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International Law and the Preemptive Use of Force Against Iraq

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Summary

On March 19, 2003, the United States, aided by Great Britain and Australia, initiated a military invasion of Iraq. Both the U.S. and Great Britain contended that they had sufficient legal authority to use force against Iraq pursuant to Security Council resolutions adopted in 1990 and 1991. But President Bush also contended that, given the "nature and type of threat posed by Iraq," the U.S. had a legal right to use force "in the exercise of its inherent right of self defense, recognized in Article 51 of the UN Charter." Given that the U.S. had not previously been attacked by Iraq, that contention raised questions about the permissible scope of the preemptive use of force under international law. This report examines that issue as it has developed in customary international law and under the United Nations Charter. It will be updated as events warrant. (For historical information on the preemptive use of force by the U.S., *see* CRS Report RS21311, *U.S. Use of Preemptive Military Force*.)

Preemptive Military Attacks Under Customary International Law

Until recent decades customary international law deemed the right to use force and even to go to war to be an essential attribute of every state. As one scholar summarized:

> It always lies within the power of a State to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.[1]

Within that framework customary international law also consistently recognized self-defense as a legitimate basis for the use of force:

> An act of self-defense is that form of self-protection which is directed against an aggressor or contemplated aggressor. No act can be so described which is not

[1] Hyde, Charles Cheney, *International Law Chiefly As Interpreted and Applied by the United States*, Vol. 3 (1945), at 1686.

> occasioned by attack or fear of attack. When acts of self-preservation on the part of a State are strictly acts of self-defense, they are permitted by the law of nations, and are justified on principle, even though they may conflict with the ... rights of other states.[2]

Moreover, the recognized right of a state to use force for purposes of self-defense traditionally included the preemptive use of force, *i.e.*, the use of force in anticipation of an attack. Hugo Grotius, the father of international law, stated in the seventeenth century that "[i]t be lawful to kill him who is preparing to kill."[3] Emmerich de Vattel a century later similarly asserted:

> The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force ... against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.[4]

The classic formulation of the right of preemptive attack was given by Secretary of State Daniel Webster in connection with the famous *Caroline* incident. In 1837 British troops under the cover of night attacked and sank an American ship, the *Caroline*, in U.S. waters because the ship was being used to provide supplies to insurrectionists against British rule in Canada headquartered on an island on the Canadian side of the Niagara River. The U.S. immediately protested this "extraordinary outrage" and demanded an apology and reparations. The dispute dragged on for several years before the British conceded that they ought to have immediately offered "some explanation and apology." But in the course of the diplomatic exchanges Secretary of State Daniel Webster articulated the two conditions essential to the legitimacy of the preemptive use of force under customary international law. In one note he asserted that an intrusion into the territory of another state can be justified as an act of self-defense only in those "cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation."[5] In another note he asserted that the force used in such circumstances has to be proportional to the threat:

> It will be for [Her Majesty's Government] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.[6]

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[2] *Id.* Vol. 1, at 237.

[3] Grotius, Hugo, *The Law of War and Peace*, at 1625.

[4] de Vattel, Emmerich, *The Law of Nations*, Vol. IV, at 3.

[5] Letter from Secretary of State Daniel Webster to Lord Ashburton of August 6, 1842, set forth in Moore, John Bassett, *A Digest of International Law*, Vol. II (1906), at 412.

[6] Letter from Mr. Webster to Mr. Fox of April 24, 1841, 29 British and Foreign State Papers 1129, 1138 (1857), quoted in Damrosch, Lori, *International Law: Cases and Materials* (2001), at 923.

Both elements – necessity and proportionality – have been deemed essential to legitimate the preemptive use of force in customary international law.[7]

Effect of the United Nations Charter

However, with the founding of the United Nations, the right of individual states to use force was purportedly curbed. The Charter of the UN states in its Preamble that the UN was established "to save succeeding generations from the scourge of war"; and its substantive provisions obligate Member States of the UN to "settle their international disputes by peaceful means" (Article 2(3)) and to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations" (Article 2(4)). In place of the traditional right of states to use force, the Charter creates a system of collective security in which the Security Council is authorized to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken ... to maintain international peace and security" (Article 39).

Although nominally outlawing most uses of force in international relations by individual States, the UN Charter does recognize a right of nations to use force for the purpose of self-defense. Article 51 of the Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[8]

The exact scope of this right of self-defense, however, has been the subject of ongoing debate. Read literally, Article 51's articulation of the right seems to preclude the preemptive use of force by individual states or groupings of states and to reserve such uses of force exclusively to the Security Council. Measures in self-defense, in this understanding, are legitimate only *after* an armed attack has already occurred.[9]

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[7] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice stated that "[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law." 1996 I.C.J. Reports para. 41.

[8] United Nations Charter, Article 51.

[9] This reading of Article 51 finds support in the decision of the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. Reports p. 14. The gravamen of the Court's ruling was that in customary international law as well as Article 51, the use of force in self-defense is justified only in response to an armed attack:

> ... [F]or one State to use force against another ... is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack .... In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of "collective" armed response to acts which do not constitute an "armed

(continued...)

Others contend that Article 51 should not be construed so narrowly and that "it would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first, and perhaps fatal, blow ...."[10] To read Article 51 literally, it is said, "is to protect the aggressor's right to the first strike."[11] Consequently, to avoid this result, some assert that Article 51 recognizes the "inherent right of individual or collective self-defence" as it developed in customary international law prior to adoption of the Charter and preserves it intact. The reference to that right not being impaired "if an armed attack occurs against a Member of the United Nations," it is said, merely emphasizes one important situation where that right may be exercised but does not exclude or exhaust other possibilities.[12]

In further support of this view, it is argued that the literal construction of Article 51 simply ignores the reality that the Cold War and other political considerations have often paralyzed the Security Council and that, in practice, states have continued to use force preemptively at times in the UN era and the international community has continued to evaluate the legitimacy of those uses under Article 51 by the traditional constraints of necessity and proportionality. The following examples illustrate several aspects of these contentions:

- In 1962 President Kennedy, in response to photographic evidence that the Soviet Union was installing medium range missiles in Cuba capable of hitting the United State, imposed a naval "quarantine" on Cuba in order "to interdict ... the delivery of offensive weapons and associated material."[13] Although President Kennedy said that the purpose of the quarantine was "to defend the security of the United States," the U.S. did not rely on the legal concept of self-defense either as articulated in Article 51 or otherwise as a justification for its actions. Abram Chayes, the Legal Adviser to the State Department at that time, later explained the decision not to rely on that justification as follows:

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[9] (...continued)
attack."
Id. para. 211.

[10] Statement by Sir Humphrey Waldock, quoted in Roberts, Guy, "The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction," 27 *Denver Journal of International Law and Policy* 483, 513 (1999).

[11] *Id.*

[12] Simma, Bruno, ed., *The Charter of the United Nations: A Commentary* (1994), at 51. This contention finds some support in the advisory opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Reports para. 96-97. In passing on the question of whether it might ever be legal for a nation to use nuclear weapons, the Court refused to construe Article 51 or customary international law to preclude "the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake." The Court's decision did not specifically deal with the question of preemptive attack. But it seems to give support to an expansive understanding of what might be permissible in instances of extreme necessity.

[13] Proclamation 3504, 27 Fed. Reg. 10401 (October 25, 1962).

> In retrospect ... I think the central difficulty with the Article 51 argument was that it seemed to trivialize the whole effort at legal justification. No doubt the phrase "armed attack" must be construed broadly enough to permit some anticipatory response. But it is a very different matter to expand it to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome. To accept that reading is to make the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either .... Whenever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible .... In this sense, I believe that an Article 51 defence would have signalled that the United States did not take the legal issues involved very seriously, that in its view the situation was to be governed by national discretion, not international law.[14]

- In 1967 Israel launched a preemptive attack on Egypt and other Arab states after President Nasser had moved his army across the Sinai toward Israel, forced the UN to withdraw its peacekeeping force from the Sinai border, and closed the port of Aqaba to Israeli shipping, and after Syria, Iraq, Jordan, and Saudi Arabia all began moving troops to the borders of Israel. In six days it routed Egypt and its Arab allies and had occupied the Sinai Peninsula, the West Bank, and the Gaza Strip. Israel claimed its attack was defensive in nature and necessary to forestall an Arab invasion. Both the Security Council and the General Assembly rejected proposals to condemn Israel for its "aggressive" actions.[15]

- On June 7, 1981, Israel bombed and destroyed a nuclear reactor under construction in Iraq. Asserting that Iraq considered itself to be in a state of war with Israel, that it had participated in the three wars with Israel in 1948, 1967, and 1973, that it continued to deny that Israel has a right to exist, and that its nuclear program was for the purpose of developing weapons capable of destroying Israel, Israel claimed that "in removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defense within the meaning of this term in international law and as preserved also under the United Nations Charter."[16] Nonetheless, the Security Council unanimously "condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct" and urged the payment of "appropriate redress."[17]

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[14] *See* Chayes, A., *The Cuban Missile Crisis* (1974), at 63-64, quoted in Carter, Barry, and Trimble, Phillip, *International Law* (1999), at 1241-42.

[15] The Security Council, instead, adopted Resolution 242 calling on Israel to withdraw from the territories and for the termination of all claims or states of belligerency and the acknowledgment of the territorial integrity and the right of every State in the region to live in peace.

[16] 20 ILM 996 (July, 1981) (excerpts from Security Council debate).

[17] *Id.* at 993 (S/RES/487 adopted on June 19, 1981).

Current Situation

Thus, in both theory and practice the preemptive use of force appears to have a home in current international law. Its clearest legal foundation is in Chapter VII of the UN Charter. Under Article 39 the Security Council has the authority to determine the existence not only of breaches of the peace or acts of aggression that have already occurred but also of threats to the peace; and under Article 42 it has the authority to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." These authorities clearly seem to encompass the possibility of the preemptive use of force. Less clear is whether international law currently allows the preemptive use of force by a nation or group of nations without Security Council authorization. That would seem to be permissible only if Article 51 is read not literally but as preserving the use of force in self-defense as traditionally allowed in customary international law. As noted, the construction of Article 51 remains a matter of debate. But so construed, Article 51 would not preclude the preemptive use of force by the U.S. against Iraq or other sovereign nations. To be lawful, however, such uses of force would need to meet the traditional requirements of necessity and proportionality.

As the examples listed above illustrate, the requirement of necessity is most easily met when an armed attack is clearly imminent, as in the case of the Arab-Israeli War of 1967. But beyond such obvious situations, as Abram Chayes argued, the judgment of necessity becomes increasingly subjective; and there is at present no consensus either in theory or practice about whether the possession or development of weapons of mass destruction (WMD) by a rogue state justifies the preemptive use of force. Most analysts recognize that if overwhelmingly lethal weaponry is possessed by a nation willing to use that weaponry directly or through surrogates (such as terrorists), some kind of anticipatory self-defense may be a matter of national survival; and many – including the Bush Administration – contend that international law ought to allow, if it does not already do so, for the preemptive use of force in that situation.[18] But many states and analysts are decidedly reluctant to legitimate the preemptive use of force against threats that are only potential and not actual on the grounds the justification can easily be abused. Moreover, it remains a fact that the international community judged Israel's destruction of Iraq's nuclear reactor site in 1981 to be an aggressive act rather than an act of self-defense.

Iraq has become an occasion to revisit the issue. Iraq had not attacked the U.S., nor did it appear to pose an imminent threat of attack in traditional military terms. As a consequence, it seems doubtful that the use of force against Iraq could be deemed to meet the traditional legal tests justifying preemptive attack. But Iraq may have possessed WMD, and it may have had ties to terrorist groups that seek to use such weapons against the U.S. If evidence is forthcoming on both of those issues, then the situation necessarily raises the question that the Bush Administration articulated in its national security strategy, *i.e.*, whether the traditional law of preemption ought to be recast in light of the realities of WMD, rogue states, and terrorism. Iraq likely will not resolve that question, but it is an occasion to crystallize the debate.

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[18] The Bush Administration contends that "we must adapt the concept of imminent threat to the capabilities and objectives of ... rogue states and terrorists." *See* White House, *The National Security Strategy of the United States of America* (Sept. 2002), at 15.