

THE CHANGING CONTOURS OF SELF-DEFENCE: FROM ARTICLE 2(4) TO THE BUSH DOCTRINE

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Abstract

The paper examines the nature of the use of force prior to and during the regime of the Charter of the United Nations, when the only exception allowed on a blanket prohibition has been "self-defence". Looking critically at the 'Bush Doctrine', as the American model of pre-emptive self-defence has come to be called, the author submits that the framework of the United Nations Charter is adequate for the present-day, and argues for a 'strict scrutiny' approach to the application of the Caroline Criteria in the present day.

I. INTRODUCTION

"If it ain't broke, don't fix it" – Anon.

The American response to the 9/11 terrorist strikes based on a doctrine of pre-emptive war, now called the "Bush Doctrine", represents the greatest assault on the norms of the Charter of the United Nations. The genesis of this doctrine lie in the bellicose pronouncements of President George W. Bush wherein he stated "The greater the threat (to national security), 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 pre-emptively".¹

Attempts to assess the legality of the doctrine must seek not only to look at the Charter, subsequent definitions of controversial terms,² and United Nations resolutions, but must also relate these to each other.³ This assumes special relevance since international law lacks strong enforcement mechanisms, thus requiring nations to justify their actions in ways that other states would accept; alternatively, they attempt to build consensus for the methods they adopt.⁴ Unilateral modifications,

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1 Speech delivered by George Bush on March 16, 2006 at the White House where he outlined America's National Security Strategy.

2 Such as "force", "inherent right" (in the context of self-defence), "necessity", "proportionality" and "imminence".

3 Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States*, 37 Brit. Y. B. Int'l L. 269 at 269.

4 In the words of Henkin: "The fact that nations feel obliged to justify their actions under international law, that justifications must have plausibility, that plausible justifications are often unavailable or limited, inevitably affects how nations will act". Louis Henkin, *HOW NATIONS BEHAVE. LAW AND FOREIGN POLICY*, Princeton Publications, 1964 at 45; David A. Sadoff, *A Question of Legitimacy: The Legal Status of Anticipatory Self-Defence*, 40 Geo. J. Int'l Law 523 at 581. Also Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. Chi. L. Rev. 113, 117-18.

thus, remain problematic leading to a lack of legality and legitimacy.

The present paper seeks to argue that it is the *limitations*, rather than the *exercise* of the use of force that have aroused controversy during the Charter era.⁵ In order to do this, I examine the Doctrine in light of Article 2(4) of the United Nations Charter, Article 51, and the Charter's definition of self-defence. I argue that the Bush doctrine would, if used further, represent an impermissible encroachment into the Charter rules, which are sufficient to deal with contemporary threats to stability and peace. In relation to terrorism, I examine a new model, that of *Strict Scrutiny*, which could be used to legitimise and legalise counterterrorist operations.

II. THE HISTORICAL BASIS FOR THE LIMITS ON THE USE OF FORCE BY STATES

Modern International law traces its existence, as per many authors, to the Treaty of Westphalia in 1648.⁶ This assumed a concept of strict state sovereignty, coupled with a 'positivist' approach to international relations,⁷ thus allowing states to go to war, regardless of the reason for doing so.⁸ Hence, the very idea of a 'lawful' or 'unlawful' war seemed irrelevant: *all* wars, at least until the third quarter of the 19th century, were legitimate.⁹ Despite the development of norms that involved the use of force, without being considered to be war- reprisals¹⁰ and self-defence¹¹ being other, less serious resorts to the use of force. The limitations of such a structure were soon realised, however, and attempts were made to restrict the right of states to use force. The earliest global attempts included the Hague Conventions of 1899¹²

5 As an example, one may look at Thomas L. Frank, *Who Killed Article 2(4), Or Changing Rules Governing International Relations Between States*, 64 Am. J. Int'l L. 809, and its subsequent rebuttal in Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 Am. J. Int'l Law, 544.

6 Brownlie, *INT'L PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 6th edn, Clarendon Press, Oxford, 2004 at 14; Shaw, *Malcolm, INTERNATIONAL LAW*, 5th edn, Cambridge University Press, Cambridge, 2003 at 1015.

7 See, for example, Brierty, J., *THE LAW OF NATIONS*, 7-16, (6th Waldoock Edition 1981); Anthony Clark Arend and Robert J. Beck, *INTERNATIONAL LAW AND THE USE OF FORCE*, at 16.

8 A pronouncement typical of that generation was William Edward Hall's pithy summary in 1880: "[I]nternational law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose"; *ibid* at 17. It is perhaps not entirely a coincidence, though, that this pronouncement ruled Supreme during a period of unprecedented peace on the European Continent, with only one major war (The Crimean War) involving more than two major powers. While this was argued by some authors as irrelevant, ignoring as it did. For the use of the 'threat' of war, see *infra* n. 9, Sturchler.

9 Edward Gordon, *Article 2(4) In Its Historical Context*, 10 Yale J. Int'l Law, 271 at 271; Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE*, at 75; Nikolas Sturchler, *THE THREAT OF FORCE IN INTERNATIONAL LAW*, 2007 Cambridge University Press at 9-10. Judith Gardam, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES*, Cambridge University 2004, at 38-9.

10 *Supra* n. 6 at 17-18.

11 The *locus classicus* of anticipatory self-defence, the Caroline Incident, which has been discussed further, occurred during this period.

12 Also known as 'The Convention for the Pacific Settlement of International Disputes', Available online at <http://www.icrc.org/IHL.nsf/INTRO/150?OpenDocument>. It must be noted, though, that the first such proposal, at a local level, was provided for by Brazil and Argentina, which sought to render void all transfers of territory if accompanied by the use of threat of force. *Rights and Duties of States in Case of Aggression* 33 Am J. Int'l Law 886 at 890.

and 1907.¹³ Furthermore, the use of force was prohibited to recover debts,¹⁴ and a formal declaration was required in order to declare war.¹⁵ This was in contrast to state practice prior to this, which continued to regard war as a situation which existed if and *only* if the parties chose to regard it as such.¹⁶

A. THE INTER-WAR PERIOD: LEGAL AND ILLEGAL WAR

Subsequent to the carnage of the First World War, fought partly as a result of a historical accident, and largely because a party- Germany- did not believe itself to be bound by the Hague Convention when it conflicted with its national interest,¹⁷ an attempt was made to develop a set of procedural safeguards to the use of war. The inter-war period, thus represents the first global attempt to establish a distinction between “legal” and “illegal” war.

As per its preamble, the Charter of the League of Nations required its members to accept “obligations not to resort to war”.¹⁸ As per Article 12 of the Charter, all disputes which were likely to lead to “a rupture” were to be submitted either to an arbitral body, the Permanent Court of International Justice (established at Geneva for that purpose), or the League Council. Subsequent to a decision by these bodies, the states had the option of complying with the decision, or, if rejecting it, waiting for three months, in what was widely considered to be a “cooling-off period”.¹⁹ Significantly, this provided for protection against all *aggression*, and not only war. A further step was taken by the Kellogg-Briand pact²⁰, signed in Paris in 1928, that sought “the solution of all disputes or conflicts...by pacific means”²¹ along with a renunciation of war as an instrument of national policy.²² The pact is significant, despite its failure to prevent the Second World War, as it represents a fundamental shift from earlier positions on war.²³ Thus, it was the precursor of the legal regime that the United Nations sought to uphold.

13 Gordon, *supra* n. 9, at 272.

14 The Second and Third Hague Conventions, both of 1907. See John O. Brien, *INTERNATIONAL LAW*, (Routledge Cavendish 2001), at 676

15 *Ibid.* In fact, prior to this period, states had often attempted to recover money through the use or threat of use of force. An example would be the 1834 declaration of the then American President (Jackson) to “take redress into their own hands” if France would continue to refuse to pay instalments on a spoliation claim of 1831.

16 Christopher Greenwood, *ESSAYS ON WAR IN INTERNATIONAL LAW*, (2007 Cameron May Publications) at 37.

17 *Supra* n. 13.

18 Preamble, Covenant of the League of Nations, [Hereinafter referred to as ‘Covenant. available at http://avalon.law.yale.edu/20th_century/leagcov.asp.]

19 *Supra* n. 7 at 21.; Ingrid Dettler Delupis, *THE LAW OF WAR*, (Cambridge University Press 2000) at 62-3.

20 Formally referred to as The General Treaty for the Renunciation of War As An Instrument of National Policy

21 Article 2, *ibid.*

22 Article 1, *ibid.*

23 *Supra* n. 7 at 25. Clark and Beck note that a number of diplomats and international jurists appealed to the Kellogg-Briand pact as a source of legal obligation as late as 1941, thus establishing some degree of *opinio juris* for the principles embodied within it.

Unfortunately, however, the bulk of these well-meaning provisions remained largely on paper. The League of Nations, despite initial successes,²⁴ proved unsuccessful in dealing with large-scale aggression committed during the latter part of its existence. The existence of a veto power to all members of the League Council²⁵ and the fact that the foremost powers were either only intermittently (if at all) a part of the League, handicapped the League from its very inception;²⁶ their insistence on democracy while possessing huge empires also affected their credibility. The League's failure to respond to the Italian invasion of Abyssinia and the Japanese invasion of Manchuria dealt a series of body-blows to its credibility, and its half-hearted attempts to prevent German remilitarisation and subsequent occupations sounded its death-knell. The Second World War dwarfed the first in its scale of human misery, and thus rendered necessary a far more effective system of elimination of use of force. During the war itself, calls were made by the Allied powers for the establishment of an international legal regime that was to proscribe aggression far more harshly than before.²⁷ This saw its culmination in the United Nations Charter.

B. THE UNITED NATIONS CHARTER: DREAMS AND REALITIES

The statesmen that assembled in San Francisco towards the end of the Second World War determined, in theory, to "save succeeding generations from the scourge of war"²⁸ and to live together "in tolerance and peace".²⁹ In order to do so, efforts were made to prevent, remove and suppress all forms of aggression, and to "develop friendly relations between nations. The first part of this statement was sought to be dealt with by Article 2(4) and Article 51, both of which have been discussed at some length.

1. ARTICLE 2(4) OF THE UN CHARTER:

Having witnessed the birth and demise of the League of Nations, the language used in the Charter was more far-reaching than before - where the Kellong-Briand pact had sought the renunciation of war in international relations, the Charter regime called upon its members to abjure not only from the use, but also the "threat ... of

²⁴ Such as the settlement of the question of the borders of Albania, the Åland Islands, the dispute between Iraq and Turkey over Mosul, and, as a final gasp, the Saarland dispute between France and Germany.

²⁵ As provided by the Covenant. As the membership of the Council increased, researchers have pointed out that the number of vetoes went on increasing. Adam Roberts et al, (ed.), *THE UNITED NATIONS, SECURITY COUNCIL, AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945*, Oxford Publications, 2008, at 11.

²⁶ *Ibid*, at 10.

²⁷ See Article 8, *Joint Declaration by the President of the United States of America and Mr Winston Churchill Representing His Majesty's Government in the United Kingdom*, 1946-47 U.N. Y.B at 2 which called for "the abandonment of the use of force" in order to evolve a lasting peace. Also, the Moscow Declaration on General Security, *ibid*, at 3.

²⁸ *Preamble*, Charter of the United Nations.

²⁹ *Ibid*

armed force" in international relations. Article 2(4), one of the fundamental pillars of the new world legal system, stated:

"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"

The model that was chosen, then, was one of "collective" self-defence, wherein the bulk of all aggression was to be dealt with through a single centralised authority—the Security Council.³⁰ The provision dealt with two major issues: the prohibition on the use and threat of force, and the definition of an "armed attack", both of which were to prove controversial.

A. ARTICLE 2(4) AND ITS PROHIBITION ON THE USE OF FORCE

For a provision as historic as Article 2(4), there was surprisingly little debate on its substantive terms when put to vote.³¹ The language was ambiguous; the fact that there was no clear definition of terms even in the *travaux préparatoires* has meant that the question of what exactly constitutes "force" continues to be problematic. Opinions are thus divided on whether violence is a necessary pre-requisite or not. Rosalyn Higgins, amongst others, suggests that the fact that economic or diplomatic intrigues sufficient to affect the territorial integrity of a state might constitute a use of force.³² This argument has also been advanced by many third-world countries.³³ A number of General Assembly Resolutions have called for the end of "economic, political or any other measures" for coercion of a state; claiming that these amount to aggression.³⁴ Some academics have also supported such a view,³⁵ thus also supporting a "threshold" argument for the application of the principle. The most persuasive use of such an argument has been in the case of states contemplating a

30 A succinct explanation of three different models of collective security, and the role of the United Nations were provided in the first part of Hans Kelsen, *Collective Security and Collective Self-Defence Under the Charter of the United Nations*, 42 Am. J. Int'l Law 783, at 584-5.

31 Nicholas Struchiner, *supra* n. 9 at 23. He mentions, in fact, only two major discussions, one an abortive attempt by Brazil to have the scope of threat widened to include the use of economic measures, and the other an attempt by Australia which added the portion that dealt with "territorial integrity or political independence of any member state".

32 Rosalyn Higgins, *The Legal Limits To The Use of Force By States: United Nations Practice*, 37 Brit. Y.B. of International Law 269 at 264-65. With regard to economic means of coercion, see also Myers Mc Dougal et al, *International Coercion and World Public Order: The General Principles of The Law of War*, 67 Yale L.J. 771.

33 Contained in a note *verbale* from the Dahomey Ministry of Foreign Affairs, dated 22 February 1965, U.N. Doc. A/AC.9/1/4 (1965). *The Use of Non-Violent Measures of Coercion: A Study in Legality Under Article 2 (4) of the United Nations*, (1974) 122 U. Pa.L. Rev. 983.

34 *Ibid* at 991.

35 *Ibid* at 999.

case of humanitarian intervention to protect their own nationals.³⁶ The bulk of state practice, however, has not supported this view to any great extent.³⁷ Furthermore, the prohibition of "threat of use of force" too has received limited attention.³⁸

The emphasis on the prohibition on the use of force has meant that the principle has attained the highest normative position in International law - making it a *jus cogens* norm;³⁹ the "corner-stone of the international system after World War II."⁴⁰ While most nations have shown 'normative' deference to the principle, its exceptions have rendered the principle bootless in practice.

B. SELF-DEFENCE AND ARTICLE 2(4)

The only major exception to the prohibition of the use of force provided under the Charter was dealt within Article 51, which recognised the right of self-defence.⁴¹ Though not originally a part of the Charter, this was added- ironically, as it seems to have turned out- at the behest of the United States of America. The final section, as added to the Charter, states:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."⁴²

36 Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620 at 1625-6.

37 See. Generally, Thomas L. Franck and Nigel Rodley, *After Bangladesh: The Law of Humanitarian Intervention Through Military Force*, 67 Am. Jour. Int'l Law 275. In fact, the Corfu case relied on such an understanding by Britain, one that was subsequently rejected by the Court, which held that such intervention did constitute a threat to the sovereignty and territorial integrity of Albania, *The Corfu Channel Case, United Kingdom v. Albania*, ICJ Reports 1949 at 234.

38 An exception to this is the attention paid by Professor Struchler to the issue in Nikolas Sturchler, *THE THREAT OF FORCE IN INTERNATIONAL LAW*, 2007 Cambridge University Press.

39 *Jus cogens* is defined by Brownlie as a 'peremptory norm of general international law'. See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 2003 Oxford University Press. Glossary. The effect of such a norm, moreover, is to render any derogations void-even if so ordained under an international treaty. See for instance Karin Cahan, *Jus Cogens and the Inherent Right to Self-Defence*, 3 ILSA J. Int'l & Comp. L. 767, at 769.

40 Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 2003 Oxford University Press at 699.

41 This shall be dealt with in greater detail in the following section, as the extent of self-defence remains in doubt. Furthermore, its interrelations with the Bush Doctrine necessitate a deeper examination of the principle that has been dealt with.

42 Article 51, The Charter of the United Nations, *supra* n. 27.

The right to self-defence was embedded in the notion of state sovereignty. However, the meaning of the term was a veritable Gordian knot, involving, as it did, a number of different, and in some cases, contradictory approaches. Questions about the contemporaneous legality of anticipatory self-defence remained unanswered.⁴³

The Caroline case, which originated in the 19th century, exemplifies this dilemma. The British, facing an insurrection in Canada in 1839, boarded a US ship, the *Caroline*, suspected of aiding the rebels, which, though aiding the Canadians in Canadian territory, was in US territory at the time of the attack.⁴⁴ The British troops then killed a few of the American nationals on board, and destroyed the ship.⁴⁵ This attack, an armed attack by whatever definition, was undertaken while Britain and America were at peace,⁴⁶ on the basis of "likelihood of attack".⁴⁷ In response to American protests, the British ambassador cited the doctrine of self-defence. This claim, however, was important since no American attack had actually occurred, and nor was it forthcoming. The American response to this required proof that the danger posed to the ships was "instant, overwhelming, leaving no choice for means, and no time for deliberation"⁴⁸ and "that [the British] did nothing unreasonable or excessive; since the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it."⁴⁹ Interestingly, while the American and British government disagreed on the facts, they were in complete agreement on the law.⁵⁰

Thus, the Caroline incident enunciated that, for action by any state to come within the ambit of self-defence, it was necessary that the action be both necessary and proportionate, and that a threat be imminent. These tests remain the fundamental

43 Ian Brownlie, *The Use of Force in Self-Defence*, 37 Bnt. Y.B. of Int'l Law 183 at 184-6, where he examines works by French authors in the 19th century which seem to support such an interpretation. See, for instance, Vattel's *Les Droits de Gens*, where the extract translates as follows; 'It is in vain the nature has given to nations like to people the need to protect itself, and to move towards perfection of themselves and their state, if it has not given to them the right to guarantee this from all that wish to render this infructuous'. (Author's own translation). Also see R.Y. Jennings, *The Caroline and MacLeod Cases*, 32 AJIL (1938) 86; James Green, *Docking the Caroline: Understanding the Relevance of the Formula in light of Existing International Customary Law*, 14 Cardozo J. Int'l & Comp. L. 429 (2003); William Bradford, *The Duty to Defend Them: A Natural Legal Defense of the Bush Doctrine of Preventive War*, 79 Notre Dame Law Rev. 1355, 1415-1417 (2004).

44 Abraham Sofaer, *On the Necessity Of Pre-emption*, 14 Eur. J. Int'l Law 209 at 221.

45 *Supra* n. 7 at 18.

46 *Supra* n. 43, Jennings at 91.

47 Jennings, *supra* n. 41 at 90.

48 Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842); Quoted in Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620 at 1624 (1984); Miriam Sapiro, *Iraq, The Shifting Sands of Pre-emptive Self-Defence*, 97 Am. J. Int'l L. 599.

49 *Ibid*.

50 James Green, *Docking the Caroline: Understanding the Relevance of the Formula in light of Existing International Customary Law*, 14 Cardozo J. Int'l & Comp. L. 429 at 432.

guding principles of the doctrine of anticipatory self-defence even today, which is now considered to be customary international law.⁵¹ The scope of these, however, is controversial.

The lack of any international forum during the three-quarters of a century between the Caroline incident and the establishment of the League of Nations implied that every state could refer to any action it took as justifiable under the right to self-preservation.⁵² Far-fetched analogies saw this extended to the Boxer Rebellion in 1900,⁵³ wherein eight nations undertook military action against an enfeebled China to wrest concessions from it. This situation, thus, led directly to the First World War, itself a direct consequence of such a doctrine.⁵⁴

The international legal regime during the interwar period, though more repressive with regard to the use of force, continued to allow an "inherent right"⁵⁵ of self-defence, albeit a residual right.⁵⁶ The existence of institutions to determine the existence of such necessity also meant that states could no longer misuse these provisions with impunity.⁵⁷ However, there was (and continues to be) uncertainty, both during the League of Nations era and after the United Nations Charter was promulgated, concerning the exact scope of anticipatory self-defence after 1919. This is especially relevant given that both international organizations have proven to be far less effective in controlling aggression than their founding fathers thought.⁵⁸

Even subsequent to the Charter, states have used self-defence as a justification for intervention, even in situations when it has seemed patently ludicrous- an example of this being India seeking to justify its invasion of Goa, or both India and China justifying their attacks on each other claiming self-defence.⁵⁹ Another instance was

51 Michael Bonafede, *Here, There and Everywhere: Assessing The Proportionality Doctrine and U.S. use of Force In Response to Terrorism After The September 11 Attack*, 88 Cornell L. Rev. 155 at 168. Also see *Supra* n. 7 at 18.

52 *Supra* n. 43 at 201, where Westlake's definition seems to suggest that "a state may defend itself by preventive means if ...conduct from which an intention to attack may reasonably be apprehended".

53 *Supra* n. 43, at 188.

54 In fact, the First World War has been described as a 'preventive war' by historians. They argue, in fact, that the German entry into the war- and its attack on France (known as the Scheiffen Plan)- had a strong pre-emptive element, acting as it did the presumption that France, humiliated by the loss of Alsace-Lorraine in 1870, would seek any excuse to attack Germany when she was occupied elsewhere. Daniel Moran, *Preventive War and The Crisis of July 1914*. Available online at <http://www.ccc.nps.navy.mil/st/nov02/strategy.asp>.

55 See, for example, the French and Czech note on 14th and 28th July 1928, both of which recognised an inherent right, and the Japanese note of July 1928, *Supra* n. 43 at 201.

56 *Ibid* at 223- 224.

57 As demonstrated by responses to the Mukden incident and the Nuremberg Trials; Valene Epps, *Rejecting the Supposed Right to Anticipatory Self-Defence*, Northeast Asian Law Review, Vol. 2, p. 1, 2008 at 9.

58 The Security Council, for instance, has authorized the use of force under Article 39 in only once instance, the Korean War. Subsequently, the veto power proved sufficient to deter all attempts made in this regard until the Gulf War of 1991.

59 *Supra* n. 5, Frank, at 811.

the United States invasion of Panama, where the alleged killing of two American soldiers was seen as a pretext to launch a full-scale invasion of the country,⁶⁰ unequivocally condemned by international law scholars.⁶¹

The terminology of Article 51 itself is open to controversy, however. It is true that the Charter seems to recognise an "inherent right" of self-defence⁶² - which traditionally has included anticipatory self-defence. However, this is qualified by the addition of the phrase "when an armed attack occurs". Before we address the Caroline triumvirate, though, we must look at differing opinions with regard to the existence of the right to anticipatory self-defence subsequent to the Charter of the United Nations, and the definition of an armed attack.

2. ARMED ATTACK AND THE SCHEME OF THE CHARTER:

The definition of 'armed attack' necessarily seems to imply a higher degree of force than "use or threat of force" as expressed in Article 2 (4) of the Charter. This phrase itself is not without ambiguity since the French term in the equally authoritative translation- *aggression armée*- is widely understood as armed aggression, and may not in fact imply an armed attack in the English sense.⁶³ There exists confusion, however, as to when a state could have been said to perpetrate an armed attack against another. Some argue that a series of 'pin-prick' attacks would come within this ambit⁶⁴, and that a single incident in itself cannot be sufficient to be considered an 'armed attack'.⁶⁵ Some commentators also believe that the use of force must be direct, though this is disputed by most.⁶⁶ In fact, state practice has also supported the allegation that intervention- along with a supply of arms and mass propaganda- would come within the ambit of 'armed attack'.⁶⁷

⁶⁰ *Supra* n. 9. Gardam, at 267.

⁶¹ See, for instance, Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 Columbia JTL 293 at 309

⁶² In the years immediately subsequent to Article 51, a number of draft declarations also used such language. See, for instance, the Draft Declaration On The Rights And Duties of American States which was prepared by the Governing Board of the Pan-American Union as early as 1946-47, and other opinion was also tending towards support of this doctrine. *Ibid.* at p.223.

⁶³ The conventional translation for an armed attack in French would be "une attaque armée". *Supra* n. 3 at 299-*supra* n. 10 at 183.

⁶⁴ *Supra* n. 9, Dinstein, at 193

⁶⁵ See, for instance, the comments of the Tunisian Delegate to the General Assembly after the Sidi-Sakelt aggression in 1958, or Indian opinion subsequent to the Pakistani justification of its actions in Kashmir a decade earlier: *Supra* n. 3, Higgins at 300-01. It is submitted by the present researcher that such an argument might owe more to the difference between the French and English meanings (both equally authoritative), as have already been remarked on.

⁶⁶ *Ibid* at 302.

⁶⁷ See, for example, Lebanon's claim in 1958 that UAR aid to insurgents in civil war amounted to an 'armed attack'- and the United Nations acceptance of the claim Thomas Frank, *Who Killed Article 2 (4): Changing Norms Governing the Use of Force By States*, 64 Am. J. Int'l Law, 809 at 815-818. However, there is only so far such a definition can go- when India tried to assert that the vast influx of refugees into Indian Territory in 1971 amounted to a use of force, this argument was firmly rejected by the international community. See Indira

The International Court of Justice has, in the *Nicaragua* case⁶⁸ adopted a "gravity of force" threshold- thereby prohibiting the use of force in cases of 'low level warfare'.⁶⁹ Perversely, however, the Court continued to recognise the concept of an 'indirect' attack- thereby implying the provision of weapons or aid and comfort without direct aggression, and stated that this would also come within the ambit of aggression.⁷⁰ This question is necessarily controversial, as it requires a determination of the degree of force needed. Nevertheless, this approach may well be the most realistic when married to the criterion of imminence. In order to look at this, then, we need to re-examine anticipatory self-defence, and its contemporary survival- a question that is by no means determinably settled.

In part this is due to the fact that the principles enshrined in the Charter- smacking of idealism and naivete as they were - soon floundered upon the rocks of realpolitik. A warning was sounded with regard to the nature of the Collective Self-Defence enshrined in the Charter even before the ink was dry,⁷¹ noting, among other facts, the lack of compulsory jurisdiction assigned to the United Nations⁷² and the restraint upon the effective functioning of the Security Council that the veto power represented.⁷³ Such warnings, unfortunately, turned to be too prescient. The failure of the United Nations to enforce collective security⁷⁴- due to superpower vetoes⁷⁵ and its inability to create a permanent formal mechanism for the purpose⁷⁶ has been a major reason for the failure of the United Nations to prevent armed conflict. Furthermore, regional collective security measures have also met with limited success; the United States' intervention in Guatemala and Panama, and the Soviet

Gandhi's speech in Parliament, 15th November 1971, "When we have such a large proportion of the population of another country coming on to our soil, it is a kind of aggression". [Unpublished, Television Recording Available at the Doordarshan Archives, India].

68 *Case Concerning Military And Paramilitary Activities In And Around Nicaragua (Nicaragua v. USA)*, ICJ 1986 14.

69 *Ibid*.

70 *Ibid*.

71 *Supra* n. 29.

72 *Ibid* at 789- first noted by the Author in an article written as early as 1946,

73 *Ibid*.

74 The only example of collective security authorising the use of force in United Nations history has been the use of force against North Korea during the Korean war, and that happened as a result of an accident when the Soviet delegates walked out, and consequently did not vote. Subsequently, this was used during the 1990 Iraq crisis.

75 Through much of the Cold War, either the United States or the Soviet Union habitually used the veto in an effort to reject military use- see <http://www.globalpolicy.org/security/pubs/secref.htm>. Major examples of these include the Suez Crisis- when Britain and France exercised the veto, the Bangladesh war- when the Soviet Union exercised it, and the Afghanistan war, when the Soviet Union exercised this. *Supra* n. 6, Arend and Clark, at 57. Also see 'Thomas Frank, *Who Killed Article 2 (4): Changing Norms Governing the Use of Force By States*, 64 Am. J. Int'l Law, 809

76 *Ibid*.

Union's intervention in Hungary and Czechoslovakia have been justified under the rubric of regional intervention.⁷⁷ As a result, a number of commentators have referred to the United Nations prohibition on the use of force as a dead-letter,⁷⁸ or, poetically, as Ozymandias⁷⁹ - referring to the "king of kings" of Egyptian mythology-reduced to presiding over ruins.

Other scholars, however, refute this. Henkin, one of Article 2(4)'s most consistent defenders, has long argued that the mere fact that Article 2(4) has not ended armed conflict does not detract from the huge influence it has had with regard to international relations.⁸⁰ He argues that the function of the Charter is to establish a 'norm' of International behaviour, and in such an attempt, the United Nations Charter has been successful.⁸¹ Be as it may, it remains a fact that no state has, or can yet afford to reject the United Nations Charter.

The very fact that no outright rejection has taken place is not a resounding testimonial to the efficacy of the system. This view is taken by yet another set of international law scholars who refer to a "core" meaning of Article 2(4) - this core of course does not have a static meaning, and changes from definition to definition.⁸² Arguments in this regard vary from the mere extension of the exceptions- with humanitarian intervention and anticipatory self-defence being the most commonly heard cases,⁸³ to that proposed by Rostow, who argued for a formal adherence to the system in response to the threat of Soviet aggression.⁸⁴

3. OPINIONS OF COMMENTATORS: DOES A RIGHT TO ANTICIPATORY SELF-DEFENCE STILL EXIST?

Various commentators have evolved their own understanding of anticipatory self-defence and its legality in the period after 1945.⁸⁵ By far the most 'persistent objector' of the doctrine has been Brownlie, who has flatly denied the existence of

77 *Ibid.* The Warsaw Pact (officially known as the Treaty of Friendship, Co-operation, and Mutual Assistance 219 UNTS 3 (1 May 1955)) and the Bogota Pact (formally called the American Treaty for Pacific Settlement, 30 UNTS 55 (30 Apr. 1948)) were used to justify this.

78 *Ibid.*

79 *Ibid.*

80 Louis Henkin, *The Reports on the Death of Article 2(4) are Greatly Exaggerated*, 65 Am. Journal of Int'l Law 542 at 545.

81 *Ibid.* at 544.

82 *Supra* n. 10, Arend and Clark, at 182.

83 See, for instance, W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2 (4)*, 78 Am. J. Int'l Law 642.

84 Eugene Rostow, *The Legality of The International Use of Force By And From States*, 10 Yale J. Int'l Law 286 at 291.

85 See, for instance, Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE*, Grotius Publications 1994 at 182-7. However, Dinstein at 244 does acknowledge that the Caroline formula still exists, and in fact calls the *Nicaragua* decision to be a reasonable interpretation of the word "inherent".

such a right in the post-Charter regime. He argues that, whatever its historical relevance, the signing of the Charter completely negated such a doctrine. This interpretationist⁸⁶ criticism is predicated on the United Nations Charter,⁸⁷ and on the qualification of the occurrence of an armed attack appended to Article 51.⁸⁸ An argument often used to support this vision is the response of Governor Harold Stassen to questions on the present status of self-defence, where he stated that such a restrictionist definition was the one he supported.⁸⁹ Furthermore, this is also in keeping with the argument that the right of self-defence was supposed to be a temporary right, until the Security Council could act to avert the threat to the state posed by the actions of an aggressor state.⁹⁰ With this strict interpretation of the Charter, it is no surprise that Brownlie is contemptuous of the legality of the Bush Doctrine, comparing it with the invasion of Serbia by Austria-Hungary in 1914.⁹¹

In contrast to this opinion, however, commentators have recognised the existence of a right of anticipatory self-defence⁹² albeit a slimmed-down doctrine compared to the halcyon regime that prevailed before 1919. This school thus seems to regard Article 51 to be in the nature of a 'savings-clause', and not an exhaustive expression of the law of self-defence. The counter-argument against the 'scheme-of-the-Charter' contention is critically weakened by suggesting that Governor Stassen's argument was being made with reference to collective self-defence, and not the inherent right of self-defence.⁹³ Furthermore, it has been argued that Article 51 was not meant to be an exhaustive summary of the law of self-defence.⁹⁴ Proponents of this view argue that the concept of an "inherent" right takes precedence over the subsequent requirement for an armed attack.⁹⁵ In fact, it is argued that the words "if

86 David A. Sadoff, *A Question of Legitimacy: The Legal Status of Anticipatory Self-Defence*, 40 Geo. J. Int'l Law 523 at 551.

87 *Ibid.* at 232.

88 *Ibid.*

89 Foreign Relations of the United States, Diplomatic Papers (1945), General: The United Nations (1967), at 425-29; Karin Cahan, *Jus Cogens and the Inherent Right to Self-Defence*, 3 ILSA J. Int'l & Comp. L. 767 AT 817.

90 Such an approach is certainly suggested by the language of the Article, in particular its second half. Also, Christine Gray, *INTERNATIONAL LAW AND THE USE OF FORCE*, 2000 Oxford University Press at 93.

91 Brownlie, Ian, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 6th edn, Clarendon Press, Oxford, 2004 at 41

92 See, for instance, Christine Gray, *supra* n. 90; Oscar Schachter, *The Lawful Resort To Unilateral Use of Force*, 10 Yale J. Int'l L. 291 at 291; Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620 at 1625-26; *supra* n. 6 at 79; *Supra* n. 3, Higgins at 209; fn.2.); D.W. Bowett, *Self-Defence in International Law* 112-13 (1958): It must be noted that other commentators who have supported this right have been connected with the International Court of Justice. Waldock, Schwebel, and Jennings are all past Presidents of the Court; Fitzmaurice was a Judge of that Court. See Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq*, 4 San Diego Int'l LJ 7 at 9.

93 *Supra* n. 66.

94 T.D. Gill, *The Temporal Dimension of Self-Defence. Anticipation, Preemption, Prevention and Immediacy*, 11 J. Conflict & Sec. L. 361 at 363.

95 Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620 at 1633.

an armed attack occurs” were intended as a sort of abundant caution to safeguard the Chapultepec Treaty,⁹⁶ and thus were an example of merely one of the numerous ways self-defence could be protected under International law. Brownlie's arguments, then, seem to require states to passively await their destruction, like “sitting ducks”.⁹⁷

III. THE CAROLINE TRIUMVIRATE: NECESSITY, PROPORTIONALITY AND IMMINENCE

The Caroline criteria have attained a mythical authority - with both state practice and *opinio juris* deferring to them in the main. It is thus advisable that these are examined in somewhat greater detail-especially since, as shall soon be demonstrated, the three are interlinked.

I. The requirement of necessity derives itself from the notion that the requirement of a state to defend itself must be “instant, overwhelming, leaving no choice for means, and no time for deliberation”.⁹⁸ Relatively straightforward, it places the onus on states to prove that they had no other feasible option but the recourse to armed force.⁹⁹ Hence, commentators usually require proof that force is used as a last resort.¹⁰⁰ However, it is well-acknowledged that such a right is subject to the ability of a state to do so - and hence the requirement is usually interpreted as a “practical” check- if a state could not practically resort to peaceful means, then the formula holds.¹⁰¹

II. It is essential, in order to support the legal regime enshrined in the United Nations Charter¹⁰² and the need to minimise the possibilities of international disruption¹⁰³ that the force used by nations for self-defence, in *jus ad bellum* be proportionate. Unfortunately, however, the question of what comes within the ambit of proportionality is far more difficult- while some consider it must be proportionate

96 Which led to the Rio Pact, also called the Inter-American Treaty of Reciprocal Assistance in 1948. This marked the beginning of the idea of a Hemispheric Defence. D. Bowett, *SELF DEFENCE IN INTERNATIONAL LAW*, at 183

97 McDougal, *The Soviet-Cuban Ambiguity and Self-Defence*, 57 Am. J. Int'l Law 597 at 597.

98 *Supra* n. 41

99 John Quigley, *The Afghanistan War and Self-Defense*, 37 Val U. L. Rev. 541 at 546 (2003). Irving J. Sloan, *THE LAW OF SELF-DEFENCE: LEGAL AND ETHICAL PRINCIPLES* 46 (1987); David A. Sadoff, *A Question of Legitimacy: The Status of Anticipatory Self-Defence*, 40 Geo. J. Int'l Law 523 at 551. Also, Christine Gray, *International Law and the Use of Force*, 2000 Oxford University Press at 105, Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620 at 235.

100 Quigley, Yoram Dinstein, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*. Remarks, 86 Am. Soc'y Int'l L. Proc. 54 at 57. *Supra* n. 8, Judith Gardam, at 5.

101 See, for instance, the Chatham House Principles. Also see James Green, *Docking the Caroline: Understanding the Relevance of the Formula in light of Existing International Customary Law*, 14 Cardozo J. Int'l & Comp. L. 429 at 445

102 See Articles 2(3) and 2(4) of the Charter.

103 *Supra* n. 8, Judith Gardam, at 12125

to the actual danger, the bulk of judicial opinion now agrees that the aim of the state claiming a right to pre-emptive action must only be to avert the attack, and not the occupation or invasion of enemy territory,¹⁰⁴ i.e. proportional to the threat exhibited by the belligerent state.¹⁰⁵ Thus, despite opinions to the contrary,¹⁰⁶ it is acceptable for a threat to be disproportionate to the *actual* armed attack if the state can show that its reason to do so is to remove the overall threat that has been so demonstrated.¹⁰⁷

The International Court of Justice has required that the standard of proof for determining such proportionality requires proof capable of withstanding strict scrutiny (an argument that will be dealt with at greater length subsequently).¹⁰⁸ It is also a general rule that this force not be exercised against non-military targets and civilian bases.¹⁰⁹ Most commentators, even those who argue that the Caroline principle is not a true reflection of Customary International Law,¹¹⁰ have not doubted either the need, or the desirability of this doctrine.

III. It is at the point where the notion of *imminence* is brought up, however, that the most strident challenges to the Caroline doctrine emerge. It must be noted that Webster's letter required an "instant"¹¹¹ necessity, leaving "no moment for deliberation".¹¹² However, there is an equal need to note that the doctrine was framed much before the possibility of weapons of mass destruction or Nuclear Weapons were thought off. The definition of 'imminent' thus is no longer what it was. Some researchers, thus, advocate two more criteria in assessing this threat- the gravity of the situation and the method of delivery of the threat.¹¹³

While recognising this, however, states have recognized the need for a 'temporal scope' in recognising the proportionality doctrine. In the usual case of self-defence, it implies that a country have time to assess and formulate a response to the extant danger.¹¹⁴ This was evinced in 1982, when Argentina invaded the

104 Cassese, Antonio, *INTERNATIONAL LAW*, p. 363

105 Gardam, *Supra* n. 5; Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AJIL (1993), 391; R.Y. Jennings, *The Caroline and MacLeod Cases*, 32 AJIL (1938) 86.

106 See Higgins, *supra* n. 3 at 314.; also *supra* n. 70, Gardam, *supra* n. 100

107 James Green, *Docking the Caroline: Understanding the Relevance of the Formula in light of Existing International Customary Law*, 14 Cardozo J. Int'l & Comp. L. 429 (2003).

108 *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) ICJ Reports (1986) 14, Para. 196.; *Legality of the Threat and Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports (1996) 226, para. 141.

109 Dinstein, *supra* n. 100.

110 Maria Berruneta Ocelli, *Sinking the Caroline: Why the Caroline Doctrines Restrictions on International Law Must Not be Considered Customary International Law*, San Diego Int'l LJ 467 at 487; Timothy Kearley, *Sinking the Caroline*, 17 Wis Int'l LJ 325.

111 Jennings, *supra* n. 43.

112 *Ibid*.

113 Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 San Diego Int'l LJ, 7, at 16.

114 Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE*, 1994, 4th edition, Grotius Publications, at 237

Falklands, an overseas territory of the British, citing that it was an integral part of Argentina.¹¹⁵ In those circumstances, the British were allowed to retain the right of temporary self-defence, even though the response to the attack took 23 days.¹¹⁶ Even in the first Iraq war in 1990, though a five month period was allowed to elapse before the collective Security Council forces invaded Iraq, this was justified since the invasion was, in effect, a continuing armed attack.¹¹⁷

In the case of anticipatory self-defence, thus, I submit that the need of imminence must be interpreted in a similar manner, i.e. to demonstrate that a threat is likely, and likely in the near future. Precedent for the same has also been found in State Practice.¹¹⁸ Hence, the imminence doctrine stands modified by time from the strict Websterian formula. However, states have usually sought to justify their actions employing the temporal scope argument,¹¹⁹ proving an element of state practice and *opinio juris*. To use this as the logic for rejecting the Caroline incident in totality, as some authors have done, appears to be fallacious.¹²⁰ The very need of a 'temporal' scope justifies the use of the Caroline doctrine. Further, the requirements of necessity and proportionality are in no way impaired by the changing definition that has been placed on the imminence argument - as researchers themselves admit.¹²¹ The Bush doctrine's almost complete rejection of the imminence argument is problematic at various levels.¹²² Carried to its logical extreme, nothing would prevent an Indian strike against Pakistan, or an Arab strike against Israel (or vice versa), completely subverting the logic for the original prohibition in the first place. Hence, while it is true that to call the Caroline formula "international customary law" and leave it at that is problematic, one must guard against dismissing it as a "polite exchange of diplomatic courtesies".¹²³ Far more relevant to current international law would be to consider an attempt made to "dock", rather than sink, the Caroline - approving of the spirit, rather than the letter of its invocation.¹²⁴

115 The Argentinian claim relied upon the fact that the Falklands (called the Malvinas by the Argentinians, were an integral part of the territory of Argentina, and that the British occupation of the Islands was illegal. In order to justify their invasion, thus, the Argentinian foreign minister relied on the fact that Article 2 (4) of the United Nations Charter could not be taken as an endorsement of historical wrongs. See UNSCOR, 2315th meeting, 37 UN Doc S/PV 2350-5.

116 M.J. Levin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 Harv. Int'l. L. J. 621 at 638 (1986); Supra n. 37 at 1627.

117 *Ibid*, James Green, *Docking the Caroline: Understanding the Relevance of the Formula in light of Existing International Customary Law*, 14 Cardozo J. Int'l & Comp. L. 429 (2003) at 437.

118 See, in particular, the claim of Israel with regard to the Arab-Israeli war of 1967.

119 See, for example, Israel's strike against the Osirak nuclear reactor in 1981. Israel claimed that the threat was imminent - defining imminence in an extremely broad way, true, but nevertheless using the Caroline argument.

120 Supra n.101, at 483-88.

121 *Ibid* at 488.

122 See, for instance, the initial articulation of the doctrine quoted at the beginning of the paper.

123 Supra n. 101, at 490.

124 See, generally, James Green, *Docking the Caroline: Understanding the Relevance of the Formula in light of Existing International Customary Law*, 14 Cardozo J. Int'l & Comp. L. 429 (2003).

The fact that the Caroline formula might not have been international customary law at the time of its articulation¹²⁵ is a specious argument- one might easily also argue that a prohibition or restriction on the use of force, since it did not amount to contemporary practice in 1919- is illogical, ignoring the subsequent century of regard paid to it. Thus, it is my opinion that the formula continues in existence, and is far more relevant than a mere "polite exchange of diplomatic courtesies".

It is pertinent to note, however, that while the above examples prove that Webster's criteria in the Caroline case are still widely considered legitimate in present-day international law, states have been chary of justifying their actions using the excuse of 'anticipatory self-defence'. In fact, even when that seems to be the main factor influencing their decision in doing so, states have hesitated to employ this term. Instead of using anticipatory self-defence, states have often relied upon the ambiguity of meaning that the words "armed attack" imply.

Examples of such an approach include the Israeli attack on Egypt, Jordan and Syria in 1967. Immediately before the war, Egypt had amassed a huge land force on the border,¹²⁶ closed the Gulf of Aqaba¹²⁷ thereby adversely affecting Israel's trade and, in contravention of the 1967 ceasefire, re-militarised the Sinai.¹²⁸ Israel responded with a massive air and land attack on Egypt and Jordan, thereby demolishing the numerical superiority the countries enjoyed, and establishing a decisive victory within six days.¹²⁹ Instead of relying on anticipatory self-defence, though, which seemingly formed the main consideration for the attack, Israel sought to justify its actions through a broader definition of "armed attack" than earlier.¹³⁰ In particular, Israel claimed that the naval blockade that was instituted by Egypt was "an act of war".¹³¹ Thus, the defence of an anticipated self-defence was not used, despite the existence of evidence that the world community would not have been averse to such a step.¹³²

A few years earlier, America, worried at the large number of armaments exported to Cuba by the Soviet Union,¹³³ and fearing a nuclear threat which could

¹²⁵ As has been argued, see *supra* n. 101, Green.

¹²⁶ Bob Edwards, *A Century of Conflict: Part IV; The 6 Day War*, Available online at <http://www.npr.org/news/special/mideast/history/transcripts/6day-p4.100302.html>.

¹²⁷ 'Egypt Closes Gulf Of Aqaba To Israel Ships: Defiant move by Nasser raises Middle East tension', The Times, Tuesday, May 23, 1967.

¹²⁸ Dominica Svarc, *Redefining Imminence: The Use of Force Against Threats and Use of Force in the 21st Century*, 13 ILSA JICL 171 at 172.

¹²⁹ Christine Gray, *INTERNATIONAL LAW AND THE USE OF FORCE*, 2000, 2nd edition, Oxford University Press at 111.

¹³⁰ *Ibid*.

¹³¹ *Supra* n. 80 at 567

¹³² Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq*, 4 SAN DIJ 7.

¹³³ Abram Chayes, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE ROLE OF LAW*, 8 (1974); *Ibid* at 564.

attack deep into its territory,¹³⁴ contemplated a surgical strike on Cuba's missile bases.¹³⁵ The United States declared a quarantine around Cuban waters, and sought to organize consensus between the members of the Organization of American States for removing these weapons.¹³⁶ However, this case does not fulfil most of the criteria dealing with anticipatory self-defence- there was no armed attack on Cuba, and the restraint of the United States was in marked contrast with its policy during the Iraq war of 2003 in the face of much greater, and more imminent threats. This may also be distinguished from the Panamanian 'invasion' in 1989. While this was also a response to what President Bush referred to as an "imminent danger", it was, in reality, geared towards the protection of American citizens abroad,¹³⁷ and so does not fall within the realms of this paper.

The one case where anticipatory self-defence was actually used as an argument in order to justify the strike of a country against a threat that was not imminent was in the Osiraq Case. In this case, Iraq had acquired a nuclear reactor with French assistance, and was ostensibly using it for research purposes. Israel suspected, however that the use for weapons was in contravention of the French-Iraqi agreement, and that this was actually to be used for the production of nuclear weapons.¹³⁸ Israel, thus, launched a strike on the facility three months before its completion,¹³⁹ Owing to the nature of the operation, though, casualties were reduced to a minimum. Furthermore, Israel justified its strike through the claim that Iraq had, on numerous occasions, announced its intention to attack Israel, and had demonstrated hostility to it since its inception¹⁴⁰ - thus implying, as per its supporters, that it had no other choice.¹⁴¹ Israel, however, was unable conclusively to demonstrate necessity, or exhaustion of peaceful remedies.¹⁴²

International reaction to these claims was not in favour of Israel's step.¹⁴³ Such reaction was overwhelmingly negative. Indeed, the Security Council passed a resolution strongly condemning Israel's "military attack ... in clear violation of the

134 *Ibid.*

135 Cuban Resolution, October 1962, U.S. Public Law 87-733, S.J. Res. 230

136 *Supra* n. 125.

137 John F. Murphy, *The United States And The Rule of Law in International Affairs*, Cambridge University Press 2004, at 147

138 *Supra* n. 80 at 362.

139 *Ibid*

140 *Ibid.*

141 Lt Col Uri Shoham, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self Defense*, 109 *Mil L. Rev.* 191 (1985).

142 Gardam, at 153-4.

143 *Supra* n. 125 at 176; Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilisation Employing the Principles of Anticipatory Self-Defence And Pre-emption*, *Air Force Law Review*, 2004. Available online at http://www.accessmylibrary.com/coms2/summary_0286-18289206_1TM

Charter of the United Nations and the norms of international conduct.”¹⁴⁴ As D’Amato points out: “The majority of international law scholars echoed these arguments.”¹⁴⁵

Some international scholars- such as D’Amato, however, consider this a valid strike. They argue that the only way in which Israel’s strike could be justified is by considering Israel a ‘proxy’ for the world community.¹⁴⁶ In a situation where the world community is effectively disabled from taking action, and the state is an unstable ‘rogue’ state, D’Amato argues that groups of states, or states as individuals- must act in order to eliminate these threats - “Multilateral action is better than unilateral action, but unilateral action is better than no action at all”.¹⁴⁷ It is interesting, though, that D’Amato also uses the rubric of ‘humanitarian intervention’ to defend his stand, but that humanitarian intervention, whether in the Charter or outside, has received little support- either from states or from scholars.¹⁴⁸ In fact, in the Bangladesh crisis, one of the most cited examples of ‘genuine’ humanitarian intervention, the Indian government was obliged to change its justification from humanitarian intervention to invoking Pakistan’s prior armed attack.¹⁴⁹

IV. NON-STATE ACTORS AND THE CHANGING PARADIGM OF SELF-DEFENCE

In the present international scenario, however, a new threat has emerged to international peace and security as well, obviously, as International Law - that of terrorism.¹⁵⁰ The fact that terrorists recognise no restrictions that the International Community recognises, and in fact, attack in a different way, has been sought to be used as a justification for calls to use reprisals against the traditional rules of force in light of these new threats. Those who argue this consider that international law has not been geared towards the recognition of non-state actors, yet, in today’s world, the greatest threat to international peace and stability is exhibited through non-state actors. As per the traditional state responsibility paradigm in international law, the criteria of attributability and breach of an international obligation need to be satisfied.¹⁵¹ In cases of states, the arguments that have been raised, especially after

144 S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981)

145 Anthony D’Amato, *Israel’s Air Strike Against the Osirak, A Retrospective*, 10 Temp. Int’l & Comp. L.J. 259 at

261. D’Amato refers here to authors like Starke and Brownlie, who condemn such an opinion.

146 *Ibid.*

147 *Ibid.*

148 See, for a succinct summary of such views, I. Brownlie, *Humanitarian Intervention*, in John N. Moore, ed., *LAW AND CIVIL WAR IN THE MODERN WORLD*, (John Hopkins University Press, Baltimore, 1974) at 224.

149 Thomas M. Frank and Nigel S. Rodley, *After Bangladesh. The Law of Humanitarian Intervention By Military Force*, 67 Am. J. Int’l L. 275.

150 See, for example, generally, Helen Duffy, *THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW*, 2004 Cambridge University Press, Dorothy Schramm Winner, *International Law at a Crossroads: Self-Defence, Global Terrorism and Pre-emption*, 13 Trans’l Law and Contemporary Problems, 771 at 779-92;

151 Article 2, Articles on Responsibility of States For Intentionally Wrongful Acts, 2001.

the Nicaragua test, deal with "effective control"¹⁵² as the criteria to determine whether a state would actually be liable. Due to this, a number of authors preface their appreciation of the Bush Doctrine with the present global scenario.¹⁵³ Furthermore, the extension of the 'War on Terror' to states instead of terrorist groups by the American government also seems to be predicated on this approach to International law.¹⁵⁴

It is my opinion, though, that these arguments are not sufficient to explain either the background or the application of the Bush doctrine in Iraq. In fact, though popular perception has been built up to include Iraq as part of the Axis of Evil, there exist no identifiable links between the Iraqi regime and the Al-Qaeda or any other Islamic terrorist organization. In fact, this is what has driven Zizek to refer to Iraq as the "borrowed kettle", similar to the old joke about a person who borrows a kettle, breaks it, and claims, alternately, that the kettle was already broken, and that he had not borrowed the kettle at all.¹⁵⁵ In order to understand this conflation, it is necessary to go into the matter in greater detail.

V. THE BUSH DOCTRINE AND IRAQ: MYTH AND REALITY

The 'Bush doctrine', as America's strategy of pre-emptive war has come to be called, has been the most blatant flouting of the United Nations Charter in recent years. This assumes greater significance since it was committed by a state that was at the forefront of the drafting of the Charter. While proponents of the doctrine have argued that this is not new, citing Kennedy's arguments during the Cuban missile crisis,¹⁵⁶ the restraint shown by Kennedy stands in stark contrast to the Bush Doctrine and the subsequent invasion of Iraq.

Any attempt at understanding the Bush doctrine fails if it does not take into account US-Iraqi relations over the 12 years that preceded it. In August 1990, Iraq invaded Kuwait, with whom it had had deteriorating relations ever since the end of the Iran-Iraq war.¹⁵⁷ The Iraqi government sought to justify this by arguing that

152 *Case Concerning Military and Paramilitary Activities in and around Nicaragua*, ICJ Reports 1986 AT 546.

153 See, merely for illustrations, C. Yoo, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 Chi. J. Int'l Law 379 at 380.

154 *Supra* n. 95 at 20.; Also see John C. Yoo, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 Chi. J. Int'l Law 379 at 381-2. A link is sought to be drawn between the Bush Doctrine in Iraq and terrorism, one that evidence has not so far justified.

155 See Slavoj Zizek, *IRAQ: THE BORROWED KETTLE*, 2005, Powell's Books.

156 While the American President spoke of the "deliberate deception and offensive threat" of Cuba and the Soviet Union, and the need to check aggressive conduct to prevent a repeat of the 1930s, the actual matter was satisfied without weapons. For a fuller account of the matter from the perspective of the American and British Governments, See, generally, L.V. SCOTT MACMILLAN, *KENNEDY, AND THE CUBAN MISSILE CRISIS*, 1999 Palgrave MacMillan Publications.

157 Christopher John Sahet, *The Security Council Comes Of Age: An Analysis of the International Legal Response to the Invasion of Kuwait*, 21 Ga. J. Int'l & Comp. Law 63 at 65.

Kuwait was actually a province of Iraq, illegally separated by the British.¹⁵⁸ International condemnation was swift and severe - the end of the cold war meant that both the Soviet Union and the United States acted together thus ensuring that the Security Council passed near-unanimous economic sanctions.¹⁵⁹ In an unprecedented step, the Security Council also approved military action against Iraq.¹⁶⁰ The language of the section, requiring the use of "all possible means" was ambiguous. It has been argued by some that the ambiguity was deliberate- allowing as it did, the use of all possible means.¹⁶¹

In January 1991, after waiting in order to satisfy the 'proportionality' requirement,¹⁶² forces from 17 countries invaded Iraq. The battle was concluded relatively swiftly, with the Security Council authorising a ceasefire on 3 April 1991, within three months under Resolution 687.¹⁶³ In addition to declaring a ceasefire, this resolution also called for Iraq to destroy and renounce attempts to create Weapons of Mass Destruction.¹⁶⁴ This was sought to be done through a United Nations Special Commission (UNSCOM), established for this purpose. Furthermore, the crippling economic sanctions were to remain in place, and only medicine and food was to be exported to Iraq.¹⁶⁵

The unanimity of allied action enthused many commentators who were otherwise disappointed at the Security Council's lacklustre performance so far- in the words of one commentator, the Security Council had '*come of age*' with this decision.¹⁶⁶ Enthusiasm faded later, however, as subsequent conflicts- in Kosovo- were not dealt with as swiftly or as unanimously. As Iraq continued to remain under sanctions, Saddam continued his defiance and remained 'bloody but unbowed'- an (allegedly) Iraqi attempt to assassinate President Bush invited strikes in retaliation in

158 The Iraqi government announced that Iraq had "decided to return the part and branch, Kuwait, to the whole and origin, Iraq, in a comprehensive, eternal and inseparable merger unity." Id. President Saddam claimed that "history has proved that Kuwait is part of Iraq." Press Statement of President Saddam Hussein in Baghdad, Iraq (Aug. 8, 1990) (excerpts available from Federal News Service, LEXIS, NEXIS library, Fednew file).

159 *Supra* n. 142, at 68.

160 Resolution 678, Security Council, 1990. This called for the Security Council to use 'all' necessary means to evict Iraq from Kuwait. While this was the second time such measures had been approved, the last time this had occurred was because of the absence of the Soviet Union, during the height of the Korean Crisis in 1950, *id.*; Also, Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE, *supra*, at 153.

161 John F. Murphy, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS, Cambridge University Press 2004, at p. 148. This is evidenced further, by the fact that reference was made to Chapter 7 of the Security Council, but no specific section was argued in favour of.

162 *Ibid* at 154.

163 UN Security Council Resolution S/RES/687 (1991). available at <http://www.fas.org/news/un/iraq/stes/are0687.htm>.

164 *Ibid*. Part C.

165 *Ibid*, Part D.

166 *Supra* n. 167.

1993,¹⁶⁷ and a four day bombing in Baghdad was carried on in 1998, both times justifying itself under Resolution 678. The second bombing, codenamed *Operation Desert Fox* is noteworthy. Though the US and UK relied on Security Council resolutions for the bombing¹⁶⁸ - due to Iraq's persistent refusal to co-operate with UNSCOM norms - it is pertinent to note that *neither* Security Council resolution expressly authorised the use of force. In fact, while both warned Iraq that non-compliance with UNSCOM teams would have the 'gravest possible consequence' for Iraq, both stopped well short of the use of force.¹⁶⁹ In fact, the UK sought to justify its use of force in response to concerns by other members citing the *implicit* authority under resolution 678.¹⁷⁰

Despite Iraq's bluster and intransigence, though, Iraq did not demonstrate any convincing proof of remilitarisation, and with good reason. Sanctions had reduced a once-thriving economy to subsistence level.¹⁷¹ A rising foreign debt,¹⁷² lack of humanitarian assistance,¹⁷³ and embargoes assisted in what has, with some justification, been called the 'silent slaughter' of Iraqi civilians.¹⁷⁴ It is odd that neither the US nor the UK showed much concern for the plight of the Iraqi civilians during this period, especially in light of the 'humanitarian intervention' argument they used subsequently to justify their invasion. Furthermore, Iraq was reduced to making vain protestations in the Security Council¹⁷⁵ as and when Turkey and Iran repeatedly attacked parts of Kurdistan, arguing self-defence, while the rest of the world- especially the US and United Kingdom - remained silent.

In 2002, the Bush administration sought to justify the extension of its 'War on Terror' into Iraq claiming Iraq formed part of the international "Axis of evil". To this end, a resolution was overwhelmingly passed by the US Congress, allowing the use of "the armed forces of the state, to defend the national security of Iraq...and to enforce all United Nations Resolutions with regard to Iraq."¹⁷⁶ To bolster this claim,

167 Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes under the U.N. Charter*, 19 B.U. INT'L L.J. 207 (2001), at 229.

168 United Nations General Assembly Resolutions 1154 S/RES/1154/1998 (2 March 1998), and 1205 S/RES/1205/1998 (5 November 1998).

169 Murphy, *supra* n. 160 at 152; Christine Gray, 13 European Journal of International Law, 11-12.

170 *Ibid* at 152.

171 Kamil A. Mahdi, *IRAQ'S ECONOMIC PREDICAMENT*, 1st edn, Garnet Publishing 2002, at 9.

172 Iraqi foreign debt, already high by 1990 (\$42.8 billion) after the eight-year long Iran-Iraq war, had jumped to \$141 billion, *ibid*, at 111.

173 The 'oil-for-food' programme, launched five years after the sanctions progressed as a humanitarian measure, had mixed successes.

174 Abbas Alnasrawi, *Long-term Consequences of War And Sanctions*, pp. 343-349 in Kamil A. Mahdi, *IRAQ'S ECONOMIC PREDICAMENT*, Garnet Publishing 2002, at 347.

175 Christine Gray, *INTERNATIONAL LAW AND THE USE OF FORCE*, *supra* n. 102, p.104-105.

176 This was carried through with a 77 to 23 majority in the Senate of the United States of America. *Supra* n. 160 at 169.

the American government alleged that the Iraqi regime possessed Weapons of Mass Destruction. Subsequently, the Security Council of the United Nations adopted Resolution 1441. This resolution reiterated Iraq's 'material breach' of its obligations under the Charter,¹⁷⁷ required Iraq to give immediate access to its WMD programme to the UNSCOM,¹⁷⁸ and warned Iraq of "repeated...serious consequences" on its failure to do so- without at any point threatening actual war.¹⁷⁹

Resolution 1441 was a sleight of diplomacy- it coupled a unanimous concern for Iraq's continual intransigence, with ambiguity as to the consequences contemplated.¹⁸⁰ Subsequent events brought out this dichotomy even further- France and Germany remained intractably opposed to war, with France publicly announcing its intention to use the veto power if needed¹⁸¹ to prevent armed conflict in the region, while the United States, by most accounts, remained unyielding in its decision to go to war - even treating Iraq's agreement to the United Nations Monitoring, Verification, and Inspection Committee (UNMOVIC) inspections as a 'setback'.¹⁸² Unfortunately, Iraq's report to the UNMOVIC - recycled, inaccurate and incomplete,¹⁸³ provided the US (along with its allies) with the justification to declare war. As Hans Blix, the head of UNMOVIC, clashed with Colin Powell, it was clear to the rest of the world that the United States viewed Saddam's Iraq as a threat, and was willing to risk international condemnation in order to effectively neutralise it.¹⁸⁴ The American government assured the world, though, that its legal basis was unquestioned- 'evidence' was adduced through photographs and documents that provided "unquestionable" proof that such weapons existed.¹⁸⁵ On the 19th of March 2003, the United States and the United Kingdom, along with 47 other states¹⁸⁶, invaded Iraq after an ultimatum, warning Saddam and his sons to quit Iraq, expired.

The legal basis of this ultimatum and invasion is controversial, at best, as American and British practice demonstrated- attempts were made to garner support

177 Security Council Resolution 1441; <http://daccessdds.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf?OpenElement>.

178 *Ibid.*

179 *Ibid.* para 12.

180 *Supra* n. 184 at 169. See also Lord Alexander of Weeton, QC, *Iraq: The Pax Americana and the Law*, Available online at http://www.justice.org.uk/50_anniversary/main.html#iraq.

181 Ruth Wedgwood, *The Fall of Saddam Hussein, Security Council Mandates and Pre-emptive Self Defence*, 97 Am. J. Int'l Law 576 at 578, 579.

182 S.R. Westerman, *A Long Winding Road to a Diplomatic Dead-end*, N.Y. Times, March 17, 2003. *Supra* n. 176 at 171.

183 John C. Yoo, *International Law and the War in Iraq*, 97 Am. J. Int'l Law 564 at 564.

184 This was in accordance with the National Security Strategy, which had, even when originally enunciated, announced an intention to protect itself and its civilians, even from international condemnation if necessary.

185 See, for example, William H. Taft and Todd F. Buchwald, *Pre-emption, Iraq and International Law*, 97 Am. J. Int'l L. 557 at 562.

186 Most of who had sent a token force, and in fact, pulled out of the Iraq war in the next few years.

for a Security Council resolution authorising the use of force; these, however, proved fruitless.¹⁸⁷ Subsequently, the countries claimed that Iraq's material breach of Resolution 1441 in effect 'turned the clock back' to Resolution 660, rendering the ceasefire worthless.¹⁸⁸ Those who support this argument argue that Security Council resolutions authorising the use of force usually expressly provide for a time limit either through a sunset clause¹⁸⁹ or through a subsequent termination.¹⁹⁰ In the case of Resolution 678, neither was employed; rather, the argument goes, throughout the 12 years *interbellum* period in Iraq, constant references were made to the resolution.¹⁹¹ Hence, there was no expiry of the resolution, which continued until it was superseded- of sorts- by Resolution 1441.

While this argument does have its share of supporters, its detractors not only include those who outrightly condemn the Bush doctrine, but also those who would seek justify the doctrine based on 'policy considerations'.¹⁹² Most argue that this is far too legalistic an approach, difficult to sustain in real practice. Furthermore, even those who support the doctrine acknowledge that to raise a resolution from desuetude is legally problematic; yet argue that in the present case there was no desuetude- the sanctions imposed by the UN would make the resolution current.¹⁹³ While this argument might appear attractive at first, facts suggest otherwise. As mentioned before, 12 years of sanctions had crippled Iraq's economy, making the production of WMDs difficult. Furthermore, Iraq itself had, by allowing weapon inspectors into the country, created a situation which could serve as a basis for negotiations for further inspections. In fact, Iraq had shed its bluster so far as to offer an explanation for the weapons- albeit an implausible one.¹⁹⁴ It is also a trifle ingenuous to suggest that the Security Council- usually so cautious with regard to authorising the use of force, would permit any implicit use of force based on previous resolutions, especially one that did not expressly refer to armed force even at the outset¹⁹⁵ - a point noted by international law experts in their reply to Goldstein.¹⁹⁶ Furthermore, while Iraq's

¹⁸⁷ *Ibid*

¹⁸⁸ This was adequately summed up through Lord Goldstein's argument See, for a succinct summary, *supra* n 7. David Sadoff, at 561.

¹⁸⁹ A sunset clause refers to a clause in a treaty or resolution which would serve to automatically terminate the resolution after a certain period of time had elapsed. See, for example, Security Council Resolution 961 (1994), dealing with Rwanda, in *supra* n 183 at 569.

¹⁹⁰ As in the case of Bosnia, Security Council Resolution 1031 (1997), *ibid*.

¹⁹¹ Both Operation Desert Storm in 1998 and the 1993 Air Strikes in Iraq were sought to be justified through this resolution.

¹⁹² *Supra* n. 162.; Murphy, at 204.

¹⁹³ Wedgewood, *supra* n. 181.

¹⁹⁴ In fact, the Iraqi government also suggested that the materials had been dumped into the desert wastes of Iraq. This, though implausible, has been used by conspiracy theorists to suggest that Iraq *did* in fact possess such weapons of mass destruction, and thus got rid of them.

¹⁹⁵ See above, *supra* n. 189.

¹⁹⁶ Letter to the Editor, *War Would Be Illegal*, Guardian, London, March 7 2003 at 12.

refusal to comply with some of the points of the resolution was undoubtedly difficult, it must be remembered that Resolutions 660 and 678 were passed in a particular context the Iraqi invasion of Kuwait.¹⁹⁷ Once that objective had been achieved, the use of force seemed decidedly controversial. As already mentioned, the Caroline formula requires that recourse be made to peaceful means unless the threat is imminent. To abandon the logic of a formula completely based on new threats used to attack old actors appears somewhat presumptive. In fact, American officials at the Pentagon itself suggested that international law had to be rejected and a new order created, as current international law had posed an impediment to America's actions.¹⁹⁸ While international law evolves through State Practice, such unilateral modifications to *jus cogens* norms make students of International Law raise their eyebrows.

Events seemed to conspire, though, to make the Bush administration end up with egg on their face. Scholars who were uncertain about the applicability of the Bush doctrine too had allayed their misgivings through the argument that if Iraq did possess WMDs, the prestige of the United States would be much enhanced - the end, justifying the means, as it were. This can be succinctly summarised in the arguments of de Lisle, who suggested that American forces could achieve legitimacy, if not legality, if such weapons and plans to discover them were discovered.¹⁹⁹ Unfortunately for the US, six years after the invasion, it is yet to discover any trace of the "31000 chemical warfare munitions, the 600 tons of VX, and 13 tons of biological growth media"²⁰⁰ that it had considered unquestionable grounds for invasion.

The Security Council has received its share of brickbats from both sides - those that believe it failed to respond to what was expected of it by not explicitly authorising the use of force in Iraq,²⁰¹ as well as by those who were dismayed at its inability to stop the United States led invasion - by far the larger figure.²⁰² The American justification, was that it acted as a proxy for the world; in an effort to enforce relevant UN vetos and defend world peace and security.²⁰³ This argument, similar to

197 See the text of Security Council Resolutions 678 and 687.

198 Helen Duffy, *THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW*, *supra*, at 199.

199 Jacques de Lisle, *Illegal? Yes. Lawless? Not so fast: The United States, International Law, and the Use of Force*, Unpublished paper; quoted in *supra* n. 149, Murphy, at 203.

200 *Supra* n. 181.

201 See, for example, John C. Yoo, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 *Chi. J. Int'l Law* 379; also, Yoo, *supra* n. 182; Wedgwood, *supra* n. 181. To a lesser extent, see Henry M. Perrin, *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 *J. Syracuse Int'l Law and Commerce* 149.

202 See, for example, *The Security Council and Iraq: An Incremental Practice*, 97 *Am. J. Int'l Law* 823;

203 In the words of John Negroponte, American Ambassador to the United Nations, *supra* n. 198, Duffy at 197.

As Duffy then goes on to point, the whole point of the veto power would be defeated if states could be permitted to circumvent an actual (or, since the matter was never put to vote in the security Council) or threatened veto claiming that the power of the state exercising the veto power was doing so unnecessarily. In fact, she refers to such an argument as nonsense. *Ibid.*, at 203.

D'Amato's argument with regard to Israel mentioned earlier in this paper cannot however, be countenanced. The United Nations is a collective organization, and the Charter bars all use of force other than in the exercise of the right to self-defence. No matter how broadly the Charter is read, the idea of nations unilaterally defending world peace and security- even without looking at the *bona fides* of the matter - is entirely antithetical to the Charter.²⁰⁴

Some however, seek to understand this in the context of a 'new' role for the Security Council - one where the Security Council authorises, explicitly or implicitly, the use of force against some other countries. To allow such an argument to succeed on a 'policy' level, as some have advocated,²⁰⁵ is dangerous.

The present-day notion of sovereignty has been tempered through international organizations, but states *inter se* are still theoretically equal to plead legal justifications and have the equal right to feel threatened. To allow unilateral enforcement would be anarchy- a point that is explored in some detail later in this paper. An example of the distinction between legality and legitimacy may be seen in the global reaction to America's response to September 11 in Afghanistan and Iraq. As commentators have been quick to point out, in both cases, the American government may have exceeded its brief- certainly there are many who felt that American action in Afghanistan interfered with the Security Council's functioning under Chapter VII of the Charter.²⁰⁶ For that matter, there was little debate on the no-fly zones and the economic sanctions in Iraq, even though the enforcement of such an action was controversial. Indeed, Iraq had made several protestations to the Security Council arguing that such actions allowed Iran and Turkey to invade it of their free will. The fact that a large number of scholars think that the invasion of Iraq in 2003 was illegitimate thus underscores the illegitimacy of the war.

Six years since the war, the situation remains bleak. The chaos in Iraq since then makes a mockery of the American claim that the war was fought "to make the world safe for democracy". A new government has been put in place, propped up through American military occupation. However, the war still continues. More soldiers have been killed in Iraq than anywhere since Vietnam. The cost to Iraq- economically, culturally and in terms of the damage to humans, has been immense. Unfortunately, however, the political leaders who allowed the invasion to take place do not seem particularly apologetic when it has turned out that their evidence was flawed - one leader was convinced that "history would forgive" their intervention.²⁰⁷ The people of Iraq might not be so sure.

204 See above, pp. 46-50.

205 See the later discussion on the applicability of this to North Korea, Iran and Sudan.

206 A prime example of such a view has been Carsten Stahn, *International Law at A Crossroads? The Impact of September 11*, 62 *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 184 at 229-32.

207 'Prime Minister's Speech to Congress', 18 July 2003, at <<http://www.number10.gov.uk/output/Page4220.asp>.

A set of commentators, though, continue to argue for the further extension of the Bush Doctrine to other nations. In fact, some even argue that to say the Bush Doctrine was flawed at its outset does not necessarily mean that the Doctrine cannot be applied to other countries,²⁰⁸ especially those that the United States Government has seen fit to consider "rogue states". Iran and North Korea, with their bellicose leaders and nuclear weapons, are prime targets that the United States seems to focus on. North Korea is a favourite, though Iran and Sudan vie for second place. Rather than deterring these countries, though, their observation of the Iraqi movement seems to suggest that their only option to prevent an invasion and wholesale military action might either be through nuclear militarization,²⁰⁹ or as North Korean experience suggests, through pre-empting pre-emptive threats.²¹⁰ One wonders where such ideas would lead were the Bush doctrine to be considered a generally-accepted norm of state practice. In the context of the (generally tense) international relations in the Indian subcontinent,²¹¹ a terrorist attack on any Indian or Pakistani city could lead to a nuclear conflagration.

As already mentioned, the concept of sovereignty has been eroded in modern-day international law.²¹² One of its less salubrious manifestations is the loss of formal equality between nations. Though some international scholars argue in favour of such an argument, stating that as per the present system, there is a very real possibility of less than 5% of the world's population amounting to a numerical majority in the General Assembly,²¹³ it is the author's belief that these arguments do not adequately consider the reason for imposition of such formal equality- to inform the system with a form of legitimacy. History has shown that international organizations rendered toothless in form and substance by hijacking states have swiftly ceased to exist- the United Nations is an exception, though it is far from being a perfect one. While it has withstood great storms, the removal of the rule of "one member, one vote" might prove to be its breaking-point, a situation we can ill-afford.

208 Christian Henderson (2004), *The Bush Doctrine: From Theory to Practice*, 9 J. Conf. and Sec. Law. 3 at 11. Also see, generally, Matthew Klapper, *The Bush Doctrine and North Korea*, 8 Gonz. Journal of International Law 2.

209 A dominant opinion expressed in Iran suggests that the country believes that nuclear weapons and the threat of their deployment may be the only means of preventing an attack; see *ibid* at 23.

210 The recent nuclear tests in Korea underscore its regime's view of this matter.

211 Especially after the 2008 Mumbai Bombings.

212 For a detailed and by and large supportive analysis of how this has come about, see John H. Jackson, *Sovereignty: Modern: A New Approach To An Outdated Subject*, 97 Am. J. Int'l Law 782.

213 *Ibid* at 295.

VI. RECONCILING THE NEW WORLD ORDER WITH THE UNITED NATIONS CHARTER

*The Letter Killeth, The Spirit Giveth Life.*²¹⁴

As demonstrated in this paper, the war against Iraq and the use of the Bush Doctrine seem to indicate a vendetta against Saddam's regime. Well-established norms of International Law were brushed aside and the "Iraqi threat" was magnified many times by mass media, journalists and international scholars - as much as the American government.

The question of the applicability of the Bush Doctrine to other countries, however, brings up new and worrying questions. Is the Charter regime, as narrowly construed by those who seem determined to stick to the text of the Charter, sufficient to deal with the current international law scenario? In particular, do Article 2(4) and Article 51 adequately represent current international law threats? It is worth noting that the danger of adhering solely to the letter, rather than the spirit, so succinctly mentioned in the Bible, has been remarked on by major legal commentators as well.²¹⁵

While the text of the United Nations Charter mentions an armed attack in the context of self-defence, the role of states has changed in the sixty five years that have passed since the promulgation of the Charter. The creators of the Charter seemed to have envisaged a threat to the world order solely from states; the role of terrorist organizations, despite their existence in the years prior to drafting of the Charter²¹⁶ was not adequately dealt with.²¹⁷ The present world order, though, faces its greatest threat not from state actors *per se*, but terrorist groups, often acting without the consent and knowledge of any state. Despite this, though, the tests have not held countries liable. While the Nicaragua case had cited the effective control test mentioned earlier, the International Court of Justice has gone a step further, claiming that, in the case of organized groups, there must be "overall control" exercised over them.²¹⁸ While the standards of this test are a little lower than that of the "effective

214 While this is a line from The Bible, scholars of International Law will be familiar with this as having been used by Henkin in his defence of Article 2(4). *Supra* n. 4, Henkin, at 544.

215 See, for instance, Thomas Jefferson's statement: "[n] lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."; Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 22 *Deu. J. Int'l L. & Pol'y* 483, 489 (1999).

216 In fact, a Serbian terrorist organization, the Black Hand, was responsible for the assassination of the Archduke Francis Ferdinand, thus sparking of the 1st World War.

217 Amos Guiora (2007), *Anticipatory Self-Defence and International Law: A Re-evaluation*, 13 *Journ. Of Confl. and Sect'y Law* 3.

218 See, generally, the *Case of The Application of the Convention of the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 91, 2007 at 152.

control" test, it is nonetheless inapplicable, the researcher presumes, in the case of Iraq – even if such retrospective analysis would be possible.

In this situation, thus, one may need to revisit the distinction between legality and legitimacy.²¹⁹ In a situation where the legal norm shows signs of stress, it would be wise to modify it to reach a situation that possesses international legitimacy while adhering to the spirit of the norm. Past examples of such cases include the 1967 Arab-Israeli war, and the global response to the War Against Terror in Afghanistan.

A model that seems to make sense, then, is the concept of 'Strict Scrutiny'. A word borrowed from Constitutional Law, the Strict Scrutiny model as proposed by some international scholars²²⁰ allows for the state to defend its citizens through counter-terrorist operations. However, before such operations can be launched, a detailed dossier demonstrating the grounds for such a strike exist and are founded on compelling evidence must be provided. This evidence needs to be predicated on the rule of law, and should be gathered relatively impartially. The government agency to which such information could be provided would be the Courts.²²¹ This would thus ensure that there be a legal need to evaluate these criteria, thus broadening the role of Courts, which have traditionally considered the waging of war to be a policy decision, one not subject to judicial review.²²² On the contrary, the present model requires courts to examine the evidence and rule on its admissibility.²²³

In such a situation, of course, procedural rigours may render the concept toothless if strictly applied. Hence, the model proposed by Guiora deals with a judicial authority that is required to establish certain basic criteria. Once that is done, a possibility of the use of counter-terrorist operations is allowed. Guiora further argues that there is little danger of this being used to limit the authority of the state. Rather, by allowing counter-terrorist strikes, the state is allowing for anticipatory self-defence.²²⁴

On the face of it, the argument seems compelling. Such examination, thus, seeks to ensure that the Caroline Criteria continue to be relevant, and that any

219 As mentioned before, this crack in international law had emerged during the 1967 Arab-Israeli war and the 1971 Indo-Pakistani war that emerged after the creation of Bangladesh. However, it was after the 1999 Kosovo crisis that the crisis found full resonance. For a detailed account of this crisis, see Mikael Nabati, *International Law at a Crossroads, Self-Defence, Global Terrorism and Pre-emption*, 13 *Transnat'l L. & Contemp. Probs.* 771 at 783-85.

220 Most notably Amos Guiora, see generally *supra* n. 217.

221 *Ibid.*

222 Lord Alexander of Weedon, *Iraq: The Pax Americana and the Law*, Justice Tom Sargent Memorial Lecture.

Available online at http://www.justice.org.uk/50_anniversary/index.html.

223 *Supra* n. 216.

224 *Supra* n. 217, p. 11.

change in international law- any dilution in the norm, as it occurs, would meet the consent of the bulk of all states - based as it will be on a legal evaluation of the options. While Guiora admits that this would lead to substantial changes in the classical thesis of separation of powers, he argues that the minimising of intelligence-based mistakes and the legitimacy that this operation would provide would compensate for the changes in the law.²²⁵

Such a thesis, however, can only stand in countries which accept the separation of powers, and those that have a tradition of Western, liberal democracy. Countries with little or no judicial independence cannot support such an argument- if the executive is the judiciary, what legitimising function will be obtained by such a system.

The researcher, in light of the above, suggests that the thesis be modified in a way that such information be submitted to a judicial body at the United Nations, either the Security Council, or, since an impartial organisation is required, the International Court of Justice. This might thus serve as a way to keep recalcitrant big powers in check, while preserving the United Nations norms from death, or worse, irrelevance.

VII. CONCLUSION

The paper has examined the existence and need for a norm against the use of force since the turn of the 19th century. While it is true that the Charter regime is not sufficient to deal with recalcitrant states and terrorism, it is also true that the American aggression against Iraq in 2003 used a threat of terrorist attack²²⁶ implicitly and subtly to create a bugaboo of *Civilisation in Danger* as an excuse for the invasion of Iraq. Unfortunately, the invasion seems to have done little to demonstrate American interest in making the world a safer place; in fact, the bulk of the Muslim world seems to consider the war against Iraq an assault against Islamic civilisation.

It is in this context that the above alternative to the rejection of the Caroline Criteria and the Charter regime has been proposed by the author. The above argument, based on the Strict Scrutiny Model, seems to be a way to preserve the Charter and the role of the state in protecting civilians; no small matter in today's world.

²²⁵ *Ibid.*

²²⁶ As mentioned before, Iraq's links with the Al Qaeda were hardly, if ever, expressly mentioned. However, the fear psychosis that Slavoj Žižek alludes to in his work, Iraq: A Borrowed Kettle, was subtly created in order to create conditions for an armed attack against Iraq.