

**JUSTIFICATION FOR UNILATERAL ACTION IN
RESPONSE TO THE IRAQI THREAT:**

A CRITICAL ANALYSIS OF OPERATION DESERT FOX

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I. Introduction

On 16 December 1998, the United States and Great Britain began a four-day air campaign against Iraq.² The operation, code named Desert Fox, was the most robust military action against Iraq since the end of the Persian Gulf War in 1991.³ The confrontation was a result of Iraq's failure to comply with United Nations resolutions.⁴ Although there was a consensus in the international community that the President of Iraq, Saddam Hussein, violated United Nations resolutions, there was not a consensus as to whether the United States and Great Britain would be justified in resorting

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2. Steven Lee Myers, *U.S. and Britain End Raids on Iraq, Calling Mission a Success*, N.Y. TIMES, Dec. 20, 1998, at 1, 20 [hereinafter Myers, *U.S. and Britain End Raids*]. This article analyzes the United States justification for the attack. Although Great Britain participated in the air strikes, this article does not attempt to analyze the British justification for the attack. The attack was a united effort between the United States and Great Britain, therefore the effort is labeled unilateral rather than bilateral or multilateral.

3. See Francis X. Clines & Steven Lee Myers, *Impeachment Vote in House Delayed as Clinton Launches Iraq Air Strike, Citing Military Need to Move Swiftly*, N.Y. TIMES, Dec. 17, 1998, at A1, A14 (stating that although the administration launched two previous strikes on Iraq in July 1993 and September 1996, Desert Fox was the largest military operation against Iraq since the Persian Gulf War).

4. See *id.* at A1 (stating that President Clinton ordered the attacks because Iraq failed to allow the United Nations Special Commission to carry on its work disarming Iraq as the government had agreed to do at the end of the Persian Gulf War in 1991).

to military action to enforce the United Nations resolutions.⁵ In fact, of the five permanent Security Council members, only the United States and Great Britain favored military action.⁶ Russia, France, and China were vocally opposed to any military action.⁷

This article addresses the legality of Operation Desert Fox in the context of the international legal system. The United Nations Charter, to which all parties involved in this conflict are signatories, prohibits the use of force except under two narrow exceptions. Part II of this article describes the events that resulted in American and British air strikes. Part III explains the international law as it pertains to the situation. Parts IV, V, and VI explain the theories for justification based on anticipatory self-defense, reprisal, and material breach of Resolution 687, respectively. Finally, this article concludes with a discussion about the legality of the United States attack on Iraq. The first step in the analysis, however, is to understand the crisis and the events that lead the Clinton administration to believe military force was the best solution to deal with the Iraqi government.

II. Crisis Development

A. Persian Gulf War

The road leading up to this confrontation spanned nearly eight years of conflict between Iraq and the international community. On 2 August 1990, the Iraqi Army, at the direction of Saddam Hussein, invaded the neighboring state of Kuwait.⁸ The invasion of Kuwait was a direct result of a long-running dispute over the sovereignty of Kuwait.⁹ Iraq made several additional claims: Kuwait illegally removed \$2.4 billion worth of Iraqi crude oil by "slant drilling" into the Rumaila oil field; Kuwait ille-

5. See Barbara Crossette, *As Tension Grows, Few Voices at U.N. Speak Up for Iraq*, N.Y. TIMES, Nov. 13, 1998, at A1, A14 [hereinafter Crossette, *As Tension Grows*] (stating that few countries are voicing support for the Iraqi defiance of the United Nations and many are saying that Iraq is fully responsible for any military action resulting from the crisis).

6. Steven Erlanger, *U.S. Decision to Act Fast, and Then Search for Support, Angers Some Allies*, N.Y. TIMES, Dec. 17, 1998, at A14.

7. See *id.* (finding that China, France, and Russia criticized the United States for the attack on Iraq).

8. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996 at 14, U.N. Doc. DPI/1770, U.N. Sales No. E.96.I.3 (1996).

9. See *id.* at 12-14.

gally occupied the islands of Warba, Bubiyan, and Failaka in the Persian Gulf, blocking Iraqi access to the Gulf; and the Organization of Petroleum Exporting Countries (OPEC) breached export quotas.¹⁰

Although the invasion caught the international community off guard, the condemnation rapidly followed. Within a few hours of the Iraqi invasion, the United Nations Security Council adopted Resolution 660 in which it condemned the invasion and demanded an immediate withdrawal of Iraqi forces from Kuwait.¹¹ Over the course of the next four months, the international community, through the conduit of the United Nations, diplomatically attempted to force an Iraqi withdrawal from Kuwait.¹² During this time, the Security Council adopted ever more forceful resolutions to back up this diplomatic effort.¹³ Finally on 29 November 1990, the Security Council adopted Resolution 678.¹⁴ This resolution authorized member states "to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent resolutions and to restore international peace and security to the area."¹⁵ This resolution would become effective after 15 January 1991, if continued diplomatic efforts failed to force Iraq out of Kuwait.¹⁶ Following Resolution 678, diplomatic efforts continued up until the night of 15 January 1991, but the international community failed to achieve a diplomatic solution to the standoff.¹⁷

On 16 January 1991, the coalition arrayed against Iraq launched an aerial bombardment and, on 24 February 1991, ground maneuvers began.¹⁸ In one of the most overwhelming military defeats in history, the

10. *Id.* at 14.

11. S.C. Res. 660, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/660 (1990).

12. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 17-18, 21-22.

13. *See* S.C. Res. 661, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/661 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/662 (1990); S.C. Res. 664, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/664 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/665 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/667 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/670 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/674 (1990). *See also* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 15, 17, 20-22.

14. S.C. Res. 678, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/678 (1990). *See also* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 22. The vote in the Security Council for Resolution 678 was twelve in favor, two against (Cuba and Yemen) and one abstention (China). *Id.*

15. S.C. Res. 678, *supra* note 14, at 1.

16. *Id.*

17. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 25.

coalition forcefully removed Iraq from Kuwait.¹⁹ On 27 February 1991, Saddam Hussein agreed to abide by all Security Council resolutions including the demand to remove all Iraqi forces from Kuwait and rescind all Iraqi claims to the territory of Kuwait.²⁰

B. Cease-Fire Agreement

On 2 March 1991, the Security Council passed Resolution 686.²¹ This resolution was a provisional agreement to end the hostilities between Iraq and the coalition.²² Under Resolution 686, all twelve of the previous Security Council resolutions pertaining to the Iraqi crisis remained in full effect.²³

Resolution 686 provided an opportunity for the Security Council to draft and to pass the formal cease-fire agreement, Resolution 687.²⁴ The Security Council passed Resolution 687 on 3 April 1991, officially ending

18. *See id.* at 25, 27. The coalition consisted of sixteen countries to include the United States, Great Britain, France, Saudi Arabia, Kuwait, Egypt, Morocco, Syria, Bahrain, Oman, Qatar, United Arab Emirate, Bangladesh, Niger, Pakistan and Senegal. DILIP HIRO, *DESERT SHIELD TO DESERT STORM: THE SECOND GULF WAR xxii-xxiii* (1992). These countries had ground troops in Saudi Arabia on 13 January 1991, right before the war began. *Id.*

19. *See id.* at 27.

20. *See id.* at 28.

21. S.C. Res. 686, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/686 (1991).

22. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 29.

23. *Id.*

The Security Council,

Recalling and reaffirming its Resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990), 677 (1990), and 678 (1990),

....

Acting under Chapter VII of the Charter,

1. Affirms that all twelve resolutions noted above continue to have full force and effect

S.C. Res. 686, *supra* note 21, at 1.

24. *See* S.C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/687 (1991); THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 30.

the hostilities in the Gulf and returning Kuwait to the free and sovereign status it held before Iraq's invasion.²⁵ This resolution was a very detailed document delineating steps Iraq had to take to restore Kuwait's freedom and ensure long-term peace and security in the region.

As part of this resolution, the Security Council required Iraq to dismantle and to destroy all weapons of mass destruction (WMD) in its arsenal and the means by which Iraq could deliver those weapons.²⁶ This measure sought to dismantle Iraq's nuclear, biological, and chemical weapons program, as well as a large part of the Iraqi missile capability. To ensure compliance with this portion of the resolution, the Security Council established the United Nations Special Commission (UNSCOM) to inspect and to verify progress towards destruction of the weapon systems.²⁷ This special commission was to work in coordination with an action team from the International Atomic Energy Agency (IAEA),²⁸ which would inspect and verify the nuclear capability of the Iraqi infrastructure.²⁹ Paragraph 8 of Resolution 687 specifically states:

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

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

(b) All ballistic missiles with a range greater than one hundred and fifty kilometers, and related major parts and repair production facilities.³⁰

Paragraph 12 goes on to state that Iraq shall unconditionally agree "to place all of its nuclear-weapons-usable materials under the exclusive control, for custody and removal, of the International Atomic Energy Agency,

25. See THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 30. The vote in the Security Council for Resolution 687 was twelve in favor, one against (Cuba), and two abstentions (Ecuador and Yemen). *Id.*

26. See S.C. Res. 687, *supra* note 24, at 5-6.

27. *Id.* at 5.

28. Throughout the remainder of this analysis, a reference to UNSCOM will include both the United Nations Special Commission and the International Atomic Energy Agency teams, unless otherwise specified.

29. See S.C. Res. 687, *supra* note 24, at 6.

30. *Id.* at 5.

with the assistance and cooperation of the Special Commission.”³¹ In an exchange of letters, the UNSCOM leadership and the Iraqis established the specific process by which UNSCOM would conduct these inspections. During this exchange, Iraq agreed to “[u]nrestricted freedom of movement without advance notice within Iraq of the personnel of the Special Commission and its equipment and means of transport.”³² For nearly eight years, UNSCOM, to the best of its ability, carried out the requirements under the resolution.

As early as June 1991, Iraq attempted to impede the access of UNSCOM inspections.³³ That month, Iraq sought to deny an IAEA team access to certain locations on three separate occasions.³⁴ On the third occasion, the IAEA team attempted to block the departure of some vehicles leaving the compound in an effort to inspect the vehicles for illegal material. The Iraqis denied access to the vehicles and fired automatic weapons over the heads of the inspectors to warn them against approaching the vehicles.³⁵ This was just the beginning of a series of confrontations between UNSCOM and the Iraqi government.

Over the succeeding seven and a half years, the Iraqi government denied UNSCOM inspectors access to suspected weapon sites on innumerable occasions.³⁶ The Security Council adopted one resolution finding Iraq in material breach of Resolution 687 as it pertains to the inspection and verification of WMD.³⁷ The Security Council adopted six other resolutions concerning Iraqi violations of Resolution 687, in one case deploring and in the others, condemning the actions of the Iraqi government.³⁸

In the fall of 1997, there was a serious confrontation between the international community and Iraq over the continued inspections of

31. *Id.* at 6.

32. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 77.

33. *Id.* at 80.

34. *Id.*

35. *Id.*

36. See THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 82-94 (finding that between the years 1991 and 1995, Iraq declared ongoing monitoring to be unlawful, threatened UNSCOM aircraft, continued to submit alleged “full and final disclosures” of WMD programs, refused inspection team access to certain sites, blocked UNSCOM flights, attempted to prevent the removal and destruction of chemical agents, protested the installation of monitoring cameras and threatened to block the work of UNSCOM all together).

37. S.C. Res. 707, U.N. SCOR, 46th Sess., at 3, U.N. Doc. S/RES/707 (1991).

UNSCOM within Iraq. Iraq claimed the UNSCOM inspection teams were biased in their composition because the teams included too many westerners and were not representative of the international community.³⁹ On 29 October 1997, Iraq expelled the American members of the inspection teams.⁴⁰ Richard Butler, the head of UNSCOM, removed the remaining teams from Iraq in protest of this American expulsion.⁴¹ The United States made explicit threats to use military action to force Iraqi compliance with Resolution 687.⁴² A Russian diplomatic mission managed to extinguish the crisis by coercing Iraq to grant authorization allowing American inspectors to return to Iraq.⁴³

Shortly thereafter, another confrontation flared over Iraq's denial of unfettered access to all sites within its territory. In December 1997, Iraq declared certain "presidential palaces" off limits to the UNSCOM inspection teams who sought access to conduct inspections.⁴⁴ Although inspections continued at other sites around the country, UNSCOM and the United States suspected Iraq was hiding WMD, and the material to build those weapons, in these presidential palaces. In a statement, Richard Butler explained that it was impossible for UNSCOM to successfully verify full implementation of Resolution 687 without access to these sites and full Iraqi cooperation.⁴⁵

The United States and Great Britain began a military buildup in the region as a means to force strict compliance by Iraq.⁴⁶ Several sources

38. S.C. Res. 1060, U.N. SCOR, 51st Sess., at 2, U.N. Doc. S/RES/1060 (1996); S.C. Res. 1205, U.N. SCOR, 53d Sess., at 2, U.N. Doc. S/RES/11205 (1998); S.C. Res. 1194, U.N. SCOR, 53d Sess., at 2, U.N. Doc. S/RES/1194 (1998); S.C. Res. 1137, U.N. SCOR, 52d Sess., at 2-3, U.N. Doc. S/RES/1137 (1997); S.C. Res. 1134, U.N. SCOR, 52d Sess., at 2, U.N. Doc. S/RES/1134 (1997); S.C. Res. 1115, U.N. SCOR, 52d Sess., at 1, U.N. Doc. S/RES/1115 (1997).

39. See *Iraq Protests U.N. Choices on Arms Team*, N.Y. TIMES, Jan. 12, 1998, at A10 (stating that Iraq criticized the United Nations inspection teams because they had too many American and British experts on them).

40. Steven Lee Myers, *Iraq Carried Out Threat to Expel U.S. Inspectors*, N.Y. TIMES, Nov. 14, 1997, at A1.

41. Steven Lee Myers, *Clinton is Sending 2d Carrier to Gulf*, N.Y. TIMES, Nov. 15, 1997, at A1.

42. See *id.*

43. Steven Erlanger, *Albright Says Iraq Agrees to Let U.S. Inspectors Back*, N.Y. TIMES, Nov. 20, 1997, at A1.

44. Michael R. Gordon & Elaine Sciolino, *The Deal on Iraq: The Way it Happened*, N.Y. TIMES, Feb. 25, 1998, at A1.

45. Christopher S. Wren, *U.N. Official Doubts Team Can Verify Iraq Arms*, N.Y. TIMES, Jan. 24, 1998, at A3 [hereinafter Wren, *U.N. Official Doubts*].

including Russia, France, and the Arab League launched diplomatic efforts.⁴⁷ It was not until a personal visit by Kofi Anan, Secretary General of the United Nations, that the international community reached an agreement with Iraq.⁴⁸ This agreement required Iraq to comply fully with all United Nations resolutions and thus, provide unfettered access to all suspected weapon sites.⁴⁹ Following the agreement, Iraq began to allow United Nations inspectors access to the presidential palaces previously declared off limits.⁵⁰ This agreement averted military action by the United States.

On 5 August 1998, the Iraqi government declared that it was ending all cooperation with UNSCOM.⁵¹ Iraq also demanded that the United Nations dismiss Richard Butler as the chief of UNSCOM.⁵² This declaration clearly violated the agreement brokered by Kofi Anan earlier in the year. Iraq brought the international community back to the brink of military action.

In the following months, Iraq allowed spot inspections of suspected weapons sites; but, on 31 October 1998, Iraq once again declared an end to cooperation with UNSCOM.⁵³ After two weeks of negotiations the United States prepared to launch a military strike on Iraq.⁵⁴ Once again,

46. Douglas Jehl, *Standoff with Iraq: The Scene*, N.Y. TIMES, Feb. 5, 1998, at A1.

47. Christopher S. Wren, *The Diplomacy: U.N. Chief Cancels Trip to Mideast as a Hunt for Compromise Continues*, N.Y. TIMES, Feb. 10, 1998, at A8 [hereinafter Wren, *The Diplomacy*].

48. Barbara Crossette, *U.N. Rebuffs U.S. on Threat to Iraq if it Breaks Pact*, N.Y. TIMES, Mar. 3, 1998, at A1 [hereinafter Crossette, *U.N. Rebuffs U.S. on Threat*].

49. *Id.*

50. *Touring Iraq's Presidential Sites*, N.Y. TIMES, Mar. 30, 1998, at A16.

51. Barbara Crossette, *Iraqis Break Off All Cooperation with Inspectors*, N.Y. TIMES, Aug. 5, 1998, at A1 [hereinafter Crossette, *Iraqis Break Off All Cooperation*].

52. *Id.*

53. See Barbara Crossette, *In New Challenge to the U.N., Iraq Halts Arms Monitoring*, N.Y. TIMES, Nov. 1, 1998, at 1 (stating that since the announcement in August Iraq allowed spot inspections).

54. See Crossette, *As Tension Grows*, *supra* note 5, at A1 (stating that the United States continued to build up forces in the Persian Gulf area in preparation for a possible military strike on Iraq).

Iraq averted a military strike at the last minute by allowing UNSCOM to resume inspections.⁵⁵

On 15 December 1998, Richard Butler provided the Security Council a written report detailing Iraq's level of cooperation with UNSCOM inspections over the course of the previous month.⁵⁶ In this report, Richard Butler explained that Iraq had not fully cooperated with the UNSCOM inspection teams.⁵⁷ The United States repeated warnings of possible military strikes for Iraq's failure to allow unfettered access to suspected WMD sites and full cooperation with UNSCOM inspection teams.⁵⁸

In response to the report by Richard Butler and the continued non-compliance by Iraq, the United States and Great Britain launched Operation Desert Fox on 16 December 1998.⁵⁹ The air campaign consisted of strikes by cruise missiles, fighters, and bombers.⁶⁰ The attacks concentrated on command centers, missile factories, and airfields.⁶¹ Out of fear of releasing chemical weapons into the atmosphere and risking collateral damage, the United States and Great Britain did not attack suspected chemical and biological weapon sites.⁶²

President Clinton claimed victory at the end of the four-day campaign.⁶³ Clinton explained that the United States had sought "to degrade Saddam's weapons of mass destruction program" and "his capacity to attack his neighbors."⁶⁴ Officials inside the Clinton administration admitted that the effectiveness of an air strike is limited and the damage would

55. See Philip Shenon & Steven Lee Myers, *U.S. Says it was Just Hours Away from Starting Attack Against Iraq*, N.Y. TIMES, Nov. 15, 1998 at 1 (stating that Iraq avoided a military strike because of a last ditch plea by Kofi Anan and Iraq's announcement hours later that the country would allow the inspectors to return to their "normal work").

56. Steven Lee Myers & Barbara Crossette, *Iraq is Accused of New Rebuffs to U.N. Team: U.S. Repeats Warnings of Striking Baghdad*, N.Y. TIMES, Dec. 16, 1998, at A1, A4.

57. *Id.* at A4.

58. *Id.* at A1.

59. Clines & Myers, *supra* note 3, at A1. See generally *UNSCOM: Chronology of Main Events* (visited Feb. 10, 1999) <<http://www.un.org/Depts/unscom/chronology.htm>>, for a complete timeline of the events surrounding the weapons inspectors leading up to the air strikes.

60. Myers, *U.S. and Britain End Raids*, *supra* note 2, at 20.

61. *Id.*

62. Steven Lee Myers, *Jets Said to Avoid Poison Gas Sites*, N.Y. TIMES, Dec. 18, 1998, at A1 [hereinafter Myers, *Jets Said to Avoid Poison*].

63. Philip Shenon, *Mission Intended to Degrade Iraq Threat*, N.Y. TIMES, Dec. 20, 1998, at 20.

64. *Id.*

merely restrict the Iraqi WMD program for a matter of months or possibly just weeks.⁶⁵

This article analyzes the legality of the military air strikes under international law. By applying the two exceptions of the United Nations Charter and some evolving norms of customary international law, it will become clear that the United States and Great Britain were justified in taking unilateral military action to enforce the provisions of United Nations Resolution 687. This conclusion does not mean that in the future the United States has the authority to act unilaterally, using military force against other nations. Under these particular circumstances, however, the United States action was legally justified.

III. International Law and the Use of Force

To understand the issues, one must first understand the pertinent sources of international law that, according to many scholars, are found in Article 38 of the Statute of the International Court of Justice (ICJ):⁶⁶ international conventions, custom, and general principles of law.⁶⁷ This article deals primarily with international conventions and customary international law.⁶⁸

In addition, there are two subsidiary sources of international law: judicial decisions and teachings of prominent international legal scholars.⁶⁹ There is, however, a caveat contained in Article 59 of the Statute of the ICJ about using a judicial decision as a source of international law.⁷⁰ The judicial decisions of the ICJ are not binding, except on the particular dispute for which the decision was made.⁷¹ The practical effect of this

65. *Id.*

66. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE 5 (1993).

67. Charter of the United Nations Statute and Rules of Court, 1947 I.C.J. Acts & Docs. 46 (ser. D, 2d ed.) No. 1.

68. The general principles of international law are a difficult area because legal scholars can not agree on a sound definition for the terms. AREND & BECK, *supra* note 66, at 7. Principles of international law may mean basic principles recognized in most domestic legal systems, general principles of international law which states have simply come to accept, or principles of higher morality turned into principles of law. *Id.* General principles of law do not play a part in this analysis because the concepts in the discussion do not deal directly with the use of force.

69. Charter of the United Nations Statute and Rules of Court, 1947 I.C.J. Acts & Docs. at 46.

70. *Id.* at 49.

caveat is to prohibit applying *stare decisis* to ICJ decisions.⁷² Although an ICJ decision may not be binding outside that particular case, under the principle of *stare decisis*, international legal scholars generally regard ICJ decisions as “persuasive authority of existing international law.”⁷³

A. International Agreement Law

The first primary source of international law that is important to this discussion is commonly referred to as treaty law. Although the ICJ refers to the first source as international conventions, other terms generally found interchangeable with convention include “treaty, protocol, declaration, covenant, charter, pact, statute, or the word ‘agreement’ itself.”⁷⁴ For clarity purposes, this analysis will refer to this source of law as international agreement law, rather than treaty law. The most important international agreement in this dispute is the United Nations Charter.

In 1945, the Allied powers of World War II assembled to draft a charter for the United Nations.⁷⁵ On 26 June 1945, fifty-one states signed the Charter and the United Nations was born.⁷⁶ Today the membership of the United Nations has expanded to 185 states.⁷⁷ The United Nations Charter is an international agreement under international law and is, therefore, binding on all signatories. The heart of the United Nations Charter is Article 2(4), which provides that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial

71. *Id.*

72. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 107 (2d ed. 1987).

73. *Id.* When the decision of the court is divided and highly political, however, the international legal community is likely to hold the decision in lower regard than a decision that is not political in nature and the deciding votes of the justices are much more lopsided. *Id.* at 108.

74. George K. Walker, *Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 *NAVAL L. REV.* 1, 14 (1988).

75. AREND & BECK, *supra* note 66, at 29.

76. *Id.* at 30.

77. *United Nations Member States* (last modified Dec. 9, 1998) <<http://www.un.org/Overview/unmember.html>>.

integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.”⁷⁸

This provision, however, was not an absolute ban on the use of force by the international community. Built into the United Nations Charter were two exceptions to this prohibition on the use of force.

The first exception is action by the Security Council under Chapter VII. Article 41 stipulates that the Security Council must first try to use measures short of the use of force to solve problems that pose a threat to international security.⁷⁹ Under Article 42, however, “should the Security Council consider that the measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”⁸⁰

Resolution 678, allowing the use of “all necessary means” to force an Iraqi withdrawal of Kuwait, is the premiere example of a Chapter VII action by the United Nations.⁸¹ The coalition was justified in using force against Iraq during Desert Storm because the coalition was explicitly authorized to use force by Resolution 678.

The second exception to the use of force in the United Nations Charter is the self-defense provision of Article 51.⁸² Under this provision, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”⁸³

The limits of this provision have been a topic of debate since 1945 and will be discussed in more detail below. Initially, it is important to understand that there is a legal right to individual or collective self-defense. Beyond Articles 42 and 51, there is no right to the use of force under the United Nations Charter. All of the countries involved in the standoff with

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

79. *Id.* art. 41.

80. *Id.* art. 42.

81. See S.C. Res. 678, *supra* note 14, at 1.

82. U.N. CHARTER art. 51.

83. *Id.*

Iraq, including Iraq itself, are signatories and therefore, bound by the Charter.

There is disagreement about the exact legal effect of a United Nations resolution.⁸⁴ Most of the disagreement revolves around the effect of a General Assembly resolution, rather than a Security Council resolution.⁸⁵ The Security Council acts with a certain degree of authority, which the General Assembly does not possess. The Security Council may force member states to comply with matters specifically covered in the United Nations Charter.⁸⁶ Article 25 of the United Nations Charter requires member states “to accept and carry out the decisions of the Security Council.”⁸⁷ Member states are, therefore, obligated to adhere to a resolution passed by the Security Council. Failure to adhere to a Security Council resolution may expose the member state to action by the Security Council following the powers granted to it in Chapter VI and Chapter VII.⁸⁸

84. JOSEPH MODESTE SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 2-3 (6th ed. 1988) (finding that there is much controversy surrounding the belief that United Nations resolutions are a source of international law).

85. *Id.* As the Deputy Legal Advisor for the Department of State, Stephen M. Schwebel once stated:

As a broad statement of U.S. policy in this regard, I think it is fair to state that General Assembly resolutions are regarded as recommendations to member States of the United Nations.

To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practices of states, such resolutions are evidence of customary international law on a particular subject matter.

Id. (citing McDOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1975, at 85 (1976)).

86. *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 163 (July 1962) (during a discussion about the responsibilities of the Security Council, the court found that Article 24 of the United Nations Charter gives the Security Council the authority “to impose an explicit obligation of compliance” on a member state).

87. U.N. CHARTER art. 25.

88. *See id.* art. 34 (granting the Security Council the power to investigate disputes); *id.* art. 35 (granting the Security Council the power to make recommendations for settlement of a dispute); *id.* art. 41 (granting the Security Council the power to take measures short of armed force); *id.* art. 42 (granting the Security Council the power to use air, sea and land force to maintain or restore international peace and security).

B. Customary International Law

The second source of international law that will play a part in this analysis is customary international law. There are two requirements for an idea to become customary international law: (1) state practice, which is measured by the duration, consistency, and number of states; and (2) a state belief that the practice is legally required, also called *opinio juris*.⁸⁹ Without either one of these two requirements, the action does not rise to the level of customary international law. For example, if a state were to refrain from the use of force in a situation only because that state was incapable of taking military action, not because the state believed the action illegal, then the prohibition on the use of force as applied to that state would not rise to level of customary international law.

Although the United Nations Charter is international agreement law, the provisions in the Charter may also become customary international law, if both of the requirements described above are met. This fact is important as the discussion of Operation Desert Fox unfolds.

Through international agreements and customary international law, it is possible to conduct a legal analysis of the standoff between the international community and Iraq. If military action against Iraq violated either of these two sources, then the action would be illegal under international law. This article analyzes three separate and unique theories supporting the validity of the use of force during Operation Desert Fox. The theories are: anticipatory collective self-defense, reprisal, and material breach of Resolution 687. While only one valid theory is necessary to justify military action, this article discusses each theory at length.

IV. Anticipatory Self-Defense

The first theory for legal justification to strike Iraq stems from the notion of self-defense. The international community recognized the theory of self-defense long before adopting the United Nations Charter.⁹⁰ Article

89. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

90. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5, 8, 13, 26, 41 (1963) (tracing the historical development of the use of force from as early as several hundred years before Christ). *But see* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 176 (1994) (claiming that until war was a prohibited action, self-defense was little more than a legal justification to wage war, not a legal right to do so).

51 of the United Nations Charter merely codified the theory and transformed it into an international agreement to which all signatory states must adhere. Self-defense is the theory that a state may respond to force with force.⁹¹

Over the years, legal scholars have attached several requirements to the use of self-defense. These requirements include necessity, proportionality, and, under certain conditions, imminency.⁹² Although the requirements are closely tied together, they are separate. Necessity means that the use of force in self-defense must be absolutely necessary to repel the threat and that “peaceful measures have been found wanting or when they clearly would be futile.”⁹³ Proportionality, on the other hand, prohibits the use of force in self-defense from disproportionately exceeding the manner or the aim of the necessity that originally provoked the use of force.⁹⁴ If either of these two requirements are not met, the use of force in self-defense is not legally justified. The third requirement of imminency arises only in the case of anticipatory self-defense and will be explained below.⁹⁵

A. Legal Right to Anticipatory Self-Defense

States have often used the theory of self-defense to strike preemptively against an impending use of force.⁹⁶ Anticipatory self-defense is the theory that a state may respond to an imminent threat of force before that force is actually exerted.⁹⁷ There is general agreement among international legal scholars that customary international law recognized a right to

91. See BROWNLIE, *supra* note 90, at 252 (defining self-defense as the reaction to an immediate threat posed to the state itself); DINSTEIN, *supra* note 90, at 175 (defining self-defense as the lawful use of force in response to an unlawful use of force or threat of force).

92. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635, 1637 (1984) [hereinafter Schachter, *Right of States*] (stating that self-defense requires necessity and proportionality as well as the additional requirement of imminency when considering the case of anticipatory self-defense). *But see* DINSTEIN, *supra* note 90, at 202-03 (stating that self-defense has the three requirements of necessity, proportionality and immediacy). The distinction between imminency and immediacy is important to the discussion and will be covered in depth in the discussion *infra* Part V.A. Immediacy does not apply effectively in the case of anticipatory self-defense which will be fully explained in this later section.

93. Schachter, *Right of States*, *supra* note 92, at 1635.

94. *Id.* at 1637.

95. See discussion *infra* Part IV.A.1.

96. See discussion *infra* Part IV.B.

97. BROWNLIE, *supra* note 90, at 257.

anticipatory self-defense before the international community adopted the United Nations Charter.⁹⁸

1. Customary International Law

Anticipatory self-defense became an accepted custom of international law as early as 1837 during the Canadian Rebellion against the British.⁹⁹ The *Caroline* case arose from that conflict.¹⁰⁰ During the Canadian Rebellion, the British militia attacked a United States ship, the *Caroline*, which was transporting supplies to Canadian insurgents. This attack led to an agreement between the United States Secretary of State and the British Special Minister to Washington, D.C.¹⁰¹ In this agreement, the two parties concluded that self-defense may at times require the use of force.¹⁰² For a state to invoke the right of self-defense the state must show that the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹⁰³

This case defines the right of anticipatory self-defense because it outlines the requirements that a state must meet to act preemptively in self-defense. In the *Caroline* case, the two states concluded that the right to anticipatory self-defense was not properly exercised and the British Special Minister apologized for the intrusion into American territory.¹⁰⁴ Secretary Webster’s comment that the threat be instant and overwhelming evolved into the requirement of imminency over the course of time.¹⁰⁵ To

98. See AREND & BECK, *supra* note 66, at 72 (citing DINSTEIN, *supra* note 90, at 172); see also discussion *infra* Part IV.B; cf. BROWNLIE, *supra* note 90, at 257-60 (stating that although most scholars believe customary international law allowed anticipatory self-defense, one must be cautious because certain forms of anticipatory self-defense may exceed the customary international law). Ian Brownlie provides a list of legal scholars who adhere to the belief that anticipatory self-defense is a customary international law. BROWNLIE, *supra* note 90, at 257, n.2.

99. See 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (quoting Letter from Mr. Webster, United States Secretary of State to Lord Ashburton, the British Special Minister to Washington, D.C. (Aug. 6, 1842)).

104. *Id.*

105. See Schachter, *Right of States*, *supra* note 92, at 1635 (stating that one may infer from statements given on the debate about the Israeli bombing at Osarik, that a preemptive strike is valid only where the threat is imminent).

justify the preemptive use of force in self-defense, customary international law requires that the threat be imminent.

2. *International Agreement Law*

Not only may one make the argument that anticipatory self-defense is recognized by customary international law, many scholars would argue that Article 51 of the United Nations Charter authorizes anticipatory self-defense. Analyzing this line of reasoning requires a close look at the exact language in Article 51; however, there have been several disputes as to interpretation of the text.

The first controversy concerning the interpretation centers on the meaning of “inherent right” as it relates to “armed attack” in Article 51.¹⁰⁶ There are two separate schools of thought on whether these phrases would permit anticipatory self-defense.¹⁰⁷ The first is a literal interpretation, in which case there is no right of self-defense without an actual armed attack.¹⁰⁸ Followers of this line of reasoning are sometimes called “restrictionists.”¹⁰⁹ Under this interpretation, the supporters argue that “inherent right” in no way modifies “armed attack” and therefore, unless troops, planes or ships cross an international border to commence an attack, there is no right to self-defense. Although this is a plausible interpretation, it

106. See U.N. CHARTER art. 51. On 14 December 1974, the General Assembly adopted Resolution 3314, which is the Definition of Aggression. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-44, U.N. Doc. A/9890 (1974). This resolution was an attempt by the General Assembly to define further an act of aggression as it applies to the United Nations Charter. Unfortunately, there was a caveat put into the definition which severely limits the application of the definition to Article 51. Article 6 of the Definition of Aggression states that “[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.” *Id.* at 144. Because the use of force in self-defense is a lawful use of force, the prohibition on diminishing the scope of the Charter prevents the Definition of Aggression from diminishing the scope of Article 51.

107. AREND & BECK, *supra* note 66, at 73.

108. *Id.*

109. *Id.* Anthony C. Arend and Robert J. Beck find that Ian Brownlie, Yoram Dinstein, Louis Henkin, and Philip Jessup all fall in the restrictionist category. *Id.* (citing BROWNLIE, *supra* note 90, at 275-78; DINSTEIN, *supra* note 90, at 173; LOUIS HENKIN, HOW NATIONS BEHAVE 140-44 (2d ed. 1979); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1948)).

completely alters customary international law as it existed at the birth of the United Nations by severely limiting the right to self-defense.

The second school of thought, called “counter-restrictionist,” believes that the drafters used “inherent right” in the Article to preserve the right to self-defense as it existed in 1945.¹¹⁰ The counter-restrictionists would preserve the right of anticipatory self-defense under an alternative interpretation of Article 51.¹¹¹ This alternative interpretation concentrates on the word “inherent.”¹¹² To the counter-restrictionist the word modifies self-defense, therefore the drafters did not mean to restrict the customary right of self defense, but rather intended to list one situation under which a nation may resort to self-defense.¹¹³ Some counter-restrictionists further argue that state action since 1945 requires this interpretation because states have on numerous occasions acted under the guise of anticipatory self-defense.¹¹⁴

The other Article 51 interpretation problem that may arise in this analysis revolves around the phrase “until the Security Council has taken measures.”¹¹⁵ It is not entirely clear to what extent the Security Council must act in a given situation to preclude a nation from using force in self-defense. One school of thought argues that once the Security Council takes any action whatsoever, that action completely cuts off the continued use of force in self-defense by any nation involved in the conflict.¹¹⁶ This is a lit-

110. AREND & BECK, *supra* note 66, at 73. Anthony C. Arend and Robert J. Beck find that D. Bowett, William O'Brien, Myres McDougal, Florentin Feliciano, and Julius Stone all fall into the counter-restrictionist category. *Id.* (citing D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 184-93 (1958) [hereinafter BOWETT, SELF-DEFENCE]; William V. O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, 11 ORBIS 716, 721 (1967) [hereinafter O'Brien, *International Law*]; MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 232-44 (1961); JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 98-100 (1958)).

111. AREND & BECK, *supra* note 66, at 73.

112. *Id.*

113. *Id.*

114. *Id.*

115. See U.N. CHARTER art. 51.

116. See Roger K. Smith, *The Legality of Coercive Arms Control*, 19 YALE J. INT'L L. 455, 496 (1994) (citing comments made in Washington D.C. on 4-6 October 1990 by Professor Abram Chayes at the Conference on International Law and the Non-Use of Force and comments made by United Nations Secretary General Javier Perez de Cuellar as found in *U.N. Article 51 May Not Permit Strike at Iraq*, WASH. POST, Nov. 9, 1990, at A30).

eral interpretation of Article 51 and may lead to some absurd results as described by the opposing school of thought.

The alternative school of thought advances two reasons why this literal interpretation is not valid. First of all, a literal reading of Article 51 would be “an implausible—indeed, absurd—interpretation.”¹¹⁷ Through this interpretation, the right of a state to defend itself would be subordinate to the will of the Security Council.¹¹⁸ For example, if the Security Council condemned a state claiming to act in self-defense, but failed to take action against the aggressor, a literal interpretation of Article 51 would prevent the injured state from taking any action whatsoever against the aggressor. This simply cannot be the proper interpretation, if the right to self-defense is to be anything other than an illusory right.

The second argument advanced against a literal interpretation is based on the drafters’ intent for the United Nations Charter.¹¹⁹ Initially, there was a proposal to specifically deny the right of a state to act in self-defense, if the Security Council took *any* action.¹²⁰ But the drafters rejected this proposal.¹²¹ What this means is that the drafters intended the Article 51 right to self-defense to terminate not upon *any* action by the Security Council, but rather upon *specific* action by the Security Council which *explicitly* denied the right to self-defense.¹²²

For these two reasons, by implication, the right to self-defense ends not upon Security Council action per se, but upon Security Council action that *explicitly* eliminates the right to self-defense; or alternatively, determines that the actions of the state acting in self-defense have surpassed the self-defense prerogative and become a threat to international security.¹²³

117. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT’L L. 452, 458 (1991) [hereinafter Schachter, *United Nations Law*].

118. Smith, *supra* note 116, at 497.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 497-98.

123. It is this second reason that may prevent a nation from using WMD in self-defense against a conventional attack. The use of WMD would likely exceed the self-defense prerogative and become a threat to international security—although this determination is left up to the Security Council.

In either case, at that point the state acting in self-defense may no longer justify its actions based on Article 51.

There clearly is a right to self-defense under international law recognized by both the United Nations Charter and customary international law. What is not as clear is whether a right to anticipatory self-defense exists. Because of the *Caroline* case, there is a customary international law permitting anticipatory self-defense, but scholars differ dramatically in determining whether that right exists under the United Nations Charter. What does appear clear, however, is that state action since the United Nations Charter was adopted supports the argument that a right to anticipatory self-defense exists.

B. Historical Examples

In the fifty years since the United Nations Charter was adopted, there have been many situations in which states have used force under the rubric of anticipatory self-defense. These actions may shed insight on just how the signatory nations interpret Article 51 and support that customary international law recognizes the right to use force in anticipatory self-defense.

1. *Cuban Missile Crisis*

The first and possibly most important exercise of anticipatory self-defense was the Cuban Missile Crisis, a confrontation between the United States and the former Soviet Union.¹²⁴ On 15 October 1962, the United States discovered that the Soviet Union was shipping nuclear missiles to the island-state of Cuba.¹²⁵ The United States initiated a naval blockade of Cuba to prevent further shipments of the weapons to the island.¹²⁶

Under Article 2(4) of the United Nations Charter, this blockade constituted a use of force prohibited by the Charter, although that use of force would be allowed if the action fell under one of the Charter exceptions. In

124. See AREND & BECK, *supra* note 66, at 74.

125. A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II*, 215 (1997).

126. *Id.* at 216.

the days that followed, the Security Council debated the issue, but never passed a resolution supporting, or condemning the United States action.¹²⁷

The United States officially justified the blockade as a regional action under Article 52 of the United Nations Charter because the Organization of American States endorsed it.¹²⁸ But, the question of anticipatory self-defense was intertwined in the discussion.¹²⁹ A primary topic in the Security Council discussion was whether the nuclear missiles had a defensive or offensive purpose.¹³⁰ If the missiles were on the island for an offensive purpose, then it was possible the United States would have been justified in acting preemptively to strike that offensive capability. The Security Council had several members, including the Soviet Union, voicing strong opposition to the blockade. Because the Security Council did not reach a consensus at least partially suggests that the international community did not completely dismiss the right of anticipatory self-defense.

The Cuban Missile Crisis is an important example for two reasons. First, the situation involved a use of force to prevent proliferating WMD

127. *Id.* at 217-18.

128. See Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 134 (1986) [hereinafter Schachter, *Defense of International Rules*] (stating that the United States viewed the action as a defensive response, however the argument given to the international community was that the Organization of American States was the source of the authority to act). On 23 October 1962, the Organization of American States voted by 19 votes to none to adopt a resolution requesting that Cuba remove the missiles from the island and allowing member states to take all necessary means to achieve this goal. WEISBURD, *supra* note 125, at 216. Article 52 of the United Nations Charter states:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

U.N. CHARTER art. 52.

129. AREND & BECK, *supra* note 66, at 76.

130. For example the Ghanaian delegate to the Security Council, a rotating member, analyzed the situation under the principles of the *Caroline* case. See *id.* at 75. The Ghanaian delegate argued that there was insufficient proof to conclude that the weapons were for offensive purposes and opposed the United States blockade of Cuba because it was an illegal use of force. See *id.* (citing U.N. SCOR, 17th Sess., 1023d mtg. at 19, U.N. Doc. S/PV.1023 (1962) (statement of Quaison-Sackey, Ghanaian delegate to the Security Council)).

and a shift in the balance of power. It is even more important because the support of the United States action came from nations along a large spectrum of ideals and economic development around the globe. In the Security Council, Chile, China, France, Ireland, the United Kingdom, and Venezuela all supported the United States action.¹³¹ On the other hand, the Soviet Union, Ghana, Romania, and the United Arab Republic opposed the United States action.¹³² For these reasons, the Cuban Missile Crisis was important in the evolution of anticipatory self-defense.

2. Arab-Israeli War of 1967

Probably the situation that fits the anticipatory self-defense mold best is the 1967 attack by Israel against the Arab states in the region. Although the discussions that followed this attack spent very little time actually addressing anticipatory self-defense, this is predominately a result of the Cold War feuding between the East and West.¹³³

After the Soviet Union falsely reported to the United Arab Republic (UAR) that Israel was planning a major attack on the UAR, President Gamal Abdel Nasser took several very provocative actions:¹³⁴ the UAR moved a force large enough to conduct offensive operations into the Sinai; Nasser publicly made statements that he intended to eliminate Israel; the UAR dismissed the United Nations emergency force from the Sinai; and the UAR closed the Straits of Tiran to Israel.¹³⁵ Israel had previously stated that any interference with Israeli shipping in the Straits of Tiran would constitute an act of war.¹³⁶

On 5 June 1967, Israel mounted a massive air campaign against the UAR airfields.¹³⁷ In the days that followed, Israel captured the Sinai, the West Bank, and the Golan Heights in ground maneuvers against the UAR, Jordan, and Syria.¹³⁸ On 10 June 1967, both Syria and Israel accepted a cease-fire on the last active front in the short war.¹³⁹ Israel justified the

131. WEISBURD, *supra* note 125, at 217.

132. *Id.*

133. AREND & BECK, *supra* note 66, at 77.

134. WEISBURD, *supra* note 125, at 136.

135. *Id.*

136. *Id.*

137. *Id.* at 137.

138. *Id.*

139. *Id.*

attack by arguing that closing the Straits of Tiran was an act of war by the UAR, and the massing of the UAR troops on the southern border of Israel posed a serious and imminent threat to the security of Israel.¹⁴⁰ To prevent an invasion of Israel, the nation struck preemptively against the Arab coalition of the UAR, Jordan, Syria, and Iraq.

In the wake of the Israeli attack, there was debate in both the General Assembly and the Security Council. Most of the sentiment in the Security Council was a result of Cold War animosity.¹⁴¹ The Soviet Union backed the Arab position finding that the Israeli action was sheer aggression that violated Article 2(4).¹⁴² The United States and the West, however, acquiesced in the Israeli use of force, preferring to focus rather on the Israeli complaints.¹⁴³ Because of the posturing on the part of the two superpowers, it is difficult to say whether the use of anticipatory self-defense was a justified use of force in this situation.¹⁴⁴ The failure of the United Nations, however, to condemn the action is an indication that the right to strike preemptively against a possible aggressor was, at a minimum, an unsettled question under the United Nations Charter.

3. *Israeli Attack on Iraq*

The Israeli Air Force attack against the Iraqi nuclear facility at Osarik was another prominent example of anticipatory self-defense. With the assistance of France and other nations in 1981, Iraq was only three months from completing construction of a nuclear reactor.¹⁴⁵ Although publicly, Iraq claimed the facility was for research only, other factors indicated the

140. See AREND & BECK, *supra* note 66, at 76.

141. See *id.* at 76-77.

142. See *id.*

143. WEISBURD, *supra* note 125, at 139.

Communist states, Arab states and several prominent nonaligned states tended to condemn Israel unequivocally and demand immediate withdrawal from the territory Israel had taken during the fighting The second view adhered to by the United States, Canada, Australia, New Zealand, Japan, most Western European states, most Latin American states, and much of Francophone Africa, was that it was necessary to address its causes.

Id. at 138.

144. See AREND & BECK, *supra* note 66, at 77.

145. WEISBURD, *supra* note 125, at 287-88.

possible alternative use of manufacturing nuclear weapons for use against Israel.¹⁴⁶ Israel attempted to rally international condemnation and action against the construction of the nuclear reactor in Iraq, but failed in this endeavor.¹⁴⁷ In light of this failure, Israel attacked the facility on 7 June 1981, completely destroying it.¹⁴⁸ The Security Council extensively debated the Israeli attack on the facility. It ultimately adopted a resolution condemning the attack, but the reasons that states supported this resolution were starkly different.¹⁴⁹

There were many states that argued for a strict restrictionist interpretation of Article 51, condemning the Israeli action as sheer aggression.¹⁵⁰ Although the vast majority of other states also condemned the Israeli action, many of these states argued that, if the action met the requirements of the *Caroline* case, there would have been legal justification under international law for the attack.¹⁵¹

This line of reasoning is in accord with a counter-restrictionist view of Article 51.¹⁵² These states found that the problem with the Israeli attack stemmed from the lack of an imminent threat.¹⁵³ As required in the *Caroline* case, there must be an instant and overwhelming threat to justify use of force for anticipatory self-defense. The Israeli argument failed because it was not clear whether Iraq would use the reactor to produce nuclear weapons.¹⁵⁴ There was even more doubt about the threat those nuclear weapons would pose to Israel.¹⁵⁵ Even if Iraq intended to use the reactor to produce weapons, there was not an imminent threat of the use of those weapons against Israel.¹⁵⁶ Israel simply argued that Iraq would, in the very

146. *Id.* at 288. The factors contributing to the Israeli concern included the following: Iraq's uranium purchases that indicated a weapons project rather than peaceful uses for the uranium, IAEA controls on nuclear proliferation were weak, and Iraq officially stated an intention to acquire nuclear weapons to be used against Israel. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. AREND & BECK, *supra* note 66, at 78. The delegates from Syria, Guyanan, Pakistan, Spain, and Yugoslavia took the restrictionist position in expressing an opinion about the Israeli attack. *Id.*

151. *Id.* at 78-79.

152. *Id.* at 78.

153. *Id.* at 78-79. The representatives of Sierra Leone, Great Britain, Uganda, and Niger all argued under a counter-restrictionist approach using the *Caroline* doctrine of an instant and overwhelming force to justify an anticipatory attack. *Id.*

154. *See id.*

155. *See id.*

near future, obtain the *means* to create a weapon, which *could* pose a potential threat to it.¹⁵⁷ The international community simply found this argument too attenuated to support an attack based on anticipatory self-defense.¹⁵⁸

Although the Security Council passed a resolution condemning the Israeli attack, no sanctions were included in the resolution.¹⁵⁹ This attack is important in the development of the preemptive strike analysis because of the target. Israel feared the future potential use of WMD against the Israeli state. Although it was clear the threat could materialize, the international community overwhelmingly concluded that the threat was too attenuated to support a strike.

These three examples provide the basis for an analysis of the legal justification of a preemptive strike against the WMD facilities in Iraq. There is no clear consensus on whether anticipatory self-defense is an authorized use of force under Article 51. This historical analysis shows that, at a minimum, there is a large block of nations around the globe which support the use of anticipatory self-defense under certain limited conditions. These nations support a counter-restrictionist view of Article 51. This block of nations has grown larger as anticipatory self-defense has increasingly been the basis for a state to use force.¹⁶⁰

As long as the requirements of necessity, proportionality and imminency are met, these nations would support a preemptive use of force. Because of the state action since the adoption of the United Nations Char-

156. *Id.* at 79. The British delegate to the Security Council argued extensively under the context of the *Caroline* case finding that there was no instant and overwhelming threat that would authorize a preemptive strike against Iraq. *Id.* The Sierra Leone delegate reached a similar conclusion quoting directly from the *Caroline* case. *Id.*

157. WEISBURD, *supra* note 125, at 289.

158. *See id.* at 288-89. The General Assembly adopted a resolution finding the attack was an act of aggression and seeking an arms embargo as punishment for the attack. *Id.* at 288. The resolution passed by a vote of 109 in favor, 2 against (Israel and the United States) and 34 abstaining (mostly European and Latin American states). *Id.* at 288-89.

159. *Id.* at 288.

160. *See* AREND & BECK, *supra* note 66, at 79 (finding that the base of support for a counter-restrictionist interpretation of Article 51 had increased since the Cuban Missile Crisis). Anthony C. Arend and Robert J. Beck argue that although the international community was divided on the question of the right to use anticipatory self-defense, there is a growing block of nations voicing a counter-restrictionist position. *Id.* This expanding view holds that under certain circumstances anticipatory self-defense may be a justified use of armed force. *Id.* Arend and Beck argue that it is impossible to show a consensus that anticipatory self-defense violates international law. *See id.*

ter, there appears to be a customary right to anticipatory self-defense that prevails today.

C. Threat of Iraqi Weapons of Mass Destruction

Iraq quite clearly possesses the materials and weapons not only to produce WMD, but also the will to use those weapons against other states.¹⁶¹ Following Resolution 687, the formal cease-fire for the Gulf War, UNSCOM began inspecting Iraqi WMD facilities. During the seven and a half years before Operation Desert Fox, UNSCOM found and destroyed vast amounts of chemical, biological, and nuclear material.¹⁶² Every six months UNSCOM submitted a report to the Security Council on the progress in fulfilling the requirements of Resolution 687.¹⁶³ By the beginning of 1998, UNSCOM had destroyed, removed, or rendered useless missiles, missile equipment, chemical weaponry, and biological weaponry, including the entire Al-Hakam facility, the main biological weapons production facility.¹⁶⁴

This documentation of the UNSCOM progress, even in spite of Iraqi defiance, is a testimony to the success of the weapons inspection program

161. See LEONARD A. COLE, *THE ELEVENTH HOUR PLAGUE: THE POLITICS OF BIOLOGICAL AND CHEMICAL WARFARE* 87-90 (1997) (Iraq's resolve to use chemical weapons is evident by the use of chemical weapons against Iran in the Iran-Iraq War); William Clinton, Address to the Nation on the Strikes Against Iraq (Dec. 19, 1998), in *N.Y. TIMES*, Dec. 20, 1998, at 20 (President Clinton stating that if Saddam Hussein were left unchecked, he may use WMD against others).

162. See *THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996*, *supra* note 8, at 95.

163. Since the end of 1995, UNSCOM submitted six reports in accordance with Resolution 687 and the changed reporting procedures outlined in Resolution 1051, which consolidated the reports, required under Resolutions 699 and 715. See U.N. SCOR, 53d Sess., U.N. Doc. S/1998/920 (1998) (reporting for the period of 16 April 1998 to 11 October 1998); U.N. SCOR, 53d Sess., U.N. Doc. S/1998/332 (1998) (reporting for the period of 11 October 1997 to 15 April 1998); U.N. SCOR, 52d Sess., U.N. Doc. S/1997/774 (1997) (reporting for the period of 11 April 1997 to 11 October 1997); U.N. SCOR, 52d Sess., U.N. Doc. S/1997/301 (1997) (reporting for the period of 11 October 1996 to 11 April 1997); U.N. SCOR, 51st Sess., U.N. Doc. S/1996/848 (1996) (reporting for the period of 11 April 1996 to 11 October 1996); U.N. SCOR, 51st Sess., U.N. Doc. S/1996/258 (1996) (reporting for the period of 11 October 1995 to 11 April 1996); S.C. Res. 1051, U.N. SCOR, 51st Sess., at 3, U.N. Doc. S/RES/1051 (1996) (requiring a report once every six months from the Special Commission commencing on 11 April 1996); S.C. Res. 699, U.N. SCOR, 46th Sess., at 1, U.N. Doc. S/RES/699 (1991) (requiring a report once every six months from the Special Commission); S.C. Res. 715, U.N. SCOR, 46th Sess., at 2-3, U.N. Doc. S/RES/715 (1991) (requiring a report once every six months from the Special Commission).

established by the Security Council. The extent and history of the WMD program in Iraq is eerie, particularly because of the documented use of

164. See *UNSCOM Main Achievements* (visited March 1998) <<http://www.un.org/Depts/unscom/achievement.htm>>. By the beginning of 1998, UNSCOM had destroyed, removed, or rendered useless the following prescribed items:

Missile Area:

- 48 operational long-range missiles
- 14 conventional missile warheads
- 6 operational mobile launchers
- 28 operational fixed launch pads
- 32 fixed launch pads (under construction)
- 30 missile chemical warheads
- other missile support equipment and materials
- supervision of the destruction of a variety of assembled and non-assembled “super-gun” components

Chemical Area:

- 38,537 filled and empty chemical munitions
- 690 tonnes of chemical weapons agent
- more than 3,000 tonnes of precursors chemicals
- 426 pieces of chemical weapons production equipment
- 91 pieces of related analytical instruments

Biological Area:

- the entire Al-Hakam, the main biological weapons production facility
- a variety of biological weapons production equipment and materials

See *UNSCOM Main Achievements* (visited March 1998) <<http://www.un.org/Depts/unscom/achievement.htm>>. The following information may help one further understand the UNSCOM success in the chemical and biological arena. Through the end of 1995, UNSCOM had destroyed the following:

- More than 480,000 litres of chemical warfare agents (including mustard agent and the nerve agents sarin and tabun);
- More than 28,000 filled and nearly 12,000 empty chemical munitions (involving 8 types of munitions ranging from rockets to artillery shells, bombs and ballistic missile warheads);
- Nearly 1,800,000 litres, more than 1,040,000 kilograms and 648 barrels of some 45 different precursor chemicals for the production of chemical warfare agents;
- Equipment and facilities for chemical weapons production; and
- Biological seed stocks used in Iraq’s biological weapons programme.

these weapons in the eight-year war between Iraq and Iran.¹⁶⁵

1. Chemical Threat

Iraq took an interest in chemical weapons as early as the 1970s.¹⁶⁶ The Iraqi regime was able to begin its chemical weapons production with the help of certain western countries.¹⁶⁷ During the 1980 to 1988 Iran-Iraq War, the Iraqi weapons program grew dramatically.

The war began on 22 September 1980, when Iraqi forces invaded the Iranian territory at Shatt al Arab.¹⁶⁸ The Iraqi attack was in response to an Iranian call for an overthrow of the ruling Ba'ath government in Iraq.¹⁶⁹ Using this as justification, Iraq launched an assault against its menacing neighbor to the east.¹⁷⁰ The initial goal of Iraq was simply to weaken Iran and capture certain territory in the south, which would provide Iraq with a better approach to the Persian Gulf.¹⁷¹ Both sides made only minor advances into the other's territory during the long eight-year war.¹⁷²

Although the war was a large and protracted struggle between two regional powers, for the most part, the hostilities remained contained to the borders of Iraq and Iran.¹⁷³ The significant aspect of the war was Iraq's use of chemical weapons against Iran.¹⁷⁴ Both Iran and Iraq were signatories to the 1925 Geneva Protocol prohibiting the use of chemical and bio-

165. See COLE, *supra* note 161, at 87-88.

166. *Id.* at 81.

167. *Id.* Iraq received components from Switzerland, the Netherlands, Belgium, Italy, and West Germany. *Id.*

168. WEISBURD, *supra* note 125, at 47.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 48.

173. During the Iran-Iraq War, there were limited military clashes over shipping in the Persian Gulf with states not involved in the Iran-Iraq War. See discussion *infra* Part V.B.3.

174. COLE, *supra* note 161, at 87-88.

logical weapons in war.¹⁷⁵ But, in contravention of this treaty, Iraq openly and without shame used chemical weapons on the battlefield.¹⁷⁶

The chemical attacks began as early as 1982 and lasted until the cease-fire in 1988.¹⁷⁷ The attacks included both mustard and nerve agents.¹⁷⁸ Toward the end of the war, Iraq's Foreign Minister Tariq Aziz acknowledged his country's use of chemical weapons, but claimed that Iran used the weapons first.¹⁷⁹ This claim against Iran was never substantiated.¹⁸⁰ There were also claims by Kurdish physicians and Iranian officials that Iraq used biological agents during the war—including botulism and anthrax.¹⁸¹ These claims were never proven by an outside source.¹⁸²

Since Desert Storm, certain evidence surfaced that raised the possibility that Iraq used chemical weapons during the Gulf War.¹⁸³ Again, these claims have not been proven.¹⁸⁴ The Iraqi regime will not hesitate to use chemical and/or biological weapons against another state. The Iraqi chemical threat is well documented and quite clear, but the biological threat is

175. OFF. OF LEGAL ADVISER, U.S. DEP'T OF STATE, PUB. NO. 9433, TREATIES IN FORCE 369 (1997) (Iran and Iraq are signatories to the agreement, however Iraq placed a reservation on the agreement). *See also* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

176. *See* COLE, *supra* note 161, at 87-90.

177. *See id.*

178. *Id.* at 88.

179. Serge Schmemmann, *Iraq Acknowledges Its Use of Gas but Says Iran Introduced it in War*, N.Y. TIMES, July 2, 1988, at A3. Tariq Aziz said, "Sometimes such [chemical] weapons were used in the bloody war, by both sides." *Id.*

180. COLE, *supra* note 161, at 91-92. Claims were made that Iran used chemical weapons in the town of Halabja against the Kurds, but these claims are only a minority view. *Id.*

181. *Id.* at 93.

182. *Id.* at 92-93.

183. Phillip Shenon, *New Report Cited on Chemical Arms Used in Gulf War*, N.Y. TIMES, Aug. 22, 1996, at A1 [hereinafter Shenon, *New Report Cited*]. The Pentagon acknowledged in a new report that chemical detectors in the forward staging areas of United States forces detected chemicals up to seven times during the first week of the Gulf War. *Id.* The report could not confirm that Iraq actually fired chemical weapons at United States forces, leaving open the possibility that the chemicals were released by facilities in Iraq damaged in the coalition bombing campaign. *Id.*

184. *Id.*

possibly a more serious threat because of the lack of information on the extent of the program.

2. *Biological Threat*

The consolidated UNSCOM report did not include figures for the Iraqi biological program simply because that program was still a large mystery. It was not until 1995 that the Iraqi regime provided documents attesting to the biological weapons program that the country had pursued since 1973.¹⁸⁵ Iraq claimed these documents were previously unknown to most in the Iraqi regime and were discovered only upon the defection of General Hussein Kamal, the head of the Iraqi Organization of Military Industrialization.¹⁸⁶ This organization was the heart of the Iraqi advanced weapons program, which included its chemical, biological, and nuclear efforts. After General Kamal defected, Iraq released documents admitting that Iraq:

- Did research on anthrax, botulinum toxin (which cause muscular paralysis resulting in death), aflatoxin (which causes liver cancer), tricothecene mycotoxins (which cause nausea, vomiting and diarrhea), wheat cover smut (which ruins food grains), hemorrhagic conjunctivitis (which causes extreme pain and temporary blindness) and rotavirus (which causes acute diarrhea that can lead to death).
- Field-tested germs in sprayers, 122-millimeter rockets, 155-millimeter artillery shells, tanks dropped from jet fighters and LD-250 aerial bombs.
- Began a crash program to speed germ development in August 1990, just as it invaded Kuwait.
- Built and loaded 25 germ warheads for Al Hussein missiles, which have a range of 400 miles. Botulinum toxin went into 16 of them, anthrax into 5 and aflatoxin into 4. It also filled bombs designated R-400, which hold 20 gallons each. Botulinum toxin went into 100, anthrax into 50 and aflatoxin into 7.

185. William J. Broad & Judith Miller, *Iraq's Deadliest Arms' Puzzles that Confront Inspectors Breed Fears*, N.Y. TIMES, Feb. 26, 1998, at A1, A10.

186. *Id.*

- Deployed these weapons in the opening days of the 1991 gulf war at four locations ready for use, and kept them there throughout the war.¹⁸⁷

These documents provided sufficient proof that Iraq maintained a large biological weapons program, which the nation had developed for use against other states. Iraq has since claimed that it destroyed all biological weapons in May and June of 1991, however, inspectors remain skeptical about the truth of this assertion.¹⁸⁸ There is no doubt that Iraq at one time possessed a biological weapons program, and there are many clues which support the claim that Iraq still possess a biological weapons capability.

3. Nuclear Threat

Similar to the biological weapons program, very little is known about the Iraqi nuclear program. It is not entirely clear how close Iraq was to manufacturing a nuclear weapon when the coalition attacked in 1991.¹⁸⁹ Following Resolution 687, the International Atomic Energy Agency (IAEA) teams removed from Iraq's possession plutonium, highly enriched uranium and irradiated uranium.¹⁹⁰ The IAEA teams completed this removal by February 1994, thus eliminating Iraq's nuclear capability to the best of the IAEA's knowledge.¹⁹¹

Although UNSCOM and the IAEA have destroyed large amounts of chemical and biological weapons and probably eradicated Iraq's ability to manufacture a nuclear weapon, Iraq still possess the facilities and material to either use or produce WMD. Continued efforts by UNSCOM may some day bring an end to Iraq's ability to manufacture and deploy WMD. How-

187. *Id.*

188. *Id.*

189. See HIRO, *supra* note 18, at 251-52 (stating that an IAEA team found in November 1990 that Iraq possessed enough enriched uranium to produce one crude bomb, while the Bush administration claimed that Iraq was approaching its goal of acquiring a nuclear weapons arsenal).

190. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 95.

191. *Id.*

ever, UNSCOM has not yet reached that point and the threat is still as real as ever.

4. *Delivery Capability*

The only issue that may diminish the threat of Iraqi's WMD is the delivery capability of these weapons. During the Gulf War, Iraq fired thirty-nine Scud missiles at the state of Israel, all containing conventional warheads.¹⁹² A special technical group, separate from UNSCOM, was sent to Iraq in February 1998 to determine if UNSCOM had eliminated the Iraqi missile capability.¹⁹³ The group failed to find that Iraq no longer possessed the long-range missile capability to launch a chemical or biological strike.¹⁹⁴ In spite of the inability to verify the remaining Iraqi missile capability, however, it is believed that Iraq possesses few if any missiles capable of carrying chemical or biological weapons as far as Israel.¹⁹⁵

Even if Iraq no longer possesses missiles that allow a chemical or biological attack on neighboring states, it is possible that Iraq could use human couriers to move the weapons into population centers and launch an attack on a civilian target. The March 1995 Aum Shinrikyo cult attack on commuters in the Tokyo subway is the perfect example of an unconventional strike using a limited delivery means.¹⁹⁶ This attack used human couriers to release the deadly chemical Sarin into the ventilation system of the subway, leaving ten people dead and thousands injured.¹⁹⁷ The close proximity of Israel and the ability of Iraq to move a weapon through Jordan or Syria makes the possibility of a human courier attack a distinct possibility.

Based on the capability of Iraq and the past record of the Iraqi government using chemical weapons, the threat of a chemical or biological

192. Joel Greenberg, *Israelis Lining Up for Gas Masks as Officials Warn Iraq*, N.Y. TIMES, Jan. 30, 1998, at A6.

193. Judith Miller, *Standoff with Iraq: The Inspectors*, N.Y. TIMES, Feb. 14, 1998, at A5.

194. *Id.*

195. See Michael R. Gordon & Eric Schmitt, *The Plan: U.S. Plan for Iraq Envisions 4 Days of 24-Hour Bombing*, N.Y. TIMES, Feb. 21, 1998, at A1 (stating that American intelligence estimates that Iraq has only a small stockpile of Scud missiles which are capable of carrying biological or chemical warheads and can range as far as Saudi Arabia and Israel).

196. Nicholas D. Kristoff, *Terror in Tokyo: The Overview*, N.Y. TIMES, Mar. 23, 1995, at A1.

197. *Id.*

attack is real. The exact threat is not entirely clear, but one concerned with international peace and security may not dismiss the threat. If UNSCOM or the United States government knew the exact threat posed, the question would be much simpler, but unfortunately, that information is not available to those outside the Iraqi regime. One must assume that there is at least some possibility that Iraq would launch a chemical or biological attack against another state, most likely Israel or the United States. Based on this assumption, this article next analyzes the legal justification for an attack on Iraq's WMD program.

D. Legal Justification Under Anticipatory Self-Defense

Legal justification for a preemptive strike on Iraqi WMD facilities is a difficult case to make. As discussed above, the international community is divided on the legal justification of anticipatory self-defense. There appears, however, to be a growing block of nations who, through rhetoric and through state action, endorse the right to use anticipatory self-defense, if the proper circumstances exist.¹⁹⁸ Necessity, proportionality, and imminency are the three minimum requirements a state would need to meet in order to justify a preemptive strike.

The Security Council adopted Resolution 687 in 1991, and the Iraqi government agreed to adhere to the resolution.¹⁹⁹ For nearly eight years, the international community used the peaceful framework outlined in Resolution 687 to attempt to rid Iraq of its WMD program.

At every turn, the Iraqi regime struggled to conceal weapons and material, as well as inhibit the work of UNSCOM and the IAEA inspection teams.²⁰⁰ During the crisis in the fall of 1997, the United Nations accepted

198. See AREND & BECK, *supra* note 66, at 79.

199. See Letter from the Permanent Representative of Iraq to the President of the Security Council transmitting the National Assembly decision of 6 April 1991 concerning acceptance of Security Council Resolution 687 (Apr. 10, 1991), U.N. SCOR, 46th Sess., U.N. Doc. S/22480 (1991) (formally accepting Resolution 687); Identical Letters from the Deputy Prime Minister and Minister for Foreign Affairs of Iraq to the President of the Security Council and to the Secretary-General stating that Iraq has no choice but to accept the provisions of Security Council Resolution 687 (1991), U.N. SCOR, 46th Sess., U.N. Doc. S/22456 (1991) (making certain condemnations of the resolution as an assault on the sovereignty of Iraq, but stating that Iraq has no choice but to accept the cease-fire resolution).

200. See THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 79-94 (detailing a pattern of obstruction and interference with both UNSCOM and IAEA inspectors).

a Russian brokered deal with Iraq to solve the confrontation over weapons inspectors.²⁰¹ In early 1998, another major diplomatic effort advanced a peaceful framework to end the standoff and ended in a deal brokered by Kofi Anan.²⁰² President Clinton called off an air strike at the last minute in November 1998 to give Iraq the opportunity to comply with the inspection agreements.²⁰³

In light of these attempts by the international community to solve the crisis diplomatically, there can be no doubt that these efforts “have been found wanting.”²⁰⁴ Forceful action became a necessity to end the threat posed by Iraq, thus meeting the first requirement for a legal use of anticipatory self-defense.

In terms of proportionality, Iraq possesses the ability to inflict mass casualties on nations in the region. If deployed and detonated properly, WMD can result in casualties in the thousands, if not millions.²⁰⁵ The threat is much more serious than any conventional threat a rogue nation could pose to the international community. The problem with WMD is that the weapons will often target both military and non-military population centers. It is difficult, if not impossible, to focus a WMD attack on strictly military targets. That assumes that Iraq would even attempt to target strictly military targets, which is highly unlikely given the Iraqi Scud missile attacks during the Gulf War targeting non-military population centers.²⁰⁶ Although the threat posed by Iraqi WMD is large scale, which would seem to allow an extensive attack on Iraq, the weapons themselves and the facilities to manufacture and deploy those weapons are limited. Under the rule of proportionality, it would be difficult to justify attacking facilities not associated with the production, deployment, or use of WMD.

During the attack, the United States specifically avoided suspected chemical and biological sites.²⁰⁷ Instead of attacking the WMD facilities,

201. Erlanger, *supra* note 43, at A1.

202. Barbara Crossette, *Standoff with Iraq: The Overview; Iraq Agrees to Inspections in a Deal with U.N. Leader*, N.Y. TIMES, Feb. 23, 1998, at A1.

203. See Shenon & Myers, *supra* note 55, at 1 (stating that the United States was just hours away from launching air strikes).

204. See Schachter, *Right of States*, *supra* note 92, at 1635.

205. See Jessica Stern, *Taking the Terror Out of Bioterrorism*, N.Y. TIMES, Apr. 8, 1998, at A19 (claiming that biological weapons are as dangerous as nuclear weapons and could kill millions of people if detonated under the proper circumstances).

206. See Hiro, *supra* note 18, at 323 (stating that Iraq hit Tel Aviv and Haifa with twelve Scud missiles during the Gulf War).

207. Myers, *Jets Said to Avoid Poison*, *supra* note 62, at A1.

the United States concentrated the attacks on command centers, missile factories, airfields and large buildings such as Republican Guard barracks.²⁰⁸ In addition, the United States attacked an oil refinery.²⁰⁹ The failure to attack the WMD facilities may violate the rule of proportionality. However, some of the targets in the attacks may be sufficiently related to the WMD program to warrant an attack under a proportionality analysis.

Very few targets in the operation fall neatly into an allowed target category or a prohibited target category under the proportionality doctrine. Command centers control the Iraqi military regime—one part of that regime is the WMD program. An attack on the command infrastructure of the Iraqi military and even the civilian government shares a close enough relation to the WMD program to justify an attack under the proportionality doctrine, although that conclusion is certainly open to debate.

Missile factories are clearly an authorized target because the missiles are one of the primary delivery means for WMD. Along the same lines, airfields may also be so closely related to the delivery capability of the WMD that an attack on these targets is justified. However, that justification is much weaker because it is not clear that Iraq has the capability to deliver the WMD by aerial means. It is unlikely the final two targets would qualify under the proportionality doctrine. The Republican Guard barracks and the oil refinery have little, if anything, to do with the use or delivery of a WMD device.

Under the proportionality analysis, the United States finds some success with target selection in the attack. But, it also appears clear that some of the targets would not be proper under the proportionality doctrine. The difficulty with this dilemma is deciding whether the unjustified targets affect the entire operation or merely those specific targets. There is no clear answer for this dilemma; therefore, an assumption that the attack on

208. Myers, *U.S. and Britain End Raids*, *supra* note 2, at 20; Ross Roberts, *Desert Fox: The Third Night*, PROCEEDINGS (April 1999) <<http://www.usni.org/Proceedings/Articles99/PROroberts.htm>> (*Proceedings* is a journal published by the U.S. Naval Institute).

209. Myers, *U.S. and Britain End Raids*, *supra* note 2, at 20.

the improper targets does not invalidate the entire operation will allow further analysis under both the self-defense and the reprisal justification.²¹⁰

The final requirement of imminency is another difficult aspect of legal justification for anticipatory self-defense. Iraq poses a threat to international peace and security because it possesses the ability and the will to use WMD. In light of the limited delivery capability of the Iraqi military,²¹¹ however, and the fact that there is no documented proof Iraq used WMD in the Gulf War against the coalition, it is difficult to say that the threat is imminent.²¹²

As the *Caroline* case requires, the threat must be instant and overwhelming, neither of which would seem to exist in this situation.²¹³ The international community failed to recognize a right to anticipatory self-defense in the 1981 Israeli attack on Iraq, the overwhelming reason being Israel's failure to meet the imminency requirement.²¹⁴ It is almost certain that the United States would be unable to claim that the threat to its own national security is even close to instant and overwhelming. The best claim would be an instant and overwhelming threat to Israel. If the threat to Israel were found to be imminent, the United States could act in a collective anticipatory self-defense role against Iraq. But, even the threat to Israel is certainly no more imminent than it was in 1981 when the international community condemned the Israeli attack on Iraq. There is simply no instant and overwhelming threat.

Although the United States can make the case under the necessity prong and to some extent under the proportionality prong, it falls short of the mark on the imminency prong. Without meeting these requirements, the United States may not lawfully act in anticipatory self-defense against Iraq. This does not, however, rule out other possible grounds for legally justifying the attack on Iraq.

210. Because there is a second justification for the material breach of Resolution 687 that does not require a proportionality analysis, the assumption that some invalid targets do not invalidate the entire operation is plausible. See discussion *infra* Part VI.

211. See Gordon & Schmitt, *supra* note 195, at A1.

212. Shenon, *New Report Cited*, *supra* note 183, at A1.

213. See MOORE, *supra* note 99, at 412.

214. See WEISBURD, *supra* note 125, at 289.

V. Reprisal

A. Legal Right to Reprisal

The second possible justification for the attack is under the umbrella of reprisal. A reprisal is an action that either punishes a state for past misconduct or deters future misconduct.²¹⁵ Under a strict interpretation of Article 2(4), the United Nations Charter prohibits resort to reprisal, but this prohibition is blurred in the face of Article 51 and the practice of states during the existence of the United Nations.

Reprisal, like self-defense, is a self-help remedy in reaction to an unjust action by another state.²¹⁶ There are certain preconditions that are common for both self-defense and reprisal.²¹⁷ These requirements boil down to necessity and proportionality.²¹⁸ The terms have the same definition for reprisal as they have for self-defense.²¹⁹

Imminency has not been applied to reprisal; instead, the requirement of immediacy has been applied.²²⁰ The difference between imminency and immediacy is of prime importance to the analysis of Operation Desert Fox

215. See Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972) [hereinafter Bowett, *Reprisals Involving Recourse*] (defining a reprisal as a means to impose punishment for a harm committed or to compel a settlement to a situation created by an illegal action); DINSTEIN, *supra* note 90, at 216 (defining a reprisal as a limited use of force by one state against another for a previous violation of international law).

216. Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 3.

217. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987) (section for unilateral remedies requiring both necessity and proportionality).

218. *Id.*

219. See discussion *supra* Part IV.

220. See DINSTEIN, *supra* note 90, at 219 (requiring armed reprisals to meet the conditions of necessity, proportionality and immediacy). Professor Dinstein applies the requirement of immediacy to both self-defense and to reprisal. *Id.* at 202, 219. He distinguishes, however, the immediacy requirement for reprisal from that of self-defense by explaining that a temporal element must exist for a reprisal, but plays no part in a self-defense analysis. See *id.* at 220. The requirements of self-defense, particularly anticipatory self-defense, derive from the *Caroline* case. See discussion *supra* Part IV.A.1. In the *Caroline* case, anticipatory self-defense requires a threat, which is instant and overwhelming. Although the word instant could imply a temporal relationship, the word overwhelming implies something more in that it requires an event that is going to happen and leaves the target state no opportunity to hesitate in choosing a response. The exact requirements of both anticipatory self-defense and reprisal are far from settled, but this discussion adopts the requirement of imminency for anticipatory self-defense and immediacy for reprisal because of the temporal distinction between the two.

because the justification for the attack based on anticipatory self-defense failed due to the inability to show that the Iraqi threat was imminent. With this in mind, expanding on this difference between imminency and immediacy is required.

Black's Law Dictionary defines immediate as “[p]resent; at once; without delay; not deferred by any interval of time.”²²¹ Imminent on the other hand is defined as “[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; . . . something to happen upon the instant.”²²² There is a distinct difference between the two terms, however subtle it may seem. The definition of imminent specifically says that the triggering event must be mediate, rather than immediate. Immediacy requires a temporal relationship to the triggering event, while imminency requires the triggering event to be on the verge of happening. This is because mediate requires an intermediary agent, while immediate is an act without the interposition of an intermediary agent.²²³

For anticipatory self-defense that intermediary agent is the impending threat of the use of force. This threat is one that is on the verge of happening, but has not happened yet. Imminent also uses the term instant, as required under the *Caroline* case for a legally justified use of self-defense. Because of this difference between the two terms, there may be cases where a reprisal is justified while a preemptive strike is not or vice versa.

The immediacy requirement means a reprisal must have a temporal relationship to the illegal event, which brought rise to the reprisal.²²⁴ If the illegal event occurred in the distant past, then the immediacy requirement for a reprisal must fail.²²⁵ For one even to consider the legality of a

221. BLACK'S LAW DICTIONARY 749 (6th ed. 1990).

222. *Id.* at 750.

223. Mediate means “[t]o convey or transmit as an intermediary agent or mechanism.” THE AMERICAN HERITAGE DICTIONARY 781 (2d college ed. 1982). Immediate on the other hand means “[a]cting or occurring without the interposition of another agency or object.” *Id.* at 643.

224. DINSTEIN, *supra* note 90, at 220. Professor Dinstein applies the theory of immediacy to self-defense as well. *Id.*

225. *Id.*

reprisal, the attack must meet the three conditions of necessity, proportionality, and immediacy.

A reprisal is a punitive measure, unlike self-defense, which is a security measure.²²⁶ Taken in a larger context, by examining a series of confrontations between two states, the distinction between reprisal and self-defense becomes blurred. This distinction is even less clear when the discussion attempts to find the difference between anticipatory self-defense and a reprisal aimed at deterring a future illegal act. The only way to distinguish between the two actions is the difference between an imminent threat and an immediate illegal act.

The United Nations Charter does not directly address the distinction and therefore, leaves the legal justification of reprisal, at least in terms of international agreement law, in a state of limbo. A restrictionist view would strictly prohibit a reprisal. However, a counter-restrictionist interpretation of Article 51 may very well support a claim that Article 51 allows certain armed reprisal.²²⁷ Under this theory, reprisal would be a form of self-defense, differentiated merely by the time and place of the response to the aggressor state's action. On its own, this is a farfetched argument, but in light of state action since adopting the United Nations Charter, this argument garners much more support. A look at state action over the past fifty years is in order.

B. Historical Examples

1. Israeli-Palestinian Conflict

Even if one can draw the line between reprisal and self-defense, the practice of states since the United Nations Charter was adopted would seem to point to the legality of a reprisal under certain conditions. The first and foremost example of reprisal revolves around the protracted conflict between Israel and the Palestinians, particularly from 1971 to 1975.²²⁸ Throughout the conflict, Israel battled its Arab neighbors to protect its ter-

226. *Id.*

227. See William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 476 (1990) [hereinafter O'Brien, *Reprisals*] ("[T]he right of self-defense should be interpreted as taking two forms: on-the-spot reaction, and defensive reprisals at a time and a place different from those of the original armed attack.").

228. See *id.* at 426 (finding that the bulk of the Security Council debate concerning reprisal evolved from the Israeli actions during the period 1971 to 1975).

ritorial integrity and maintain its sovereignty. In 1971, the Palestinian guerrillas, fighting against the state of Israel, moved their base of operations into southern Lebanon.²²⁹ For the next four years, the two sides waged a limited war. The war generally consisted of guerrilla warfare, as well as terrorist attacks on Israeli citizens and property.²³⁰ In response, Israel often took military action against Palestinian strongholds on the Israeli borders.²³¹ This exchange of attacks by the two sides was the norm for the struggle between Israel and the Palestinians.

Israel claimed not that it was involved in acts of reprisal, but rather that Israel was fighting a war against the Palestinians.²³² Israel further explained that these acts were in self-defense against countries that failed to restrain guerrilla activity within their borders. Therefore, the international community must look at the conflict in its entirety, not in the vacuum of separate individual Israeli actions.²³³

The Security Council, on the other hand, referred to the Israeli actions as reprisals and dealt with them as such in its debates on the situation.²³⁴ Taken in the context of the conflict as a whole, it is difficult to dissect and analyze individual actions by either the Israelis or the Palestinians. The general Security Council reaction to the conflict was to condemn Israel for its reprisals against the Palestinians in Lebanon and other states, while failing to condemn or take action against the Palestinian organizations or the countries that harbored them.²³⁵

From 1970 to 1975 the Security Council adopted eight resolutions that condemned Israel for violating Lebanese territory.²³⁶ The United States vetoed three other resolutions during that period because they were

229. WEISBURD, *supra* note 125, at 141-42.

230. *See id.* at 142-43.

231. *See id.* at 142.

232. *Id.*

233. O'Brien, *Reprisals*, *supra* note 227, at 434.

234. *Id.* at 436. William V. O'Brien explains that the attitude of the Security Council toward reprisal has been unfair. Certain member states of the Security Council, to include France, the Communist states and Third World states, hold other United Nations member states to a strict interpretation of the United Nations Charter, generally arguing that a reprisal is an illegal use of force. *Id.* at 472-73. Conversely, the actions of national liberation movements, like the Palestine Liberation Organization, are not held to this same strict interpretation. The actions of those national liberation movements are seen as a just war of national liberation. *Id.*

235. Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 24.

236. WEISBURD, *supra* note 125, at 142.

too lopsided against Israel.²³⁷ Other than the verbal condemnation of these eight resolutions, no concrete action was taken by any state against Israel in response to the attacks into southern Lebanon.²³⁸ Although the Security Council may have condemned the actions by the Israelis as an illegal use of force, the failure to act further against the Israeli attacks is evidence of international acceptance that certain types of reprisals are justified. In respect to the law of reprisals, the conflict between Israel and its Arab neighbors is much more extensive than that just described. This brief discussion simply frames the issues and sets the stage for a growing movement in favor of what are known as “reasonable” reprisals.²³⁹

2. *United States’ Attack on Libya*

During the debates about the Israeli attacks, the United States began to accept and even openly to support the Israeli legal position. This United States policy change culminated with the 1986 raid on Libya.²⁴⁰ In March of 1986, the United States continued its five-year old policy of asserting its right to navigate on the high seas in the Gulf of Sidra.²⁴¹ Libya claimed the Gulf of Sidra was sovereign waters, adopting this view even though the internationally accepted limit of territorial sovereignty was twelve miles offshore.²⁴²

On 24 March 1986, after being attacked by Libyan shore based missiles, the United States destroyed several missile sites in Libya.²⁴³ In response to the military clashes with Libya, the exercises in the Gulf of Sidra were canceled the next day.²⁴⁴ On 5 April 1986, however, terrorists bombed a German discotheque killing two Americans.²⁴⁵ The United

237. *Id.*

238. *Id.* at 143. Only states connected to the Arab states imposed any type of sanction on Israel for these attacks. *Id.*

239. See Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 26.

240. See Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 94-95 (1988) (stating that the United States turned to the unilateral use of force as a last resort in combating Libyan terrorism and sent a signal to the international community for a change in the law on the use of force to combat terrorism).

241. *Id.* at 81.

242. U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: U.N. CONVENTION ON THE LAW OF SEA at 23, U.N. Sales No. E.97.V.10 (1997).

243. Warriner, *supra* note 240, at 81.

244. *Id.*

245. *Id.* at 82.

States was able to quickly link the attack to Libya and, on 14 April 1986, the United States made limited air strikes on targets in Libya.²⁴⁶

The United States claimed that the action was an exercise of its self-defense right under Article 51.²⁴⁷ The Security Council response was mixed. A resolution to condemn the United States action failed by a vote of nine to five.²⁴⁸ Although the United States claim was one of self-defense, it fit the reprisal mold much better than it fit the self-defense mold because the attack was in response to a past injustice and a deterrent to future injustices.²⁴⁹

Western European nations criticized, but did not go so far as to condemn, the attack.²⁵⁰ The communist states were critical, but did not take any action against the attack.²⁵¹ Most Arab states were very critical, but some Arab states were completely silent on the issue.²⁵² Arab states chose not to impose a sanction on the United States.²⁵³ The United States action against Libya signaled a growing consensus, particularly among Western states that “reasonable” reprisals are a legal use of force.

3. *United States’ Attack on Iran*

The final significant action in the context of developing the law of reprisal stems from the United States actions in the Persian Gulf from 1987 to 1988. During the war between Iran and Iraq, Iran attacked neutral ships in the Persian Gulf in an attempt to prevent supplies from reaching Iraq. In 1987, the United States began escorting ships in the Persian Gulf, which resulted in several clashes with Iran.²⁵⁴ These consisted of limited military actions by the Iranians against either neutral ships in the Gulf or direct action against United States military forces in the Gulf.²⁵⁵ In response, the

246. *Id.* at 83.

247. *Id.* at 86.

248. *Id.* at 87. The United States, Great Britain, France, Australia, and Denmark voted against the resolution. WEISBURD, *supra* note 125, at 296. Venezuela abstained in the vote. *Id.*

249. WEISBURD, *supra* note 125, at 297.

250. *Id.* at 296.

251. *Id.*

252. *Id.* Sudan recalled its ambassador. Tunisia did not comment. Egypt, Iraq, and Jordan voiced only mild criticism. *Id.*

253. *Id.* OPEC would not even consider a sanction against the United States. *Id.*

254. O’Brien, *Reprisals*, *supra* note 227, at 467.

255. *Id.* at 468.

United States attacked several Iranian ships and oil platforms.²⁵⁶ In 1988 after an acceptance of a cease-fire, the United States stopped escorting ships and the hostilities ended.²⁵⁷

In some cases, the United States acted in immediate self-defense against an attack, while in others the United States retaliated for Iranian military action by making limited attacks on oil platforms.²⁵⁸ The Security Council never debated the United States actions against Iran, including the reprisals against the oil platforms.²⁵⁹ There are several reasons for this, but this lack of action supports the argument that the Security Council recognizes the right of “reasonable” reprisal under certain circumstances. Even if the right may not be acceptable under a close reading of the United Nations Charter, reprisals may have risen to the level of customary international law.

There are many other instances that could fall under the rubric of reprisal. There are instances where the Security Council acted on and condemned the reprisal, took only limited action against the reprisal, or completely ignored the reprisal. In the past, when it chose to voice an opinion, the Security Council took the firm position that all armed reprisals are illegal.²⁶⁰ The unclear position, however, derives from the inaction or limited action in certain instances. The growing trend is for either inaction or limited action against a form of “reasonable” reprisal. There may be other explanations for this inaction, such as Cold War animosity, but clearly one possible explanation is the belief that a reprisal is legal under certain conditions.²⁶¹

C. “Reasonableness” Analysis

There has been an attempt to define the criteria by which one may judge the “reasonableness” of state action.²⁶² The criteria are as follows:

- (1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;

256. *Id.*

257. *Id.*

258. *Id.* at 468-69.

259. *Id.* at 468.

260. Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 21.

261. *Id.* at 22.

262. *See id.* at 27.

- (2) That the governmental use of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;
- (3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;
- (4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;
- (5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution be taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;
- (6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;
- (7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;
- (8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constituted the unacceptable provocation are clearly conveyed;
- (9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign state;
- (10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;
- (11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1)-(10), and that a disposition to accord respect to the will of the international community be evident;

(12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terroristic enterprises.²⁶³

This long list of criteria for a “reasonable” reprisal lays out a very specific guideline for this analysis. By meeting at least some of the criteria above, it is arguable that the action could be a “reasonable” reprisal, whereas if the action meets all or nearly all of the criteria it would be difficult to argue the reprisal was not “reasonable.”

Allowing for “reasonable” reprisal is one way to deal with the inconsistent positions of the Security Council. Another way is for the Security Council to accept an expansionary view of Article 51.²⁶⁴ By accepting this expansionary view, certain armed action, before or after the action which prompted the reprisal, could fall into the fold of self-defense. This would turn certain limited reprisals into a subset of self-defense. Either way, it is clear that there is at least mixed feelings about the legality of reprisals. The United States could draw on this lack of unanimity as a basis for justifying the attack on Iraq.

263. *Id.*

264. *Id.* at 4. Professor Bowett argues that an expansionary view of Article 51 would group together anticipatory self-defense and certain armed reprisals. *Id.* He makes the following argument in support of this claim:

To take what is now the classic case, let us suppose that guerrilla activity from State A's territory by which State B, eventually leads to a military action within State A's territory by which State B hopes to destroy the guerrilla bases from which the previous attacks have come and to discourage further attacks. Clearly, this military action cannot strictly be regarded as self-defense in the context of the previous guerrilla activities: they are past, whatever damage has occurred as a result cannot now be prevented and no new military action by State B can really be regarded as a defense against attacks in the past. But if one broadens the context and looks at the whole situation between these two states, cannot it be said that the destruction of the guerrilla bases represents a proper, proportionate means of defense-for the security of the state is involved-against future and (given the whole context of past activities) certain attacks.

Id. at 3-4.

D. Legal Justification Under Reprisal

There are two separate lines of reasoning that may support a reprisal justification for Operation Desert Fox. An expansive view of the right to self-defense would quite clearly bring the United States action under the United Nations Charter. Another possibility is a customary right to conduct "reasonable" reprisals. Regardless of which approach is used, the requirements of necessity, proportionality, and immediacy must first be met.

Although the justification is different, the arguments for necessity and proportionality, as addressed above for anticipatory self-defense, would result in the same conclusion when applied to reprisal.²⁶⁵ Immediacy, on the other hand, is slightly different than imminency. Because immediacy addresses a temporal relationship, it is possible that even though the Iraqi threat is not imminent, it may be immediate.

The current confrontation arose because the international community felt the WMD capability of the Iraqi regime posed a threat to international peace and security.²⁶⁶ Although UNSCOM and the IAEA have destroyed a portion of the Iraqi WMD arsenal, there is a strong belief that the Iraqi program is far from eradicated.²⁶⁷ In fact, a recent report hints at the possibility that Iraq may have exported certain parts of its WMD program to friendly countries in the area.²⁶⁸ If this report is true, the threat of Iraqi WMD looms as large as ever.

The continued Iraqi interference in the UNSCOM investigations makes further discussion of the nature of the threat impossible. Iraq has the capability to use those assets today. It is hard to imagine a chemical or biological threat more immediate than that of Iraq. To fulfill the temporal condition of immediacy, the United States need simply strike Iraq at a point

265. See discussion *supra* Part IV.D.

266. See *Standoff with Iraq; War of Words: The Administration, Its Critics and Questions of Moral Right*, N.Y. TIMES, Feb. 19, 1998, at A9 (presenting excerpts for the answers of Secretary of Defense William Cohen claiming that the United States has a moral obligation to ensure Iraq does not pose a threat to its neighbors).

267. See Tim Weiner, *U.N. Inspectors Face a Difficult Task*, N.Y. TIMES, Nov. 22, 1997, at A6 (discussing intelligence reports about the missile, chemical and biological programs believed to still exist in Iraq).

268. See *Other Nations Said to Store Iraq's Arms*, N.Y. TIMES, Feb. 16, 1998, at A8 (Yousef Bodansky, the director of the House of Representatives Task Force on Terrorism and Unconventional Warfare, claims that Iraq maintains a WMD capability through an export of weapons and materials to other countries including Libya, Sudan, and Yemen).

in time in close proximity to the breach of international law which precipitated the reprisal. The threat from Iraq is serious and the breaches common, striking immediately after a breach fulfills the temporal condition of immediacy. In Operation Desert Fox, the United States struck Iraq within twenty-four hours of Richard Butler's report to the Security Council.²⁶⁹ It is hard to imagine a military action on the scale of Operation Desert Fox, which could be launched in less than twenty-four hours. The reprisal justification meets the immediacy requirement for a use of force.

Based on this minimum requirement analysis, the case for a reprisal under the expansive definition of self-defense is a simple one. If one accepts the expansive view, then as long as the use of force meets the minimum requirements for reprisal, that use of force is justified under the United Nations Charter. The problem here consists of making the leap to accept the expansive view of self-defense, which many are not prepared to make. But, coupled with the support of customary international law, this leap requires a much smaller stretch of the imagination.

For a nation to launch a "reasonable" reprisal, an in-depth analysis of the use of force is required to determine if that action meets the conditions for reasonableness.²⁷⁰ The best way to achieve this analysis is to address the twelve criteria used to judge reasonableness point by point.

(1) The United States has been extremely vocal and open about making its case for the use of force against Iraq.²⁷¹ The United States is not passing the burden of persuasion onto others, but rather accepting that burden as a precursor to the use of force.

(2) Ever since the Gulf War, the United States made it clear to the international community that the United States has a vested national security interest in stability and peace in the Middle East.²⁷² The vital petroleum resources in the area are extremely

269. Clines & Myers, *supra* note 3, at A1.

270. See Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 26-27.

271. See Steven Lee Myers, *Standoff with Iraq: The Allies; Cohen is Heading for Gulf to Tell Arabs of War Plans*, N.Y. TIMES, Feb. 7, 1998, at A6 (describing trips by Secretary of Defense William Cohen and Secretary of State Madeline Albright to the Middle East to explain the United States position and build support for a strike on Iraq).

272. See *Confrontation in the Gulf; Excerpts from President's Remarks to V.F.W. on the Persian Gulf Crisis*, N.Y. TIMES, Aug. 21, 1990, at A12 (citing President George Bush in claiming that the United States deployed military troops to the Middle East in the fall of 1990 to protect American national security, as well as that of the international community).

important to the United States economy.²⁷³ Thus, the use of force is vital to the U.S. national security.

(3) The United States, through the media and contact in the United Nations, has explained to the Iraqi government that violating the Security Council resolutions may result in use of force by the United States.²⁷⁴ Through this explanation, the United States directly tied any military action to the Iraqi failure to comply with weapons inspections.

(4) The United States went to the brink of military action twice and backed down.²⁷⁵ The United States used the United Nations and Kofi Anan as pacific means to settle the confrontation to no avail.²⁷⁶ The President has stayed in close consultation with Security Council members during the entire confrontation.²⁷⁷ This confrontation is a result of seven and a half years of diplomatic attempts to force Iraqi compliance, which is more than a reasonable amount of time.

(5) The strikes were proportional to the threat to some extent as discussed earlier.²⁷⁸ The United States used cruise missiles and precision guided bombs as a way to avoid collateral damage.

(6) The strikes concentrated on military targets as evident by the targets listed above.²⁷⁹

273. See Michael R. Gordon, *Cracking the Whip*, N.Y. TIMES, Jan. 27, 1991, at 16 (claiming that the Arabian oil fields are the second most important security interest of the United States, directly after the security of Europe).

274. See Tim Weiner, *Clinton's Warning to Iraqis: Time for Diplomacy May End*, N.Y. TIMES, Jan. 22, 1998, at A6 (stating that President Clinton, through media sources and through contact with the United Nations, wished to iterate that the window for a diplomatic solution to the crisis with Iraq was closing and military confrontation was a distinct possibility).

275. Crossette, *U.N. Rebuffs U.S. on Threat*, *supra* note 48, at A1; Shenon & Myers, *supra* note 55, at 1.

276. See discussion *supra* Part I.

277. See *Standoff with Iraq; War of Words: The Administration, Its Critics and Questions of Moral Right*, N.Y. TIMES, Feb. 19, 1998, at A9 (citing Secretary of State Madeline K. Albright in stating that the United States wants to work closely with the Security Council on the matter and that the United States has support from members of the United Nations); Erlanger, *supra* note 6, at A14 (stating that the United States consulted with sixteen foreign ministers of the Security Council before the attack).

278. See discussion *supra* Part IV.D.

279. See *id.*

(7) The air strikes were discussed in the Security Council almost immediately.²⁸⁰

(8) Throughout the confrontation the United States explained to the Iraqi government the basis of the unacceptable conduct.²⁸¹ Saddam Hussein had the opportunity to avert the air strikes by cooperating with the weapons inspectors.

(9) The United States tried diplomatic channels in February 1998 and November 1998 to no avail.²⁸² The economic sanctions in place clearly did not force Iraqi cooperation. There was no way for the United States to act forcefully against Iraq from the confines of America.

(10) The strikes were limited to a four-day period at the conclusion of which the United States ceased hostilities on its own accord.²⁸³ The choice to cease the air strikes after a relatively short period of time and the United States attitude toward the Iraqi people showed a sensitivity to Iraqi citizens.²⁸⁴

(11) During the February standoff, the United States made efforts to act in accordance with the will of the international community by trying to gather support before possible air strikes.²⁸⁵ The international community criticized the United States for not seeking this consensus prior to the initiation of hostilities in December 1998.²⁸⁶ Support during the strikes was not wide spread, but did exist.²⁸⁷

280. See Erlanger, *supra* note 6, at A14 (stating that the Security Council met in an emergency meeting on the first day of the air campaign).

281. See Clinton, *supra* note 161, at 20 (claiming that the United States made it clear from the beginning that if Iraq did not fully cooperate, the United States would react with military force).

282. Crossette, *U.N. Rebuffs U.S. on Threat*, *supra* note 48, at A1; Shenon & Myers, *supra* note 55, 1.

283. Shenon, *supra* note 63, at 20.

284. See Clinton, *supra* note 161, at 20 (stating that the United States would seek to continue the oil for food program even after the completion of the air strikes).

285. See Gordon & Sciolino, *supra* note 44, at A1.

286. Erlanger, *supra* note 6, at A25.

287. See *Critics from Paris to Kuwait, but Friend in London*, N.Y. TIMES, Dec. 18, 1998, at A25 (stating that Great Britain, Germany, Spain, Poland and Portugal expressed degrees of approval for the attack, but that some other countries criticized the attack).

(12) President Clinton did not specifically cite Iraq's support for terrorism as a reason behind the attack;²⁸⁸ however, one month after the attack he described the threat for the twenty-first century.²⁸⁹ In that description, he specifically mentioned Iraq's WMD capability as a reason to keep a constant vigilance to counter unconditional warfare and bioterrorism around the globe.²⁹⁰

For all of these reasons, it should be clear that the United States met most, if not all, the indicators of reasonableness. By meeting these conditions, the strike on Iraq is a "reasonable" reprisal. As such, the attack on the Iraqi WMD fulfills the international requirements to be a customary exercise of international law.

Operation Desert Fox meets the definitional requirements under both an expansive self-defense use of force and a "reasonable" reprisal. Therefore, the action is arguably a valid exercise of the United States right to reprisal in the international arena. "Arguably" is used because many would say that a strict interpretation of the United Nations Charter prevents a reprisal justification for the attack. If the reprisal justification is not enough for the restrictionist camp, one more argument exists for legally justifying an attack on Iraq.

VI. Material Breach of Resolution 687

The final argument that could justify an attack on Iraq derives from the basic legal theory of material breach. This is the justification upon which the United States government appears to rely heavily in explaining the authority for an attack on Iraq.²⁹¹ The theory is that Iraq is in material breach of Security Council Resolution 687; therefore, the United States may resort back to Resolution 678 authorizing "all necessary means" in

288. See Clinton, *supra* note 161, at 20 (claiming that the basic assumption in deciding to attack Iraq was based on Saddam Hussein's previous use of WMD).

289. Judith Miller & William J. Broad, *Clinton Describes Terrorism Threat for 21st Century*, N.Y. TIMES, Jan. 22, 1999, at A1, A12.

290. *Id.*

291. See Christopher S. Wren, *Standoff with Iraq: The Law; U.N. Resolutions Allow Attack on the Like of Iraq*, N.Y. TIMES, Feb. 5, 1998, at A6 [hereinafter Wren, *Standoff with Iraq*] (concluding that the United States assertion to have a right to attack Iraq stems from a line of reasoning resting on a material breach of Resolution 687, which would return Iraq and the United States to a state of war).

order to force Iraqi compliance with the cease-fire agreement of Resolution 687.

A. Legal Nature of a Security Council Resolution

A better understanding of this line of reasoning requires an in-depth analysis of the legal nature of a United Nations resolution. The Vienna Conventions codified customary international law as it pertains to international agreements.²⁹² Although an international agreement is the common form of agreement among nations, a United Nations resolution is different in two important ways.²⁹³

First, an international agreement expresses the will of the agreeing states, whereas a United Nations resolution does not necessarily reflect the will of all member states.²⁹⁴ It is possible for a resolution to pass in the United Nations without a unanimous vote.²⁹⁵ There is an even greater distinction when differentiating between a General Assembly resolution and a Security Council resolution. For a General Assembly resolution, all member states have a voice in the debate and an opportunity to vote on the resolution,²⁹⁶ whereas in the Security Council, only fifteen member states have a voice and a vote.²⁹⁷ This makes a Security Council resolution even

292. See Vienna Convention on the Law of Treaties (with Annex), concluded May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, opened for signature Dec 31, 1986, U.N. Doc. A/CONF.129/15, 25 I.L.M. 543.

293. RENATA SONNENFELD, RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL 1-2 (1988).

294. *Id.* at 1.

295. See U.N. CHARTER art. 18 (requiring a two-thirds vote of those members present and voting to pass a resolution); *id.* art. 27 (requiring nine members of the Security Council to vote in favor to pass a resolution and all permanent members must at least concur in the vote).

296. See U.N. CHARTER art. 9 (granting each member state a seat in the General Assembly); *id.* art. 18 (granting each member of the General Assembly one vote).

297. See *id.* art. 23 (granting fifteen member states seats on the Security Council, five of which are permanent seats while ten seats rotate every two years); *id.* art. 27 (granting each member of the Security Council one vote for each member state and each permanent member may veto a resolution).

less representative of the will of member states than a General Assembly resolution.

The second way that a United Nations resolution differs from an international agreement is in the adopting body.²⁹⁸ For an international agreement, it is the agreeing parties that adopt the resolution and is therefore, an agreement between two or more states or organizations.²⁹⁹ On the other hand, a United Nations resolution is an act of the organization, not an act of the member states.³⁰⁰ The resolution adopted represents the interest of the United Nations. This interest may or may not be the interest of all member states. These two differences affect the legal nature of a United Nations resolution, but that does not mean that a United Nations resolution is not similar in other ways to an international agreement.

Because a United Nations resolution is not the same as an international agreement, the issue arises as to whether a United Nations resolution is a source of international law. Article 38 of the ICJ Charter does not list a United Nations resolution, per se, as a source of international law.³⁰¹ There are three possible explanations for this oversight: United Nations resolutions are not a source of international law different from international agreement law, United Nations resolutions are not legal acts, or the drafters of the ICJ Charter were not aware of this oversight.³⁰²

The clearest treatment of how a United Nations resolution fits into the international legal framework has been by the ICJ. In the case concerning *Reparations for Injuries Suffered in the Service of the United Nations*, the court essentially established the basis for United Nations resolutions as a source of international law.³⁰³ In the case, the ICJ found that the United Nations is a subject of international law and the organization possesses both international rights and duties.³⁰⁴

In another case, the ICJ specifically recognized the acts of an international organization as a source of international law.³⁰⁵ An advisory opin-

298. SONNENFELD, *supra* note 293, at 2.

299. *Id.*

300. *Id.*

301. Charter of the United Nations Statute and Rules of Court, 1947 I.C.J. Acts & Docs. 46 (ser. D, 2d ed.) No. 1.

302. SONNENFELD, *supra* note 293, at 3.

303. *See* *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

304. *Id.*

ion by the ICJ specifically applied the issue to the Security Council, concluding that Security Council resolutions are binding on member states that must carry out the resolution.³⁰⁶

Although the drafters of the United Nations Charter did not explicitly provide an easy answer to this dilemma, it is difficult to believe that the drafters would create an organization without some legally binding authority. Most legal scholars are of the opinion that a United Nations resolution must possess some type of legal character.³⁰⁷ It appears that the drafters of the ICJ Charter simply did not realize this oversight and therefore, the ICJ Charter failed to include a United Nations resolution as a source of international law.³⁰⁸

Assuming that a resolution of the Security Council is a source of international law, the next area of interest is to consider the legal nature of a Security Council resolution. Unlike the previous area, Article 25 of the United Nations Charter answers this question. Member states are required to carry out a Security Council resolution under Article 25.³⁰⁹ This means that a resolution is binding on member states. Therefore, assuming that a Security Council resolution carries legal authority as a source of international law and member states are bound by the resolution, it logically follows that there must be some method to deal with breach. The remainder of this discussion will rest on the assumption that a Security Council resolution is a source of international law and binds a member state.

B. Material Breach of a Security Council Resolution

The analysis of breach is difficult because the situation with Iraq is unique in that the Security Council has never before adopted a cease-fire

305. See SONNENFELD, *supra* note 291, at 4 (providing an ICJ advisory opinion in the case of the judgments of the International Labour Organization's Administrative Tribunal).

306. Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 54 (June 21).

307. SONNENFELD, *supra* note 293, at 5. But, there are some legal scholars, such as Baladore Pallieri, who do not believe in the full legal effect of resolutions passed by the United Nations. *Id.*

308. There is far less consensus of the status of a General Assembly resolution as a source of international law, however this article does not attempt to draw a conclusion on this issue. The only resolutions pertinent to the crisis with Iraq are Security Council resolutions.

309. See U.N. CHARTER art. 25.

resolution as extensive as 687.³¹⁰ Unfortunately, nowhere in this resolution is there an explanation of what to do in the event that Iraq may breach the terms of the resolution.³¹¹ The ICJ, however, has ruled on the Security Council authority to act in a similar situation when it reached a decision in the Namibia dispute.³¹²

1. The Namibia Case

In 1970, the Security Council adopted Resolution 276, which ordered South Africa to withdraw its administration from Namibia by 4 October 1969.³¹³ South Africa failed to follow this resolution and withdraw.³¹⁴ In addressing the legal consequence of the breach of this resolution, the ICJ first inquired as to the binding nature of the resolution.³¹⁵ The court found that “[i]n view of the nature of the powers under Article 25, the question whether [these powers] have been in fact exercised is to be determined in each case.”³¹⁶

To make this determination, one must look at: (1) the terms of the resolution, (2) the discussions in the Security Council leading up to the adoption of the resolution, (3) what provisions of the Charter were invoked in the resolution, and (4) all other circumstances which may help the analysis.³¹⁷ The court found in the *Namibia* case that Resolution 276 invoked the Article 25 powers and was therefore, binding on all member states.³¹⁸ It went further to find that:

[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such

310. David M. Morris, *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, 896 (1996) (stating that the cease-fire terms of Resolution 687 “are entirely unique in U.N. history and world practice”).

311. See S.C. Res. 687, *supra* note 24.

312. Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 54 (June 21).

313. *Id.* at 51.

314. *Id.* at 54.

315. *Id.* at 53.

316. *Id.*

317. *Id.*

318. *Id.*

a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.³¹⁹

In the *Namibia* case, the court also found that it is up to the Security Council to decide what may be done in the event that a state breaches a Security Council resolution.³²⁰ These Security Council decisions include what measures are to be taken and who may take those measures.³²¹ In the circumstances of the *Namibia* case, the ICJ found that the Security Council was fully authorized to take action against South Africa because of its breach of Resolution 276.³²²

The *Namibia* case is important because it is an extensive discussion of the issues surrounding a breach of a Security Council resolution. Although action may be taken in the event of breach, in the *Namibia* case, that authority would seem to lie with the Security Council alone.³²³ The Security Council may delegate the authority to act to member states, but without this explicit grant, the ICJ does not seem to find any authority for member states to act unilaterally. If the *Namibia* analysis is applied directly to the current situation, the United States would be unable to act unilaterally. The case, however, may be significantly distinguished and the application to the current situation limited.

The *Namibia* case may be distinguished because Resolution 678 was in the chain of resolutions leading up to Resolution 687. In fact, Resolution 687 expressly affirmed the application of all thirteen previous resolutions, including Resolution 678.³²⁴ These thirteen resolutions addressed the Iraqi threat to peace and security under the authority granted the Security Council by Article 39 of the United Nations Charter.³²⁵ By so doing,

319. *Id.* at 54

320. *Id.* at 55.

321. *Id.*

322. *Id.*

323. *See id.*

324. Joseph Murphy, *De Jure War in the Gulf: Lex Specialis of Chapter VII Actions Prior to, During, and in the Aftermath of the United Nations War Against Iraq*, 5 N.Y. INT'L L. REV. 71, 82 (1992).

325. *Id.* According to Article 39 of the United Nations Charter the Security Council shall determine whether any threat to the peace, breach of peace or act of aggression has taken place. U.N. CHARTER art. 39. The Security Council may then make a recommendation as to what measures should be taken in accordance with Articles 41 and 42. *Id.*

Resolution 687 implies that Iraq still poses a threat to international peace and security in the region.

The failure of Resolution 687 to replace or revoke Resolution 678 must mean that the authority to use “all necessary means” to restore international peace and security in the region still exists under Resolution 687, modified only by the requirements of Resolution 687 itself.³²⁶ This means that unlike Resolution 276, Resolution 687 was predicated on explicit authority for member states to use force. The *Namibia* case differed as well because Resolution 276 was not a cease-fire resolution, but was rather a resolution seeking South African compliance with norms of international law concerning intervention in another state and apartheid.³²⁷

In addition, Article 38 and Article 59 of the Statute of the ICJ prevents the *Namibia* decision from binding the international community.³²⁸ Without *stare decisis* the case has no legal impact on future disputes. The case simply provides a scholarly discussion of the issue, which may be applied as the situation allows in the future.

Because the *Namibia* case does not control the current crisis, it is necessary to look elsewhere for authority to act unilaterally in the event of breach. There is no other explicit primary or secondary source of international law that covers the situation, therefore it is necessary to analyze the use of force through analogy and logic. In light of this fact, an analysis of the Iraqi breach requires a two-step process. The first step is to decide if Iraq materially breached the resolution. If no material breach occurred, the analysis must stop there and the United States may not act unilaterally under the theory of material breach. If a material breach did occur, however, the second step is to decide the consequence of that material breach.

2. *Defining Material Breach*

Black's Law Dictionary defines material breach as the “violation of a contract which is substantial and significant and which usually excuses the aggrieved party from further performance under the contract.”³²⁹ Although a Security Council resolution differs from an international agree-

326. Murphy, *supra* note 324, at 82.

327. See S.C. Res. 276, U.N. SCOR, 25th Sess., U.N. Doc. S/RES/276 (1971).

328. See discussion *supra* Part III.

329. BLACK'S LAW DICTIONARY, *supra* note 221, at 189.

ment per se, conceptually speaking similarities exist. The two are similar because both involve consensus between parties on an important international issue. The Vienna Convention defines material breach as: (a) a repudiation of the treaty not sanctioned by the present Convention, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.³³⁰

From the dictionary definition and the convention definition, it is possible to define the concept of material breach as it relates to a Security Council resolution. The dictionary definition is broad, whereas the Vienna Convention definition is narrowly tailored for an agreement between states. A material breach of a Security Council resolution could stem from either a repudiation of the resolution by a member state or a violation of an essential element of the resolution. Both of which would be a breach of the resolution. To be material, the breach would have to be both substantial and significant. This application to a Security Council resolution incorporates both definitions into a properly tailored description of material breach.

In 1991, the Security Council found Iraq in material breach of Resolution 687.³³¹ This material breach was, among other things, a result of Iraq's declaration on 7 July 1991, admitting that the nation maintained three programs to enrich uranium.³³² Iraq argued that the programs were meant for peaceful purposes, but the Security Council found these programs in direct violation of Resolution 687.³³³ The Security Council also prohibited Iraq from maintaining any nuclear programs beyond those relating to isotopes for medical, industrial, or agricultural use.³³⁴ Another reason for finding material breach was based on incomplete notification by Iraq to the Security Council as required in Resolution 687 on both 8 April and 28 April 1991.³³⁵ In addition, the Security Council found that Iraq was in material breach for concealing activities from UNSCOM and the IAEA inspectors.³³⁶ Resolution 707 is strong evidence that Iraqi misconduct under the watchful eye of the weapons inspectors may constitute material

330. Vienna Convention Between States and International Organizations, *supra* note 290, art 60, para. 3.

331. S.C. Res. 707, *supra* note 37, at 3.

332. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 81.

333. *Id.*

334. *Id.*

335. S.C. Res. 707, *supra* note 37, at 3.

336. *Id.*

breach of Resolution 687. No additional resolutions have been adopted that found Iraq in material breach. This may be more for diplomatic reasons on the part of permanent members of the Security Council than because Iraq has not actually been in material breach since the summer of 1991.

Since that time, Iraq has exhibited a pattern of conduct inconsistent with its responsibilities under Resolution 687.³³⁷ In the February 1998 crisis, this conduct resulted in the Iraqi refusal to allow inspectors access to certain suspected weapon sites in Iraq.³³⁸ Because the refusal only applies to a few sites, on its face, this breach would appear to be of little significance, but the truth is quite the contrary. The eight presidential palaces which Iraq restricted access to in February 1998 included approximately 1500 buildings³³⁹—some of the compounds occupied land area as large as metropolitan Washington, D.C.³⁴⁰ It would be possible for even the most unsavvy military organization to hide vast amounts of chemical and biological stockpiles in these large establishments.

As part of the original dialogue concerning Resolution 687, Iraq promised the weapons inspectors “[u]nrestricted freedom of movement” within Iraq.³⁴¹ It is impossible to match this refusal to allow weapons inspectors into a suspected weapons site with the agreement to allow unrestricted freedom of movement in the country. The two positions are completely inconsistent.

In August 1998 and again in October and November 1998, Iraq declared an end to cooperation with the UNSCOM inspections.³⁴² Richard

337. See *supra* note 36.

338. See Christopher S. Wren, ‘Presidential Sites’: How Many, and How Big?, N.Y. TIMES, Feb. 16, 1998, at A8 [hereinafter Wren, ‘Presidential Sites’] (finding that the core of the showdown with Iraq in the winter of 1997-98 resulted from the closure of certain presidential sites to UNSCOM weapons inspectors).

339. Barbara Crossette, *Standoff with Iraq: In Baghdad; U.N. Team Calls Iraq Sites Smaller than Thought*, N.Y. TIMES, Feb. 21, 1998, at A4 (noting that the figure cited is an estimate by UNSCOM, but the special envoy sent to map the sites found the sites much smaller than UNSCOM described; however this may be explained by the fact that the envoy went off a list provided by Iraqi officials, not one provided by UNSCOM for mapping the sites).

340. Wren, ‘Presidential Sites,’ *supra* note 338, at A8.

341. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 77.

342. Crossette, *Iraqis Break Off All Cooperation*, *supra* note 51, at A1; Crossette, *As Tension Grows*, *supra* note 5, at A1.

Butler's report details the pattern of conduct followed by the Iraqi regime before Operation Desert Fox.³⁴³ Iraq refused to hand over pertinent documents, Iraq claimed that UNSCOM tampering resulted in a positive chemical analysis on missile fragments, and Iraq restricted the access of inspection teams.³⁴⁴ These among other violations during the seven and a half years of UNSCOM inspections is a clear indication that Iraq failed to live up to the nations responsibilities under Resolution 687.

Material breach requires proof that this refusal violates an essential provision of the agreement because Iraq has not actually repudiated the resolution.³⁴⁵ Richard Butler released a report in February 1998 in which he expressed his doubts about the ability of UNSCOM to finish its task.³⁴⁶ In his opinion, if Iraq prevented UNSCOM from answering questions about the WMD in the country, then it is unlikely that UNSCOM can verify the elimination of Iraqi WMD.³⁴⁷ Richard Butler reiterated this opinion in his report to the Security Council on 15 December 1998.³⁴⁸

Quite clearly, a major goal of Resolution 687 is to eliminate the Iraqi WMD program entirely. Although there will continue to be dual use equipment in the country, this equipment will be closely monitored for weapons production, but all other equipment must be destroyed or moved out of the country.³⁴⁹ If Iraq refuses to allow the inspection of suspected weapons sites and prohibits UNSCOM from verifying the elimination of the WMD program, then the Iraqi actions are a breach of an essential provision of the resolution. This breach is material because it is both substantial and significant.

Without the elimination of the WMD program in Iraq, the intent of Resolution 687 will not be fulfilled and Iraq will remain a threat to international peace and security. There is nothing in Resolution 687, or international law, that would require the finding of material breach to be

343. Report from Richard Butler, Chief UNSCOM, to Kofi Anan, Secretary General of the U.N. (Dec. 15, 1998), in *N.Y. TIMES*, Dec. 16, 1998, at A4.

344. *Id.*

345. Vienna Convention Between States and International Organizations, *supra* note 292, art. 60, para. 2(c).

346. Wren, *U.N. Official Doubts*, *supra* note 45, at A3.

347. *Id.*

348. Butler, *supra* note 343, at A4.

349. See S.C. Res. 687, *supra* note 24, at 5. Dual use equipment is that equipment which possesses both a civilian use and a military use.

documented with a Security Council resolution. There can be little doubt that Iraq has materially breached the resolution on numerous occasions.

3. *Consequence of Material Breach*

Alternative Theories—Because Iraq materially breached Resolution 687, the next step in the analysis requires a look at the consequence of the material breach. Falling back on the international agreement comparison, the type of international agreement determines what rights a state is entitled to in case of a material breach by another state. In general, a material breach of a multilateral agreement allows for remaining states to decide unanimously to suspend the agreement.³⁵⁰ If there is not unanimous consent for suspending the agreement, a nation specially affected may suspend the international agreement as it relates to that state, not as it relates to the other states.³⁵¹ In essence, international law treats the situation as if there were a bilateral agreement between the states involved in the dispute and, in that case, one party may suspend the agreement in the face of the other party's material breach. What the rule of multilateral treaty suspension prevents is the ability of other states to use a breach against a different state to suspend the agreement without unanimous consent.

In the case of special multilateral treaties, a unanimous decision to suspend the international agreement is not required.³⁵² For example, in a disarmament agreement, the unanimity requirement would put a nation at risk because the state guilty of breach may be arming for an attack.³⁵³ Disallowing unilateral suspension risks the national security of the state adhering to the agreement. This special provision, however, only applies in cases where the material breach of the international agreement radically alters the situation of every party with respect to furtherance of the goal of the agreement.³⁵⁴ Unlike domestic contractual breach where material

350. Vienna Convention Between States and International Organizations, *supra* note 292, art. 60, para. 2(a).

351. *Id.* para. 2(b).

352. *Id.* para. 2(c).

353. HENKIN ET AL., *supra* note 72, at 482-83.

354. Vienna Convention Between States and International Organizations, *supra* note 292, art. 60, para. 2(c).

breach may excuse one party in the contract from performance, international agreements allow for excusal only under very limited circumstances.

Resolution 687 would seem to be analogous to a multilateral agreement because it is between the member states of the United Nations and Iraq. The question at that point would be whether it is a special multilateral agreement or a normal multilateral agreement. It would appear to fall into a gray area between a special multilateral agreement, which does not require unanimous consensus for suspension, and a normal multilateral agreement, which does. More than likely, the resolution does not meet the special multilateral agreement requirement that Iraq's actions radically changed the position of the other nations of the world.³⁵⁵ Iraq's breach, however, certainly affects every state around the globe because the breach raises the risk of a WMD attack. It is difficult to argue that Iraq's material breach altered the position of every state with respect to the obligations under the agreement. Iraq is the state with the obligations, not the other states involved. The worst case scenario is that the agreement is treated as a normal multilateral agreement, in which case the unanimity requirement exists.³⁵⁶ If this analogy to the international agreement context is accepted, the United States may suspend the operation of the agreement in full or in part as it pertains only to the United States and Iraq. Other states may follow suit, but the suspension is only between that state and the breaching party, Iraq.

Although the analogy to international agreement law may originally appear to assist in the analysis, it must conceptually fail in the end. Nowhere in the United Nations Charter does a state have the right to ignore a Security Council resolution. A Security Council resolution is passed by the collective member states and binds the collective member states. It does not allow a single member state to be excused or ignore the resolution. The domestic breach analogy fails for the exact same reason, one state may not be excused or ignore the resolution. Therefore, using these two theories leads back to square one and leaves unanswered the consequence of breaching a Security Council resolution. There is one last area of international law that may shed some insight on this issue of material breach.

Law of Cessation of Hostilities—Although murky, the law concerning the cessation of hostilities may provide the answer to a breach of a cease-

355. *Id.*

356. *Id.* art. 60, para. 2(a).

fire resolution. Traditionally conflicts ended with an armistice or a peace treaty.³⁵⁷ The former being a temporary cessation of hostilities, while the latter was a permanent cessation.³⁵⁸ A peace treaty falls under the purview of the Vienna Convention and one must treat it as an international agreement.³⁵⁹ On the other hand, an armistice is different and has its own law to govern the temporary cessation of hostilities. Article 40 of the Hague Convention outlined specific provisions in the event one party violated the armistice.³⁶⁰ Article 40 explained that “[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.”³⁶¹ Although Article 40 allows for the continuation of hostilities in the event of a violation, the continuation is allowed only under certain circumstances.³⁶²

The cease-fire concept, on the other hand, is a hodge-podge of all the other methods of ending warfare.³⁶³ Out of the confusion there seems to be some consensus that a cease-fire resolution is a Security Council action that is binding under Chapter VII.³⁶⁴ The United Nations has traditionally used the cease-fire as a way to end hostilities between belligerents.³⁶⁵ The cease-fire established by Resolution 687 would seem to fit this mold. Although it may be distinguished from previous cease-fire agreements because, for the first time, it laid the framework by which Iraq could reenter the community of nations.³⁶⁶

Legal scholars writing on the topic muddle the exact consequence of a material breach of a Security Council cease-fire resolution. Through a case study approach, a legal scholar concludes that the existence of a United Nations cease-fire limits the authority of the nations involved to resume hostilities in case of a breach.³⁶⁷ Under this theory, modern inter-

357. See Morris, *supra* note 310, at 809-11 (although he finds that there were four types of cessation of hostilities, he concentrates primarily on the armistice and the peace treaty in his discussion about the evolution of the cease-fire).

358. *Id.* at 810.

359. See *id.* at 810-11 (stating that the peace treaty “is a political act at the heart of sovereign power”).

360. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, *concluded* Oct. 18, 1907, 36 Stat. 2277, 2305-06.

361. *Id.*

362. *Id.*

363. Morris, *supra* note 310, at 810-11.

364. *Id.* at 813.

365. *Id.* at 802.

366. *Id.* at 892.

national law concerning cease-fires has modified the basic concept developed under armistice law in that, no longer do serious violations amount to a material breach which would allow resumption of hostilities.³⁶⁸ On the other hand, another legal scholar would disagree with this conclusion, at least as far as it relates to Resolution 687.³⁶⁹ Since Resolution 687 was the mode by which the international community sought to transform the temporary cease-fire of the Gulf War into a permanent cease-fire, material breach of this agreement nullifies Resolution 687.³⁷⁰ Nullification would reinstate Resolution 678 and authorize “all means necessary” to return peace and security to the region.³⁷¹

This is the very essence of the United States official position.³⁷² This theory does place certain restrictions on the use of force in the event hostilities resume.³⁷³ The use of force would have to meet international requirements of necessity and proportionality in order to be a legal use of force.³⁷⁴ The problem with both theories is that they lack any legal justification beyond mere hypothesis and personal belief. It is not sufficient to accept either analysis on faith alone.

Historical Precedent—The one factor that may tip the scale is the past conduct of the international community. At the end of the Gulf War, the Kurds revolted against the Iraqi regime.³⁷⁵ Saddam Hussein put down the revolt with military force and began to drive the Kurds north towards Turkey.³⁷⁶ Turkey feared a large influx of Kurds because it might stir unrest in the southern regions of the country where a large faction of Kurds had been pushing for political independence for quite some time.³⁷⁷ At the request of Turkey and in response to the Iraqi violation of the cease-fire, certain members of the coalition sent ground troops into northern Iraq to establish safe enclaves for the Kurdish refugees.³⁷⁸ The countries that par-

367. *Id.* at 822.

368. *Id.*

369. Murphy, *supra* note 324, at 84-85.

370. *Id.* at 85.

371. *Id.*

372. See Wren, *Standoff with Iraq*, *supra* note 291, at A6.

373. *Id.*

374. *Id.*

375. Christopher M. Tiso, *Safe Haven Refugee Programs: A Method of Combating International Refugee Crises*, 8 GEO. IMMIGR. L.J. 575, 577 (1994).

376. *Id.*

377. See *id.* at 578 (stating that the Turkish government feared a large influx of Kurds might cause unrest in Turkey).

378. *Id.* at 578.

ticipated in the operation acted without specific Security Council authority, but also without Security Council condemnation.³⁷⁹ In fact, shortly after the military intervention, the Security Council passed Resolution 688, which required immediate access of humanitarian organizations to the refugees in northern Iraq.³⁸⁰

This intervention by the international community was in response to an Iraqi violation of Resolution 686 because Iraq used offensive military force against the Kurds.³⁸¹ Had it not been for the cease-fire resolutions, it is highly unlikely the intervention would have happened without sharp criticism. More than likely the intervention would have been condemned as a violation of the national sovereignty of Iraq. This military intervention established a precedent by which states may unilaterally use force to implement the terms of a cease-fire agreement.

In light of this discussion, it is a close call as to whether international law would allow material breach of Resolution 687 to form the basis for unilateral action by the United States. The *Namibia* decision provides important insight into the issues, but that situation may be distinguished from the current situation. Also, the nonbinding nature of an ICJ decision limits the effectiveness of the *Namibia* line of reasoning. Since it is difficult to apply the theory of material breach of an international agreement to the material breach of a Security Council resolution, one must look elsewhere for legal justification. The domestic law theory of material breach would allow the United States to suspend the resolution, but this application is inconsistent with the general concept of a Security Council resolution. Legal scholars differ on the appropriate theory concerning the authority to resume hostilities in the event of a cease-fire violation.

The historical precedent of the coalition intervention in northern Iraq under Resolution 687 is perhaps the one clear factor weighing in favor of allowing unilateral action by the United States and Great Britain. Iraq has materially breached Resolution 687, but the consequence of that material breach is the issue that raises the difficulties faced under this justification for an attack. In light of the historical precedent and the failure of Resolution 687 to repudiate Resolution 678, the United States may justify the

379. *See id.* at 577-78 (finding that the Secretary General was hesitant to get involved in the situation until the coalition operation in northern Iraq forced Iraq to specifically request United Nations assistance).

380. S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/688 (1991).

381. *See Tiso, supra* note 373, at 577.

attack on Iraq as a unilateral response to the breach of a Security Council resolution meant to ensure peace and stability in the region.

VII. Conclusion

There is no precise legal authority that would allow the United States to act unilaterally in forcing Iraqi compliance with Resolution 687. Quite clearly, the Security Council would be authorized to force compliance under either Article 41 or Article 42. But the issue is much more difficult when discussing the authority for unilateral action.

Anticipatory self-defense is a generally accepted use of force under the current international-legal framework, although some would argue the United Nations Charter prohibits anticipatory self-defense. In this case, however, Iraq does not pose the imminent threat that must exist for a state to launch a preemptive strike. There is no instant and overwhelming threat to either the United States or Israel that would justify an anticipatory strike against Iraq.

Conversely, the law surrounding reprisal is not clear as to the existence of this right to use force. A strong case may be made, under a counter-restrictionist theory that the United Nations Charter would allow reprisal. An alternative theory, based on customary international law, would allow the use of a "reasonable" reprisal. In either case, as long as the reprisal meets the requirements of necessity, proportionality and immediacy, the use of force may be legally justified. Although the Iraqi threat may not be imminent, it is most certainly immediate. Continued violations of Resolution 687 provide ample opportunity for the United States to meet the temporal requirement of reprisal and strike the Iraqi WMD program. However, the strike must be limited in scope to the WMD threat in order to fulfill the proportionality requirement. Targets struck outside the WMD threat violate the rule of proportionality and would appear to be an unauthorized use of force. These unjustified targets may invalidate the attack were reprisal the only justification; but because material breach is an alternative justification, reprisal against the WMD targets is a valid justification for Operation Desert Fox.

Similar to reprisal, material breach of a Security Council resolution is far from settled law in the international arena. It is easy to show that Iraq materially breached Resolution 687, but it is extremely difficult to determine what the consequence of that material breach should be. The one

clear indicator of international law in the area stems from limited historical precedent. Although contrary opinions exist, the coalition action following the Gulf War and the United Nations acquiescence in that action, indicate that a state may be allowed to act unilaterally in addressing a material breach of a Security Council resolution.

Both before Operation Desert Fox and now only a matter of months after the air strikes, Iraq poses a significant threat to international peace and security. The American and British attack, in accordance with international law, respects the intent of the United Nations Charter by stabilizing international peace and security. It is time the nations of the world took seriously measures passed by the Security Council. Unilateral action by the United States and Great Britain to force compliance with Resolution 687 was a step in that direction. It was an attack intended to stabilize the peace and security of the international community through the limited use of precision attacks against a hostile and dangerous nation.