

Hastings International and Comparative Law Review

Volume 26
Number 2 *Winter 2003*

Article 1

1-1-2003

Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla

Davis Brown

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159 (2003).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol26/iss2/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla

BY DAVIS BROWN*

Introduction

The Iraqi government is the most murderous and aggressive regime in the Middle East today. Ever since the Ba'ath Party took power in 1968,¹ Iraq's respect for the norms of international law has devolved to the point where it epitomizes the concept of the "rogue state." The party ascended to power by military coup and formed a police state that grows more oppressive every year, terrorizing its population with murder and torture, and often murder by torture. Its invasion and annexation of Kuwait in 1990, itself a totally unacceptable violation of international law, is even less reprehensible than its conduct in warfare, having used hostages as human shields, pillaged and looted Kuwait, killed or deported to Iraq thousands of Kuwaitis, and inflicted wanton destruction far in excess of the confines of military necessity.² Cold, evil and ruthless, Saddam Hussein is the Ernst Stavro Blofeld³ of the modern world.

The greater travesty is that despite Iraq's complete disdain for international law, the community of States, acting in accordance with international law, has allowed the Ba'ath regime to remain in power.

* J.D., New York University, 1994; LL.M., George Washington University, 2003 (expected).

1. LIBRARY OF CONGRESS, *IRAQ: A COUNTRY STUDY* 57 (4th ed. 1990) [hereinafter *IRAQ COUNTRY STUDY*].

2. Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F.L. REV. 41 (1994).

3. Ernst Stavro Blofeld, the fictional nemesis of James Bond, attempted to blackmail Great Britain and the United States with a nuclear weapon. IAN FLEMING, *THUNDERBALL* (Viking Press, 1961). He also appeared in subsequent James Bond novels and most of the early James Bond films.

Iraq has therefore enjoyed the benefits of the principles of sovereign equality, non-interference with internal affairs, and, for the most part, non-use of force, without shouldering any of the responsibilities that come with the privilege of recognition as a State. These responsibilities include the non-use of force in its relations with other States,⁴ the duty not to support or promote terrorism,⁵ the duty to comply with the law of war,⁶ the duty to observe and respect fundamental human rights,⁷ and the duty to honor its agreements with other States and international organizations (*pacta sunt servanda*).⁸

It is the latter obligation upon which this work will be focused, particularly with respect to its agreements and obligations not to develop nuclear, biological and chemical weapons (referred to collectively as weapons of mass destruction⁹), and how they are to be enforced when Iraq persists in ignoring its obligations in this area. The phrase "800-pound gorilla" refers metaphorically to the enormous gravity of the obligations, and to the State most likely to end up enforcing them with military force, *i.e.* the United States, whether unilaterally or by leading a coalition. This article will begin with a presentation of a new approach to *jus ad bellum* which takes

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

5. *Declaration On Principles of International Law Concerning Friendly Relations And Co-operation Among States In Accordance With The Charter Of The United Nations*, Annex to G.A. Res. 2625, § 1, para. 10 (1970).

6. All States are bound to respect the laws of war as customary international law. Convention (IV) respecting the Laws and Customs of War on Land, Oct. 18, 1907, pmbl. para. 8, 36 Stat. 2277, 205 Consol. T.S. 277, 279 ("...the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience"). See also JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1985).

7. The Universal Declaration of Human Rights was proclaimed as a "common standard of achievement for all peoples and all nations." Universal Declaration of Human Rights, pmbl. para. 8, G.A. Res. 217 (1948). Respect for fundamental human rights is generally regarded today as a norm of customary international law. It should be noted that the protection of fundamental human rights is among the obligations that States taking countermeasures for wrongful international acts must continue to honor. Draft articles on Responsibility of States for Internationally Wrongful Acts, art. 50, para. 1(b), *Report of the International Law Commission on the work of its Fifty-third session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on State Responsibility].

8. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339.

9. Weapons of mass destruction also include radiological weapons; however, the documented threat from Iraq has not to date included such weapons and they will not be discussed further.

just war theory to the next level, where force is used as a remedy to a grave injury caused by the breach of an international obligation. The next two sections will apply an injury-remedy approach to two prior case studies involving Iraq's noncompliance with obligations not to develop weapons of mass destruction, specifically the 1981 Israeli strike on the Osiraq nuclear reactor, and the U.S.-UK strikes against Iraq in December 1998 (Operation Desert Fox). Drawing upon much of the background information presented in these two sections, this article will conclude with a discussion of the burning question of 2002-03: the lawfulness of the recently concluded Operation Iraqi Freedom, in which the United States and a small coalition used force without Security Council authorization to effect a regime change in Iraq.

I. A Naturalist Approach

The prevailing philosophy behind the U.N. Charter framework for dealing with use of force was that peace was more precious than justice. The League of Nations, which had taken a legal approach to prevent war by placing specific obligations upon members,¹⁰ had in the end failed to check the aggression of the Axis powers that ultimately triggered the Second World War. The drafters of the UN Charter, on the other hand, took the political approach, recognizing from the outset that its effectiveness in maintaining peace and security would fundamentally depend on the collective willingness of the Great Powers to "cooperate in defense of common interests."¹¹

The primary purpose of the Charter, as well as that which appears first in the text, is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . ."¹² During the San Francisco conference, the major powers defeated an amendment to the above language that would have required that the "collective measures" mentioned therein "be taken in accordance with international law and justice."¹³ The major powers were

10. LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 10 (3d & rev. ed., 1969)

11. *Id.* at 11.

12. U.N. CHARTER art. 1, para. 1.

13. GOODRICH ET AL., *supra* note 10, at 27-28.

concerned that such a requirement would hamper the Security Council's flexibility, for the objective of such "collective measures" was to prevent or suppress the use of force, not to settle the underlying dispute.¹⁴ From this record it is quite evident that decisions of such magnitude, to be made by the Security Council, were in fact to be based on political considerations. International law and justice had to settle for the more limited role expressed in the Charter, that "adjustments or settlement of international disputes or situations which might lead to a breach of the peace" would take place "in conformity with the principles of international law and justice."¹⁵ The political reality was that in preventing or halting a war or other major crisis, the role of justice was distantly secondary, inserted in the text of the Charter almost as an afterthought.

In post-Charter *jus ad bellum*, the most fundamental principle is that of the renunciation of force in international relations. In the text of the Charter this principle takes the form of article 2(4), which reads:

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.¹⁶

It was intended that violations of this norm be resolved by the organs established in the Charter, particularly the Security Council. The Charter specifically delegates to the Security Council the function and responsibility of maintaining international peace and security.¹⁷ In responding to disputes, the Security Council may make recommendations to member States,¹⁸ or in more serious situations, decide on measures to be taken by some or all States to maintain or restore international peace and security,¹⁹ measures which member States are required to carry out.²⁰ The Security Council wields the

14. *Id.*

15. U.N. CHARTER art. 1, para. 1.

16. *Id.* art. 2, para. 4.

17. *Id.* art. 24, para 1.

18. *Id.* art. 36, para. 1; *id.* art. 39.

19. *Id.* art. 39.

20. *Id.* art. 25.

ultimate power—"it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."²¹ This is one of the Charter-based exceptions to article 2(4).

The other two Charter-based exceptions, the inherent right of self-defense²² and enforcement action under regional arrangements,²³ also look to the role of the Security Council in deciding on the appropriate measures to be taken. Article 51 preserves the inherent right of self-defense, but only "until the Security Council has taken measures necessary to maintain international peace and security." Article 53(1) admonishes regional organizations that "[n]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." In the Charter framework of *jus ad bellum*, all roads lead to the Security Council chambers.

Certainly, Article 2(4) has not put a halt to the use of force by States, but to question the validity of Article 2(4) solely on that basis would be unfair. No one questions the validity, for example, of statutes that outlaw murder, even though the daily news media is replete with stories of shootings, abductions, and other heinous crimes. On the other hand, the general population would assuredly react negatively to the repeal of a statute that prohibits murder. Similarly, the international community of states would equally assuredly react negatively to the repeal of Article 2(4). Contrary to what some would say, the prohibition of the use of force in inter-State relations is indeed honored more in its compliance than its breach. In stark contrast to world history up to the First World War, the fact that one State is *not* at war with another State over some dispute is *not* a newsworthy event. For the most part, the general prohibition of the use of force has worked remarkably well.

The very large body of scholarly literature, however, is devoted to the many exceptions, deviations, and occasional outright thumbing of noses at this general prohibition. The one commonality to virtually all of it is that one begins with the basic rule (no use of force in international relations) and then proceeds to explain why an exception is created or why Article 2(4) does not apply. Like all its progenitorship, so this work must begin.

The basic principle of international law relating to the use of

21. *Id.* art. 42.

22. *Id.* art. 51.

23. *Id.* art. 53, para. 1.

force is that States must refrain from using force against the territorial integrity or political independence of other States. The objective of war, which is to impose one State's will upon another,²⁴ is rendered invalid under this norm. In the UN Charter system, all States are sovereign equals²⁵ and in modern international law, no State has the right to subjugate another State to its wishes or its control by using methods whose end result is to kill people and break things.

However, like English grammar, Article 2(4) is so replete with exceptions that the exceptions seem to swallow up the rule. Because Article 2(4) has not deterred States from using force, a plethora of legal theories have been developed—or revived—to circumvent the basic rule. To name just a few, they include humanitarian intervention, pro-democratic intervention, anticipatory self-defense, defensive armed reprisal,²⁶ and the new kid on the block, pre-emptive self-defense—not one of which draws from the text of the UN Charter. The reason for this can be partially attributed to the paralysis of the Security Council during the Cold War.²⁷ By 1970, the Charter framework, and the Security Council itself, seemed so weak and ineffective at dealing with real crises that renowned international legal scholar Thomas Franck was driven to lament, “Who Killed Article 2(4)?”²⁸

Professor Franck's lament was founded on a false premise; Article 2(4) deserves not a funeral, but a bar-mitzvah. Thanks to the resurrection of doctrines such as humanitarian intervention and anticipatory self-defense, Article 2(4) has grown out of the overly simplistic, almost childlike vision of a Utopian system where, as Professor Franck put it, “the national interest is perceived to be congruent with a renunciation of the use of military force in interstate relations.”²⁹ To borrow a witticism from Professor Henkin, the reports of the death of Article 2(4) are indeed greatly exaggerated.³⁰

24. CARL VON CLAUSWITZ, ON WAR 83 (Michael Howard & Peter Paret eds. & trans., Alfred A. Knopf 1993) (1832).

25. U.N. CHARTER art. 2, para. 1.

26. A creation of Yoram Dinstein in YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 194 (3d ed. 2001).

27. The USSR and U.S., who were the primary adversaries during the Cold War, both had veto powers in the Security Council and, being a political body, many actions that could have taken place were blocked due to political considerations.

28. Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

29. *Id.* at 837.

30. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly*

Far from being dead, it has in fact matured.

Why has the growth of *jus ad bellum* taken place? Why have States and scholars alike had to resort to thinking outside the Charter framework to find legal underpinnings for use of force that was clearly not in self-defense or authorized by the Security Council, but which achieved just results nonetheless? Why are the likes of Manuel Noriega and Saddam Hussein able to claim the protection of international law, when the former has certainly not been missed and the latter would be even less so? Why does the General Assembly condemn Israel for attacking terrorist targets, and barely flinches when other States call for its annihilation?

While the answers to such complex questions are equally complex, they can all be traced to two fundamental flaws in the Charter paradigm for *jus ad bellum*. The first is that the U.N. organs designed to address, diffuse, and resolve crises that threaten international peace and security are political organs, and its members are driven by their own national self-interests and political considerations rather than by the principles of international law. The other, deeper flaw is that the U.N. Charter was based on the premise that *peace* is preferable to *justice*. The fact that so many subdisciplines of *jus ad bellum* have evolved in the last few decades is an indicator that the subordination of justice to peace offends the notions of many as to how the world should be.

Articles 2(4) and 51 of the Charter set forth rules on inter-State relations that are very clear and unambiguous on their face. Article 2(4) prohibits States from using force against other States, and Article 51 permits a State to use force, in accordance with its inherent right of self-defense, if an armed attack occurs against that State.³¹ However, if States had followed the exact letter of the Charter, the world would be a vastly different place. In the absence of the exercise of anticipatory self-defense, Israel would have been obliterated from the map in 1967. But for the renewed recognition of the doctrine of humanitarian intervention, Kosovo would be homogeneously Serb today and Cambodia might either still be a “killing field” or simply

Exaggerated, 65 AM. J. INT’L L. 544 (1971). Professor Henkin wrote, “What has become obsolete is the notion that nations are as free to indulge in [war] as ever, and the death of that notion is accepted in the Charter.” *Id.* at 545.

31. U.N. CHARTER article 51 reads in part, “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.”

have ceased to exist for lack of a population. It is precisely because Article 2(4) is *too* rigid that States are prone to “violate[] it, ignore[] it, run roughshod over it, and explain[] it away,”³² at least when the Security Council fails to discharge its function in any given situation. It is a sense of justice that pulls States away from complying with the letter of Articles 2(4) and 51 and drives them to resort to “self-help.” A lack of pull towards compliance is cause to challenge the legitimacy of such a rule. As Professor Franck put it:

A rule without exculpation, while seeming to court legitimacy by its apparent simplistic clarity, may actually appear illegitimate by producing results that appear so extraordinarily unjust, cavalier, unfair, even absurd, as to undermine the rule’s ability to exert a strong pull to compliance.³³

While other factors besides fairness contribute to the legitimacy of a rule and ultimately to its pull towards compliance,³⁴ one cannot deny that in international law, the more a rule is regarded as unfair, *i.e.* favoring an unjust result, the less reliable it shall be in predicting the outcome of inter-State relations. The growth of *jus ad bellum* out of the cocoon of the UN Charter, by the resurrection of some legal theories and the creation of others, is an expression of the naturalist rejection of the unfair absolutism of the text of the Charter. State practice has proven again and again that *justice* is preferable to *peace*.

For Article 2(4)—and the general norms of sovereign equality and renunciation of force—to remain good law, any deviation from it must have just cause. For a State to have just cause in violating the norm, it must have suffered some injury at the hands of another State. If the injury is caused by the other State’s breach of its international obligations, the State committing the breach will be responsible for the injury.³⁵

32. Franck, *supra* note 28, at 810.

33. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 73 (1990).

34. The other factors include the purported authority making the rule, whether the rule has been enacted in accordance with the procedures of that rule-making authority, and the extent to which the rule adheres to the rest of international law. Thomas M. Franck, *The Legitimacy of Law and Institutions*, 240 RECUEIL DES COURS 41, 42 (1993-III).

35. Draft Articles on State Responsibility, *supra* note 7, arts. 1, 31.

Some obligations of States to other States are so vital to the maintenance of peace and security that their breach inflicts injury to other States that is so great that the appropriate remedy can only be achieved by the threat or use of force. From this theory all other doctrines concerning the use of force can be derived. A tort-based just war theory—duty, breach, injury, remedy—can serve as a framework for evaluating such diverse doctrines as self-defense, anticipatory self-defense, preemptive self-defense, protection of nationals, humanitarian intervention, intervention to preserve forms of government, national liberation, peace enforcement, and enforcement of other obligations. The principle may be restated thusly:

When a State breaches an obligation, and that breach results in an injury, the injured party has the right to a remedy from the State that breached the obligation.

This article will apply this theory to the enforcement of arms control and disarmament agreements by military force, using the case studies of the 1981 Israeli strike on the Iraqi nuclear reactor Osiraq and the 1998 air strikes on Iraq in response to its non-compliance with Security Council Resolution 687 (Operation Desert Fox).

II. The Nuclear Spectre: The Destruction of Osiraq by Israel

A. What Happened

On June 7, 1981, the Israeli Air Force struck the Osiraq nuclear reactor near Baghdad and destroyed it.³⁶ Although Iraq claimed to be conducting nuclear research and developing “peaceful uses of atomic energy,”³⁷ Israel asserted that Iraq was embarked on a program to develop nuclear weapons for use against Israel,³⁸ that Osiraq was actually designed to produce the weapons,³⁹ and that the reactor was

36. *Letter dated 8 June 1981 from the representative of Israel to the President of the Security Council*, U.N. SCOR, 36th Sess., Supp. Apr.-Jun. 1981, at 55, U.N. Doc. S/14510 (1981).

37. U.N. SCOR, 36th Sess., 2280th mtg. at 26, U.N. Doc. S/PV.2280 (1981).

38. *Id.* at 41-46; U.N. SCOR, 36th Sess., 2284th mtg. at 8, U.N. Doc. S/PV.2284 (1981).

39. U.N. Doc. S/14510, *supra* note 36.

to become operational as early as July 1981.⁴⁰

In the debates in the Security Council that ensued,⁴¹ Israel justified its strike on the grounds of anticipatory self-defense. Israel cited numerous instances of Iraq's conspiracy to destroy Israel. Iraqi forces, argued Israel, had taken part in three Arab wars against it: the Israeli War of Independence in 1948, the Six-Day War in 1967, and the Yom Kippur War in 1973.⁴² Israel also referred to statements of Iraqi officials: from Iraqi President Ahmad Hassan Al-Bakr, "Efforts . . . must be consolidated to support the liquidation of the racist Zionist entity . . .";⁴³ and from the Iraqi ambassador to India, "Iraq does not accept the existence of a Zionist state in Palestine . . . the only solution is war."⁴⁴

Israel also asserted various facts as evidence that Iraq was embarked on a program to develop nuclear weapons. Iraq, alleged Israel, had in 1974 attempted to buy a gas-graphite reactor,⁴⁵ the same type of reactor used by the nuclear powers to extract plutonium for use in nuclear bombs.⁴⁶ Iraq had purchased the necessary facilities for reprocessing nuclear fuel,⁴⁷ which would have simplified the recovery of plutonium.⁴⁸ Furthermore, averred Israel, Iraq had been stockpiling uranium.⁴⁹ Finally, Iraq had insisted on the availability of weapons-grade fuel for the Osiraq reactor,⁵⁰ even though France (who sold the reactor to Iraq) had offered to substitute a type of fuel ("caramel") suitable for operating the reactor but which was not sufficiently enriched for use in a nuclear bomb.⁵¹

Despite Israel's arguments, not one of which was refuted by any other State, including Iraq,⁵² the Security Council was not convinced

40. *Id.*

41. The matter was debated on June 12-19, 1981. U.N. SCOR, 36th Sess., 2280th-2288th mtgs., U.N. Docs. S/PV.2280-2288 (1981).

42. U.N. Doc. S/PV.2280, *supra* note 37, at 41.

43. *Id.*

44. *Id.* at 42.

45. *Id.* at 46.

46. TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 47 (1996).

47. U.N. Doc. S/PV.2280, *supra* note 37, at 47.

48. MCCORMACK, *supra* note 46, at 43.

49. U.N. Doc. S/PV.2280, *supra* note 37, at 47.

50. *Id.*

51. MCCORMACK, *supra* note 46, at 50-51.

52. In the debates, Iraq made no attempt to refute any of the facts asserted above. Iraq's position was centered on two points: (1) Israel's failure to subscribe to

that Israel's strike on Osiraq was justified. On June 19, less than two weeks after the strike, the Security Council passed Resolution 487, in which it "[s]trongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."⁵³ Even Israel's staunchest ally, the United States, voted in favor of the resolution, though not for the reasons that most other members did.⁵⁴

The Security Council's response to Osiraq is an example of U.N. politics forcing a "race to the bottom." The Council did not seriously debate the facts asserted by Israel, and blindly accepted the fallacy that Iraq's adherence to the IAEA safeguards regime somehow "vindicated" it.⁵⁵ Furthermore, in the face of Israeli arguments, based on the writings of eminent publicists of international law suggesting that anticipatory self-defense against a nuclear strike was a necessary right,⁵⁶ only a small number of States even discussed the right to anticipatory self-defense. Even then, these States did little more than apply the traditional elements of the doctrine, the applicability of which is questionable. Syria's response was nothing more than a diatribe against "Israeli atrocities, Israeli arrogance, Israeli expansionism, . . . [and the] Israeli cancer in our region."⁵⁷

Much has already been written about Osiraq and the applicability of anticipatory self-defense to that situation and to nuclear weapons in general, and it is not the purpose of this paper to rehash old arguments. In this work, the justification of the strike on Osiraq will be examined against the theory presented in the previous section (duty, breach, injury, remedy). However, it is relevant and useful to conduct a brief exposition of the law of anticipatory self-

IAEA safeguards with respect to its nuclear program, as Iraq had done; and (2) Iraq had adhered to all IAEA safeguards put in place on its nuclear program, and therefore Iraq could not be developing nuclear weapons. Amazingly, many members of the Council accepted that argument. U.N. SCOR, 36th Sess., 2280th-2288th mtgs., *supra* note 41.

53. S.C. Res. 487, ¶ 1 (1981).

54. The United States voted in favor of S.C. Resolution 487 because it believed that Israel had failed to exhaust peaceful means for resolving the matter. The U.S. did not comment on Israel's argument of anticipatory self-defense. U.N. SCOR, 36th Sess., 2288th mtg. at 19, U.N. Doc. S/PV.2288 (1981).

55. MCCORMACK, *supra* note 46, at 59. Even the IAEA, however, was concerned that Iraq was trying to develop nuclear weapons despite its adherence to the safeguards. *Id.*

56. U.N. Doc. S/PV.2280, *supra* note 37, at 53-55; U.N. Doc. S/PV.2288, *supra* note 54, at 33 (citing Humphrey Waldock, Stephen Schwebel and Myres McDougal).

57. U.N. Doc. S/PV.2284, *supra* note 38, at 5.

defense and how scholars have applied it to Osiraq.

B. Application of Anticipatory Self-Defense to Osiraq

Most eminent jurists agree on the right of anticipatory self-defense in pre-Charter, customary international law.⁵⁸ The legal criterion for justifying the use of force as an act of anticipatory self-defense usually follows classical *Caroline* doctrine of the right of self-preservation,⁵⁹ that the State invoking it must “show a necessity for self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁶⁰

The UN Charter does not expressly confirm the right of anticipatory self-defense. Article 51 reads, “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 . . .” (emphasis added). The Charter does not speak to whether a State retains the right to strike first in a situation where an armed attack is known to be imminent. Scholars disagree whether Article 51 has superseded the right to anticipatory self-defense. Those who argue against such a right in post-Charter international law (the “restrictionist” view) look to the plain meaning of Article 51, which permits self-defense “if an armed attack occurs,”⁶¹ *i.e.*, after the attacking State has committed its forces to the armed attack. Those who believe the “counter-restrictionist” view, that Article 51 does not limit the right to anticipatory defense, argue realism—that the Charter cannot be construed to require a State to allow its destruction before resorting to measures to defend itself.⁶² If one supposes, as this

58. 1 OPPENHEIM'S INTERNATIONAL LAW 421 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) [hereinafter 1 OPPENHEIM]; D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 58-59 (1958); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECEUIL DES COURS 451, 464 (1952-II); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257 (1963); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 234 (1961); DINSTEIN, *supra* note 26, at 173.

59. BROWNLIE, *supra* note 58, at 257.

60. BOWETT, *supra* note 58, at 59. For the original text of the formulation, see Letter from U.S. Secretary of State Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 669 (1983).

61. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 141 (2d ed. 1979); BROWNLIE, *supra* note 58, at 275; 2 OPPENHEIM'S INTERNATIONAL LAW 156 (Hersch Lauterpacht ed., 7th ed. 1952).

62. Waldock, *supra* note 58, at 498; BOWETT, *supra* note 58, at 191; Military And Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.) (merits), 1986 I.C.J. 14, 347 (June 27) (Schwebel, J. dissenting). Dinstein takes the restrictionist

author does, that the counter-restrictionist view of anticipatory self-defense is the better reflection of international law as practiced by States, then Israel's justification of its attack on Osiraq⁶³ must now be evaluated on that basis.

The latest edition of Oppenheim's International Law translates the *Caroline* formula into the following elements: first, an armed attack is launched, or is imminent, against a State's territory, nationals, and/or forces.⁶⁴ Second, an urgent necessity to defend against that attack must exist.⁶⁵ Third, there must be no practical alternative to taking measures in self-defense.⁶⁶ Fourth, the measures taken in self-defense are limited to those necessary to stop or prevent the attack.⁶⁷

The crucial matter in the Osiraq affair would appear to be whether an attack on Israel was imminent. Israel claimed that the reactor would have gone on-line as early as the following month, and that striking the reactor after it had become "hot" would have inflicted far greater casualties.⁶⁸ Israel also claimed that the nuclear bombs that an operational Osiraq reactor would be capable of producing would be used against Israel.⁶⁹ Assuming that the factual evidence presented by Israel made it clear that Iraq was embarked on a clandestine program to develop nuclear weapons (this evidence will be discussed later), the dispositive issue was the intentions of Iraq towards Israel at the time of the strike.⁷⁰ In his comprehensive study

view of Article 51, but would allow action in "interceptive self-defense," when an attack is imminent and practically unavoidable, e.g. Israel's first strike in the 1967 Six-Day War. DINSTEIN, *supra* note 26, at 168-173. Oscar Schachter advances the drafting history of Article 51 as manifesting the intent to not impair the pre-Charter right of self-defense. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-1634 (1984).

63. Specifically, Israel cited the reason for its attack thusly: "Under no circumstances will we allow an enemy to develop weapons of mass destruction against our people. We shall defend the citizens of Israel in time, and with all the means at our disposal." U.N. Doc. S/14510, *supra* note 36.

64. 1 OPPENHEIM, *supra* note 58, at 422.

65. *Id.*

66. *Id.* If another state has jurisdiction to stop or prevent the attack but is unable or unwilling to do so, this element is satisfied. *Id.*

67. *Id.* The traditional requirement of proportionality indirectly figures into this element. Oppenheim also adds a fifth element: that, in the case of collective defense, the victim state must request assistance. *Id.* Since the Osiraq was not a matter of collective defense, that element will not be discussed further.

68. U.N. Doc. S/14510, *supra* note 36.

69. *Id.*

70. See MCCORMACK, *supra* note 46, at 45.

of the case, Timothy McCormack takes into account Israel's quite reasonable position that Iraq's prior wars with Israel and the lack of any peace settlement made Iraq a continuing threat to Israel.⁷¹ McCormack also points out that Iraq had ambitions of regional hegemony, a goal which would be furthered by a nuclear attack,⁷² and furthermore that Saddam Hussein had no moral reservations about using nuclear weapons to destroy the "Zionist entity" and its population.⁷³ However, the latter argument is only proven with knowledge after the fact;⁷⁴ Israel could not have proven this from the events contemporaneous with the strike.

Even if Iraq's regional aspirations and designs towards Israel were proven, the question of imminency still remains. McCormack concludes that once Osiraq became operational, it would have taken 12 to 18 months for it to produce enough plutonium for a single nuclear device.⁷⁵ Because Iraq would also have to make the explosive device, McCormack estimates that "it may well have taken longer than two years for Iraq to produce a nuclear weapon."⁷⁶ Although Matt Nydell has shown a genuine tactical need for Israel to destroy Iraq's nuclear weapons before they be installed in delivery devices and dispersed,⁷⁷ it appears that Iraq's nuclear program had a long way to go before that would even be a consideration. Ultimately, it cannot be shown that an armed attack on Israel was imminent.⁷⁸

71. *Id.* at 102.

72. *Id.* at 103.

73. *Id.*

74. The one-time head of Iraq's nuclear weapons program, now a defector to the West, confirms that Saddam Hussein's original plan was to develop a crude device, too large for a warhead, and "drop one unannounced on Israel." KHIDHIR HAMZA, *SADDAM'S BOMBMAKER* 333 (2000).

75. MCCORMACK, *supra* note 46, at 104.

76. *Id.* at 105.

77. Matt S. Nydell, Note, *Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor*, 24 VA. J. INT'L L. 459, 484, n.124 (1984). In addition, Thomas Mallison and Sally Mallison advance the fact that the strike had been planned since 1979 as further proof that the threat was not imminent. W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417, 430 (1982). This author respectfully disagrees with that assertion; the fact that the strike was a long time in the making would actually show that Israel acted with restraint, waiting to strike until what Israel regarded as the last possible moment.

78. See Georges Fischer, *Le Bombardement par Israël d'un Réacteur Nucléaire Irakien*, 27 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 147, 163 (1981); John Quigley, *Israel's Destruction of Iraq's Nuclear Reactor: A Reply*, 9 TEMP. INT'L &

The case of Osiraq exposes the long-recognized difficulty in applying the *Caroline* doctrine, formulated in the context of defending against armed bands operating from another State,⁷⁹ to anticipatory self-defense in the nuclear age. As Waldock put it,

if the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of the purpose of the Charter to compel a defending State to allow its assailant to deliver the first perhaps fatal blow. . . . To cut down the customary right of self-defence beyond even the *Caroline* doctrine does not make sense in times when the speed and power of weapons of attack has [sic] enormously increased.⁸⁰

McDougal and Feliciano cite the above passage to argue against the restrictionist view of Article 51.⁸¹ Even Professor Henkin, who comes out unequivocally in favor of the restrictionist view, acknowledges the argument that upon clear evidence of a sudden, all-out nuclear attack that is so imminent as to be unpreventable, “the only meaningful defense for the potential victim might indeed be the preemptive attack.”⁸² However, opponents of this position argue that the threat of nuclear war further compels the need to maintain a clear distinction between anticipatory self-defense (*i.e.* the *Caroline* formula) and preemptive strikes, which do not fit within that formula.⁸³ Balanced analyses of the two arguments seem to yield no clear answer.⁸⁴

Nagendra Singh analyzed the so-called “right” to anticipatory self-defense as specifically applied to defense against a nuclear

COMP. L.J. 441 (1995); Anthony D’Amato, *Israel’s Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT’L & COMP. L.J. 259, 261 (1996) (though D’Amato would justify the strike on other grounds); DINSTEIN, *supra* note 26, at 169 (though Dinstein would have justified the strike based on Israel’s continuing war with Iraq).

79. BROWNLIE, *supra* note 58, at 257.

80. Waldock, *supra* note 58, at 498.

81. MCDUGAL & FELICIANO, *supra* note 58, at 238.

82. HENKIN, *supra* note 61, at 144.

83. Schachter, *supra* note 62, at 1634 (citing HENKIN, *supra* note 61).

84. *See id.*

strike.⁸⁵ Having presented the conflict between the confines of Article 51 and the need for self-preservation in the nuclear age, Judge Singh's proposed solution was to deem an armed attack as having begun at the time the attack is launched, rather than when the delivery system violates the territory of the target State.⁸⁶ However, his solution could not have taken into account the realities of modern nuclear military tactics. Because nuclear weapons have the potential of defeating (or destroying) the enemy on the first strike, an aggressor State seems far more likely to use nuclear weapons in a surprise attack than by a means that the defending State could easily detect and repel. Nuclear-armed aircraft and submarines can be intercepted and destroyed en route at minimal risk to the territory of the defending State. However, the response time to a nuclear attack launched by missiles from the territory of the attacking State is measured in minutes. A reasonable belief that such an attack will occur puts the defending State on its highest guard indefinitely—exactly the kind of intolerable situation that justified Israel's first strike in the Six-Day War. Furthermore, the capability of States to intercept and destroy missiles en route is still very much in its infancy. Judge Singh's formula was written prior to the contemporary problems of rogue states and large-scale terrorist attacks, and it does not consider the possibility that the nuclear weapon would be delivered clandestinely.

Scholarly studies of the attack on Osiraq differ widely as to whether the attack was justifiable as anticipatory self-defense. Some have rejected the justification on the grounds that an Iraqi attack on Israel was not imminent.⁸⁷ Those who have supported it have argued that the *Caroline* formula for self-defense, as applied to nuclear weapons, is too restrictive for today's reality.⁸⁸ Beth Polebaum

85. M. Nagendra Singh, *The Right of Self-Defence in Relation to the Use of Nuclear Weapons*, 5 INDIAN Y.B. INT'L AFF. 3 (1956).

86. *Id.* at 25. He makes the assumption that the decision to launch the attack is irrevocable, which may be a reasonable assumption in the case of missiles, but not necessarily in the case of submarines or aircraft. *Id.* at 25-26.

87. Nydell, *supra* note 77, at 483; Mallison & Mallison, *supra* note 77, at 431; Joanne E. Birnberg, *The Sun Sets On Tamuz 1: The Israeli Raid on Iraq's Nuclear Reactor*, 13 CAL. W. INT'L L.J. 85, 105 (1983). Birnberg admits, however, that one element of self-defense, that the State invoking it be the target of hostile activities from the State against which it will be invoked, was satisfied by Iraq's manifestation of its desire and intent to destroy Israel. Professor Quigley appears to reject the doctrine of anticipatory self-defense altogether. Quigley, *supra* note 78.

88. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging*

employed a “reasonable nation” test to argue that Israel’s determination that the threat from Iraq was sufficiently great to justify a preemptive strike was completely reasonable.⁸⁹ The conflicts between the *Caroline* formula, modern weapons technology, and between the restrictionist and counter-restrictionist interpretations of Article 51, result in the failure of the doctrine of anticipatory self-defense to provide a satisfactory framework for analyzing the legality of preemptive strikes against nuclear installations such as that against Osiraq in 1981.

C. *Osiraq as a Remedy to an Injury*

A different analytical framework, therefore, must be applied. If Iraq breached a duty and thereby caused injury to Israel that was so severe that the attack on Osiraq was an appropriate remedy, then the attack was just.

1. *Iraq’s duty*

Iraq is one of many signatories to the Nuclear Nonproliferation Treaty (NPT).⁹⁰ It deposited its instrument of ratification to the NPT on October 29, 1969, and the NPT entered into force for Iraq on March 5, 1970, which is the date of entry into force of the Treaty itself.⁹¹ The primary purpose of the Treaty is “to avert the danger of [nuclear] war,”⁹² and its regime is based on the “[b]elief[f] that the

Standard For A Nuclear Age, 59 N.Y.U. L. REV. 187, 223 (1984); Louis Rene Beres, *Reconsidering Israel’s Destruction of Iraq’s Osiraq Nuclear Reactor* 9 TEMP. INT’L & COMP. L.J. 437 (1995); Uri Shoham, *The Israeli Aerial Raid upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191, 220-221. Bruce Hurwitz also rejects the right of anticipatory self-defense, but curiously finds the strike justified anyway. Bruce Hurwitz, *To the Editors-in-Chief*, 78 AM. J. INT’L L. 198 (1984). Professor D’Amato suggests that the strike was permissible because the force was not used against the territorial integrity or political independence of Iraq. Anthony D’Amato, *Israel’s Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584, 585 (1983).

89. Polebaum, *supra* note 88, at 208. Louis Capezzuto does not address the question directly, but endorses Polebaum’s “reasonableness” approach. Louis J. Capezzuto, *Preemptive Strikes Against Nuclear Terrorists and Their Sponsors: A Reasonable Solution*, 14 N.Y.L. SCH. J. INT’L & COMP. L. 375, 393 (1993).

90. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

91. E-mail from Francis J. Holleran, Depositary Officer, Office of the Assistant Legal Advisor for Treaty Affairs, U.S. Department of State, to the author (Sept. 25, 2002, 3:38 p.m. EST) (on file with author).

92. NPT, *supra* note 90, pmbl. para. 2.

proliferation of nuclear weapons would seriously enhance the danger of nuclear war.”⁹³ Article II of the NPT reads,

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; *not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices*; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.⁹⁴

As consideration for abandoning their nuclear aspirations, the non-nuclear States gain access to peaceful nuclear technology, including special fissionable material, but only if the material is subject to safeguards.⁹⁵ The purpose of those safeguards, which are implemented by the International Atomic Energy Agency, is “verification of the fulfillment of its obligations assumed under [the NPT] with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.”⁹⁶ Although the Treaty includes provisions for withdrawal,⁹⁷ Iraq has not done so and its obligation not to develop nuclear weapons continues under the NPT.⁹⁸

2. *Iraq breached its duty*

The facts available on June 7, 1981 showed that Iraq had violated its duty not to develop nuclear weapons; indeed, Iraq was engaged in a large-scale subterfuge by using nuclear technology and material,

93. *Id.* pmb. para. 3. In interpreting the context of the purpose of a treaty, the treaty’s preamble must be taken into consideration. Vienna Convention on the Law of Treaties, *supra* note 8, art. 31, para. 2.

94. NPT, *supra* note 90, art. II (emphasis added). The NPT, at Article IX, paragraph 3, defines “nuclear-weapon State” as one which has manufactured and detonated a nuclear device before January 1, 1967. As of that date, the five nuclear weapon States were the United States, Great Britain, France, the USSR, and China. All other States are considered “non-nuclear-weapon States” under the NPT.

95. *Id.* art. III, para. 2.

96. *Id.* art. III, para. 1.

97. *Id.* art. X, para. 1.

98. Iraq has similar obligations under Security Council resolutions, which will be dealt with in the section on Operation Desert Fox.

which it could not have obtained outside of the NPT-safeguards regime, to do the very thing the regime was designed to prevent.

The detailed facts of the case, as they were available in 1981, are sufficiently well documented to establish conclusively that Iraq intended to use the Osiraq reactor to develop fissionable nuclear material suitable for making a nuclear explosive device. Iraq's first nuclear reactor was a two thermal megawatt reactor built by the Soviets,⁹⁹ suitable for research and little else. In the 1970s, Iraq sought a larger, more powerful reactor.¹⁰⁰ Having decided to buy one from France, Iraq's first choice was a 1500 thermal megawatt gas-graphite reactor.¹⁰¹ As Timothy McCormack's analysis makes clear, Iraq could only have arrived at that choice of reactors if its real intent was neither research nor production of electricity, but in fact to build a nuclear weapon. The gas-graphite reactor, while suitable for generating electricity, had been superseded by more efficient reactor technology,¹⁰² and the need for such capability was questionable given Iraq's vast oil reserves.¹⁰³ Iraq's real interest in the gas-graphite reactor was that it produced large quantities of plutonium, which could be used as the fissionable material for a nuclear bomb.¹⁰⁴

Iraq's second choice, the Osiris model, was also questionable. The Osiris model was not suitable for producing large amounts of electricity, but was eminently suitable for research.¹⁰⁵ However, the Iraqi nuclear program was small and immature, with no apparent need for a 75 thermal megawatt Osiris reactor when a one to five thermal megawatt model would have sufficed.¹⁰⁶ The real reason for the Osiris as Iraq's second choice was, like the gas-graphite model, the ability to produce "significant quantities" of plutonium.¹⁰⁷

In addition, Iraq's preference of highly enriched nuclear fuel was also suspect. The original agreement for the sale of the reactor had also provided for the sale of nearly 80 kilograms of 93% enriched

99. MCCORMACK, *supra* note 46, at 46.

100. *Id.* at 46-47.

101. *Id.* at 47.

102. *Id.*

103. *Id.* at 48.

104. *Id.* at 47. France, Great Britain, the U.S. and the USSR were all producing weapons-grade plutonium using this technology. *Id.*

105. *Id.* at 47-48.

106. *Id.* at 48.

107. *Id.* at 49.

uranium, enough to build up to five nuclear bombs.¹⁰⁸ In response to pressure from Israel, the U.S. and other States, France offered to substitute a different fuel.¹⁰⁹ This 7% enriched fuel, called “caramel,” was suitable for operating the Osiris reactor but could not be used to build an explosive device.¹¹⁰ Iraq, however, insisted on the 93% enriched fuel.¹¹¹

At the time of the Israeli strike on Osiraq, Iraq had bought over 250 tons of natural uranium from other countries.¹¹² Iraq had no reactor that could be fueled with natural uranium.¹¹³ The only reasonable explanation for Iraq’s stockpiling of natural uranium was to blanket the core of the Osiraq core—a procedure necessary for the production of plutonium.¹¹⁴ Even more damning was Iraq’s effort to stockpile depleted uranium.¹¹⁵ Large quantities of depleted uranium have only two uses: (1) in “breeder” reactors, of which Iraq had none;¹¹⁶ and (2) making the recovery of plutonium safer.¹¹⁷

The above facts, all known at the time of the strike, show that Iraq was attempting to manufacture a nuclear weapon,¹¹⁸ even though it had a clear obligation under the NPT not to do so. The element of breach is established.

3. *What was the injury?*

Although Iraq’s breach of its duty not to develop nuclear weapons is established, the extent of the injury to Israel is not as well

108. *Id.* at 50.

109. *Id.*

110. *Id.* at 50-51.

111. *Id.* at 51. It is suggested that Iraq may have had legitimate, research-based reasons for wanting the high enriched fuel. *Id.* Given the totality of the circumstances, however, this author considers the most likely motive for this to be the furtherance of its clandestine nuclear program.

112. *Id.* at 52-53.

113. *Id.* at 53.

114. *Id.* at 52.

115. *Id.* at 53.

116. *Id.* at 54. A “breeder” reactor is used to produce fuel for other reactors. The only working models are in France. *Id.*

117. *Id.* at 53.

118. Subsequent revelations make it even more clear that that was Iraq’s intent. A book by the head of Iraq’s nuclear program, who eventually defected to the West, recounts a meeting in which Saddam Hussein himself asks “When will you deliver the plutonium for the bomb?” HAMZA, *supra* note 74, at 116. When the head of the extraction team reminded him of Iraq’s proscriptions in the NPT, Saddam’s response was to put him in jail. *Id.* at 116-117.

defined. When a State commits an armed attack on another State, in breach of its duty to refrain from the threat or use of force in its international relations,¹¹⁹ the injury sustained by the State against which the armed attack is directed is readily discernable. This is not so when the attack has not yet occurred. In order for Israel's attack on Osiraq to be justifiable, it must be shown that Iraq's breach of its duty injured other States, and specifically Israel, in such way that the use of force against Osiraq was an appropriate remedy.

The relationship of nuclear weapons to anticipatory self-defense has been pondered almost since the inception of the UN Charter. As early as 1946, the Atomic Energy Commission, in considering whether anticipatory self-defense was part of the inherent right to self-defense, reported to the Security Council:

In consideration of the problem of violation of the terms of the treaty or convention [a hypothetical convention controlling nuclear weapons], it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter of the United Nations.¹²⁰

Judge Waldock viewed the report as an affirmation that just as preparation for conventional war may constitute an "armed attack" under Article 51, "preparations for atomic warfare in breach of the Convention would in view of the appalling power of the weapon, have to be treated as an 'armed attack' within Article 51."¹²¹

Writers disagree on the exact moment at which an anticipatory strike against a nuclear threat may be lawfully carried out. Judge Singh placed that moment at the time the attack is launched,¹²² requiring that the attacking State commit the "last irrevocable act"

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

120. U.N. Doc. AEC/18/Rev. 1, at 24; AEC, Special Supp., 1946, at 109-110, reprinted in GOODRICH ET AL., *supra* note 10, at 347.

121. Waldock, *supra* note 58, at 498. Judge Waldock reads the phrase in Article 51 "if an armed attack occurs" to not necessarily mean after it occurs, noting that the French text reads "dans un cas où un Membre des Nations Unies est l'objet d'une agression armée" (in a case where a Member of the United Nations is the object of an armed attack). *Id.* at 497 (translation from French by the author).

122. Singh, *supra* note 85, at 25.

necessary for the attack to take place.¹²³ However, Singh was envisioning nuclear attacks by submarine or aircraft, *i.e.* means of delivery that could be easily detected and intercepted. To apply such criteria to delivery systems that cannot be easily detected or intercepted, such as the launching of ICBMs or clandestine delivery in a cargo container, would run contrary to the basic premise, as expressed by Singh himself, that “in nuclear warfare time is of the very essence.”¹²⁴ The supposition that the point at which an anticipatory strike should be justified comes earlier than the “last irrevocable act” has support from those who have critiqued Singh’s argument.¹²⁵ Indeed, the official U.S. formulation of this principle, which the author coins the “Kennedy formula,” is that “[n]uclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.”¹²⁶

The idea that a State may be “injured” by an attack that has yet to come but is clearly imminent, and therefore may use force in response, has been validated by State practice in situations where the imminency of the attack was clear. The purest example of post-Charter anticipatory self-defense is the 1967 Six-Day War between Israel and its neighbors. Although Israel was the first to actually strike, a number of factors taken together lead to the reasonable conclusion that an armed attack on Israel was imminent.¹²⁷ Those facts included the peremptory expulsion of the U.N. peacekeeping force (UNEF I) from the Sinai,¹²⁸ the unprecedented massing of Egyptian forces along the border,¹²⁹ the closure of the Straits of Tiran (effectively blockading Israel’s only southern access to the high seas),¹³⁰ the inflammatory rhetoric of the Egyptian president,¹³¹ and

123. *Id.* at 26.

124. *Id.* at 24-25.

125. MCDUGAL & FELICIANO, *supra* note 58, at 240.

126. Address by U.S. President John F. Kennedy, The Soviet Threat to the Americas, 47 DEP’T STATE BULL. 715, 716 (1962). The address was made during the 1962 Cuban Missile Crisis.

127. MICHAEL WALZER, JUST AND UNJUST WARS 83 (2d ed. 1977).

128. *Id.* See also UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING 76 (2d ed. 1990).

129. WALZER, *supra* note 127, at 82.

130. *Id.* at 83. With the support of the international community, Israel took the position that the closure of Straits, an international waterway, would constitute an act of war (*casus belli*) on Israel. *Id.*

the sudden alliances of Jordanian and Iraqi forces under Egyptian control.¹³² Israel's first strike was justified even though no attack on Israel had yet taken place.

The international community of States for the most part accepted Israel's justification. Draft resolutions condemning Israel were defeated in both the Security Council and General Assembly.¹³³ The contention that the Israeli first strike was an act of lawful anticipatory self-defense is not widely challenged.¹³⁴

In that case, the injury to Israel was in subjecting it to the intolerable situation of an indefinitely high alert, putting Israel at a significant tactical disadvantage if it did not strike on its own terms. As Michael Walzer put it, "[i]t would have opened Israel to attack at any time. It would have represented a drastic erosion of Israeli security such as only a determined enemy would hope to bring about."¹³⁵

It cannot be said that Iraq's development of nuclear weapons, in breach of its NPT obligations, was a *casus belli* with respect to *all* States. Had the attack on Osiraq been committed by Brazil, a justification of anticipatory self-defense would clearly have been invalid, for Iraq had not threatened or used force against Brazil. Nor can it be said that the development of nuclear weapons *per se*, in the absence of any obligation not to do so, inflicts any injury upon other States. In the absence of a threat or use of force, the appropriate and proportional remedy for development of nuclear weapons in violation of the NPT is for other States to suspend their obligations to Iraq under the NPT,¹³⁶ e.g. by suspending any programs to supply equipment, technology, or materials to Iraq. Although subsequent acts by Iraq demonstrate its propensities toward aggression against other States and utter disregard of its international obligations,¹³⁷

131. A week before the war began, President Nasser announced that if war broke out, Egypt's objective would be nothing less than the destruction of Israel. *Id.*

132. *Id.*

133. U.N. SCOR, 22d Sess., 135th mtg. at 5 (1967); U.N. GAOR, 5th Emer. Spec. Sess., 154th mtg. at 15-17.

134. See, e.g., Richard Gardner, *Commentary on the Law of Self-Defense*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 51 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

135. WALZER, *supra* note 127, at 84.

136. Draft Articles of State Responsibility, *supra* note 7, art. 49, para. 2.

137. E.g., Iraq's use of chemical weapons against the Kurds and against Iranian forces during the Iran-Iraq War, the invasion and annexation of Kuwait by Iraq, the attacks on Iraqi dissident populations after the Gulf War, and the continued refusal

these acts cannot be used in hindsight to find an injury to the international community as a whole, because they had not happened yet.

The injury to Israel, however, is an entirely different matter. Beth Polebaum has proposed a two-tiered analysis to determine whether a State's perception of an imminent nuclear attack is reasonable: (1) what danger does the State perceive; and (2) whether a reasonable State would preemptively strike in such a situation.¹³⁸ The specific questions to be addressed in this context are: (1) what was Israel's perception that a nuclear attack from Iraq was imminent; and (2) was Israel's perception reasonable, and would a reasonable nation have acted in the same manner as Israel did.

Israel perceived an enormous threat from Iraq. Iraqi forces had participated in wars against Israel in 1948, 1956, 1967 and 1973.¹³⁹ Of all the Arab states in the region, Iraq had consistently taken the hardest line against any relationship with Israel or even recognition of Israel as a State.¹⁴⁰ Iraq had declared that it does not consider itself "a party to any resolution, procedure or measure in armistice or cease-fire agreement or negotiations or peace with Israel, now or in the future."¹⁴¹ Iraqi President Saddam Hussein had declared that the basis of the Ba'ath party in Iraq is "the liberation of Palestine."¹⁴² Iraq had been a major supporter of Palestinian terrorist groups.¹⁴³ In January 1980, Iraq's Foreign Minister Hamadi said, "... the land of Palestine is an Arab land and we cannot conceive giving it up. . . . The struggle against Zionism is for us a struggle in which there can be no compromise."¹⁴⁴ Finally, in August 1980, Saddam Hussein said, "[A] better decision [than boycotting any nation with an embassy in Jerusalem] would be to destroy Tel Aviv with bombs. But we have to use the weapons available until it is actually possible to respond to the enemy with bombs."¹⁴⁵ Israel's perception of a threat of attack from

of Iraq to disarm its weapons of mass destruction as ordered by the Security Council under Chapter VII.

138. Polebaum, *supra* note 88, at 209.

139. Shoham, *supra* note 88, at 206 n.67.

140. *Id.* nn.66 & 68-69.

141. *Id.* n.69.

142. Al-Hawadith (Apr. 17, 1981), *cited in* Shoham, *supra* note 88, at 206. The phrase "liberation of Palestine" is an oft-used euphemism for "annihilation of Israel."

143. Shoham, *supra* note 88, at 206.

144. *Id.* at 205.

145. *Id.* at 208.

Iraq seems clear and reasonable under the circumstances.

In determining whether a reasonable State would take preemptive action such as Israel did, Polebaum breaks down the analysis into five elements. First, the decisionmakers must be aware of a clear threat. "An opponent's vague threats to wage war should be insufficient unless its present intention to use nuclear arms then or in the future can be ascertained."¹⁴⁶ That element appears to be satisfied. Second, "[t]he threatening nation must have acquired or must have been acquiring nuclear capability."¹⁴⁷ The facts show that Iraq was close to making nuclear weapons, and none of the writers cited herein refute this, not even those who claim the Israel's strike violated international law. Third, the State carrying out the strike must have:

acted at the last available moment for effective action. . . . Even if relations between the two nations had been tense, a preemptive attack would not have been justified where the relations had undergone no significant change. Such a strike would be justified only if the defending nation reasonably believed that further delay would have seriously compromised its security or would have heightened the danger [to civilians].¹⁴⁸

What had changed in 1981 was that the reactor used for extracting the plutonium necessary to make the bomb was about to become operational. Israel's assertion that attacking an operational nuclear reactor would put the civilian population at risk appears reasonable. Furthermore, to delay the strike until after the plutonium was already extracted and spirited away would completely defeat the purpose of preventing Iraq from making the bomb. Fourth, the State should act affirmatively to seek a peaceful resolution.¹⁴⁹ Israel had, since 1974, expressed its concerns to France, who sold the reactor to Iraq, and to the U.S.¹⁵⁰ It was not possible for Israel to seek a peaceful solution directly with Iraq, who did not recognize its existence and even

146. Polebaum, *supra* note 88, at 210.

147. *Id.*

148. *Id.* at 211.

149. *Id.* at 212.

150. MCCORMACK, *supra* note 46, at 108; Shoham, *supra* note 88, at 214-215.

refused to negotiate with it.¹⁵¹ Polebaum's fifth element, that the strike must be strictly limited to the force necessary to remove the nuclear threat,¹⁵² will be discussed in the section dealing with the appropriate remedy.

From the facts, all of which were known at the time of the attack, it is evident that the prevailing question was not whether Iraq would attack Israel with nuclear weapons, but when. Given its small size and population, a single, well-placed nuclear explosion could so cripple Israel that Iraq and other hostile States could then have easily defeated its armed forces and occupied the country or worse. A mere half-dozen nuclear explosions could eliminate most of the population, making the annihilation of Israel inevitable. The injury to Israel was the real and substantial reduction of its life expectancy to a few years. Such an injury warranted the use of force as an appropriate remedy.

4. What was the appropriate remedy?

The discussion now turns to defining what remedy was proportionate to Israel's injury. Certainly if Iraq actually had carried out a nuclear attack on Israel, Israel's remedy would have been total war against Iraq. Fortunately that did not happen, so the proportionate remedy is something less than total war.

In defining the proportionality of a remedy to an armed attack that has not yet occurred, it may be useful to draw an analogy to an interest-bearing certificate of deposit. Suppose that the objective is to have a \$1000 payout when the CD expires. To achieve this objective after only one year, it would be necessary to make a large deposit, say \$950. One could deposit much less, say \$250, but the objective of \$1000 might take 20 years to be realized. Now suppose that the objective of a nuclear attack on Israel is equivalent to the \$1000, and the point at which Iraq's nuclear program had progressed represents \$250 toward that goal. At that point in Iraq's investment, Israel's remedy to its above-stated injury is not total war against Iraq, but rather is limited to the destruction of the means for Iraq to carry out the attack. Before the reactor goes on line, the amount of force necessary to do this is equivalent to the \$250 investment of Iraq. After the reactor goes on line and begins producing plutonium, Iraq's investment may have increased to \$500 and the amount of force proportional to the injury would correspondingly increase as well.

151. Shoham, *supra* note 88, at 205.

152. Polebaum, *supra* note 88, at 212.

From an economy of force standpoint, it made sense for Israel to destroy the reactor when it did, because waiting until Iraq's return on its investment was larger would mean that the amount of force required to destroy it would have had to be much greater as well. The amount of force proportional to the injury is equivalent to the "present value" of the injury, not the future value. From this perspective, Israel's operation—destroying the nonoperational reactor and nothing else—was the minimum amount of force necessary¹⁵³ for Israel to secure its remedy to the injury caused by Iraq's breach of its obligations. That remedy was the inability of Iraq to attack Israel with nuclear weapons.

IV. Enough Is Enough: Operation Desert Fox

A. What Happened

On December 16-19, 1998, in a campaign known as "Operation Desert Fox," U.S. and British forces conducted a series of strikes against military targets in Iraq. The purpose of the operation was to attack Iraq's weapons of mass destruction (WMDs) and "its ability to threaten its neighbors."¹⁵⁴ The operation was in direct response to Iraq's failure to cooperate with U.N. organs in disarming its WMDs.

The strikes were a culmination of a long-smoldering dispute over Iraq's compliance with the disarmament scheme imposed on it by the Security Council. By the terms of Security Council Resolution 687, which the Council enacted as the "cease-fire agreement" after the Gulf War, Iraq was required to submit to the total disarming of its weapons of mass destruction (specifically nuclear, chemical and biological weapons) and submit to on-site inspections.¹⁵⁵ Iraq was also required to submit to the destruction of all its ballistic missiles with a range greater than 150 kilometers.¹⁵⁶ The inspection and verification of the disarmament of the chemical and biological weapons and ballistic missiles was to be carried out by a special commission established by the Security Council (the United Nations Special

153. This is Polebaum's fifth element to her "reasonable State" analysis. *Id.* at 212.

154. *Letter dated 16 December 1998 from the Chargé d'Affaires a.i. of the United States Mission to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/1998/1181 (Dec. 16, 1998).

155. S.C. Res. 687, ¶¶ 8-12 (1991).

156. *Id.* ¶ 8(b).

Commission, or UNSCOM).¹⁵⁷ Iraq's nuclear program was subject to the same regulations, a program that was to be carried out by the International Atomic Energy Agency (IAEA).¹⁵⁸ However, as the pattern of conduct of Iraq since 1991 has clearly shown, Iraq never had any intention of dismantling these programs¹⁵⁹ and the disarmament process, to say the least, has not gone well.

Far from complying with its disarmament obligations, Iraq "chose to follow a course of denial, concealment and obstruction" from the outset.¹⁶⁰ The specific instances of Iraq's deception are already well documented in other sources.¹⁶¹ The following is a brief

157. *Id.* ¶ 9(b)(i).

158. *Id.* ¶ 13.

159. RICHARD BUTLER, *THE GREATEST THREAT: IRAQ, WEAPONS OF MASS DESTRUCTION, AND THE CRISIS OF GLOBAL SECURITY* 143-144 (2000). Mr. Butler writes, "Iraq's behavior had made perfectly clear that Saddam's fundamental concern was not relief from sanctions but to maintain weapons of mass destruction. If relief from sanctions had been his main concern, he could have achieved that quickly, years before, by cooperating with the disarmament requirements." Mr. Butler was the Chairman of UNSCOM during the events leading up to and including Operation Desert Fox. Mr. Butler's deputy, Charles Duelfer, writes, "Iraq believes these weapons capabilities are highly valuable, perhaps essential, for its national security." Charles Duelfer, *Arms Reduction: The Role of International Organizations, the UNSCOM Experience*, 5 J. CONFLICT & SECURITY L. 105, 107 (2000).

160. *Fourth Consolidated Report of the Director General of the International Atomic Energy Agency under paragraph 16 of Security Council resolution 1051 (1996)*, ¶ 74, Appendix to *Note by the Secretary General*, U.N. Doc. S/1997/779 (Oct. 8, 1997). These are particularly strong words in the watered-down diplomatic language of the U.N.

161. BUTLER, *supra* note 159; Duelfer, *supra* note 159; SCOTT RITTER, *ENDGAME, SOLVING THE IRAQ PROBLEM—ONCE AND FOR ALL* (1999); Sean M. Condrón, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115 (1999); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124 (1999); Nigel D. White & Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat Too Far?*, 29 CAL. W. INT'L L.J. 243 (1999); UNSCOM: Chronology of Main Events, December 1999, on the U.N. website at <http://www.un.org/Depts/unscom/Chronology/chronologyframe.htm> (last visited Apr. 17, 2003) [hereinafter UNSCOM Chronology]. The reports of UNSCOM up to Operation Desert Fox are in U.N. Docs. S/23165 (1991), S/23268 (1991), S/23801 (1992), S/24108 & Corr. 1 (1992), S/24661 (1992), S/24984 (1992), S/25620 (1993), S/25977 (1993), S/26684 (1993), S/26910 (1993), S/1994/489, S/1994/750, S/1994/1138 & Corr. 1, S/1994/1422 & Add. 1, S/1995/284, S/1995/494, S/1995/864, S/1995/1038, S/1996/258, S/1996/848, S/1997/301, S/1997/774, S/1998/332, S/1998/920, S/1998/995, S/1998/1023, S/1998/1032, S/1998/1059, S/1998/1127, and S/1998/1172 & Corr. 1. The reports of the International Atomic Energy Agency (IAEA), with respect to weapons inspection in Iraq, up to Operation Desert Fox are in U.N. Docs. S/23813 (1992), S/24722 (1992), S/25621 (1993), S/26685 (1993), S/1994/490, S/1994/1151,

recounting of the events that finally led to Operation Desert Fox.

Iraq's course of subterfuge began immediately after the Gulf War, when Iraq revealed to U.N. inspectors only a portion of its WMD programs. Iraq declared only 10 of 19 mobile ballistic launchers and only 45 of about 140 Al-Hussein long-range ballistic missiles. Iraq revealed its program to modify its short-range Scud missiles to the long-range Al-Husseins, but not its program for indigenous development of long-range missiles. Iraq declared "aspects" of its chemical weapon inventory and production capabilities, but hid thousands of bombs and artillery shells containing the deadly chemicals, including VX nerve gas which Iraq had never acknowledged possessing. Iraq made no declarations at all regarding its biological weapons program.¹⁶² UNSCOM inspectors believed Iraq had revealed about one-third of its WMD capability and was concealing the remaining, more valuable aspects.¹⁶³ Confrontations between weapons inspectors and Iraqi officials quickly ensued. A quite unamused Security Council passed Resolution 707, demanding that Iraq "provide without further delay full, final and complete disclosure . . . of all aspects of its programmes to develop weapons of mass destruction and [prohibited] ballistic missiles,"¹⁶⁴ allow UNSCOM and IAEA inspectors "immediate, unconditional and unrestricted access to any and all areas, facilities, equipment, records and means of transportation which they wish to inspect,"¹⁶⁵ and "cease immediately any attempt to conceal, move or destroy [prohibited] material or equipment . . . without notification to and prior consent of the Special Commission."¹⁶⁶

The situation did not improve significantly. In January 1993, Iraq threw up obstacles to UNSCOM aircraft landing in Iraqi airfields, but relented after the U.S., Great Britain and France conducted air strikes against Iraq.¹⁶⁷ In 1994, Iraq imposed a deadline for completion of inspections, after which time it would cease cooperating with UNSCOM, but relented after the U.S. began

S/1995/287, S/1995/604, S/1995/844, S/1996/261, S/1996/833, S/1997/297, S/1997/779, S/1998/312, S/1998/694, S/1998/927, S/1998/1033, S/1998/1058, and S/1998/1172 & Corr. 1 (a joint report with UNSCOM).

162. RITTER, *supra* note 161, at 33.

163. Duelfer, *supra* note 159, at 109.

164. S.C. Res. 707, ¶ 3(a) (1991).

165. *Id.* ¶ 3(b).

166. *Id.* ¶ 3(c).

167. Duelfer, *supra* note 159, at 111.

amassing forces in the region.¹⁶⁸ In August 1995, Iraqi Lt. General Hussein Kamel, who headed most of Iraq's WMD programs, defected to Jordan and revealed to inspectors the true extent of the programs, and how Iraq had successfully deceived UNSCOM.¹⁶⁹ Having already filed three "Full, Final and Complete Disclosures" on the nature of biological weapons program, Iraq was then forced to admit the much greater extent of its programs.¹⁷⁰ Iraq spent most of 1996 and 1997 blocking UNSCOM access to inspection sites¹⁷¹ and making new and consistently deficient "Full, Final and Complete Disclosures."¹⁷² Following the expulsion of all United States nationals working for UNSCOM from Iraq, UNSCOM withdrew all but a skeleton crew¹⁷³ and returned only after Iraq agreed to accept its full complement of staff.¹⁷⁴

The series of crises leading to Operation Desert Fox began with Iraq's refusal of access to certain sites on the basis that they were "Presidential sites," and therefore out of bounds of UNSCOM inspectors.¹⁷⁵ In November 1997, the U.S. and Great Britain began deploying additional forces in the region.¹⁷⁶ Iraq's non-cooperation, as well as its blockage of access to eight "Presidential sites," continued through January 1998.¹⁷⁷ By February, the U.S. and Great

168. UNSCOM Chronology, *supra* note 161.

169. Duelfer, *supra* note 159, at 113.

170. UNSCOM Chronology, *supra* note 161.

171. *Id.*; see also Duelfer, *supra* note 159, at 114-115, and *Iraq's Compliance with paragraphs 2 and 3 of Security Council resolution 1115 (1997)*, Annex I to *Report by the Secretary-General on the activities of the Special Commission established by the Secretary-General pursuant to paragraph 9 (b) (i) of resolution 687 (1997)*, U.N. Doc. S/1997/774 (Oct. 6, 1997).

172. *Findings of the international panel of experts on Iraq's full, final and complete disclosure of its proscribed biological weapons programme*, Annex II to U.N. Doc. S/1997/774, *supra* note 171.

173. UNSCOM Chronology, *supra* note 161.

174. *Id.*

175. *Id.*; *Report on the visit to Baghdad from 12 to 16 December 1997 by the Executive Chairman of the Special Commission established by the Secretary-General under paragraph 9 (b) (i) of Security Council resolution 687 (1991)*, Annex to *Letter dated 17 December 1997 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to paragraph 9 (b) (i) of Security Council resolution 687 (1991) addressed to the President of the Security Council*, U.N. Doc. S/1997/987 (Dec. 17, 1997).

176. White & Cryer, *supra* note 161, at 256.

177. UNSCOM Chronology, *supra* note 161; *Letter dated 22 January 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to paragraph 9 (b) (i) of Security Council resolution 687 (1991) addressed to*

Britain were threatening to use force against Iraq unless its Presidential sites were opened up to inspectors.¹⁷⁸ As a result, U.N. Secretary-General Annan concluded a Memorandum of Understanding (MOU) with Iraq establishing special procedures for inspecting the Presidential sites.¹⁷⁹ The Security Council endorsed the MOU,¹⁸⁰ thus averting strikes against Iraq. However, the subsequent inspections of the sites did little to diffuse the crisis, for Iraq had ample time to sanitize the sites and many buildings were virtually empty, making it “clearly apparent that all sites had undergone extensive evacuation.”¹⁸¹ A dispute over subsequent visits to the sites immediately ensued; Iraq claimed the MOU was to permit one-time visits only, contrary to the interpretation of the Secretary-General¹⁸² and also contrary to the plain meaning of the text of the MOU.¹⁸³ In August 1998, Iraq declared its intention to cease all cooperation with UNSCOM and the IAEA (except some monitoring) unless the Security Council agreed to lift the oil embargo on Iraq, reorganize UNSCOM and move its headquarters out of the United States.¹⁸⁴ The Security Council condemned the decision¹⁸⁵ and Iraq responded by halting the work of UNSCOM and IAEA altogether.¹⁸⁶ UNSCOM and IAEA evacuated their personnel from Iraq.¹⁸⁷ Three days later,

the President of the Security Council, U.N. Doc. S/1998/58 (Jan. 22, 1998). These sites were comprised of about 1500 buildings and some of them covered areas the size of Washington, DC. Condron, *supra* note 161, at 172.

178. White & Cryer, *supra* note 161, at 261.

179. Memorandum of Understanding between the United Nations and the Republic of Iraq, in *Letter dated 25 February 1998 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/1998/166 (Feb. 25, 1998). The MOU established a “Special Group” of senior diplomats and technical experts to carry out the inspections. *Id.* ¶ 4(a).

180. S.C. Res. 1154, U.N. SCOR, 54th Sess., 3858th mtg., U.N. Doc. S/RES/1154 (1998).

181. *Initial entry to the presidential sites, Summary report of the Head of the Team*, para. 11, Appendix III to *Letter dated 15 April 1998 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/1998/326 (Apr. 15, 1998).

182. BUTLER, *supra* note 159, 144-151.

183. Iraq had agreed that the special procedures for entry into the Presidential sites “shall apply to the initial and subsequent entries” into them. U.N. Doc. S/1998/166, *supra* note 179, ¶ 4.

184. UNSCOM Chronology, *supra* note 161.

185. S.C. Res. 1194 (1998).

186. Duelfer, *supra* note 159, at 117.

187. *Letter dated 11 November 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to paragraph 9 (b) (i) of Security Council resolution 687 (1991) addressed to the President of the Security*

Iraq very narrowly averted American air strikes against it by agreeing to resume cooperation with both agencies.¹⁸⁸ Inspectors resumed their work, but impediments to UNSCOM's work persisted.¹⁸⁹ On December 15, 1998, the IAEA and UNSCOM transmitted their reports of Iraqi cooperation; IAEA concluded that Iraq had been cooperative¹⁹⁰ but UNSCOM did not, reporting that "Iraq's conduct ensured that no progress was able to be made in either the fields of disarmament or accounting for its prohibited weapons programmes."¹⁹¹ After seven years, reported UNSCOM, "its disclosure statement had never been complete" and "it [had] pursued a practice of concealment of proscribed items, including weapons."¹⁹² Air strikes began the following day. UNSCOM and IAEA again evacuated Iraq and did not return for nearly four years.

B. Legal Theories Justifying Operation Desert Fox

The reaction of the Security Council to Operation Desert Fox underscores the deep divisions concerning how to deal with a roguish, dangerous State such as Iraq. The Security Council met only once to discuss the matter¹⁹³ and it did not vote on any resolution supporting or condemning the strikes. Only three members (Russia, China and Kenya) were of the opinion that the strikes were completely

Council, U.N. Doc. S/1998/1059 (Nov. 11, 1998); *Letter dated 11 November 1998 from the Director General of the International Atomic Energy Agency addressed to the Secretary-General, Annex to Letter dated 11 November 1998 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/1998/1058 (Nov. 11, 1998).

188. *Letter dated 14 November 1998 from the Deputy Prime Minister of Iraq addressed to the Secretary-General, Annex to Letter dated 14 November 1998 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, U.N. Doc. S/1998/1078 (Nov. 14, 1998). Indeed, U.S. aircraft were already en route to Iraq and were recalled when Iraq transmitted its decision. (The author was the Deputy Staff Judge Advocate to the 4404th Wing (Provisional), now the 363rd Air Expeditionary Wing, in Saudi Arabia at the time of the operation.)

189. BUTLER, *supra* note 159, at 204.

190. *Letter dated 14 December 1998 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, Annex I to Letter dated 15 December 1998 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/1998/1172 (Dec. 15, 1998).

191. *Letter dated 15 December 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to paragraph 9 (b) (i) of Security Council resolution 687 (1991) addressed to the Secretary-General*, at 12, Annex II to U.N. Doc. S/1998/1172, *supra* note 190.

192. *Id.* at 4.

193. U.N. SCOR, 53d Sess., 3955th mtg., U.N. Doc. S/PV.3955 (1998).

unjustified.¹⁹⁴ Three members (Great Britain, United States and Japan, two of which carried out the operation) declared not only that Iraq had failed to live up to its obligations, but that the use of force against Iraq without prior Security Council authorization was justified because Iraq had breached Security Council Resolution 687, which laid out the conditions of the cease-fire agreement with Iraq after the Gulf War.¹⁹⁵ Four members (Costa Rica, Slovenia, Sweden and Brazil) agreed that Iraq was to blame for the crisis but the use of force against Iraq should have been authorized by the Security Council;¹⁹⁶ of those, two apparently would have been in favor of it.¹⁹⁷ Two other members (Portugal and France) neither supported nor condemned the operation, but were both very critical of Iraq.¹⁹⁸ The totality of the statements indicates that the Security Council actually came down more harshly on Iraq than on the United States and Great Britain.

Enforcement of a cease-fire agreement was the justification presented officially for the operation. Writers on the subject generally agree that Iraq was not in compliance with the disarmament and inspection provisions of Security Council Resolution 687. The Security Council itself had made such a finding on multiple occasions.¹⁹⁹ What writers generally do not agree upon is whether one

194. *Id.* at 4 (Russia); *id.* at 5 (China); *id.* at 12 (Kenya).

195. *Id.* at 6 (Great Britain); *id.* at 9 (U.S.), 11 (Japan). Great Britain also referred to Security Council resolution 1154 (Mar. 2, 1998), which threatened the "severest consequences" if Iraq did not cooperate with the inspectors. Of the three, only the U.S. specifically invoked Security Council resolution 678 (1991) (which authorized States to use "all necessary means" to expel Iraqi forces from Kuwait) as the legal authority to resume hostilities against Iraq.

196. U.N. Doc. S/PV.3955, *supra* note 193, at 7-8 (Costa Rica and Slovenia); *id.* at 10-11 (Sweden, Brazil).

197. Slovenia, like Great Britain, referred to the "severest consequences" threat of Security Council resolution 1154. *Id.* at 8. Sweden explicitly stated that it would have voted in favor of resolution authorizing force against Iraq. *Id.* at 10.

198. *Id.* at 8 (Portugal); *id.* at 12-13 (France). Of the remaining members, two (Gambia and Gabon) were neither supportive nor condemnatory of the operation, nor supportive nor critical of Iraq. *Id.* at 11 (Gambia); *id.* at 13 (Gabon). The Permanent Representative of Bahrain (who presided over the meeting) did not make a statement in his national capacity.

199. S.C. Res. 707, *supra* note 164; S.C. Res. 1060, U.N. SCOR., 51st Sess., 3672d mtg., U.N. Doc. S/RES/1060 (1996); S.C. Res. 1115, U.N. SCOR., 52d Sess., 3792d mtg., U.N. Doc. S/RES/1115 (1997); S.C. Res. 1134, U.N. SCOR., 52d Sess., 3826th mtg., U.N. Doc. S/RES/1134 (1997); S.C. Res. 1137, U.N. SCOR., 52d Sess., 3831st mtg., U.N. Doc. S/RES/1137 (1997); S.C. Res. 1154, *supra* note 180; S.C. Res. 1194, *supra* note 185; S.C. Res. 1205, U.N. SCOR., 53d Sess., 3939th mtg., U.N. Doc. S/RES/1205 (1998).

or a few states may act to enforce the cease-fire agreement unilaterally, *i.e.* without prior, specific authorization from the Security Council. Ruth Wedgwood supported unilateral force against Iraq, asserting that the original cease-fire was actually between Iraq and the coalition forces,²⁰⁰ of which the U.S. was the leader. "It is not unreasonable to regard the terms of such a cease-fire as self-executing, just as the violation of a newly settled boundary line or demilitarized zone would entitle a neighboring state to act upon a violation."²⁰¹ Under this theory the "coalition" (or rather, what was left of it) had a legitimate basis for enforcing the agreement. This position carries some support in Oppenheim's International Law, in which a violation of an essential stipulation of a peace treaty creates a right for the other party to cancel it²⁰² (and consequently go to war). It follows that the basis for going back to war would be the original resolution, which authorized the coalition to war against Iraq in the first place, *i.e.* Security Council Resolution 678.²⁰³ Sean Condrón arrives at a similar conclusion, but only after some hesitation and a finding that the U.N. had acquiesced to the unilateral threat or use of force by the United States against Iraq in the past.²⁰⁴

The opposing view, taken by many other writers and which appears to prevail among Member States of the Security Council, is that only the Security Council can authorize the use of force to enforce a Security Council resolution.²⁰⁵ For example, White and Cryer assert that it was the Security Council who fought the Gulf War against Iraq, and the Security Council who set forth the conditions to

200. Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 726 (1998).

201. *Id.*

202. 2 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 61, at 616. The principle is also embodied in Article 40 of the Regulations Respecting the Law and Customs of War on Land, 36 Stat. 2295, 2305-2306 [hereinafter Hague Regulations], Annex to Convention (IV) respecting the Laws and Customs of War on Land, *supra* note 6.

203. There would therefore be no need to rely on threats of "severest consequences" such as that of resolution 1154, ¶ 3. Indeed, to do so would be detrimental, given the statements of Council members that the resolution was not to be construed as a specific authorization of force against Iraq. U.N. SCOR, 53d Sess., 3858th mtg. at 14-17, U.N. Doc. S/PV.3858 (1998).

204. Condrón, *supra* note 161, at 178-180.

205. Michael L. Cornell, Comment, *A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction*, 16 CONN. J. INT'L L. 325 (2001); White & Cryer, *supra* note 161; Lobel & Ratner, *supra* note 161.

the cease-fire.²⁰⁶ They argue that once Iraq agreed to the cease-fire and the coalition withdrew its forces, the authorization to use force in Resolution 678 was cancelled.²⁰⁷ Therefore, they argue, any use of force to enforce Resolution 687 must be separately mandated; to proceed otherwise is to “sanction the permanent delegation of authority” of the Security Council to use force²⁰⁸ and such a delegation of authority would be *ultra vires*. White and Cryer argue further that the final paragraph of Resolution 687, which states that the Council would “take such further steps as may be required for the implementation of this resolution,”²⁰⁹ is an indicator that the Council intended that any enforcement action could only be carried out by the Council²¹⁰ (i.e. that the Resolution is *not* self-executing) and that threatening language such as “serious consequences for non-compliance” in subsequent resolutions is “too ambiguous to give the airstrikes a firm legal basis.”²¹¹ David Morriss, in his analysis of multilateral armistice agreements, writes, “Although terms of the armistice agreements dealing with important but collateral issues such as verification regimes . . . may fail, the overriding obligation not to resort to force as a means of dispute settlement is deemed severable and continues to be binding.”²¹²

This argument has several flaws. First, the authorization for the coalition to use force against Iraq during the Gulf War flowed not only from Security Council Resolution 678, but also from the inherent right of self-defense as embodied in Article 51 of the Charter. Had the Security Council never acted, the expulsion of Iraq from Kuwait and subsequent measures to disarm it would still have taken place on a perfectly sound legal basis. Rather than the coalition acting as a proxy for the Security Council, the Security Council was acting as a validator for the coalition. The war and the subsequent cease-fire were led not by the Security Council, but by the United States. Second, the interpretation of Article 34 of Resolution 687 as a

206. White & Cryer, *supra* note 161, at 270. See also Lobel & Ratner, *supra* note 161, at 127.

207. White & Cryer, *supra* note 161, at 273. See also Lobel & Ratner, *supra* note 161, at 125.

208. White & Cryer, *supra* note 161, at 272.

209. S.C. Res. 687, *supra* note 155, at ¶ 34.

210. White & Cryer, *supra* note 161, at 275.

211. *Id.* at 276.

212. David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 822-823 (1996).

statement that further steps from the Security Council would be required to enforce it, reads language into the resolution that is not there. The resolution stated that the Security Council would take further steps to *implement* the resolution, *e.g.* approving inspection plans, supervising the return of Kuwaiti property and repatriation of Kuwaiti nationals, implementing a plan for reparations. Third, the fact that the words “serious consequences” do not expressly mean air strikes does not deprive them of a legal basis for other reasons. Finally, the threats of force prior to Operation Desert Fox and the use of force during the operation were not unilateral; other States, most notably Great Britain, participated and the operations had the political support of other States.²¹³ For these reasons, the author finds the argument against the legality of Operation Desert Fox unpersuasive.

Conventional *jus ad bellum*, however, does not present a conclusive answer to the question, as the diverse opinions of States and publicists have demonstrated. Condron, analyzing the problem under the law of anticipatory self-defense and reprisals, finds the former an inadequate justification for lack of imminency of attack²¹⁴ and the latter an adequate justification after applying D.W. Bowett’s preconditions for reprisals.²¹⁵ This author, on the other hand, disagrees with both of Condron’s conclusions: as the discussion of the Israeli strike on Osiraq has shown, there is precedent for relaxing the imminency requirement of anticipatory self-defense when weapons of mass destruction are involved, and the doctrine of “reprisals” in post-Charter *jus ad bellum* is both unnecessary and dangerous.²¹⁶ At the end of the day, the questions remain.

C. Operation Desert Fox as a Remedy to an Injury

Under the theory presented at the beginning of this work, when a State breaches an obligation to another State, and that breach results

213. *E.g.* Japan’s support of Operation Desert Fox, *supra* note 195. White & Cryer themselves acknowledge that the threat of force during the crisis of February 1998 had the political support of about 20 States. White & Cryer, *supra* note 161, at 243.

214. Condron, *supra* note 161, at 150.

215. *Id.* at 164. Bowett presented his preconditions in Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 3 (1972).

216. See Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Response*, 11 CARD. J. INT’L & COMP. L. 1, 35-37 (2003).

in an injury to the other State, the injured State has the right to a remedy from the State that breached its obligation. Although the backdrop for the application of this theory is the events leading up to and including Operation Desert Fox, the approach is as germane to the current debate of going to war with Iraq as it is to the events of five years ago.

1. *Iraq's legal obligations*

Iraq was under a variety of legal obligations not to develop nuclear, biological or chemical weapons, and to dismantle its existing capabilities in those areas. Iraq's treaty-based obligations regarding nuclear weapons have been documented in the previous section on Osiraq. Iraq is also a party to the 1925 Geneva Gas Protocol, which prohibits the wartime use of asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices.²¹⁷ This Protocol also prohibits the "use of bacteriological methods of warfare."²¹⁸ Although the 1925 Gas Protocol proscribes the *use* of gaseous and bacteriological weapons, it places no restrictions on the development and stockpiling of such weapons. However, Iraq is also a party to the 1972 Biological Weapons Convention,²¹⁹ which it ratified after the Gulf War.²²⁰ Article I of the Convention reads:

217. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, Geneva, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Gas Protocol]. Iraq acceded to the Gas Protocol on September 8, 1931, with two reservations: (1) that Iraq is bound by the Protocol only towards other parties to it; and (2) that Iraq is not bound toward enemy States whose armed forces, or the armed forces of their allies, do not respect the Protocol. E-mail from Francis J. Hollaran, Depositary Officer, Office of the Assistant Legal Advisor for Treaty Affairs, U.S. Department of State to the author (Nov. 12, 2002, 10:54 a.m. EST) (on file with author). The Gas Protocol has a great many parties, including the United States and all of its NATO allies, the USSR (now Russia), China, Japan, both Koreas, India and Pakistan. All the States in the Middle East are parties (including Iran and Israel), except for Oman and the United Arab Emirates. U.S. DEPARTMENT OF STATE, TREATIES IN FORCE (2002).

218. Gas Protocol, *supra* note 217.

219. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention].

220. Iraq deposited its ratification of the Convention on April 18, 1991. E-mail from State Department, *supra* note 91. Iraq ratified the Convention in response to paragraph 7 of Security Council Resolution 687, in which the Council "invite[d]" Iraq to do so. Because Security Council Resolution 687 was the cease-fire agreement ending the Gulf War, the circumstances raise the question of whether Iraq was coerced into acceding to the Convention. Article 52 of the Vienna Convention on

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

- (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.²²¹

Article II of the Convention requires States to “destroy, or to divert to peaceful purposes . . . all agents, toxins, weapons, equipment and means of delivery . . . which are in its possession or under its jurisdiction or control.”²²² Iraq is not a party to the 1993 Chemical Weapons Convention,²²³ and therefore the treaty-based prohibitions on developing and stockpiling chemical weapons, as well as the use of non-gaseous weapons, do not apply to it.

However, Iraq, like all nations, remained bound under customary international law to observe certain restrictions on its conduct in warfare. The customary law of war (*jus in bello*) prohibits attacks on civilians²²⁴ and attacks “which may be expected to cause incidental loss of civilian life [or] injury to civilians . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”²²⁵ The use of certain weapons, biological weapons in

the Law of Treaties, *supra* note 8, renders a treaty void if procured by the threat or use of force. However, the threat or use of force must have been in violation of the Charter. Since the use of force was justified under Article 51 of the Charter, as well as authorized by Security Council Resolution 678, the cease-fire agreement (and Iraq's accession to the Convention) is not rendered void for coercion.

221. Biological Weapons Convention, *supra* note 219, art. 1.

222. *Id.* art. 2.

223. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993).

224. Protocol I Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, ¶ 2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I].

225. *Id.* art. 51, ¶ 5(b). Notwithstanding that neither Iraq nor the U.S. are parties to the Protocol, the principles of military necessity and proportionality embodied in them are generally regarded as reaffirmations of customary international law.

particular, violates this principle because they are so indiscriminate as to pose a significant danger to the civilian population, if they are directed toward enemy combatants and other lawful targets.²²⁶ The prohibition of targeting civilians is not limited to weapons of mass destruction. Iraq, like all States, had the obligation not to deliberately target civilian populations using conventional weapons, or to use such weapons in a manner that does not adequately distinguish between a legitimate military objective and the civilian population. For example, if Iraq intended to attack a military target with long-range ballistic missiles, it had a duty to ensure that the missile has a reasonably good chance of hitting that target. To fire a missile at a certain target knowing that it has only a slim chance of hitting it would be unlawful.

Iraq also had specific obligations imposed on it by the Security Council. In Resolution 687, the Security Council imposed the following duties on Iraq:

Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of

(a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto;

(b) All ballistic missiles with a range greater than [150] kilometres, and related major parts and repair and production facilities;²²⁷

The Security Council also decided that "Iraq shall unconditionally undertake not to use, develop, construct or acquire any of the items specified [above]."²²⁸ Regarding Iraq's program for developing nuclear weapons, the Council imposed the following obligations on Iraq:

Iraq shall unconditionally agree not to acquire or

226. Admittedly the same cannot necessarily be said of certain types of chemical weapons that disperse and evaporate so quickly that the chemicals are rendered harmless within an hour of delivery.

227. S.C. Res. 687, *supra* note 155, at ¶ 8.

228. *Id.* ¶ 10.

develop nuclear weapons or nuclear-weapon-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above.²²⁹

Security Council Resolution 687 thus completely bans Iraq from possessing or developing nuclear, biological or chemical weapons.²³⁰

Resolution 687 also imposed on Iraq several duties designed to ensure its compliance with the proscriptions enumerated above. The Council ordered Iraq to submit "a declaration on the locations, amounts and types of all items specified [above]"²³¹ and to submit to on-site inspections of Iraq's biological, chemical and missile capabilities, with the objective of destroying or rendering harmless those programs.²³² In the nuclear arena, Iraq was required:

to submit . . . a declaration of the locations, amounts and types of all items specified above; to place all of its nuclear-weapon-usable materials under the exclusive control, for custody and removal, of [the IAEA]. . . ; to accept . . . urgent on-site inspection and the destruction, removal or rendering harmless . . . of all items specified above; and to accept . . . future ongoing monitoring and verification of its compliance with these undertakings.²³³

After initial Iraqi recalcitrance, the Security Council clarified these obligations in Resolution 707, demanding that Iraq "provide . . . full, final and complete disclosure . . . of all aspects of its programmes to develop weapons of mass destruction and ballistic missiles with a range greater than [150] kilometres,"²³⁴ and further demanded that Iraq allow UNSCOM and IAEA inspectors "immediate, unrestricted and unconditional access"²³⁵ and to cease all attempts to conceal or

229. *Id.* ¶ 12.

230. The resolution makes no mention of radiological weapons, which are the other category of weapons of mass destruction.

231. *Id.* ¶ 9(a).

232. *Id.* ¶¶ 9(a)-9(b).

233. *Id.* ¶ 12.

234. S.C. Res. 707, *supra* note 164, ¶ 3(a).

235. *Id.* ¶ 3(b).

relocate items of interest.²³⁶

Both resolutions 687 and 707, as well as all subsequent resolutions on Iraqi disarmament, were enacted under Chapter VII of the Charter. Under Chapter VII, the Security Council has the authority to decide what measures shall be taken to maintain and restore international peace and security.²³⁷ Members of the United Nations have the obligation to “accept and carry out the decisions of the Security Council.”²³⁸ Iraq, being a member of the United Nations, had the affirmative duty to carry out the decisions of the Security Council. Furthermore, as members of the Security Council have asserted and writers on Operation Desert Fox have acknowledged, Security Council Resolution 687 constituted a cease-fire agreement,²³⁹ which Iraq accepted in writing.²⁴⁰ The agreement was therefore binding on Iraq and the principle of *pacta sunt servanda* required that Iraq perform its provisions in good faith.²⁴¹

2. *Iraq has breached its obligations*

Iraq violated every obligation mentioned above, and worse, tried to deceive the Security Council into believing that it was in fact in

236. *Id.* ¶ 3(c).

237. U.N. CHARTER art. 39.

238. *Id.* art. 25.

239. Resolution 687 states that “upon official notification by Iraq to the Secretary-General and the Security Council of its acceptance of the above provisions, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990).” S.C. Res. 687, *supra* note 155, ¶ 33.

240. *Identical letters dated 6 April 1991 from the Minister for Foreign Affairs of the Republic of Iraq addressed respectively to the Secretary-General and the President of the Security Council*, Annex to UN Doc. S/22456 (1991). At page 7, Iraq states that “it has no choice but to accept this resolution.” The extremely bellicose, grudging and unrepentant tone of the letter calls into question whether Iraq entered into this agreement voluntarily. Writers disagree on this question. Duelfer, for example, does not view the resolution as an arms control agreement. Duelfer, *supra* note 159, at 107. Wedgwood, however, does regard the cease-fire as an agreement. Wedgwood, *supra* note 200, at 725-26. The prevailing viewpoint in the Security Council is that it is an agreement; indeed, the fact that Iraq sent an identical letter to the persons stated in the resolution, specifically referencing the resolution, is a strong indicator that Iraq intended to derive the benefit of a cease-fire from it. Iraq could not, therefore, subsequently claim that it had not accepted the resolution as a cease-fire agreement.

241. Vienna Convention on the Law of Treaties, *supra* note 8, art. 26. An identical provision appears in article 26 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, but that treaty has not entered into force.

compliance. Instead of dismantling its nuclear, biological and chemical weapons programs, Iraq made considerable efforts to continue its development of nuclear weapons technology, and to retain its chemical warheads and ballistic missile components. Iraq also made considerable efforts to hide equipment and documentation from U.N. inspectors, in a deliberate campaign to deceive the Security Council. The details of the above have already been presented.²⁴² Iraq never disclosed the full extent of its biological and chemical weapons programs,²⁴³ or its nuclear program.²⁴⁴ To say that Iraq did not perform its treaty obligations or its obligations under Security Council resolutions in good faith is a gross understatement.

A few incidents not fully described above reveal how complete Iraq's bad faith actually was. In June 1991, only two months after the cease-fire, IAEA inspectors caught Iraqi officials trying to remove Calutron electromagnetic isotope separators, which were components of the Iraqi nuclear weapons program. Inspectors pursued the officials and were shot at in the process.²⁴⁵ In September 1991, IAEA inspectors found millions of pages of documents on Iraq's nuclear program. After a four-day standoff, Iraqi security services forcibly removed the documents from the inspectors.²⁴⁶ In March 1992, Iraq claimed it had unilaterally destroyed many of its missiles, munitions and production tools. Iraq had in fact destroyed some of them (but not all it said it had), without UNSCOM supervision, in order to remove any trace of evidence of Iraq's previous program and to invalidate any evidence inspectors may have had about Iraq's previous false statements. UNSCOM inspectors tried to physically verify Iraq's declaration of unilateral destruction but they found a significant shortfall. Iraq then claimed that what the inspectors found

242. See *supra* notes 159-192 and accompanying text.

243. Annex II to U.N. Doc. S/1998/1172, *supra* note 191, at 4.

244. A 1998 status report from the IAEA reads, "... the provision of information by Iraq has seldom, if ever, been voluntary, and Iraq's cooperation in this regard has never approached full transparency." *Interim Status Report of the Director General of the International Atomic Energy Agency in response to the Presidential statement on Iraq of 14 May 1998*, para. 4, Appendix to *Letter dated 27 July 1998 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/1998/694 (July 27, 1998).

245. RITTER, *supra* note 161, at 108-109. Richard Butler has been highly critical of Ritter's book, asserting that his facts are "rarely accurate." BUTLER, *supra* note 159, at 179. However, Ritter was in a better position to describe first-hand the course of various inspections, and therefore in those matters Ritter's text will be taken as equally authoritative.

246. RITTER, *supra* note 161, at 111-112.

was only part of the total; the rest had been melted into ingots (which, naturally, were unverifiable as to their origin). UNSCOM requested documentation of this and Iraq claimed there was none.²⁴⁷ In July 1992, Iraq denied access to a building containing 1.5 million pages of key documents. UNSCOM inspectors cordoned off the building and remained there in order to prevent their clandestine removal. As the standoff wore on, thousands of Iraqi civilians began pelting the inspectors' cars with eggs and vegetables and threatened them with knives and skewers. Faced with threats to their safety, the inspectors withdrew and returned several days later to find nothing in the buildings; the documents had been removed.²⁴⁸ Obviously the demonstration had been carried out at the behest of Iraqi government, for such a large public gathering and extensive public disorder could not have taken place in such a repressive regime, so close to a sensitive government facility, without government complicity.

This breed of "compliance" continued throughout the seven years that inspections took place. For example, after the defection of Hussein Kamel,²⁴⁹ the Iraqi government "discovered" 1.5 million pages of documents on Hussein Kamel's chicken farm and claimed that he had continued the biological weapons program without authority.²⁵⁰

In 1998, Iraq's concealment techniques became more brazen. In March 1998, UNSCOM's Concealment Investigations Unit intercepted communications revealing that Iraq's Special Security Organization had evacuated material from sites in advance, or created delays until material was withdrawn, proving what inspectors had long suspected.²⁵¹ In June 1998, UNSCOM inspectors discovered traces of VX nerve gas, which Iraq for years had denied ever producing, on metal fragments from destroyed Iraqi Scud warheads. When confronted with the evidence, Iraq admitted to producing VX, but claimed it had made only 200 liters of it and then unilaterally destroyed it. UNSCOM had evidence that Iraq had in fact made almost 20 times that amount. Right after revealing the findings to Deputy Prime Minister Tariq Aziz, UNSCOM Executive Chairman

247. *Id.* at 34-36.

248. *Id.* at 36-37.

249. *See* note 169 and accompanying text.

250. RITTER, *supra* note 161, at 47.

251. *Id.* at 18.

Richard Butler contracted a strange illness and he has suspicions that he was poisoned (though a blood test was inconclusive).²⁵² In December 1998, an UNSCOM inspector was shown an empty building, that had obviously been sanitized, while Iraqi authorities “stood about laughing and saying, ‘What else did you expect? That we would show you anything serious?’”²⁵³ The award for the most disgustingly pathetic attempt at deception goes to an incident in March 1998. At the close of a particularly tense meeting between Butler and Aziz, Aziz hauled in a visibly terrified Iraqi civilian who had no blemishes on his arm—as proof that Iraq was not testing biological weapons on human beings.²⁵⁴ The evidence that Iraq breached its obligations to dismantle its programs on weapons of mass destruction in the worst faith imaginable is overwhelming.

3. *What is the injury?*

The fact that Iraq’s compliance with its obligations was so unsatisfactory did not warrant the use of force against Iraq in and of itself. For the use of force to be an appropriate response, the injury to other States must have been so severe that the use of force was necessary to secure a proportionate remedy. The *Caroline* formula of anticipatory self-defense could not be applied to Operation Desert Fox, for it could not be shown that an armed attack was imminent. Furthermore, Iraq apparently was much further away from developing a nuclear weapon than it was when Israel struck Osiraq in 1981, so even under the relaxed standard of imminency for nuclear weapons, the justification of anticipatory self-defense was questionable.

The injury that justified the use of force against Iraq in 1998 was the substantial likelihood that if Iraq’s programs for developing weapons of mass destruction went unchecked, it would *eventually* use them against other States. Iraq’s propensity to do so was demonstrated by its prior record of aggression. As shown in the previous section on Osiraq, Iraq had taken the hardest line against Israel’s right to exist and in favor of its annihilation.²⁵⁵ Iraq used

252. BUTLER, *supra* note 159, at 159-161. In response to Iraqi accusation of U.S. bias against it, other samples were taken from the same site for further testing; a Swiss lab found no VX and a French lab “reported somewhat ambiguous outcomes that might have been consistent with presence of VX.” *Id.* at 177.

253. *Id.* at 206.

254. *Id.* at 1-4.

255. See *supra* notes 139-145 and accompanying text.

mustard gas and tabun (a nerve agent) against Iranian forces during the Iran-Iraq war from 1983 to 1988.²⁵⁶ Iraq also used mustard gas against Kurdish civilians in northern Iraq in late March 1988.²⁵⁷ In March of 1990, the U.S. detected missile launch sites in western Iraq that were aimed at Israel.²⁵⁸ Authorities also intercepted an Iraq-bound shipment that contained high-grade steel tubes for building a "supergun" designed to fire warheads to targets up to 1000 kilometers away.²⁵⁹ In August 1990, Iraq invaded and annexed Kuwait, precipitating the Gulf War. During the occupation of Kuwait, Iraqi forces looted and pillaged the country, and hundreds of Kuwaitis disappeared.²⁶⁰ During the same period, Iraq fired Scud missiles indiscriminately at Israel, which was not even a member of the coalition.²⁶¹ In the course of their withdrawal from Kuwait at the end of the Gulf War, Iraqi forces set fire to hundreds of Kuwaiti oil wells.²⁶² The same "gang of despicable liars and cheats"²⁶³ in power during the foregoing incidents remained in power at the time of Operation Desert Fox. Iraq was at the time the single most aggressive and dangerous State in the Middle East.

Military assessments of the threat posed by Iraq's weapons of mass destruction were similarly downbeat. Tony Cordesman

256. From 1984 to 1988 a team of experts appointed by the Secretary-General investigated and reported on allegations that Iraq had used chemical weapons during the 1980-88 Iran-Iraq War. The team concluded that Iraqi forces had used chemical weapons on Iranian forces, Iranian civilians, and Iraqi civilians. U.N. Doc. S/16433 (1984); U.N. Doc. S/17127 (1985); U.N. Doc. S/17911 (1986); U.N. Doc. S/18852 (1987); U.N. Doc. S/19823 (1988). In the Iran-Iraq War, Iraq was the first to use force against Iran, launching attacks on Iranian air bases in September 1980. IRAQ COUNTRY STUDY, *supra* note 1, at 233. However, on the question of identifying the original aggressor in the Iran-Iraq War, this author is willing to give Iraq the benefit of the doubt, for Ayatollah Khomeini had embarked on a campaign to export Islamic revolution to other States, particularly the Shi'ite minority population in Iraq. Iran thus posed a genuine threat to Iraq.

257. U.N. Doc. S/19823, *supra* note 256.

258. RITTER, *supra* note 161, at 98.

259. *Id.* at 99.

260. DeSaussure, *supra* note 2, at 53-54.

261. *Id.* at 55-56. Major DeSaussure noted that the Circular Error Probable (CEP) of Iraq's Scuds was 1000 meters, meaning that about half of them were expected to land within 1000 meters of their targets, and therefore that the use of such inaccurate missiles could only be justified against large military targets in sparsely populated areas. *Id.* at 55.

262. *Id.* at 57.

263. Richard Butler recounts how his predecessor at UNSCOM had characterized the Iraqi leadership. BUTLER, *supra* note 159, at 65.

estimated in 1994 that once freed from UN controls, Iraq could recover a "significant capability" to use chemical weapons in a major land war within five years.²⁶⁴ In the area of biological weapons, Cordesman theorized that a single Scud missile with a full payload of botulinum toxin could contaminate an area of 3700 square kilometers and kill in as little as 12 hours.²⁶⁵ Anthrax could kill an even larger area.²⁶⁶ "At some point in the near future, it would recover the ability to fire Scuds with chemical warheads, and at some point in the near-term, it would recover the ability to use aircraft and artillery to deliver large volumes of chemical bombs and ordnance."²⁶⁷

Some authors have questioned whether Iraq's forces were strong enough to pose a real threat. UNSCOM inspector Scott Ritter opined that the Iraqi army (in 1999) was in "total disarray"²⁶⁸ and that the Republican Guard remained an effective fighting force but could not operate too far from its supply, and was therefore not a serious international threat.²⁶⁹ Ritter assessed the Iraqi Air Force as being no match for any modern air force.²⁷⁰ Although Iraq's army had been significantly degraded by and after the Gulf War, and may not have been very effective against Western forces, it remained the superior land force in the region.²⁷¹ The Iraqi air force was probably defeatable by Turkey or Saudi Arabia (perhaps with U.S. assistance) once reconstituted.²⁷² The threat from Iraq's navy was negligible.²⁷³

However, in order to pose a regional threat, Iraq need not militarily defeat the U.S. or other western powers, only its immediate neighbors. The many scenarios of open conflict included low-level conflict with Turkey and Iran, war with the Kurdish and Shi'ite minorities within Iraq, confrontation with Syria over its peace agreement with Israel, attacks against Persian Gulf shipping, and unconventional attacks on U.S. facilities or ships in the region.²⁷⁴ It is

264. ANTHONY H. CORDESMAN, *IRAN AND IRAQ: THE THREAT FROM THE NORTHERN GULF* 254 (1994).

265. *Id.* at 256.

266. *Id.*

267. *Id.* at 273.

268. RITTER, *supra* note 161, at 199.

269. *Id.* at 200. Ritter notes that the Republic Guard was "decimated in a matter of hours once it engaged the U.S. Army in 1991." *Id.*

270. *Id.*

271. CORDESMAN, *supra* note 264, at 199.

272. *Id.* at 219.

273. *Id.* at 224.

274. *Id.* at 283.

the unconventional attacks that posed the greatest danger, especially if such attacks involved biological or chemical weapons. The relative weakness of its conventional forces gave Iraq a “strong incentive” to carry out such an attack by unconventional means and “[s]enior Iraqi leaders have . . . been quite clear about their desire for revenge in their discussions with Arab leaders, and Tariq Aziz has stated that it is dishonorable to leave revenge to one’s sons.”²⁷⁵ Using terrorists and other proxies to carry out its revenge was far more feasible—and safe—than doing so by means of a large-scale military action.²⁷⁶ Used in this manner, a few hundred weapons of mass destruction could have been highly effective, particularly if Iraq used human couriers to deliver them into population centers.²⁷⁷ The potential for covert attacks, by regular forces or by terrorists with Iraqi sponsorship, was enormous. Even in its weakened state, Iraq was a significant threat to the security of many other States, even to those who could defeat it militarily.

4. *The appropriate remedy*

In determining the appropriate remedy to the injury, several questions must be addressed. First, who decides what the remedy shall be? Second, what remedy is proportional to the injury?

It is useful to draw from the international law on countermeasures in determining who should decide the appropriate remedy to the injury. Article 49 of the Draft Articles on State Responsibility provides that “[a]n injured State may only take countermeasures against the State which is responsible for an international wrongful act.”²⁷⁸ When that injury is a material breach of a bilateral agreement,²⁷⁹ the expressly designated countermeasure is the non-performance of international obligations of the injured State toward the breaching State.²⁸⁰ More specifically, “[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke

275. *Id.*

276. *Id.*

277. Condron, *supra* note 161, at 146. He cites the Aum Shinrikyo attack on the Tokyo subway system with sarin nerve gas as an example.

278. Draft Articles on State Responsibility, *supra* note 7, art. 49, para. 1.

279. The Vienna Convention on the Law of Treaties defines a material breach of a treaty as either a repudiation of the treaty not sanctioned by the Convention, or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. Vienna Convention on the Law of Treaties, *supra* note 8, art. 60, ¶ 3.

280. Draft Articles on State Responsibility, *supra* note 7, art. 49, ¶ 2.

the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”²⁸¹ When the injury is a “serious violation” of an armistice, the other party has the right to denounce the armistice, “and even, in cases of urgency, . . . recommenc[e] hostilities immediately.”²⁸² When these two principles are put together, the result is that a material breach of an armistice by one party entitles the other party to suspend or terminate all or part of the armistice, and resume the use of force when necessary.

When the injury involves a material breach of a multilateral treaty, the situation becomes more complex. In such a case, three possibilities ensue. First, all other parties may suspend or terminate the treaty as between themselves and the breaching State, or as between all the parties. Second, a party specially affected by the breach may suspend or terminate it as between itself and the breaching State. Third, if the breach radically changes the positions of all the other parties, then any other State may suspend the application of the treaty to itself.²⁸³ In the case of Desert Fox, Iraq’s material breach of the NPT, the Gas Protocol and the BWC, and the consequent threat of Iraq’s use of weapons of mass destruction, was so severe that the positions of all the members of the coalition were radically changed. In addition, certain States (including the United States) were specially affected by the breach because of the greater likelihood that they or their forces would be the object of an attack with Iraq’s weapons of mass destruction. However one arrives at this result, the common conclusion is that the State entitled to choose and implement its remedy to the wrongful act is that which suffered the injury.

Iraq was also in material breach of Security Council resolution 687. If the resolution is construed as an order of the Security Council, then a breach might cause injury to the Security Council, but almost certainly would cause greater injury to other States, particularly against those that Iraq would threaten. If the resolution is construed as an international agreement (*i.e.* an armistice or cease-fire) between Iraq and the coalition, then it is the coalition that may exercise the prerogative to resume the war in order to enforce the terms of the cease-fire agreement. Other States injured by Iraq’s breach may also seek remedies. If the resolution is construed as a cease-fire

281. Vienna Convention on the Law of Treaties, *supra* note 8, art. 60, ¶ 1.

282. Hague Regulations, *supra* note 202, art. 40.

283. Vienna Convention on the Law of Treaties, *supra* note 8, art. 60, ¶ 2.

agreement between Iraq and the Security Council²⁸⁴ then the prerogative to enforce the terms of the agreement is the Security Council's. However, the failure for political reasons of the Security Council either to authorize or prohibit remedial action cannot be allowed to preempt other States, which are injured by Iraq's breach, from taking necessary and appropriate remedies when the severity of the injury warrants it, including the use of force.

In all of the alternatives described above, the result is the same—the injured State(s) decides on and implements the remedy. This does not mean, of course, that States should have unfettered discretion in doing so, for a State that commits an act that would be wrongful but for its being a remedy to a wrongful act by another State, does so at its own risk. A State's assessment of its injury and its decision to use force must be reasonable; it must act in conformity with the actions of other prudent, similarly situated States. This reasonableness standard also applies in the execution of the remedy.

In the area of execution of the remedy, *i.e.* the use of force against Iraq, some writers have been critical of the United States. Whereas on one hand, some contend that the U.S. went too far by using force against Iraq, Condron and Ritter both contend that the U.S. did not go far enough. Condron notes that Operation Desert Fox targeted command centers, missile batteries and airfields, but not the weapons of mass destruction themselves for fear of injuring the civilian population.²⁸⁵ Ritter claims that Desert Fox targeted little more than empty buildings.²⁸⁶ Given the stated objectives of the operation, which were "attacking Iraq's weapons of mass destruction programmes and its ability to threaten its neighbors,"²⁸⁷ it would seem that the operation was not successful. While it is true that Iraq has not seriously threatened to attack its neighbors since Desert Fox, it is also true that U.N. inspectors were not allowed into Iraq for the next four years, and Iraq's weapons of mass destruction programs therefore went without any serious monitoring from December 1998 until December 2002. Indeed, the United Kingdom claimed that Iraq's nuclear, biological, chemical and missile programs continued to

284. This author would not construe the agreement in this manner, as discussed in section IV(B) *infra*.

285. Condron, *supra* note 161, at 123.

286. Ritter, *supra* note 161, at 29.

287. U.N. Doc. S/1998/1181, *supra* note 154.

thrive.²⁸⁸ Operation Desert Fox did not stop Iraq from developing these weapons.

Although the decision to use force in response to Iraq's breach of its obligation was correct, the United States did not pursue all the right objectives. If the breach consisted of Iraq retaining and developing weapons of mass destruction and ballistic missiles, and the injury was the substantial threat that Iraq would eventually use such weapons against its enemies, then the proportionate remedies should have been (1) to destroy the existing weapons and programs to develop such weapons; (2) destroy Iraq's ability to use force against other States; and (3) secure the ability of UNSCOM and IAEA to meaningfully monitor Iraq's ability to develop such weapons in the future. The return of weapons inspectors was not among the reasons the United States presented in its justification of Desert Fox,²⁸⁹ and the operation did not force Iraq to readmit the inspectors. If the objective were to destroy Iraq's WMD programs, the U.S. and UK should have done so decisively and comprehensively, striking factories, research facilities, and the weapons themselves in a sustained campaign until Iraq relented. Yet the strikes ended after only four days. If the objective were to destroy Iraq's ability to threaten other states, then Iraq's conventional forces and their weapons should also have been targeted. Ritter writes that one of the targets was the 8th Battalion of the Special Republican Guard, which had played a key role in Iraq's concealment operations. However, Ritter claims that their armories, ammunition and vehicles were not targeted.²⁹⁰ Targeting the forces involved in the concealment was not militarily necessary and suggests that the U.S.'s true motive may have been to "punish" Iraq for its deception. That is not an appropriate remedy, for just as a countermeasure should be for the purpose of inducing the wrongdoing State to comply with its obligations,²⁹¹ a

288. Iraq's Weapons of Mass Destruction – The assessment of the British Government (Sept. 24, 2002) 17, on the British Prime Minister's website at <http://www.pm.gov.uk/output/Page271.asp> (last visited Apr. 12, 2003) [hereinafter British Iraq Dossier].

289. The UK stated its objective to Operation Desert Fox as "compliance by the Iraqi leadership with the obligations laid down by the Council." *Letter dated 16 December 1998 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/1998/1182 (1998). However, it does not expressly mention the return of inspectors.

290. RITTER, *supra* note 161, at 196-197.

291. Draft Articles on State Responsibility, *supra* note 7, art. 49, ¶ 1.

remedy to an injury should be for the purpose of inducing the wrongdoing State to cease the injury and make amends. Operation Desert Fox did not achieve this and, given its brevity, appears to never have been intended to achieve this. Although the entitlement to use force against Iraq was clearly there, its execution was far off the mark and for the next four years Iraq was allowed to continue its WMD programs with relative impunity.

IV. To War Or Not To War? Or, "There He Goes Again."

Against the foregoing historical background, this article now turns to the million-dinar question of 2003: the legality of a war with Iraq to remove Saddam Hussein and the Ba'ath Party from power there. Although the Security Council did not specifically authorize the use of force against Iraq, the United States indicated that it would use force unilaterally if necessary²⁹² and ultimately did so. Consequently the overriding question for international lawyers is whether the unilateral use of force to effect regime change in Iraq was permitted in international law, in the absence of an armed attack on the United States or its allies.

A hasty reading of the U.N. Charter would lead to the conclusion that a unilateral war against Iraq would not be permitted. Article 2(1) of the Charter reaffirms the Westphalian principle of sovereign equality of States, a legal norm that proscribes interference in another State's internal affairs. Article 2(4) reaffirms the post-World War norm of renunciation of the use of force in international relations. However, to look solely to the Charter for guidance is to grossly oversimplify the issue.

A. Making Sausage: How the Security Council (Mis)Handled the Crisis

Iraq's retention and continuing development of weapons of mass destruction was at the forefront of the threat posed by that country, and was particularly central to the debates in the Security Council and the resulting resolution passed in November 2002. After

292. Text of President Bush's Address to U.N., WASH. POST, Sept. 13, 2002, at A31 ("We will work with the U.N. Security Council for the necessary resolutions, but the purposes of the United States should not be doubted. The Security Council resolutions will be enforced, the just demands of peace and security will be met, or action will be unavoidable, and a regime that has lost its legitimacy will also lose its power").

President Bush's speech in the General Assembly, and at the behest of South Africa,²⁹³ the Security Council convened an open meeting where non-member States and several regional organizations were invited to present their views on the subject.²⁹⁴ The large majority of States took the position that it is imperative that Iraq comply fully with the provisions of the Gulf War cease-fire agreement (Security Council resolution 687) and disarm its weapons of mass destruction. In a statement read at the open meeting, the Secretary-General referred to the upcoming Security Council resolution as Iraq's "last chance."²⁹⁵ However, only a few States, mostly U.S. allies, suggested that Iraq's non-compliance with Security Council resolutions should have "serious consequences"²⁹⁶ (a euphemism for military action). In contrast, Russia made it very clear that it opposed the use of force against Iraq²⁹⁷ and most of the Arab States used the debate as yet another forum for bashing Israel.²⁹⁸ France expressed its desire for a two-tiered approach, the first stage being that the Security Council enact a resolution setting forth what it expects from Iraq. Should inspectors report Iraqi non-compliance, then the Security Council would then meet a second time to decide on its response.²⁹⁹

The French approach prevailed. On November 8, 2002, the Council passed resolution 1441,³⁰⁰ determining that Iraq "has been and remains in material breach of its obligations" to dismantle its WMD programs.³⁰¹ Using tougher words than in the past, the resolution was written to give Iraq a "final opportunity" to comply with its obligations. However, the resolution did not automatically

293. Letter dated 10 October 2002 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2002/1132 (2002).

294. U.N. SCOR, 57th Sess., 4625th mtg., U.N. Doc. S/PV.4625 & Resumptions 1-3 (Oct. 16-17, 2002).

295. U.N. Doc. S/PV.4625, *supra* note 294, at 4.

296. U.N. Doc. S/PV.4625 Resumption 1, *supra* note 294, at 10 (Australia); *id.* at 14 (Denmark); *id.* at 17 (New Zealand); *id.* at 19 (Argentina); *id.* at 22 (Canada); U.N. Doc. S/PV.4625 Resumption 3 at 15 (Norway). Of these States, only Norway is a member of the Security Council.

297. U.N. Doc. S/PV.4625 Resumption 3, *supra* note 294, at 22.

298. *E.g.*, U.N. Doc. S/PV.4625, *supra* note 294, at 14 (Yemen); *id.* at 15 (Algeria); U.N. Doc. S/PV.4625 Resumption 2, *supra* note 294, at 9 (Lebanon); *id.* at 18-19 (Saudi Arabia); U.N. Doc. S/PV.4625 Resumption 3, *supra* note 294, at 7 (Syria).

299. U.N. Doc. S/PV.4625 Resumption 3, *supra* note 294, at 13.

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

301. *Id.* ¶ 1.

authorize the use of force to enforce it.³⁰² Only at the very end, almost as an afterthought, did the Council warn Iraq of the “serious consequences” of non-compliance, and then the Council merely “recall[ed]” its repeated warnings of the past.³⁰³

The wording and approach of resolution 1441 was a political defeat for the United States, for despite the tough wording of the resolution and the Secretary-General’s call for the Security Council to “face its responsibilities,”³⁰⁴ the Security Council seemed unlikely to expressly authorize any use of force against Iraq. The procedure set forth in the resolution for responding to Iraqi delicts was cumbersome and open to political manipulation. The resolution directed the *heads* of UNMOVIC and IAEA to report Iraqi violations,³⁰⁵ and the heads of those agencies potentially faced immense political pressure from various States to issue reports favorable towards their predispositions.³⁰⁶ Even if Iraqi violations were reported, it seemed unlikely that the Security Council would be able to pass a resolution authorizing military force, for one permanent member (Russia) had already expressly declared its opposition to the use of force.³⁰⁷ It was evident that the Council as a whole was unwilling to condone the use of force against Iraq without its express authorization. On February 5 the Russian Foreign Minister confirmed the Security Council’s collective intent that such force would require an additional resolution: “we cannot rule out the possibility that at some stage the Security Council may need to adopt a new resolution, or perhaps more than one resolution.”³⁰⁸ At the same meeting China and Chile took similar positions.³⁰⁹

302. Several members of the Council reiterated this point in the discussion after the vote. U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/PV.4644 (2002).

303. S.C. Res. 1441, *supra* note 300, ¶ 13.

304. U.N. Doc. S/PV.4625, *supra* note 294, at 4.

305. S.C. Res. 1441, *supra* note 300, ¶ 11.

306. Richard Butler claims he was under such pressure from Russian Foreign Minister Primakov in November 1997 and again from Russian Foreign Minister Ivanov in December 1998. BUTLER, *supra* note 159, at 106-107 and 202-203.

307. See note 297 and accompanying text.

308. U.N. SCOR, 58th Sess., 4701st mtg. at 21, U.N. Doc. S/PV.4701 (2003).

309. *Id.* at 18 (China); *id.* at 30 (Chile).

B. A Forcible Regime Change in Iraq Is Justified and Necessary

1. Iraq's Duty

It has already been shown that Iraq had a duty under Security Council resolution 687 to fully disclose its WMD capabilities, dismantle its WMD programs, and cooperate with U.N. inspectors sent to verify and monitor Iraq's compliance with these obligations.³¹⁰ Iraq's obligation had been reaffirmed in several subsequent resolutions.³¹¹ The most recent affirmation, resolution 1441, imposed several specific obligations on Iraq. By December 7, 2002, Iraq was to provide "a currently accurate, full, and complete declaration of all aspects" of its chemical, biological, and nuclear weapons programs, as well as its development of ballistic missiles, unmanned aerial vehicles (UAVs), and other dispersal systems.³¹² Iraq was also required to grant "immediate, unimpeded, unconditional, and unrestricted access"³¹³ to the IAEA and UNSCOM's successor, the United Nations Monitoring Verification and Inspection Commission (UNMOVIC),³¹⁴ who were entitled to inspect "areas, facilities, buildings, records and means of transport" and to interview officials.³¹⁵ The resolution also gave UNMOVIC and IAEA the right to remove or destroy prohibited systems, subsystems, components, records, and materials.³¹⁶ It further prohibited Iraq from taking or threatening "hostile acts" against any representative of the UN, IAEA or Member State acting in furtherance of the inspections.³¹⁷ Finally, the resolution declared that any false statement or omission in Iraq's declaration and Iraq's failure to comply with the resolution and cooperate fully in its implementation "shall constitute a further material breach of Iraq's obligations."³¹⁸

310. See notes 227-238 and accompanying text.

311. S.C. Res. 707, *supra* note 164; S.C. Res. 715, U.N. SCOR, 46th Sess., 3012th mtg., U.N. Doc. S/RES/707 (1991); S.C. Res. 1154, *supra* note 180; S.C. Res. 1284, U.N. SCOR, 54th Sess., 4084th mtg., U.N. Doc. S/RES/1284 (1999); and most recently S.C. Res. 1441, *supra* note 300.

312. S.C. Res. 1441, *supra* note 300, ¶ 3.

313. *Id.* ¶ 5.

314. So designated in S.C. Res. 1284, *supra* note 311.

315. S.C. Res. 1441, *supra* note 300, ¶ 5.

316. *Id.* ¶ 7.

317. *Id.* ¶ 8.

318. *Id.* ¶ 4.

The resolution passed unanimously³¹⁹ and statements of the Council's members since that time have indicated that the Council expected Iraq to comply.³²⁰ That Iraq had an obligation to cooperate is relatively uncontroversial.

2. *Iraq Was in Material Breach of Its Obligations*

It would be unfair to Iraq to conclude that Iraq has not cooperated at all. Security Council resolution 1441 required Iraq to grant access to inspectors by December 16th³²¹ and inspections in fact resumed on November 27,³²² nearly three weeks early. Iraq was also required to submit its declaration by December 8th³²³ and it did so on December 7th.³²⁴ In terms of access to sites, UNMOVIC and IAEA gave Iraq good marks.³²⁵ Apparently the large-scale problems of denial of access to sites that inspectors encountered from 1996 through 1998³²⁶ did not recur.

UNMOVIC, however, reported some "disturbing incidents and harassment" including demonstrations and other public "outbursts" at UNMOVIC's offices and at inspection sites, noting that they were "unlikely to occur in Iraq without initiative or encouragement from the authorities."³²⁷ Iraq appeared to be trying to intimidate the inspectors, as it had done in the past.³²⁸

Both UNMOVIC and the IAEA reported that they were unable to conduct interviews on their own terms. By January 27, 2003, UNMOVIC had tried to interview eleven Iraqis, all of which declined to talk to inspectors unless the interviews took place at Iraq's

319. U.N. Doc. S/PV.4644, *supra* note 302, at 2.

320. U.N. Doc. S/PV.4644, *supra* note 302; U.N. Doc. S/PV.4701, *supra* note 308.

321. S.C. Res. 1441, *supra* note 300, ¶ 5, directed inspections to begin not later than 45 days after passage of the resolution. The resolution was passed on November 8th.

322. *Update report of the International Atomic Energy Agency to the Security Council pursuant to resolution 1441 (2002)*, Encl. to *Letter dated 27 January 2003 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc. S/2003/95, at 3 (2003) [hereinafter *IAEA Report of 27 January 2003*].

323. S.C. Res. 1441, *supra* note 300, ¶ 3, required Iraq to submit its declaration not later than 30 days from the date of the resolution (8 November).

324. Statement of Mr. Hans Blix, Executive Chairman of UNMOVIC, U.N. SCOR, 58th Sess., 4692d mtg. at 4, U.N. Doc. S/PV.4692 (2003).

325. *Id.* at 3-4; *IAEA Report of 27 January 2003*, *supra* note 322, at 14.

326. See notes 171-189 and accompanying text.

327. U.N. Doc. S/PV.4692, *supra* note 324, at 4.

328. See notes 248, 252, and 254 and accompanying text.

monitoring directorate or in the presence of an Iraqi official.³²⁹ IAEA reported similar reactions with two people it tried to interview.³³⁰ UNMOVIC suggested that the individuals wanted to be able to prove to Iraqi security officials that they had said nothing that the authorities did not want them to say.³³¹ It appeared that the individuals involved with Iraq's WMD programs wished to keep relevant information from the inspectors, either on their own volition or because Iraqi authorities had intimidated them into silence. UNMOVIC reported that Iraq made "far-fetched allegations . . . publicly that questions posed by inspectors were of an intelligence character," even though Iraq knew that they were not.³³² The U.S. elaborated on this finding:

Iraqi Vice-President Ramadan accused the inspectors of conducting espionage – a veiled threat that anyone cooperating with United Nations inspectors was committing treason. . . . In early December, Saddam Hussain had all Iraqi scientists warned of the serious consequences that they and their families would face if they revealed any sensitive information to the inspectors."³³³

UNMOVIC reported another black mark against Iraqi cooperation—its denial of overflights of U-2 surveillance aircraft.³³⁴ Specifically, Iraq refused to "guarantee the safety" of such flights (*i.e.*, not fire on them) unless the U.S. and UK suspended their patrols of the Southern No-Fly Zone over Iraq. However, on February 10, Iraq declared that it would accept aerial surveillance as requested by UNMOVIC, including the U-2s.³³⁵

Notwithstanding the three items noted above, UNMOVIC and IAEA appeared to be satisfied overall with Iraq's cooperation on the inspection process, and particularly access to facilities and records.

329. U.N. Doc. S/PV.4692, *supra* note 324, at 8.

330. IAEA Report of 27 January 2003, *supra* note 322, at 11.

331. U.N. Doc. S/PV.4692, *supra* note 324, at 8.

332. *Id.* at 4.

333. Statement of Mr. Colin Powell, U.S. Secretary of State, S/PV.4701, *supra* note 308, at 7.

334. U.N. Doc. S/PV.4692, *supra* note 324, at 4.

335. Colum Linch, *Iraq to Allow Surveillance Flights*, WASH. POST, Feb. 11, 2003, at A12.

In stark contrast, Iraq's cooperation in substance was quite lacking.³³⁶ UNMOVIC reported that Iraq's 12,000 page declaration did not provide any new information, nor did it "respond to, clarify and submit supporting evidence regarding the many open disarmament issues, with which the Iraqi side should be familiar."³³⁷ The IAEA reported its similar disappointment.³³⁸ UNMOVIC believed that Iraq has not disclosed the full extent of its production of VX nerve gas, that Iraq had not accounted for approximately 6500 chemical bombs and 1000 tons of chemical agents, and that Iraq had produced more anthrax than it had declared.³³⁹ UNMOVIC reported that Iraq had submitted a certain document in February 1999 showing that it produced 650 kilograms of bacterial growth media (capable of producing 5000 litres of anthrax), which the so-called "Amorim Panel" included in its report;³⁴⁰ however, in its December 7th declaration, Iraq deliberately omitted that declaration, having resubmitted the same document but with the table missing and the pages renumbered.³⁴¹ The IAEA also reported that the declaration contained "no substantive differences" from its declaration to the IAEA in 1998.³⁴² The report went on to say, "The key outstanding issue for IAEA is the accuracy and completeness of Iraq's declaration that there have been no material changes in its nuclear programme since 1998 and that its nuclear activities have been limited to the non-proscribed use of radioisotopes."³⁴³ What the IAEA meant was that the IAEA did not believe Iraq's declaration to be fully truthful.

The Security Council received considerable evidence that Iraq continued to produce or develop prohibited weapon systems in an extraordinary presentation by U.S. Secretary of State Colin Powell.³⁴⁴

336. U.N. Doc. S/PV.4692, *supra* note 324, at 3; IAEA Report of 27 January 2003, *supra* note 322, at 14.

337. U.N. Doc. S/PV.4692, *supra* note 324, at 5. Mr. Blix made similar comments on 14 February. *Excerpts from Statements by Hans Blix and Mohamed ElBaradei at the U.N.*, WASH. POST, Feb. 15, 2003, at A27.

338. IAEA Report of 27 January 2003, *supra* note 322, at 13.

339. U.N. Doc. S/PV.4692, *supra* note 324, at 5-6.

340. Report of the First Panel Established Pursuant to the Note by the President of the Security Council on 30 January 1999 (S/1999/100), Concerning Disarmament and Current and Future Ongoing Monitoring and Verification Issues, Annex I to U.N. Doc. S/1999/356 (1999).

341. U.N. Doc. S/PV.4692, *supra* note 324, at 6.

342. IAEA Report of 27 January 2003, *supra* note 322, at 6.

343. *Id.* at 7.

344. U.N. Doc. S/PV.4701, *supra* note 308.

A phone conversation between two senior officers of Iraq's Republican Guard indicated the possession of a "modified vehicle" from the Al-Kindi company, which was "well-known to have been involved in prohibited weapon systems activity."³⁴⁵ At some point Saddam Hussein's son Qusay had ordered the removal of "all prohibited weapons," which Iraq is not supposed to have, from the presidential palaces.³⁴⁶ Secretary Powell showed satellite images of Taji, an active Iraqi chemical munitions storage facility³⁴⁷ and claimed to have "firsthand descriptions of biological weapons factories on wheels and on rails."³⁴⁸ An instruction to a commander in the Second Republican Guard Corps read "Remove the expression 'nerve agents' whenever it comes up in the wireless instructions."³⁴⁹ The U.S. said it had a "source who told us that [Saddam Hussein] recently has authorized his field commanders to use [chemical weapons]. He would not be passing out the order if he did not have the weapons or the intent to use them."³⁵⁰ Iraq's top nuclear scientists were openly called the "nuclear mujahideen" in the government-controlled press, and Saddam Hussein "regularly exhorts them and praises their progress."³⁵¹ He would not have been doing this if Iraq's nuclear program had been abandoned. Secretary Powell showed a satellite photo from April 2002 of a rocket engine test stand "clearly intended for long-range missiles that can fly 1,200 kilometres,"³⁵² even though Iraq was prohibited from producing missiles with a range greater than 150 kilometres. He also claimed to have "ample intelligence that Iraq has dedicated much effort to developing and testing spray devices that can be adapted for [unmanned aerial vehicles (UAVs)]" and that the U.S. had detected a UAV test flight that went 500 kilometres non-stop, even though Iraq's December 7th declaration had claimed its UAVs had a range of only 80 kilometres.³⁵³

This author finds the U.S.'s factual assertions to be credible, but for the benefit of the skeptics it should be pointed out that neither UNMOVIC nor the IAEA were willing to conclude that Iraq no

345. *Id.* at 3.

346. *Id.* at 5.

347. *Id.* at 6.

348. *Id.* at 8.

349. *Id.* at 11.

350. *Id.* at 12.

351. *Id.* at 13.

352. *Id.* at 14.

353. *Id.*

longer possessed chemical and biological weapons and was no longer developing long range missiles or nuclear weapons. UNMOVIC inspectors found chemical warheads in a new bunker, indicating that the warheads had been put there “at a time when Iraq should not have had such munitions.”³⁵⁴ UNMOVIC also discovered that Iraq had reconstituted several casting chambers, which UNSCOM inspectors had destroyed, that “could produce motors for missiles capable of ranges significantly greater than 150 kilometers.”³⁵⁵ UNMOVIC also reported that Iraq had illegally imported chemicals used in propellants, test instrumentation and guidance and control systems.³⁵⁶ Finally, Iraq had attempted to procure high-strength aluminum tubes which could be used, among other things, for manufacturing nuclear centrifuges. Whatever their true purpose was, “it is clear . . . that the attempt to acquire such tubes is prohibited under Security Council resolution 687.”³⁵⁷

There was also ample evidence that Iraq continued to conceal weapons, documents and other evidence from inspectors. UNMOVIC inspectors found 3000 pages of documents on laser enrichment of uranium in the private home of an Iraqi scientist, indicating that Iraq had deliberately dispersed documentation of its WMD programs, including putting them into private homes, in order to make them much harder for inspectors to find.³⁵⁸ The U.S. claimed to have human intelligence that documents were placed in cars and driven around to avoid detection, and that the hard drives of computers at Iraqi weapons facilities were replaced.³⁵⁹ Also according to the U.S., various Iraqi security organizations received orders to conceal all correspondence with the Organization of Military Industrialization, which was the organization overseeing Iraq’s WMD programs, in order to avoid detection of a connection between Iraqi WMDs and Iraqi security.³⁶⁰ Iraq was also deliberately concealing the weapons themselves. For example, a certain missile brigade had rocket launchers and biological warheads hidden in groves of trees

354. U.N. Doc. S/PV.4692, *supra* note 324, at 5.

355. *Id.* at 7.

356. *Id.*

357. Statement of Mr. Mohamed El-Baradei, Director General of the International Atomic Energy Agency, U.N. Doc. S/PV.4692, *supra* note 324, at 10.

358. *Id.*

359. U.N. Doc. S/PV.4701, *supra* note 308, at 5.

360. *Id.* at 4.

and were meant to be moved every 1-4 weeks to avoid detection.³⁶¹ Secretary Powell also showed the Security Council satellite images of Taji, mentioned earlier,³⁶² having been sanitized, claiming, "We saw this kind of housecleaning at close to 30 sites."³⁶³ He also asserted that Iraq had embedded parts of its chemical weapons infrastructures within its legitimate civilian industry.³⁶⁴ Additionally, the biological weapons factories mentioned before³⁶⁵ were designed to be mobile and therefore easy to conceal. IAEA reported that Iraq had transferred 32 tons of HMX (a high-explosive used for nuclear weapons and for other, legitimate purposes), which had been under IAEA seal, for use in producing industrial explosives, but IAEA had been unable to verify Iraq's claim because Iraq claimed all of it had been consumed through explosions.³⁶⁶ Finally, the U.S. showed evidence that Iraq had replaced weapons experts at one facility by Iraqi intelligence agents who were to deceive inspectors about the work that was being done there, and that Iraq had issued a false death certificate for one scientist and sent him into hiding.³⁶⁷

The assertions of the U.S., if true, are very grave indeed, and given Iraq's pattern of misconduct and bad faith over the previous twelve years, the evidence was highly credible. However, UNMOVIC and IAEA were not able to verify it and it is unlikely that they will ever be able to fully verify all of it. Because the U.S. is not impartial, it is useful for the purpose of this analysis to give primary weight to the evidence and findings of UNMOVIC and IAEA. Reports from the inspectors do not present nearly as convincing a case that Iraq was in material breach of its obligations under Security Council Resolution 1441.

A literal reading of the text of the Resolution suggests that Iraq would have to achieve a high threshold of non-cooperation to materially breach it. The Resolution stated that falsities or omissions in the 7 December declaration *and* failure to comply and cooperate constituted a "further material breach" of Iraq's obligations.³⁶⁸ Furthermore, to be in "further material breach" Iraq had to fail to

361. *Id.* at 5.

362. *See* note 347 and accompanying text.

363. U.N. Doc. S/PV.4701, *supra* note 308, at 6.

364. *Id.* at 10.

365. *See* note 348 and accompanying text.

366. IAEA Report of 27 January 2003, *supra* note 322, at 12.

367. U.N. Doc. S/PV.4701, *supra* note 308, at 7.

368. S.C. Res. 1441, *supra* note 300, ¶ 4.

comply with the provisions of *this* Resolution, *and* fail to cooperate in the *implementation* of it. This leads one to ask what was required of Iraq in *this* Resolution.

The exact text of Security Council Resolution 1441 specifically required only that Iraq submit a truthful and complete declaration, provide access to sites, documents, and people, and host the inspectors in a manner ordinarily expected of U.N. personnel. UNMOVIC and the IAEA agreed that Iraq's declaration was neither completely truthful nor comprehensive. However, based on the text of the resolution, it could be argued that a false or incomplete declaration puts Iraq in "material breach" only if Iraq fails to comply and cooperate as well. Regarding compliance, one could argue, Iraq did not impede access of any sites or records; the inspectors were allowed to go anywhere and take anything, and any documents they requested were produced. Furthermore, UNMOVIC and IAEA did not report any impediments to their ingress to and egress from Iraq. Regarding the interviews, one could argue that UNMOVIC and IAEA had insufficient evidence to conclude, and indeed did not conclude, that the reluctance of individuals to be interviewed without minders was directly attributable to some action on the part of Iraq. Iraq had been careful not to directly prevent access to any of these things. Therefore Iraq, one could argue, cooperated with the *implementation* of Resolution 1441.

The foregoing argument fortunately was been asserted in the Security Council, for it is based on the faulty premise—that the inspections were the primary objective. As the Spanish Foreign Minister put it, "inspections are not an end in themselves. Rather they are the means of verifying that Iraq is carrying out effective and complete disarmament of its arsenal of weapons of mass destruction."³⁶⁹ Iraq's failure to carry out its specific obligations under Resolution 1441 may have put it in "further material breach of Iraq's obligations,"³⁷⁰ meaning the obligations under Resolution 687 and subsequent resolutions of which Iraq, according to the Security Council, already remained in material breach.³⁷¹ Resolution 1441 was only meant to impose on Iraq specific deadlines and obligations in furtherance of its compliance with the underlying obligation, spelled

369. U.N. Doc. S/PV.4701, *supra* note 308, at 29.

370. S.C. Res. 1441, *supra* note 300, ¶ 4.

371. *Id.* ¶ 1.

out in Resolution 687, to dismantle its WMD programs.³⁷²

In terms of the underlying obligation to disarm, it is evident that UNMOVIC, IAEA and the Security Council all agreed that Iraq had not complied. UNMOVIC and IAEA both complained that Iraq was cooperative in process, but not in substance. Both agencies cited the example of South Africa, which had announced its abandonment of its nuclear program and had been very proactive in taking measures to instill confidence in inspectors that it was in fact doing so.³⁷³ In stark contrast, Iraq had not gained UNMOVIC's or IAEA's confidence or trust, nor had those agencies found Iraq's cooperation to be proactive.³⁷⁴ Reported the Director General of the IAEA, "we have emphasized the need to shift from passive support – that is, responding as needed to inspectors' requests – to proactive support – that is, voluntarily assisting inspectors by providing documentation, people and other evidence that will assist in filling in the remaining gaps in our information."³⁷⁵ UNMOVIC opined in January that "Iraq appears not to have come to a genuine acceptance – not even today – of the disarmament that was demanded of it."³⁷⁶ IAEA was unable to give "credible assurance that Iraq has no nuclear weapons programme."³⁷⁷ Iraq had not gained IAEA's confidence even after twelve years, nor had it gained the confidence of members of the Security Council, who while not finding Iraq in material breach of its obligations at that moment, did agree that Iraq needed to be more proactive and do more to gain the Council's confidence.³⁷⁸

3. *Iraq's Breach Constitutes an Injury*

What injury did Iraq's continued intransigence inflict on other States that entitled them, and the United States in particular, to forcibly change its government? Much of the answer lies in the two preceding sections on Osiraq and Operation Desert Fox. To summarize, Iraq had a duty, both treaty-based and under Chapter VII of the UN Charter, to cease its development of nuclear, biological

372. See notes 155-158 and accompanying text.

373. U.N. Doc. S/PV.4692, *supra* note 324, at 2, 11.

374. *Id.* at 3; IAEA Report of 27 January 2003, *supra* note 322, at 14.

375. U.N. Doc. S/PV.4692, *supra* note 324, at 11.

376. *Id.* at 2.

377. IAEA Report of 27 January 2003, *supra* note 322, at 13.

378. U.N. Doc. S/PV.4701, *supra* note 308, at 18 (China); *id.* at 21 (Russia); *id.* at 22 (Cameroon); *id.* at 27 (Pakistan); *id.* at 30 (Chile); *id.* at 31 (Angola); *id.* at 35 (Guinea); *id.* at 36 (Germany).

and chemical weapons, to destroy existing stocks of such weapons, and to dismantle its programs for developing such weapons. Iraq embarked instead on a large-scale effort to develop and stockpile these weapons, as well as delivery systems, in flagrant violation of its obligations. To suggest otherwise, that Iraq no longer possessed WMDs in the face of large amounts of unaccounted for munitions and chemical precursors, is an exercise in self-delusion. Iraq is an original party of the Nuclear Non-Proliferation Treaty, the ink of which was barely dry when Iraq launched its program to develop a nuclear bomb.³⁷⁹ When UNSCOM weapons inspections began after the Gulf War, Iraq's biological, chemical and missile programs went underground. Iraq systematically concealed equipment and documents and made it impossible for UNSCOM to complete its work. The threat from Iraq was genuine and serious.

The Iraqi leadership had no respect whatsoever for the rules of peaceful coexistence with other States, and had the means, opportunity and motive to attack other States. Iraq was a highly aggressive State, having used chemical weapons in warfare, invaded and raped Kuwait, and used Scud missiles as weapons of terror against Israeli civilians. Its stance toward Israel had not changed, nor apparently had its stance on Kuwait. There was no reason to believe that, given the chance to do so with impunity, Iraq would not "finish the job" by re-annexing Kuwait. Additionally, because of the very prominent role the U.S. took in defeating Iraq militarily during the Gulf War, it was the most likely target of Iraqi revenge, as manifested by its attempt to assassinate President Bush (the elder), who was in office during the Gulf War.³⁸⁰ Iraq also posed a threat to Saudi Arabia, whose territory also would be valuable to Iraq. Saudi Arabia was also a key member of the coalition during the Gulf War and Iraq had also launched Scud missiles attacks against that country.³⁸¹ The injury justifying Operation Desert Fox to enforce the disarmament provisions of Security Council Resolution 687 was the certainty that a

379. Iraq deposited its instrument of ratification of the NPT on October 29, 1969 and the NPT entered into force on March 5, 1970. E-mail from State Department, *supra* note 91. In 1971 its nuclear weapons program was underway. HAMZA, *supra* note 74, at 333.

380. For an extensive discussion of the incident and the legality of the U.S. 1993 air strikes on Iraq in response, see Robert F. Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569 (1995).

381. LAWRENCE FREEDMAN & EPHRAIM KARSH, *THE GULF CONFLICT 1990-1991, DIPLOMACY AND WAR IN THE NEW WORLD ORDER* 307 (1993).

revanchist Iraq running amok would eventually commit a devastating attack against another State.

Iraq also represented a terrorist threat, being known to have supported terrorism in the past.³⁸² The Ba'ath government and the Al-Qa'ida terrorist network both shared a deep hatred for Israel and the United States,³⁸³ and despite their religious differences would be natural allies in a covert war against the West and the United States in particular. Indeed, the U.S. has presented evidence that Iraqi intelligence provided training and support to Al-Qa'ida, particularly to the affiliated Zarqawi network which operated in Kurdish-held territory in northern Iraq.³⁸⁴ Such an alliance, where weapons of mass destruction are involved, would eventually have resulted in an attack of a severity rivaling that of September 11th, 2001. Saddam Hussein with weapons of mass destruction was simply a catastrophe waiting to happen.

4. *Was Regime Change the Appropriate Remedy?*

Based on UNMOVIC's assessment that Iraq had not renounced the use of weapons of mass destruction and continued to stockpile them, it was reasonable to conclude that Iraq was in material breach of its obligations under Security Council Resolution 687 and subsequent resolutions. Several members of the Security Council shared this view.³⁸⁵ The appropriate remedy was not the continuation

382. Iraq has supported Palestinian terrorist groups such as the Abu Nidal Organization, the Arab Liberation Front and the Palestinian Liberation Front, as well as terrorist groups in Turkey and Iran. CORDESMAN, *supra* note 264, at 185. An UNSCOM inspection team found a school for anti-terrorism that was actually a training camp for terrorism. RITTER, *supra* note 161, at 120-121. Richard Butler recounts a plot by Iraqi agents to attack various embassies in Bangkok. BUTLER, *supra* note 159, at 35-36.

383. For a first-hand account of Al-Qa'ida's politics, see OSAMA BIN LADEN ET AL., JIHAD AGAINST JEWS AND CRUSADERS: WORLD ISLAMIC FRONT STATEMENT (Feb. 23, 1998) (on file with author). The original statement was published in Al-Quds Al-Arabi on Feb. 23, 1998. An English translation is posted on the Washington Post website at <http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=&contentId=A4993-2001Sep21> (last visited Oct. 27, 2001). The word "Crusader" is a euphemism for the U.S.

384. U.N. Doc. S/PV.4701, *supra* note 308, at 14-16.

385. *Id.* at 17 (U.S.); *id.* at 19 (Great Britain); *id.* at 26 (Bulgaria). At the same meeting, Spain did not use the words "material breach," but its statement shows that to be Spain's opinion: "Saddam Hussain has not renounced his plan to use such weapons." *Id.* at 29.

of inspections as several Security Council members suggested,³⁸⁶ for it had become painfully apparent that not even the threat of force would be sufficient to convince Iraq to disarm; indeed, the *threat* of force only would have driven the program further underground. Under the same analysis presented in the section of this article on Operation Desert Fox, the appropriate remedy to the threat posed by the rogue regime was the use of force to destroy Iraq's weapons of mass destruction program. The question that remains, therefore, is whether the appropriate remedy included removing that rogue regime from power.

If this question were being posed ten years ago, it would probably be answered in the negative. In the present, however, the opposite conclusion is called for. Iraq's conduct during the last twelve years—its stubborn endurance of U.N. sanctions when it had only to disarm to get them lifted; its constant, brazen denials; its willingness to continue its programs after numerous threats of force and several actual uses of force—demonstrated that as long as the Ba'ath party remained in power, Iraq would continue to manufacture chemical and biological weapons and continue its program develop nuclear weapons.

An additional justification existed for the removal of the Ba'aths from power: humanitarian intervention. Iraq had one of, if not the, worst human rights records in the Middle East. Butler, Ritter and Hamza have all recounted harrowing instances of frequent and widespread violations of fundamental human rights—arbitrary detentions and seizures, extrajudicial killings, and torture, including innocent family members being raped or otherwise tortured in front of the authorities' intended subjects.³⁸⁷ The Ba'ath government also massacred thousands of Kurds (militant separatists and civilians alike), including attacking the town of Halabja with the same chemical weapons it used against Iran.³⁸⁸ The Ba'aths had no accountability whatsoever to law or the Iraqi people and had absolute

386. *Id.* at 21 (Russia); *id.* at 22 (Cameroon); *id.* at 24 (France); *id.* at 25 (Mexico); *id.* at 27 (Pakistan); *id.* at 30 (Chile). Only Syria, also controlled by the Ba'ath party, and who quite inappropriately tries to tie the Iraq question to Israeli occupations, contests the finding that Iraq constitutes a threat to its neighbors. *Id.* at 33-34.

387. RITTER, *supra* note 161; BUTLER, *supra* note 159; HAMZA, *supra* note 74. See also SAMIR AL-KHALIL, *REPUBLIC OF FEAR* (1989). U.S. Secretary of State Colin Powell also mentioned Iraq's human rights in passing during his presentation to the Security Council on February 5, 2003. U.N. Doc. S/PV.4701, *supra* note 308, at 17.

388. See *supra* notes 256-257 and accompanying text.

power, and was absolutely corrupt. Saddam Hussein was to Iraq what Idi Amin was to Uganda. On its human rights record alone, Iraq was an excellent candidate for a humanitarian intervention in order to free the Iraqi people from the constant fear of a relatively small group who could do, and in fact did, anything to them with total impunity.

The totality of the two doctrines of anticipatory self-defense and humanitarian intervention weighed heavily in favor of a forcible regime change. Given the technological advantage of U.S. forces over Iraqi forces, it was expected that the collateral loss of innocent life not of Iraq's own doing would be negligible compared to the deaths already attributable to the Ba'ath regime and to the number of lives that would be lost in a chemical or biological attack. With the invasion now in hindsight, such proved to be the case. Considering what was at stake, it was reasonable and appropriate, if not desirable, for the United States to act alone. As Anthony D'Amato was frequently quoted during the Gulf War, "multilateral action is better than unilateral action, but unilateral action is better than no action at all."³⁸⁹

Conclusion

Had the Ba'ath party remained in power in Iraq, it would have continued to benefit from its unlawful acts. Iraq obtained the benefit of access under the Non-Proliferation Treaty to peaceful nuclear technology when all the time it was using that benefit to totally violate the object and purpose of that Treaty. For twelve years Iraq benefited from the cease-fire of Security Council Resolution 687, by not having to fight a large-scale war with an international coalition, while it remained in material breach of a key provision of the cease-fire agreement by continuing its weapons of mass destruction programs unimpeded. Ruth Wedgwood summed it up perfectly when she wrote, "Iraq could hardly cloak itself in the cease-fire's benefits while flagrantly violating one of its principal conditions."³⁹⁰ The occupation of the Ba'ath party in a position of power in Iraq was a threat to the peace and security of many if not all other States, including particularly the United States. A regime change in Iraq was an appropriate remedy for those States which had been injured by Iraq's extreme delinquency. Having been so long in the making, this

389. D'Amato, *Israel's Air Strike*, *supra* note 78, at 263.

390. Wedgwood, *supra* note 200, at 726.

remedy took a 900-pound gorilla to accomplish, for an 800-pounder was no longer adequate. The lesson learned is that the longer such an intolerable situation continues, the larger the gorilla must grow in order to deal with it effectively.³⁹¹

³⁹¹ This article was originally prepared and accepted for publication prior to the U.S.-led invasion of Iraq in March 2003. Operating jointly, the U.S. and UK took less than a month to defeat Iraq's armed forces and drive the Ba'ath party out of power, doing so without any express authorization from the Security Council. Coalition troops continue to occupy Iraq as of this writing (May 2003) while a provisional government is forming. No weapons of mass destruction have yet been found in Iraq, but the weapons and materials discussed above have still not been accounted for and the search has not yet begun in earnest.

