a competing structure that a movement sets up to replace the government. It includes the administrative and**

The second phase of this strategy is the “Strategic Stalemate”. After having substantially weakened the governmental morale and forces, the insurgents find themselves in a situation in which they can wage guerilla warfare. Exposing themselves will not cause a rise in casualties on the insurgent side and will inflict enhanced losses on the governmental side in “hit and run” operations.⁶³³ Eventually, once the governmental forces have been weakened enough, the insurgents will be able to enter the third phase, which is known as the “strategic counteroffensive”. Here, insurgents will now level and possibly surpass the governmental military forces while engaging in conventional warfare tactics.⁶³⁴ At the same time, the insurgents will replace members in the current governmental authority.⁶³⁵

bureaucratic trappings of political power and performs the normal functions of government) [emphasis added].” Ibid. 316 at pp. 11-12 (point 1-32).

⁶³³ The second phase is described also in the U.S. Army – Marine Corps Counterinsurgency Field Manual at point 1-33: “*Phase II, strategic stalemate, begins with overt guerilla warfare as the correlation of forces approaches equilibrium. In a rural –based insurgency, guerillas normally operate from a relatively secure base area in insurgent-controlled territory. In an urban-based insurgency, guerillas operate clandestinely, using a cellular organization. In the political arena, the movement concentrates on undermining the people’s support of the government and further expanding areas of control. Subversive activities can take the form of clandestine radio broadcasts, newspapers and pamphlets that openly challenge the control and legitimacy of the established authority. As the populace loses faith in the established authority the people may decide to actively resist it. During this phase, a counter-state may begin to emerge to fill gaps in governance that the host-nation government is unwilling or unable to address. Two recent examples are Moqtada al Sadr’s organization in Iraq and Hezbollah in Lebanon. Sadr’s Madhi Army provides security and some services in parts of southern Iraq and Baghdad under Sadr’s control. (In fact, the Madhi Army created gaps by undermining security and services; then it moved to solve the problem it created). Hezbollah provides essential services and reconstruction assistance for its constituents as well as security. Each is an expression of Shiite identity against governments that are pluralist and relatively weak*”. Ibid. 316 at 12 (point 1-33).

⁶³⁴ HEW STRACHAN AND SIBYLLE SCHEIPERS, *THE CHANGING CHARACTER OF WAR*, (Hew Strachan & Sibylle Scheipers ed., Oxford University Press, 2011).

⁶³⁵ The third phase is depicted once more in the U.S. Army – Marine Corps Counterinsurgency Field Manual which states that: “*Phase III, strategic counteroffensive,*

Under this paradigm, terrorism is used as a temporary tactic rather than a strategy in order to give assailants a relief they would not have gained, had they exercised conventional warfare in the first place. That being said, the use of acts of terror as a tactic on the spectrum of warfare does not preclude later acts of terror on the state level as it was the case in Nazi Germany with the burning of the Reichstag, which was blamed on the communists and which helped the Nazis establish their grip on Germany. Another example was the assassination of Kirov, one of Stalin's friends, on December 1st 1934. This assassination enabled Stalin to rid himself of political adversaries and former friends.⁶³⁶ With regards to Red China, Mao's forces started by using terror as a tactic and then as a strategy after it had won the war against the Nationalists in order to create his socialist utopia.

occurs as the insurgent organization becomes stronger than the established authority. Insurgent forces transition from guerilla warfare to conventional warfare. Military forces transition from guerilla warfare to conventional warfare. Military forces aim to completely destroy the enemy's military capability. Political actions aim to completely displace all government authorities. If successful, this phase causes the government's collapse or the occupying power's withdrawal. Without direct foreign intervention, a strategic offensive takes on the characteristics of a full-scale civil war. As it gains control of portions of the country, the insurgent movement becomes responsible for the population, resources, and territory under its control. To consolidate and preserve its gains, an effective insurgent movement continues the phase I activities listed in paragraph 1-32. In addition it; establishes an effective civil administration, establishes an effective military organization, provides balances social and economic development, mobilizes the populace to support the insurgent organization, protects the populace from hostile actions." Ibid. 310 at p. 13 (point 1-34).

⁶³⁶ RANDALL D. LAW, *TERRORISM: A HISTORY*, (Polity Editions, 2009) at p. 165: "Terrorism became a particularly useful danger around which to build false accusations because it mobilized the public. The result was ever-widening circles of denunciations. From fall 1936 to fall 1938, arrests climbed into the thousands and then millions, with every victim linked through a chain of friendly, familial, or professional associations back to the conspiracy to kill Kirov, assassinate Stalin, or sabotage the economy. Stalinist terror thrived on paranoia, the belief that even your closest colleague or loved one could be a terrorist in hiding, waiting to be activated by a secret message from the devil himself, Trotsky. Each new unmasking ratcheted up the panic and reinforced the impression that the country was under siege from a hidden foe."

B. Testing the Validity of these threats

“It is a maxim founded on the universal experience of mankind, that no nation is to be trusted farther than it is bound by its interest; and no prudent statesman or politician will venture to depart from it.”⁶³⁷

States have seldom resorted to asking legal advice from an international body before engaging in a defensive military action. Multiple reasons are cited in order to explain this behavior. What entity other than the threatened state itself can perceive the danger it is confronted with? Should other states be expected, (which might not have any interest or even might have conflicting interests) to impartially assess and be judges of a situation in which one state would ask their authorization to defend itself? Furthermore, would it be reasonable to expect from a state that it forgo its inherent right of self-defense and defer it to a third party that does not necessarily share its interests or concerns in terms of self-preservation? Would a third party timely respond to an allegedly threatened state’s security concerns? Last but not least, to whom would the third party be accountable if its assessment is erroneous?

⁶³⁷ George Washington, November 14, 1778, Quoted in Joseph J. Ellis, *His Excellency, George Washington* (New York: Alfred A. Knopf, 2004), p. 123.

The above questions highlight some of the challenges that will have to be addressed here. More specifically, whether a third party should be involved at all in the determination of whether a state can resort to preventive self-defense.

We should also add a few words of caution relative to the use of prevention. First and foremost, what guarantee is there that a state would not abuse preventive force in order to launch wars of aggression, as it was done in the past? Setting aside the case of a deliberate aggression by one state against another under the guise of preventive self-defense, some states might make an honest mistake in their security estimates when assessing a potential threat. With regards to such cases, it would not be unreasonable to assume that a third party could possibly review a state's assessment prior to using preventive force. We must ask ourselves what evidence or proof could be brought forth in order to support the claim that a preventive use of force would be warranted. Furthermore, we must ponder as to the nature of the military campaign to be undertaken.

Additionally, we should also note that a state wishing to use preventive force might want to do so without prior authorization or review, and carry out the preventive military action. Considering this possibility, what should the response of the checking authority be? Would the preventing state be able to "make its case" before the reviewing authority? Should the state that used preventive force be sanctioned for not resorting to third party review? These are the type of questions we shall have to address in order to attempt to frame a normative framework around the legality of preventive force.

1. Assessment by the threatened state – setting the problem

a. The state's assessment

i. *Why the state?*

The question that we are trying to answer here is who is, or should be, responsible for assessing a growing threat. The obvious answer to this question is that this responsibility is solely borne by the threatened state. The state is first and foremost responsible for the security of its citizens and its territorial integrity. This is one of the basic premises of statehood, whereby citizens relinquish to the state certain powers and agree to perform various duties. In exchange for this, the state offers its citizenry protection from foreign aggression. Such protection would vary depending on the size and wealth of the nation, just as on the state of its armed forces. This pattern can be found in most societies organized as liberal democracies, in stark contrast to societies where the regime itself is solely centered on its self-perpetuation and that of its ruling elite, and not on the welfare of its citizenry.

Since the state is in charge of protecting its population and territorial integrity, it is naturally incumbent upon the state to determine what kind of behavior constitutes a threat to its interests. Additionally, only the state, and no other entity knows what constitutes its interests, and which ones are vital or not. A nation does not merely consist of a population and territory. A nation has a common history, experience and culture which mold its behavior, mentality,

decision making process and perception of danger. These qualities are so intrinsic to a state itself that they represent its core essence and values.

An additional argument toward recognizing that the state should be the one making the assessment of what kind of actions constitute a threat to its national interests is the fact that sometimes time is of the essence. While the invitation of a third party in the assessment process could prove at times to be a positive thing, there are times when time constraints dictate otherwise, as it was the case in the Six Days War where swift and decisive action had to be taken.

State made assessments also are not immune from drawbacks. First and foremost, one should recognize the fact that the threatened state's assessment can both be a good and a bad thing for the above mentioned reasons. Having said that, and bearing in mind what was previously said, a state takes decisions concerning its security based on intelligence it processes, based on its history, the experience it has and the challenges it was confronted with, among various factors. These factors both influence a nation's decision making process and bias it in a way in which that nation could possibly over-assess or under-assess a threat. Some could argue that the terrorist attacks on September 11, 2001 were symptomatic of an under-assessment of the threat represented by Al-Qaeda. This attack could be compared to the December 7th, 1941 attack on Pearl Harbor which followed an under-assessment of the Japanese threat (or the magnitude of an inevitable attack).

In order to somewhat remedy this, and to broaden a state's ability to identify threats, some states have undertaken to share intelligence among themselves. For instance, there is a strong intelligence sharing partnership between the United States, the United Kingdom, Australia and Canada whereby these four countries enjoy an unmatched level of intelligence sharing.⁶³⁸ Professor Lowenthal mentions in his work that NATO members also enjoy a certain level of intelligence sharing.⁶³⁹ However, this intelligence sharing is of a lesser quality due to the fact that NATO member states do not necessarily share the same interests.⁶⁴⁰ This goes to show that even intelligence sharing as a tool to remedying possible assessment mistakes has its limitations and drawbacks.

ii. Actors making the assessment – the role of intelligence

⁶³⁸ MARK M. LOWENTHAL, "INTELLIGENCE: FROM SECRETS TO POLICY", (Third Ed., Washington: CQ Press 2006) (1999) at p. 75.

⁶³⁹ Ibid. "*Intelligence relations with other North Atlantic Treaty Organization (NATO) allies are close, albeit less so than with the 'Commonwealth Cousins'. But some recent operations, such as in Bosnia, have involved military operations with nations that are view with lingering suspicion, such as Russia and Ukraine.*"

⁶⁴⁰ Additional concerns arose when former Warsaw Pact nations such as Bulgaria, or former Soviet states such as Estonia joined NATO due to their close relations with Russia. Herman Simm was Estonia's "top spy" when he was arrested on September 21st, 2008 for treason after providing Russia with Estonian and NATO secrets. Holger Stark, *Estonian Spy Scandal Shakes NATO and EU*, DER SPIEGEL, November 17, 2008, available at: <http://www.spiegel.de/international/europe/western-secrets-for-moscow-estonian-spy-scandal-shakes-nato-and-eu-a-590891.html> : "*Since Simm was responsible for dealing with classified information in Tallinn, he had access to nearly all documents exchanged within the EU and NATO. Officials who are familiar with the case assume that 'virtually everything' that circulates between EU member states was passed on to the Russian Foreign Intelligence Service, the SVR – including confidential analyses by NATO on the Kosovo crisis, the war in Georgia and even the missile defense program [...] the case reveals how vulnerable the alliance has become in the wake of the expansion of NATO and the EU into Eastern Europe* [Emphasis added]."

*“Reports that say that something hasn’t happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are things we do not know. But there are also unknown unknowns - the ones we don’t know we don’t know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones”.*⁶⁴¹

As soon as we hear “intelligence”, we start thinking about “James Bond”, imagining him shooting his way out of buildings harmlessly and flying from one country to next before saving charming women from evil villains. Unfortunately for members of the “intelligence community” this could not be further from the truth.

The first question that needs to be asked is what intelligence is, and what purpose does it serve? A definition of what intelligence consists of is given by Professor Mark M. Lowenthal as:

“Information that meets the stated or understood needs of policy makers and has been collected, processed, and narrowed to meet those needs. Intelligence is a subset of the broader category of information. Intelligence and the entire process by which it is identified, obtained, and

⁶⁴¹ Secretary of Defense Donald H. Rumsfeld, DoD News Briefing – Secretary Rumsfeld and Gen. Myers (02/12/2002) available at: <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>.

*analyzed respond to the needs of policy makers. All intelligence is information; not all information is intelligence”.*⁶⁴²

Professor Lowenthal notes that there are mainly two reasons to develop intelligence. The first is that states need to avoid “strategic surprise”. This is a kind of surprise that seeks to endanger a nation’s existence.⁶⁴³ Examples of such surprises could include the invasion of the Soviet Union by Germany or the Japanese attack on Pearl Harbor. These are to be distinguished from “tactical surprises” which are of a lesser magnitude and which do not necessarily endanger a nation’s integrity.⁶⁴⁴ An example of this would be the arrival of Blucher, the leader of the Prussian army at Waterloo, in support of Wellington who surprised Napoleon during that battle.

The second main goal of intelligence is to provide “long-term expertise”, as Professor Lowenthal put it.⁶⁴⁵ This stems mainly from two considerations. The first takes into consideration the fact that policy makers do not necessarily know all the various aspects of a given issue and need additional information to take a decision. Intelligence is used to understand the more concealed elements of a given issue and the potential implications of a policy choice over another. Furthermore, even leaders who have previously served in intelligence

⁶⁴² MARK M. LOWENTHAL, “INTELLIGENCE: FROM SECRETS TO POLICY”, (Third Ed., Washington: CQ Press 2006) (1999) at p. 2. In other words, intelligence is a type of information collected for policy makers to make decisions, which is kept secret. This definition seems to answer both questions of what is intelligence and why have it in the first place.

⁶⁴³ Ibid.

⁶⁴⁴ Ibid. at p. 3.

⁶⁴⁵ Ibid.

agencies⁶⁴⁶ cannot be expected to take fully informed decisions without attending intelligence briefings.

Another goal of intelligence is to provide “long-term expertise”. Intelligence consists of information gathered on particular issues over a period of time, which can be several years. Consequently, while political administrations come and go, the work provided by the “intelligence community” provides a stable foundation and basis on which incoming political administrations can rely in order to make informed decisions.

Last but not least, intelligence is about national security and defending one’s national interests. Intelligence gathering enables a state to monitor its foes’ actions and pretensions, as well as the actions of its friends’ or neutral states.⁶⁴⁷ This comes from the assumption that every nation has its own interests, and states in general are not willing to sacrifice their national interest for the benefit of another state. One can argue that a nation that is not willing to defend its national interests has lost its purpose and reason of existence.

“Intelligence” is not a field free of mistakes, shortcomings or failures. Intelligence should essentially be seen as the product of educated guess-work. This involves determining the other party’s intentions without being privy to the

⁶⁴⁶ Among such leaders we find George H. Bush (who served as the head of the CIA), Yuriy Andropov (who was the Secretary General of the Communist Party of the USSR, and who had also served as the head of the KGB) or Russia’s current president (who served in the KGB and was later the director of the FSB, the successor agency to the KGB). The reason for this derives from the fact that “intelligence” is a very vast field where different levels of expertise relative to various topics is required.

⁶⁴⁷ Ibid. 642 at p. 5.

other party's secrets. One of the greatest shortcomings of western intelligence communities was their inability to predict the peaceful collapse of the Soviet Union. Indeed, the "intelligence community" was aware of the Soviet Union's structural weaknesses, riddled with an inefficient administration and a fundamentally unsustainable⁶⁴⁸ economic model. However, it was unthinkable that the Soviet Union would just disappear as it did, without having fired a shot. Professor Lowenthal makes the argument that the Soviet government had basically remained in power for more than 70 years by using brutality and cruelty, and therefore would avert any kind of disintegration in a similar fashion.⁶⁴⁹ Another example is Iraq. It had been assumed, prior to the military campaign led against Iraq during the First Gulf War that Iraq was "*at least five years away from a nuclear capability*".⁶⁵⁰ After the First Gulf War, it was revealed that Iraq was far closer to developing nuclear weapons than what had been assessed. On the other hand, questions arose as to whether there had been an over-interpretation of intelligence regarding the Second Gulf War. Professor Lowenthal makes the statement that over-interpretation had not been a factor for failing to see that Iraq

⁶⁴⁸ Ibid. at p. 229.

⁶⁴⁹ Ibid. "*But a large gap exists between knowing that a state has fundamental weaknesses and foreseeing its collapse. TO a large extent, the collapse of the Soviet Union was unprecedented. (In the past, some once-great empires, such as the Ottoman Empire, had suffered long, lingering demises. Other great empires had suffered sudden collapses, but usually in the context of war, as did the German, Austrian, and Russian empires after World War I.) Nor was there anything in Soviet behavior – which had showed its brutal side often enough – to lead analysts to expect that the nation's elite would acquiesce to its own fall from power without a struggle. An irony of history is that an attempt by the so-called power ministries of the Soviet state (the military, the defense industrial complex, the KGB – the State Security Committee) to derail Gorbachev revealed how little support the Soviet system had.*"

⁶⁵⁰ Ibid. at p. 242.

did not possess weapons of mass destruction at the time of the military campaign.⁶⁵¹

We should also briefly mention what is commonly called “politicized intelligence”. “Politicized intelligence” is not intelligence at all and should not be tolerated. In liberal democracies, policy-makers are elected by constituents to whom policy makers are responsible and accountable. These policy-makers are trusted to make decisions based on various factors, including intelligence:

“In the ethos of US intelligence, a strict dividing line exists between intelligence and policy. The two are seen as separate functions. The government is run by the policy makers. Intelligence has a support role and may not cross over into the advocacy of policy choices. Intelligence officers who are dealing with policy makers are expected to maintain a certain objectivity and not push specific policies, choices, or outcomes. To do so is seen as threatening the objectivity of the analyses they present. If intelligence officers have a strong preference for a specific policy

⁶⁵¹ Ibid. *“In the course of US military action in Iraq that commenced in 2003, expected Iraqi weapons of mass destruction programs were not found. Some wondered if analysts had compensated for their earlier error by over-interpreting evidence of a possible program without considering alternative interpretations. The analysts themselves denied this assessment, and none of the postwar investigations of the intelligence community’s performance found over-interpretation to have been a factor.”* This leads us directly to what is called “counter-intelligence”. “Counter-Intelligence” essentially seeks to protect one nation’s intelligence from foreign sovereigns, anticipating what these would do. This enables us to understand the complexities relative to analyzing intelligence, and the fact that in addition to being a field where secrecy is paramount, analysts have to take into consideration the fact that their adversaries are also providing them with false information which contribute in their own way to “intelligence-failures”. A perfect example of a recent use of counter-intelligence was the use by the Allies during WWII of inflatable tanks located in the United Kingdom in order to lure the Germans into believing that the land invasion of France would occur at Calais and not on the Normandy beaches.

*outcome, their intelligence analysis may display a similar bias. This is what is meant by politicized intelligence, one of the strongest expressions of opprobrium that can be leveled in the US intelligence community.*⁶⁵²

Some have argued that a recent example of politicized-intelligence was the 2007 National Intelligence Estimate (NIE) which was released in the fall of 2007 and which trumpeted that Iran had abandoned its nuclear weapons program “in fall 2003, Tehran halted its nuclear weapons program”.⁶⁵³ John Negroponte, then Deputy Secretary of State, re-interpreted the NIE’s findings in the following lines to mean that the only thing that had been suspended was the work on the nuclear warhead.⁶⁵⁴

b. International guidelines – principles on self -defense and proportionality

i. Article 2(4) and 51 of the UN charter

⁶⁵² Ibid. at p. 4.

⁶⁵³ Office of the Director of National Intelligence, *Iran: Nuclear Intentions and Capabilities* (Washington : Director of National Intelligence, 2007).

⁶⁵⁴ “We are having some success in clarifying what the NIE actually means. And what it does mean is that we have information that at some time back in 2003, Iran stopped its activity in the area of designing a warhead. That’s what they stopped doing. But building a nuclear weapon involves three distinct activities. One is to acquire the fissile material, and as you know what activity continues in Iran. They are continuing their work on enriching uranium. Another is to develop a delivery system. And of course the Iranians are working hard on the acquisition and development of missile technology, and they already have a lot of missiles. And thirdly, of course, the actual warhead. So it’s only the work on the warhead that stopped, and we don’t even have absolute certainty that activity has not resumed.” Robert McMahon, ed. “Negroponte Says China Mostly ‘In Sync’ with U.S. on Iran,” COUNCIL ON FOREIGN RELATIONS, February 4, 2008.

International law provides rules relative to the use of force and the restrictions placed on using force against other sovereign states. These rules are narrowly defined by articles 2 (4) and 51 of the United Nations Charter. Article 2.4 provides that Member States should refrain from using force against other Member States *“in a manner inconsistent with the Purposes of the United Nations”*.⁶⁵⁵ Article 51 preserves to a certain extent the “inherent right of individual or collective self-defense” until the UN Security Council takes appropriate measures to maintain and restore international peace and security.⁶⁵⁶

These two Articles from the United Nations Charter provide us with important instruments in order to understand first and foremost the extent of use of force allowed under the Charter, but more importantly the scope of self-defense. As mentioned earlier in this research, self-defense is an inherent right that belongs to every sovereign state. The follow-up question to this statement is whether there are any limits to this right of self-defense? The obvious answer to this question is yes. This principle is an old principle that can be found in the Bible or the writings of Just War theorists. This principle is also found subtly in

⁶⁵⁵ United Nations Charter, Article 2(4): *“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”*

⁶⁵⁶ United Nations Charter, Article 51: *“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”*

Article 51. Article 51 mainly expresses the idea of Member States having the right to defend themselves against foreign aggression. Article 51 additionally states that this inherent right of individual or collective self-defense is subject to the Security Council's taking of "*measures necessary to maintain international peace and security*".⁶⁵⁷ This means that the ultimate goal of any self-defense action is limited by the idea of maintaining and restoring international peace and security.

Proportionality of the military reaction can also be seen under a slightly different light, the one of humanitarian law. A long standing debate exists in international legal circles as to what a proportional use of force consists of. The debate mainly revolves around the question of whether a proportional use of force means that the party that has suffered the aggression can reply with force similar to that of the offender, or whether proportionality seeks to address directly the "root cause" of the offense. In this sense proportionality would have to be evaluated according to actions needed to be taken in order to remove the origin of the threat.

These two understandings of what proportionality stands for have vastly different legal ramifications. While in the first instance proportionality is seen as a tit-for-tat use of force, concerns might arise over the efficiency of that use of force but also of potential collateral damage. Furthermore, such a use of force begs

⁶⁵⁷ Ibid.

the question of whether a proportional response to an armed attack is pertinent at all as it would hardly be a deterrent to further acts of aggression.

On the other hand, if proportionality is viewed through the lens of actions taken towards the removal of the threat, then force could be used in a more efficient way, mitigating undesirable effects. This approach is the one championed not only by international humanitarian law activists, but also by the Additional Protocol I of the 1949 Geneva Convention. The latter document, in Article 51 (5) (b) considers attacks that are excessive in their implementation relative to the military advantage gained, to be indiscriminate and consequently disproportional⁶⁵⁸ in neutralizing the threat. A proportional use of force would then involve having to strike a balance between on the one hand the neutralization of the threat and humanitarian concerns on the other.

ii. Form and intensity of the response against the prevented state

⁶⁵⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: “Among others, the following types of attacks are to be considered as indiscriminate: (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.

The question we will be addressing here concerns essentially the fact of whether preventive military force should be used as a measure of choice or one of last resort.⁶⁵⁹ Additionally, we also inquire as to whether other non-military measures ought to be taken before launching a preventive military action.⁶⁶⁰ This question is highly relevant when contemplating regimes seeking weapons of mass destruction. Furthermore, another aspect that should be addressed, aside from the qualitative nature of the measure, is the quantitative aspect of the preventive action; or, in other words, the magnitude of the preventive action.

First and foremost, resort to crude force nowadays as a means of enforcing a right without first attempting to resolve a dispute by peaceful means has been looked down upon in international law and within the international community.⁶⁶¹ One cannot but recall the 1981 Israeli preventive strike on the Osirak reactor in Iraq which was widely condemned in international circles and by

⁶⁵⁹ Yaniv Roznai, *Let the Caroline Sink! Assessing the Legality of a Possible Israeli Attack on Iranian Nuclear Facilities and Why the Traditional Self-Defense Formula is Incompatible with the Nuclear Age*, 18 CAL. INT. L.J. 18 (2010): “The proof of necessity requires exhaustion of all reasonable alternative means of avoiding the threat concerned without forcible means. In the Security Council debate over the Osiraq attack, the US vote in favour of the resolution condemning Israel was established upon the acknowledgement that Israel had failed to exhaust peaceful means to resolve the conflict.”

⁶⁶⁰ See the Statement by the Representative at the United Nations (Kirkpatrick) before the U.N. Security Council (June 19, 1981) in American Foreign Policy Current Documents 1981, 689, 690. In that statement, the Ambassador made it clear that the United States would agree to sanction Israel for its preventive attack because it had failed to exhaust non-military channels to resolve the issue.

⁶⁶¹ David A. Sadoff, *A Question Of Determinacy: The Legal Status Of Anticipatory Self-Defense*, 40 GEO. J. INT’L L. 523, 527 (2009) : “Under international law, self-defensive force must observe two chief principles: necessity and proportionality. With respect to necessity, a State’s resort to force has to be the sole recourse available to defend itself against an attack. This, in turn, implies that a State has exhausted all practicable measures to avert the use of military force. Such measures might include engaging in bilateral or multilateral diplomacy, imposing economic sanctions, or seeking unarmed intervention by the Security Council. The more substantial and irrevocable the threatened harm, the stronger is the case for necessity”.

United Nations Security Council Resolution 487.⁶⁶² A more gradual approach to the use of force, were it to be preventive or traditional, has been the model most states have aspired to since the Second World War.

The United Nations Charter was signed by people who were determined to “*save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind [...] to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security...*”⁶⁶³

In that spirit, states have attempted to circumvent the use of force by mainly employing non-forceful actions. These actions can range from mere “naming and shaming”⁶⁶⁴, to travel restrictions⁶⁶⁵, or diplomatic sanctions in the

⁶⁶² S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981) available at: <http://unispal.un.org/UNISPAL.NSF/0/6C57312CC8BD93CA852560DF00653995>

⁶⁶³ Preamble to the United Nations Charter, available at: <http://www.un.org/en/documents/charter/preamble.shtml>

⁶⁶⁴ A good example of this would be to mention President George Walker Bush’s 2002 State of the Union Address where he names a select list of states as members of the “Axis of Evil” (January 29th, 2002). “*Our second goal is to prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction. Some of these regimes have been pretty quite since September the 11th. But we know their true nature. North Korea is a regime arming with missiles and weapons of mass destruction, while starving its citizens. Iran aggressively pursues these weapons and exports terror, while an unelected few repress the Iranian people’s hope for freedom. Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade. This is a regime that has already used poison gas to murder thousands of its own citizens – leaving the bodies of mothers huddled over their dead children. This is a regime that agreed to international inspections – then kicked out the inspectors. This is a regime that has something to hide from the civilized world. States like these, 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.*” Available: <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>

form of withdrawing a state's representatives to a foreign country.⁶⁶⁶ These sanctions extend all the way to economic sanctions which themselves encompass a whole set of different bans and restrictions (which mainly encompass trade and financial restrictions, as well as military restrictions on the trade in weapons or the freezing of assets belonging to the sanctioned entity or person).⁶⁶⁷ The latest example of sanctions was the United States' threat of taking military actions against Syria⁶⁶⁸, were the latter to refuse to surrender its

⁶⁶⁵ Examples of travel restrictions and bans could involve restrictions such as the ones placed on the current Belarusian regime: "*The European Union today imposed travel restrictions on President Aleksandr G. Lukashenko and 30 officials in Belarus, blocking their entrance to much of Europe as punishment for election tampering and violent crackdowns in the former Soviet state*". C.J. Chivers, *Europe Imposes Travel Restrictions on Belarus Officials*, NEW YORK TIMES, APRIL 10, 2006, available at: <http://www.nytimes.com/2006/04/10/world/europe/10cnd-belarus.html? r=0>.

⁶⁶⁶ Diplomatic sanctions such as the recall of an ambassador is generally seen as a sign of great dissatisfaction towards another country's policies. We ought to cite the case of the United Arab Emirates who recalled its ambassador to Iran in April 2012 following President Ahmadinejad's visit to the Abu Mousa islands, which the UAE claim as being part of their national territory. CNN Wire Staff, *Ahmadinejad's Visit to Island Prompts UAE to Recall Iran Ambassador*, CNN, April 12/2012, available at: http://articles.cnn.com/2012-04-12/middleeast/world_meast_uae-iran-ambassador-recall_1_iran-ambassador-uae-foreign-minister-abdullah-bin?_s=PM:MIDDLEEAST

⁶⁶⁷ Again, such restrictions can be passed by states individually or collectively, as well as international organizations. We can for example take the case of Iran which has been the subject of various sanctions due to its developing of nuclear weapons. Some of the latest sanctions involve restrictions against Iranian financial institutions as well as oil companies. Justyna Pawlak, *EU Sanctions Target Iran Oil, Gas, Tanker Companies*, REUTERS, October 16, 2012, available at: <http://www.reuters.com/article/2012/10/16/us-iran-nuclear-eu-idUSBRE89F08N20121016> "*European Union governments imposed sanctions on Tuesday against major Iranian state companies in the oil and gas industry, and strengthened restrictions on the central bank, cranking up financial pressure over Tehran's nuclear program. More than 30 firms and institutions were listed in the EU's Official Journal as targets for asset freezes in the EU, including the National Iranian Oil Company (NIOC), a large crude exporter and the National Iranian Tanker Company (NITC). [...] Their importance has risen in recent months as the European Union and the United States seek to reduce Tehran's access to cash by forcing Western companies to halt trade with the OPEC producer. Tuesday's decision complements previous moves by the EU, such as this year's embargo on Iranian oil imports to Europe and a decision on Monday to ban gas purchases.*"

⁶⁶⁸ Tom Cohen, "*Kerry: Talks on Syria Chemical Weapons 'not a game'*", CNN, September 12, 2013, available at: <http://www.cnn.com/2013/09/12/politics/us-syria/index.html>.

chemical weapons. This occurred after the Syrian government⁶⁶⁹ used chemical weapons against its population on August 21, 2013.⁶⁷⁰

The question of whether these sanctions have proved successful over the years is a totally different issue that equally needs to be addressed. Once again, the answer to such a question is not that straightforward. Various sanction campaigns were directed against states such as Apartheid South-Africa, Iraq, North Korea and Iran. Studying these cases might offer us with some insights as to the usefulness and limitations of such sanctions.

In the case of Apartheid South Africa, various campaigns were undertaken to protest against the segregationist regime's policies in Pretoria and to force a regime change. Such campaigns involved taking action on the international level, specifically within the UN Security Council.⁶⁷¹ International sanctions, combined with the rise of the African National Congress and various domestic considerations led to the replacement of the Apartheid regime in 1994.

Now comes the tricky part of the equation. The segregationist regime in South Africa sought ways to get around the arms embargo imposed by the

⁶⁶⁹ Rick Gladstone and C.J. Chivers, "Forensic Details in U.N. Report Point to Assad's Use of Gas", THE NEW YORK TIMES, September 16, 2013 available at: <http://www.nytimes.com/2013/09/17/world/europe/syria-united-nations.html? r=0>. "A United Nations report released on Monday confirmed that a deadly chemical arms attack caused a mass killing in Syria last month and for the first time provided extensive forensic details of the weapons used, which strongly implicated the Syrian government."

⁶⁷⁰ Ibid.

⁶⁷¹ Security Council Resolution 418 focused on creating a mandatory arms embargo against South Africa which included the prohibition of exporting fighter jets, warships, uranium and other military or potentially military equipment to South Africa. UN Security Council Resolution 418, available at: <http://daccess-ods.un.org/TMP/5390033.12587738.html>

international community by creating front companies. This was the case of South Africa in the “Coventry Four” affair where individuals sent munitions and other equipment to South Africa through third countries.⁶⁷² In response to such dealings, the UN Security Council passed Resolution 591 which sought to actively restrict the possibility that prohibited items could be imported into South Africa through third countries. These prohibited items concerned not only weapons, but also dual use items, transport vehicles, spare parts and so forth.⁶⁷³ Other efforts were taken on a national or more local level⁶⁷⁴ to economically and politically pressure South Africa in order to abolish segregation. This continued economic and political pressure assuredly led to the fall of the Apartheid regime of South Africa. A more interesting point can be derived from the fact that during its political and economic isolation, South Africa managed to successfully develop a nuclear weapons program with a possible successful nuclear weapons test on September 22nd, 1979 regarding “Operation Phoenix”. The nuclear weapons program was dismantled in 1989, the South African government ratifying the NPT shortly thereafter. The fact that South Africa was able to develop nuclear weapons⁶⁷⁵ despite severe economic and political sanctions, and bans on the export of various material thereto just goes to show that even an

⁶⁷² Jacklyn Cock and Laurie Nathan, *War and Society: The Militarisation of South Africa*, Clyson Printers (PTY) Ltd, Maitland, South Africa (1989).

⁶⁷³ UN Security Council Resolution 591, available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/729/15/IMG/NR072915.pdf?OpenElement>

⁶⁷⁴ An example of this could be the “Sullivan Principles” whereby foreign companies (mainly American companies) would require that employees abide by certain principles (equal pay regardless of ethnicity, no segregation on the workplace etc.) in order to be able to do business in South Africa during the Apartheid.

⁶⁷⁵ South Africa, NUCLEAR THREAT INITIATIVE, available at: <http://www.nti.org/country-profiles/south-africa/nuclear/>.

isolated nation, with few outside technological contacts, can still develop highly sophisticated weapons.

After reviewing the case of South Africa, it would be interesting to see how effective economic or other non-military sanctions were on other nations. For instance, one could mention the cases of Iraq and North Korea in order to determine whether a recurring pattern can be deduced thereof. Iraq was sanctioned by the UN Security Council in Resolutions 661 and 687 for having led a war of aggression against Kuwait. These Resolutions targeted both Iraq's defense and economic sectors, by ordering the destruction of any WMDs from Iraq, delivery systems, as well as the banning of any trade in arms or commercial activity in terms of export or import of merchandise to and from Iraq and financial transactions. This regime imposed on Iraq was originally extremely strict and did not allow it to trade oil on the international markets. The international community was also moved by the fact that the Iraqi population was suffering tremendously from these trade restrictions. In order to attempt to somewhat remedy this, and ease the suffering of the Iraqi people, the Security Council passed Resolutions 706 and 712. These Resolutions established an "oil for food" program, whereby Iraq could sell oil in order to buy necessities such as food and medicines (and adequately compensate Kuwait). Unfortunately, and as it was the case with Apartheid South Africa, Iraq sought ways to circumvent these sanctions and exploit this system. It eventually managed to obtain \$10.1 billion in illegal revenues through that program:

“GAO estimates that from 1997-2002, the former Iraqi regime attained \$10.1 billion in illegal revenues from the Oil for Food program, including \$5.7 billion in oil smuggled out of Iraq and \$4.4 billion through surcharges on oil sales and illicit commissions from suppliers exporting goods to Iraq.”⁶⁷⁶

The economic sanctions put in place against Iraq proved to be of a devastating nature against the Iraqi population. It is estimated that at least 227,000 children died as a consequence of the economic sanctions imposed on Iraq from 1990 to 1998⁶⁷⁷, all the way to more than half a million according to UNICEF. On the other hand, Saddam Hussein and his regime were known to live in opulence.⁶⁷⁸ Bearing this in mind, it appears to be dubious to think that the economic sanctions against Iraq in any way paved the way for real reforms or respect for human rights. This assertion can be proved by the fact that the regime hardly granted any rights to its citizenry and continued to thumb its nose at the international community until it became too late to undergo any significant changes.

⁶⁷⁶ Joseph A. Christoff, *Observations on the Oil for Food Program*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, April 7, 2004, available at: <http://www.gao.gov/products/GAO-04-651T>

⁶⁷⁷ Richard Garfield, *Morbidity and Mortality Among Iraqi Children from 1990 Through 1998: Assessing the Impact of the Gulf War and Economic Sanctions*, COLUMBIA UNIVERSITY, July 1999, available at: <http://www.casi.org.uk/info/garfield/dr-garfield.html>

⁶⁷⁸ Leon Barkho, *“Foreign Press Tours Many of Saddam Hussein’s Opulent Palaces but Iraqi Prime Minister Aziz Vows UN Inspectors Will Never be Allowed Inside”*, ASSOCIATED PRESS, December 18, 1997 available at: <http://www.apnewsarchive.com/1997/Foreign-Press-Tours-Many-of-Saddam-Hussein-s-Opulent-Palaces-but-Iraqi-Prime-Minister-Aziz-Vows-U-N-Inspectors-Will-Never-Be-Allowed-InsideBy-LEON-BARKHO/id-5c7629d7eb0c8b75ac9a7e16740b8b38>.

The case of North Korea seems to be somewhat similar to that of Iraq. As is widely known, North Korea is a ruthless and totalitarian state. While its population was (and continues to be) starved and millions died of malnourishment or diseases, the North Korean regime carried on with its quest to develop nuclear weapons and partially succeeded in detonating two nuclear devices, one in 2006 and the other in 2009. UN Security Council Resolution 1874 sought to condemn North Korea's detonation of these devices.⁶⁷⁹ It placed an arms embargo on it and authorized member states to seize North Korean cargo that could contain arms or elements of arms, whether conventional or not.⁶⁸⁰ Another aspect of this ban regards an embargo on luxury items. The rationale behind this is that since North Koreans as a whole are extremely poor, some of them starving, the only ones capable of affording luxury items⁶⁸¹ are rulers of North Korea. This type of sanction seems more appropriate than the ones imposed on Iraq. However, one can wonder whether the ruling class would be willing to give up its nuclear weapons program in exchange of a few cases of whisky and perfume.

North Korea also sought to circumvent or mitigate economic sanctions by exploiting international sympathy towards the North Koreans' suffering. Various

⁶⁷⁹ United Nations Security Council Resolution 1874, available at: <http://www.un.org/News/Press/docs/2009/sc9679.doc.htm>

⁶⁸⁰ "Panama: North Korea Ship to Cuba 'Broke Arms Embargo'", BBC NEWS, August 29, 2013 available at: <http://www.bbc.co.uk/news/world-latin-america-23873277>: "Panama says an undeclared Cuban weapons cargo found on a North Korean ship is an "undoubted violation" of the United Nations' arms embargo on Pyongyang."

⁶⁸¹ Ambassador Susan E. Rice, Fact Sheet: UN Security Council Resolution 2094 on North Korea, US MISSION TO THE UNITED NATIONS, March 7, 2013 available at: <http://usun.state.gov/briefing/statements/205698.htm>.

international organizations, such as the World Food Program or different UN agencies like the UN Development Program, UNICEF or the UN Population Fund sought to sincerely help the North Korean people.⁶⁸²

This was done by gratuitously transferring commodities to North Korea for the purpose of helping the starved North Korean people. It is alleged that over the years, close to \$2 billion⁶⁸³ worth of food and transit fees have been transferred to North Korea. This was done without receiving any kind of accountability⁶⁸⁴ on the North Korean regime's part that these commodities were actually distributed to its people. Furthermore, the North Korean regime additionally charged these organizations "storage fees", "personnel fees" and other "consultant fees" in order to carry out these operations in North Korea.⁶⁸⁵

⁶⁸² "Combined, these agencies have poured close to \$2 billion worth of resources into North Korea over the past decade or so, according to U.N records. They have done this on terms giving Kim big opportunities to divert goods and charge fees for the benefit no of hungry North Koreans, but for his military and gulag-running, missile-vending, nuclear-bomb-testing regime." Claudia Rossett, *Look Next at North Korea, World Food Program*, FOX NEWS, January 22, 2007, available at: <http://www.foxnews.com/story/0,2933,245538,00.html>.

⁶⁸³ Ibid.

⁶⁸⁴ Ibid. "In the case of the WFP, Kim Jong-Il a little over a year ago gambled successfully – on a ploy that dramatically reduced the WFP's already limited ability to check where its aid really went. Kim's regime declared in late 2005 that North Korea had no more need for direct food aid. But instead of closing up shop in Pyongyang, the WFP negotiated a new deal, which caved in to demands of Kim's regime. The WFP agreed to cut back on the range and frequency of its monitoring trips and also promised to funnel some of its resources through state-run development projects."

⁶⁸⁵ Ibid. "Such items include \$5 million for transport, storage and handling of the free food shipped in by the WFP; \$1.39 million for "staff duty travel" within North Korea, including transportation and state guesthouse lodgings for WFP workers truing to monitor aid; \$447,200 for "National Consultants", \$106,400 for utilities; and \$279,700 for "other office expenses". These fees and incentives were paid to regime selected individuals in "hard currency" (US dollars and Euros) and help fund North Korea's nuclear weapons program among other things. The ongoing extortion of funds by North Korea from the international community, the enslavement of its population in gulags or other concentration camps demonstrates that this regime has no regards towards its population whatsoever. It solely uses the latter to emotionally manipulate and blackmail international organizations, keeping

On the other hand, some scholars hold that North Korea's lack of candid behavior in these dealings could be a result of a confrontational US approach to negotiations with North Korea. This would explain why North Korea decided to cheat on its international commitments and expelling UN weapons inspectors among other things.⁶⁸⁶

After having reviewed the cases of South Africa, Iraq and North Korea, what conclusions could we draw there-from? First and foremost, we can learn that serious reforms have to come from the state itself, as it was the case for South Africa which voluntarily decided to give up its nuclear weapons and end Apartheid. This is not to say that the economic sanctions against it did not have any effect. Had South Africa decided to continue its segregationist policies, it could still be a segregated state, possess nuclear weapons, however it would probably be subjected to immense political and economic sanctions. In short, the regime in South Africa recognized the failings of its political system. This was not the case for Iraq and is definitely not the case for North Korea. In these two cases, the ruling elites have no regard for their population. Such regimes have

its population hostage. All of this is done, in order to consolidate the regime's grip on power by developing and maintaining its armed forces and nuclear weapons.

⁶⁸⁶ Harold Hongju Koh, "On American Exceptionalism", 55 STAN. L. REV. 1479, 1492-1493 (2003): "The Clinton Administration had left an agreement to stop certain kinds of missile development and proliferation just short of completion. But when U.S. administrations changed, the new administration broke off talks and withdrew from direct engagement with North Korea, over the objections of President Kim Dae Jung and even of former President George H.W. Bush and his key Asia advisers. By his January 2002 State of the Union Address, the younger President Bush had famously labeled North Korea as part of the "Axis of Evil", along with Iraq and Iran. North Korean President Kim Jong Il was faced with the question of how to get U.S. attention back on his own terms. His chosen solution: building more bargaining chips by lifting the freeze at Yongbyon, beginning to enrich plutonium to make nuclear weapons, ousting weapons inspectors, openly cheating on other international agreements, and in January of this year, announcing North Korean withdrawal from the Nuclear Nonproliferation Treaty."

shown their intentions by mistreating their citizens. These two countries experienced, and North Korea continues to experience the imposition of economic sanctions against it. However, one can wonder whether such sanctions are effective and force change on regimes that are fully committed to developing weapons of mass destruction and use force to remain in power.

The sad truth appears to prove otherwise. These regimes maintain such a tight control on their populations that any inner dissent is met with harsh consequences.⁶⁸⁷ Economic sanctions have shown to mainly affect the populations which end up “footing the bill” for the misdeeds of their controlling rulers.⁶⁸⁸ Furthermore, economic sanctions would need to be enforced by a large number of states, which is not always the case. We should not forget to mention the ingenious schemes states create in order to circumvent these sanctions. While economic sanctions have worked to a certain extent to force change in South Africa and Rhodesia, they have been a failure in states where controlling regimes would have lost everything (including their lives) if they agreed to renounce power. This has been the case for Iraq and is now the case of North Korea, Cuba and other despotic regimes around the world. While the South African white elite at the end of the Apartheid regime saw themselves as having

⁶⁸⁷ Robert Tait, “*Iran Election Anniversary Protests Face Severe Crackdown*”, THE GUARDIAN, June 9, 2010 available at: <http://www.theguardian.com/world/2010/jun/09/iran-election-demonstration-green-repression> : “*Iran’s Green movement has suffered brutal repression as authorities try to stop a repeat of 2009’s June demonstration.*”

⁶⁸⁸ Abbas Alnasrawi, “*Iraq: Economic Sanctions and Consequences, 1990-2000*”, 22 THIRD WORLD Q. 205, 209-214 (2001). UN sanctions allegedly contributed to the death of 1.5 million people in Iraq. See generally Hannibal Travis, “*Genocide in Sudan: The Role of Oil Explorations and the Entitlement of the Victims to Reparations*”, 25 ARIZ. J. INT’L & COMP. LAW 1, 64 (2008).

a future in South Africa, it is highly doubtful whether this would be the case for the current Iranian or North Korean leaders due to their cruel rule. Unfortunately, the only other options there seem to be containment, deterrence or military action⁶⁸⁹, whose success are also relative.

Containing has proved to be partially successful with regards to a state such as the USSR which attempted to disseminate its doctrine throughout the world, selling inexpensive weaponry if not giving such weaponry away for free. On a smaller scale, the North Korean case which is seen by some as a successful example of containment offers a similar conclusion. North Korea is one of the world's supermarket for ballistic missiles and other military equipment.⁶⁹⁰

Contemplating the above paragraphs, what can be said about the current situation in Iran? It would be wise to start with a statement from Hassan Rowhani

⁶⁸⁹ Most recently, some have argued that the US threat of force against Syria following its deployment of chemical weapons is a deterrent against future chemical strikes. Peter Baker and Michael Gordon, "US – Russia Talks on Syria Arms Make Progress", THE NEW YORK TIMES, September 14, 2013, available at: http://www.nytimes.com/2013/09/14/world/middleeast/us-wont-insist-un-resolution-threaten-force-on-syria-officials-say.html?_r=0 :*"Although Mr. Obama reserved the right to order an American military strike without the United Nations' backing if Syria reneges on its commitments, senior officials said he understood that Russia would never allow a Security Council resolution authorizing force. As a strategic matter, that statement simply acknowledged the reality on the Security Council, where Russia wields a veto and has vowed to block any military action against Syria, its ally. But Mr. Obama's decision to concede the point early in talks underscored his desire to forge a workable diplomatic compromise and avoid a strike that would be deeply unpopular at home. It came just days after France, his strongest supporter on Syria, proposed a resolution that included a threat of military action."*

⁶⁹⁰ Jay Solomon, Yuka Hayashi and Colum Murphy, *North Korea's Illegal Weapon Pipeline Flows On*, Wall Street Journal (November 28, 2012) available at: <http://online.wsj.com/article/SB10001424127887323830404578144981537771060.html>

(elected president in 2013⁶⁹¹), the former Iranian chief negotiator during the EU-Iran talks regarding Iran's nuclear program:

*“An actual Iranian negotiator bluntly stated the Islamic Republic of Iran’s strategy right out loud a couple of years later: Negotiations are a double-game, the very best way to stall while getting what you really want. Hassan Rowhani said in a speech to colleagues: ‘While we were talking with the Europeans in Tehran, we were installing equipment in parts of the facility in Isfahan’.”*⁶⁹²

From these lines one can but note that Iran is an unconventional negotiating partner. Additionally, there is no indication that Iran is willing to surrender its nuclear weapons program any time soon. Recent intelligence reports seem to confirm that Iran will shortly be able to develop between 4 to 6 nuclear weapons after having amassed sufficient quantities of uranium⁶⁹³ to do so, and refined its enrichment capacities.⁶⁹⁴ The question that we need to

⁶⁹¹ James Reynolds, “Hassan Rouhani Takes Over as Iran President”, BBC NEWS, August 3, 2013 available at: <http://www.bbc.co.uk/news/world-middle-east-23557673>.

⁶⁹² Karl Vick, “In Their Own Words: For Iranian, Negotiations = Stalling”, TIME, January 16, 2012, available at: <http://world.time.com/2012/01/16/in-their-own-words-for-iranians-negotiations-stalling/>.

⁶⁹³ *Obama to Israel: Iran is piling up Fissile Material for 4-6 Bombs – in Natanz Too*, DEBKA.COM, October 19, 2012, available at: <http://www.debka.com/article/22453/>. “It is now clear to his administration that Iran’s leader Ayatollah Khamenei will press on toward a nuclear weapon capacity at any price – even if faced with a military threat. No pause is to be expected in Iran’s drive to accumulate enough enriched uranium to fuel a nuclear bomb arsenal, while advancing at the same time along a second track toward a plutonium bomb.”

⁶⁹⁴ In addition to its quest for nuclear weapons, the Iranian regime has been sponsoring terrorism throughout the globe for more than thirty years in order to promote its Islamic agenda. The regime itself is a theocracy which is maintained in place by the force of arms (the Revolutionary Guards). However, as in the case of North Korea, the current Iranian regime has no more regards towards its population than the North Korean one has. In contrast to the North Korean regime, the Iranian regime does not necessarily aspire to life in

address now regards the intensity of the military response, if such a military avenue is determined to be the appropriate one. First of all, one needs to recognize that the type of preventive action we are dealing with here is reactive, as well as proactive. It is reactive in the sense that a state, the preventor, is basically reacting to a growing threat which is considered unbearable. The military enterprise is also proactive in the sense that the preventor is also taking the first step militarily. The fundamental question we have to ask ourselves here is essentially a policy question which revolves around what result is sought by the preventive measure. Is the preventive action undertaken in order to disrupt a growing physical threat, or should the preventive action address the actual cause of the growing physical threat.

The choice here seems clear, should the military action be taken solely against the instruments of the threat, that is to say the physical elements of the said threat, or the “masterminds” of the threat? Obviously and from past experience, it seems easier to strike one or several facilities, such as it was the case for Osirak, than to change a regime. Furthermore, forcing regime change for the sole purpose of regime change is a highly controversial issue.⁶⁹⁵ It does

this world as much as life in the next one, bringing forth the 12th Imam after an apocalyptic season in this world, while at the same time indicating that they need to take care of a “cancerous tumor” in the Middle East named the “Zionist Entity”.

⁶⁹⁵ Scholars such as Professor Anthony d’Amato from Northwestern University claim that there is an affirmative moral duty and legal right to military intervene in nations where a regime uses “tyranny” against its own population: *“I argue that human rights law demands intervention against tyranny. I do not argue that intervention is justified to establish democracy, aristocracy, socialism, communism or any other form of government. But if any of these forms of government become in the Aristotelian sense corrupted, resulting in tyranny against their populations – and I regard ‘tyranny’ as occurring when those who have monopolistic control of the weapons and instruments of suppression in a country turn those weapons and instruments against their own people – I believe that intervention from outside*

not mean that regime change never occurs, as in the cases of Iraq or Libya. In these cases however, the regime change occurred as a result of a military action taken in order to enforce a right or decision, the enforcement of which had as consequence a change in the regime.

Bearing in mind the above, the nature and magnitude of the rising threat will determine the nature of the responses, whether they be of a military or non-military nature. The preventive military action should first and foremost focus on the instruments⁶⁹⁶ of the mounting threat, and that any military action should be limited to destroying these instruments, were these to be missiles, plants producing WMD material and so forth.⁶⁹⁷

is not only legally justified but morally required.” Anthony d’Amato, *US Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Invasion of Panama was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516, 519 (1990).

⁶⁹⁶ Some could also argue that a preventive military action should also focus on individuals with the necessary know-how relative to manufacturing weapons of mass destruction since they are key in the production of WMDs. More than the equipment itself, the “know-how”, that is to say the “brains” of any WMD development is an essential element. As long as the “know-how” is available to the party that wishes to develop WMDs, the chances are that if that party is patient enough it will be able to create or recreate a program that was destroyed.

⁶⁹⁷ A very good example that could be used to illustrate how a preventive use of force would be the two strikes made by the Iranians and Israelis on Osirak in 1980 and 1981. These strikes were limited strictly to the Osirak nuclear reactor and did not seek to remove the Iraqi regime, which had purchased the reactors from France. Saddam Hussein’s regime was the actual cause for the nuclear reactors’ presence on the Iraqi soil for the sole purpose of producing weapons grade nuclear material. Another example of a preventive strike that had a limited impact would be the 2007 strike on Syria that was carried out by Israel. As we have mentioned previously in the second part of this research, North Korea was aiding Syria in building on its territory a nuclear reactor possibly for Iran. In September 2007, the Israeli Air Force destroyed the illegal nuclear reactor that was being developed there. Once again, the preventive military action in this case targeted a defined site and not the regime that had caused the “growing threat” to exist. The latest preventive strike was the alleged Israeli strike against the Yarmouk complex in Sudan on October 24th, 2012 whereby planes destroyed an Iranian Shehab surface to surface missile production facility that would later possibly have been used, in a future conflict in the Middle-East. Debkafile Exclusive Reports, [The Bombed Sudanese Facility Produced Iranian Shehab Missiles \(10/24/2012\)](#): “*The Yarmouk Complex of military plants near Khartoum, which was bombed five minutes after midnight Wednesday, Oct. 24, by four fighter-bombers, recently went into manufacturing Iranian ballistic surface-to-*

There are both advantages and drawbacks to proceeding in such a way. First of all, one of the major advantages of using such preventive strikes is that they solely target the infrastructures producing the WMD weapons material. While a preventive strike may prove useful as a temporary measure, its effects would hardly be lasting if the prevented state is determined to persevere in obtaining WMD material. Furthermore, one could argue that the prevented state will now seek to conceal its WMD material in remote areas which would consequently make it harder to destroy in the future if reconstructed. Some states that have witnessed preventive action undertaken against other nations might have already thought about concealing or removing their WMD material to inaccessible areas. Under this angle, a preventive strike would be understood as a temporary tactical measure. We ought to pause a moment and reflect on the idea of whether prevention could be used as a military doctrine, that is to say with strategic goals, rather than tactical ones. The question here would be more a question of consequences rather than mere material possibility as to whether such an enterprise is possible.

First of all, what would taking a strategic preventive action involve? This could consist of attempting to permanently disrupt the cause of the threat's existence within the prevented state. In other words, this would mainly address

surface Shehab missiles under license from Tehran, Debkafile's military and intelligence sources disclose. Western intelligence sources have not revealed what types of Shehab were being turned out in Sudan but they believe the Yarmouk's output was intended to serve as Tehran's strategic reserve stock in case Iran's ballistic arsenal was hit by Israeli bombers. The Israeli Air Force has a long record of pre-emptive attacks for destroying an enemy's long-range missiles in the early stages of a conflict. In June 2006, for instance, the IAF destroyed 90 percent of Hizballah's long-range missiles in the first hours of the Lebanon war."

the issue of regime change as the regime is the source of the growing threat. Changing the course that was taken by a regime would mean to a certain extent that the regime has to be replaced or reformed in a fundamental way. Such a reform usually does not happen by itself but has to be provoked by outside intervention, such as by using prevention. Such a preventive use of force would not solely be concentrated on specific sites, but would be targeting members of the regime itself as well as its support base, its armed forces and so forth. A possible drawback to this would be that a population could come to support the regime in place, seeing an attack against the regime as an attack on the nation as a whole.

Preventive use of force on a strategic level seems problematic in terms of feasibility on the ground, that is to say nothing short than war can achieve the desired changes within the regime. More importantly such a use of preventive action could open the floodgates to abuse on the preventor's part, blurring the line between wars of aggression and defensive ones. Additionally, one should not fail to mention the fact that legitimizing strategic preventive action will dramatically destabilize the international legal regime surrounding war as we know it today, possibly causing an increase in conflicts.

From the above discussion, we might deduct that taking a limited approach towards prevention and using preventive strikes as tactical measures, would be the preferred means of preventive military actions. However, preventive use of force used in such ways might only offer a temporary relief to preventing states, which only see the growing threat setback for an undetermined period of

time down the line. This could be why a tactical preventive military action should be juxtaposed with other types of sanctions such as the ones previously mentioned, that is to say economic and political ones. In order to do so, the international community or elements thereof could be asked to support or coordinate such combined action. However, members of the international community or elements thereof should review the assessment established by the preventing state in order to ensure that no abuse was committed.

2. Checking the State made assessment

a. The Assessing Body

The preventor's assessment should be reviewed by a legitimate international body of states. The first such body that comes to mind is the United Nations Security Council. The UN Charter affords the UN Security Council the power to "*investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.*"⁶⁹⁸ The United Nations, and more specifically the UN Security Council has been responsible for international peace and security since the end of the Second World War. The Security Council has authorized the use of force by states or groups of states, and it has withheld its

⁶⁹⁸ UN Charter, Article 34, available at: <http://www.un.org/en/documents/charter/chapter6.shtml>

authorization in other cases, or has outright condemned states for having used force in other cases. One of the reasons why the UN Security Council could be an appropriate body to review such cases would be the fact that it has had some experience in reviewing and addressing preemptive and preventive uses of force for more than forty years now. Furthermore, one of the core duties of the Security Council is to preserve international peace and security, possibly indicating that the Council would by definition only authorize preventive uses of force as a measure of last resort. Another advantage of having the Security Council review prevention cases could also be the fact that the Security Council is able to convene in a continuous manner as prescribed by Article 28⁶⁹⁹ of the UN Charter, without having to wait for an extensive amount of time before convening. This provides a clear advantage in preventive and preemptive cases where speed and surprise are essential elements of such actions. The UN Security Council can also be deemed representative to a certain extent of a variety of nations in the world. As we all know, the UN Security has five permanent members and 10 non-permanent members that are elected for two year terms.⁷⁰⁰

The Security Council's relative representativeness is also a highly debated issue due to the fact that five of its members, the original victors of World War II, are permanent members which have a right to veto. In this sense, it is also argued (and continues to be argued) that the Security Council is intrinsically

⁶⁹⁹ UN Charter, Article 28: "*The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.*" Available at: <http://www.un.org/en/documents/charter/chapter5.shtml>

⁷⁰⁰ UN Charter, Article 23, available at: <http://www.un.org/en/documents/charter/chapter5.shtml>

structured in an unfair manner where a select few have the power to override the passing of resolutions. A deeper concern to address is the fact that the UN Security Council is formed of states, which have all their respective interests and that of their allies to defend. The Security Council is clearly not an institution that is “conflict of interest” free, this being a serious issue to be contemplated while considering preventive force. This topic, just as the topic of the representativeness of the UN Security Council, is vast and goes beyond the scope of this research. Nonetheless, the issue of conflicts of interest within the UN Security Council remains maybe one of its major structural flaws that will eventually need to be addressed.

b. Legitimizing a preventive use of force – a two track process

We now have to address the question of when does the anticipatory self-defense need to be authorized in order to be legitimate. This question revolves around the issue of whether a preventive strike has to be pre-approved, or whether this approval can be given after the preventive strike has been carried out. This issue also begs a fundamental question which is to whom does self-defense belong? Does this right belong to states individually or to a supervisory authority?

Let us start first of all by considering the idea of having the scenario where a state requests pre-approval of its preventive strikes. This would basically involve going before the UN Security Council, or possibly other organizations

bestowed with international legitimacy, in order to argue why a preventive strike is necessary. Furthermore the preventor would need to show that no other peaceful recourse would suffice to contain the growing and certain threat originated by a third party. The said state would then present its incriminating evidence, which would mainly consist of material evidence, evidence of misbehavior (such as evidence of brutality, crimes against humanity, war crimes and so forth) on behalf of the target state and the preventor's interests at stake. Criteria that could be considered will be described below.

One could now ask what advantages such a pre-approval would give to the preventor. Being "pre-approved" for a preventive action would offer the preventor more legitimacy to carry out the military strikes to start with. Force has not been encouraged due to the horrors that happened during the Second World War and later wars. From this we can infer that organizations that would pre-approve, or not, the use of preventive strikes would be highly suspicious with regards to these types of strikes and only allow them in cases where no other peaceful or less forceful options are available. This "pre-approval" could also specify the magnitude of the strikes, thereby limiting them to certain areas, for a determined duration and so forth. Pre-approval also suggests that the preventor has broad support to undertake its preventive strike and that the risks of reaction on the targeted state's part would be reduced since it could possibly be seen as an aggression.

Having said the above, there are also certain aspects to consider which might discourage parties from seeking pre-approval for a preventive strike. These

aspects mainly focus on the existing bias and conflicts of interest that exist in any large international organization. This goes back to George Washington's cautionary words cited at the beginning of this chapter. While ideally states could be trusted to act in a fair and impartial way, such a scenario is extremely unlikely. Reasons for this would include the fact that states that are evaluating the preventor's grounds might possibly have a bias against it for historical or commercial reasons. It would be very hard to imagine a state approve a strike against one of its major trade partners or allies. Bearing this in mind, the "pre-approving" organ could be subjected to *voir dire* whereby each member of that organ would be tested as to possible conflicts of interest or other bias. One could also suggest the number of "jurors" required to authorize such a preventive use of force, and whether such a pre-approval be granted by a simple majority, unanimity or by a determined number of approving states.

While it would be ideal for the preventor to request prior approval before using preventive force, we might also encounter the scenario whereby the preventor would have preventively struck the targeted state without having requested prior approval. How should such a course of action be viewed? This hypothetical inherently asks the question of whether a preventive strike is an act of self-defense or not. If preventive force is understood as being an act of self-defense, then using preventive force would consequently be recognized as an inherent right belonging to states individually or collectively, pursuant to Article 51 of the UN Charter. On the other hand, if the preventive force is not recognized as inherently defensive, then proceeding forward with a preventive strike without

prior approval would be extremely problematic to say the least, if not illegal and interpreted as an act of aggression. We here hold that preventive force is intrinsically defensive, being within the spectrum of self-defense. However, due to the absence of imminence between the threat and the military action, such use of force should be reviewed by a third party, preferably before the preventive use of force.

A state that has not requested pre-approval could still seek approval of its preventive strike after having undertaken it. Such approval could be done under similar circumstances as to what would have been done in a “prior-approval” scenario. However, in this case the stakes would be higher for the preventor. The reason for this is that the preventive strike would most likely have revealed the presence or absence of WMD material.

While the presence of WMD material might make it easier for the preventor to prove its case, the absence of such material could be damning. In such a case, the preventor would have to “prove its case”, despite not really “having a case” and attempt to justify its error. This could be done by collecting evidence on the ground after the strike or by any other acceptable means. Another question could be asked relative to whether the preventor should be sanctioned for acting preventively without having sought pre-approval beforehand for its preventive strike. This issue goes back to determining whether preventive force is within the spectrum of self-defense. If so, a state using preventive force should not be sanctioned for not seeking first prior approval since self-defense inherently belongs to the state. However, on the other hand, if

preventive strikes are determined not to be on the spectrum of self-defense, the state should be sanctioned. The reason for this is that the state has possibly carried out an act of aggression, and that such acts cannot be tolerated as destabilizing peace and international security, possibly encouraging others to act in such a fashion.

We should now inquire into the proceedings the preventor would have to follow before the UN Security Council in order to gain approval of its planned (or past) preventive strikes.

The United Nations Charter provides in Article 28 that "*The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization*". This Article indicates that the Security Council is an organ that could be consulted at any time in order to render decisions on any specified issue. Considering the fact that preventive use of force is a military action where time is of the essence, that is to say a matter that requires expediency, the UN Security Council would be the best organ to deal with it. Its members are present on a constant basis and thus would be able to address issues presented to it within hours.

A major trait of preventive strikes is the ability of the preventor to strike the target state by surprise. This would entail that the UN Security Council deliberate in secrecy in order to preserve that surprise effect. A point that needs to be emphasized here is that some of the evidence presented to the UN Security

Council could be of a highly confidential nature. This is why a select group, such as the Security Council would be the perfect instance where the preventor could make its case. The Council is small, counting 15 members. It is also a permanent organ within the United Nations, an organization which bears a widely accepted international legitimacy. The Council furthermore is widely regarded as the decision making organ within the United Nations which decides what is legal and what is not, based on the principles set forth in the UN Charter, and International positive and customary law.

Considering these above-mentioned factors, the best way the UN Security Council would be able to discharge its duties under these circumstances would be for it to hold closed door sessions. During these closed door meetings (*closed consultations*), the Council would be able to review the evidence presented by the preventor against the targeted state in (relative) confidentiality.⁷⁰¹ More detailed measures could be taken in order to guarantee the secrecy of these said meetings, just as they probably exist in other forums where confidentiality is required.

Another guiding principle that the Security Council would have to bear in mind is that of expediency. When the preventor has made its case before the Security Council, the Council would need to respond in a timely fashion. In practical terms, this means that the decision would have to be taken anywhere between several hours up to a few days, no more. The reason for this is that a preventive strike by definition is a military action where time itself is of the

⁷⁰¹ <http://www.un.org/en/sc/about/methods/introduction.shtml>

essence. The Council has repeatedly proved itself to be an organ capable of passing Resolutions in a swift manner, as it was the case for resolution 660 dated August 2nd 1990 pertaining to Iraq's invasion of Kuwait, passed on the day of the invasion. One of the latest examples of such prompt reaction on the Council's part was its condemnation on December 12th 2012 of North Korea's launch, that same day of its "Unha" ballistic missile.

Considering the above factors, the UN Security definitely seems to be the best forum both in terms of confidentiality of the hearings with its "closed consultations" and timeliness of its actions. Other aspects that need to be inquired into concern the quality of the state representatives reviewing the case of preventive force presented before them, and the procedure that should be followed by the preventor itself.

First of all, the representatives of the fifteen states forming the Security Council could be of a different nature than the usual ambassadors. The Security Council could ask that the fifteen member states appoint special "legal-ambassadors" who would first and foremost be jurists. The reason for this is that the Security Council would be essentially witnessing a trial. Furthermore, the state representatives would have to consider the merits of the case not based on their respective state's interests, but based on a normative standard as defined by international law.

The procedure states would have to follow when seeking approval for a preventive action could be summarized in the following words. The preventor

would bring before the UN Secretary General a request that it be heard by the Security Council. The Secretary General would then forward the request for a hearing in “closed consultations” to the Security Council. It would then hold such a meeting within a short period of time (the exact time frame to hold such a meeting could be determined based on prior Security Council practice when addressing emergencies). That time-frame would typically range from a few hours to a few days.

Once the Security Council, in its “closed consultation” formation is ready to hold a meeting, the preventor would then be able to present its case against the targeted state. At this point, the preventor would give its reasons for launching a preventive campaign based on material evidence, intelligence, the targeted state’s prior offenses and so forth. The preventor would also need to set forth the breadth of its preventive campaign and the limitations of its actions. This would entail defining within the target state itself specific sites to be struck, such strikes being undertaken under certain conditions (mainly focused on mitigating collateral damage).

One should note that this would not be an adversarial process whereby one party prosecutes a “defendant”. The targeted state in our case would not necessarily know that it is being the subject of a “preventive action”. Under this scenario, a panel of judges (the Security Council) would determine whether the preventor could legally strike the targeted state. The latter would not find itself in a position to defend itself due to the confidential nature of the Security Council’s meeting. After having heard the preventor make its case for a preventive strike

against the targeted state, the Security Council would then deliberate and determine whether a such a strike is warranted, based on its rules of procedure.

If the Security Council decides that a preventive strike is warranted, it could grant the preventor an authorization to launch a preventive strike. One can imagine the Security Council placing a set of conditions that would have to be met by the preventor during the strike. This idea would go back to what the just war theorist called *jus in bello*, whereby a war that was initially *just* would become *unjust* if violations were committed by the *just* party. Another aspect to consider would be the timing of the attack. The Council's authorization to undertake a preventive strike should only be valid for a determined period of time. Plainly speaking, this would mean that the preventor would only have an authorization to launch strikes within a relatively short period of time after the authorization has been given. The reason for this is that a lengthy lapse of time might lead to a change of circumstances in the target state, or the preventor and that preventive force might not be necessary anymore. It could also be argued that a given authorization to launch preventive strikes against a target state should not be construed as an open-ended authorization for the preventor to launch strikes against the target state at any time. This would open the door to possible abuse on the preventor's part. The preventor would justify recent strikes against the target state with an authorization that had been given a few years back. The absence of a time frame within which the preventor should launch its preventive strikes could very well lead to absurd and dangerous results where states would

“pick-off the shelf” a past authorization to launch strikes that would not be necessary.

c. Proving the case: Criteria and Methodology

i. Proof

1. The burden of proof and Iraq

Generally, the “burden of proof” refers to the obligation a party carries to show that the other party is wrong. The accuser would have to show that the accused party has done something reprehensible.⁷⁰²

Furthermore, the proof offered needs to meet a certain threshold in order to convince third parties that the party’s position is the right one. Placing the burden of proof on the accuser is hardly something new and is a common feature of most legal systems.⁷⁰³

⁷⁰² CASE CONCERNING THE OIL PLATFORMS (Iran v. U.S.), 2003, 43 I.L.M. 1334, 1356 (2003)

⁷⁰³ People in the Western world and more specifically in the United States often take for granted the fact that we should face our accusers and have a right to respond to their accusations. For instance, these rights are guaranteed in the United States by the Fifth and Sixth Amendments to the US Constitution. A similar tradition is available in the United Kingdom’s history. England in 1215 gave birth to the Magna Carta (the “Great Charter”), after a feud erupted between King John and his Barons after the former abused his powers. The Magna Carta provided for some guarantees to Barons in exchange for their loyalty to the King. One of these guarantees found in Clause 39 states that: “*No freemen shall be taken or*

While the general rule relative to burden of proof is that the accusing party has to show that the accused committed a wrong, international law might at times shift the burden of proof on the accused party. In this case, the accused party will have to show that they did not commit a given offense, or that they have stopped committing such or such an offense. This for instance was the case with regards to Saddam Hussein's Iraq.⁷⁰⁴

The First Gulf War is a clear case where one state, that is to say Iraq, violated the rights of another, Kuwait, by invading it during the summer of 1990. In the ensuing months, various diplomatic processes⁷⁰⁵ and sanctions were taken

imprisoned or disseised or exiled or in any way destroyed, now will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."Magna Carta, Clause 39. The "rule of law" consists of; a system where no one is above the law and where rulers cannot capriciously change the law at their leisure. Now, after having explored 13th Century England and 18th Century America, and their concepts of due process, we can explore the notion of due process in a third country so as to broaden the spectrum of what is regarded as due process around the world. In order to do so, we will take for instance the case of the Soviet Union. During the 1930s, Andrey Vishinsky, who held the positions of Prosecutor General of the Russian Soviet Federative Socialist Republic and then of the Soviet Union, became an expert at proving crimes that had not yet been committed and making indictments before evidence had been provided (ARKADY VAKSBERG, *STALIN'S PROSECUTOR: THE LIFE OF ANREI VYSHINSKY* (New York: Grove Weidenfeld, 1990) at pp. 78-80). The advantages of this system are obviously its expediency, reduced court costs, its simplified due process and its economical aspect since there really was no need to hire a lawyer.

⁷⁰⁴ D.M. Morris, "From Wear to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations", 36 V.J.I.L. 801, 891-892 (1995).

⁷⁰⁵ United Nations Security Council Resolution 660 in date of August 2nd, 1990 condemned the Iraqi aggression against Kuwait and also demanded the former's withdrawal back to the Iraqi territory:

"The Security Council, [...] Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait, Acting under Articles 39 and 40 of the Charter of the United Nations, 1. Condemns the Iraqi invasion of Kuwait; 2. Demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990; 3. Calls upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and supports all efforts in this regard, and especially those of the League of Arab States..."

against Iraq⁷⁰⁶ in order to force it out of Kuwait. These measures however proved fruitless against such a determined adversary.

After having been warned several times, a military campaign was launched against Iraq on January 17th, 1991, code-named “Operation Desert Storm”. This campaign lasted less than six weeks and ended on February 28th, 1991 resulting in Iraq’s defeat and the removal of its troops from Kuwait.

Due to the fact that Iraq had WMDs and had deployed and used SCUD missiles against various targets in the Middle East and more specifically against Saudi Arabia and Israel, a special regime was imposed against it. This regime purported to ensure that its nonconventional arsenal and delivery systems destroyed. Consequently, and as a material condition of the suspension of the international campaign against Iraq, the Security Council adopted Resolution 687.⁷⁰⁷

⁷⁰⁶ United Nations Security Council Resolution 661 in date of August 6th, 1990 provides that the shipment of commodities, the transfer of funds of military equipment to Iraq or Kuwait should be prevented.

⁷⁰⁷ Security Council Resolution 687 starts by stating that Iraq is the sole party responsible for the Gulf War (“*Reaffirming the need to be assured of Iraq’s peaceful intentions in the light of its unlawful invasion and occupation of Kuwait.*”). The Resolution then recalls instances of Iraq’s misdeeds: the use of ballistic missiles, the possession of attempt to possess nuclear material, and threats to perpetrate acts of terrorism (“*Aware of the use by Iraq of ballistic missiles in unprovoked attacks and therefore of the need to take specific measures in regard to such missiles located in Iraq, Concerned by the reports in the hands of Member States that Iraq has attempted to acquire materials for a nuclear-weapons program contrary to its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, [...] Deploring threats made by Iraq during the recent conflict to make use of terrorism against targets outside Iraq and the taking of hostages by Iraq ...*”). The Resolution then addresses a list of 34 paragraphs that were adopted under Chapter VII of the United Nations Charter among which one can find at paragraph 7 a general summary of international conventions to which Iraq is a party. These conventions are the 1925 Geneva Protocol and the 1972 Biological Weapons Convention. The Resolution then proceeds to impose on Iraq sanctions involving the total destruction of its weapons of mass destruction and of its ballistic missiles that have a range greater than 150 kilometers (“*Decides that Iraq shall unconditionally accept*

We can now ask ourselves what were the determining factors in this case that led to the imposition of such an obligation on Iraq. A clue that could provide an answer to this question might have been revealed in the resolution itself when the Security Council cites Iraq's prior violations of international agreements and the laws of war. Iraq also had a "rap-sheet" which included the use of chemical weapons against foreign troops and its own citizens. A combination of these factors contributed significantly towards placing such a burden on Iraq, the latter having to demonstrate that it had met its obligations under Resolution 687. The question we should ask now is whether such a scenario is within the scope of our research on preventive force? It would appear not, to due to the fact that what we are seeking here is that all deliberations be held secretly, and not in an open manner. That being said, we can also suggest that preventive force can be used in cases where the targeted state knows about the deliberations that are taking place relative to authorizing a preventive strike against it. In that case, such a strike would be viewed as a sanction of "last resort" against the target state.

the destruction, removal, or rendering harmless, under international supervision, of: (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities; (b) All ballistic missiles with a range greater than 150 kilometers and related major parts, and repair and production facilities."). Paragraph 9 goes further than paragraph 8, by placing on Iraq the burden of declaring the number of missiles and weapons of mass destruction facilities it has to the Secretary-General. The Resolution additionally demands that Iraq subject itself to a series of inspections in order to verify its compliance with the 1968 Treaty on the Non-Proliferation of Nuclear Weapons. Point 14 reemphasizes that these steps are "*actions to be taken by Iraq*", and that these actions are a burden upon Iraq, and not on the coalition. The coalition in this case only has an enforcement power, but it does not have the obligation to show that Iraq violated one of the "paragraphs" in Resolution 687 since according to the text of the Resolution, Iraq has to show that it has complied with the its demands. See also Ruth Wedgwood, "*The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*", 97 A.J.I.L. 576, 579 (2003).

2. The Standard of proof

“In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a “reasonable case” does not mean that if the matter ever came before a court, I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that Ops 4 and 12 do require a further Council decision in order to revive the authorization in Resolution 678. But equally I consider that the counter view can be reasonably maintained. However, it must be recognized that on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as it is today.”⁷⁰⁸

After having determined who bore the burden of proof, it is nothing but natural to inquire as to the nature of the “standard of proof”. That is to say, what

⁷⁰⁸ Lord Peter Goldsmith, Original Memorandum on Iraq Resolution 1441, March 7th, 2003 page 11.

test needs to be applied in order to recognize that the alleged tort-feasor committed the violations?

In the above paragraph, the former British Attorney General highlighted what he thought the standard of proof was in the international arena in order to launch a military campaign would be that the case be “reasonably arguable”. What would such an affirmation entail regarding the standard used to determine whether a party committed a violation? Is this standard also prevalent within international circles?

First of all, what does the standard “reasonably arguable” truly mean? One could grasp the meaning of such a standard by exploring a domestic standard, using the US criminal law as an example before addressing standards more relevant to this research.

The most common legal standard that we are familiar with in the United States is that of proving a case “beyond a reasonable doubt”. Although international law cannot be completely compared to domestic criminal law, using a domestic criminal standard can help the reader understand what a standard of proof is. “Beyond a reasonable doubt” first of all does not entail that a criminal matter be proved beyond all doubt. It means that short of having seen the violation with one’s own eyes, there is no other reasonable explanation as to why such an event happened in such a way.⁷⁰⁹

⁷⁰⁹ For example, this could mean that if a person charged with a battery informed the judge or jurors that he did not strike the victim with the bat he was caught with shortly thereafter, but that, what “really” happened was that a small meteorite just happened to hit the victim by

Now that we have peeked into a purely domestic standard of proof that introduced the reader to what it consisted of, we can now delve into an international standard used in humanitarian law which could have a direct application to our research. For instance, one could refer to the standard used in establishing refugee status under international humanitarian law. A note from the Office of the United Nations High Commissioner for Refugees from December 16, 1998 relative to the *“Burden and Standard of Proof in Refugee Claims”* elaborates on this point by making it clear that:

*“Procedures relating to the determination of refugee status are not specifically regulated in the international refugee instruments. There are no requirements as to whether such procedures must, by nature, be administrative or judicial, adversarial or inquisitorial. Whatever mechanism may be established for identifying a refugee, the final decision is ultimately made by the adjudicator based on an assessment of the claim put forward by the applicant in order to establish whether or not the individual has established a “well-founded fear of persecution”.”*⁷¹⁰

accident. Such an event would most likely seem implausible. In this case, the defendant's explanation would most likely not be deemed reasonable under the circumstances. However, if the defendant states that he walked up to the victim who was lying on the floor, and that he just picked up the bat that was lying next to the victim, while someone was running away from the scene; the defendant here might just have provided a reasonable doubt. The threshold of the standard of proof in most common law countries regarding criminal law is purposefully set high. The reason for this is that it seeks to prevent innocent persons from being wrongfully punished, even if it comes at the cost of setting free guilty individuals.

⁷¹⁰ United Nations High Commissioner for Refugees, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, available at <http://www.unhcr.org/refworld/docid/3ae6b3338.html> p. 1.

The above paragraph pinpoints the issue of determining who is a refugee, as no international norm appears to exist in order to do so. The note emphasizes on the other hand that such a determination could be made by using the standard of “*well-founded fear of persecution*”. This standard once again leaves us perplexed as to its precise meaning. Is this standard to be analyzed subjectively that is to say from the asylum seeker’s perspective, or objectively, that is to say whether this fear of persecution is actually based on facts? In order to give us the beginning of an answer to these questions, the author of the note admits that a key factor in determining the refugee status is whether the “*degree of likelihood which has to be shown by the applicant to qualify for refugee status has been established*”.⁷¹¹

The author of the note indicates that the standard conveyed by a “*well-founded fear of being persecuted*” is both subjective and objective.⁷¹² Furthermore, the note goes on to describe how “fear”, the subjective element of the standard, relates to the fact that the asylum seeker has to fear future persecution. The other element of the standard relates to the fact that this “fear” has to be “well-founded”, that is to say that there are good objective reasons for that fear, and that the asylum seeker is not being overly suspicious or paranoid. The objective element of the standard cannot but refer us back to a general standard of what is “reasonable”.

⁷¹¹ Ibid. at point 2.

⁷¹² Ibid. at point 13.

This is exactly the point the note is trying to make in the next paragraph when it attempts to associate the “well-founded fear of being persecuted” with “reasonable grounds”.⁷¹³ The same idea is to be found in the following paragraph of the note which states that “*an applicant’s fear of persecution should be considered well-founded if he can ‘establish, to a reasonable degree [emphasis added], that his continued stay in his country of origin has become intolerable...*”.⁷¹⁴ This sentence begs us to ask the question of how could a “reasonable degree” be quantified in an objective set of criteria. What is reasonable for one entity might not be so for a different one and so forth.

The author of the note is consequently confronted with the same challenge that we have here. That is to say, having to make objective a standard which is inherently subjective. In order to meet this challenge, the note makes the point that one cannot predict how a government will act and that such a calculation is “*inherently somewhat speculative*”. Furthermore, it notes that in order to make that determination, such an assessment of whether the fear is reasonable or not, an “*evaluation should be made based on factual considerations which take into account the personal circumstances of the*

⁷¹³ Ibid. at point 15: “*The drafting history of the Convention is instructive on this issue. One of the categories of “refugees” referred to in Annex I of the IRO Constitution, is that of persons who “expressed valid objections to returning” to their countries, “valid objection” being defined as “persecution, or fear, based on reasonable grounds of persecution”. The IRO Manual declared that “reasonable grounds” were to be understood as meaning that the applicant has given “a plausible and coherent account of why he fears persecution.” The Ad Hoc Committee on Stateless and Related Problems adopted the expression “well-founded fear of persecution” rather than adhered to the wording of the IRO Constitution. In commenting on this phrase, in its Final Report the Ad Hoc Committee stated that “well-founded fear” means that a person can show “good reason” why he fears persecution.*”

⁷¹⁴ Ibid. at point 16.

*applicant as well as the elements relating to the situation in the country of origin.*⁷¹⁵ In other words, the evaluation of whether the fear is reasonable or not is made using objective criteria. These criteria, in the case of asylum seekers, are enumerated in paragraph 19 which makes a very clear listing of what factors would be considered in order to determine whether or not an asylum seeker should be granted refugee status. These factors for instance include “*political conditions*”, “*the country’s human rights situation and record*” *et caetera*.⁷¹⁶

This international humanitarian law standard provides us with tremendous tools that could be applied in the context of preventive use of force. In such a case, the preventor seeking authorization for its preventive strike would first argue that from its perspective, it is threatened by the target state. The preventor would first have to clearly allege and represent that it fears the targeted state. This corresponds to the subjective element cited in the international humanitarian law standard. This subjective element, that is to say “fear” has to be checked by its objective counterpart. The latter relates to whether such a fear is “well-founded”, or in other words, whether there is a reasonable factual evidence to

⁷¹⁵ Ibid. at point 18.

⁷¹⁶ Ibid. at point 19: “*The applicant’s personal circumstances would include his/her background, experiences, personality and any other personal factors which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant are relevant factors to be taken into account. Relevant elements concerning the situation in the country of origin would include general social and political conditions, the country’s human rights situation and record; the country’s legislation; the persecution agent’s policies or practices, in particular towards persons who are in similar situation as the applicant, etc. While past persecution or mistreatment would weigh heavily in favor of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin.*”

support this fear. This could consist of the targeted state's prior misbehavior, acts of aggression, possession or development of weapons of mass destruction, and so forth. While investigating the "objective" aspect of this standard, the assessing body would be able to review whether the preventor's anticipated strike is necessary and whether any other non-forceful means to apprehending the issue have been exhausted as mandated by international law.⁷¹⁷ The assessing body will also be able to review whether the preventive strike is proportional in its execution when tackling the perceived threat.⁷¹⁸

This standard seems to be the most suited in cases where states seek to undertake preventive strikes due to its two-sided approach that includes both a subjective and an objective element.

ii. *Evidence provided – screening the information – threshold*

1. Propensity evidence: A "pattern of misbehavior"

⁷¹⁷ David A. Sadoff, "A Question Of Determinacy: The Legal Status Of Anticipatory Self-Defense", 40 GEO. J. INT'L L. 523, 527 (2009): "A second cluster comprises those States that appear open to the possibility of anticipatory self-defense, but in only very narrow circumstances that would certainly require at least the existence of an imminent, if not also massive, threat, supported by largely unambiguous evidence, and where peaceful means to resolve the impending conflict had been exhausted." See also James A. Green, "Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense", 14 CARDOZO J. INT'L & CONTEMP. L. 429, 443-46 (2006).

⁷¹⁸ Dominika Svarc, "Redefining Imminence: The Use of Force Against Threats and Armed Attacks in the Twenty-First Century", 13 ILSA J. INT'L & COMP. L. 171, 187 (2006), cited in David A. Sadoff, "A Question of Determinacy: The Legal Status of Anticipatory Self-Defense", 40 GEO. J. INT'L L. 523, 527 (2009).

The pattern of “misbehavior” in terms of evidence is what we refer to as *propensity evidence*. The term “*Propensity Evidence*” is generally used to describe what is more commonly known as “character evidence”.⁷¹⁹ This basically means that prior misdeeds or vicious acts should not be used against a defendant in order to determine whether he acted in this instance in conformity with these prior misdeeds. Exceptions not to using character evidence do exist in domestic US criminal law, which include “*proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident*”.⁷²⁰

If we now tried to apply this concept in an international setting by replacing the defendant with a Sovereign State whose current government has committed egregious human rights violations, this would mean that according to the rule set

⁷¹⁹ A very good example of what character evidence could be found in Article 404 of the Federal Rules of Evidence of the United States Code Service. Article 404 dictates that:

(A) Character Evidence. (1) Prohibited Uses. **Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait** [Emphasis added]. (2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case: (A) A defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; (B) Subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may: (i) Offer evidence to rebut it; and (ii) Offer evidence of the defendant’s same trait; and (C) In a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor. (3) Exceptions for a Witness, Evidence of a witness’s character may be admitted under Rules 607, 608, and 609. (b) Crimes, Wrongs, or Other Acts. (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. (2) Permitted Uses; Notice in a Criminal Case. **This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident** [Emphasis added] On request by a defendant in a criminal case, the prosecutor must: (A) Provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) Do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

⁷²⁰ Ibid.

forth by Article 404 of the United States Federal Rules of Evidence, such prior misdeeds could not be used to construe that the same government would commit again similar violations. That being said, we can also recall that Article 404 does mention that in some instances character evidence, or prior misdeeds, could be introduced into evidence in order to suggest that a defendant acted in the present case at hand, just as he had acted previously. In our setting, this means that we can infer that from a state's government prior violations of human rights, it would have a propensity to perpetrate such acts again.

In order to support applying such a domestic standard to international affairs, we ought to cite two cases that proved that such a standard could be applied internationally (among many others). We can for instance take the cases of Saddam Hussein's Iraq and Slobodan Milosevic's Yugoslavia.

a. Iraq under Saddam Hussein

Saddam Hussein received worldwide notoriety when he used chemical weapons against Iran during the Iran-Iraq war from 1980 to 1988. Iraq killed 10,000 Iranian troops in February 1986 when it deployed Tabun and mustard gas against Iran in Al-Faw. This act constituted a violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (also known as the Geneva Protocol).

Saddam Hussein also used chemical weapons against some of his citizens. On March 16, 1988, the Iraqi air force dropped chemical munitions (mostly

mustard gas, Tabun and VX) on the town of Halabja killing close to 5,000 Kurds.⁷²¹ He further went on to persecute and eliminate both Shiites and Kurds in 1991 after these two groups rebelled in Karbala and Sylaymaniah against his government following the First Gulf War.

The above two paragraphs are merely samples of Saddam Hussein's egregious crimes against his own people and foreigners. First and foremost, what we can learn from these crimes is that they consisted of a behavioral pattern on Saddam Hussein's part. The pattern here is quite simple. As soon as Saddam Hussein saw that his power was being challenged, he took drastic measures (killings) in order to neutralize the threat to his power. One should note that this behavioral pattern is not unique to Saddam Hussein and his acolytes, but is common to repressive regimes. What lesson can we retain from Saddam Hussein's exactions? We can possibly learn that most dictators, who rule by force and commit human rights violations on a large scale, are extremely likely to replicate such violations in order to remain in power.

b. Slobodan Milosevic's Yugoslavia – The case of Kosovo

Slobodan Milosevic had been the President of the Socialist Republic of Serbia (in Yugoslavia) since May 1989. From 1991 onwards he was the President of Serbia before becoming the President of the Federal Republic of

⁷²¹ ERIC A. CRODDY AND JAMES J. WIRTZ (EDITORS), WEAPONS OF MASS DESTRUCTION: AN ENCYCLOPEDIA OF WORLDWIDE POLICY, TECHNOLOGY, AND HISTORY, VOLUME ONE, CHEMICAL AND BIOLOGICAL WEAPONS, (ABC-CLIO, 2005) at p. 164-165.

Yugoslavia (composed then of Serbia and Montenegro) until he was forced to resign in October 2000.

As President of Serbia before and after the Yugoslav wars, Milosevic sought to aggrandize Serbia's influence throughout Yugoslavia and then in other newly independent republics that used to form Yugoslavia. While it would be too long and unnecessary to make a summary of all the events and atrocities that took place during the Yugoslav wars among Bosnians, Croatians and Serbs, one can but recognize Serbia's direct involvement in these atrocities. Such involvement included providing weapons, training and military equipment to militias and other irregular units outside of Serbia. This is documented by some of his acolytes who now stand on trial in The Hague for war crimes and crimes against humanity.⁷²²

Once again, the lines hereunder are not here to recreate the indictment of the ICTY prosecutors against Slobodan Milosevic for his responsibility in the Yugoslavia Wars and the Kosovo War since it would be an extremely lengthy process. However, we should possibly rely on some work done by the ICTY prosecutors in order to understand their rationale for prosecuting Slobodan Milosevic for the acts he committed in the former Yugoslavia and in Kosovo in a single case. The ICTY prosecutors, in their case against Slobodan Milosevic, had argued that the human rights violations that had occurred in Bosnia, Croatia and

⁷²² Vojislav Sesel, a former university professor who later became head of paramilitary group during the Yugoslav wars, and who furthered the cause of committing atrocities (including war crimes and crimes against humanity) against non-Serbs in Bosnia, commented that Slobodan Milosevic provided his group with all they needed in terms of arms and logistical support. He also stated that nothing would happen without Milosevic's prior consent. ADAM LEBOR, *MILOSEVIC: A BIOGRAPHY*, (Yale University Press, 2004) at p. 191.

Kosovo were part of the same transaction and consisted of a “common scheme”.⁷²³ The question of whether all the atrocities that had been committed in these separate instances should be tried as a single transaction due to a common denominator, Slobodan Milosevic’s persecution campaigns to create a “Greater Serbia”, came before the Appeals Chamber. It which rendered its decision on April 18, 2002, summarized in the Judicial Supplement No. 32 that states:

“The Appeals Chamber considered it necessary to determine whether all the events formed part of the same transaction as part of a common scheme, strategy or plan. Although it was not bound by the particular matters which led to the Trial Chamber Decision that the events in Kosovo did not form part of the same transaction as those in Croatia and Bosnia and Herzegovina, it was nevertheless appropriate to consider them, particularly in this case where there was “no contradictor to the prosecution’s appeal”. The Appeals Chamber noted that each of the matters was a relevant consideration but that none was decisive and that, in combination, they were not an answer to the application of the Prosecution. It underscored that “[a] common scheme, strategy or plan may include the achievement of a long term aim”. The Appeals Chamber deemed that “[a] joint criminal enterprise to remove forcibly the majority of non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of

⁷²³ *Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, April 18, 2002, *Judicial Supplement No. 32*

*the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time and over a long period of time as required". The Appeals Chamber was satisfied that the events alleged in all three Indictments do form part of "the same transaction".*⁷²⁴

In the Milosevic case, the Appeals Chamber noted the fact that separate instances of misconduct on Slobodan Milosevic's part could be construed as a single transaction and that a "greater picture" could be determined after analyzing the character of each offense taken individually. The greater goal here was the removal by force of non-Serbs from Serb-controlled areas. This pattern could be clearly discerned by the prosecutors in the Milosevic case, and was confirmed by the Appeals Chamber in the above mentioned lines. In this case, deadly force and ethnic cleansing were used in a patterned manner in order to ethnically cleanse Serb-controlled areas of non-Serbs.

The cases of Iraq under Saddam Hussein and Serbia under Slobodan Milosevic offer prime examples of patterns of human rights violations. In these two instances, human rights violations consisted of similar acts ordered by the same individuals (or regimes). From these examples, we can learn that such behavioral patterns ought to be used as evidence against sovereign states that commit egregious human rights violations. These patterns would determine the likelihood of such states acting in conformity to their prior misdeeds in the future.

⁷²⁴ *Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, April 18, 2002, *Judicial Supplement* No. 32.

2. Resources and Will Power

a. Resources

A question we ask is whether a state's wealth could have an impact on determining whether or not it would be able to afford a Weapons of Mass Destruction (WMD) program. WMD programs are relatively expensive to launch and weapons systems have to be periodically updated and checked in order to ensure that the weapon itself (which would consist of a warhead and a delivery system) is still functional, is not leaking (as in the case of chemical weapons) and so forth.

After having reviewed in earlier parts of this research the different stages in the manufacture of nuclear, biological and chemical weapons, one can but assume that the acquisition and maintenance of these weapons require vast amounts of riches. Missiles are usually expensive (\$70 Million for a Peacekeeper ICBM) and these weapons system have to be modernized from time to time. As of 2002, the Carnegie Endowment for International Peace counted that there were 31,055 nuclear warheads in the world,⁷²⁵ and that the United States possessed more or less 10,700 warheads whereas Russia had around 20,000

⁷²⁵ JOSEPH CIRINCIONE, DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION, (Brookings Institution Press, 2002) at p. 42.

warheads. From these figures, we can nonetheless assume that both the United States and the USSR and now Russia are relatively wealthy countries.⁷²⁶

This leads us to the next question of whether weapons of mass destruction can only be possessed by wealthy countries as the assumption made in the above lines suggests. The answer to this question is once again not a clear cut one. Additionally, other unforeseen factors might make WMD material relatively easily accessible on international markets. The break-up of the Soviet Union led to the sale on international markets of vast arsenals.⁷²⁷ Furthermore, another factor that led to the proliferation of nuclear weapons technology was the “democratization effort” (effort which was compensated) made by individuals such as Abdul Qadeer Khan and his associates.⁷²⁸ Those individuals transferred nuclear weapons technology and know-how to different states such as Iran, Iraq, Libya, North Korea and Syria.⁷²⁹

⁷²⁶ Ibid.

⁷²⁷ Ibid.

⁷²⁸ See generally, A. Q. Kahn, GLOBAL SECURITY, available at: <http://www.globalsecurity.org/wmd/world/pakistan/khan.htm>

⁷²⁹ David Albright & Corey Hinderstein, *Documents Indicate A.Q. Khan offered Nuclear Weapon Designs to Iraq in 1990: Did He Approach Other Countries?*, INSTITUTE FOR SCIENCE AND INTERNATIONAL SECURITY, February 4, 2004, available at http://www.isis-online.org/publications/southasia/khan_memo.html. “Pakistani government investigations are reported to have obtained a statement from Abdul Qadeer Khan, the father of Pakistan’s gas centrifuge program who was recently removed from his post as advisor to Pakistan’s Prime Minister, acknowledging that he provided nuclear technology, components, and equipment to Iran, Libya, and North Korea. So far, the revelations about Khan’s activities have focused on the transfer of gas centrifuge designs and components and the wherewithal to make centrifuges. However, a troubling development is the likelihood that Khan and his associates have also transferred nuclear weapon designs to these countries. Libya is reported to have told investigators from the US government and the International Atomic Energy Agency (IAEA) that it had acquired nuclear weapon design information. The source was probably Pakistanis, according to a person close to the Libyan investigation.”

b. Will Power

Sheer will is not a factor that should be dismissed. Will is probably the most important factor to be considered because this constitutes a state's drive to seek and develop WMDs. One could make several assumptions while contemplating the correlation between a state's resources and its drive to acquire resources. One could make the assumption that a state is wealthy because it possesses a lot of resources and has the will, if not to aggrandize them, to preserve them. As the saying goes, the more one has, the more one will want.⁷³⁰ The next argument to this would then be that states do not have vast resources because they do not have the will to increase these resources. A counter-argument to both of these assumptions is that wealthy states do not necessarily want to aggrandize their resources because they are comfortable with what they have or do not see the need to do so. While, on the other hand, poor states have nothing to lose and could be the most determined to increase them or preserve the resources or influence they have. In order to illustrate this last point, we can offer the example of North Korea in order to show that even extremely poor countries can afford to build nuclear weapons as long as they have enough will to do so.

⁷³⁰ Lagniet-Guerard, "*L'Araignee et la Mouche*", PARIS – BIBLIOTHEQUE NATIONALE, 17th Century engraving available at: <http://www9.georgetown.edu/faculty/spielmag/docs/legrandsiecle/lgs4.htm>.

A little review of North Korea's history will allow us to understand its actions. North Korea is an autarkic regime born after the Second World War after the defeat of Japan. It is also known to be a totalitarian state that follows a hard-line communist doctrine known as "Juche".⁷³¹ The "Juche" doctrine revolves around political, economic and military independence. North Korea is also one of the poorest nations on earth with a GDP of \$1,800 per habitant.⁷³² During the 1990s the North Korean people suffered from famine as the Soviet Union, a major trading partner, collapsed. This came in addition to having a shortage of grain which caused approximately 3 million North Koreans to die (also known as the "*Arduous March*").⁷³³ Despite this, North Korea continued to push its *Songun* policy, which is translated in English as "military-first" policy. The military in North Korea is a tool used to defend the regime against foreign entities and influence, but also as a means to protect its privileged few. This policy also means that the resources invested in the military are not available to other sectors which might also need them. In other words, the implementation of North Korea's *Songun* doctrine comes at the expense of addressing the malnutrition problem that still currently exists in North Korea. Furthermore, this doctrine was still pursued and implemented during the famine in the 1990s.

⁷³¹ Kim Jong Il, "*On the Juche Idea*", 70TH BIRTHDAY OF THE GREAT LEADER COMRADE KIM IL SUNG, March 31, 1982 available at: http://www1.korea-np.co.jp/pk/062nd_issue/98092410.htm.

⁷³² <https://www.cia.gov/library/publications/the-world-factbook/geos/kn.html>

⁷³³ Ian Jeffries, "*North Korea, 2009-2012: A Guide to Economic and Political Developments*", Volume 11 of GUIDES TO ECONOMIC AND POLITICAL DEVELOPMENTS IN ASIA at p. 832 (Routledge, 2012).

Other examples of poor states developing WMDs would include for instance Sudan which has developed over the years a chemical weapons program. Sudan started developing chemical weapons in the late 1980s, after Iraq's defeat in the 1991 Gulf War. At that time, Iraq was legally bound to surrender and allow the destruction of its WMD arsenal. In order to circumvent this, Iraq found allies with whom it could entrust some of its WMDs. Sudan was then just a safe-keeper.⁷³⁴ Sudan then started to develop its own chemical weapons program with Iraq and Osama bin Laden's help.⁷³⁵

Whereas possessing large financial resources is a great advantage in terms of developing a WMD program in a short period of time and stockpiling

⁷³⁴Weapons of Mass Destruction, Chemical Weapons (globalsecurity.org) "According to some accounts, in March/April 1991, Iraqi Deputy Prime Minister Tariq Aziz requested and was granted permission from Sudan's President Umar al-Bashir to move Iraqi chemical weapons to Sudan in order to circumvent their destruction by the UN. Thus, in the Summer of 1991, as UN inspections became inevitable, Iraq was said to have transferred chemical weapons for "safekeeping" in Yemen and Sudan [...] It is claimed that secret contacts between Iraq and Sudan resulted in the emergence of an 'Iraqi-Iranian-Sudanese Axis' by the Spring-Summer of 1995. Providing Sudan with rudimentary chemical warfare capabilities was a major request from Sudanese President Bashir that Saddam Hussein authorized". Weapons of Mass Destruction (WMD), Chemical Weapons, Fact sheet on Sudan available at <http://www.globalsecurity.org/wmd/world/sudan/cw.htm> and Task Force on Terrorism and Unconventional Warfare, US House of Representatives, Washington D.C. 20515, "The Iraqi WMD Challenge, Myths and Reality", (02/10/1998) available at: http://www.globalsecurity.org/wmd/library/congress/1998_r/980210t-fr.htm

⁷³⁵"Sudan: A party to the Chemical Weapons Convention, Sudan has pursued the capability to produce chemical warfare agents since the 1980s. Sudan has sought foreign assistance from a number of countries that have CW programs, including Iraq. During the 1990s, Sudanese officials allegedly produced chemical weapons in collaboration with Osama bin Laden's al-qaeda terrorist network, although evidence in the public domain for this allegation remains equivocal. There are no confirmed reports that Sudan is pursuing a biological weapons program". The Proliferation of Chemical and Biological Weapons Materials and Technologies to State and Sub-State Actors. Testimony by Jonathan B. Tucker, Ph.D. Director, Chemical & Biological Nonproliferation Program Center for Nonproliferation Studies Monterey Institute of International Studies Washington, D.C. Office before the Subcommittee on International Security, Proliferation, and Federal Services of the U.S. Senate Committee on Governmental Affairs November 7, 2001, 2:30 p.m. Room 342, Dirksen Senate Office Building Washington, D.C., p. 3 available at: <http://www.bioterrorism.slu.edu/bt/official/congress/tucker110701.pdf>

them, as is it the case with the case with the United States and Russia, a determined and impoverished nation that mostly relies on humanitarian aid to feed its population can succeed in developing nuclear weapons. Even though North Korea does not have stock-piles of atomic weapons, it is able to impose its views and black-mail the international community for goods and services, while enslaving its population that serves a privileged few. North Korea clearly is an example of the fact that a state's resolve in obtaining WMDs is one of the most important factors that have to be considered.

A state's resolve could be quantified by factors such as what type of political regime is established, the level of control it has over its territory and population, its legitimacy with the local population, the level of fear of being attacked and whether the regime in place formerly used violence in order to remain in power. All these factors will enable observers to determine whether a state would likely use weapons of mass destruction as a weapon of choice or attempt to develop them. We can for instance cite the examples of Syria and Libya. The Syrian regime on one hand is a regime that clings on to power by sheer force and threatens with WMDs foreign nations⁷³⁶ who would want to militarily intervene in its civil war to protect the local population.⁷³⁷ On the other

⁷³⁶ "Syrian Regime Makes Chemical Warfare Threat", THE GUARDIAN, July 23, 2012 available at: <http://www.theguardian.com/world/2012/jul/23/syria-chemical-warfare-threat-assad> : "No chemical or biological weapons will ever be used, and I repeat, will never be used, during the crisis in Syria no matter what the developments inside Syria," Makdissi said in news conference broadcast on Syrian state TV. "All of these types of weapons are in storage and under security and the direct supervision of the Syrian armed forces and will never be used unless Syria is exposed to external aggression."

⁷³⁷ Arthur Bright, "Syria's Top Defector Says Assad Not Afraid to Use Chemical Weapons", THE CHRISTIAN SCIENCE MONITOR, July 17, 2012 available at:

hand we can see how a regime that gave up its WMD programs after the 2003 Iraqi campaign got overthrown and its leader killed. These two cases are that of Basher Al-Assad's Syria and Muammar Qaddafi's Libya.⁷³⁸

Over the 1990s and the following decade, Qaddafi cleaned-up the image he had as a terror supporter and became more "acceptable" in the international arena. He achieved this goal by halting his support for terror groups (such as the Irish Republican Army) and handing over the alleged bombers of the Pan American Flight 103 to British custody and compensating the families of the victims of that terrorist attack. One of the key components in order to rehabilitate Qaddafi's Libya was the latter's destruction and surrendering of its chemical and nuclear weapons materials. In December of 2003, a few months after the military campaign against Iraq, Libya agreed to the destruction⁷³⁹ and removal of its

<http://www.csmonitor.com/World/Security-Watch/terrorism-security/2012/0717/Syria-s-top-defector-says-Assad-not-afraid-to-use-chemical-weapons> : "During an interview with the BBC in Qatar, former Syrian Ambassador to Iraq Nawaf Fares was asked about Mr. Assad's willingness to use chemical weapons against the Syrian people. "There is some information, unconfirmed information of course, that chemical weapons have been used partially in Homs," Mr. Fares said through a translator. "However, I have absolute conviction that if the circle of the people of Syria becomes tighter on the regime, the regime will not hesitate to use chemical weapons." The BBC's Frank Gardner, who interviewed Fares, notes in a separate article that the ex-ambassador only offered his convictions as evidence of his chemical weapons claims. "I have built my opinion based on my knowledge of the regime's mentality and the government's mentality," Fares told Mr. Gardner."

⁷³⁸ Muammar Qaddafi, also known as the "Brother Leader and Guide of the Revolution", accessed power in 1969 after a military coup deposed King Idris of Libya. Qaddafi's Libya supported and sponsored for decades acts of terror directed against the West and actively sought the domestic development and production of chemical and nuclear weapons. ALISON PARGETER, LIBYA: THE RISE AND FALL OF QADDAFI (Yale University Press, 2012) at p. 3.

⁷³⁹ While the above-mentioned efforts rehabilitated Qaddafi's image in the international arena, these efforts were not sufficient to dispel growing domestic discontent. In 2011, Libya was the theater of a civil war whereby government forces and rebel forces clashed. Additionally, instrumental in the rebel forces' victory in the toppling and killing of Qaddafi in October of 2011 were critical NATO airstrikes pursuant to the authorization by the Security Council in Resolution 1973.

nuclear and chemical weapons programs.⁷⁴⁰ Qaddafi's surrendering of its nuclear program is widely believed by some to have been the fruit of years of negotiations and international sanctions and offer Libya long-term economic and diplomatic benefits.⁷⁴¹ Others maintain that the 2003 invasion of Iraq had scared the Libyan ruler who feared an American preemptive campaign against it.⁷⁴²

When Hafez Al-Assad died, his son Bashar al-Assad inherited his position.

Bashar al-Assad first and foremost is an ophthalmologist who lived in London

⁷⁴⁰ "In December 2003, Libya pledged to eliminate all elements of its nuclear and chemical weapons programs and soon thereafter acceded to the Chemical Weapons Convention (CWC), which prohibits states-parties from developing, producing or using chemical weaponry [...] During an initial inspection in March 2004, the Organization for the Prohibition of Chemical Weapons (OPCW), the CWC's implementing body, verified Libya's declared stockpile of 23 metric tons of mustard gas and more than 1,300 metric tons of precursor chemicals." Michael Nguyen, *Libya Chemical Weapons Destruction Costly*, ARMS CONTROL ASSOCIATION (May 2006), available at: http://www.armscontrol.org/act/2006_05/Libya.

⁷⁴¹ Sammy Salama, "Was Libyan WMD Disarmament a Significant Success for Nonproliferation?" THE NUCLEAR THREAT INITIATIVE, September 1, 2004 available at: <http://www.nti.org/analysis/articles/was-libyan-wmd-disarmament-success/>: "Tripoli's decision to disarm has provided Libya with formidable long term diplomatic and economic benefits. Libya is able to rejoin the community of nations as a member in good standing after decades of being ostracized as a rogue state [...] Others disagree, however, arguing that Libya's disarmament had little to do with the invasion and occupation of Iraq. According to this view, Libya's decision to disarm reflects the tail-end of many years of diplomacy between Libya and the West that was aimed at resolving various issues, including Libya's compensation for the families of the Pan Am 103 terrorist bombing, Libya's overall support for terrorism, the lifting of economic sanctions, and the surrender of Libya's WMD arsenal. In fact, former Clinton administration official Martin Indyk indicated that as early as May 1999, at the outset of secret negotiations with American officials, Libya offered to give up its WMD arsenal. At that time, Tripoli was suffering through major economic difficulties brought on by the ongoing international sanctions and flawed domestic economic policies. In particular, Libya was unable to import oilfield technologies necessary to expand their oil production due to the economic sanctions."

⁷⁴² Ibid. "In addition, it has been argued by many supporters of the Bush administration's post-9/11 policy of preemption that the overthrow of Saddam Hussein's regime in Iraq influenced Qadhdhafi, who wanted to avoid sharing his fate. Among the proponents of this view, U.S. Energy Secretary Spencer Abrams stated that the invasion of Iraq "did not escape the attention of the Libyan leadership." Many have drawn a more direct correlation between Libya's decision to capitulate to international demands and the 2003 invasion of Iraq by U.S.-led coalition forces. They point to the timing of Libya's concessions less than a week after the capture of Saddam Hussein 10 miles south of Tikrit, and the reported statements of Libyan President Qaddafi to Italian Prime Minister Silvio Berlusconi including, "I will do whatever the Americans want, because I saw what happened in Iraq, and I was afraid."

until his hasty recall in Syria in order to train to become Syria's future leader. In January 2011 the "Arab Spring" phenomenon knocked on Syria's door. The civil war started in mid-March 2011 between the Bashar al-Assad regime and different opposing groups. As of September 2013, there have reportedly been 100,000 people that have died in Syria according to the United Nations since the start of the civil war, most of them civilians.⁷⁴³ The Syrian government has also been accused by Western powers of having used Sarin gas on August 21, 2013 which caused the death of 1400 people in the suburbs of Damascus.⁷⁴⁴ The reaction from certain international players has been to condemn the atrocities and loss of life in Syria. However, no UN Security resolution was passed that condemned Syria as Russia and China have vetoed such attempts.⁷⁴⁵ The

⁷⁴³ DPA, "Real Death Toll in Syria could be More than 200,000, Human Rights Group Says", HAARETZ, August 10, 2013 available at: <http://www.haaretz.com/news/middle-east/1.540747>: "The real death toll in the Syrian war could be more than 200,000 people, a pro-opposition watchdog group said Saturday, as it provided a latest count that matched that of the UN. The Syrian Observatory for Human Rights said it had documented the deaths of more than 106,000 people, but warned that the real toll could be twice as high. The United Nations said in July that more than 100,000 have been killed in Syria since March 2011." Over 32,000 Killed in Syria Conflict: Watchdog, AFP REPORT, October 9, 2012, available at: <http://www.theaustralian.com.au/news/breaking-news/over-32000-killed-in-syria-conflict-watchdog/story-fn3dxix6-1226491704440>.

⁷⁴⁴ Michael R. Gordon and Jackie Calmes, "Kerry Casts Obama's Syria Decision as 'Courageous'", THE NEW YORK TIMES, September 1, 2013, available at: <http://www.nytimes.com/2013/09/02/world/middleeast/syria.html>: "The lobbying blitz stretched from Capitol Hill, where the administration held its first classified briefing on Syria open to all lawmakers, to Cairo, where Secretary of State John Kerry reached Arab diplomats by phone in an attempt to rally international support for a firm response to the Aug. 21 chemical weapons attack in the suburbs of Damascus. Mr. Kerry appeared on five morning talk shows, announcing new evidence — that the neurotoxin sarin had been used in the attack that killed more than 1,400 people — and expressing confidence that Congress would ultimately back the president's plan for military action."

⁷⁴⁵ Russia and China Veto Syria Sanctions Threat, AP, October 5, 2011, available at: <http://www.independent.co.uk/news/world/politics/russia-and-china-veto-syria-sanctions-threat-2365794.html>: "Russia and China vetoed a European-backed UN Security Council

alleged reasons for vetoing resolutions that would impose a legally and enforceable cease-fire included the fact that they had formerly agreed to pass Resolution 1973 against Libya. The language of that Resolution had later allegedly been misused to carry a large aerial campaign against the Qaddafi regime, instead of enforcing a no-fly zone, which led to Qaddafi's removal. Other grounds included the fact that allowing military force against Syria would not achieve a peaceful resolution of the conflict. One year later, and thousands more killed peace has still not been achieved.

What can we learn from the cases of Syria and Libya? Qaddafi's Libya abandoned its nuclear and chemical weapons' ambitions in late 2003, thereby insuring that any conflict it would be engaged in would not witness the use of chemical or nuclear weapons. Libya, whose army was never that good (Libya lost the war against Chad), was an easy target for NATO troops who possessed air-power superiority. Furthermore, Libya having given up its chemical weapons, would not have been able to launch chemical warheads against Malta or Italy, EU and NATO members.

On the other hand, the same does not hold true with regards to Syria. Hafez al-Assad had obtained chemical weapons from the Soviet Union in the 1980s and was the Soviet Union's ally in the Middle East. This alliance was

resolution that threatened sanctions against Syria if it did not halt its military crackdown against civilians [...] Russia's UN Ambassador Vitaly Churkin told the council after the vote that his country did not support the Assad regime or the violence but opposed the resolution because it was 'based on a philosophy of confrontation,' contained 'an ultimatum of sanctions' and was against a peaceful settlement of a crisis. He also complained that the resolution did not call for the Syrian to dissociate itself from 'extremists' and enter into dialogue."

inherited by Bashar al-Assad, Russia which continuing to provide it with weapons systems and different arms.⁷⁴⁶ Bashar al-Assad, as an ophthalmologist seems to have a 20/20 eyesight when it comes to choosing his allies and deterring foreign intervention in the ongoing civil war which is raging in Syria. Bashar al-Assad made it very clear that he would not tolerate any foreign intervention in the ongoing conflict and that he would use chemical weapons if he needed to in order to deter such intervention.⁷⁴⁷ Western countries have promised a “*massive and blistering*” response if the Assad regime ever used chemical weapons.⁷⁴⁸ One can wonder if these words would be backed by actual force or whether they are just rhetoric in order to gain sympathy among observers who are appalled at the brutal repression that has been going on for over two years in Syria.⁷⁴⁹ First

⁷⁴⁶ Human Rights Watch, “*Isolate Syria’s Arms Suppliers*”, (6/3/2012) available at: <http://www.hrw.org/news/2012/06/03/isolate-syria-s-arms-suppliers>

⁷⁴⁷ Neil MacFarquar & Eric Schmitt, “*Syria Threatens Chemical Attack on Foreign Force*”, NEW YORK TIMES, JULY 23, 2012: “*Syrian officials warned Monday that they would deploy chemical weapons against any foreign intervention, a threat that appeared intended to ward off an attack by Western nations while also offering what officials in Washington called the most ‘direct confirmation’ ever that Syria possesses a stockpile of unconventional armaments. [...] ‘Any stock of WMD or unconventional weapons that the Syrian Army possesses will never, never be used against the Syrian people or civilians during this crisis, under any circumstances’, a Foreign Ministry spokesman, Jihad Makdissi, said at a news conference shown live on Syrian state television, using the initials for weapons of mass destruction. ‘These weapons are made to be used strictly and only in the event of external aggression against the Syrian Arab Republic.’*”

⁷⁴⁸ Angela Charlton & David Stringer, “*France Warns of Syrian Chemical Weapons Attack*”, ASSOCIATED PRESS, September 3, 2012, available at <http://www.foxnews.com/world/2012/09/03/france-warns-syrian-chemical-weapons-attack/> : “*Western powers are preparing a tough response if Syrian President Bashar Assad’s regime deploys chemical or biological weapons in its civil war, key European officials warned Monday. Syria’s leadership has said the country, which is believed to have nerve agents as well as mustard gas and Scud missiles capable of delivering them ,could use chemical or biological weapons if it were attacked from outside. ‘Our response...would be massive and blistering’, if Assad’s forces use such weapons, French Foreign Minister Laurent Fabius told RMC radio.*”

⁷⁴⁹ Bernard-Henri Levy, “*The Syria Deal Has a Hint of Munich*”, THE WALL STREET JOURNAL, September 18, 2013, A17: “*I am not talking about the letter of the agreement, which the*

of all, Western powers took a lot of time and effort to remove Qaddafi from power who was hardly a great military power. Furthermore, Western powers are not likely willing to send ground troops into Syria and would rely mostly aerial bombings.⁷⁵⁰ Once again, Syria is not Libya. Syria has recently received the Russian S-300⁷⁵¹ aerial defense system and other defense systems that Libya did not have.⁷⁵² Additionally, China,⁷⁵³ Russia, and Iran (who sends troops to

experts immediately observed was: (1) Un-implementable. How in a country at war, does one gather up and then destroy 1,000 tons of chemical weapons scattered across the entire territory? (2)Un-verifiable. According to the best estimates, the task would require 20 times more inspectors than the United Nations mustered in Syria last summer, and who, for the most part, remained shut up in their hotels or were trotted around by the regime. (3) Unaffordable. The United States has invested \$8 billion to \$10 billion to destroy its own chemical weapons and, 20 years later, the task is not yet finished. (4) Tied to a timetable ('mid-2014') that, apart from being technically meaningless, sounds more like a bad joke in a country where, for two and a half years now, hundreds of civilians have been killed each day by conventional arms. [...] What I am talking about is Bashar Assad, who has been transformed, as if by magic, from a war criminal and enemy of humanity (in the words of U.N. Secretary General Ban Ki-Moon) into an unavoidable, nay, legitimate, negotiating partner – whose spirit of cooperation and responsibility I fear we will soon hear being widely praised.”

⁷⁵⁰ This was recently confirmed by US Secretary of State John Kerry. Susan Cornwell and Patricia Zengerle, “Kerry Opens Door To ‘Boots On Ground’ In Syria, Then Slams It Shut”, REUTERS, September 3, 2013, available at: <http://www.reuters.com/article/2013/09/03/us-syria-crisis-usa-kerry-idUSBRE9820ZR20130903> : “Secretary of State John Kerry briefly opened the door on Tuesday to authorizing U.S. ground troops in Syria, but quickly slammed it shut and told Congress that any resolution approving military force would prohibit ‘boots on the ground’.”

⁷⁵¹ Russia has just agreed to deliver these systems to Iran. Iran had been wanting to purchase them for a number of years, however the sale had been put on hold. “Russia to Supply S-300 Anti-Aircraft Missiles to Iran”, THE JERUSALEM POST, September 11, 2013 available at: <http://www.jpost.com/Defense/Report-Russia-to-supply-Iran-with-S-300-anti-aircraft-missiles-325843>: “Russian President Vladimir Putin has approved the transfer of S-300 anti-aircraft missiles to Iran, according to the prestigious Russian daily newspaper Kommersant. The newspaper reported on Wednesday that the Russian government will revive the transfer three years after it canceled the original transaction. According to Kommersant, the Kremlin agreed to Tehran’s request to complete the transaction, which will net the Russian treasury \$800 million. In addition to the missile deal, Russia has also agreed to construct another nuclear reactor in Bushehr. According to the Kommersant report, the two sides are expected to finalize the details of the deal this coming Friday, when Putin is expected to meet his Iranian counterpart, Hassan Rouhani, in the central Asian republic of Kyrgyzstan.”

⁷⁵² David Lev, “Report: Russia Sent Syria Super-Advanced S-300 Missiles”, ARUTZ SHEVA, November 24, 2011, available at http://www.israelnationalnews.com/News/News.aspx/150059#.TwryzG_9OsQ.

fight in Syria) are supporters of the current regime and have no interest whatsoever in seeing it toppled. We should not forget to mention the fact that the port of Tartus in Syria is a Russian permanent base for nuclear armed warships.

We can now draw a series of conclusions from the different case studies reviewed here-above. First and foremost, we can recognize that while having large resources makes the production of WMDs easier, what really matters is the determination a state to develop and possess such weapons. A state's resources are not the main factor to be concerned about when contemplating whether a preventive strike should be launched against a potential target state. The real factor to be considered here would be the targeted state's determination in pursuing the acquisition of WMDs, and whether that state could be deterred from acquiring them. While being determined to develop WMDs and having acquired the material means to do so could already be considered as good evidence against the targeted state, these factors combined with the targeted state's prior egregious acts should be regarded as additional aggravating evidence against it. If the preventor fears that the targeted state's actions are going to severely jeopardize its sovereignty, its fears being supported by evidence that is reasonable and which support such allegation, one could assume that the Security Council would most likely authorize the preventor to strike the targeted state.

⁷⁵³ Jonathan E. Davis, "From Ideology to Pragmatism: China's Position on Humanitarian Intervention in Post-Cold War Era", 44 VAND. J. TRANSNAT'L L. 217, 220 (2011): "This is not to say that China shows signs of supporting the further development of the international law of humanitarian intervention; rather, China is likely to remain a "persistent objector" to claims of a unilateral right of humanitarian intervention for the foreseeable future."

CONCLUSION

There is no doubt that recent technological advances in the field of warfare have broken down both time barriers and the magnitude of destruction of certain types of weapons. Untold levels of destruction can now be achieved by

both states and non-state entities in a minimal amount of time. Concerned states and international organizations provide for different incentives and sanctions in order to curb the spread of weapons of mass destruction. While deterrence and containment might have seen viable means of controlling bellicose states that possessed such weapons, these doctrines are not full-proof and might not be applicable to states that act according to a logic based on life in the hereafter.

The model of normalization of preventive force offered by this research could be likened to a small trial presided by the United Nations Security Council. Its members form a jury that would essentially decide whether a preventive strike against a target state would be legal. The UN Security Council, assembled in its “closed consultation” formation would be the perfect forum around which such actions could be discussed due to the possibility of holding a speedy and confidential meeting there. The Council would proceed to review the case brought forth by the preventor. This review would be carried out by considering supporting evidence provided by the preventor concerning the development or possession of WMDs, and the target state’s propensity to commit egregious acts. The Council, in reviewing this matter, should determine whether the case brought forward by the preventor is reasonable and that it can articulate a reasonable fear. The Council, so as to insure that the preventor does not abuse the authorization received, could set guidelines or conditions to be met while carrying out the preventive strikes. Overall, this process would delineate the boundaries of prevention, steps that would reinforce stability in international relations and legal regime.

History has consistently showed us that states have resorted to anticipatory self-defense when they felt threatened. States have also abused self-defense and more specifically anticipatory self-defense as a justification for attacking other states, waging wars of aggression. The Just War theorists and later philosophers warned us of these abuses and attempted to strike a balance between the two. The comprehensive approach offered in this research seeks to defend both the preventor and the target state by creating a normative framework whereby the legality of the preventive strikes would be reviewed, attempting to create a stable system.

Titus Maccius Plautus once wrote "*homo homini lupus est*" which is commonly translated as "man is a wolf to man", referring to an inherent strive in man to subdue another. Publius Flavius Vegetius Renatus, another Roman who lived centuries later added to this "*si vis pacem, para bellum*"⁷⁵⁴, meaning that if one wants peace, one should prepare for war. These two maxims are hardly statements made to comfort individuals, but merely describe the intrinsic nature of man. On the other hand, Lucius Annaeus Seneca wrote that "*homo homini sacra res*", that is to say that man is a sacred thing to man. These three Latin maxims highlight the tension that exists in man and within men, recognizing both man's cruel but also sacred nature. These proverbs could be applied to states, entities that are formed and controlled by men. These statements also provide us with a recipe for stability in international relations. On the one hand we are taught to show strength in order to promote peace and prevent wars, while keeping an

⁷⁵⁴ Publius Flavius Vegetisu Renatus, De Re Militari.

eye on the sacredness of mankind. This is the lesson we should bear in mind while contemplating the use of preventive force.

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ⁱ Article 2 of the United Nations Charter:

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

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1. *The Organization is based on the principle of the sovereign equality of all its Members.*
 2. *All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.*
 3. *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*
 4. *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*
 5. *All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.*
 6. *The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.*
 7. *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. “*

ⁱⁱ Article 51 of the UN Charter:

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

ⁱⁱⁱ JOSEPH CIRINCIONE, *DEADLY ARSENALS: TRACKING WEAPONS OF MASS DESTRUCTION*, (Brookings Institution Press, 2002) at p. 48. These four species of biological weapons are described by Mr. Cirincione as follows:

“Bacterial Agent, such as those that cause anthrax and tularemia, are single cell organisms that either invade host tissue or produce nonliving toxins (poisons). Some bacteria cause disease by both means. Bacterial agents can be cultivated in nutritive solutions. Under specific conditions, some bacteria can transform into spores. Spores are often more resistant to environmental conditions, such as temperature and

humidity, than are the original bacteria. Spores “are a dormant form of bacterium, and like the seeds of a plant, they can germinate when conditions are favorable.” Because of their resilience, spores are often more effective as biological agents.

Rickettsial agents include those that cause Q fever and epidemic typhus. *Rickettsiae* are parasitic microorganisms that live and replicate inside living host cells for survival. They are often highly susceptible antibiotic treatments.

Viral agents include smallpox virus, Venezuelan equine encephalitis virus, and various viral hemorrhagic fevers. Viruses are sub cellular organisms that are dependent upon host cells for survival. Viral agents act as intra-cellular parasites, triggering changes within the host cells that eventually lead to cell death. The successful cultivation of viruses is difficult.

Biological toxins, such as ricin and botulinum toxin, are potent potent poisons generated by living organisms, i.e. bacteria, fungi, algae, and plants. Unlike bacterial or viral agents, toxins are nonliving akin to synthetic chemical poisons. As non-living agents, toxins cannot reproduce or spread and are therefore less deadly relative to living pathogens. Several characteristics, however, differentiate biological toxins from chemical agents. Unlike their chemical counterparts, toxins are not human-made. They are not volatile and thus are unlikely to spread by direct human contact. However, the toxicity of many biological toxins is several orders of magnitude higher than that of chemical nerve agents. Like other biological agents, the effective distribution of toxins generally requires an aerosol system.”

iv

BACTERIOLOGICAL WARFARE AGENTS			
<u>Bacteriological Agent</u>	<u>Lethality</u>	<u>Treatment</u>	<u>Number of organisms</u>
Anthrax	High	Vaccine	8 000 – 50 000 spores
Cholera	Moderate	Antibiotics	10 – 500 organisms
Pneumonic plague	High	Vaccine	100 – 500 organisms

VIRAL WARFARE AGENTS			
<u>Viral Agent</u>	<u>Lethality</u>	<u>Treatment</u>	<u>Number of organisms</u>

Smallpox	High	Vaccine	10 – 100 organisms
Ebola	High	No treatment	1 – 10 organisms
Typhus	High	No treatment	U/K

TOXINS			
<u>Toxin</u>	<u>Lethality</u>	<u>Treatment</u>	<u>Number of organisms</u>
Botulinum Toxin	High	Vaccine	0.001 mg/kg of body weight if inhaled
Ricin	High	No treatment	3 mg/kg of body weight if ingested
Staphylococcal Enterotoxin B	Low	No treatment	0.03 mg/kg of body weight

^v Ibid. p. 50:

“Blood gases, such as hydrogen cyanide, poison cells by blocking the transport of oxygen in the blood vessels. The most serious effects of cyanide poisoning are caused by a lack of oxygen to the brain.

Blistering agents, such as mustard gas, phosgene oxime, and lewisite, penetrate body tissues and mucous membranes and react with enzymes, proteins, and DNA to destroy cells. The skin, eyes, and airways are especially vulnerable.

Chocking agents, such as chlorine and phosgene, damage the membrane of the lungs and ultimately cause suffocation. Pulmonary agents must be inhaled to harm the body.

Nerve agents, such as sarin, VX, and tabun, affect the transmission of nerve impulses in human and animal nervous systems, triggering death. All nerve agents are chemically categorized as organophosphorus compounds. Such chemical warfare agents are highly toxic, spread quickly, and have rapid effects upon skin contact or inhalation.”

^{vi}

Nerve Agents			
<u>Name of Agent</u>	<u>Mode of Absorption</u>	<u>Lethal Dose</u>	<u>Effects on Humans</u>

Tabun (GA)	Skin, Eyes, Respiratory System	Skin: 1 g Inhalation: 200mg	Seconds to minutes for vapors, Minutes to hours for skin contact. Effects range from headaches, loss of consciousness, convulsions, paralysis, respiratory failure and then death.
Sarin (GB)	Skin, Eyes, Respiratory System	Skin :1.7g Inhalation: 70- 100mg	Seconds to minutes for vapors, Minutes to hours for skin contact. Effects range from headaches, loss of consciousness, convulsions, paralysis, respiratory failure and then death.
Methylphos pho- nothioate (VX)	Skin, Eyes, Respiratory System	Skin: 10 mg Inhalation: 30mg	Seconds to minutes for vapors, Minutes to hours for skin contact. Effects range from headaches, loss of consciousness, convulsions, paralysis, respiratory failure and then death.

Blistering Agents			
<u>Name of Agent</u>	<u>Mode of Absorption</u>	<u>Lethal Dose</u>	<u>Effects on Humans</u>
Mustard Gas (H/HD)	Skin, Eyes, Respiratory System	Skin: 100mg/kg Inhalation: 1.5g	Symptoms appear from 2-24 hours. Blisters appear on skin, damage to eyes, destruction of airways.
Lewisite (L)	Skin, Eyes, Respiratory System	Skin :2.8g Inhalation: 1.2-1.5g	Instant action. Blisters to skin, permeability of capillaries, hepatic and/or renal necrosis.
Phosgene Oxime (CX)	Skin, Eyes, Respiratory System	N/A	Elongated lesions on skin. Pulmonary Edema. Immediate action followed by rapid tissue necrosis.

Blood Agents			
<u>Name of Agent</u>	<u>Mode of Absorption</u>	<u>Lethal Dose</u>	<u>Effects on Humans</u>
Hydrogen cyanide (AC)	Skin, Eyes, Respiratory System	Skin: 1.1mg/kg Inhalation: 2.5-5g	Death occurs 6-8 minutes after inhalation. Respiratory activity stops 2-3 after inhalation. Cardiac arrest then follows.
Cyanogen Chloride (CK)	Skin, Eyes, Respiratory System	Skin :200 mg Inhalation: 11g	Death occurs 6-8 minutes after inhalation. Respiratory activity stops 2-3 after inhalation. Cardiac arrest then follows.

Choking (pulmonary) Agents			
<u>Name of Agent</u>	<u>Mode of Absorption</u>	<u>Lethal Dose</u>	<u>Effects on Humans</u>
Chlorine (CL)	Respiratory System	Inhalation: 6.651 ppm/min	Acts between 30 minutes to 4 hours. Corrosion of the eyes, pulmonary edema, respiratory tract, accumulation of fluid in lungs leading to fatal choking.
Phosgene (CG)	Respiratory System	Inhalation: 3.2 g	Acts between 30 minutes to 6 hours. Corrosion of the eyes, respiratory tract, accumulation of fluid in lungs leading to fatal choking.
Chloropicrin (PS)	Respiratory System	Inhalation: 0.3ppm/min 119ppm/min	Tears and eye pain. Death by pulmonary edema.

^{vii} Atomic Weapons:

“Gun-design”

The “Gun-design” nuclear device is a simple device which uses Uranium 235 as fissionable material. As indicated by its name, the “gun-design” device uses a tube to

shoot a projectile into the Uranium 235 in order to obtain a nuclear chain reaction. The “projectile” consists of a subcritical mass (criticality is defined as “an assembly of fissile and other materials that can support a self-sustaining chain reaction”) [“Weapons of Mass Destruction: An Encyclopedia of Worldwide Policy, Technology, and History”, Volume Two, Nuclear Weapons, Eric A. Croddy and James J. Wirtz, editors, ABC-CLIO (2005). P. 87.] of U235 shaped as a doughnut, that was projected at an extremely high velocity into a subcritical cylinder of Uranium 235. This collision between the two subcritical elements would then create a critical mass that would in turn produce a self-sustaining nuclear chain reaction.

The nuclear chain reaction would force neutrons to escape and collide with other atoms, further inducing the nuclear chain reaction. The “Gun-design” device was used during the bombing of Hiroshima and produced a yield of 13 Kilo Tons of TNT. Due to its high cost (Uranium 235 was expensive to obtain) and to its relative inefficiency^{vii} [The drawbacks to the gun-type design are the lack of compression, which results in a need for large amounts of fissionable material and leads to low efficiency; inefficiency in its use of fissile material, as only 3 percent of the material is fissioned, on average; a slow insertion speed which means that only U235 and U233 can be used; and the weight and length of the gun barrel, which make the weapon heavy and fairly long”. Ibid. p. 135.], researchers agreed on a more compact and efficient nuclear device using Plutonium 239, known as the “Implosion-design”.

“Implosion-design”

The “Implosion-design” device was used in the August 9, 1945 bombing of Nagasaki when “Fat Man” was detonated. In contrast to “gun-design” devices, “implosion-design” devices are understood to be more economical (Uranium 235 is rare and expensive, whereas Plutonium 239 is a by-product obtained when operating a nuclear reactor). An “implosion-design” device works by compressing a subcritical mass of Pu239 into a critical mass. This process is achieved by detonating different plastic explosives (RDX, Composition B etc.) simultaneously around a Pu239 sphere. This Pu239 sphere is surrounded by an aluminum “pusher” which protects it from impurities, while compressing the plutonium sphere. A tamper is inserted the plutonium sphere and the aluminum pusher in order to contain neutrons within the compressed area and induce additional nuclear chain reactions. [“In an implosion design, the fissile material is in the form of a small subcritical sphere surrounded by a tamper. Outside this is a high explosive, which is detonated simultaneously at a number of points on the exterior to produce a symmetrical, inward-traveling shock wave. This “implosion compresses the fissile material to two to three times its normal density. At the moment of maximum compression, a burst of neutrons is injected to initiate a chain reaction”.Ibid.]

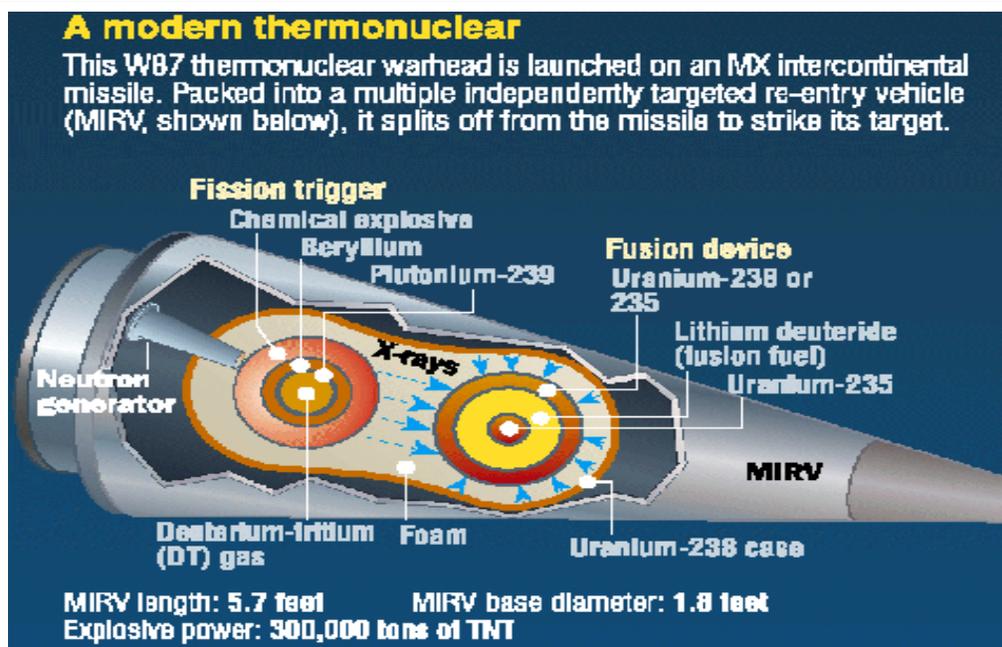
Hydrogen Bombs – Thermonuclear Weapons:

Hydrogen bombs were the next generation of weapons to be developed. The Teller-Ulam design is the basic platform for thermonuclear weapons. The Teller-Ulam weapon design is a two staged design where an implosion fission bomb’s induces a secondary thermonuclear reaction. A fission bomb (using the “implosion-device” bomb with plutonium 239) is placed either on top or under of the secondary element. The secondary

element has a core made from plutonium 239 or uranium 235 surrounded by “fusion fuel” which mainly consists of deuterium or tritium or both, which are hydrogen isotopes. The extremely high temperatures brought about by the detonation of the fission bomb then enable these hydrogen isotopes to “fuse” when neutrons collide with them. [Ibid. p. 164.] While these latter isotopes fuse, an extraordinary amount of energy is released. [Ibid. Abe Denmark discusses in detail how the amount of energy released relates to the mass of atoms (c.f. Einstein’s formula $e=mc^2$).] In order to increase the number of nuclear chain reactions, a “tamper” is added surrounding the secondary element so that neutrons bounce back on it for the purpose of inducing additional chain reactions.

Whereas atomic bombs produce low-yield weapons that range from a few kilotons of TNT (“Little Boy” was 13 kilotons and “Fat Man” was 21 kilotons), thermonuclear weapons usually have a yield of hundreds of Kilotons up to 100 Megatons. “Ivy Mike” was the first thermonuclear device to be detonated by the United States on November 1st 1952, producing a yield of 10.4 megatons. [Ibid. p. 163.] The Soviets in turn detonated a 58 Megaton thermonuclear device in Novaya Zemlya on October 31, 1961 named “Tsar Bomba”. For information purposes only, such a weapon would destroy everything on 22 mile radius. Further information regarding thermonuclear devices is widely available and will not be treated as the subject matter of this research is not nuclear physics.

Design of the W87 thermonuclear warhead:



Cox Committee Report diagram of the W87 thermonuclear warhead, Nuclear Weapons Archive, (September 1, 2001) available at: <http://nuclearweaponarchive.org/Usa/Weapons/W87.html>