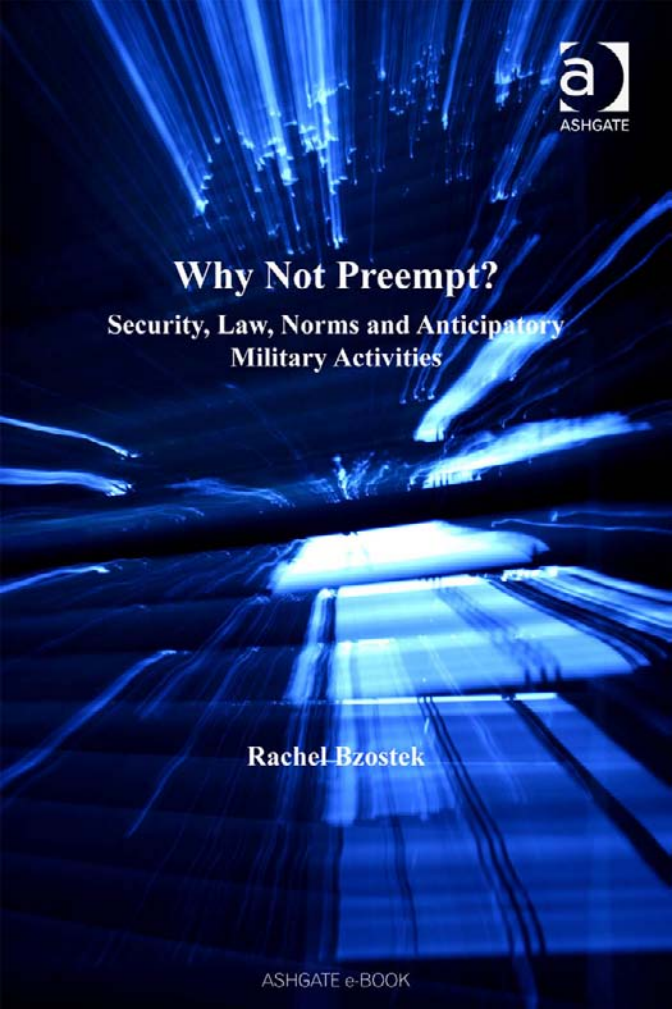
ASHGATE
Why Not Preempt?
Security, Law, Norms and Anticipatory Military Activities
Rachel Bzostek
ASHGATE e-BOOK

WHY NOT PREEMPT?

Justice, International Law and Global Security

Series Editor: Howard M. Hensel

As the global community enters the 21st century, it is confronted with a wide variety of both traditional and non-traditional challenges to its security and even survival, as well as unprecedented opportunities for global socio-economic development. International law will play a major role as the international community attempts to address these challenges and opportunities while, simultaneously attempting to create a just and secure global order capable of protecting and promoting the common good of the whole of mankind.

The Ashgate Series on Justice, International Law and Global Security is designed to encourage and highlight analytical, scholarly works that focus on the ways in which international law contributes to the management of a wide variety of contemporary challenges and opportunities, while, simultaneously, helping to promote global justice and security.

Also in the series

The Law of Armed Conflict
Constraints on the Contemporary Use of Military Force
Edited by Howard M. Hensel
ISBN: 978-0-7546-4543-6 (HB)
ISBN: 978-0-7546-7113-8 (PB)

Why Not Preempt?

Security, Law, Norms and Anticipatory Military Activities

RACHEL BZOSTEK
California State University, USA

ASHGATE

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Bzostek, Rachel
Why not preempt? : security, law, norms and anticipatory military activities. - (Justice, international law and global security)
1. Intervention (Interbnational law) 2. National security
I. Title
327.1'17

Library of Congress Cataloging–in–Publication Data
Bzostek, Rachel.
Why not preempt? : security, law, norms and anticipatory military activities / by Rachel Bzostek.
p. cm. -- (Justice, international law and global security)
Includes bibliographical references and index.
1. Preemptive attack (Military science) 2. Just war doctrine. 3. Military doctrine--United States. 4. War (International law) 5. Security, International. I. Title. II. Series.

U163.B96 2007
172'.42--dc22

2007031002

ISBN 978-0-7546-7057-5

Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall.

Contents

For Gene Wittkopf: You are missed.

Acknowledgments

I would be remiss if I did not take this opportunity to express my deep and sincere thanks to everyone who helped me with this daunting, and often frustrating, project. First and foremost, this entire project would never been completed without the encouragement and support Eugene R. Wittkopf. Gene was always there to give me a push in the right direction when I needed it. For all his help and support, I am truly grateful. Although he was not able to see the final product, he remained a source of support throughout.

James Garand, Kathleen Bratton, Bill Clark, Cooper Drury, and Gitika Commuri also provided helpful comments and suggestions at various stages of the project. Mark Schafer was of great assistance in helping me conceptualize the project, and trying to figure out exactly what relationship I was actually studying.

The Faculty Teaching and Learning Center at California State University, Bakersfield, and, especially Jesus Calderon, provided invaluable assistance in terms of getting the book completed. I truly thankful for the work that Jesus put into this project.

I would also like to thank Rev. Dr. Terry Boggs for his help with the Just War literature. Over the years, I have been fortunate to have had the opportunity to learn a great deal from Rev. Boggs, and I am truly honored that he was able to help me with this project. Brian Blanchard also deserves a heartfelt thanks for helping with the data-coding. Data-coding is one of the more tedious aspects of a project of this type, and Brian's assistance was not only a selfless act, but also one of significant importance to the project.

I would never have gotten this far in my academic career without the love and support of my family and friends. My parents have always done everything in their power to support me, and have always encouraged me that I can accomplish anything. My siblings have also been very supportive—and empathetic—during this whole process. I have been fortunate to have such a wonderful and supportive family that I can turn to, especially one that understands the ins and outs of the research process. I would also like to thank my friends for their patience throughout this whole process. Thanks for indulging me when I needed to talk out some argument or another, listening when things were going badly, and making me laugh when I needed it. You will never know how much it all meant to me.

A special thanks goes out to Kelly Lai and Michael Moroneso. You have both gone above and beyond the call of duty by reading parts of the manuscript (even if you had no idea what I was trying to say), patiently listening to me prattle on endlessly about preemption for months on end, and never saying no when I asked for help. You guys are amazing.

I would also like to thank the anonymous reviewers at Ashgate for their very helpful comments and suggestions. They were both thoughtful and very helpful. I believe that they made the final text much stronger than it was originally. I am truly grateful for the time that these individuals spent with the manuscript to make it as good as possible.

As I complete this stage of the project, which has been with me for a long time, I find myself starting a new chapter, with a new perspective. And I am struck by the words of a friend who is wise beyond his years: Life in every breath. The sudden loss of Gene Wittkopf, who was not only my mentor, but also my friend, while I was in the middle of completing the book, has really brought this home to me. We learn something through every experience, and I hope to carry this with me always.

R.B.
July 2007

Chapter 1

Introduction

In 1962, President John F. Kennedy stated, "We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril."[1] On April 14, 1986, President Ronald Reagan announced on national television that "there should be no place on earth where terrorists can rest and train and practice their skills." He went on to assert that self-defense "is not only our right, it is our duty."[2] In 1981, Israeli Prime Minister Menachem Begin ominously warned his Cabinet that,

> It must be clear that if Israel does not prevent it, Iraq will manufacture nuclear weapons… Somewhere in the vicinity of Baghdad weapons of mass destruction are being prepared for use against us. Are we at liberty to sit by with folded arms in view of that terrible danger? It is our duty to our people to take the risk—and act.[3]

In 2002, President George W. Bush echoed, and extended, these positions. The September 2002 *National Security Strategy of the United States of America* (NSS), mirrored Kennedy's statement, arguing that "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." The NSS goes on to say that,

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.[4]

The NSS also deals with the problems posed by terrorism. In this context, President Bush stated,

---

1 Laurence Chang and Peter Kornbluh (eds), *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York: The New Press, 1998), 161.

2 Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993), 138.

3 Shlomo Nakdimon, *First-Strike: The Exclusive Story of How Israel Foiled Iraq's Attempt to Get the Bomb*, translated by Peretz Kidron (New York: Summit Books, 1987), 159.

4 George W. Bush, *The National Security Strategy of the United States of America* (Washington, DC: The White House, 2002), <www.whitehouse.gov/nsc/nss.pdf> (accessed September 25, 2002), 15.

> America will hold to account nations that are compromised by terror, including those who harbor terrorists—because the allies of terror are the enemies of civilization. The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn.[5]

In what has become known as the Bush Doctrine, President Bush extended and expanded the traditional concept of self-defense.

While self-defense is generally viewed as a reactionary policy, the new type of self-defense advocated in the NSS, namely anticipatory self-defense, is designed to be proactive. According to the NSS, the traditional conceptualization of self-defense must be adapted and updated in order to deal with today's world, and today's threats. Whereas previous leaders were able to see "a visible mobilization of armies, navies, and air forces preparing to attack", today's leaders do not have this luxury.[6] Rather, according to President Bush (and echoing the sentiment expressed by Prime Minister Begin), "Facing clear evidence of peril, we cannot wait for the final proof — the smoking gun — that could come in the form of a mushroom cloud."[7] In other words, the NSS put the world on notice that the United States would now follow a strategy based upon the possible use of anticipatory military activities.

It is this policy of anticipatory military activities that is the focus of inquiry.[8] The NSS focused American strategic policy around the (potential) use of such activities, specifically of preemptive or preventive military activity—particularly as a counterproliferation tool. While the concepts of preemption and prevention are not new strategies, they have never been highlighted to such an extent. Vagts asserts that "since at least the eighteenth century, [governments] had been forced to exercise great care not to admit preventive motivations when going to war."[9]

In September 1950, President Truman stated, "We do not believe in aggressive or preventive war. Such war is the weapon of dictators, not of free and democratic countries."[10] During the same month, Acheson stated that preventive war "is a thoroughly wicked thing … immoral and wrong from every point of view."[11] Schlesinger argues a similar point, stating that unilateral preventive war "is illegitimate and immoral." He goes on to add, "For more than 200 years we have

---

5 Bush, *National Security Strategy* (2002), i–ii.

6 Bush, *National Security Strategy* (2002), 15.

7 George W. Bush, *President Delivers State of the Union Address*. The President's State of the Union Address (Washington, DC: Office of the Press Secretary, January 29, 2002) <www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html> (accessed April 27, 2003).

8 It is important to note that this work does not seek to examine the 2002 NSS in depth, but rather one of the foundational concepts of the Bush Doctrine, namely anticipatory military activities. The Bush Doctrine, as well as the related issues of the impact of international terrorism on international law, the just war tradition, and anticipatory military activities, are discussed in Chapter 8.

9 Alfred Vagts, *Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations* (New York: King's Crown Press, 1956), 263.

10 Robert W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore, MD: The Johns Hopkins Press, 1960), 15.

11 Tucker, *The Just War*, 15.

not been that kind of country."[12] In this respect, the Bush administration's explicit announcement of an intention to adopt a strategy based upon the ideas of preemptive or preventive military action marks a significant shift away from past norms, if not state practice.

Hesitancy to take anticipatory military actions has also been expressed by Israeli leaders. One Israeli leader wrote in 1967,

> I oppose a pre-emptive war morally and politically; morally, because as long as we can postpone the war without endangering Israel, there is no need to pre-empt, and by acting thus there is a possibility that the war will be postponed for many years… Politically it would be an historic mistake to become involved in an aggressive war. In that case we would lose friends in the world and there is a possibility that we might face an embargo.[13]

It has also been reported that while Israeli Prime Minister Golda Meir expressed some regrets about not taking anticipatory action in October 1973, which would have improved Israel's strategic situation in the early part of the war, she was also very clear that she felt that the costs associated with taking anticipatory action were too high: "This time it has to be crystal clear who began, so we won't have to go around the world convincing people our cause is just."[14]

In his investigation of preemptive war, Reiter notes that it has rarely been waged and finds that there are "two arguments why preemptive war is rarer than might be expected: because the political costs of attacking first often prevent preemption, and because the fear of preemption can actually serve to facilitate the peaceful resolution of a crisis."[15] His analysis is based on the traditional international security concepts of spiral models and offense-defense theory. Could there also be other factors that limit the use of anticipatory military strategies? Specifically, do international law and normative issues, such as the just war tradition, also influence states' decisions with respect to employing a strategy based upon the use of anticipatory military activities?

While Reiter hints at the legal and normative elements as limiting factors vis-à-vis preemption, he does not explicitly test these ideas. Instead, Reiter argues that there are "political costs" associated with taking preemptive action, but he does not elaborate on what these "costs" entail. This work seeks to fill part of this gap. What will be examined here is if the legal and normative elements are in fact the component parts of these "political costs."

---

12 Arthur Schlesinger Jr., "The Immorality of Preemptive War," *NPQ: New Perspectives Quarterly*, 19, No. 4 (Fall 2002), 42.

13 Michael Brecher, *Decisions in Crisis: Israel, 1967 and 1973* (Berkeley: University of California Press, 1980), 99.

14 Abraham R. Wagner, *Crisis Decision-Making: Israel's Experience in 1967 and 1973* (New York: Praeger Publishers, 1974), 158.

15 Dan Reiter, "Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen," *International Security*, 20, No. 2 (Autumn 1995), 6.

Anticipatory Military Activities

What constitutes a preemptive or preventive military activity?[16] According to the United States Department of Defense, a preemptive attack is defined as, "an attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent." A preventive war, on the other hand, is "a war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve great risk."[17]

Definitions of the concepts have not been limited to the defense establishment. The academic community has also attempted to provide definitions for these concepts. A few examples of these definitions are helpful in understanding the concept under investigation.

Van Evera defines these activities in the following manner:

> A preemptive mobilization or attack is mounted to seize the initiative, in the belief that the first mover gains an important advantage and a first move by the opponent is imminent. A preventive attack, in contrast, is mounted to engage an opponent before it gains relative strength. The incentive to preempt is two-sided: both adversaries gain by forestalling the other. The incentive to prevent is one-sided: the declining state wants immediate war, while the rising state wants to avert war.[18]

This, however, is not the only definition of these concepts. Reiter offers these definitions:

> A war is preemptive if it breaks out primarily because the attacker feels that it will itself be the target of a military attack in the short term. The essence of preemption, then, is that it is motivated by fear, not by greed. This definition is limited to perceptions of short-term threats to national security: in contrast, the term preventive war is used for a war that begins when a state attacks because it feels that in the longer term (usually in the next few years) it will be attacked or will suffer relatively increasing strategic inferiority.[19]

For Reiter, the time element is a crucial distinction. Harkavy echoes this perspective, arguing that preemption "is usually linked to an immediate crisis situation, one with mutual escalating fears and threats, in which there is an apparent advantage to striking first."[20] Betts offers a similar definition, stating that a "*preemptive* strike is one made in immediate anticipation of enemy attack; a surprise attack against an enemy who is

---

16 A full discussion of the varying definitions of preemptive and preventive military activities can be found in Chapter 2.

17 Department of Defense, *DOD Dictionary of Military Terms* (December 17, 2003) <http://www.dtic.mil/doctrine/jel/doddict/index.html> (accessed April 5, 2004).

18 Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca, NY: Cornell University Press, 1999), 40.

19 Reiter, "Preemptive Wars," 6–7.

20 Robert E. Harkavy, *Preemption and Two-Front Conventional Warfare: A Comparison of 1967 Israeli Strategy with the Pre-World War One German Schlieffen Plan*, Jerusalem Papers on Peace Problems, No. 23 (Jerusalem: Leonard Davis Institute for International Relations, 1977), 7.

not yet preparing his own attack may be *preventive*, but not preemptive." Conversely, for Betts, preventive war,

> in its pure form, involves longer-term premeditated behaviour on the part of one antagonist, often where striking the first blow may not be perceived as crucial. What *is* important is the forestalling of a change in the balance of power; premeditated aggression is usually impelled by an expectation by one member of a potential conflict pairing that the balance of power will shift away from it, and hence, that war *now* will be more favourable than war *later*.[21]

Schweller presents a similar description of preventive wars, arguing that they "are motivated by the fear that one's military power and potential are declining relative to that of a rising adversary."[22]

In this respect, one of the key differences between preemptive and preventive activities is the temporal proximity of the threat. Walzer argues for a "spectrum of anticipation" with preemptive activities, which are "like a reflex action, a throwing up of one's arms at the very last minute" at one end and "preventive war, an attack that responds to a distant danger, a matter of foresight and free choice" at the other.[23]

Preemptive activities seem designed to forestall an imminent threat, while preventive activities are directed toward a more distant threat. What constitutes a "distant" threat, or even an "imminent" threat, however, appears to be based primarily on the perceptions and interpretation of the potential preemptor/preventer. In this sense, the difference between "preemptive" and "preventive" is in the eye of the beholder.

The conceptual distinctions between preemption and prevention are clouded, however, by the fact that policy makers often use the terms interchangeably. For example, the policy articulated in the NSS clearly fits into the "preventive" rubric as defined above, even though it is described as "preemptive" in nature. By focusing on the type of threat faced and the policies adopted to counter such a threat, rather than on the semantically ambiguous terms preemptive or preventive, a more meaningful understanding of anticipatory military activities can be fashioned. As discussed below, the primary demarcation used in this analysis is the type of threat addressed, rather than focusing on the preemptive vs. preventive distinction.

There are two different types of responses that should be examined. The first is anticipatory uses of military force. These actions are characterized by the actual use of military force in anticipation of an attack or in response to another type of threat. Examples of this type of action include the Israeli attack on Egypt in 1967 and the Israeli attack on the Iraqi nuclear facility in 1981. The second type of response is anticipatory military activities that fall short of actual uses of force. In these cases, the anticipator deployed forces in response to a threat, but did not engage in actual

---

21 Richard K. Betts, "A Nuclear Golden Age? The Balance Before Parity," *International Security*, 11, No. 3 (Winter 1986–1987), 19 (emphasis in original).

22 Randall L. Schweller, "Domestic Structure and Preventive War: Are Democracies More Pacific?" *World Politics*, 44, No. 2 (January 1992), 236.

23 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Second (New York: Basic Books, 1992), 74–75.

armed conflict. An example of this type of activity is the US naval quarantine of Cuba in 1962.

It is important to be clear about what this work will *not* examine. Specifically, this work does not look at reprisals or other forms of punishments for past wrongs. These are reactive policies, i.e., in response to an actual attack, and therefore do not fit into the rubric of anticipatory activities. It is important to stress that there is a difference between a policy that is in response to a crisis trigger and a policy that is in response to an actual armed attack. Although both could be considered "reactive," they are not really the same—particularly with respect to their standing within international law and the just war tradition. As will be discussed in more depth throughout the remaining chapters, there is no legal or normative problem with states acting in self-defense in response to an armed attack. This type of "reactionary" policy is excluded from this study. The second type of action—a military response to a non-violent crisis trigger, or what is termed here an anticipatory military activity—is more contested within the legal and normative literature. It is this type of action will be the primary focus of this work.

Additionally, this study will not examine targeted assassinations or forcible regime change, both of which have often been discussed in conjunction with anticipatory military activities, particularly with respect to the Bush Doctrine. The reason for their exclusion is primarily pragmatic, since these actions are not included in the data currently available.

Anticipatory military activities are defined as actions taken in response to either an imminent threat or to counter a more distant threat. For the purposes of this study, the presence of a threat is determined through the context of an international crisis, as determined by the International Crisis Behavior Project (ICB). More information on this element is presented in Chapters 2, 6, and 7. The term "anticipatory military activities," therefore, includes the traditional concepts of both preemption and prevention. The type of threat faced by the state still matters, and the analysis will include actions taken to counter both immediate/imminent and more distant threats. Additionally, anticipatory military activities are limited to actions that take place *within* the context of an international crisis. In this respect, anticipatory military activities do not include the proverbial "bolt out of the blue," but, instead, are intended to deal with a particular, and identified, threat posed by another actor.

Specifically, two different types of threats will be studied. The first type of threat is defined by ICB as "non-violent military," which includes activities such as troop mobilizations and deployments and is used in this work as representing an "imminent" threat. The second type of threat is described as an "external change" which includes the development of new weapons technology, or the deployment of a new weapon, and is used to represent the more "distant" threats. Both types of threats and the various different types of responses will be examined in the chapters that follow.

Structure of the Book

The primary question under investigation is if states are constrained by the legal and normative elements with respect to the use of anticipatory military activities. One of the primary goals of international law is the regulation of the use of force, which has taken the form of general prohibitions on its use. Anticipatory military activities, predicated on the idea of self-defense, however, do not fit neatly into the rubric of modern international law. The question seems simple enough: are anticipatory military activities permitted under international law? There is not a clear cut or simple answer, however. While there is substantial disagreement on the legality of anticipatory military activities, the conventional answer is no, with a few exceptions. In other words, under the traditional interpretation of international law, anticipatory military activities are allowed only under a very strict set of circumstances.

Additionally, only some kinds of anticipatory military actions, specifically those designed to counter an imminent and actual armed attack are permitted.[24] Brown argues that the "right to preempt" a threat that is an "unprovoked act of aggression" and is imminent is merely an extension of the legitimate right to self-defense.[25] However, anticipatory military activities designed to prevent a distant or potential attack are not permitted under international law.

There also appears to be support for the use of anticipatory military activities within the just war tradition, assuming that the threat is imminent.[26] Particularly with respect to the issue of just cause, some scholars see room for some anticipatory military activities under the umbrella of the just war tradition. Walzer also argues that anticipatory military activities *are* permitted when there is "sufficient threat," which he describes as consisting of three things: "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."[27]

As with international law, there seems to be a clear division between what types of anticipatory military activities are permissible and what types are not. The imminence requirement once again proves to be the most salient in terms of distinguishing legitimate from illegitimate anticipatory military activities. In a similar vein to that found in international law, anticipatory military activities designed to counter an *imminent* threat are permitted. All others, whether designed to counter a distant or merely potential threat, are not considered legitimate.

The question remains, however, if these positions influence or constrain leaders when trying to decide whether or not to use anticipatory military activities in

---

24 This notion of an "imminent" threat complicates the situation, since imminence is hard to quantify and often is in the eye of the beholder. For a discussion on the evolving nature of the idea of imminence, see Terence Taylor, "The End of Imminence?" *The Washington Quarterly*, 27, No. 4 (Autumn 2004), 57–72.

25 Chris Brown, "Self-Defense in an Imperfect World," *Ethics and International Affairs*, 17, No. 1 (2003), 2.

26 Tucker, however, agues that even preventive war can be justified since "the 'anticipatory' use of force remains as an integral feature of the right of self-defense the legitimacy of preventive war is preserved." Tucker, *The Just War*, 121.

27 Michael Walzer, *Just and Unjust Wars*, 81.

response to various crisis triggers. It is this question that this study seeks to answer. The structure of the book is as follows. Chapter 2 discusses the different definitions and conceptualizations of "preemptive" and "preventive" activities. Chapter 3 examines these concepts from the perspective of international security. Chapter 4 focuses on the standing of anticipatory military activities within the framework of international law. Chapter 5 looks at these activities from the perspective of the just war tradition. Chapter 6 presents case studies where the threat faced was classified as being "imminent." The case studies in Chapter 7 focus on threats classified as more "distant" in nature. Chapter 8 examines the Bush Doctrine in more detail, exploring when and where it has and has not been applied. Finally, Chapter 9 presents the conclusions and implications of the study.

Chapter 2

What are Anticipatory Military Activities?

Before discussing the conditions that influence states' decisions vis-à-vis the use of anticipatory military activities, it is necessary to establish exactly what is an "anticipatory military activity." Traditionally, anticipatory military activities have been given two different labels: preemption/preemptive attack and prevention/preventive war.[1] These terms are problematic, in that although they refer to different concepts, they are often used in a haphazard manner. A good example of this conceptual confusion can be seen in a September 2002 interview with an Atlanta, Georgia television station, where Secretary of Defense Donald Rumsfeld blurred the distinctions between these separate (but related) concepts. Referring to the Cuban Missile Crisis, Rumsfeld stated that Kennedy "decided to engage in preemptive action, preventive action, anticipatory self-defense, self-defense, call it what you wish." Rumsfeld went on to argue that Kennedy "prevailed because he did take preventive action."[2]

Numerous scholars, from a variety of different disciplines, have offered various definitions of preemptive and preventive military activities. While virtually all of the definitions are quite similar, there are important nuances that differentiate them. Specifically, there are four different categories that the different definitions can be divided into. The categorizations of these definitions are not completely clear-cut, as some of the definitions could be placed in several different categories. In these instances, the definition is listed in the category that seems to best represent the overall position of the definition. It is important to note that not all of the following definitions will be utilized in this study. This survey of the literature is intended to present the entire spectrum of conceptualizations of the concepts of preemptive and preventive military activities.

The first group focuses on the temporal aspect, distinguishing between imminent and more distant threats. The second group emphasizes the importance of "windows

---

1 According to Evans, "The English language seems to be unique in having two different words here – 'preemption' to describe responses to imminent threats, and 'prevention' for non-imminent ones: that luxury, however, cherished though it may be for policy aficionados who happen to be native English speakers, seems to have done far more to confuse than clarify the debate for everyone else, who tend to use the words, if at all, interchangeably." Gareth Evans, "When is It Right to Fight?" *Survival*, 46, No. 3 (Autumn 2004), 65.

2 Donald Rumsfeld, "Secretary Rumsfeld Interview with NBC Affiliate – WXIA Channel 11, Atlanta, GA," *United States Department of Defense News Transcript*, September 27, 2002, <www.defenselink.mil/transcripts/2002/t09302002_t927wxia.html> (accessed October 17, 2004).

of opportunity" or shifting power differentials between states. The third group defines preemptive and preventive military activities specifically within the context of nuclear weapons or weapons of mass destruction. Finally, the fourth group includes the idea of regime change within the conceptualization of preemptive and preventive military activities. These groupings are not mutually exclusive, however, since almost all the definitions include the "imminence" factor, and some definitions include elements from more than one group.

Each of the different groups will be discussed, along with some definitions that deviate from the traditional perspectives. After reviewing the various conceptualizations of preemptive and preventive military activities, the "anticipatory military activities" concept, which will be used in this work, will be discussed. Additionally, many of these definitions will be expanded upon in later chapters, particularly in Chapter 3, which discusses anticipatory military activities from the perspective of international security—the literature from which the vast majority of these definitions are drawn.

Preemption vs. Prevention: Temporal Distinctions

The most often described distinction between preemptive and preventive military activities revolves around the proximity of the threat. For example, according to the United States Department of Defense, a preemptive attack is defined as, "an attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent."[3] A preventive war, on the other hand, is "a war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve great risk."[4]

Cimbala argues that a "preventive war is one undertaken by a state in anticipation of an enemy intent to attack at some future date or in response to an expected power transition in the international system which the state considers unacceptable and is willing to go to war to prevent." Preemption, on the other hand, "is a decision to strike first in the belief that an enemy has already decided to attack and is now attempting to implement that decision."[5] Reiter states that,

> A war is preemptive if it breaks out primarily because the attacker feels that it will itself be the target of a military attack in the short term … This definition is limited to perceptions of short-term threats to national security; in contrast, the term preventive war is used for a war that begins when a state attacks because it feels that in the longer term (usually the next few years) it will be attacked or will suffer relatively increasing strategic inferiority.[6]

---

3 It is interesting to note that the Department of Defense does not define what constitutes "incontrovertible evidence" or what qualifies as "imminent."

4 Department of Defense, *DOD Dictionary of Military Terms*. December 17, 2003, <http://www.dtic.mil/doctrine/jel/doddict/index.html> (accessed April 5, 2004).

5 Stephen J. Cimbala, *Military Persuasion: Deterrence and Provocation in Crisis and War* (University Park, PA: Pennsylvania State University Press, 1994), 77.

6 Dan Reiter, "Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen," *International Security*, 20, No. 2 (Autumn 1995), 6–7.

For Tucker, "whereas a preventive war initiates the deliberate and premeditated initiation of hostilities at the most propitious time, a pre-emptive attack involves an action in which the attempt is made to seize the initiative from an adversary who has either already resorted to force or is certain to initiate hostilities in the immediate future."[7]

Harkavy offers a similar definition of preemption and prevention, stating that:

> Preemption, then, is usually linked to an immediate crisis situation, one with mutual escalating fears and threats, in which there is an apparent advantage to striking first. Preventive war, on the other hand, and in its pure form, involves longer-term premeditated behaviour on the part of one antagonist, often where striking the first blow may not be perceived as crucial.[8]

Kegley and Raymond distinguish between the two activities in the following manner:

> A *preemptive* military attack entails the use of force to quell or mitigate an impending strike by an adversary. A *preventive* military attack entails the use of force to eliminate any possible future strike, even when there is no reason to believe that aggression is planned or the capability to launch such an attack is operational. Whereas the grounds for preemption lie in the evidence of a credible, imminent threat, the basis for prevention rests on the suspicion of an incipient, contingent threat.[9]

Snyder argues that a "state *preempts* when another state is poised to strike; it *prevents* another state from striking (through disarmament) where the strike is a future, but not immediate, risk."[10] For Buhite and Hamel, a "preventive war occurs when a state or combination thereof attacks one or more opponents on the assumption that doing so will prevent the attackers' security from being compromised at some later date."[11]

For the authors described above, the key distinction between preemptive and preventive military activities lies in the proximity of the threat: is the threat imminent or is it more distant? If the military action is taken to counter an imminent, or immediate, threat, it is considered to be "preemptive." If, on the other hand, the military action is taken to counter a more distant, or even potential, threat, it is

---

7 Robert W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore, MD: The Johns Hopkins Press, 1960), 142–43.

8 Robert E. Harkavy, *Preemption and Two-Front Conventional Warfare: A Comparison of 1967 Israeli Strategy with the Pre-World War One German Schlieffen Plan*, Jerusalem Papers on Peace Problems, No. 23 (Jerusalem: Leonard Davis Institute for International Relations, 1977), 7.

9 Kegley, Charles W. Jr. and Gregory A. Raymond, "Preventive War and Permissive Normative Order," *International Studies Perspectives*, 4, No. 4 (November 2003), 388 (emphasis in original).

10 Jack Snyder, "Imperial Temptations," *The National Interest*, 71 (Spring 2003), 654 (emphasis in original).

11 Russell D. Buhite and Wm. Christopher Hamel, "War for Peace: The Question of an American Preventive War Against the Soviet Union, 1945–1955," *Diplomatic History*, 14, No. 3 (Summer 1990), 368.

considered "preventive." It is important to stress that from the perspectives discussed above, the underlying reasons that would cause a threat to "develop" in the future are not really addressed. Rather, the emphasis is placed on the fact that military action is (or could be) undertaken to counter such a threat. For the next category, however, more emphasis is put on the nature of the "distant" threat, with emphasis placed on the different types of "distant" threats.

Preemption vs. Prevention: Developing Threats

In this category, specific attention is placed on the interactions between how and why threats might develop in the future and the actions states take to counter these threats. In this respect, many of these definitions of preemptive and preventive military activities focus on not only the temporal issue, but also the underlying issues that can lead a state to perceive that there is an emerging threat that it needs to address. In other words, these definitions not only look at the temporal aspect, but also provide the rationale for a preventive military action. In this respect, they can be viewed as going a step beyond those that focus solely on the temporal aspect. Among the developments that can induce a preventive military activity are the development of new military technology or a shift in the balance of power between the acting state and a rival. While some scholars focus on one or the other of these elements, others include both in their definitions of preemptive and preventive military activities.

Some scholars explicitly address the issue of the creation of new military technologies in their definitions of preemptive and preventive military activities. Snyder, for example, differentiates between a "preventive war, which forestalls the creation of new military assets, and preemptive attack, which forestalls the mobilization and deployment of existing forces."[12] Gaddis offers the following definitions:

> Preemption implied military action undertaken to forestall an imminent attack from a hostile state. Prevention implied starting a war to keep such a state from building the capacity to attack.[13]

Haass argues that:

> Preventive uses of force are those that seek either to stop another state or party from developing a military capability before it becomes threatening or to hobble or destroy it thereafter. For the target country, preventive attacks are the proverbial bolt out of the blue... Preemptive uses of force come against a backdrop of tactical intelligence or warning indicating imminent military action by an adversary; they may constitute actions

12 Jack Snyder, *Myths of Empire: Domestic Politics and International Ambition* (Ithaca, NY: Cornell University Press, 1991), 160.

13 John Lewis Gaddis, *Surprise, Security, and the American Experience* (Cambridge, MA: Harvard University Press, 2004), 123.

> or attacks before the other side acts or attacks or even after hostilities have begun but the target forces have not been introduced into battle.[14]

Blinken offers these definitions:

> One acts 'preemptively' against an adversary whose fist is cocked. One acts 'preventively'against an adversary whose fist is not yet even raised, but who has been muscling up and might decide to strike you sometime in the future.[15]

In these conceptualizations, the key motivation for preventive military activities is to act now, before the state can be threatened by new military technologies that the adversary/rival state is developing.

Inherent in many of these definitions is one of the key difficulties with "preventive" actions. How is the decision maker to be certain that an attack will actually occur? Blinkin's definition highlights this problem. He states that a preventive action is taken against another state that "might decide to strike you sometime in the future." "Might" and "sometime in the future" are not very reassuring assessments upon which to base decisions to use force.[16] At the same time, however, the fact that the decision maker feels that there is a real possibility that such an action is likely to take place, and the appeal inherent in acting first to avoid significant damage and reduce associated costs cannot be ignored or underrated. This issue will be addressed throughout the rest of this study.

Other scholars focus on the shifting balance of power between the actor and adversarial/rival state. Vagts, for example, argues that wars "are called preventive when they are undertaken in order to keep an enemy, who is preparing or suspected of preparing an attack, from striking the first blow at a later date, which threatens to be more unfavorable to one's own side."[17] For Brodie, preventive war refers to "the undertaking to destroy now an already strong rival power one fears *may* grow faster than one's own."[18] Lemke defines "the preventive motive" (i.e., the rational for undertaking preventive military action) "as present when one state is declining in power relative to another."[19]

---

14 Richard N. Haass, *Intervention: The Use of American Military Force in the Post-Cold War World* (Washington, DC: Carnegie Endowment for International Peace, 1994), 51–52.

15 Antony J. Blinken, "From Preemption to Engagement," *Survival*, 45, No. 4 (Winter 2003–04), 35.

16 Additionally, it is perhaps not coincidental that one of the key demarcations between legitimate (i.e., legally and normatively permitted) and illegitimate anticipatory military actions is the "imminence" factor, whereby "might" and "sometime in the future" are not sufficient to justify the use, or threat of use, of force. Instead, what is necessary in order for the use of force to be legitimate is that it be used to forestall an *actual* threat.

17 Alfred Vagts, *Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations* (New York: King's Crown Press, 1956), 263.

18 Bernard Brodie, *War and Politics* (New York: The Macmillan Company, 1973), 25 (emphasis in original).

19 Douglas Lemke, "Investigating the Preventive Motive for War," *International Interactions*, 29, No. 4 (2003), 278.

Schweller argues that the "concept of preventive war refers to those wars that are motivated by the fear that one's military power and potential are declining relative to that of a rising adversary."[20] Van Evera offers the following definitions:

> A preemptive mobilization or attack is mounted to seize the initiative, in the belief that the first mover gains an important advantage and a first move by the opponent is imminent. A preventive attack, in contrast, is mounted to engage an opponent before it gains relative strength.[21]

In an earlier work, Van Evera argued that a preventive war is undertaken when "one side foresees an adverse shift in the balance of power, and attacks to avoid a more difficult fight later."[22] According to these arguments, states would use anticipatory military actions in response to situations where it fears that it is losing power vis-à-vis a rival, and that it needs to act *now*, while it still can. Waiting, in this context, would be detrimental, since as its power declines, it would be placed at an increasing disadvantage relative to the adversary.

Organski echoes the importance of changes in the balance of power. He argues that "a preventive war [is] launched by the dominant nation to destroy a competitor before it became strong enough to upset the existing international order."[23] Betts argues that a "preventive attack is undertaken against a potential and growing threat, lest the target country become too strong to defeat at a later date" while a "preemptive attack is spurred by strategic warning, evidence that the enemy is already preparing an attack."[24]

In a later work, Betts argued that "The rational for preventive war is that conflict with the adversary is so deep and unremitting that war is ultimately inevitable, on worse terms than at present, as the enemy grows stronger over time."[25] Wirtz and Russell provide similar definitions:

> Preventive war is based on the concept that war is inevitable, and that it is better to fight now while the costs are low rather than later when the costs are high. It is deliberate decision to begin war. Preemption, by contrast, is nothing more than a quick draw. Upon

---

20 Randall L. Schweller, "Domestic Structure and Preventive War: Are Democracies More Pacific?" *World Politics*, 44, No. 2 (January 1992), 236.

21 Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca, NY: Cornell University Press, 1999), 40.

22 Stephen Van Evera, "The Cult of the Offensive and the Origins of the First World War," *International Security*, 9, No. 1 (Summer 1984), 64.

23 A.F.K. Organski, *World Politics*, Second Edition (New York: Alfred A. Knopf, Inc., 1968), 371.

24 Richard K. Betts, "Universal Deterrence or Conceptual Collapse? Liberal Pessimism and Utopian Realism," in Victor A. Utgoff (ed.), *The Coming Crisis: Nuclear Proliferation, US Interests, and World Order* (Cambridge, MA: MIT Press, 2000), 76. In an earlier work, Betts argued that preventive war "is designed to engage the enemy before he has improved his capabilities" Richard K. Betts, *Surprise Attack: Lessons for Defense Planning* (Washington, DC: The Brookings Institution, 1982), 145.

25 Richard K. Betts, "Striking First: A History of Thankfully Lost Opportunities," *Ethics and International Affairs*, 17, No. 1 (2003), 18.

> detecting evidence that an opponent is about to attack, one beats the opponent to the punch and attacks first to blunt the impending strike.[26]

These statements add an interesting element to the concept of preventive war—the idea that war is inevitable. Simply because the threat might not fully develop until sometime in the future, for these scholars, does not mitigate the motivation to act now. Rather, the fact that the state *can* act now, when its chances of winning are greater, as opposed to waiting for the unknown future, provides the motivation for states to engage in preventive military activities.

Levy and Gochal discuss the underlying assumptions that influence states' decisions vis-à-vis the use of preemptive and preventive military activities. They state that "Leaders anticipate that the failure to preempt will result in an immediate war by the adversary, whereas the failure to take preventive action will result in a continued decline in relative military power and bargaining strength."[27] Barber's description of preventive military activities flows from a similar perspective:

> Preventive war says: "It is a dangerous world where many potential adversaries may be considering aggression against us or our friends, or may be acquiring the weapons that would allow them to do so should they wish to: so we will declare war on that someone and interdict the possible unfolding of this perilous chain of could-be's and may-be's"[28]

Barber brings up an interesting point about the nature of preventive military activities: they are designed to deal with something, i.e., an attack or development of a new weapon, which *might* happen in the future.

The importance of perceptions of threats or dangers raises an important, and potentially intractable issue. How can a leader be sure that the threat is real? How can he be sure that the shift in the balance of power is real? How are intentions to be measured? It is difficult to quantify perceptions, as well as seemingly amorphous "threats," particularly when they are seen as being distant or merely potential. While there are no good answers to these questions, for the purposes of this study, the analysis will be based upon the data provided in the International Conflict Behavior Project (ICB) dataset.[29] The dataset provides information on various different types of threats and actions that precipitated international crises, threats that include both the immediate and more distant varieties. In this respect, the problem of perceptions and threats is somewhat mitigated, or at least partially deflected, in that these elements are coded for in the dataset. There are data for the date the crisis was perceived by the various actors, the gravity of the perceived threat, as well as the type of

---

26 James J. Wirtz and James A. Russell, "US Policy on Preventive War and Preemption," *The Nonproliferation Review*, 10, No. 1 (Spring 2003), 116.

27 Jack S. Levy and Joseph R. Gochal, "Democracy and Preventive War: Israel and the 1956 Sinai Campaign," *Security Studies*, 11, No. 2 (Winter 2001–2002), 7.

28 Benjamin R. Barber, *Fear's Empire: War, Terrorism, and Democracy* (New York: W.W. Norton and Company, 2003), 90.

29 Case selection for inclusion in Chapters 6 and 7, plus operationalization of the types of threats and "anticipatory military activities," was based on the ICB dataset. The cases included in Chapter 8 (the Bush Doctrine chapter), however, were included despite their coding in the ICB dataset. This is discussed in more depth in Chapter 8.

threat the precipitated the crisis, or in other words, both perceptions and threats are quantified—at least to a certain extent.

Some scholars link the acquisition/development of new military technologies and the shifting balance of power in their definitions of preemptive and preventive military activities. Walzer, for example, argues that,

> The general argument for preventive war is very old; in its classic form it has to do with the balance of power. 'Right now,' says the prime minister of country X, 'the balance is stable, each of the competing states feels that its power is sufficient to deter the others from attacking. But country Y, our historic rival across the river, is actively and urgently at work developing new weapons, preparing a mass mobilization; and if this work is allowed to continue, the balance will shift, and our deterrent power will no longer be effective. The only solution is to attack now, while we still can.'[30]

Levy also includes both elements in his definitions. He argues that "Preventive war is more concerned with minimizing one's losses from future decline than with maximizing one's gains by fight now."[31] He also differentiates between preemptive and preventive military activities by stating that a "preemptive attack is designed to forestall the mobilization and deployment of the adversary's existing military forces, where as prevention aims to forestall the creation of new military assets."[32]

In this second grouping of definitions, much of the emphasis is placed on the changing power dynamics between two states. This focus is clearly evident in the definitions of preventive military activities, which highlight the mechanisms through which the "distant threat" may develop in the future.

Preemption vs. Prevention: Weapons of Mass Destruction

This group of definitions places emphasis on the role of nuclear weapons or other weapons of mass destruction. While this group is not very large, it does present an interesting deviation from the standard definitions of preemptive and preventive military activities in that it focuses solely on the role of one particular aspect of modern warfare. Influenced by the nuclear rivalry between the United States and Soviet Union, the definitions in this group specifically address the relationship between nuclear weapons, along with other weapons of mass destruction (WMD), and preemptive or preventive military activities.

Brodie uses preventive war "to describe a premeditated attack by one country against another, which is unprovoked in the sense that it does not wait upon a specific aggressor or other overt action by the target state, and in which the chief and most immediate objective is the destruction of the latter's over-all military power

30 Michael Walzer, "The Triumph for Just War Theory (and the Dangers of Success)," *Social Research*, 69, No. 4 (Winter 2002), 21.

31 Jack S. Levy, "Declining Power and the Preventive Motivation for War," *World Politics*, 40, No. 1 (October 1987), 88.

32 Levy, "Declining Power and the Preventive Motivation for War," 91.

and especially its strategic air power."[33] A preemptive attack, on the other hand, "envisages a strategic air attack by the United States upon the Soviet Union *only after* the latter has already set in motion its own strategic air attack, but *before* that attack is consummated and preferably before it gets well underway."[34]

Betts also examines the idea of preventive military activities through the nuclear framework, arguing:

> A nation might launch a preventive nuclear war if it decided that a continuation of the trends inherent in the status quo was certain to be intolerable, and that waiting longer before resorting to nuclear force would allow the enemy to inflict greater damage. The motive would be the prospect of *eventual*, not imminent, defeat or destruction by the enemy ... In strict meaning, preemption refers to striking first when one believes the enemy is about to try to strike—beating an opponent to the draw, not shooting him in the back.[35]

For Litwak,

> *Prevention* refers to a repertoire of strategies to forestall the acquisition of weapons of mass destruction (WMD) through a variety of means, including, in extreme circumstances, the possible use of force ... *Pre-emption* pertains narrowly to military action when actual WMD use by an adversary is imminent.[36]

It is not clear if Litwak intended to limit preemptive and preventive military activities *only* to those times when they were employed against WMD, or merely wanted to highlight this element. In one respect, it could be that the increased destructive capability of WMD has reduced the applicability of anticipatory military activities to a very narrow set of situations, i.e., those described by Litwak. Or, on the other hand, it could be that these authors were merely addressing one particular facet of anticipatory military activities as they pertain to WMD, but did not intend to limit the scope of the activities to the realm of WMD-related usage. While it is not possible at this time to determine which perspective was intended, it is important to note that, at least for some scholars, the existence of WMD affects the calculus—at least to some extent—with respect to the use of anticipatory military activities.

For one scholar, the nature of WMD technology, i.e., the fact that such weapons can be rapidly deployed and used with virtually no warning, necessitates a fundamental reassessment of the distinctions between preemptive and preventive military activities. For Boot, the fact that "weapons of mass destruction can be used without warning" causes "the distinction between pre-emptive and preventive to collapse."[37] While this position may be overstating the case to a certain extent, it

---

33 Bernard Brodie, "The Anatomy of Deterrence," *World Politics*, 11, No. 2 (January 1959), 227.

34 Brodie, "The Anatomy of Deterrence," 242 (emphasis in original).

35 Richard K. Betts, "Surprise Attack and Preemption," in Graham T. Allison, Albert Carnesale and Joseph S. Nye, Jr. (eds), *Hawks, Doves, and Owls: An Agenda for Avoiding Nuclear War* (New York: W.W. Norton and Company, 1985), 56–57 (emphasis in original).

36 Robert S. Litwak, "The New Calculus of Pre-Emption," *Survival*, 44, No. 4 (Winter 2002–2003), 54 (emphasis in original).

37 Max Boot, "Who Says We Never Strike First?" *New York Times*, October 4, 2002, A27.

does highlight some of the problems with the "traditional" definitions in the context of modern warfare. This issue will be discussed in more depth in later chapters, but it is important to note at this point that the "imminence" threshold may have been reduced by the development of modern weapons technology.

Preemption vs. Prevention: Regime Change

One scholar includes the notion of regime change in the definition of preventive military activity. From this perspective simply attacking the adversary is not sufficient. Rather, removing the regime in control of the rival state is a necessary element for any successful preventive action.[38] Freedman states that

> prevention exploits existing strategic advantages by depriving another state of the capability to pose a threat and/or eliminating the state's motivation to pose a threat through regime change. Prevention provides a means of confronting factors that are likely to contribute to the development of a threat before it has had a chance to become imminent... A pre-emptive war takes place at some point between the moment when an enemy decides to attack—or more precisely, is perceived to be about to attack—and the attack is actually launched ... Prevention is cold-blooded: it intends to deal with a problem before it becomes a crisis, while pre-emption is a more desperate strategy employed in the heat of crisis. Prevention can be seen as pre-emption in slow motion, more anticipatory or forward thinking, perhaps even looking beyond the target's current intentions to those that might be acquired along with greatly enhanced capabilities.[39]

From this perspective, an integral and fundamental part of preventive military activities is regime change. Regime change is seen to be vital to the successful prevention of the adversary developing a new technology. Merely destroying the existing capability (or sites where it is being developed) is not sufficient, since the leadership, which may be even more determined to develop the technology, will merely start again. Only by removing the regime, it is argued, with the technological development really be forestalled and prevented.

Preemption vs. Prevention: Other Definitions

Still other scholars have contributed to the conceptual confusion through their definitions of preemptive and preventive military activities. O'Connell, for example, argues that:

---

38 An example of a policy based upon such reasoning is the 2003 US-led invasion of Iraq where the Bush administration argued that merely destroying Saddam Hussein's capacity to build WMD was not enough, but that the regime needed to be removed in order to completely deal with the threat. While the Bush administration's policy vis-à-vis Iraq will be examined in Chapter 8, a full discussion of the efficacy of regime change within the context of anticipatory military activities is outside the scope of this work.

39 Lawrence Freedman, *Deterrence* (Cambridge: Polity Press, 2004), 85–86.

> The term 'preemptive self-defense' is used ... to refer to cases where a party uses force to quell any possibility of future attack by another state, even where there is no reason to believe that an attack is planned and where no prior attack has occurred. Some writers also call this 'preventive' self-defense or 'preventive' war. It is also to be distinguished from 'anticipatory' self-defense. The latter is a narrow doctrine that would authorize armed responses to attacks that are on the brink of launch, or where an enemy attack has *already* occurred and the victim learns more attacks are planned.[40]

O'Connell uses "preemption" to describe "prevention" and "anticipatory self-defense" to describe "preemption." Van Den Hole also uses the term "anticipatory self-defense," which he defines as "the use of force by a state to repel an attacker before an actual attack has taken place, before the army of the enemy has crossed its border, and before the bombs of the enemy fall upon its territory."[41] Thus, what would be referred to as "preemption" or even "prevention" above, is instead given the label of "anticipatory self-defense."

Heisbourg also presents interesting definitions of preemption and prevention, which do not seem to match those discussed above:

> Until recently, 'prevention' was widely used in strategic discourse to refer to crisis prevention or preventive deployment—as an alternative to the use of lethal force... 'Preemptive' has been taken to mean 'marked by the seizing of the initiative: initiated by oneself' (as in, preemptive attack). This broad interpretation has allowed prevention and preemption to be used interchangeably in numerous strategic situations…[42]

It is not clear why "prevention" is described as being used to designate "non-violent" strategies, as there is a clear history of the term being used in a military context. However, Heisbourg is correct in pointing out that the definitions of preemptive and preventive military activities are so vague that they permit multiple interpretations.

These varying definitions only serve to complicate the situation, as it becomes difficult to compare scholarly works on these concepts. Are the authors even talking about the same things? This problem becomes particularly acute when trying to understand particular policies. An example of this semantic ambiguity is found in the 2002 NSS. The policy articulated in the NSS clearly fits into the "preventive" rubric as defined above, even though it is described as "preemptive" in nature.

Preemption vs. Prevention: Anticipatory Military Activities

The definitions discussed above show considerable variance in their content. There is, however, one element that is consistently present in the various different

---

40 Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, ASIL Task Force Papers (Washington, DC: The American Society of International Law Task Force on Terrorism, 2002), 1 (emphasis in original).

41 Leo Van Den Hole, "Anticipatory Self-Defence Under International Law," *American University International Law Review*, 19 (2003), 73.

42 François Heisbourg, "A Work in Progress: The Bush Doctrine and Its Consequences," *The Washington Quarterly*, 26, No. 2 (Spring 2003), 78.

definitions: time. Across virtually all the definitions, one of the key differences between preemptive and preventive military activities is the temporal proximity of the threat. Walzer argues for a "spectrum of anticipation" with preemptive activities, which are "like a reflex action, a throwing up of one's arms at the very last minute" at one end and "preventive war, an attack that responds to a distant danger, a matter of foresight and free choice" at the other.[43]

Preemptive activities seem designed to forestall an imminent threat, while preventive activities are directed toward a more distant threat. What constitutes a "distant" threat, however, appears to be based primarily on the perceptions and interpretation of the potential preventer. Additionally, the notion of a "distant threat" is contingent on various possibilities and probabilities. As Barber noted above, the "threat" is contingent upon a string of "could-be's and may-be's."

This work will not focus on the preemptive/preventive distinction, but will instead look at the use of all types of anticipatory military activities. By focusing on the type of threat faced and the policies adopted to counter such a threat, rather than on the semantically ambiguous terms preemptive or preventive, a more meaningful understanding of anticipatory military activities can be fashioned.

Anticipatory military activities are defined as military actions taken in response to either an imminent threat or to counter a more distant threat within the context of an international crisis. In this respect, the term "anticipatory military activities" includes the traditional concepts of both preemption and prevention. Additionally, it is important to stress that anticipatory military activities are limited to actions that take place within the context of an international crisis. In this respect, anticipatory military activities do not include the proverbial "bolt out of the blue," but, instead, are intended to deal with a particular, and identified, threat posed by another actor.

The type of threat faced by the state still matters, and the analysis will include actions taken to counter both immediate/imminent and more distant threats. Specifically, two different types of threats will be studied. The first type of threat is defined by ICB as "non-violent military," which includes activities such as troop mobilizations and deployments and is used in this work as representing an "imminent" threat. The second type of threat is described as an "external change" which includes the development of new weapons technology and is used to represent the more "distant" threats.

In addition to examining the type of threat involved, there are also two different types of responses that should be examined. The first is anticipatory uses of military force. These actions are characterized by the actual use of military force in anticipation of an attack or in response to another type of threat, such as troop deployment/mobilization, or the development or new military technologies such as nuclear weapons. Examples of this type of action include the Israeli attack on Egypt in 1967 and the Israeli attack on the Iraqi nuclear facility in 1981.

The second type of response is anticipatory military activities that fall short of actual uses of force. In these cases, the anticipator mobilized or deployed forces in response to a threat, but did not engage in actual armed conflict. An example

43 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Second Edition (New York: Basic Books, 1992), 74–75.

of this type of activity is the US quarantine of Cuba in 1962. This category is important in that it not only illustrates when states are prepared to use force in an anticipatory manner, but can also help determine if states are influenced by the legal and normative restrictions and limitations on the use of force. In other words, it is possible that these cases represent instances where leaders decide to try non-violent means first, but at the same time choose a policy such that they are still in a good position to take military action if necessary later.[44]

It is important to be clear about what this study will *not* examine. Specifically, this study does not look at reprisals, retaliatory strikes, or other forms of punishments for past wrongs. These are reactive policies, i.e., in response to an actual attack, and therefore do not fit into the rubric of anticipatory activities. It must be stressed that there is a difference between a policy that is taken in response to a specific *crisis trigger* and a policy that is taken in response to an *actual armed attack*. Although both could be considered "reactive," they are not really the same—particularly with respect to their standing within international law and the just war tradition.

As will be discussed in more depth throughout the remaining chapters, there is no legal or normative problem with states acting in self-defense in response to an armed attack. This type of "reactionary" policy is excluded from this study. The second type of action—a military response to a non-violent crisis trigger, or what is termed here an anticipatory military activity—is more contested within the legal and normative literature. It is this type of action will be the primary focus of this work.

Additionally, this study will not examine targeted assassinations or forcible regime change, both of which have often been discussed in conjunction with anticipatory military activities, particularly with respect to the Bush Doctrine and as counter-terrorism tools.[45] The reason for their exclusion is primarily pragmatic, since these actions are not included in the data currently available.

---

44 It could be the case that these instances are examples where states were bluffing, in that they deployed troops, but were not prepared to use force. However, in the data used, the cases that are coded as instances of anticipatory military activities that did not include the use of force, the crisis was resolved without force being used. In this respect, it is impossible to know if these states were bluffing or not.

45 For more information on targeted assassinations, see Steven R. David, "Israel's Policy of Targeted Killing," *Ethics and International Affairs*, 17, No. 1 (2003), 111–26; Yael Stein, "By Any Name Illegal and Immoral," *Ethics and International Affairs*, 17, No. 1 (2003), 127–37. For more information on regime change, see Dieter Janssen, "Preventive Defense and Forcible Regime Change: A Normative Assessment," *Journal of Military Ethics*, 3, No. 2 (2004), 105–28; Jeffrey Record, "The Bush Doctrine and War with Iraq," *Parameters*, 33, No. 1 (Spring 2003), 4–21; Robert S. Litwak, "Non-Proliferation and the Dilemmas of Regime Change," *Survival*, 45, No. 4 (Winter 2003–2004), 7–32.

This page intentionally left blank

Chapter 3

International Security

There have been several studies that have specifically examined both preemptive and preventive military activities within the international security literature.[1] Additionally, other works discuss these activities vis-à-vis various causes of war. These studies explore the use (or, non-use) of these activities as well as the various situations and factors that make states more or less likely to engage in them. While there are a variety of different situations that could be conducive to the use of anticipatory military activities, by and large, these scholars argue that states rarely employ such military activities.

Different scholars point to different factors to explain the paucity of actual uses of anticipatory military activities. Among these explanations are the regime type of the actor, the political consequences of taking anticipatory action, or structural impediments. According to this last logic, it is not the legal or normative elements that prevents, or dissuades, states from using anticipatory military activities, but rather, it is not in the strategic interest of the states to do so.[2]

At the same time, however, there are also many different "motivations" that may make anticipatory military activities appear to be an attractive policy option. Vagts,

---

1 While there are a variety of different definitions of both preemptive and preventive military activities in the international relations literature (see Chapter 2), the fundamental distinction between the two activities is the type of threat that precipitates their use: if the threat is imminent and impending, a military response would be considered "preemptive;" but, if the threat is more distant or even merely a potentiality, a military response would be considered "preventive," a distinction that is determined by how the cases are coded by ICB. Although this work does not focus explicitly on the traditional preemptive/preventive divide, for the purposes of this chapter it is important to keep these distinctions in mind. In much of the international relations literature, preemptive and preventive military activities are treated as separate and distinct—each with unique enabling and inhibiting factors. For this reason, the terms preemptive and preventive, as well as anticipatory military activities will be used, as appropriate, in this chapter. Combining preemption and prevention into "anticipatory military activities" does *not* imply that there are no differences or distinctions between the two actions. Rather, by focusing on anticipatory military actions designed to deal with imminent threats and anticipatory military actions designed to deal with more distant threats, much of the current semantic ambiguity that surrounds the terms "preemption" and "prevention" can be avoided. In this respect, the analysis can focus on the differences between the types of actions, rather than becoming bogged down in much of the rhetorical confusion that complicates the comparison across and between studies.

2 There appears to be some cross-over between the "political costs" that inhibit states from using anticipatory military activities and the legal and normative constraints discussed in Chapters 4 and 5. This overlap is discussed in more depth below, and will be examined in Chapters 6 through 8.

for example, states that "Arguments in favor of preventive war combine strategic necessity with the momentary military superiority of one's own side."[3] Furthermore, if there is a significant advantage in striking first, or, if a state is experiencing a decline in its power vis-à-vis a rival, a state may determine that the use of an anticipatory military activity would be the most efficacious way to secure its interests.[4] Among the other concepts and elements within the international security literature that could impact the attractiveness or viability of using anticipatory military activities are the security dilemma, balance of power, deterrence theory, arms races, the offense-defense balance, power transition theory, windows of opportunity, enduring rivalries, misperceptions, surprise, polarity, crises, and international institutions. Before discussing the specific theories regarding anticipatory military activities, the underlying concepts will be defined and briefly discussed.

This chapter is divided into three sections. The first section provides a general discussion and overview of the international security concepts that relate to anticipatory military activities. The descriptions and definitions contained in this section are broadly construed, and, therefore, the first section does not directly deal with anticipatory military activities, but rather provides the conceptual foundation necessary for more specific discussion of these activities vis-à-vis the international security literature. The second part of the chapter focuses on the more explicit treatment of anticipatory military activities within the international security literature. Building upon the concepts presented in the first section, this section explores the

3 Alfred Vagts, *Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations* (New York: King's Crown Press, 1956), 334.

4 The term "interests" is notoriously vague and difficult to operationalize. Wolfers notes that the notion of "national interest" or "national security" does not have a exact meaning, and "while appearing to offer guidance and a basis for broad consensus, they may be permitting everyone to label whatever policy he favors with an attractive and possibly deceptive name." He goes on to add that, "In a very vague and general way 'national interest' does suggest a direction of policy which can be distinguished from several others presenting themselves as alternatives." In this respect, "It emphasizes that the policy subordinates other interests to those of the nation. But, beyond this, it has very little meaning." Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore, MD: The Johns Hopkins University Press, 1962), 147. Haas notes that "it is contended that the national interest includes all those features of state aspirations which bear a relation to the permanent and enduring needs of the state, thus in fact begging the question [what is the national interest?] further." Ernst B. Haas, "The Balance of Power: Prescription, Concept, or Propaganda," *World Politics*, 5, No. 4 (July 1953), 380. Brodie notes that "According to customary usage, those of our interests are 'vital' that we are ready to fight to preserve." Bernard Brodie, *War and Politics* (New York: The Macmillan Company, 1973), 342. At the same time, however, he cautions that "they are not fixed by nature nor identifiable by any generally accepted standard of objective criteria." Brodie, *War and Politics*, 343. Finally, Brodie offers this definition of "vital interests": "They concern those issues in our *foreign* affairs that are thought to affect the survival or security of the nation, meaning specifically against military attack" (emphasis in original). Brodie, *War and Politics*, 344. To be sure, these definitions are not fully satisfying, and are still fairly malleable and can be used to justify a wide variety of activities. Providing a definition of these concepts, however, is not the primary goal of this work, and in this sense, the last definition listed will be used throughout this work.

security concepts that are posited in the literature to make the use of anticipatory military activities more or less likely.

International Security: General Concepts and Definitions

A variety of different concepts and ideas have been generated to help explain the causes of war and the myriad of situations that make the outbreak of war more or less likely to occur. As Reiter notes, "Preemption is not a theory of war, but rather a path to or scenario for war predicted by some theories."[5] Since anticipatory military activities are not a *type* of war, but rather an element often included on the *path* to war, it is instructive to review and briefly discuss some of the theories about the causes of war and of the different elements that make the outbreak of war more or less likely.

While there are numerous different theories on the causes of war, or on how and why various elements make war more or less likely, several are particularly relevant to the use/non-use of anticipatory military activities.[6] It is important to note that many of these concepts are related and closely linked to each other, and sometimes operate in conjunction with each other. They are discussed individually, however, due to the fact that they each offer a potential explanation (or at least a partial explanation) for why states do or do not use anticipatory military activities. It is important to note at the outset that the following discussion of the "causes of war" is primarily theoretical in nature, focusing on the theoretical hypotheses about the causes of war rather than on their empirical testing.

---

5 Dan Reiter, "Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen," *International Security*, 20, No. 2 (Autumn 1995), 6.

6 It is important to stress that the below discussion about the causes of war is not intended to be an exhaustive survey of all the theoretical causes of war. Rather, it is specifically restricted to those theories and ideas that relate directly to anticipatory military activities. Other causes of war that are not discussed here include imperial expansion, civil war, war initiation for domestic reasons, and economic motivations. See, Geoffrey Blainey, *The Causes of War* (New York: The Free Press, 1973); Seyom Brown, *The Causes and Prevention of War* (New York: St. Martin's Press, 1987); Dale C. Copeland, *The Origins of Major War* (Ithaca: Cornell University Press, 2000); Michael W. Doyle, *Ways of War and Peace* (New York: W.W. Norton and Company, 1997); Robert Gilpin, *War and Change in World Politics* (New York: Cambridge University Press, 1983); Michael Howard, *The Causes of Wars and Other Essays* (Cambridge, MA: Harvard University Press, 1983); Jack S. Levy, "Quantitative Studies of Deterrence Success and Failure," in Paul C. Stern et al. (ed.), *Perspectives on Deterrence* (New York: Oxford University Press, 1989), 98–133; Barry R. Posen, *The Sources of Military Doctrine: France, Britain, and Germany Between the World Wars* (Ithaca, NY: Cornell University Press, 1984); Robert I. Rotberg and Theodore K. Rabb (eds), *The Origin and Prevention of Major Wars* (New York: Cambridge University Press, 1993); Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca, NY: Cornell University Press, 1999); John A. Vasquez, *The War Puzzle* (New York: Cambridge University Press, 1997); Kenneth N. Waltz, *Man, the State, and War: A Theoretical Analysis* (New York: Columbia University Press, 1959); Wolfers, *Discord and Collaboration*; Quincy Wright, *A Study of War* (Chicago: University of Chicago Press, 1966).

Causes of War: The Security Dilemma and Related Concepts

One of the most fundamental elements of the international relations literature on the causes of war is what is known as the "security dilemma." Herz describes the security dilemma in the following manner:

> Groups or individuals living in [an anarchic society] must be, and usually are, concerned about their security from being attacked, subjected, dominated, or annihilated by other groups and individuals. Striving to attain security from such attack, they are driven to acquire more and more power in order to escape the impact of the power of others. This, in turn, renders the others more insecure and compels them to prepare for the worst. Since none can ever feel entirely secure in such a world of competing units, power competition ensues, and the vicious circle of security and power accumulation is on.[7]

Butfoy argues that the security dilemma is a result of "a complex interplay between four factors." These elements include:

(a) the inherently violent and destructive potential of military capabilities;
(b) the nature and implications of international anarchy;
(c) the politics of identity and interests; and
(d) sense of threat.[8]

The security dilemma thus refers to a situation where "the measures a state takes to increase its own security usually decreases the security of other states." Additionally, "it is difficult for a state to increase its own chances of survival without threatening the survival of other states."[9]

For Stern, et al., "The concept of 'security dilemma' in international relations reminds us that when a state takes strong action to protect itself against a perceived threat, that action is itself often perceived as a threat because it is interpreted as an increased capability or commitment to attack."[10] Butfoy argues that the security dilemma complicates the job of those in charge to determining a country's defense

---

7 John H. Herz, "Idealist Internationalism and the Security Dilemma," *World Politics*, 2, No. 2 (January 1950), 157.

8 Andrew Butfoy, "Offence-Defence Theory and the Security Dilemma: The Problem with Marginalizing the Context," *Contemporary Security Policy*, 18, No. 3 (December 1997), 45.

9 John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton and Company, 2001), 36. It is important to note that the concept of "security" is also debated and contested within the literature. Brodie, for example, argues that security is a "flexible term, and that for a nation like the United States its meaning is legitimately, indeed almost necessarily, expanded to something beyond simple self-defense." Brodie, *War and Politics*, 345. There are problems with this notion, however, as Brodie notes that "The more distant or indirect the threat that is alleged to affect our national security, the more controversial is the question whether it actually does warrant a military response, and if so, what kind." Brodie, *War and Politics*, 356.

10 Paul C. Stern et al., "Deterrence in the Nuclear Age: The Search for Evidence," in Stern, et al. (eds) *Perspectives on Deterrence*, 7.

policy: "On the one hand they can relax defence efforts in order to facilitate peaceful relations; the problem is that they may thereby make their country more vulnerable to aggression; on the other hand they can strengthen defence preparations; but this can have the unintended consequence of undermining long-term security through exacerbating international suspicions and reinforcing pressures for arms racing."[11] In this respect, the security dilemma can be viewed as a central element in the strategic/structural rationales that lead states to take anticipatory military activities. They may fear that a) their rival is preparing for an attack or b) that they are declining relative to their rival and that they should take action while they still can.

A variety of different concepts and ideas have developed and evolved out of the larger security dilemma framework within the international security literature. These concepts are particularly relevant vis-à-vis the causes of war. Some of the elements refer to measures taken to depress the likelihood of war, while others deal with different mechanisms that increase the likelihood of war. Each of these concepts is briefly discussed below.[12]

Deterrence Theory If one of the externalities of the security dilemma is the increased likelihood of conflict between two adversaries—each feeling less secure due to the other's attempt to increase its own security—deterrence theory can be seen as a possible way to mitigate this dangerous situation. Reduced to its core, "deterrence means discouraging the enemy from taking military action by posing for him a prospect of cost and risk outweighing his prospective gain."[13] Brodie argues that "The threat of war, open or implied, has always been an instrument of diplomacy by which one state deterred another from doing something of a military or political nature which the former did not wish the latter to do."[14]

Brody finds that while there is no single definition of deterrence, "the term, as it has gained general usage, has come to stand for any of a series of proposed strategies which would forestall, i.e., deter, possible aggression by making aggression 'costly.'"[15] For Snyder, deterrence can be seen as "simply the negative aspect of political power; it is the power to dissuade as the opposed to the power to coerce or compel."[16] Lebow describes deterrence as "an attempt to influence another actor's assessment of its interests." He goes on to argue that deterrence "seeks to prevent

11 Butfoy, "Offence-Defence Theory and the Security Dilemma: The Problem with Marginalizing the Context," 39–40.

12 While a complete and thorough discussion of these concepts is well beyond the scope of this work, the discussion of these elements will focus on the fundamental and core aspects of each. It is also important to note that many of these concepts are debated throughout the literature, and often there is no one "accepted" definition. These debates will be addressed as necessary and if relevant to the particular context of this work.

13 Glenn H. Snyder, *Deterrence and Defense: Toward a Theory of National Security* (Princeton, NJ: Princeton University Press, 1961), 4.

14 Bernard Brodie, "The Anatomy of Deterrence," *World Politics*, 11, No. 2 (January 1959), 174.

15 Richard A. Brody, "Deterrence Strategies: An Annotated Bibliography," *The Journal of Conflict Resolution*, 4, No. 4 (December 1960), 443.

16 Snyder, *Deterrence and Defense: Toward a Theory of National Security*, 9.

an undesired behavior by convincing the party who may be contemplating it that the cost will exceed any possible gain."[17] For Jervis, "One actor deters another by convincing him that the expected value of a certain action is outweighed by the expected punishment."[18] Cimbala states that "Deterrence is the process by which a state established in the minds of its potential opponents that they cannot obtain a military victory at an acceptable cost."[19]

According to this perspective, one way to mitigate the security dilemma is to convince the opponent that any aggressive action will be met in kind, and that the retaliatory action will be severe enough to impose costs that outweigh any gains from the initial attack.[20] In this respect, the negative consequences of the security dilemma can be dampened (at least hypothetically) by making aggressive action extremely unattractive. Or, in other words, the basic logic behind deterrence theory is to counter the instability created by the security dilemma by instead creating a situation that dissuades (again, at least hypothetically) states from attacking.[21]

Jervis points out one of the important caveats of deterrence theory: deterrence is only effective if the other states believe that the "defender" will actually carry out the threatened action, and if the "defender" threatens something that the potential

---

17 Richard Ned Lebow, "Deterrence: A Political and Psychological Critique," in Stern, et al. (eds) *Perspectives on Deterrence*, 25.

18 Robert Jervis, "Deterrence and Perception," *International Security*, 7, No. 3 (Winter 1982–1983), 4.

19 Stephen J. Cimbala, *Military Persuasion: Deterrence and Provocation in Crisis and War* (University Park, PA: Pennsylvania State University Press, 1994), 257.

20 Alexander L. George and Richard Smoke, *Deterrence in American Foreign Policy: Theory and Practice* (New York, 1974), 11.

21 Some argue that deterrence is usually used primarily against "revisionist" or "expansionist states," while states that prefer the status quo would have no incentive or motive to attack, and therefore would not need to be deterred. For more on this distinction, see Charles L. Glaser, "Political Consequences of Military Strategy: Expanding and Refining the Spiral and Deterrence Models," *World Politics*, 44, No. 4 (July 1992), 497–538; Robert Jervis, *Perception and Misperception in International Politics* (Princeton, NJ: Princeton University Press, 1976); Randall L. Schweller, "Neorealism's Status-Quo Bias: What Security Dilemma?" *Security Studies*, 5, No. 3 (Spring 1996), 90–121; Paul W. Schroeder, "Failed Bargain Crises, Deterrence, and the International System," Stern, et al. (eds), *Perspectives on Deterrence*, 66–83. While this differentiation does raise some important questions about how the security dilemma functions, it relies on the classification of states as either "revisionist" or "status quo." Buzan argues that "Where status quo and revisionist states differ primarily is in their outlook on relations with the rest of the system." Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, Second Edition (Boulder, Colorado: Lynne Reinner Publishers, 1991), 301. Additionally, "If stability is the security goal of the status quo, then change is the banner of revisionism." Buzan, *People, States and Fear*, 303. Wolfers argues that a status quo powers are states that "either desire to preserve the established order or that, while actually desiring change, have renounced the use of force as a method for bringing it about." On the other side are those nations, "formerly called 'revisionist' countries, which are bent on changing the *status quo* by force if necessary" Wolfers, *Discord and Collaboration*, 125. This distinction, though conceptually clear, is difficult to quantify and is not used in this work.

attacker actually values. If, on the other hand, the adversary does not believe that the defender will act, the deterrent threat is not "credible"[22] and will, therefore, do nothing to reduce the likelihood of conflict. In fact, such situations may even make conflict between the two more likely, since the adversary may believe that there will be no, or little, cost associated with attacking—i.e., the attacker does not believe that the defender will actually take any action in response, or that the action taken will be mild. Additionally, if the defender targets something that is not valued by the potential attacker, there will not be any incentive *not* to attack.[23] As a result, Jervis argues that the defender is in a difficult situation, whereby "the state must display the ability and willingness to wage war." At the same time, "Issues of little intrinsic value become highly significant as indices of resolve."[24]

Jervis describes this situation in the following manner: "states often refuse to back down not because of the immediate and direct costs of doing so, but because of the belief that a retreat will be seen as an indication of general weakness and so lead others to expect retreats in the future."[25] Or, framed in a different light, "If you have been caught bluffing in poker, are others likely to call you in the next round in the belief that you bluff a lot or are they unlikely to do so because they think that you know it is no longer safe to bluff?"[26]

Deterrence can be thus viewed as a "dynamic" process, in that "it acquired relevance and strength from its failures as well as its successes."[27] Brodie argues that "the very large number of wars that have occurred in modern times proves that the threat to use force, even what sometimes looked like superior force, has often failed to deter." He goes on to add that "deterrence failures" can also have positive outcomes, in that the "very frequency with which wars occurred contributed importantly to the credibility inherent in any threat."[28] The use of force to counter an attack or other hostile move thus makes future threats, i.e., deterrence, more credible. According to Huth, the elements that come into play to in order to deter an adversary also create a situation that can be conducive to the use of anticipatory military activities.[29]

Spiral Models One of the more direct ways through which the security dilemma can contribute to the outbreak of war is through what is known as the "spiral model." Often presented as an alternative to deterrence,[30] the spiral model offers another

22 Huth notes that "The credibility of a deterrent threat depends upon the defender being perceived as possessing (1) military capabilities sufficient to inflict substantial costs on a potential attacker and (2) the will or intention to use those capabilities if necessary." Paul K. Huth, *Extended Deterrence and the Prevention of War* (New Haven, CT: Yale University Press, 1988), 4.

23 Jervis, "Deterrence and Perception," 13.

24 Jervis, *Perception and Misperception in International Politics*, 59.

25 Jervis, "Deterrence and Perception," 12.

26 Jervis, "Deterrence and Perception," 13.

27 Brodie, "The Anatomy of Deterrence," 175.

28 Brodie, "The Anatomy of Deterrence," 175.

29 Huth, *Extended Deterrence and the Prevention of War*, 9.

30 Glaser argues that "these models are distinguished primarily by the intentions of one's adversary: the deterrence model applies when the defender faces an expansionist adversary

explanation of how the security dilemma can push states into war. As a result of the security dilemma, both sides may engage in a tit-for-tat process of arms buildups, based on the idea that the other's build-up decreases its security and it must, therefore, engage in its own build-up to increase its security.

Since the international system is anarchic, i.e., there is no 911 that states can call for help when they are in trouble, states must act to protect themselves. And the best way that states can protect themselves, at least according to this perspective, is to become stronger than their current or potential rivals and adversaries.[31] Due to the security dilemma, however, each action that a state takes to make itself more secure makes the other state(s) feel less secure and it then takes measures to increase its security. Jervis argues that "When states seek the ability to defend themselves, they get too much and too little—too much because they gain the ability to carry out aggression, too little because others, being menaced, will increase their own arms and so reduce the first state's security."[32]

According to Kydd, this "cycle can even lead to war if mutual fears grow to such an extent that preemptive or preventive incentives to attack become dominant."[33] In other words, this cycle can create a situation where one side believes that an attack by the adversary is either imminent or likely in the future and, therefore, decides to strike now. This aspect of spiral models will be discussed more below.

Arms Races Another mechanism through which elements of the security dilemma can lead to war is that of arms races. The manner in which arms races induce war is similar to that of the spiral model. In fact, arms races can be viewed as a tangible manifestation of the spiral model.[34]

This is not to imply that all arms races culminate in war, however. Morrow, for example, argues that arms races "create fluctuations in the ratio of military capabilities between the racing nations" and that such "fluctuations create an incentive to escalate a dispute to war for the side that is losing a temporary military advantage."[35] From this perspective, arms races are closely linked to other causes of war, such as power shifts and windows of opportunity, that are discussed in more depth below.

Some scholars, however, caution against isolating arms races as a distinct and discrete cause of war. Downs states that,

---

and prescribes competitive policies; the spiral model applies when the defender faces a status quo power, explains conflict as resulting fundamentally from the combination of international anarchy and the security dilemma, and prescribes cooperative policies." Glaser, "Political Consequences of Military Strategy: Expanding and Refining the Spiral and Deterrence Models," 499. See also Jervis, *Perception and Misperception in International Politics*.

31 See Jervis, *Perception and Misperception in International Politics*, 63.

32 Jervis, *Perception and Misperception in International Politics*, 64.

33 Andrew Kydd, "Game Theory and the Spiral Model," *World Politics*, 49 (April 1997), 371–72.

34 Jervis, *Perception and Misperception in International Politics*, 67.

35 James D. Morrow, "A Twist of Truth: A Reexamination of the Effects of Arms Races on the Occurrence of War," *The Journal of Conflict Resolution*, 33, No. 3 (September 1989), 526.

> Whether a given arms race leads to war or whether a decision maker committed to peace should aggressively match the arms policies of a rival state (or ignore them as a gesture of cooperation) depends on a host of factors. These include national goals, strategic choices, the current technology of war, and the level of uncertainty and misperception that exists. Because these factors vary dramatically from case to case, the likelihood that an arms race will lead to war and the optimal arms policy that a nation should follow vary as well.[36]

Howard argues that "'Arms races' can no more be isolated than wars themselves from the political circumstances that give rise to them, and like wars they will take as many different forms as political circumstances dictate." He goes on to add that "If there are no political causes for fear or rivalry this process need not in itself be a destabilizing factor in international relations."[37] This does not imply, however, that arms races are generally "peaceful." Rather, Howard adds,

> The trouble is that what is seen by one party as the breaking of an alien hegemony and the establishment of equal status will be seen by the incumbent powers as a striving for the establishment of an alternative hegemony, and they are not necessarily wrong. In international politics, the appetite often comes with eating; and there really may be no way to check an aspiring rival except by the mobilization of stronger military power. An arms race then becomes almost a necessary surrogate for war, a test of national will and strength; and arms control becomes possible only when the underlying power balance has been mutually agreed.[38]

In this respect, arms races become especially dangerous when combined with the requirements of deterrence, such as the necessity of showing resolve, as well as the consequences of the security dilemma, such as the seemingly zero-sum nature of security. Arms races can, in this respect, create a situation that is very conducive for the use of anticipatory military activities.

The Offense-Defense Balance The security dilemma is also impacted by whether or not military technology gives a benefit or advantage to the offense or defense.[39] Lynn-Jones defines the offense-defense balance as "the amount of resources that a state must invest in offense to offset an adversary's investment in defense."[40] Lynn-Jones also adds that the offense-defense balance "can be described as the ease

---

36 George W. Downs, "Arms Races and War," in Philip E Tetlock et al. (eds), *Behavior, Society, and Nuclear War*, Vol. 2 (New York: Oxford University Press, 1991), 74.

37 Howard, *The Causes of Wars and Other Essays*, 18.

38 Howard, *The Causes of Wars and Other Essays*, 21.

39 Numerous scholars challenge the notion of the offense-defense balance. For an overview of these critiques, see Butfoy, "Offence-Defence Theory and the Security Dilemma: The Problem with Marginalizing the Context;" Jack S. Levy, "The Offensive/Defensive Balance of Military Technology: A Theoretical and Historical Analysis," *International Studies Quarterly*, 28, No. 2 (June 1984), 219–38; Sean M. Lynn-Jones, "Offense-Defense Theory and Its Critics," *Security Studies*, 4, No. 4 (Summer 1995), 660–91.

40 Lynn-Jones, "Offense-Defense Theory and Its Critics," 665.

with which power (resources) can be translated into threat" and "is shaped by the technology that is available to states."[41]

Hopf notes that there are three elements of the "offense-defense balance." The first element is "the technical offense-defense military balance concerning the relative military advantages enjoyed by the offense or defense on the battlefield, that is castles versus canons, machine guns versus trenches, and so on." The next part is "the cumulatively of power resources, or the relative availability of the resources that underlay military capability and the relative ease of the extraction by occupying states." The final component is "the set of strategic beliefs held by the leaders of the great powers, their relative concern for their reputation, or credibility."[42]

Van Evera argues that there are ten "war-causing effects" that arise when the offense is dominant. These effects include the ease of conquest, difficulty of self-defense, higher levels of insecurity among states, greater first-strike advantages, larger windows of opportunity and vulnerability, diplomacy tends to rely on the use of fait accompli tactics, negotiations are more likely to fail and less likely to be employed, states tend to be more secretive vis-à-vis defense and foreign policies, arms races tend to be harder to control, and "offense dominance is self-reinforcing."[43] Additionally, as will be discussed in more depth below, offense dominance can create a situation that is conducive to the use of anticipatory military activities.[44]

When defense is dominant, on the other hand, the situation is reversed. Territory is more easily defended and states have secure borders. Additionally, states tend to be less aggressive, less interventionist, and "more willing to accept the status quo."[45] A situation where the defense is dominant would tend to make the use of anticipatory military activities less likely.

---

41 Lynn-Jones, "Offense-Defense Theory and Its Critics," 666.

42 Ted Hopf, "Polarity, The Offense Defense Balance, and War," *The American Political Science Review*, 85, No. 2 (June 1991), 473.

43 Stephen Van Evera, "Offense, Defense, and the Causes of War," *International Security*, 22, No. 4 (Spring 1998), 57–64. The idea of the offense-defense balance is plagued by a variety of problems of complications that hinder its use in the study of a relatively short time frame. Specifically, one of the primary difficulties with the offense-defense balance is that it tends to be fairly static. In this respect, it is possible for long periods of time to be characterized by the same type of "balance," which thus limits its explanatory power vis-à-vis different state actions during the same time period and in response to the same inputs. Adams classifies the time period under investigation in this study (1946–present) as belonging to the same "balance" type. Karen Ruth Adams, "Attack and Conquer? International Anarchy and the Offense-Defense-Deterrence Balance," *International Security*, 28, No. 3 (2003/04), 60. Therefore the offense/defense balance as an explanatory variable is not particularly useful in the testing of the specific hypotheses presented in the later chapters. However, since it is often discussed by scholars vis-à-vis both preemption and prevention, its inclusion in this discussion is important in order to provide a complete picture of the conceptualization of preemption and prevention in the international security literature.

44 Jack S. Levy, "Declining Power and the Preventive Motivation for War," *World Politics*, 40, No. 1 (October 1987), 100; Stephen Van Evera, "The Cult of the Offensive and the Origins of the First World War," *International Security*, 9, No. 1 (Summer 1984), 65.

45 Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca, NY: Cornell University Press, 1999), 124.

Causes of War: The Balance of Power

There are numerous different definitions of the "balance of power." Brown argues that the balance of power "refers to the relative capabilities countries have for coercing others." He goes on to add that "Balances of power may be global or local, and their components will vary with different issues." And, while "military components usually constitute the heaviest weights in a coercive balance" it is important to realize that "the balance of power also includes nonmilitary pressures that countries in conflict can bring to bear on each other."[46]

Wolfers defines the balance of power "as meaning an equilibrium or a roughly equal distribution of power between two opponents, the opposite, then, of hegemony or domination."[47] Claude juxtaposes the idea of a "balance of power system" with one of "collective security." For Claude, the "balance of power stresses the possibility of achieving order through the arrangement of appropriate patterns of conflictual relations, while collective security looks instead to the development of a structure of general cooperation to hold conflict in check."[48]

Others examine "balance of power theory" as opposed to merely a "balance of power." Waltz, for example, describes balance of power theory in the following manner:

> A balance-of-power theory, properly stated, begins with assumptions about states: They are unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination. States, or those who act for them, try in more or less sensible ways to use the means available in order to achieve the ends in view. Those means fall into two categories: internal efforts (moves to increase economic capability, to increase military strength, to develop clever strategies) and external efforts (moves to strengthen and enlarge one's own alliance or to weaken and shrink an opposing one)...To the assumptions of the theory we then add the condition for its operation: that two or more states coexist in a self-help system, one with no superior agent to come to the aid of states that may be weakening or to deny to any of them the use of whatever instruments they think will serve their purposes.[49]

According to this perspective, there are certain characteristics of both states and the international system that will induce them to either band together to prevent an aggressor's expansion or other hostile acts (i.e., balancing) or to join with the aggressor, hoping to partake of the spoils of war (i.e., bandwagoning).

While the full dynamics of Waltz's balance of power theory are not particularly relevant in this context, it is important to take note of the emphasis placed on the existence of anarchy as well as the enduring quest for security by states within the theory. Geller contends that the basic logic underlying the balance of power can be extrapolated to the dyadic level, so that "Just as in the case of an international system

46 Brown, *The Causes and Prevention of War*, 62–63.

47 Wolfers, *Discord and Collaboration*, 118.

48 Inis L. Jr. Claude, *Power and International Relations* (New York: Random House, 1962), 145.

49 Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1983), 118.

where deterrence against hegemonic expansion is reinforced by the formation of a blocking coalition, so too in the case of a dyadic relationship may a potential aggressor be deterred by equivalent opposing power."[50]

For the purposes of this work, the notion of the balance of power is important in that it could impact the degree to which one state's behavior is seen by other states as threatening. However, since the focus is on unilateral anticipatory activities, and not coalitional activities, much of the traditional "balance of power" concept is not entirely relevant in this situation. In other words, the focus in this work will be on element of "balance of power" that concerns a state acting to prevent another from gaining a preponderance of power, rather than on the elements of polarity[51] and whether the system is "balanced."[52]

Power Cycles, Power Transition, and Windows of Opportunity Closely related to the idea of balance of power is the notion that the likelihood of conflict between two or more states is impacted by changes in the balance of power or relative power differentials between two or more states. Specifically, many scholars have hypothesized that war and conflict becomes more likely as states experience shifts in their relative power vis-à-vis a rival or adversary.[53] Geller notes that "Conceptually, dynamic power balances can be separated into two categories: *transitions* (a reversal of relative power transition) and *power shifts* (power convergence or divergence)."[54]

Although power cycles and the associated concepts are not directly addressed in this work, their inclusion in this discussion is important due to the fact that they are often discussed as one of the primary motivations that leads states to use anticipatory military activities. According to Levy, the "theoretical significance of preventive war derives from the importance of the phenomenon of changing power differentials between states arising from uneven rates of growth."[55] The specific theories and

50 Daniel S. Geller, "Power Differentials and War in Rival Dyads," *International Studies Quarterly*, 37, No. 2 (June 1993), 174.

51 Polarity generally refers to the number of great powers in the international system. Brecher argues that bipolar systems tend to be the least violent, with multipolar or polycentric systems more prone to violence. See Michael Brecher, "Crisis Escalation: A New Model and Findings," in Frank P. Harvey and Ben D. Mor (ed.), *Conflict in World Politics: Advances in the Study of Crisis, War and Peace* (New York: Palgrave Macmillan, 1998), 122–23. See also Franz Kohout, "Cyclical, Hegemonic, and Pluralistic Theories of International Relations: Some Comparative Reflections on War Causation," *International Political Science Review*, 24, No. 1 (January 2003), 58.

52 It is also important to note that the temporal constraints on the data analyzed in Chapters 6 through 8 (1946–2006) significantly limits any examination of the impact of polarity on the likelihood that states will use anticipatory military activities. This is not to say that balance of power and polarity do not play a role in this dynamic, but rather that such a role may not be evident (or at least may not be prominent) in the cases analyzed in Chapters 6 through 8.

53 The theories regarding power transitions and power cycles are often presented as alternatives to balance of power theory. For a review of the various different "cyclical" theories and balance of power theory, see Kohout, "Cyclical, Hegemonic, and Pluralistic Theories of International Relations: Some Comparative Reflections on War Causation."

54 Geller, "Power Differentials and War in Rival Dyads," 175.

55 Levy, "Power and Preventive War," 82.

hypotheses about power cycles and transitions and anticipatory military activities are discussed in more depth in later sections of this chapter.

Some scholars argue that shifts in states' power can be seen as part of a dynamic cycle that involves the entire international system. Doran argues that "Power cycle theory explains the *evolution* of systemic structure via the *cyclical dynamic* of state rise and decline." He adds that "The foundation of state power which the power cycle traces is national capability *relative to that of other states in the system at that time*."[56] Yoon adds that power cycle theory "focuses on the rise, maturation, and decline in capability of each state relative to all other states (including but not restricted to potential aggressors) in the relevant system.[57]

Yoon notes that "Rather than the largest state 'assuming control of the system' (i.e., dominating), in power cycle theory the most powerful state 'plays a leadership role' along with other states capable of assuming a major role in foreign affairs." Additionally, it is important to note that in power cycle theory, both role and power are considered to be systemic.[58] However, unlike power, "role exists only if legitimized through systemic acceptance, whereas power expresses itself through unilateral action and as control."[59] Tessman and Chan argue that power cycle theory "argues that changes in national power tend to follow a regular pattern of ascendance, maturation, and decline and that these trajectories reflect the major states' relative competitiveness in the international system."[60]

In power cycle theory, war becomes more likely as a state finds its power, and accordingly its role in the system, changing. As such, "each major state finds itself, at any given moment, to be gaining, losing, or maintaining its power position relative to its counterparts."[61] At the same time, however, "the interests that states perceive themselves to possess and the roles that they aspire to hold do not tend to adjust sufficiently or promptly to the changes in their relative power." This situation, in turn, creates a situation that is ripe for "international tension."[62] Hebron and James note that "Power cycle theory, in essence, argues that major war grows out of a government's unsuccessful struggle to adjust to a sudden, massive change in its projected ability to exercise power and influence within the international system."[63]

---

56 Charles F. Doran, *Systems in Crisis: New Imperatives of High Politics at Century's End* (Cambridge: Cambridge University Press, 1991), 19 (emphasis in original).

57 Young-Kwan Yoon, "Introduction: Power Cycle Theory and the Practice of International Relations," *International Political Science Review*, 24, No. 1 (January 2003), 6.

58 Yoon, "Introduction: Power Cycle Theory and the Practice of International Relations," 6.

59 Charles F. Doran, "Economics, Philosophy of History, and the 'Single Dynamic' of Power Cycle Theory: Expectations, Competition, and Statecraft," *International Political Science Review*, 24, No. 1 (January 2003), 15.

60 Brock F. Tessman and Steve Chan, "Power Cycles, Risk Propensity, and Great-Power Deterrence," *Journal of Conflict Resolution*, 48, No. 2 (April 2004), 131.

61 Tessman and Chan, "Power Cycles, Risk Propensity, and Great-Power Deterrence," 132.

62 Tessman and Chan, "Power Cycles, Risk Propensity, and Great-Power Deterrence," 132–33.

63 Lui Hebron and Patrick James, "Great Powers, Cycles of Relative Capability and Crises in World Politics," *International Interactions*, 23, No. 2 (1997), 150.

There are also other cyclical theories that deal with the changing power/status of states and the likelihood of war and conflict erupting. Doran and Parsons discuss a "cycle of relative capability." They note that "the relative capability of a major power at any time is the percent of the total capability among the major powers it holds at that time."[64] The position of states within this system changes over time along with their roles and influence in the system. These changes can trigger conflict and war in a variety of different ways. According to Doran and Parsons, changes in relative capabilities of states within these power cycles

> may engender feelings of powerlessness, determinism, and subsequent helplessness in a governing elite anxious about security. A government may respond to such feelings with aggressiveness and violent coercion, despite room for independent action. Paranoid attributes establish the conditions for aggression in such contexts because slippage in relative power position may reinforce mistaken projections of hostility into rivalry.[65]

Much like power cycle theory, the relative capability cycle also predicts that when a state is faced with its decline vis-à-vis others in the system, it is likely to lash out, often violently.

Organski and Kugler present another cyclical model, that of the "power transition." According to this model, "the source of war is to be found in the differences in size and rates of growth of the members of the international system."[66] While shifts in each state's power *can* lead to war, Organski and Kugler point out that this will not always be the case:

> changes in the power structure will not, in and of themselves, bring war about. Satisfied great powers are not likely to interpret advantages gained by lesser powers as threatening. Moreover, the powerful and satisfied do not start wars. Only if the great powers think that the changing system challenges their positions, or if they no longer like the way benefits are divided, should the shifts be deemed dangerous.[67]

Additionally, "it is not a desire to maximize power or a single-minded urge to guarantee security in the narrow sense that leads nations to start major wars, though the latter is often the excuse furnished." Rather, "it is a general dissatisfaction with its position in the system, and a desire to redraft the rules by which relations among nations work, that move a country to begin a major war."[68]

All of these models are based on the idea that there is something about shifts and changes in the distribution of power within the system that is conducive to the outbreak of war. The individual operationalizations of these shifts vary, as do the mechanisms through which they occur, but, at their core, they are generally making the same argument. Kim and Morrow offer a more generalized position about shifts

---

64 Charles F. Doran and Wes Parsons, "War and the Cycle of Relative Power," *American Political Science Review*, 74, No. 4 (December 1980), 948.

65 Doran and Parsons, "War and the Cycle of Relative Power," 952.

66 A.F.K. Organski and Jacek Kugler, *The War Ledger* (Chicago: University of Chicago Press, 1980), 20.

67 Organski and Kugler, *The War Ledger*, 23.

68 Ibid., 23.

in power and war. They argue that "Power shifts are more likely to lead to war as the challenger becomes more risk-acceptant, the declining state more risk-averse, the expected costs of war decrease, the rising state's dissatisfaction with the status quo increases, and during periods of equality between the two sides."[69]

Huth and Russett also extend the ideas of power transition theory down from the systemic level to the regional level, or, in other words, focusing on the relationship between individual rival states. They argue that these transitions make war or conflict more likely as a result of two factors: "(1) if the challenger's current position of military advantage is diminishing, the challenger has an added incentive to confront its adversary before its relative position shifts to one of disadvantage; and (2) conversely, if the challenger's military position is improving relative to its adversary, the challenger may become more assertive in its demands for a change in the status quo and more confident in its ability to force the adversary to make concessions."[70]

Closely related to the theories concerning power shifts and power transitions is the idea of "windows of opportunity." Lebow defines a "window of opportunity" as "a period during which a state possesses significant military advantage over an adversary."[71]

Windows of opportunity are often cited as one of the key factors leading states to employ anticipatory military activities. As such, they will be discussed in more depth below.

Causes of War: Enduring Rivalries and Protracted Conflict

The ideas of "enduring rivalries" and "protracted conflict" have also been discussed with respect to the causes of war. Vasquez defines rivalry as "*a relationship characterized by extreme competition, and usually psychological hostility, in which the issue positions of contenders are governed primarily by their attitude toward each other rather than by the stakes at hand*."[72] Hensel defines enduring rivals as "two or more 'actors whose relations are characterized by disagreement or competition over some stakes that are viewed as important, where each perceives that the other poses a significant security threat, and where this competition and threat perception last for substantial periods of time'."[73] Goertz and Diehl note that "'rivalry' in our conception

69 Woosang Kim and James D. Morrow, "When Do Power Shifts Lead to War?" *American Journal of Political Science*, 36, No. 4 (November 1992), 896.

70 Paul Huth and Bruce Russett, "General Deterrence Between Enduring Rivals: Testing Three Competing Models," *American Political Science Review*, 87, No. 1 (March 1993), 65.

71 Richard Ned Lebow, "Windows of Opportunity: Do States Jump Through Them?" *International Security*, 9, No. 1 (Summer 1984), 147.

72 John A. Vasquez, "Distinguishing Rivals That Go to War from Those That Do Not: A Quantitative Comparative Case Study of the Two Paths to War," *International Studies Quarterly*, 40, No. 4 (December 1996), 532 (emphasis in original).

73 Paul R. Hensel, "Interstate Rivalry and the Study of Militarized Conflict," in Harvey and Mor (eds), *Conflict in World Politics*, 163.

signifies a certain level of competition, 'enduring' means that the competition is not ephemeral."[74] Azar, et al., give the following definition of "protracted conflict:"

> Protracted conflicts are hostile interactions which extend over long periods of time with sporadic outbreaks of open warfare fluctuating in frequency and intensity. These are conflict situations in which the stakes are very high – the conflicts involve whole societies and act as agents for defining the scope of national identity and social solidarity. While they may exhibit some breakpoints during which there is a cessation of overt violence, they linger on in time and have no distinguishable point of termination. It is only in the long run that they will 'end' by cooling off, transforming or withering away; one cannot expect these conflicts to be terminated by explicit decision. Protracted conflicts, that is to say, are not specific events or even clusters of events at a point in time; they are processes.[75]

Both enduring rivalries and protracted conflict are characterized by repeated hostile interactions and relations between a set of states.[76]

The effect of enduring rivalries or protracted conflicts on the likelihood of war has been examined in a variety of different contexts. Brecher and Wilkenfeld examine the impact of enduring rivalries and protracted conflicts on international crises. They argue that not only are crises between these actors more likely to be triggered by violent acts, but also they are more likely to involve triggers that have a higher level of threat, e.g., threats to existence, and involve violent counter-measures.[77] In other words, crises that take place in protracted conflicts are more likely to be both severe and violent—and more destabilizing.[78] Vasquez examines the link between rivalry and war and argues that "the most important things about understanding whether rivalries result in war are: (1) the issues under contention—some issues, like territorial issues, are much more prone to war than others, for example, purely ideological issues; and (2) the pattern of interaction—that is, how the issues are handled."[79]

Others have examined the impact of enduring rivalries and protracted conflict on future relations between the parties involved. Since enduring rivalries and protracted conflicts develop and evolve over time, and as a result of repeated interactions, some scholars argue that there is a residual effect of the rivalry/protracted conflict.

---

74 Gary Goertz and Paul F. Diehl, "Enduring Rivalries: Theoretical Constructs and Empirical Patterns," *International Studies Quarterly*, 37, No. 2 (June 1993), 158.

75 Edward E. Azar, Paul Jureidini, and Robert McLaurin, "Protracted Social Conflict; Theory and Practice in the Middle East," *Journal of Palestine Studies*, 8, No. 1 (Autumn 1978), 50.

76 Protracted conflicts are normally dyadic in nature, but are not always limited to only two states. The Arab-Israeli conflict, for example, includes multiple states. In most quantitative studies, however, the level of analysis is usually the conflict dyad, with each dyad analyzed separately.

77 Michael Brecher and Jonathan Wilkenfeld, *Crisis, Conflict and Instability* (New York: Pergamon Press, 1989), 129.

78 Michael Brecher and Patrick James, "Patterns of Crisis Management," *Journal of Conflict Resolution*, 32, No. 3 (September 1988), 433.

79 Vasquez, "Distinguishing Rivals That Go to War from Those That Do Not: A Quantitative Comparative Case Study of the Two Paths to War," 534.

For Brecher and Harvey, protracted conflicts are "the conceptual link between international conflict and international crises."[80] Leng argues that "the propensity to draw lessons from the outcome of one dispute to guide policymaking in the next is especially strong when statesmen find that they are engaged in a second or third crisis with the same adversary."[81] For Hensel, "Continued involvement in crises or wars is seen as likely to build up suspicion, distrust, and hostility, along with grievances and desires for revenge if their confrontations should lead to the loss of life or changes in the status quo ante."[82]

Goertz and Diehl argue that "the proposition that one conflict should be viewed in the historical context of previous conflicts seems plausible." This leads to a situation where "the interconnection of disputes is important in explaining the initiation of military conflict, the bargaining strategies used in that conflict, and the likelihood that the conflict will escalate into war."[83] Brecher argues that "prolonged acute and widespread hostility between the same adversaries creates an anticipation of violent behavior in the future." Additionally, "frequent resort to violence accentuates the image of violence as a protracted conflict norm."[84]

Causes of War: International Crises

One of the primary pathways through which states pass on the way to war is that of an international crisis. While all crises do not result in war, many do. Brecher and Wilkenfeld differentiate between international crises, which occur on the macro-level, and foreign policy crises, which occur on the micro level.[85] For the International Crisis Behavior project, Brecher and Wilkenfeld provide the following definitions of both international and foreign policy crises:

> *An international crisis* is a situational change characterized by an increase in the intensity of *disruptive interactions* between two or more adversaries, with a high probability of *military hostilities* in time of peace (and, during a war, an *adverse change* in the *military balance*). The higher-than-normal conflictual interactions destabilize the existing relationship of the adversaries and pose a *challenge* to the existing *structure* of an international system—global, dominant and/or sub-system.
>
> *A foreign policy crisis*, that is, a crisis viewed from the perspective of an individual state, is a situation with three necessary and sufficient conditions deriving from a change in a state's external or internal environment. All three are perceptions held by the highest

80 Michael Brecher and Frank P. Harvey, "Conflict, Crisis and War: Cumulation, Criticism, Rejoinder," in Harvey and Mor (eds), *Conflict in World Politics*, 9.

81 Russell J. Leng, "When Will They Ever Learn? Coercive Bargaining in Recurrent Crises," *Journal of Conflict Resolution*, 27, No. 3 (September 1983), 380.

82 Hensel, "Interstate Rivalry and the Study of Militarized Conflict," 176–77.

83 Goertz and Diehl, "Enduring Rivalries: Theoretical Constructs and Empirical Patterns," 148.

84 Brecher, "Crisis Escalation: A New Model and Findings," 125.

85 For the purposes of this work, the analysis will focus on foreign policy crises, since it is the actions taken by states in response to the initiation of these crises that is the primary element under investigation.

> level decision-makers of the actor concerned: *a threat to basic values*, along with the awareness of *finite time for response* to the external value threat, and a *high probability of involvement in military hostilities*.[86]

Lebow also offers an operationalization of international crises. The first element of a crisis is when "Policy-makers perceive that the action of another international actor seriously impairs concrete national interests, the country's bargaining reputation, or their own ability to remain in power."[87] The second part is when "Policy-makers perceive that any actions on their part designed to counter this threat (capitulation aside) will raise a significant prospect of war."[88] The final element of crisis is that of a perceived time constraints that are operating on the actors.[89]

There is nothing in the above definitions that would predestine such crises to escalate into the outbreak of violence or full-scale war. Brecher and Harvey note that "The change or increase in hostility is usually triggered by an external act or event; a threatening statement; the severance of diplomatic relations; a trade embargo; the movement of troops; violence against an ally or client state; or a direct military attack."[90] Brecher discusses a variety of different situations that increase the likelihood that an interstate (or foreign policy) crisis will develop and escalate into war.

Specifically, he argues that "An incipient international crisis is most likely to develop into a fully-crystallized crisis when: a crisis occurs within a polycentric structure; it takes place outside the dominant system; it is part of a protracted conflict; the main adversaries are geographically proximate to each other; there are more than two adversarial actors; they are heterogeneous in military, economic, political, and/or cultural terms; and there are several cross-cutting issues in dispute." If the following conditions are added, the crises are more likely to escalate to include the use of violence: "there is considerable power discrepancy between the adversaries; they are ruled by military or other types of authoritarian regimes; and major powers are active in supporting clients in the crisis with military aid."[91]

Causes of War: Misperception

An important underlying element of all of these "causes of war" is the notion of perception/misperception. Howard notes that "The causes of war remain rooted, as much as they were in the pre-industrial age, in perceptions by statesmen of the growth of hostile power and the fears for the restriction, if not the extinction, of their own."[92] As a result, it is essential that the actors involved have an accurate view and understanding of the situation at hand. Particularly with respect to anticipatory

86 Brecher and Wilkenfeld, *Crisis, Conflict and Instability*, 5 (emphasis in original).

87 Richard Ned Lebow, *Between Peace and War: The Nature of International Crisis* (Baltimore: The Johns Hopkins University Press, 1981), 10.

88 Lebow, *Between Peace and War*, 11.

89 Ibid., 12.

90 Brecher and Harvey, "Conflict, Crisis and War: Cumulation, Criticism, Rejoinder," 8.

91 Brecher, "Crisis Escalation: A New Model and Findings," 132.

92 Howard, *The Causes of Wars and Other Essays*, 18.

military activities, where the action is taken *before* an armed attack, the element of misperception, and its consequences, is particularly important.

Misperceptions of the adversary can take many different forms. Jervis presents two different types of misperceptions that can impair the functioning of deterrence. The first type of misperception concerns an erroneous view of "what the target state values and fears," or, in other words, what elements should be targeted by any deterrent threat. If the threatened target is not valued by the targeted state, it will not be "deterred." The second type of misperception concerns an erroneous view of the credibility of the deterrent threat.[93] If the target state does not believe that the deterrer will actually carry out the threatened action, it will not be deterred.

Misperceptions can also come in the form of erroneous assumptions about the capabilities and intentions of the adversary.[94] Levy argues that "Of all forms of misperception, the one most likely to play a critical role in the processes leading to war is the underestimation of the adversary's capabilities relative to one's own."[95] Jervis argues that even though "it is usually hard to draw inferences about a state's intentions from its military posture, decision-makers in fact often draw such inferences when they are unwarranted." Additionally,

> They frequently assume … that the arms of others indicate aggressive intentions. So an increase in the other's military forces makes the state doubly insecure—first, because the other has an increased capability to do harm, and, second, because this behavior is taken to show that the other is not only a potential threat but is actively contemplating hostile actions.[96]

This problem is compounded by the fact that the statesmen believe that their state's intentions are clear, and "others know that it is not a threat, it will conclude that they will arm or pursue hostile policies only if they are aggressive."[97] It is in this manner that the spiral model discussed above is often perpetuated.

Although the pitfalls of misperception are severe, Jervis argues that statesmen continue to be plagued by them. In fact, Jervis asserts that statesmen often create a situation that is ripe for misperception, since they often "assume that their opposite numbers see the world as they see it, fail to devote sufficient resources to determining whether this is actually true, and have much more confidence in their beliefs about the other's perceptions than the evidence warrants."[98] Especially when coupled with the sub-optimum decision-making environment produced by crises, or with the

---

93 Jervis, "Deterrence and Perception," 5–8.

94 Kydd contests this position, arguing "that though uncertainty over motivations can never be totally eliminated, states possess abundant means to reduce it to manageable levels, and hence security-seeking states are generally able to recognize each other as security seekers and avoid conflict." Andrew Kydd, "Sheep in Sheep's Clothing: Why Security Seekers Do Not Fight Each Other," *Security Studies*, 7, No. 1 (Autumn 1997), 117.

95 Jack S. Levy, "Misperception and the Causes of War: Theoretical Linkages and Analytical Problems," *World Politics*, 36, No. 1 (October 1983), 84.

96 Jervis, *Perception and Misperception in International Politics*, 68.

97 Ibid., 71.

98 Jervis, "Deterrence and Perception," 5.

increased danger due to modern weaponry, misperception becomes an important element on the road to war.

Surprise While the concept of "surprise" is not a "cause of war," but rather an aspect of war, it is important to examine the situations that could make it more likely for a state to either a) engage in a surprise attack, or b) be the victim of a surprise attack.[99] This is especially the case when examining anticipatory military activities. Betts describes surprise as "the difference between the victim country's actual military readiness at the time of attack and the degree of readiness it planned to have if given warning."[100] Russett notes that there is a "point of surprise" in every conflict that he defines in the following manner:

> The moment when those controlling the foreign policy of a state realize that something is going wrong and is likely to involve their state in war. While the awareness may exist to some degree for a very long period before the *key event*, there is usually a point which can be identified as signaling a sharp increase in the awareness of danger. It is not the moment when the danger actually develops, as it may develop before the actors are aware of it.[101]

As such, the notion of surprise is closely linked to misperception and other cognitive elements.

Ben-Zvi notes that in two cases where states were "surprised,"[102]

> it was the continued inability of the political and military leaders of the victim states to update their assessments of the adversary's military capabilities during the period preceding the onslaught which proved to be the main factor responsible for the inadequate response in the face of the clearly perceived threat of war. Thus, while perceptions of the enemy's immediate intentions were revised and updated in view of the accumulating tactical indicators of the approaching war, no such change took place in the perceptions of the adversary's capabilities, which remained largely outdated and depreciatory.[103]

According to this position, leaders are often surprised because they do not believe that the situation has changed enough to sufficiently lower the costs of war for the

---

99 Hybel describes two different "schools of thought" with respect to surprise in international relations. The first he describes as "the *victims school*," which tries "to uncover the factors that constrain a victim's attempt to avert surprise." The second school is "the *surpriser's school*," which tries "to explain the means an actor is likely to use to deceive an adversary in order to surprise him." Alex Roberto Hybel, *The Logic of Surprise in International Conflict* (Lexington, MA: Lexington Books, 1986), 3. To these can also be added another grouping that seeks to understand why an attacker would be motivated to initiate a surprise attack.

100 Richard K. Betts, "Surprise Attack and Preemption," in Graham T. Allison, Albert Carnesale and Joseph S. Nye, Jr. (eds), *Hawks, Doves, and Owls: An Agenda for Avoiding Nuclear War* (New York: W.W. Norton and Company, 1985), 54.

101 Bruce M. Russett, "Cause, Surprise, and No Escape," *The Journal of Politics*, 24, No. 1 (February 1962), 6.

102 The two cases are United States in December 1941 and Israel in October 1973

103 Abraham Ben-Zvi, "Threat Perception and Surprise: In Search of the Intervening Variable," in Harvey and Mor (eds), *Conflict in World Politics*, 245.

adversary. While the leaders may acknowledge a shift in the adversary's intentions, they may not realize that the adversary now has the requisite capabilities to implement these new goals.

Anticipatory Military Activities: Do States Preempt?

While there are a plethora of different factors that could influence the likelihood of a state's using anticipatory military activities, a few generalizations can be made. For one, it appears that uncertainty, which underlies most of the concepts discussed above, and is applicable to both the capabilities and the intentions of the adversary, tends to increase, at least hypothetically, the probability of a state using anticipatory military activities to deal with threats posed by an adversary. This is primarily due to the fact that states tend to expect the worst from their adversary. Or, in other words, as the adage goes, it's better to be safe than sorry.

But, is this actually the case? If uncertainty is truly as rampant and detrimental as many scholars suggest, and if taking anticipatory military action is seen as an effective tool for dealing with this uncertainty, one would expect to see states frequently employing these activities. But, as Reiter notes, for the most part states do not take anticipatory action. It is important to note that the absence of such actions does not necessarily imply a corresponding lack of uncertainty. To be sure, there are numerous different elements at play, all of which must be taken into consideration. However, it is also true that just as the influence of many of the international security concepts can be underestimated, they can also be overestimated, leaving a situation of partial understanding. In this respect, Chapters 6 through 8 seek to rectify at least part of this problem by integrating and including concepts from a variety of different sources, specifically, through adding legal and normative elements into the analysis.

Several scholars have empirically tested various hypotheses about preemptive and preventive war using concepts and theories derived from the international security literature. While there is diversity vis-à-vis the explanatory variables used in these studies, there appears to be consensus with respect to the conclusions: states rarely use anticipatory military activities. Before discussing these conclusions, it is important to look at the different explanations and hypotheses tested in these studies.

Pathways to War: Enabling Factors

Anticipatory military activities are not a *type* of war,[104] but rather a type of action that can signal the beginning of a war or be used in response to a particular crisis trigger, such as the development of a new military technology[105] or the mobilization

104 Among the various different "types" of war are hegemonic war, total war, limited war, civil war, guerrilla war, and counterinsurgency. See Levy, "Quantitative Studies of Deterrence Success and Failure."

105 Such an action is coded as "external change" in the ICB dataset and would be an example of a anticipatory military action designed to deal with a distant threat, or is often

of an opponent's military forces.[106] In this sense, anticipatory military activities can be viewed as a "tactic" used by states involved in some form of crisis situation. One of the primary questions of interest in this chapter is if there are structural or strategic elements that make states more or less likely to use anticipatory military activities. In other words, are there certain situations where anticipatory military activities are more likely to be the "preferred" pathway to war? From the theoretical perspective, there are several situations and conditions that *should* make the use of anticipatory military activities appear more appealing to states.

One of the first of these situations is if there is a significant advantage to "striking first," or at least preparing to go to war first. Van Evera distinguishes between a "first-strike advantage,"[107] where the first to use force gains an advantage, and a "first-mobilization advantage," when the first to prepare for war (i.e., mobilize its troops) gains the advantage.[108] Snyder describes the "first-strike advantage" as being a situation where "if war is believed to be imminent, one's own losses are minimized by getting in the first blow."[109] According to Fearon, "In the pure preemptive war scenario leaders reason as follows: 'The first-strike advantage is so great that regardless of how we resolve any diplomatic issue between us, one side will always want to attack in an effort to gain the (huge) advantage of going first.'"[110]

Betts refers to a "first-strike bonus" for the side that strikes first in that it would suffer "less damage from retaliation" by striking first.[111] Schelling argues that "the *likelihood* of war is determined by how great a reward attaches to jumping the gun, how strong the incentive to hedge against war itself by starting it, how great the penalty on giving peace the benefit of the doubt in crisis."[112] Jervis presents a similar argument, stating that

> If technology and strategy are such that each side believes that the state that strikes first will have a decisive advantage, even a state that is fully satisfied with the status quo may start a war out of fear that the alternative to doing so is not peace, but an attack by its adversary. And, of course, if each side knows that the other side is aware of the advantage of striking first, even mild crises are likely to end in war.[113]

---

referred to as a preventive action.

106 Such an action is coded as "non-violent military act" in the ICB dataset and would be an example of a anticipatory military action designed to deal with an imminent threat, or is often referred to as a preemptive action.

107 According to Van Evera, there are four elements that determine the size of the first-strike advantage: "1. The feasibility of gaining surprise"; "2. The effect of a surprise strike on the force ratio between the two sides"; "3. The offense-defense balance"; and "4. The size of the political penalty on first-strike." Van Evera, *Causes of War*, 70.

108 Ibid., 37.

109 Snyder, *Deterrence and Defense*, 105.

110 James D. Fearon, "Rationalist Explanations for War," *International Organization*, 49, No. 3 (Summer 1995), 403.

111 Betts, "Surprise Attack and Preemption," 57.

112 Thomas C. Schelling, *Arms and Influence* (New Haven: Yale University Press, 1966), 235 (emphasis in original).

113 Jervis, *Perception and Misperception in International Politics*, 67.

According to the "first-strike advantage," states that fear an impending crisis or war with an adversary would be better off striking first rather than waiting and having to absorb an enemy attack. In this respect, the strategic benefits of "going first" are seen to outweigh the potential costs—political, legal, or normative—that may be attached to such actions.

Huth argues that there are elements of deterrence theory that could also create a situation conducive to the use of anticipatory military activities. Specifically, the requirements for successful deterrence may also create a situation that is conducive for the use of anticipatory military activities.

> In a situation of attempted deterrence, the sensitivity of a potential attacker to military threats and challenges to its reputation make it difficult for a defender to undertake actions that demonstrate resolve while avoiding provocation. For example, in a crisis situation military preparations by a defender may be perceived as preparations for a potential attack and may thereby create incentives for a preemptive strike by the state that is supposed to be deterred. The distinction between an offensive and a defensive posture is often difficult to discern, and therefore policymakers assuming the worst may perceive the defender's military preparations as a potential offensive threat.[114]

For Morgan, the requirements of deterrence could lead to anticipatory action, due to the fact that "in constantly refining their military forces and plans states might deliberately or inadvertently make deterrence more unstable." This would happen because after one state achieved a "technological breakthrough," it could create a window of opportunity, thereby making a first-strike appear to be an attractive option. At this point, according to this logic, the other state would then be afraid of the adversary's anticipatory action, and take one of its own.[115]

Another element that could influence whether or not a state would use anticipatory military activities is the offense-defense balance. When the offense has the advantage, the "first-strike" benefits discussed above may be amplified:

> The greater the offensive advantage, the greater the potential advantage for a preventer who chooses to strike first, and hence the stronger the preventive motivation. This is particularly compelling if the offensive advantage is expected to persist into the future period of the adversary's superiority, for that would increase the seriousness of the future threat.[116]

For Van Evera, when the offense is dominant, "the size of the advantage accruing to the side mobilizing or striking first increases, raising the risk of preemptive war." Additionally, offensive dominance causes both windows of opportunity to "open wider, forcing faster diplomacy and raising the risk of preventive war."[117]

Additionally, several scholars have pointed to shifting power differentials as a prime motivation for a state to engage in anticipatory military activities. Gilpin notes

---

114 Huth, *Extended Deterrence and the Prevention of War*, 9.

115 Patrick M. Morgan, *Deterrence Now* (Cambridge: Cambridge University Press, 2003), 21.

116 Levy, "Power and Preventive War," 100.

117 Van Evera, "The Cult of the Offensive and the Origins of the First World War," 65.

that "By launching a preventive war the declining power destroys or weakens the rising challenger while the military advantage is still with the declining power."[118] He also offers another explanation of how shifts in relative power or in power differentials can lead to anticipatory military activities:

> it is the perception that a fundamental historical change is taking place and the gnawing fear of one or more of the great powers that time is somehow beginning to work against it and that one should settle matters through preemptive war while the advantage is still on one's side. The alternatives open to a state whose relative power is being eclipsed are seldom those of waging war versus promoting peace, but rather waging war while the balance is still in that state's favor or waging war later when the tide may have turned against it.[119]

Levy argues that the "theoretical significance of preventive war derives from the importance of the phenomenon of changing power differentials between states arising from uneven rates of growth."[120]

Copeland cautions that not all "declines" are the same, and they will not all result in the same outcomes. Specifically, "Two aspects of its decline will be of utmost importance to the declining state's calculus: the depth of decline—how far the state will fall before it bottoms out; and the inevitability of decline—the degree of certainty that the state will fall if it sticks with current policies."[121] Copeland also adds,

> All things being equal, *the more severe a state's decline will be in the absence of strong action, the more severe its actions are likely to be, that is, the more risks of inadvertent spiraling it will be willing to accept*. In the extreme, when decline is expected to be both deep and inevitable, and when even hard-line crisis or deterrent/containment policies are unlikely to overcome it, leaders may see preventive war as the only option.[122]

The difficulty for leaders in this situation, however, is being able to determine how significant the decline will be, and how rapidly the decline will occur.

These shifting power differentials are closely related to arms races. Lebow notes that "Mutual perceptions of threat are likely to be greatest when the disadvantaged side has progressed far enough with its armaments program to begin to diminish its adversary's military advantage."[123] Additionally, "The anxiety generated by a diminishing military advantage, coupled with what appears to be aggressive muscle flexing by the adversary in the process of closing the strategic gap, can make preventive war an attractive option to leaders."[124]

This situation is similar to what has been described as the "preventive motivation." Levy defines the preventive motivation as developing "from the perception that one's

---

118 Gilpin, *War and Change in World Politics*, 191.
119 Ibid., 200.
120 Levy, "Power and Preventive War," 82.
121 Copeland, *The Origins of Major War*, 5.
122 Ibid., 41 (emphasis added).
123 Lebow, *Between Peace and War*, 261.
124 Ibid., 262.

military power and potential are declining relative to that of a rising adversary, and from the fear of the consequences of that decline."[125] Fearon notes that frequently it "is argued that if a declining power expects it might be attacked by a rising power in the future, then a preventive war in the present may be rational."[126]

With the advent of the nuclear era, the risks of being a victim of a surprise attack have grown to such an extent that many scholars argue that states could be driven to preempt the adversary's preemption. Schelling has described this situation in the following manner: "We live in an era in which a potent incentive on either side—perhaps the main incentive—to initiate total war with a surprise attack is the fear of being a poor second for not going first."[127]

Additionally, Schelling notes that "If surprise carries an advantage, it is worth while to avert it by striking first." He goes on to add that "Fear that the other may be about to strike in the mistaken belief that we are about to strike gives us a motive for striking, and so justifies the other's motive." This creates a situation whereby "it looks as though a modest temptation on each side to sneak in a first blow—a temptation too small by itself to motivate an attack—might become compounded through a process of interacting expectations, with additional motive for attack being produced by successive cycles of 'He thinks we think he thinks we think … he thinks we think he'll attack; so he thinks we shall; so we will; so we must."[128] From this perspective, anticipatory military activities, if there is a "first-strike advantage," become almost inevitable.

International crises can also create situations that are conducive for the use of anticipatory military activities. According to Copeland,

> Most important, crises typically involve the increased mobilization of each side's military forces, the placing of these forces on alert, and hostile rhetoric (demands and threats). These measures ensure that the state will not be caught unprepared, while also serving as signals of a state's resolve. Yet they can also produce a mutual fear of surprise attack, since each side is uncertain as to what the other will do with its mobilized forces.[129]

In this respect, crises can serve to heighten and reinforce many of the elements discussed above.

According to the perspectives discussed above, it would appear that states would have a multiplicity of opportunities and motivations to engage in anticipatory military actions. The incentives to "anticipate" are numerous, and the underlying

---

125 Levy, "Power and Preventive War," 87; see also Douglas Lemke, "Investigating the Preventive Motive for War," *International Interactions*, 29, No. 4 (2003), 273–92. Levy also adds that the preventive motivation is not only concerned with relative decline in military capabilities, but also includes one or more of these assumptions: "the preventer's perception of the inevitability, or at least high probability, of a future war; his expectation of being surpassed in power capabilities by the rising adversary; the preventer's initiation of the war; and his military superiority." Levy, "Power and Preventive War," 89.

126 Fearon, "Rationalist Explanations for War," 385.

127 Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960), 231.

128 Ibid., 207.

129 Copeland, *The Origins of Major War*, 45.

logic is persuasive. After all, what state would want to knowingly accede to its own destruction, or at least be the victim of significant damage, if it could prevent such an occurrence by adopting a more proactive policy? These elements, however, are only part of the picture. There are also a number of constraining elements within the international security literature that work against the use of preemptive and preventive activities.

Limiting Factors: International Institutions

International institutions are seen by some scholars as a way to reduce the likelihood of war erupting. Simmons and Martin note that while there are numerous definitions of international institutions, "most scholars have come to regard international institutions as sets of rules meant to govern international behavior." Rules "are often conceived as statements that forbid, require or permit particular kinds of actions."[130] In this respect, international institutions are intended to reduce uncertainty by explicitly spelling out how states should behave vis-à-vis each other.

Keohane and Martin argue that international institutions can reduce conflict in a number of ways. First, institutions can "mitigate fears of cheating and so allow cooperation to emerge." Additionally, "Institutions can facilitate cooperation by helping to settle distributional conflicts and by assuring states that gains are evenly divided over time, for example by disclosing information about the military expenditures and capacities of alliance members."[131] Keohane also argues that institutions can

> create the capability for states to cooperate in mutually beneficial ways by reducing the costs of making and enforcing agreements—what economists refer to as 'transaction costs.' They rarely engage in centralized enforcement agreements, but they do reinforce practices of reciprocity, which provide incentives for governments to keep their own commitments to ensure that others do so as well. Even powerful states have an interest, most of the time, in following the rules of well-established international institutions, since general conformity to rules makes the behavior of other states more predictable.[132]

Accordingly, if an international institution exists that establishes rules regulating the use of force or the settlement of disputes, such as the United Nations (at least in theory), such an institution could reduce the likelihood that states will settle disputes through the use of force.

---

130 Beth A. Simmons and Lisa L. Martin, "International Organizations and Institutions," in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), *Handbook of International Relations* (London: Sage Publications, 2002), 194.

131 Robert O. Keohane and Lisa L. Martin, "The Promise of Institutional Theory," *International Security*, 20, No. 1 (Summer 1995), 45–46.

132 Robert O. Keohane, "International Institutions: Can Interdependence Work?" *Foreign Policy*, 110 (Spring 1998), 86.

Limiting Factors: Domestic and Political Constraints

Wolfers notes that "the moral dilemmas constantly facing statesmen and their critics revolve around the question of whether in a given instance the defense or satisfaction of interests other than survival justifies the costs in other values."[133] In a similar vein, some scholars argue that there are political constraints that discourage states from using anticipatory military activities. These elements include the regime type of the actors involved and the potential international political consequences of engaging in such controversial activities. While not explicitly referring to either normative (i.e., the just war tradition) or international legal elements as constraining states from using anticipatory military activities,[134] many of the scholars who focus on the political constraints bring these elements into play.

Reiter notes that one of the reasons states tend not to use anticipatory military activities is that "the political costs of attacking first often prevent preemption."[135] According to this argument, there are strings attached to "going first." States contemplating preemption could be susceptible to a negative response to the action by either key allies or the international community as a whole. For Reiter, this element was crucial in Israel's decision not to use anticipatory military action in October 1973:

> On the morning of October 6, 1973, the Israeli cabinet concluded correctly that an Arab attack was likely later that day. However, despite this assessment and the ingrained Israeli belief in the military advantages of striking first, the leadership decided with little dissent not to preempt because they feared that attacking first would jeopardize relations with the United States. Indeed, Secretary of State Henry Kissinger and US Ambassador Kenneth Keating had previously told Israeli diplomats that if Israel attacked first, the United States would not come to Israel's aid.[136]

While there may be a "first-strike bonus" from the strategic or tactical perspective, there may also be a "first-strike penalty"[137] from the political and diplomatic perspective. According to Van Evera, "If this political penalty is small, a military first-strike advantage still provides a general first-strike advantage." But, on the other hand, "a large political penalty can outweigh even a large military first-strike advantage, converting a military success into a general political-military failure."[138]

The relative strength of each of these contrasting elements may be impacted by the intricacies and particularities of each crisis situation. However, due to the legal

133 Wolfers, *Discord and Collaboration*, 60.

134 See Chapters 3 and 4 for more on the legal and normative perspectives on anticipatory military activities.

135 Reiter, "Preemptive Wars," 6.

136 Ibid., 24–25. See Chapter 7 for a more detailed discussion of this case.

137 Elements included in a "first-strike penalty" include being labeled as an aggressor, which could convince other states to ally with the state's rivals, and also could "inflame and energize the opponent's public for war." Van Evera, *Causes of War*, 70.

138 Ibid., 70.

and normative uncertainties of anticipatory actions, allies of the would be preemptor/preventer may decide to withhold their support.

Misperception can compound the difficulties inherent in deciding if a state should engage in anticipatory military activities. Betts notes that while launching a first-strike "may be the only way to avoid the consequences of being struck first in the near future", in the real world, "it is rarely possible to be sure that the enemy preparations for war are definite, or are aggressively motivated, rather than precautionary reactions to rising tension and fear."[139]

Others examine if the regime type of a state impacts its propensity to use anticipatory military activities. Schweller argues that there are a variety of different factors that reduce the likelihood that democracies will use anticipatory military activities, and that these factors can help explain why different states respond to the same situations in different manners, i.e., why some states preempt while others do not. There are numerous attributes of democratic states that Schweller proposes predisposes these states away from using anticipatory military activities. For instance, Schweller extrapolates Kant's position that "public opinion inhibits democratic state actors from initiating wars expected to be of great risk and cost" to apply to "preventive war," which by its nature is risky, since it is "an unprovoked war now to avoid the risks of war under worse circumstances later."[140]

Other characteristics of democratic states that influence the use or non-use of anticipatory military activities include the civilian control over the military (which serves to mitigate the "military's institutional preference for offensive doctrine"),[141] the knowledge that the next election is just around the corner and that wars often come with a substantial political cost and therefore "democratic elites require something more than the assumption of a potential future threat based on the projection of an irreversible decline in relative power,"[142] and finally, there are the normative and "moral" constraints imposed by the "moral values of that society."[143] Schweller does not argue that democracies *never* employ anticipatory military activities, but rather that they are severely constrained with respect to which crises and situations will be conducive to their use.

There are situations where even democracies will resort to the use of anticipatory military activities. For example, Huth argues that "When the potential attacker perceives a threat of preemption by the defender the costs of escalation and initiating force are likely to be far less constraining than when it perceives no threat of preemption."[144] Lebow offers a similar argument, stating that "Leaders who believe that their national interests require military action can still be constrained by public

139 Richard K. Betts, "Striking First: A History of Thankfully Lost Opportunities," *Ethics and International Affairs*, 17, No. 1 (2003), 18–19.

140 Randall L. Schweller, "Domestic Structure and Preventive War: Are Democracies More Pacific?" *World Politics*, 44, No. 2 (January 1992), 242.

141 Ibid., 245.

142 Ibid., 242.

143 Ibid., 246.

144 Huth, *Extended Deterrence and the Prevention of War*, 31n6.

opinion or other domestic political forces." Additionally, leaders may be dissuaded from launching conflict due to the costs involved with such a policy.[145]

Levy and Gochal build upon Schweller's arguments by looking at the situations in which democracies might use anticipatory military activities. They argue that the type of threat faced is crucial in determining if a democracy will in fact respond with the use of an anticipatory military act. According to Levy and Gochal, "If the adverse power shift is sufficiently great, the adversary sufficiently hostile, the probability of a future war sufficiently large, and alternative options to deal with the threat unavailable or inadequate, military action to forestall the threatening shift in power and its consequences might well be morally justifiable by Walzer's criteria."[146] Or, in other words, such action would be congruent with the requirements of the just war tradition which are discussed in Chapter 5. With respect to the United States, Gaddis argues that "military action had to be linked to morality: to preempt even clear and present danger was to take the responsibility for *initiating* the use of force, and that always carries a cost."[147] In other words, democratic leaders *are* bound and constrained by the normative and moral elements contained in the just war tradition.

An additional constraint against the use of anticipatory military action is the fact that "the greatest danger inherent in preventive war is that it sets in motion a course of events over which statesmen soon lose control."[148] Particularly since the true nature of the threat is often unknown, especially with regard to the more "distant" threats, it is possible that the anticipatory action could unleash a chain of events that are more destructive and costly than the action, which was a mere potentiality, they were designed to forestall. This raises the costs associated with such activities, and therefore could decrease the attractiveness of the activities.

States may also be constrained against using anticipatory military activities because of the precedent that such actions would create. Litwak notes that critics of the 2002 *National Security Strategy of the United States* (NSS), which enumerated an explicit doctrine of preemption, raised concerns that such actions, "particularly when the threat is not demonstrably imminent, will undermine an important norm of global governance." Additionally, it is feared that "If the United States exercises this unilateral military option, it could give license to other states to do the same."[149]

While there are numerous factors that would appear to create a situation conducive to the use of anticipatory military activities, there are also some substantial constraining elements that serve as a counter-balance. The question remains, however, which elements are more influential?

---

145 Lebow, "Windows of Opportunity: Do States Jump Through Them?" 155.

146 Jack S. Levy and Joseph R. Gochal, "Democracy and Preventive War: Israel and the 1956 Sinai Campaign," *Security Studies*, 11, No. 2 (Winter 2001/2002), 14.

147 John Lewis Gaddis, *Surprise, Security, and the American Experience* (Cambridge, MA: Harvard University Press, 2004), 56 (emphasis in original).

148 Gilpin, *War and Change in World Politics*, 191.

149 Robert S. Litwak, "The New Calculus of Pre-Emption," *Survival*, 44, No. 4 (Winter 2002–2003), 59.

Anticipatory Military Activities: When Do States Preempt?

While there has been a significant amount of theoretical discussion about which situations make the use of preemptive/preventive military activities more or less likely, there has been relatively little empirical testing of these theories. This work seeks to fill part of this gap. Additionally, what quantitative testing has been carried out has been somewhat problematic. For example, these studies are based on data taken from the Correlates of War (COW) project, which does not code for preemption/prevention.

In his study examining preemption, Reiter operationalizes "preemption" in the following manner: "A war is preemptive if a primary motivation for the attack is that that the attacker thinks that the target is likely to strike first within 60 days."[150] While the operationalization itself is sound, its applicability to the specific dataset is more problematic. It is not clear, for example, how such a determination is made. The COW dataset does not contain information regarding perceptions of threat or perceived likelihood of war, which would appear necessary to make such a determination. In this respect, the COW data does not appear satisfactory vis-à-vis quantitative testing of hypotheses regarding the use of anticipatory military activities.

As opposed to those studies, this work uses different data to test these hypotheses. This work uses the International Crisis Behavior dataset, which focuses on how states act during *crises*. In this respect, this project examines the use of anticipatory military activities in response to a particular crisis. As such, this work does *not* examine the proverbial bolt out of the blue, or the complete surprise attack. To be sure, many of the crises were initiated by a surprise attack, but the motivations of the "surprising" or "triggering" entity are not examined here. Rather, what is relevant for these cases is why the target state was surprised.[151]

Additionally, one of the goals of this work is to examine the extent to which both the strategic/structural elements as well as the normative and legal aspects influence state behavior. Are democracies less likely to use anticipatory military activities? Does the type of threat or trigger impact the likelihood that states will employ anticipatory military activities? Do the structural and strategic elements, such as the security dilemma and shifting power differentials between rivals, override the legal and normative constraints on using these activities?

Besides the problems with the data used, these studies have examined the use of *either* preemption or preventive war. They did not, however, examine both together. While there are important theoretical rationales for looking at the concepts separately, the same can also be said for examining both together. The analysis provided in Chapters 6 and 7 distinguishes between the actions taken in response to imminent versus distant threats (i.e., the traditional preemptive/preventive divide). Chapter 6 provides case studies focusing on responses to "imminent" threats, the

150 Reiter, "Preemptive Wars," 13.

151 An example of this situation can be seen in the October 1973 Egyptian/Syrian surprise attack on Israel. Rather than focusing on the Egyptian and Syrian decision to launch a surprise attack, the side of the equation that will investigated here is the failure of Israel to anticipate the surprise. This example is discussed in the case studies contained in Chapter 7.

case studies in Chapter 7 concern responses to more "distant" threats. Chapter 8 examines applications of the Bush Doctrine where the line between distant and imminent threats seems to begin to blur, at least as presented by policymakers.

This page intentionally left blank

Chapter 4

International Law

This chapter will focus on the standing of anticipatory military activities within international law. Specifically, are such activities permitted under international law? While there is substantial disagreement on the legality of anticipatory military activities, the conventional answer is no, with a few exceptions. In other words, under the traditional interpretation of international law, anticipatory military activities are only allowed under a very strict set of circumstances. Additionally, only some kinds of anticipatory military actions, specifically those designed to counter an imminent and actual armed attack are permitted. Brown argues that the "right to preempt" a threat that is an "unprovoked act of aggression" and is imminent is merely an extension of the legitimate right to self-defense.[1] However, anticipatory military activities designed to prevent a distant or potential attack are not permitted under international law.

There is considerable debate among international law scholars with respect to the concept of self-defense and its legal standing. While modern international law (i.e., treaty law) has repeatedly sought to outlaw the use of force, under certain circumstances, namely in conditions of self-defense, the use of force is permissible. Customary international law also permits the use of force in self-defense. What constitutes an act of legitimate self-defense, however, is a highly contentious topic.[2] It is this debate about the legality of self-defense that lies at the heart of the legality of anticipatory military actions.

Dinstein argues that self-defense is in a sense actually "armed self-help." In an international system that is anarchic and defined by the lack of any centralized authority, states must act on their own to ensure their survival. Often, this includes the use of force. Dinstein goes on to argue that only after "the universal liberty to go to war was eliminated, could self-defence emerge as a right of signal importance in international law."[3] Although international law has been used to formalize and regularize interactions between states, it has not yet matured to the point that the potentiality of states acting unilaterally in their own defense no longer exists.

---

1 Chris Brown, "Self-Defense in an Imperfect World," *Ethics and International Affairs*, 17, No. 1 (2003), 2.

2 Watts argues that "Self-defence probably has to be an inherently relative concept—relative to the times and circumstances in which it is invoked." Sir Arthur Watts, "The Importance of International Law," in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 11.

3 Yoram Dinstein, *War, Aggression, and Self-Defence* (Cambridge: Cambridge University Press, 2001), 160–61.

Before discussing the development of the concept of self-defense in international law, a brief discussion about the nature of international law itself is in order.

The Nature and Development of International Law

It is generally accepted that there are three or four primary "sources" of international law.[4] According to Article 38(1) of the Statute of the International Court of Justice (ICJ), there are four elements of international law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the consenting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 51, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[5]

This last segment is roughly analogous to the use of precedent in municipal law. Each of these elements will be discussed below.

Treaty Law

Treaties are the most formalized and explicit component of international law. They are negotiated by two or more states, signed by the leaders of those states, and are considered to be binding upon the signatories. Von Glahn describes treaties as declarations of "existing rules." For von Glahn, what is important for international law are treaties known as "law-making treaties." These treaties are "concluded between a number of countries acting in their joint interest, intended to create a new rule, and adhered to later by other states, either through formal action in accordance with the provisions of the treaty or by tacit acquiescence in and observance of the new rule."[6] He goes on to argue that,

> A law-making treaty, then, is an instrument through which a substantial number of states declare their understanding of what a particular rule of law is, by which new general rules for the future conduct of the ratifying or adhering states are laid down, by which some

4 It is important to note that there is debate about the existence of international law and what role it plays in the actions of states. D'Amato argues that "International law exists in the sense that nation-state officials in their international dealings *refer* to it, both by direct literal reference and by the use of legal argumentation in claim-conflict situations." Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971), 33. This work follows D'Amato's position that international law does exist. One of the questions asked and examined in this work is if international law influences state behavior.

5 Valerie Epps, *Documentary Supplement to International Law*, 2nd edn. (Durham, NC: Carolina Academic Press, 2001), 32.

6 Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 3rd edn. (New York: Macmillan Publishing Co., Inc., 1976), 11.

> existing customary or convention rule of law is abolished or modified, or by which some new international agency is created. It is this kind of treaty through which conventional international law is created.[7]

In this respect, treaty law represents the formal agreement of two or more states to act in a particular way. Treaties, in this sense, are quite similar to contracts in municipal law. Additionally, when disputes arise between signatory states, there is a tangible record that can be consulted. It is also important to emphasize that treaty law is only binding upon states that have ratified the particular treaty. In this respect, treaty law is the most restrictive element of international law.

According to the 1969 Vienna Convention on the Law of Treaties, treaties should not be viewed as "a static instrument" and can be interpreted based upon the ways in which states apply the treaty.[8] Article 31 of the Vienna Convention argues that when interpreting a treaty, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account.[9] Schachter, however argues that "At times, the line between violations and emerging law may be difficult to draw, made more difficult by the absence of judicial authority and the great disparities in power in the international community."[10] In this respect, there are some similarities between treaty law and customary law, in that both are inherently linked to state practice.

Customary Law

If treaty law is that which has been codified into tangible and concrete agreements, customary law is based in the amorphous, and sometimes contentious, realm of state practice and habit. The fact that customary international law cannot be traced to a particular treaty or agreement, however, does not minimize its importance or its relevance to international law as a whole. Instead, customary law represents a vital and essential component of international law. Cohan notes that since a wide range of issues are *not* regulated by treaty law, "customary international law may sometimes have more widespread application than treaty law."[11] Additionally, since customary law is not a formal agreement between specific parties, but rather based on the practice of states, it is seen as having universal jurisdiction.[12]

---

7 von Glahn, *Law Among Nations*, 11.

8 Timothy L. H. McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (New York: St. Martin's Press, 1996), 211

9 Epps, *Documentary Supplement to International Law*, 124.

10 Oscar Schachter, "Self-Defense and the Rule of Law," *The American Journal of International Law*, 83, No. 2 (April 1989), 267.

11 John Alan Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law," *Pace International Law Review*, 15 (Fall 2003), 293.

12 D'Amato, *The Concept of Custom in International Law*, 4; J. Patrick Kelly, "The Twilight of Customary International Law," *Virginia Journal of International Law Association*, 40 (Winter 2000), 451.

Kelly defines customary law as "a set of norms derived from practice that is invested with binding authority by the relevant community." He goes on to add that customary law "is not mere practice or habitual behavior, rather it is a normative order consisting of rights and duties abstracted from practice."[13] Additionally, "The ultimate test of customary law is what do the members of a society regard as the rule."[14]

Arend and Beck note that customary international law is developed as a result of state behavior. They state that, "If, over a period of time, states begin to act in a certain way and come to regard that behavior as being required by law, a norm of customary international law has been developed." This law-building aspect of behavior is tempered, however, because in order for the state practice to develop into customary international law, the states must act "because they believe that the practice is required by law."[15] Another definition of customary international law states that it is the "collection of international behavioral regularities that nations over time come to view as binding as a matter of law."[16]

Von Glahn describes international legal custom as, "a usage with a definite obligation attached to it." He goes on to add that, "failure to follow a legal custom entails the possibility of punishment, of sanctions, or retaliation; it involves, therefore, state responsibility toward other nations."[17]

Cohan offers various definitions of customary law. He notes that Grotius states that "the proof for the new law of nations is similar to that for unwritten municipal law; it is found in unbroken custom and the testimony of those who are skilled in it." He adds that Vattel argued that "customary law of nations" is comprised of "certain maxims and customs consecrated by long use, and observed by nations in the mutual intercourse with each other as a kind of law." Finally, Cohan offers a quasi-definition of customary international law, stating that "One of the traditional criterions advanced for determining the content of customary international law is 'concordant practice by a number of States with reference to a type of situation falling within the domain of international relations.'"[18]

There are two central elements of customary international law: state practice and *opinio juris*.[19] According to Roberts, "State practice refers to general and consistent

---

13 Kelly, "The Twilight of Customary International Law," 461.

14 Ibid., 462.

15 Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993), 6–7.

16 Jack L. Goldsmith and Eric A. Posner, "A Theory of Customary International Law," *University of Chicago Law Review*, 66 (Fall 1999), 1116.

17 von Glahn, *Law Among Nations*, 14.

18 Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law," 293.

19 There are numerous scholars who question the utility of either state practice or *opinio juris* for understanding customary international law. See Michael Byers, "Introduction Power, Obligation, and Customary International Law," *Duke Journal of Comparative and International Law*, 11 (Fall/Winter 2001), 81–88; D'Amato, *The Concept of Custom in International Law*; Jack L. Goldsmith and Eric A. Posner, "Understanding the Resemblance Between Modern and Traditional Customary International Law," *Virginia Journal of International Law Association*,

practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation."[20] *Opinio juris* is defined by Cohan as, "a kind of 'state of mind' on the part of states that a certain form of conduct is permissible, required, or mandated by international law." Cohan goes on to add that, "*opinio juris* refers to statements and declarations by states that articulate the legality of practices in question."[21]

One recent example of *opinio juris* is found in the September 2002 *National Security Strategy of the United States*. This document stated,

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.[22]

It is clear that the Bush administration was making an argument in favor of anticipatory military activities based on customary international law.[23]

One problem with the application of customary international law is that it is primarily based upon state practice. In this respect, if states do not act in a particular way, there is an accepted customary prohibition against such action. This formulation, however, is problematic in that it ignores other possible explanations for state behavior. Perhaps there are other factors involved that could also explain state behavior. It could be that states have not engaged in a certain behavior simply because it was not in their interest to do so, as opposed to there being a legal constraint preventing the action. In light of these issues, Goldsmith and Posner offer a different conceptualization of customary international law based upon rational choice theory.

Goldsmith and Posner argue that, "States do not comply with [customary international law] because of a sense of moral or legal obligation; rather [customary international law] emerges from the states' pursuit of self-interested policies on the international stage."[24] According to this perspective, it is not appropriate to argue that states act in accordance with customary international law. Rather, what is important

---

40 (Winter 2000), 639–72; Jack L. Goldsmith and Eric A. Posner, "Further Thoughts on Customary International Law," *Michigan Journal of International Law*, 23 (Fall 2001), 191–200; Kelly, "The Twilight of Customary International Law."

20 Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *The American Journal of International Law*, 95, No. 4 (October 2001), 757.

21 Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law," 294.

22 George W. Bush, *President Delivers State of the Union Address*. The President's State of the Union Address, January 29, 2002, Office of the Press Secretary, <www.whitehouse.gov/news/releases/2002/01/print/20020129–11.html> (accessed April 27, 2003).

23 Some scholars have noted that the Bush administration explicitly appealed to customary international law since the action advocated was in clear violation of treaty law. See Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law," 295.

24 Goldsmith and Posner, "A Theory of Customary International Law," 1114.

is understanding why states pursued the actions in question. This position is similar to much of international relations theory that argues that states act in accordance with their self-interests.[25]

Similar problems seem to plague the notion of *opinio juris*. How can one determine if leaders frame their actions in terms of international law merely to provide a shield of legitimacy for what they would do anyway, and not because they feel a "moral obligation" to act in a certain way? This is a crucial element of determining if a state's behavior is consistent with customary international law. In its 1969 decision regarding the *North Sea Continental Shelf Cases*, the ICJ argued that:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it … The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[26]

Additionally, if customary international law is also dependent upon state practice, a "chronological paradox" arises. According to Byers, "states creating new customary rules must believe that those rules already exist, and that their practice, therefore, *is* in accordance with law."[27] The requirements of customary law seem to present a "chicken and egg" situation. Customary law rests upon state practice and statements that show that the state is operating in a manner consistent with customary law. But, it is not clear how such customary law is created or modified, if customary international law arises out of state practice and *opinio juris*.

The reliance on state practice and *opinio juris* leads to a second quandary. How can it be determined if a state's action is either a) in violation of international law or b) an indication of the development of a new custom? Furthermore, Byers argues that "the requirement of opinio juris meant that only some instances of state practice counted for the purpose of the customary process, since a state had to believe that its behavior was already required by customary international law.[28]

These problems have led some, such as Kelly, to suggest that since "there is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms," customary international law "is then a matter of taste." He goes on to argue that "it cannot function as a legitimate source of substantive legal norms in a decentralized world of nations without a broad base of shared values."[29] While this position is somewhat extreme, it does highlight some of the challenges of inherent in the use of customary international law.

---

25 John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton and Company, 2001); Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979).

26 Michael Byers, *Custom, Power and the Power of Rules* (New York: Cambridge University Press, 1999), 131.

27 Ibid., 131.

28 Byers, "Introduction Power, Obligation, and Customary International Law," 84.

29 Kelly, "The Twilight of Customary International Law," 450–51.

General Principles of Law

The category of "general principles" is much more difficult to clearly define than the other aspects of international law. Von Glahn states that there are two primary conceptualizations of general principles of law. The first takes the position that these principles are taken from "domestic jurisprudence" and then applied to international relations. The second position links natural law to positive law, or is "the transformation of broad universal principles of a law applicable to all of mankind into specific rules of international law."[30] Von Glahn also adds the caveat that "Most modern writers appear to regard general principles of law as a secondary source of international law, little used in practice but helpful on occasion."[31]

Arend and Beck note that this element of international law is more problematic and harder to define than either treaty or customary law. They note that there are three primary ways in which these "general principles" can be understood. In the first, general principles are seen as "those basic legal principles that are present in most *domestic* legal systems." The next interpretation states that these general principles may reflect ideas "about the nature of international law that states have come to accept." The final possibility is that "the meaning of general principles of law is that they refer to 'principles of higher law,' such as principles of humanity or equality."[32]

Judicial Decisions and the Writings of Legal Scholars

According to von Glahn, "the more often a rule involved in a decision happens to be in line with the basic structure of the regional or general legal system affected, the more likely will it be accepted, respected, and followed by the legal persons in that system." He goes on to add, "Thus the decisions of international courts and arbitral awards handed down by international tribunals may serve to interpret a rule, apply a rule, or eliminate an obsolete rule."[33] Opinions of the justices sitting at the ICJ often serve to clarify provisions of international law. For example, the decision in the *Nicaragua* case is often referred to in order to determine the standing of self-defense in international law.[34]

---

30 von Glahn, *Law Among Nations*, 18.

31 Ibid., 18.

32 Arend and Beck, *International Law and the Use of Force*, 7.

33 von Glahn, *Law Among Nations*, 20.

34 In the judgment regarding this case, the ICJ did not take a position on the legality of anticipatory self-defense per se. In fact, the judgment seems to be arguing two different positions. On the one hand, the judgment stated "The general rule prohibiting force established in customary law allows for certain exceptions. The exception of the right of individual or collective self-defense is also, in view of States, established in customary law, as is apparent for example from the terms of Article 51 of the United Nations Charter, which refers to an 'inherent right', and from the declaration in resolution 2625 (XXV). The Parties, who consider the existence of this right to be established as a matter of customary international law, agree in holding that whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence."

It is important to note that unlike treaty law, the decisions of the ICJ are not binding upon the states involved. There is no sanction method attached to the Court, therefore states can choose to disregard the Court's decision. This does not necessarily mean that the Court is irrelevant, but it does highlight the major limitation of much of international law—it is unenforceable. Perhaps it is for this reason that the normative element is so important with respect to international law. The rationale being that states follow international law because it is the *right* thing to do, not out of fear of punishment. The issue of why states follow international law is discussed below.

The other part of this element of international law is the writings and teachings of legal scholars. While these writings do not necessarily create international law, they can be used by states to examine the different interpretations of the law. Such writings are used by statesmen and scholars alike to understand and apply international law. This element is closely related to the idea of *opinio juris* discussed above in the context of customary international law. In this respect, some scholars do not consider this element as a completely separate and discrete part of international law.

International Law and State Behavior: Compliance or Coincidence?

The above discussion about the nature of international law leaves a primary question unanswered. Particularly, why do states follow international law? Or, more fundamentally, do states follow international law? Does international law actually have an influence on state behavior? These questions will be empirically tested in Chapters 6, 7, and 8.

There are various different positions vis-à-vis both influence of and compliance with international law. The traditional position is that states follow international law because they consented to it, through the negotiation and ratification process. From this perspective, states are expected to follow the rules that they created.[35]

Fisher, however, notes that "Shared values and a sense of community, by themselves, are not enough to cause a government to respect the law."[36] Fisher goes

---

This statement seems to leave some room for anticipatory self-defense. At the same time however, the judgment also states, "Whether self-defence be individual or collective, it can only be exercised in response to an 'armed attack'." International Court of Justice, "Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)," *Case Summaries* (Merits), June 27, 1986, <http://212.153.43.18/icjwww/icacases/inus/ inus_isummaries/inus_isummary_19860627.htm> (accessed May 13, 2004). According to Kastenberg, "Despite its lengthy analysis, the ICJ never mentioned any of the several concepts pertinent to modern aspects of sovereignty, namely, aiding and abetting terrorist organizations, anticipatory self-defense, and preemption. Indeed, the ICJ's reliance on customary international law seems to indicate that Article 51 did not eviscerate its usage." Joshua E. Kastenberg, "The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense and Preemption," *The Air Force Law Review*, 55 (Spring 2004), 110.

35 Andrew T. Guzman, "A Compliance-Based Theory of International Law," *California Law Review*, 90 (December 2002), 1833.

36 Roger Fisher, *International Conflict for Beginners* (New York: Harper Colophon Books, 1970), 158.

on to argue that what is important about international law is that it actually influences what governments want, and can influence how states act accordingly.

> In one sense law cannot restrain a government from doing what they want, but law affects what they want. In the absence of a legal rule to the contrary, the United States government might well conclude that they wanted to take over the oil fields of Kuwait. The existence of a rule of international law which makes it improper for the United States to seize the oil fields of Kuwait results in the United States government's not wanting to seize the fields. Law, by affecting what governments want, does restrain them from doing things which they would otherwise want to do.[37]

Fisher adds

> Law thus operates as a restraint by making certain courses of action, if illegal, either ineffective or counterproductive. That illegality operates as a restraint in the obverse of the fact that legality may serve as a tool.
>
> International law may also operate as a restraint by raising the political cost which a country pays for engaging in certain conduct.[38]

Finally, Fisher also notes that "Law also operates as a restraint by raising for each country the fear of setting a harmful precedent."[39] In this respect, states follow, or obey, international law because it is the most effective way to achieve the desired policy, but it also minimizes associated costs with the policy.

Some argue that states follow international law because it reduces uncertainty and shows that they are reliable and trustworthy.[40] The logic behind this position is that it increases stability and reduces the potential for conflict among states. This idea is similar to that advanced by international relations scholars, such as Martin and Simmons, who study the role of international institutions.[41] These approaches share the same underlying assumption that regimes, either legal or institutional, can influence state behavior, foster cooperation, and perhaps reduce conflict.

Guzman argues that states follow international law because of a concern "about reputational and direct sanctions triggered by violations of the law."[42] At the same time, there are incentives for some states to *disobey* international law. For example, strong states, such as the United States, may not be constrained by international law due to the fact that they "cannot be punished when they violate international law, so they may do better by violating international law when doing so shows that they will retaliate against threats to national security."[43] For other states, disobedience of

37 Fisher, *International Conflict for Beginners*, 163.

38 Ibid., 174. In this respect, Fisher explicitly links the legal constraints to the political costs that Reiter discusses.

39 Ibid., 175.

40 Goldsmith and Posner, "A Theory of Customary International Law," 1133.

41 Lisa L. Martin and Beth A. Simmons, "Theories and Empirical Studies of International Institutions," *International Organization*, 52, No. 4 (Autumn 1998), 729–57.

42 Guzman, "A Compliance-Based Theory of International Law," 1827.

43 Goldsmith and Posner, "A Theory of Customary International Law," 1135.

international law may serve their interests by making them seem to be "unpredictable or irrational."[44]

Furthermore, Benvenisti argues that a distinction must be made between actions that are illegal and *inexcusable* and those that are illegal and *excusable*. In this respect, a state may act in a manner that is, according to the letter of the law, illegal, but it may be considered excusable, and therefore the state would not be subject to sanction. He states, "even if an anticipatory attack is unlawful under Article 51 and customary international law, it doesn't necessarily mean that if someone used their power in anticipatory self-defence they would be condemned by the UN or brought before the ICC."[45]

Others, however, argue that international law does not really constrain state behavior, but rather is used to merely justify actions that the state would pursue anyway. According to Watts, "In effect, States' apparent acceptance of international law may be little more than high-sounding tokenism: they may feel that the importance of international law can be safely acknowledged precisely because, in the final analysis, it is weak and can be ignored."[46]

Gray cautions against this position, arguing that "Simple assertions that this use of language is mere cynical manipulation of the rules, and no more than *ex post facto* rationalization for actions reached on other grounds, are not justified in the absence of empirical evidence that this is in fact the case and are no more plausible than the opposite version that states are in fact influenced by law."[47] Chayes makes a similar argument, stating that while "We cannot ask for a demonstration that legal considerations dictated decision",[48] evidence can be found that the legal elements *influenced* decision-makers:

> One important piece of evidence for constraint would be to examine the conduct in terms of the asserted prohibition. If the conduct complies, there is at least a prima facie argument that the norm operated in its intended sense. The converse is even more compelling: if the conduct violates the norm, it would seem to be very strong evidence that the law did not constrain.[49]

Without full access to the entire decision-making process, it is unlikely that scholars will be able to truly provide the empirical evidence that Gray proposes. Chayes's position is somewhat more amenable to scholarly analysis, however, in that it relies

---

44 Goldsmith and Posner, "A Theory of Customary International Law," 1136.

45 Eyal Benvenisti, *Iraq and the "Bush Doctrine" of Pre-Emptive Self-Defence*, August 20, 2002, Crimes of War Project, <www.crimesofwar.org/print/expert/bush-Benvenisti-print.html> (accessed May 23, 2004).

46 Watts, "The Importance of International Law," 8.

47 Christine Gray, *International Law and the Use of Force* (New York: Oxford University Press, 2000), 22.

48 Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974), 4.

49 Ibid., 35.

primarily on the action ultimately taken—rather than the process through which the decision was made to take the action.[50]

Additionally, some scholars note that attributes of states can determine how states view international law. Gray, for example, argues that powerful states, primarily the permanent members of the UN Security Council, have a great deal of power to determine the content of customary law or the ways in which the UN Charter is interpreted. Since they can effectively sanction or condemn any action, regardless of whether or not it is really consistent with the UN Charter, they have the ability to "create new customary international law in reinterpretation of the Charter."[51] Schachter echoes this sentiment, stating that "power is a factor limiting the efficacy of legal constraints." Additionally,

> A relatively powerful state may pursue its perceived interest in violation of its international obligations; it may do so with impunity or pay a price. Moreover, it may by its very violation shape the future law.[52]

Falk notes that the United States, "as the dominant state in a unipolar world order enjoys an exemption from legal accountability with respect to uses of force irreconcilable with the UN Charter system; other states, in contrast, would be generally held to account unless directly protected under the United States exemption."[53] In this respect, it is possible that international law does not really serve as a constraint on these states' actions. Rather, international law can be manipulated to serve their interests.

Development of the Prohibition on the Use of Force in International Law

Early Prohibitions on the Use of Force

According to Van Den Hole, "The bellum justum doctrine, which originated in the Middle Ages, legitimized the resort to violence in international law as a procedure of self-help only if certain criteria were met relating to a belligerent's authority to make war, its objectives, and its intent."[54] The idea of just war is discussed in depth in Chapter 5, but it is important to note that the development of the just war tradition was an important step in the development of a general prohibition of the use of force. It was the development of the modern state system, predicated on the idea of sovereignty, that led to the development of formal rules to regulate interactions between these juridically equal entities.

---

50 This work seeks to examine both the action taken, as well as the decision-making process that led to its adoption.

51 Gray, *International Law and the Use of Force*, 18.

52 Oscar Schachter, "The Role of Power in International Law," in *Proceedings of the Annual Meeting*, ASIL Proceedings (American Society of International Law, 1999), 205.

53 Richard A. Falk, "What Future for the UN Charter System of War Prevention," *The American Journal of International Law*, 97, No. 3 (July 2003), 593.

54 Leo Van Den Hole, "Anticipatory Self-Defence Under International Law," *American University International Law Review*, 19 (2003), 70.

With respect to the legality of the use of force in international law, scholars often refer back to Hugo Grotius. In a Congressional report, *International Law and the Preemptive Use of Force Against Iraq*, Ackerman writes, "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.'"[55] While Grotius did advocate a very broad standard for the legitimate use of force, including "in the defense of chastity,"[56] to argue that Grotius would approve of anticipatory military action against a distant, and merely potential, threat would be to ignore other elements of his work. Grotius also states that,

> The danger, again, must be immediate and imminent in point of time. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled … But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.[57]

He goes on to argue that,

> if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambuscade, or that he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot be lawfully killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences.[58]

In other words, anticipatory action can be taken, but the threat must be imminent and force must be the last viable option available.

Vattel also presented a similar argument, combining elements of the just war tradition with "legal" elements. According to Vattel

> The right of employing force, or making war, belongs to nations no farther than is necessary for their own defence, and for the maintenance of their rights … Let us say in general, that the foundation, or cause of every just war is injury, either already done or threatened … the just and lawful object of every war, which is, to *avenge or prevent injury*.[59]

Vattel goes on to argue, that when faced with a neighbor "by whom a nation fears she may one day be crushed," the state "must either have actually suffered an injury or be visibly threatened with one, before [it is] authorized to take up arms, or have just grounds for making war."[60]

---

55 David M. Ackerman, *International Law and the Preemptive Use of Force Against Iraq*, Congressional Research Service (March 17, 2003), 2.

56 Hugo Grotius, *The Law of War and Peace De Jure Belli Ac Pacis Libri Tres*, translated by Francis W. Kelsey (Indianapolis, IN: The Bobbs-Merrill Company, Inc, 1925), 175.

57 Ibid., 173.

58 Ibid., 174–75.

59 Emerich de Vattel, *The Law of Nations: Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, translated by Joseph Chitty (West Brookfield, MA: Merriam and Cooke, 1844), 301 (emphasis in original).

60 Ibid., 307.

These requirements are in line with the ideas expressed in the just war tradition, primarily that force must be used as a last resort and only after all other means of resolving the conflict, or mitigating the threat, have been exhausted. Additionally, it is interesting that the positions of both Grotius and Vattel would be closely reflected in what would become the cornerstone of the modern position in customary international law about the use of force in self-defense.

Customary International Law and the Use of Force

The regulations on the use of force in customary law are less stringent than those found in treaty law. One of the first instances where the use of force was limited under customary law came in the mid-1800s. In what is referred to as the *Caroline* incident, the limitations and requirements for the use of force in self-defense were articulated by Secretary of State Daniel Webster. In 1837, British troops attacked an American ship, the *Caroline*, in the cover of darkness in order to prevent the ship from supplying insurgents in Canada. The United States protested this act, and demanded an apology and reparations. On July 27, 1842, Secretary of State Daniel Webster sent a letter to Lord Ashburton. This letter also contained a copy of an earlier correspondence sent to Ambassador Henry S. Fox on April 24, 1841. It was in this correspondence that Webster laid out what would become the roots of customary law's limits on the use of force in self-defense.

Webster argued in order to justify its use of force against the *Caroline*, the British Government must prove that the action was undertaken because of the "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Webster went on to state the following:

> It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on faire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.[61]

It is from this letter that the modern requirements of necessity, imminence, and proportionality became an integral part of international law vis-à-vis self-defense and the use of force.

---

61 R.Y. Jennings, "The Caroline and McLeod Cases," *The American Journal of International Law*, 32, No. 1 (January 1938), 89.

Jennings notes that Webster's letter is important in that it represented the first time that the right of self-defense moved from being "an absolute primordial right" to being an action that can be regulated and limited.[62] Others have framed Webster's letter in a different light. Ackerman states that, "The classic formulation of the right of preemptive attack was given by Secretary of State Daniel Webster in connection with the famous *Caroline* incident."[63] Eckert and Mofidi state that,

> Webster impliedly acknowledged Britain's right to anticipatory self-defense; he never questioned that right in principle. One can assume, therefore, that anticipatory self-defense was deemed a proper response even before the predicate attack actually occurred, so long as the state acted in a justifiable and unquestionable manner. Webster's statement concerning when anticipatory self-defense may be properly exercised remains the standard limitation for self-defense in customary international law.[64]

Others have also used Webster's response to the *Caroline* incident as providing the customary legal basis for the right to use anticipatory military activities. Taft, for example, states that "The President's National Security Strategy relies on the same legal framework applied to the British in Caroline… The United States reserves the right to use force preemptively in self-defense when faced with an imminent threat."[65]

Webster's formula has become a cornerstone of much of the literature about the legitimate use of force in self-defense. Arend notes that there is an "accepted doctrine of anticipatory self-defense" in customary law that was laid out in the *Caroline* incident.[66] Kearley notes that it has become commonplace in today's scholarship about international law and self-defense to base the legality of using force in self-defense on Webster's reaction to the *Caroline* incident.

However, Kearley argues that this is a misinterpretation of Webster's intent, and, furthermore, that these interpretations distort the historical record. According to Kearley, the proper interpretation of Webster's formula regarding self-defense applies only "to extra-territorial uses of force by a state in peacetime against another

---

62 Jennings, "The Caroline and McLeod Cases," 92.

63 Ackerman, *International Law and the Preemptive Use of Force Against Iraq*, 4. It is interesting to note that Ackerman's description of Webster's letter regarding the *Caroline* as permitting preemption came in a *Congressional Research Service* document that was prepared for the US government in the context of the use of force against Iraq. In this respect, Ackerman's paper and interpretation can be viewed as an example of how legal scholars' interpretations of the law can be used to clarify or interpret elements of international law for governments.

64 Amy E. Eckert and Manooher Mofidi, "Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law," *Tulane Journal of International and Comparative Law*, 12 (Spring 2004), 131.

65 William H. Taft, IV, *The Legal Basis for Preemption*. Memorandum to American Society of International Law-Council on Foreign Relations Roundtable on Old Rules, New Threats, November 18, 2002, <www.cfr.org/publication.php?id=5250> (accessed May 30, 2004).

66 Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly*, 26, No. 2 (Spring 2003), 90.

state which was unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the state taking action."[67] Brownlie takes a similar stance vis-à-vis the meaning of Webster's letter. He states that "The Webster correspondence in reality merely stated a right of self-defence which had a more limited application than the vague right of self-preservation and the broad and political concept of self-defence found in nineteenth-century thought and practice."[68] According to this approach, Webster's formula was not intended to allow the use of force in response to any threat, but only in response to a specific type of threat.

At the same time, however, Webster's formula also raises many questions. Taylor notes that Webster's formula does not elaborate upon what constitutes an "imminent threat," how "necessity" is to be defined, what is meant by "instant," how long a "moment for deliberation" lasts, and above all, who is to determine the meanings of these elements?[69] In fact, the ambiguity inherent in these fundamental concepts is an issue that continues to complicate the conceptual picture with respect to the use of force and self-defense in international law.

Modern Treaty Law and the Use of Force

The first modern attempt to limit the use of force through treaty law came with the establishment of the League of Nations. Under the Covenant of the League of Nations an extensive set of procedures was established to regulate the use of force.[70] The League of Nations established an elaborate institutional process through which states were supposed to be able to resolve their differences without using force. Article 12 of the Covenant states

> The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they will agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within the six months after the submission of the report.[71]

The Covenant, however, did not outlaw the use of force by states. Article 15 states that, "If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to

---

67 Timothy Kearley, "Raising the Caroline," *Wisconsin International Law Journal*, 17 (Summer 1999), 325.

68 Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 261.

69 Terence Taylor, "The End of Imminence?" *The Washington Quarterly*, 27, No. 4 (Autumn 2004), 61.

70 It is important to note that the Covenant, as well as the Kellogg-Briand Pact, outlawed the use of "war" as opposed to merely the use of force. This created a potential loophole for states to shirk their responsibility under the Covenant by not formally declaring war.

71 *The Covenant of the League of Nations*. <www.yale.edu/lawweb/avalon/leagcov.htm> (accessed July 31, 2004).

the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice."[72]

After the demise of the League of Nations, an additional attempt was made to limit the use of force in the 1928 Kellogg-Briand Pact, which officially banned the use of war as an "instrument of national policy." While this treaty was by far the most extensive attempt to date to restrict the use of force, it is important to note that the signatories of the Pact believed that the use of force in self-defense remained lawful. This is evidenced by the correspondence between the various negotiators of the Pact. For example, the French negotiators noted that "The renunciation of war, thus proclaimed, would not deprive the signatories of the right of legitimate defense."[73] The negotiators from the United States stated:

> There is nothing in the American draft of an anti-war treaty to restrict or impair in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion, and it, alone, is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provisions can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a justice conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.[74]

Wright notes that the states involved feared that by expressly defining the right of self-defense, the treaty would thereby limit and impair this essential right. In the words of Secretary of State Henry L. Stimson, "This right is so inherent and universal that it was not deemed necessary to insert it expressly in the treaty."[75]

However, since the Pact did not expressly enumerate what constituted legitimate self-defense, it remained unclear what type of activities were permitted under these new guidelines.[76] Such ambiguity with respect to what constituted self-defense would also come to characterize the prohibition on the use of force contained in the Charter of the United Nations.

The United Nations Charter and the Use of Force Today, international law has been codified in the Charter of the United Nations. Virtually all sovereign states are members of the UN, and, accordingly, are bound by the Charter's provisions. As a result, the Charter is viewed as having universal applicability.[77] McCormack notes that the United Nations was established to maintain international peace and security,

---

72 "The Covenant of the League of Nations."

73 Quincy Wright, "Meaning of the Pact of Paris," *American Journal of International Law*, 27 (January 1933), 42.

74 Ibid., 43.

75 Ibid., 44.

76 Arend and Beck, *International Law and the Use of Force*, 23–24.

77 Michael N. Schmitt, "International Law and the Use of Force: Attacking Iraq," *RUSI Journal*, 148, No. 1 (February 2003), 521.

and that the "whole scheme of the Charter was based on the provision of a system of collective measures to prevent and remove threats to the peace."[78]

The Charter deals extensively with the use of force, but with respect to self-defense two provisions are particularly relevant. Article 2(4) of the Charter expressly prohibits the use of force. It states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.[79]

There are only two exceptions to this general prohibition of the use of force. Chapter VII allows for the Security Council to sanction the use of force to "keep the peace." Article 51 allows for force to be used in self-defense in response to an armed attack:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[80]

There has been extensive discussion and debate as to the meaning of both Article 2(4) and Article 51 with respect to what constitutes self-defense and what qualifies as an armed attack.

On the surface, it appears that the Charter explicitly outlaws the use of force, except in specific, and extraordinary, circumstances. This language, however, is both vague and open to numerous interpretations.[81] With respect to Article 2(4) and Article 51, the debate centers around how restrictive the prohibition on the use of force really is.

Much of the debate concerns the language of Article 51, which provides for the "self-defense" exception to the prohibition on the use of force. The primary focus of this debate revolves around the following clause of Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-

---

78 McCormack, *Self-Defense in International Law*, 187.

79 Epps, *Documentary Supplement to International Law*, 2. It is interesting to note that Sofer makes the argument that "The use of force to disarm an established aggressor, without altering the territory of that member state, or depriving it of its sovereign status, is an end that is consistent with the 'Purposes' of the United Nations." Abraham D. Sofaer, "On the Necessity of Pre-Emption," *European Journal of International Law*, 14, No. 2 (2003), 223.

80 Epps, *Documentary Supplement to International Law*, 12.

81 Randelzhofer notes that "Neither legal writings no State practice have so far clarified these terms beyond doubt." Albrecht Randelzhofer, "Article 2(4)," in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Volume I, Second Edition (Oxford: Oxford University Press, 2002), 117.

defence if an armed attack occurs…" Does this include the right to anticipatory self-defense or preemption that is allowed under customary international law? This position focuses on the "inherent right" element of the clause. On the other hand, does the clause limit self-defense only to situations where an actual armed attack has occurred? This perspective focuses on the second part of the clause.

There are two primary positions in this debate. The "restrictionist" side argues that the use of force is prohibited except in the few instances that are specifically enumerated in the Charter. Randelzhofer argues that "The prevailing view refers, above all, to the purpose of the UN Charter, i.e., to restrict as far as possible the use of force by the individual State, and considers Art. 51 to exclude any self-defence, other than that in response to an armed attack."[82]

According to this argument, there are only three clear exceptions to the prohibition on the use of force: 1) actions explicitly authorized by the Security Council, 2) collective and individual self-defense to an actual armed attack, and 3) measures taken against former enemies (i.e., the Axis powers from World War II).[83] Kunz argues that the right to self-defense "does not exist against any form of aggression which does not constitute 'armed attack.'"[84] He goes on to argue that the mere "threat of aggression" would not be sufficient to justify the unilateral use of force.[85]

Some have even argued that the inclusion of the caveat of if "an armed attack occurs" supercedes the "freedom of action which states had under traditional law." Jessup goes on to argue that,

> A case could be made out for self-defense under the traditional law where the injury was threatened by no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring military state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.[86]

Supporters of this approach believe that the Charter must be taken at face value, in other words, the Charter says what it means and means what it says. Additionally, supporters of this argument advance the position that the "limits imposed on self-

---

82 Albrecht Randelzhofer, "Article 51," in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Volume I, Second Edition (Oxford: Oxford University Press, 2002), 792; Michael McGinty, "That Was The War That Was: International Law, Pre-Emption and the Invasion of Iraq," *RUSI Journal*, 148, No. 3 (June 2003), 20–25.

83 Timothy Kearley, "Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent," *Wyoming Law Review*, 3 (Winter 2003), 669–70.

84 Josef L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," *The American Journal of International Law*, 41, No. 4 (October 1947), 878.

85 Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," 878.

86 Philip C. Jessup, *A Modern Law of Nations: An Introduction* (New York: The Macmillan Company, 1948), 166.

defence in Article 51 would be meaningless if a wider customary law right of self-defence survives unfettered by these restrictions."[87]

This position holds true for Article 51's provisions about self-defense, meaning that when the Charter stated that self-defense is permitted in the event of an armed attack, this means *only* after an armed attack has occurred. Randelzhofer states that this position is supported by the ICJ in its judgment in the *Nicaragua* case. He argues that the ICJ "proceeds on the assumption that the existence of an armed attack is a *conditio sine qua non* for the exercise of the right to individual and collective self-defence." He presents the following excerpts of the judgment in support of this position:

> In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this.
>
> The Court has recalled above … that for one State to use force against another, on the ground that that State has committed a wrongful act against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not 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 attack'.[88]

At the same time, the ICJ did not take a position on the use of *individual* anticipatory action. In the same decision, the ICJ stated:

> In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue.[89]

According to this perspective, there is clarification that the collective use of anticipatory military force would be in violation of both customary and treaty law, but it remains unclear as to the standing of a unilateral action of this type.

On the other side of the debate are those who see the prohibitions in Article 2(4) and Article 51 as being less stringent, and more open to interpretation. This group is often referred to as the "counter-restrictionist" school. They argue that one of the key components on the Charter's restriction on the use of force is the fact that Article 2(4) outlaws uses of force that are "against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations." In this respect, they argue that the Charter was designed to

---

87 Gray, *International Law and the Use of Force*, 87.

88 Randelzhofer, "Article 51," 793.

89 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (International Court of Justice June 27, 1986), 103

prohibit uses of force that are aggressive in nature, not necessarily to prohibit any use of force whatsoever.

Furthermore, the "counter-restrictionists" view the "inherent right" clause of Article 51 to indicate that the Charter did not replace the customary right to anticipatory self-defense against an imminent attack. In this respect, the term "inherent right" is not "a dynamic term capable of shifting in meaning over time; the scope of the right was fixed in customary law in 1945 and is…not susceptible to restriction in light of subsequent state practice."[90]

Several scholars have also argued that international law is not a "suicide pact."[91] Others have taken this idea a step further, and argued that the anticipatory use of force against an imminent attack *is* permitted under the UN Charter. Schmitt argues that "it would be absurd to suggest that international law requires a State to 'take the first hit' when it could effectively defend itself by acting preemptively."[92] Kearley states the following in support of this position:

> Given the continued inability of the Security Council to take effective actions to eliminate "threat[s] to peace, breach[es] of the peace or act[s] of aggression," it is preferable to interpret Article 51 as including the rights of intervention in self-defense and of anticipatory self-defense, as narrowly defined in the *Caroline* doctrine, than to interpret it as eliminating these rights. States that truly are the victims of armed harassment by forces operating out of another state, or that are threatened by imminent and grave aggression from another state, should not be forced to act outside the law.[93]

Other scholars supporting this position have argued that Article 51 explicitly discusses only one *type* of self-defense, in response to an armed attack, but that this does not imply that there are not other types of self-defense that are also legitimate.

Van Den Hole argues that since "self-defence is a pre-existing, inherent right recognized in customary international law," the UN Charter cannot outlaw elements of self-defense that are legitimate under customary international law, such as anticipatory self-defense.[94] McCormack echoes this sentiment when he states that "Article 51 should be interpreted to include anticipatory self-defense within specified limits: (1) so that regional organizations do not have an unrestricted right to use force; and (2) so that, both individually and collectively, states have the freedom to defend themselves against the threat of an attack that the Security Council will do nothing to stop."[95] McCormack also agues that "In requiring member states to forego the right to use force, the framers of the Charter envisaged that the Security Council would guarantee the protection of individual states from violations of Article 2(4)

---

90 Gray, *International Law and the Use of Force*, 87.

91 Louis Rene Beres and Yoash Tsiddon-Chatto, "Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor," *Temple International and Comparative Law Journal* 9, Fall (1995), 437–440; Emanuel Gross, "Self-Defense Against Terrorism – What Does It Mean? The Israeli Perspective," *Journal of Military Ethics*, 1, No. 2 (2002), 96.

92 Schmitt, "International Law and the Use of Force: Attacking Iraq," 535.

93 Kearley, "Raising the Caroline," 345–46.

94 Van Den Hole, "Anticipatory Self-Defence Under International Law," 74.

95 McCormack, *Self-Defense in International Law*, 209–10.

against them by other states."[96] Others, however, argue that this interpretation is misguided, since it privileges one part of Article 51 over another.

In an attempt to determine what the drafters of the Charter intended, or what the proper interpretation of the Charter should be, some scholars have gone back to the drafting history of the Charter, also known as the *travaux préparatories*. By looking at drafts, proposals, and meeting minutes, these scholars have tried to trace the development of the Charter. The 1969 Vienna Convention on the Law of Treaties states that "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its completion" can be used to determine the meaning of a treaty when the text of the treaty "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."[97]

Randelzhofer notes that "nothing can be drawn from the *travaux préparatories*" with respect to the proper interpretation of Article 51.[98] This is also evidenced by the fact that different scholars have different interpretations of the *travaux préparatories*. For example, Jessup refers to the *travaux préparatories* to support a more restrictive interpretation of Article 51.[99] Henkin echoes this sentiment, stating that "The fair reading of Article 51 permits unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed attack occurs" and that "Nothing in the history of its drafting (the *travaux préparatories*) suggests that the framers of the Charter intended something broader than the language implied."[100]

O'Connell argues that "the drafting history of the Charter" supports the position that "the prohibition of force was intended by the drafters to be very broad, admitting of only explicit exceptions."[101] Franck argues that "It is beyond dispute that the negotiators deliberately closed the door on any claim of 'anticipatory self-defence.'"[102] Brownlie states that "There is no indication in the discussions that the right of self-defence in the Article was in contrast with any other right of self-defence permitted by the Charter or that the phrase 'if an armed attack occurs' was anything other than a characterization of the right of self-defence."[103]

Kearley, on the other hand, argues that an examination of the development of the UN Charter indicates that the states involved in the negotiations included explicit reference to self-defense because of a strong desire of the negotiators that this right be maintained.[104] Additionally, he goes on to state that "The record shows that in

96 McCormack, *Self-Defense in International Law*, 195.

97 Epps, *Documentary Supplement to International Law*, 124.

98 Randelzhofer, "Article 51," 792.

99 Jessup, *A Modern Law of Nations*, 166.

100 Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn. (New York: Council on Foreign Relations by Columbia University Press, 1979), 141.

101 Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, ASIL Task Force Papers (Washington, DC: The American Society of International Law Task Force on Terrorism, 2002), 4.

102 Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (New York: Cambridge University Press, 2002), 50.

103 Brownlie, *International Law and the Use of Force by States*, 271.

104 Kearley, "Regulation of Preventive and Preemptive Force in the United Nations Charter," 681.

the case for the Charter's use of force rules, the drafters expressly refrained from defining aggression and implicitly avoided defining the limits of individual self-defense because they knew they could not agree upon such definitions."[105] Finally, he states that although "the drafters assumed that the traditional right of self-defense would remain unimpaired," "The minutes show no uses of the term anticipatory self-defense nor do they show any clear debate about the concept."[106] In this respect, the *travaux préparatories* do not really provide much help in determining the status of anticipatory military activities (or the extent of the right of self-defense) within the UN framework.

Self-Defense, the Use of Force, and International Law Today

International law is not a monolithic bloc of rules and regulations. Rather, it is an amalgamation of numerous sources and components. It is unclear if one element is more important or carries more weight. Accordingly, it is difficult to determine the legality of an action that is in violation of treaty law but consistent with customary law. Furthermore, since customary law evolves and changes over time, it is difficult to determine if an action taken is a violation or merely an indication of the evolution of customary law. For example, if a state violates existing customary law but is not sanctioned by other states, is this an example of a violation? Also, since treaty law is also susceptible to new interpretations, it is difficult to determine if a specific action is a violation of the law or an indication of a new and valid interpretation. Additionally, if states are unwilling or unable to impose effective punishment on violations, how effective or influential is international law?[107]

Furthermore, the meaning of treaty law can also change over time. As discussed above, the interpretation of treaties can evolve over time and analysis of the meaning of treaties must be adaptive to changes in state practice. The UN Charter is susceptible to these changing interpretations, and it is possible that as state practice changes, so too must the interpretations of the provisions of the Charter. Gray notes that in its decision in the *Nicaragua* case, the ICJ "seems to have accepted the possibility of a dynamic interpretation of Articles 51 and 2(4) based on the development of state practice."[108] This idea makes intuitive sense since the world itself is not static. New technologies, such as nuclear weapons, and new threats, such as international terrorism, arise that were not present when the Charter was originally adopted. In order for the Charter to remain relevant, it must be able to adapt to the changing international landscape.

105 Kearley, "Regulation of Preventive and Preemptive Force in the United Nations Charter," 723.

106 Ibid., 726–27.

107 It is not the purpose of this work to provide a definitive answer to these questions. That is left to the international law scholars. Rather, this study seeks to determine if international law plays a role in determining state behavior.

108 Gray, *International Law and the Use of Force*, 4.

There appears to be a consensus among legal scholars that force can be used unilaterally in self-defense against an actual armed attack. Additionally, there is fairly widespread acceptance of the use of anticipatory military activities if the threat is clearly imminent, along the lines of the *Caroline* doctrine.[109]

McCormack notes that the interpretation of Article 51 that allows the anticipatory use of military force is valid for three reasons: "(1) It reflects the intentions of the framers of the Charter (2) it is consistent with the purposes of the Organization, and (3) because examples of state practice show that, regardless of what states say they believe about the right to use force in anticipation of an attack, in situations where they have felt intolerably threatened states have used force."[110]

Schmitt argues that while there is a legal right for states to "act preemptively in self-defense," there are strict limitations on this right. Specifically, "there must be near certainty that an armed attack will be launched, peaceful alternatives to resolution of the situations must be exhausted beyond reasonable doubt, defensive action can only be taken during the last available window of opportunity, and the defensive force cannot exceed that necessary to deter the threat."[111] Maxon presents several "criteria" that should be met before force can be used either in the traditional conception of self-defense, or in "anticipatory" self-defense. With respect to the use of force in self-defense, the following guidelines are offered:

1. *Is the proposed response aimed at protecting the status quo?*…Actions that have retribution as the objective are not self-defense and are aggressive in nature.

---

109 Beres and Tsiddon-Chatto, "Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor."; Michael Byers, "Terrorism, the Use of Force and International Law After 11 September," *International and Comparative Law Quarterly*, 51, No. 2 (April 2002), 401–14; Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law."; Falk, "What Future for the UN Charter System of War Prevention."; Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*; Eckert and Mofidi, "Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law."; Richard N. Haass, "Sovereignty: Existing Rights, Evolving Responsibilities," Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University (Washington, DC, January 14, 2003); Louis Henkin, "The United Nations and Its Supporters: A Self-Examination," *Political Science Quarterly*, 78, No. 4 (December 1963), 504–36; Michael J. Kelly, "Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law," *Journal of Transnational Law and Policy*, 13 (Fall 2003), 1–39; John B. Mitchell, "'Preemptive War': Is It Constitutional?" *Santa Clara Law Review*, 44 (2004), 497–527; Mikael E. Nabati, "Anticipatory Self-Defense: The Terrorism Exception," *Current History* May 2003: 222–32; Mary Ellen O'Connell, "American Exceptionalism and the International Law of Self-Defense," *Denver Journal of International Law and Policy*, 31 (Fall 2002), 43–57; Arend, "International Law and the Preemptive Use of Military Force."; O'Connell, *The Myth of Preemptive Self-Defense*; Miriam Sapiro, "Iraq: The Shifting Sands of Preemptive Self-Defense," *The American Journal of International Law*, 97, No. 3 (July 2003), 599–607.

110 McCormack, *Self-Defense in International Law*, 111.

111 Schmitt, "International Law and the Use of Force: Attacking Iraq," 547.

2. *Has there been a violation of a legal obligation?* Each member state of the United Nations is obligated by Article 2(4) to refrain from using force or threats of force against the territorial integrity or political independence of any state. Threats to either of these fundamental values would violate that legal duty…
3. *Has there been an actual armed attack from an external source?* As distinguished from anticipatory self-defense … the clearest case for self-defense arises when one state has been subjected to armed attack by another state or an organization sponsored by another state…
4. *Is the response, or proposed response, timely?* Actions in self-defense must not be remote in time from the initial aggression. A delayed response may be seen by the international community as a threat to international peace and security. The need for immediacy (necessity) of action is lost if too much time lapses between the initial overt act of aggression and the defensive reaction.
5. *Is the military response in self-defense necessary?* Article 2(3) of the Charter cautions all member states to resolve their disputes by peaceful means. Article 33 requires parties to a dispute to refer it to the Security Council should they fail in its resolution. Before military force may be used in self-defense, the threatened state is required to attempt all practical, peaceful means to resolve the dispute. If there is a realistic, meaningful alternative to military action, self-defense is not available. There is, however, no requirement to exhaust all peaceful means if it would be fruitless to do so. If, however, the need for military action is not clear, it is not justified.
6. *Is the military response in self-defense proportionate to the threat?* A nation acting in self-defense may use force no greater than that needed to halt the danger posed by an aggressor nation…
7. *Has any military response been immediately reported to the Security Council?*…
8. *Has the Security Council taken meaningful, effective measures to stop the aggressive conduct?* Once the Security Council takes effective action to end the aggressive acts of a state, the target state must cease its self-defense activities.

With respect to anticipatory self-defense, Maxon notes that the primary question that needs to be answered is if there the threat of armed attack is both imminent and immediate. In order to answer this question, he provides the following criteria:

> *Are there objective indicators that an attack is imminent?* Factors such as troop buildups, increased alert levels, increased training tempo, and reserve call-ups may suggest that an attack is imminent.
>
> *Does the past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack is probable?* A pattern of aggressive past conduct or hostile public statements may demonstrate an intention by an aggressor nation to launch an armed attack.

> *What is the nature of the weapons available to the alleged aggressor nation, and does it have the ability to use them effectively?* Weapons of mass destruction and modern delivery systems make waiting for an actual armed attack exceedingly dangerous. While possession of such weapons alone is not indicative of an intent to use them, it is a factor that must be considered with all other relevant factors.
>
> *Is the use of force the last resort after exhausting all practicable, peaceful means?* Unlike actions in self-defense following an armed attack, preemptive actions generally mean some time is available for peaceful resolution...[112]

Not only does Maxon extend the legal right of self-defense to include anticipatory self-defense, albeit within fairly tight parameters, but he also explicitly links anticipatory self-defense to many of the elements of the Just War tradition, which are discussed in Chapter 5.

Byers notes that there has been a great deal of reluctance on the part of states to "claim a right of anticipatory self-defense."[113] Gray extends this position by stating that this reluctance is due to the fact that states are unsure of the legality of anticipatory self-defense. She states that the reluctance of states "to rely on anticipatory self-defence … is strong evidence of the controversial status of this justification for the use of force, as is the deliberate avoidance of the issue of the legality of anticipatory self-defence by the International Court of Justice in the *Nicaragua* case."[114]

Although there is considerable debate among international legal scholars, there is support for the use of anticipatory military activities—albeit within very limited and strict parameters. The key element is the imminence factor. In order for the anticipatory action to be considered a legitimate, i.e., "legal," act of self-defense, it must be taken in response to an *imminent threat.*

What qualifies as imminent, however, is often times in the eye of the beholder. It seems as if the framers of the UN Charter clearly intended the Security Council to make such decisions. However, given the fact that the Security Council did not develop into the strong body that was envisioned, it is somewhat problematic to require States to defer all judgments on imminence to the Security Council.

Some also argue that the nature of "imminence" changes over time. Schmitt notes that "the requirement of imminency must evolve as the nature of the threat changes."[115] In this respect, the requirement of going through the Security Council before taking action may be untenable. According to Greenwood,

> Where the threat is an attack by weapons of mass destruction, the risk imposed upon a State by waiting until that attack actually takes place compounded by the impossibility for that State to afford its population any effective protection once the attack has been launched, mean that such an attack can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded. The second consideration is

---

112 Richard G. Maxon, "Nature's Eldest Law: A Survey of a Nation's Right to Act in Self-Defense," *Parameters*, Autumn 1995: 55–68, <http://carlisle-www.army.mil/usawc/Parameters/1995/maxon.htm> (accessed April 17, 2005).

113 Byers, "Terrorism, Force, and Law," 409.

114 Gray, *International Law and the Use of Force*, 115.

115 Schmitt, "International Law and the Use of Force: Attacking Iraq," 519.

> the method of delivery of the threat. It is far more difficult to determine the time scale within which a threat of attack by terrorist means would materialize than it is with threats posed by, for example, regular armed forces. These would be material considerations in assessing whether, in any particular case, an attack should be treated as imminent.
>
> Nevertheless, the requirement that an attack be imminent cannot be ignored or rendered meaningless. Even when taking into account [these] issues … the right of self-defense will justify action only where there is sufficient evidence that the threat of attack exists. That will require evidence not only of the possession of weapons but also of an intention to use them.[116]

In this respect, the imminence factor is not irrelevant, but must be tweaked to a certain extent in order to effectively address the challenges that states face today. In such a situation, a state may not necessarily have time to go through the sometimes lengthy process of bringing the issue to the Security Council before taking action.

Some also argue that the failure of the Security Council to effectively deal with threats has virtually negated the prohibitions contained within the Charter. The prohibitions on the use of force were predicated upon a functioning Security Council that would be able to maintain peace and security. If, however, the Security Council is unable to effectively fulfill its obligations, these scholars argue, it is unreasonable to expect states to continue to be bound to a system that is not working and thereby sacrifice their own security.[117]

Others, however, contend that states knowingly and willingly entered into a binding agreement when they signed the UN Charter. Along these lines, McCormack argues:

> The fact that the Security Council did not live up to expectations does not mean that Article 2(4) is no longer binding on states. In signing the Charter, states unconditionally obligated themselves to the proscription in Article 2(4).[118]

According to McCormack, while states are still bound to Article 2(4), the fact that the Security Council failed to live up to expectations does provide somewhat more leeway in terms of the legitimate use of force by states. He states that "Article 51 should also be interpreted to allow states to help achieve the maintenance of international peace and security in situations where the Council cannot or will not take action."[119]

---

116 Christopher Greenwood, "International Law and the Pre-Emptive Use of Force, Afghanistan, Al-Qaida, and Iraq," *San Diego International Law Journal*, 4 (2003), 16.

117 Arend, "International Law and the Preemptive Use of Military Force"; Thomas M. Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force By States," *American Journal of International Law*, 64, No. 4 (October 1970), 809–37; Michael J. Glennon, "The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law and Public Policy*, 25, No. 2 (Spring 2002), 539–58.

118 McCormack, *Self-Defense in International Law*, 188.

119 Ibid., 188.

At the same time, there are also complications due to the changing nature of the threats involved. The threats faced by States in the early 1940s when the Charter was drafted are markedly different from the threats faced by States today. This has made many scholars question if the rules embodied in the UN Charter should (or can) evolved and adapt over time to reflect the new reality.[120]

Henkin cautions, however, that while the "law, like the institutions of the United Nations, must grow to reflect changes in nations, in relations between nations, [and] in the force available to affect relations between nations" this "reinterpretation" process is "dangerous and delicate."[121] For Schmitt, "law must be construed in the context in which it is to be applied if it is to remain relevant; and in the twenty-first century security environment, insistence on a passé application of international legal principles to strategies of preemption would quickly impel States at risk to ignore them."[122]

Jessup quotes a 1946 Department of State Memorandum that argues that the conceptualization of what an armed attack is must change to reflect the new technological environment:

> It is equally clear that an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define 'armed attack' in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.[123]

Dinstein argues that sometimes "the opening of fire is an unreliable test of responsibility for an armed attack."[124] He goes on to say that:

> The crucial question is who embarks upon an irreversible course of action, thereby crossing the Rubicon. This, rather than the actual opening of fire, is what casts the die and

120 Beres and Tsiddon-Chatto, "Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor;" Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law;" Franck, *Recourse to Force*; Thomas M. Franck, "The Use of Force in International Law," *Tulane Journal of International and Comparative Law*, 11 (Spring 2003), 7–19; Thomas Graham, Jr. "Is International Law Relevant to Arms Control? National Self-Defense, International Law, and Weapons of Mass Destruction," *Chicago Journal of International Law*, 4 (Spring 2003), 1–17; Haass, "Sovereignty: Existing Rights, Evolving Responsibilities"; Henkin, "The United Nations and Its Supporters: A Self-Examination;" Nabati, "Anticipatory Self-Defense." Among the new threats that international law scholars are currently debating are terrorism and the protection of nationals. In both of these instances, the rubric of self-defense can be pushed and expanded to encompass the use of military policies. However, since these actions would be primarily reactionary, an analysis of them is not included in this paper.

121 Henkin, "The United Nations and Its Supporters: A Self-Examination," 530.

122 Schmitt, "International Law and the Use of Force: Attacking Iraq," 547.

123 Jessup, *A Modern Law of Nations*, 166–76.

124 Dinstein, *War, Aggression, and Self-Defence*, 170.

> forms what may be categorized as an incipient armed attack. It would be absurd to require that a defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove an immaculate conception of self-defense.[125]

In this respect, he distinguishes between a "preventive strike [that] anticipates an armed attack that is merely 'foreseeable' (or even just 'conceivable')" and "an interceptive strike [that] counters an armed attack which is 'imminent' and practically 'unavoidable.'"[126]

For the purposes of this study, the question to be examined is to what extent the legal elements actually influenced state action during specific crises. Arend and Beck argue that in order to determine if an accepted norm is actually a "law," it must be accompanied by both authority and control. In other words, states must believe that it is a law and must act accordingly.[127] If this is true, then the opposite must also apply: an accepted norm is not a "law" if states do not believe it to be so, nor act in accordance with the norm. According to this position, if states do not adhere to the restrictionist interpretation of Article 51, which would outlaw anticipatory military activities, it would be hard to support the position that such prohibition is in fact law.

One of the hypotheses that will be tested is that states are constrained by the legal elements (i.e., the limitations on the use of force), but only up to a certain point. If the threat posed were sufficiently severe—such as a threat to the state's existence—the costs of violating international law would be less than the costs of taking no action. Additionally, within international law there is more support for anticipatory action taken to redress imminent threats as opposed to more distant threats. In this respect, states could take anticipatory action in response to an imminent threat, again within certain limits, and still be operating within the boundaries of international law.

Support for the notion that the type of crisis, i.e., what type of threat is faced and how severe the threat is, influences whether or not international law acts as a constraint on state behavior is supported by Goldsmith and Posner's rational choice approach to understanding customary international law. Goldsmith and Posner argue that states' interests play a pivotal role in understanding how international law is interpreted. In this respect, when a state faces a crisis that threatens its security or existence, its interests (i.e., survival) may trump constraints on actions found in international law.

---

125 Dinstein, *War, Aggression, and Self-Defence*, 172.

126 Ibid., 172.

127 Arend and Beck, *International Law and the Use of Force*, 9.

Chapter 5

The Just War Tradition

Concern with minimizing the use of force has a long history. Arend and Beck note that limitations on the legitimate use of force can be found as early as 330 BC with the idea of "holy war" contained in the Hebrew Bible. Under this conception, only a war that was instituted by God was permissible.[1] This idea later developed into the tradition of "just war," which codified the conditions under which it was permissible to use force and engage in war.

The just war tradition deals with a vast and expansive range of activities, and has been examined and interpreted by numerous scholars. It is important to note at the outset that this chapter is particularly concerned with the standing of anticipatory military activities within the just war tradition, not the tradition in its entirety. While a brief overview of the just war tradition is important, the emphasis will be placed on the just war tradition as it relates to anticipatory military activities.

The Just War Tradition: Development and Components

The just war tradition was developed in order to bridge the gap between the Christian teachings of pacifism and the need to engage in military activities to defend the state's interests. Augustine argues,

> For if the Christian religion condemned wars of every kind, the command given in the gospel to soldiers asking counsel as to salvation would rather be to cast away their arms, and to withdraw themselves wholly from military service; whereas the word spoken to such was, 'Do violence to no man, neither accuse any falsely, and be content with your wages,'—the command to be content with their wages manifestly implying no prohibition to continue in the service. Wherefore, let those who say that the doctrine of Christ is incompatible with the State's well-being give us an army composed of soldiers such as the doctrine of Christ requires them to be; let them give us such subjects … as the Christian religion has taught that men should be, and then let them dare to say that it is adverse to the State's well-being; yea, rather, let them no longer hesitate to confess that this doctrine, if it were obeyed, would be the salvation of the commonwealth.[2]

Johnson notes that Augustine dealt with this quandary by creating "a justification of war under certain prescribed circumstances, yet with genuine limits on the harm

---

1 Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993), 11–12.

2 Saint Augustine, Bishop of Hippo, *The Political Writings of St. Augustine*, edited by Henry Paolucci (Washington, DC: Regnery Publishing, Inc., 2002), 180.

that could be done even in a justified war."[3] For Miller, "Saint Augustine's basic distinction between the just and the unjust war provided a useful guide for the priest and the Christian layman, and formed the basis for meeting an urgent need of the time, i.e., defense against the invasion of the barbarians."[4] Cullinan describes the just war tradition as

> a moral framework for relating ends and means in considering whether and how armed force may be permissible or even required. It reflects the collective legacy of Western thought—both religious and secular—in grappling with enduring moral concerns where the stakes are literally matters of life and death.[5]

In this respect, the just war tradition can be viewed as being a "middle ground" between the pacifistic position, outlawing all war, and the militaristic or realist position, which did not put any moral or ethical constraints on the waging of war.[6] Weigel defines the just war tradition as "a kind of ethical calculus, in which moral reasoning and rigorous empirical analysis are meant to work together, in order to provide guidance to public authorities on whom the responsibilities of decision-making fall."[7]

Although what is today considered the "just war tradition" can be traced to Augustine and the early Christians, similar ideas were explored by the ancient Romans and Greeks as well as by ancient Chinese and Indian philosophers.[8] While it is interesting to note that concerns with morality and warfare were pursued in various cultures, it was the Augustinian tradition that developed into the just war tradition, and is part of the foundation of Western positive international law. Accordingly, the below discussion will be restricted to the Augustinian tradition.

It is also important to note that the just war tradition is not, nor has it ever been, static or rigid. Rather, it has evolved and changed over time in accordance with the evolving and changing nature of political actors and the military technologies they employ.[9] According to O'Brien, there are three primary sources of the "classic just war doctrine:"

---

3 James Turner Johnson, *Can Modern War Be Just?* (New Haven: Yale University Press, 1984), 1.

4 Lynn H. Miller, "The Contemporary Significance of the Doctrine of Just War," *World Politics*, 16, No. 2 (January 1964), 254.

5 John F. Cullinan, "Preempt Iraq: Necessity, Law, and Justice, " *National Review* December 16, 2002, <www.nationalreview.com/comment/comment-cullinan121602.asp> (accessed August 1, 2004).

6 Nick Fotion, Bruno Coppieters, and Ruben Apressyan, "Introduction," in Bruno Coppieters and Nick Fotion (eds), *Moral Constraints on War: Principles and Cases* (Lanham, MD: Lexington Books, 2002), 11; Inis L. Jr. Claude, "Just Wars: Doctrines and Institutions," *Political Science Quarterly*, 95, No. 1 (Spring 1980), 83–96.

7 George Weigel, "Getting 'Just-War' Straight and Pre-Emption, Just War and the Defense of World Order." 2003, Catholic Educator's Resource Center, <www.catholiceducation.org/articles/social_justice.sj0008.html> (Accessed October 17, 2003).

8 Fotion, Coppieters, and Apressyan, "Introduction," 11–12.

9 For detailed histories and discussions of the evolution of the just war tradition, see Bruno Coppieters and Nick Fotion (eds), *Moral Constraints on War: Principles and Cases*

1. The theological tradition, represented by the writings of St. Augustine, St. Thomas Aquinas, and the late Scholastics...
2. The canonists and ecclesiastic councils.
3. Customary *jus gentium* incorporated into just war doctrine, mainly by later Scholastics.[10]

The classical just war tradition later developed into what O'Brien calls "Modern Just War Doctrine." O'Brien describes the development of the just war tradition in the following manner:

> in its long evolution, just-war doctrine has assumed an eclectic character. It spans several normative disciplines. In its origins just-war doctrine is heavily theological. As it developed in Scholastic thought it became more and more philosophical, an expression of natural law. At the same time, just-war theory was enriched by the chivalric code and by emerging jus gentium, the law of nations. In the twentieth century, just-war doctrine has been elaborated in a substantial body of Catholic social thought on war of mixed theological-philosophical character. The contemporary just-war literature by moral and legal publicists likewise reflects varied emphases from theological to philosophical to pragmatic political-military.[11]

According to Elshtain, the evolution of the just war tradition also included its secularization. This process did not remove the "ethical content" of the tradition, and was facilitated when the tradition was "absorbed into the thinking of international law." Additionally, "many of its ethical constraints were encoded in both the Geneva and Hague Conventions" and "the just war tradition had become part of the way in which much of the world spoke of war and peace questions."[12]

Johnson discusses another element of the evolution of the just war tradition, namely that the different components develop different meanings over time,

---

(Lanham, MD: Lexington Books, 2002); James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, NJ: Princeton University Press, 1981); Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Upper Saddle River, NJ: Prentice Hall, 1999); James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999); James Turner Johnson, "Just War, As It Was and Is," *First Things*, 149 (January 2005), 14–24; Robert L. Holmes, "Can War Be Morally Justified? The Just War Theory," in *Just War Theory*, Jean Bethke Elshtain (ed.) (New York: New York University Press, 1992); Michael D. Ramsey, "Textualism and War Powers," *The University of Chicago Law Review*, 69, No. 4 (Fall 2002), 1543–638.

10 William V. O'Brien, "The International Law of War as Related to the Western Just War Tradition," in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, John Kelsay and James Turner Johnson (eds) (New York: Greenwood Press, 1991), 165.

11 William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), 13.

12 Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003), 53. Johnson argues that this process has served to erode and distort much of the core of the just war tradition. In this respect, he notes that what has developed as "positive international law" diverges significantly from the just war tradition and privileges what were secondary aspects of the tradition over more fundamental elements. See, Johnson, "Just War, As It Was and Is."

stating that "an illustration of the divergence of meaning that has historically been attached to these terms, just cause in the Middle Ages could be construed in terms of punishing evildoers in the stead of God, while today it tends to be put, especially in international law, in terms of outlawing aggression and defining a limited right of self-defense."[13]

Jus ad Bellum and Jus in Bello: The Building Blocks of a "Just War"

Today, there are seven basic principles of the just war tradition, divided into two different categories.[14] The first concerns *jus ad bellum* or "justice on the way to war." The elements of *jus ad bellum* include the following: legitimate authority, just cause, right intention, last resort, and reasonable chance of success. These elements are designed to help guide statesmen vis-à-vis the decision to go to war or use force.

The second part of the just war tradition is *jus in bello* or "justice in war." This category includes the requirements of proportionality and the discrimination between combatants and noncombatants. The elements of *jus in bello* are meant to guide statesmen in their conduct once war has been initiated.[15]

If the *jus ad bellum* requirements must be met *prior* to the use of force, then these elements can be seen as superceding the *jus in bello* criteria. According to Johnson, "if a given resort to force has not been morally justified, then even the most strictly delimited uses are, according to just war tradition, unjust."[16] Johnson also argues that there are particular *jus ad bellum* elements that *must* be adhered to first, before the other elements should even be considered. Specifically, if the use of force is not undertaken by sovereign authority for a just cause and with the "right intention," it cannot be just, regardless if it complies with the other *jus ad bellum* and *jus in bello*

13 Johnson, *Just War Tradition and the Restraint of War*, xxii.

14 Johnson notes that for Aquinas, there were only three elements that served to make a war (*bellum*) "just." These included: sovereign authority, just cause, and right intention. Additionally, Johnson argues that it is important to note the specific importance of the word "bellum" for Aquinas. "*Bellum* in medieval usage referred to any use of armed force by a sovereign ruler, whether this force was applied internally to that ruler's society or externally. Its opposite was *duellum*, use of force on private authority and thus presumptively for private purposes. *Bellum*, in the terms of just war theory, might be just or unjust, depending on circumstances; *duellum* could only be unjust." This is markedly different from the contemporary understanding of "bellum," which, according to Johnson, "has certain particular meanings which we may wrongly read back into [Aquinas]. In positive international law it refers to a specific relationship of conflict between or among states, and more broadly to 'armed conflict' that may involve nonstate actors within states or across national borders." Johnson, "Just War, As It Was and Is," 16. For Johnson, this changing interpretation of "bellum" has served to change and morph the just war tradition away from its traditional basis. More on this shift and transformation will be discussed throughout this chapter.

15 Since the *jus in bello* elements are intended to guide behavior within an armed conflict, they are excluded from later parts of this work, which focuses on anticipatory military activities that, by definition, take place before (or signal the beginning of) the war.

16 James Turner Johnson, "Just Cause Revisited," in *Close Calls: Intervention, Terrorism, Missile Defense, and 'Just War' Today*, Elliott Abrams (ed.) (Washington, DC: Ethics and Public Policy Center, 1998), 3.

criteria.[17] This does not take away from the importance of the *jus in bello* criteria, but rather limits their applicability to an analysis of the justness of a particular resort to force, which falls solely within the realm of *jus ad bellum*.

It is also important to note that the different elements of the just war tradition are not completely independent of each other. Rather, they should be viewed as component parts of a greater whole. O'Brien argues that viewing the components in this manner is necessary to prevent actors from selectively choosing to adhere to certain requirements while ignoring others when determining if their action is "just." He goes on to state that judgments vis-à-vis the just war criteria can be reevaluated and reassessed as a result of additional information and experience.[18]

Each of the component parts of *jus ad bellum* and *jus in bello* are briefly discussed below.

Legitimate Authority One of the primary concerns for Augustine revolved around the idea of who could send soldiers to battle. According to Augustine, "Yet the natural order which seeks the peace of mankind, ordains that a monarch should have the power of undertaking war if he thinks it advisable, and that the soldiers should perform their military duties in behalf of the peace and safety of the community."[19] O'Brien argues that in Augustine's time, "it was important to insist that war—in which individuals would be called upon to take human lives—must be waged on the order of public authorities for public purposes."[20] According to Johnson,

> Only a person in a position of responsibility for the good of the entire community may rightly authorize the use of the sword. Anyone not in such a position who resorts to the sword, for reasons however lofty, is guilty of disturbing the public good. The only exception to this is the use of arms in response to an attack under way or immediately offered, but even this allowance disappears when public authority is at hand to combat this evil. So the authority of a sovereign is necessary for a just war, because we are here talking about *bellum*, the only kind of resort to the sword that may be just. That Aquinas puts this requirement first is not accidental but follows from the logic of the concept of just war being set out: only uses of force by sovereign authority have the potential to be justified; thus this is the primary criterion.[21]

While this constraint was originally intended to distinguish between (legitimate) public wars and (illegitimate) private wars, it has evolved over time as the nature of political actors has changed.

In the contemporary just war tradition, the requirement of legitimate authority is generally taken to refer to the necessity that war be declared by sovereign states. This area is somewhat complicated, however, with respect to non-state actors, particularly national liberation movements, or international organizations, such as

17 See Johnson, "Just War, As It Was and Is," 17–18.

18 O'Brien, *The Conduct of Just and Limited War*, 35–36.

19 Augustine, *The Political Writings of St. Augustine*, 163–64.

20 O'Brien, *The Conduct of Just and Limited War*, 17.

21 Johnson, "Just War, As It Was and Is," 17.

the United Nations or the European Union.[22] Can these groups engage in a "just war?" Additionally, with respect to international organizations, do these groups supplant the individual states' rights to engage in a just war? In other words, does the legitimate authority for engaging in just war rest with the sovereign state or the international organization?

The answers to these questions are outside the scope of this work.[23] Instead, the more "traditional" conceptualization of legitimate authority will be applied, namely that the authority to engage in a "just war" rests with the recognized governments of independent states. Thus, while states may decide to deploy their own forces under the umbrella of the United Nations or other multilateral organizations, the decision to engage those troops, or to deploy them independently and unilaterally, rests with the sovereign governments of the individual states. As such, these deployments can still satisfy the requirements of the just war tradition, provided that they are carried out in a manner consistent with the other requirements of the tradition.

Just Cause One of the central, and oldest, elements of the just war tradition is that of "just cause." Langan argues that just cause is in fact the first and central requirement of the just war tradition, so that without "a just cause, there can be no just war, so this will always be the most fundamental requirement."[24] The just cause requirement of the tradition is intended to limit war by defining the specific situations that were deemed grave enough to warrant the use of force.

Johnson notes that there are at least 4 different elements that are traditionally viewed to be components of "just cause." These elements are: 1) intervention to protect "innocent neighbors" from unprovoked aggression, 2) punishing evil, 3)

---

22 While these groups have never "gone to war," per se, there is some debate among scholars as to the "legitimacy" of the use of armed troops in peacekeeping and humanitarian intervention missions, which some see as akin to "armed intervention." Jean Bethke Elshtain, "Just War and Humanitarian Intervention," in *Proceedings of the Annual Meeting* (Washington, DC: American Society of International Law, 2001), 1–12; John Langan, S.J., "Humanitarian Intervention: From Concept to Reality," in Abrams (ed.), *Close Calls*; George R. Lucas, Jr., "The Role of the 'International Community' in Just War Tradition—Confronting the Challenges of Humanitarian Intervention and Preemptive War," *Journal of Military Ethics*, 2, No. 2 (June 2003), 122–44; Tony Pfaff, *Peacekeeping and the Just War Tradition* (Carlisle, PA: Strategic Studies Institute, 2000).

23 The question of legitimate authority, international organizations, and non-state actors is particularly relevant with respect to the Bush Doctrine and the "Global War on Terrorism." Additional information on this issue can be found in Chapter 9. For discussions of the changing nature of legitimate authority, see Eugene R. Rostow, "Competent Authority Revisited," in Abrams (ed.), *Close Calls*; Gregory D. Foster, "Just War Doctrine in an Age of Hyperpower Politics," *The Humanist*, 64, No. 2 (March/April 2004), 23–25; Johnson, *Can Modern War Be Just?*; James Turner Johnson, "Aquinas and Luther on War and Peace: Sovereign Authority and the Use of Armed Force," *Journal of Religious Ethics*, 31, No. 1 (2003), 3–20; Johnson, "Just War, As It Was and Is;" George Weigel, "The Just War Tradition and the World After September 11th," *Logos: A Journal of Catholic Thought and Culture*, 5, No. 3 (Summer 2002), 13–44.

24 John Langan, "Is There a Just Cause for War Against Iraq," *Georgetown Journal of International Law*, 4, No. 1 (Winter/Spring 2003), 88.

defense, and 4) wars that are viewed as "holy" or based on various ideological foundations such as "war of national liberation."[25] Johnson also argues that "defense" is a central element of just cause, stating that "*defense* always constitutes a just cause" and that "[t]his idea is as old as the ages".[26] However, consistent with the rest of the just war tradition, what counts as a "just cause" has also changed over time.

Johnson argues that the changes vis-à-vis just cause were a result of the changing nature of politics and warfare that occurred in the nineteenth century. The combination of nationalism and mechanized warfare caused many to try to find a way to minimize the occurrence of war, which was done by limiting just cause to one element only: self-defense. The reason for this limitation is fairly straightforward: "From the perspective of those who saw war itself as the evil to be avoided, the other classically recognized just causes—recovery of something wrongly taken and punishment of evil—were too easily made instruments of national self-interest."[27] For Johnson, this necessitated a reconceptualization of just cause, such that by the twentieth century, the Catholic just-war doctrine had reduced "just cause" to include only defense.[28]

This does not mean that just cause as "defense" is limited to the use of force in response to an actual armed attack. Often termed a "presumption against war," which was first used in the 1983 pastoral letter, *The Challenge of Peace*, many have interpreted the just war tradition today as limiting the legitimate use of force to instances when an armed attack has actually occurred. Johnson argues that this "presumption against war" is not an accurate interpretation of the just war tradition:

> the modern-war pacifists get it wrong: their contingent judgment [that massive destruction is an inherent element of modern warfare] does not describe a permanent truth about warfare in the modern age. The morality of modern war, as of all war, depends on the moral choices of those who fight it. It is not the choice to fight that is inherently wrong, as the 'presumption against war' argument has it; it is the choice to fight for immoral reasons and/or by immoral means.[29]

This does not imply that leaders are given a carte blanche in terms of justifiable uses of force.

Rather, from this perspective, it is important to understand that within the just war tradition, there are times when uses of force *are* justified, and that these situations are not confined to situations where an actual armed attack has occurred. In this respect, Holliday notes that the 1996 *Encyclopedia of War and Ethics* states the following about just cause:

> Self-defense is the obvious rationale for going to war. But the principle of just cause has been extended to cover defense of another state against aggression, intervention to protect

25 Johnson, *Can Modern War Be Just?* 19.
26 Ibid., 19 (emphasis in original).
27 Johnson, "Just Cause Revisited," 17.
28 Ibid., 19.
29 Johnson, "Just War, As It Was and Is," 19.

> potential victims of massacre, assisting secessionists, and even preemptive strikes against potential aggressors.[30]

Or, in other words, there may be instances when it is permissible to use force in an anticipatory manner.

Others have also discussed what "just cause" means in the contemporary world. Rengger argues that "in the modern context" the idea of just cause "has shrunk to national self-defense against armed attack, or perhaps, retaliation for armed attack."[31] Powers notes that according to the *Catechism of the Catholic Church*, just cause is limited to situations where "the damage inflicted by the aggressor on the nation or community of nations [is] lasting, grave and certain."[32] According to Weigel,

> In the classic just war tradition, 'just cause' was understood as defense against aggression, the recovery of something wrongfully taken, or the punishment of evil. As the tradition has developed since World War II, the latter two notions have been largely displaced, and defense against aggression has become the primary, even sole, meaning of just cause. This theological evolution has parallels in international law: the defense against aggression concept of just cause shapes Articles 2 and 51 of the Charter of the United Nations.[33]

It is not clear, however, if defense "against aggression" limits states only to responsive action *after an armed attack,* or, if it permits anticipatory action. What is clear is that within the modern just war tradition, just cause appears to be limited to situations where the threat is both severe and imminent—a constraint that can be seen clearly in modern positive international law, particularly in the UN Charter's articles 2(4) and 51, which set the framework and guidelines for the use of force and the parameters of self-defense.[34]

The idea of just cause lies at the heart of the debate about the "justness" of anticipatory military activities. Accordingly, just cause will be discussed in more depth below.

Right Intention Kunz notes that "Even the prince who has a just cause of war, can make an unjust war, if he acts from wrong motives, such as territorial aggrandizement or elimination of the enemy as a competitor in the future."[35] This statement focuses on the "right intention" element of the just war tradition, which can be viewed as both an extension of just cause as well as an independent moral principle within the just war tradition. Holmes argues that the right intention requirement is as important

---

30 Ian Holliday, "When is a Cause Just?" *Review of International Studies*, 28 (2002), 560.

31 Nicholas Rengger, "On the Just War Tradition in the Twenty-First Century," *International Affairs*, 78, No. 2 (2002), 359.

32 Gerald Powers, *Would an Invasion of Iraq Be a "Just War?"* Special Report No. 98 (Washington, DC: United States Institute of Peace, 2003), 4.

33 Weigel, "Getting 'Just-War' Straight and Pre-Emption, Just War and the Defense of World Order," 27.

34 Claude, "Just Wars," 93. See also Chapter 4.

35 Josef L. Kunz, "Bellum Justum and Bellum Legale," *American Journal of International Law*, 45, No. 3 (July 1951), 530. It is interesting to note that Kunz seems to be arguing that *preventive* war would be unjust, in that it does not fulfill the requirement of right intention.

as the other jus ad bellum elements, since it is "expressly required" since "having a just cause and legitimate authority is insufficient" on their own to justify going to war.[36]

In their 1983 pastoral letter, *The Challenge of Peace*, the US Catholic Bishops offered this definition of right intention:

> Right intention is related to just cause—war can be legitimately intended only for the reasons set forth above as a just cause. During the conflict, right intention means pursuit of peace and reconciliation, including avoiding unnecessarily destructive acts or imposing unreasonable conditions (e.g., unconditional surrender).[37]

According to O'Brien, there are three different elements of right intention. First, the action in question must be limited in scope to only "the pursuit of the avowed just cause." Next, the ultimate goal of any military action or war must be "a just and lasting peace." Finally, the rights of the enemy must be protected, even in times of conflict.[38]

While the above definitions seem straightforward enough, the right intention portion of the just war tradition is highly susceptible to the critique that it is overly subjective in nature. It is often nearly impossible to determine the "true" intentions of any state or actor. Holmes argues that it is "subjectivistic, dependent upon inner purity".[39] The problematic nature of the concept does not strip if of any utility, but rather exemplifies some of the problems inherent in applying the just war tradition in an empirical analysis of state behavior.

Since the actions investigated in this study were taken in the course of an international crisis, and in response to specific threats or actions by another action, the requirement of right intention will not be directly relevant. In other words, since the actions are *responsive* in nature, it is assumed that they were not taken out of aggressive motivations, and therefore comply with the requirements of right intention.

Last Resort According to the principle of last resort, recourse to armed force is only "just" if all other peaceful means of conflict resolution have been attempted. Johnson describes the last resort criterion in the following manner:

> force must be the last step, not taken until other steps have been tried. The traditional idea that force must be the last resort thus carries with it the counsels of caution and prudence and serves as an implicit reminder that force may inspire more force, with the danger of loss of rational control over events. On the other hand, this criterion of *last* resort reminds us that the use of force may be a legitimate resort, when there are no other ways left to protect values that require to be preserved.[40]

---

36 Holmes, "Can War Be Morally Justified? The Just War Theory," 200.

37 US Catholic Bishops' Pastoral Letter, "The Challenge of Peace: God's Promise and Our Response," in *Just War Theory*, Jean Bethke Elshtain (ed.) (New York: New York University Press, 1992), 100.

38 O'Brien, *The Conduct of Just and Limited War*, 34.

39 Holmes, "Can War Be Morally Justified? The Just War Theory," 200–01.

40 Johnson, *Can Modern War Be Just?* 24 (emphasis in original).

Walzer argues that a literal interpretation of last resort is untenable and would effectively outlaw all uses of force. Rather, he argues for a more expansive and flexible interpretation of last resort:

> For we can never reach lastness, or we can never know that we have reached it. There is always something more to do: another diplomatic note, another UN resolution, another meeting. Once something like a blockade is in place, it is always possible to wait a little longer and hope for the success of (what looks like but isn't quite) nonviolence. Assuming, however, that war was justified in the first instance, at the moment of the invasion, then it is justifiable at *any* subsequent point when its costs and benefits seem on balance better than those of the available alternatives.
>
> But sending troops into battle commonly brings with it so many unanticipated costs that it has come to represent a moral threshold, one that political leaders must cross with great reluctance and trepidation. This is the truth contained in the 'last resort' maxim. If there are potentially effective ways of avoiding actual fighting while still confronting the aggressor, they should be tried.[41]

Roberts notes that this "moral obligation requires an assessment of all means available to meet a particular threat—economic, political and military—and, of those deemed *sufficient* to do so, a preference for means other than war." [42] In this respect, last resort cannot be viewed as an absolute point in time, but rather it is dependent upon the particulars of each situation.

The concept of last resort plays a central role in the legitimacy of anticipatory military activities and will be discussed in more depth below.

Reasonable Chance of Success The final *jus ad bellum* criterion is "reasonable chance of success." Fotion and Coppieters note that this element is a rather late edition to the just war tradition, being first discussed by Grotius.[43]

According to this requirement, if there is not a good chance that the use of force would be successful in redressing the wrong done and restoring peace, it would therefore inflict more harm than good, and therefore, be "unjust." In this respect, it is closely related to the *jus in bello* requirement of proportionality.

According to the US Catholic Bishops' Pastoral Letter on War and Peace, this element is a "difficult criterion to apply, but its purpose is to prevent irrational resort to force or hopeless resistance when the outcome of either will clearly be disproportionate or futile."[44] O'Brien notes that decisions with respect to proportionality, such as "the probable good to be achieved by successful recourse to armed coercion in pursuit of the just cause must outweigh the probably evil that the wary will produce" "must

41 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd edn. (New York: Basic Books, 1992), xiv–xv (emphasis in original).

42 Brad Roberts, "NBC-Armed Rogues: Is There a Moral Case for Preemption?" in Abrams (ed.), *Close Calls*, 86 (emphasis in original).

43 Nick Fotion and Bruno Coppieters, "Likelihood of Success," in Coppieters and Fotion (eds), *Moral Constraints on War*, 79.

44 US Catholic Bishops' Pastoral Letter, "The Challenge of Peace: God's Promise and Our Response," 100–01.

be made in the light of realistic estimates of the probability of success."[45] O'Brien also includes an important caveat to the reasonable chance of success criterion. He states that "A war of self-defense may be engaged in irrespective of the prospects for success, particularly if there is a great threat to continued existence and to fundamental values."[46]

This criterion is also vulnerable to the critique that it is highly subjective in nature. Who is to determine what constitutes "success?" Who is to determine what constitutes a "reasonable chance?" Who is to determine what is "proportional?" And, finally, who is to determine what constitutes legitimate "self-defense?"

Additionally, this component is particularly troublesome with respect to the anticipatory use of military force, when the true nature of the threat is unknown. The specifics of this criterion and anticipatory self-defense are discussed in more depth below.

The next two elements, proportionality and discrimination, are part of *jus in bello*. Since these requirements deal with conduct during the actual war (which is outside the scope of this work), they are discussed only briefly.

Proportionality Proportionality is also a criterion for *jus in bello*. Within the *jus in bello* framework, proportionality concerns the levels of force that are permitted within the actual war context. For Van Damme and Fotion, proportionality in *jus in bello* "refers to the total calculus of the balance of goods and evils associated with a particular operation or action in the course of a war."[47] O'Brien argues that "the principle of proportion deals with military means at two levels: (1) tactically, as proportionate to a legitimate military end, *raison de guerre*; and (2) strategically, as proportionate to the just-cause ends of the war, *raison d'état.*"[48]

Discrimination In the *jus in bello* framework, discrimination refers to distinguishing between combatants and non-combatants during the conduct of war. Much like the other elements of the just war tradition, there are multiple different interpretations of this criterion. For this discussion, however, it is sufficient to note that the just war tradition "prohibits direct intentional attacks on noncombatants and nonmilitary targets."[49]

Anticipatory Military Activities and the Just War Tradition

Many of the early thinkers argued that force could, in fact, be used in a proactive, or anticipatory manner while still being considered just. However, although Grotius, Vattel, and Vitoria seemed to advocate a permissive position vis-à-vis the justice of anticipatory military activities, the legitimate use of such actions was tied to the

45 O'Brien, *The Conduct of Just and Limited War*, 28.

46 Ibid., 31.

47 Guy Van Damme and Nick Fotion, "Proportionality," in Coppieters and Fotion (eds), *Moral Constraints on War*, 129.

48 O'Brien, *The Conduct of Just and Limited War*, 42.

49 Ibid., 42.

notion of self-defense, which is linked to an actual threat.[50] Force could only be used to forestall what was seen as an imminent attack. Johnson summarizes these positions as arguing that in order "to employ preemptive self-defense one must be absolutely certain that the enemy intends to attack."[51] But, Johnson also argues that "*the moment of last resort may come before the enemy fires its first shot across one's borders.*" [52] In other words, the use of force in an anticipatory manner can be congruent with the requirements of the just war tradition.

According to Osgood,

> The principles of just war, quite reasonably, proscribe the resort to war for ends other than self-defense. But the concept of national self-defense is plausibly stretched to cover an almost limitless range of actions encompassed in the expansive rubric of national security. On the other hand, the stricter construction of self-defense to proscribe 'aggression'—a concept that has proved impossible to define authoritatively—excludes the first use of force under a range of circumstances that, arguably, render the first use of force morally acceptable or even compelling—as, for example, in Israel's preemptive strike against Egypt in 1967 or America's blockade against the Soviets in the Cuban missile crisis of 1962.[53]

Osgood goes on to argue that while the "presumption against the first use remains valid," it "should not rule out anticipatory self-defense in exceptional and scrupulously circumscribed circumstances, as when it is clear that there is no other way to protect the state from external armed attack or intimidation."[54]

Support for this position can also be found in the writings of other contemporary just war scholars. According to Crawford,

> one may also, in cases of a credible threat of imminent attack, act preemptively to prevent such a threat from being realized. On the other hand, preventive war, waged to defeat a potential adversary before its military power can grow to rival your own, is not just.[55]

For Crawford, preemption can be "morally justified" provided that four conditions are met. First, the action must conform to a "narrow conception of the 'self,'" i.e.,

---

50 Johnson, "Just Cause Revisited."; Gregory M. Reichberg, "Preemptive War: What Would Aquinas Say?" *Commonweal*, 131, No. 2 (January 30 2004), 9–10. Again, it is important to stress the inherent complications inherent in the idea of "actual threat." Who determines what is a threat? Where is the line between perception and reality? For the purposes of this work, threats will be determined based on a) the coding of the dataset and b) the statements of the actors during the specific crises. The purpose of this work is not to determine if the threats were real, or merely imagined, but rather how the actors dealt with elements that have been coded as "threats" or were perceived as such.

51 Johnson, "Just Cause Revisited," 14.

52 Johnson, *Can Modern War Be Just?* 25 (emphasis added).

53 Robert E. Osgood, "Force in International Relations: The Moral Issues," in Kenneth W. Thompson (ed.), *Ethics and International Relations, Vol. 2: Ethics in Foreign Policy* (New Brunswick: Transaction Books, 1985).

54 Osgood, "Force in International Relations: The Moral Issues."

55 Neta C. Crawford, "Just War Theory and the US Counterterror War," *Perspectives on Politics*, 1, No. 1 (March 2003), 7.

"When our lives are threatened we must be able to defend ourselves, using force if necessary" but "war itself—and certainly preemption—is not justified to protect imperial interests or assets taken in a war of aggression." Next, the threat must be imminent and immediate, which only includes threats "which can be made manifest within hours or weeks unless action is taken to thwart an attack." In this respect, "capability alone is not a justification." The third criterion revolves around the likelihood of success. For preemption to be morally justified, "there should be a high likelihood that the source of the military threat can be found and that the damage it was about to do could be greatly reduced or eliminated by preemptive attack." Finally, the idea of last resort is also important. In this respect, "there must be no time for other measures to work, or those other measures must be unlikely to avert a devastating attack, the preparations for which are already underway."[56] In other words, the just war concepts of just cause, reasonable chance of success, and last resort must all be considered when determining if anticipatory military activities are "morally justified."

Walzer also argues that anticipatory military activities *are* permitted when there is "sufficient threat," which he describes as consisting of three things: "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."[57] Schroeder echoes this sentiment, stating that:

> To justify a resort to preemptive war, a state needs to give reasonable evidence that the step was necessary, forced upon the initiator by its opponents, and also that it represented a lesser evil, i.e., that the dangers and evils averted by war outweighed those caused the international community by initiating it. This requires showing that the threat to be preempted is (a) clear and imminent, such that prompt action is required to meet it; (b) direct, that is, threatening the party initiating the conflict in specific concrete ways, thus entitling that party to act preemptively; (c) critical, in the sense that the vital interests of the initiating party face unacceptable harm and danger; and (d) unmanageable, that is, not capable of being deterred or dealt with by other peaceful means.[58]

Again, this reiterates the centrality of the ideas of just cause, reasonable chance of success, and last resort.

Roberts argues that, with respect to the proliferation of nuclear, chemical and biological weapons, there can be a "moral case for preemption," provided that certain criteria are met.[59] He also argues that many of the traditional just war criteria should be evaluated somewhat differently with respect to the threat from nuclear, chemical, and biological weapons. These new technologies necessarily alter the calculus with respect to just cause, last resort, proportionality, and reasonable chance for

---

56 Neta C. Crawford, "The Best Defense: The Problem with Bush's "Preemptive" War Doctrine," *Boston Review*, 28, No. 1, February/March 2003, <www.bostonreview.net/BR28.1/crawford.html> (accessed September 5, 2004).

57 Walzer, *Just and Unjust Wars*, 81.

58 Paul W. Schroeder, "Iraq: The Case Against Preemptive War," *The American Conservative*, October 21, 2002, <http://www.amconmag.com/10_21/iraq.html> (accessed April 29, 2003).

59 Roberts, "NBC-Armed Rogues: Is There a Moral Case for Preemption?" 106.

success. For example, with respect to last resort, Roberts argues that "Particularly when rogue regimes and weapons of mass destruction are part of the threat calculus, the last-resort criterion should probably be subject to a quite narrow interpretation" since they can be developed quickly and "when arsenals already exist, deferring a preemptive strike may induce an aggressor to dispense his weapons and give him the time to do so, greatly reducing the likelihood that preemption will eliminate them."[60] These criteria, however, still must be met in order for any act of preemption to be "just."

Langan echoes this idea that modern technology necessitates a revision of just war criteria, particularly last resort. He argues that,

> A requirement that we must wait until an attack has actually begun seems unrealistic at a time when missiles can deliver destructive payloads within minutes and when terrorists can launch lethal surprise attacks. Some have claimed that the mere possession of weapons of mass destruction by a rogue state or by a terrorist group constitutes an intolerable threat to the security of the United States and its allies. It is clear that the acquisition and possession of such weapons indicates the presence of anxiety and hostility, and it is reasonable for a state that thinks itself to be the likely target of such weapons to take measures to defend itself. Indeed, if the danger is grave and imminent, then the state may well be justified in attacking first.[61]

Again, the notion of an imminent threat is a central requirement for any "just" use of force.

Others take a more expansive view of what types of anticipatory military activities are "just." Tucker, for example, argues that even preventive war can be justified since "the 'anticipatory' use of force remains as an integral feature of the right of self-defense the legitimacy of preventive war is preserved."[62] Weigel echoes this sentiment, arguing that "[a]t the level of moral principle, however, there may be instances when it is not only right to 'go first,' but 'going first' may be morally obligatory."[63] This position, however, is supported by a small minority of scholars.

At the same time, however, there are some that express concern about including anticipatory activities within the framework of the just war tradition. For Hoffmann,

---

60 Roberts, "NBC-Armed Rogues: Is There a Moral Case for Preemption?" 86–87.

61 Langan, "Is There a Just Cause for War Against Iraq," 89.

62 Robert W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore, MD: The Johns Hopkins Press, 1960), 121.

63 George Weigel, "Just War and Pre-Emption: Three Questions," *The Catholic Difference*, October 2, 2002, <www.eppc.org/news/newsID.1407/news_detail.asp> (accessed August 1, 2004). Weigel made this statement in the context of the debate concerning the potential US-led invasion of Iraq. It is worth recalling that Weigel takes the restrictionist approach that just cause has been limited to "defense against an aggression under way." At the same time, he has also argued that "When a vicious regime that has used chemical weapons against its own people and against a neighboring country, a regime that has no concept of the rule of law and that flagrantly violates its international obligations, works feverishly to obtain and deploy further weapons of mass destruction, a compelling moral case can be made that this is a matter of an 'aggression under way.'" (Weigel, "Just War and Pre-Emption: Three Questions").

"anticipatory self-defense—preemptive war—can be even more a source of serving-claims than self-defense against an armed attack in progress." He goes on to argue that this highlights one of the "central difficulties of *jus ad bellum*: each state's resort to self-interpretation, and the political uncertainties of assessment."[64] Foster echoes this, stating that the "established just war precepts, rather than being clear guides to action (or inaction), can be vague, malleable, and subject to self-serving manipulation by governments seeking both legitimacy and exculpation for their martial sins."[65]

It is interesting to note that the development and evolution of both international law and the just war tradition present specific parallels. For example, in both customary international law and the classical just war tradition (both which are "early" manifestations), anticipatory actions taken in self-defense, but not in response to an actual armed attack are permissible. At the same time, many interpretations of international treaty law and the contemporary just war tradition (both of which are "later" manifestations) limit the legitimate/just use of force to situations where an armed attack has already occurred. While these interpretations that limit the use of force to responsive self-defense are not unanimous, it is telling that these interpretations are present in scholarship focusing on both modern treaty law and the just war tradition.

As with international law, there seems to be a clear division between what types of anticipatory military activities are permissible and what types are not within the just war tradition. The imminence requirement once again proves to be the most salient in terms of distinguishing legitimate from illegitimate anticipatory military activities. In a similar vein to that found in international law, anticipatory military activities designed to counter an *imminent* threat are permitted. All others, whether designed to counter a distant or merely potential threat, are not considered legitimate.

There is also debate about the extent to which the requirements inherent in the just war tradition can, and do, influence state behavior. Elshtain states that "Just war insists on the power of moral appeals and arguments of the sort that, for the strategic realist, is mere window dressing, icing on the cake of strategic considerations."[66] Roberts argues that statesmen *are* influenced by the just war tradition, stating that the "memoirs of public officials along with public statements of the moment reveal a good deal of concern and often debate about whether particular military actions will be just, and will be perceived as just by the American public and the international community."[67] Walzer notes that the just war tradition "now provides the crucial framework, the vocabulary and the conceptual scheme, with which we commonly argue about war."[68] He also argues that "moral theory has been incorporated into war-making as a real constraint on when and how wars are fought."[69]

---

64 Stanley Hoffmann, "States and the Morality of War," *Political Theory*, 9, No. 2 (May 1981), 153.

65 Foster, "Just War Doctrine in an Age of Hyperpower Politics," 23.

66 Elshtain, "Just War and Humanitarian Intervention," 3.

67 Roberts, "NBC-Armed Rogues: Is There a Moral Case for Preemption?" 85.

68 Michael Walzer, "Words of War: Challenges to the Just War Theory," *Harvard International Review*, 26, No. 1 (Spring 2004), 37.

69 Michael Walzer, "The Triumph for Just War Theory (and the Dangers of Success)," *Social Research*, 69, No. 4 (Winter 2002), 933.

Oppenheim, on the other hand, argues that states should *not* be constrained on the basis of "moral principles." He argues that it would be "pointless to urge governments on moral grounds to disregard the national interest for the sake of other goals"[70] and "if a specific foreign policy is clearly the best or the only way of protecting national security, adopting it is not chracterizable as morally right or wrong."[71] According to Schlesinger,

> If in the management of foreign affairs, decisions can be made and questions disposed of on other grounds, so much the better. Moral values in international politics—or so, at least, my temperament enjoins me to believe—should be decisive only in questions of last resort. One must add that questions of last resort do exist.[72]

He goes on to add,

> It is not only that moral principles are of limited use in the conduct of foreign affairs. It is also that the compulsion to see foreign policy in moral terms may have, with the noblest of intentions, the most ghastly of consequences. The moralization of foreign affairs encourages, for example, a misunderstanding of the nature of foreign policy. Moralists tend to prefer symbolic to substantive politics. They tend to see foreign policy as a means, not of influencing events, but of registering virtuous attitudes.[73]

For Schlesinger, the "national interest" serves as a better determinant of foreign policy. This is not to say that there is no room for "morals" in foreign policy, but rather that they should be a component part of the national interest, "but they should not supersede it."[74]

Chapters 6, 7, and 8 seek to determine if the just war tradition does impact states' decisions vis-à-vis the use of anticipatory military activities. These chapters will examine the histories of particular cases to determine if the statesmen making the decisions used the just war tradition, or the ideas contained within it, when making their decisions about how to respond to particular international crises. Chapter 6 looks at how leaders responded to crises triggered by "imminent" threats, Chapter 7 examines cases where the crises were triggered by threats that were classified to be of a more distant nature, and Chapter 8 focuses on applications of the Bush Doctrine.

For the purposes of this work, emphasis will be placed on the ideas of just cause, last resort, and reasonable chance of success. The reasons for this are twofold. The first is primarily instrumental and related to the data available. Since the data available only includes actions taken by recognized, sovereign states, it is assumed

---

70 Felix E. Oppenheim, "National Interest, Rationality, and Morality," *Political Theory*, 15, No. 3 (August 1987), 379.

71 Ibid., 380.

72 Arthur Schlesinger, Jr., "National Interests and Moral Absolutes," in Ernest W. Lefever (ed.), *Ethics and World Politics: Four Perspectives* (Washington, DC: Ethics and Public Policy Center, 1988), 22.

73 Ibid., 27

74 Ibid., 34.

that they conform to the requirement of legitimate authority.[75] Additionally, since the data consists of responses to crises, it is assumed that the actions in question were not of a purely aggressive nature, but rather in response to an aggressive act by another state, which would conform to the requirements of right intention.

75 This assumption is also based on the idea that legitimate authority rests with the sovereign state and not with an international organization such as the United Nations.

This page intentionally left blank

Chapter 6

Strategic Necessity, Law, and Norms I: Anticipatory Military Activities and Imminent Threats

As discussed in the previous chapters, there are a variety of different approaches and explanations for the use, or non-use, of anticipatory military activities (AMAs). The international security literature suggests that anticipatory military activities are likely in response to numerous situations, such as shifting balances of power, weapons proliferation, and in response to the imminent threat of an armed attack.[1] According to this literature, the decision to utilize and employ AMAs is determined purely by the strategic situation, which is independent of either the constraints or requirements of both international law or the just war tradition. At the same time, however, the literatures from international law and the just war tradition provide numerous normative constraints and limitations on the legitimate use of these anticipatory military actions. The primary goal of the next three chapters is to examine individual cases where states had the opportunity to use AMAs (and either did or did not) in an attempt to ascertain if these legal and normative elements do in fact constrain states against the use of anticipatory military activities. In other words, are the security related elements or the legal and normative elements more influential?

The case studies examined are divided into three groups, based primarily on the type of threat posed in the specific crisis. There are two types of threats that are of primary interest in this study. The first is the threat of an imminent attack. In these

1 For more information on these arguments, see Richard K. Betts, "Surprise Attack and Preemption," in Graham T. Allison, Albert Carnesale and Joseph S. Nye, Jr. (eds) *Hawks, Doves, and Owls: An Agenda for Avoiding Nuclear War* (New York: W.W. Norton and Company, 1985); Richard K. Betts, "Striking First: A History of Thankfully Lost Opportunities," *Ethics and International Affairs*, 17, No. 1 (2003), 17–24; James D. Fearon, "Rationalist Explanations for War," *International Organization*, 49, No. 3 (Summer 1995), 379–414; Paul K. Huth, *Extended Deterrence and the Prevention of War* (New Haven, CT: Yale University Press, 1988); Richard Ned Lebow, *Between Peace and War: The Nature of International Crisis* (Baltimore: The Johns Hopkins University Press, 1981); Douglas Lemke, "Investigating the Preventive Motive for War," *International Interactions*, 29, No. 4 (2003), 273–92; Jack S. Levy, "Declining Power and the Preventive Motivation for War," *World Politics*, 40, No. 1 (October 1987), 82–107; Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960); Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca, NY: Cornell University Press, 1999); Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore, MD: The Johns Hopkins University Press, 1962).

cases, the anticipator acts due to the fact that it perceives that an attack is imminent. This is the type of action that is usually referred to as "preemptive." The second type of threat is more distant in nature, such as the development/deployment of a new technology that could be used against the anticipator at some point in time in the future. These activities are usually described as "preventive."

As discussed in Chapter 2, the use of the terms preemptive/preventive is problematic for a variety of reasons. This does not mean that the inherent differences in the underlying concepts are unimportant. Rather, it necessitates the use of different terminology to describe these actions. With this in mind, this study will examine the use of AMAs with respect to two different types of threats, or triggers, that initiated the crisis within which the AMA was used or considered as a policy option.

One of the unique elements of the International Crisis Behavior Project's dataset is that it includes information on "crisis triggers."[2] According to the ICB Codebook,

> The trigger or precipitating cause of a foreign policy crisis refers to the specific act, event or situational change which leads decision-makers to perceive a threat to basic values, time pressure for response and heightened probability of involvement in military hostilities. A trigger may be initiated by: an adversary state; a non-state actor; or a group of states (military alliance). It may be an environmental change; or it may be internally generated.[3]

There are two distinct triggers that are particularly relevant in this context, and that clearly distinguish between the traditional preemptive/preventive divide.

The first type of trigger is that of a "non-violent military act," which includes a: "show of force, war game or maneuvers, mobilization, movement of forces, [or] change of force posture to offensive."[4] These activities, rather than presenting a more distant threat, can be viewed as creating a more imminent threat of attack and war. In this respect, anticipatory military activities taken in response to a "non-violent military act" can be viewed as being "preemptive."

The second type of trigger is referred to as an "external change," which is described as an: "intelligence report, change in specific weapon, weapon system, offensive capability, change in global system or regional subsystem, [or] challenge to

---

2 The ICB dataset was chosen as the primary source of cases for this project due to its unique character. It codes for the "triggering events" that precipitated a crisis, rather than focusing on the first use of force, as is the case in the more standard datasets such as the Correlates of War (COW) or the Militarized Interstate Dispute (MID) datasets. In this respect, the ICB data provides an excellent opportunity to investigate when states use anticipatory military activities (i.e., first use of force or potential for use of force). The ICB project website gives case descriptions, including historical background, which will be used to determine which crises were actual or potential instances of anticipatory military activity. This information is available at: http://www.cidcm.umd.edu/icb/dataviewer/. It is important to note that only crises that were triggered by external entities and that were not part of an intra-war crisis were included in this analysis.

3 Michael Brecher and Jonathan Wilkenfeld, *International Crisis Behavior (ICB) Online*, 2003 <http://www.cidcm.umd.edu/icb/dataviewer>.

4 Brecher and Wilkenfeld, *International Crisis Behavior (ICB) Online.*

legitimacy by international organization."[5] The activities included within this trigger represent more distant, or even merely potential, threats. In this respect, AMAs taken to counter this type of trigger could be described as being "preventive" in nature.

These two distinct triggers can also be distinguished in another manner. Actions designed to counter the "non-violent military act" trigger can also be termed "conventional uses," and can be viewed as activities intended to counter a conventional military threat. As discussed above, these activities are usually employed to respond to an imminent threat. Examples of such uses include the Israeli attack on the Egyptian army in June 1967 and the British strike on American forces in 1837, known as the Caroline incident.[6]

The second type of threat deals with the problems of proliferation or actions that could signal the development of more distant threats by other states. While these activities are often designed to function as a "counterproliferation tool," they could also be in response to other operational military changes by an adversary, as indicated by the trigger label of "external change." In this respect, these activities are designed to counter more distant threats. Examples of this type include the Israeli attack on the Iraqi nuclear reactor in 1981 and possible attacks by the United States on Chinese nuclear facilities in 1960–64[7] and North Korea in 1993–94.[8]

As discussed in the previous chapters, activities designed to counter an imminent military threat are more conducive to justification vis-à-vis both the just war tradition and international law. Brown notes that the "right to preempt" is in fact "an extension of the right of self-defense," but only if "it is indisputably the case that there is an imminent threat of unprovoked aggression".[9] Preparations for launching an attack, such as troop mobilizations, are highly visible and thus it is easier to demonstrate that the adversary was preparing for an imminent attack.

---

5 Brecher and Wilkenfeld, *International Crisis Behavior (ICB) Online*.

6 These actions are usually referred to as "preemptive war." Van Evera argues that there are three distinct types of preemptive war: generic preemptive war, accidental war, and reciprocal fear of surprise attack. Since each of these categories all concern conventional military threats, they are all included in this first group of activities. See Van Evera, *Causes of War*, 42–44.

7 William Burr and Jeffrey T. Richelson, "Whether to "Strangle the Baby in the Cradle": The United States and the Chinese Nuclear Program, 1960–64," *International Security*, 25, No. 3 (Winter 2000/01), 54–99; Lyle J. Goldstein, "When China Was a 'Rogue State': The Impact of China's Nuclear Weapons Program on US-China Relations During the 1960s," *Journal of Contemporary China*, 12, No. 37 (November 2003), 739–64; Robert S. Litwak, "The New Calculus of Pre-Emption," *Survival* 44, No. 4 (Winter 2002–03), 53–80.

8 Bruce Cumings, "Bush's Bomb," *Nation*, 276, No. 19 (March 19 2003), 4–5; Bruce Cumings, "North Korea: The Sequel," *Current History*, 102, No. 663 (April 2003), 147–51; Litwak, "The New Calculus of Pre-Emption," 64; James J. Przystup, *Anticipating Strategic Surprise on the Korean Peninsula*, Strategic Forum No. 190 (Washington, DC: Institute for National Strategic Studies, National Defense University, 2002), <http://www.ndu.edu/inss/strforum/SF190/sf190.pdf>; Jonathan Schell, "A Nuclear Education: Letter from Ground Zero," *Nation*, 276, No. 20 (May 26 2003), 7.

9 Chris Brown, "Self-Defense in an Imperfect World," *Ethics and International Affairs*, 17, No. 1 (2003), 2–8.

The second type of activities presents a more complicated situation.[10] With respect to anticipatory activities designed for counterproliferation or in response to another type of "external change," it is harder to a) prove that the new technology, reactor, or chemical/biological weapons factories are solely for military purposes, b) show that these weapons will be used against the preemptor/preventer as soon as they are deployable, and c) show that the preemptor/preventer is the intended target of these weapons. Lacking affirmative confirmation of the above criteria, acting in an anticipatory manner against such targets is not congruent with the standards imposed by international law or the just war tradition.

Aside from the difficulties addressed above, there are at least two elements that influence the possibility of such activities being undertaken. The first element that influences the use of AMAs as a counterproliferation tool is where the weapons program stands in terms of its development. In other words, if the new technology is already deployed, the reactor has already been turned on, or if viable chemical/biological agents have already been produced, military activity against the production facilities is unlikely. The reason for this is straightforward: at this stage in WMD development, destruction of the facilities would be as bad as an attack using the weapons. To be sure, the damage would be inflicted upon the developing state, but it would be harder to justify any activities that would have such catastrophic consequences. Additionally, the preemptor/preventer would also have to consider the likelihood of a reprisal using these WMD by the target state.

The second element that plays a role in determining the use or non-use of AMAs for counterproliferation focuses on the previous interactions of the states involved. In this respect, these activities are more likely to be used in instances where there have been previous deterrence failures. Conventional deterrence is a much easier strategy to pursue, and it is assumed that it will remain the preferred method to counter proliferation. If, however, there is a prior relationship between the would-be preemptor/preventer and the target state where deterrence failed, it is unlikely that the preemptor/preventer would attempt the same strategy again. Rather, it would search for alternatives, hence the use of AMAs.

Although international law is unclear about the legitimacy of anticipatory activities, there is a demarcation between what activities can be considered acceptable and those that are not. First, it is generally accepted that states should defer to the United Nations Security Council to deal with threats. States are able to undertake unilateral (or multilateral, but outside of the UN) responses to threats only after the UN has been consulted, but failed to act. In this respect, it is essential to determine if the states in question attempted to work through the UN, or bypassed it in favor of unilateral action. This requirement dovetails with the just war requirement of "last resort" that requires all other remedies for solving the crisis be implemented before military actions are taken.

The use of an AMA, but one that did not include the actual use of force, could indicate that the actor was sensitive to the limitations on the use of force contained in both international law and the just war tradition. For example, a mobilization could begin while negotiations are underway. If the negotiations failed, the state would

10 These types of activities will be examined in Chapter 7.

be in a position to still use anticipatory military force, while still adhering to the requirements of last resort. Additionally, the state could mobilize while the Security Council deliberated on the issue. If the Security Council failed to act, the state could use anticipatory military force in accordance with international law, since the use of force in self-defense is permitted when the Security Council fails to act.

Finally, leaders who are more risk-averse are less likely to use AMAs when the legitimacy or legality of such actions are in question. Such actions could inflict substantial costs on the anticipator, costs that a risk-averse actor may be unwilling to accept. If the AMA is designed to counter an imminent threat, which could be viewed as "legitimate," or if the threat is severe enough, the benefits of taking such action would outweigh the potential costs. For actors who are more risk-acceptant, the constraints against taking anticipatory military action to counter a non-imminent threat should not be as influential.

Finally, it is important to stress that the primary and quintessential goal of all states is survival. In that respect, if a state feels that its survival is truly on the line in the crisis, it will do anything and everything to ensure that it lives to see another day, so to speak. Accordingly, the prohibitions on taking anticipatory action contained within the legal and normative literatures should not constrain states that find themselves in this type of situation.

There is a clear distinction between imminent and more distant threats in both the international law and just war literature, and although this line is notoriously hard to define, the distinction is essential with respect to both legal and normative justification for the activities in question. For this reason, the case studies are divided along this distinction. Threats that were classified as imminent[11] are examined in this chapter. The cases dealing with more distant and developing threats[12] will be discussed in the next chapter. Finally, cases involving application of the Bush Doctrine are investigated in a separate chapter.[13]

Three cases will be examined for each type of threat, one representing each of three alternative responses: the use of an anticipatory military action that included the use of force, the use of an anticipatory military action that did not include the use of force, and no response.[14] By examining multiple cases that are similar with respect to the crisis trigger, but differ in terms of the response taken, it is possible to look at the differing impact of the various influences (i.e., structural/ security,

---

11 These types of threats are coded as "non-violent military" triggers in the ICB dataset. For more information on the ICB dataset, see http://www.cidcm.umd.edu/icb/dataviewer.

12 These types of threats are coded as "external change" triggers in the ICB dataset.

13 Unlike Chapters 6 and 7, the cases investigated vis-à-vis the Bush Doctrine are not divided by type of threat. More details on case selection with respect to the Bush Doctrine are provided in Chapter 8.

14 The cases were selected first on the basis of the type of trigger that initiated the crisis—either a non-violent military event or an external change. Only after this first selection on the basis of an independent variable was made were the values on the dependent variable considered. The three cases studied present variation with respect to the value of the dependent variable. For information on the importance of this element, see Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton University Press, 1994), 129–32.

legal, and normative). In other words, the primary goal of these case studies is to determine if the legal and normative elements discussed in the previous chapters constrained states and influenced what type of response was chosen to deal with a specific crisis.

For the purposes of these cases studies, it is important to note at the outset that it is not the entire period of the crisis, or all actions taken within the crisis, that is under investigation. Rather, we are interested in only a very limited segment of each crisis. Since the primary question we are trying to answer involves the use (or non-use) of an anticipatory military activity, only a certain portion of each specific crisis is relevant. Specifically, the time period under investigation begins with the triggering event that signals the beginning of the crisis (as identified in the ICB dataset) and ends when the decision vis-à-vis the use of an anticipatory military activity is made. This does not mean that prior events will be ignored or excluded, but rather that they will only be included as they pertain to the decisions in the individual crises with respect to the use of anticipatory military activities.

Additionally, the case studies presented below are not intended to present comprehensive or exhaustive histories, descriptions, or discussions of the individual crises or events. There are vast literatures on most of the cases presented, and it is not the intention to repeat or attempt to replicate those studies below. Rather, these case studies are intended to examine *one* aspect of the various crises or events—namely the decision for or against employing an anticipatory military activity. Therefore, there are elements of each crisis that will not be addressed or discussed at length.[15] It should also be stressed that the case studies are primarily focused on the actions taken by one particular actor within the crisis, namely the actor who was in the position to take anticipatory military action in response to the particular crisis trigger. To be sure, no crisis occurs in a vacuum, and there are always at least two sides involved in any crisis.[16] In this respect, the actions of third parties are included to the extent that they influenced the decision vis-à-vis anticipatory military activities.

The three cases addressed in this chapter are the June 1967 Israeli strike on Egypt (the Six Day War crisis), the July 1951 Indian mobilization (the Punjab War Scare I crisis), and the Israeli decision in October 1973 not to deploy troops or respond to reports of an impending attack (the October-Yom Kippur War crisis).[17] To what extent

15 For example, the operational details of the decisions made during the actual fighting, i.e., the histories of the actual wars or attacks, will not be discussed in these case studies. Where applicable, references to descriptions and histories of these cases will be provided.

16 The narrow scope of the case studies is not intended to downplay the importance of other actors who were involved in the specific crisis, but rather to allow for a more in-depth analysis of the decisions of the specific actor studied. These other actors are not wholly excluded from the analysis, but rather they are not the central focus. The goal is to try to understand the actions of a *specific* actor in a particular crisis—how did actor X respond to the specific triggers in this crisis.

17 The cases selected represent the range of possible outcomes on the dependent variable: use of an anticipatory military that included the use of force, use of an anticipatory military activity that did not include the use of force, and a response that did not include the use of an anticipatory military activity. For a discussion on the importance of including "negative cases," see James Mahoney and Gary Goertz, "The Possibility Principle: Choosing Negative

did the legal and normative constraints on the use of AMAs influence the decision makers involved in these crises? Did these elements play a role in the determination of what policy/reaction would be employed in response to the crisis?

Going First: The Israeli Decision to Use An Anticipatory Military Activity in June 1967

The Israeli decision to use an anticipatory military action in June 1967 is often described as a textbook example of a "preemptive" strike designed to deal with an imminent threat. According to Handel, the following elements had been expressed to be *casi belli* (or actions that would be viewed as a cause of war) by Israel:

a. *A threatening concentration of Arab military forces on one or more of its borders* (especially when combined with new military treaties among Arab neighboring states directed against Israel).
b. The closing of the Straits of Tiran or *any* other *direct air and sea routes to Israel*.
c. An intolerable level of Arab guerilla activities or any other form of intensified military semi-warfare that cannot be countered by reprisal or retaliation policies.
d. An attempt by an Arab state more powerful than Jordan or Lebanon to take control of either of these and change the balance of power on Israel's eastern or northern border.
e. A situation in which Israel's security is seriously undermined by unbalanced arms supplies to Arab countries not matched by similar supplies to Israel.[18]

During the period leading up to the Six Day War, many of these *casi belli*, which are also referred to as "red lines," had been crossed by Egypt, Syria, and Jordan, such as the blockade of the Straits of Tiran, the movement of Egyptian troops into the Sinai, and the placement of the Jordanian armed forces under foreign command. Israeli decision makers felt that the writing was on the wall: war was imminent. And, due to its strategic situation, it could ill-afford to absorb a first blow. Accordingly, Israel seized the initiative and struck first, initiating an anticipatory military activity against its Arab neighbors on the morning of June 5, 1967.

But, is this the whole story? Was the decision to "preempt" based solely on the strategic situation? Or, were alternatives, particularly those in the diplomatic realm, also considered and pursued first? Did the Israeli actions conform to the requirements of international law and the just war tradition? Were Israeli decision makers concerned with the legal and normative constraints? Or did the strategic concerns trump all else? From the various case histories, reports, and documents

---

Cases in Comparative Research," *American Political Science Review*, 98, No. 4 (November 2004), 653–69.

18 Michael I. Handel, *Israel's Political-Military Doctrine*, Occasional Papers in International Affairs No. 30 (Cambridge, MA: Center for International Affairs Harvard University, 1973), 65 (emphasis in original).

available concerning the time leading up to the outbreak of the Six Day War,[19] it appears that the decision to use an anticipatory military action was only taken as a last resort, after all other avenues, particularly diplomatic and legal, had been exhausted. Additionally, there is some support for the conclusion that the Israelis had at least the tacit approval from the United States for the action. In this respect, it appears that the constraints inherent in both international law and the just war tradition did influence Israeli decision makers and did play a role in the policy ultimately chosen to deal with the specific crisis.

According to the ICB data, the Six Day War crisis began on May 17, 1967 with two specific acts carried out by Egypt. The first act was an overflight by the Egyptian air force of the Israeli nuclear research facility in Dimona and the deployment of Egyptian troops into the Sinai. These acts were then followed by the expulsion of UN observer forces (UNEF) from the Sinai,[20] forces which had been dispatched to the region following the 1956 Suez crisis/war in order to maintain the cease-fire in the area. The next major escalation of hostilities was the Egyptian closure of the Straits of Tiran on May 22–23, which constituted a virtual blockade of the Israeli southern port of Eilat. Additionally, according to Sela, the blockade of the Straits was "accompanied by threatening, bellicose speeches, tauntingly challenging Israel to war and proclaiming that Egypt was now strong enough to win."[21] It was within this context that the decision regarding the use of anticipatory military action unfolded.

In his analysis of the Six Day War, Brecher divided the crisis period into three distinct phases: 1) May 17–22: "Apprehension and Mobilization;" 2) May 23–28: "Delay and Diplomacy;" and 3) May 29–June 4: "Resolution."[22] This temporal distinction is useful for understanding how the Israeli leadership came to the decision to use an anticipatory military action. Additionally, it is possible to see how the various influences of structural/security, legal, and normative elements shifted in importance throughout the different stages of the crisis. Accordingly, Brecher's crisis timeline will be used to structure the analysis below.

The primary Israeli decision-makers during this crisis were Prime Minister and Defense Minister[23] Levi Eshkol, Foreign Minister Abba Eban, Minister of Labor Yigal Allon, and Moshe Dayan. After the formation of a national unity government on June 1, 1967, the following individuals were members of the Ministerial Committee on Defense, within which the decision to take anticipatory action was made: Zalman

---

19 Numerous names have been given to each of the wars fought between Israel and the Arab states. For the sake of clarity and consistency, this work uses the same names as used in the ICB case descriptions.

20 The official "request" to remove the UNEF troops had been made before Egyptian troops had been moved into the Sinai, but their removal did not take place until the after the Egyptian troop movement had begun.

21 Avraham Sela (ed.), *Political Encyclopedia of the Middle East* (Jerusalem, Israel: The Jerusalem Publishing House, Ltd., 1999), 65.

22 Michael Brecher, *Decisions in Crisis: Israel, 1967 and 1973* (Berkeley: University of California Press, 1980), 91–92.

23 Eshkol held both portfolios until June 1, 1967 when the defense portfolio was given to Moshe Dayan.

Aranne, Minister of Education and Culture; Abba Eban; Pinhas Sapir, Minister of Finance; Eliahu Sasson, Minister of Posts; Yaacov Shimshon Shapira, Minister of Justice; Yigal Allon; Israel Barzilai, Minister of Health; Haim Moshe Shapira, Minister of Interior; Zerah Warhaftig, Minister of Religious Affairs; Moshe Kol, Minister of Tourism; Menachem Begin, Minister without Portfolio; Yosef Saphir, Minister without Portfolio; and Moshe Dayan, Minister of Defense.

Stage 1: May 17–22

The first stage of the crisis began with the withdrawal of the UNEF forces from the Sinai and the subsequent movement of Egyptian troops into the area. According to Wagner,

> Although Egypt was reluctant to ascribe any aggressive motives to this action, her Syrian brothers were not so reserved, as indicated in a statement of Syrian foreign Minister Ibrahim Makhous: 'The withdrawal of the UN forces in this manner, which means 'make way, our forces are on their way to the battle,' proves that there is nothing that can stand in the way of the Arab revolution and that reaction's attempt to raise doubts regarding the presence of these forces had boomeranged.'[24]

The Israelis were concerned by this action, and by such statements. Aware of Israeli concerns, President Johnson explicitly warned the Israelis against engaging in "retaliatory action"[25] in response to Egyptian actions in Sinai. According to Rodman, "While [Washington] did not formulate a specific solution to the crisis, it apparently hoped to restore the status quo ante—that is, to put United Nations peacekeeping troops back at their posts as well as to convince Israel and Egypt to demobilize their armed forces."[26] In what would soon become an all-too familiar mantra, Johnson stated in a note dated May 18,

> I want to emphasize strongly that you have to abstain from every step that would increase the tension and violence in the area. You will probably understand that the United States cannot accept any responsibility for situations that are liable to occur as a result of action in which we were not consulted.[27]

For the Israelis, the message from the United States was clear: do not take any unilateral action at this point in time. And, as long as the situation remained as it was, the Israelis were prepared to live with the status quo. As Wagner notes, the situation on May 18 was such that "The consensus among the members of the Israeli government was still that this move was forced on Nasser by [political] pressure and

24 Abraham R. Wagner, *Crisis Decision-Making: Israel's Experience in 1967 and 1973* (New York: Praeger Publishers, 1974), 68–69.

25 It is not entirely clear what Johnson meant by "retaliatory action." At the same time, however, it does seem likely that Johnson was cautioning Israel against using anticipatory action in response to the crisis.

26 David Rodman, "The Diplomatic Prelude to the Six-Day War," *Midstream*, 47, No. 4 (May/June 2001), 8.

27 Brecher, *Decisions in Crisis*, 107.

that the UNEF withdrawal was an international issue and had not yet reached the stage of severe domestic crisis."[28] In other words, let the international community deal with the problem.

Indeed, the issue of UNEF troops was perfectly suited for the international community since it dealt with an issue that was squarely within the international community's purview. According to Bar-Zohar, there was a "top-secret document kept in the UN files that Hammarskjöld had drawn up in 1957 after a seven-hour conference with Nasser in which it had definitely been agreed that the UN forces stationed in Sinai could not be withdrawn without the consent of the UN General Assembly."[29] Since no General Assembly consent had been granted to the withdrawal of the UNEF forces, it could be argued that Nasser was in violation of this agreement. Bar-Zohar goes on to argue that while Eban was making this argument, "He seemed to forget that the most solemn treaty becomes only a scrap of paper as soon as one of its signatories decides to disregard it."[30] The crisis soon progressed beyond the legality of Nasser's expulsion of the UNEF forces.

The situation began to change dramatically on May 19, when it became clear to the Israelis that the Arab states were beginning to coordinate their forces, Syria announced that its forces were fully mobilized, and Egyptian missile bases were at "full alert." Additionally, large numbers of troops and materiel were being massed by the Egyptians in the Sinai. As a result of these developments, it was believed in Israel that it was now a possibility that the Straits of Tiran could be closed,[31] which was a declared "red line" for Israel. In response to the new, and worsening situation, the Israeli Cabinet decided to mobilize troops and also to try to enlist international support for its rights to the international waterway in the event that it should be closed. These diplomatic efforts were clearly couched in both the terminology and spirit of international law. Rather than respond to the crossing of the declared red lines with the use of military force, as would be predicted by the security literature,[32] the Israeli government instead decided to pursue non-violent means of conflict resolution first.

---

28 Wagner, *Crisis Decision-Making*, 69.

29 Michael Bar-Zohar, *Embassies in Crisis: Diplomats and Demagogues Behind the Six-Day War*, translated by Monroe Stearns (Englewood Cliffs, New Jersey: Prentice-Hall, Inc, 1970), 38.

30 Bar-Zohar, *Embassies in Crisis*, 39.

31 See Michael B. Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (New York: Oxford University Press, 2002), 76–77. It is important to note that the blockade/closure of the Straits of Tiran was a major cause of the 1956 Suez Crisis/War. For more information on this crisis/war see Keith Kyle, *Suez* (New York: St. Martin's Press, 1991); Sela, *Political Encyclopedia of the Middle East*.

32 As discussed in Chapter 3, according to the security literature one of the principal ways in which states would deal with this type of situation (whereby an adversary crossed stated red lines) would be the use of an anticipatory military activity. There are two primary reasons for this course of action. First, the state might chose to take anticipatory action in order to preserve its future deterrent capabilities, believing that failing to act now would erode its ability to deter future "aggressive" actions. Second, the state might take anticipatory action in the belief that war, or a military action, is likely in the short term (i.e., imminent), and it would be better to "go" now as opposed to waiting when the situation might be less favorable.

In other words, Israel sought recourse through the use of international law before using military force—which would then be used as a last resort after the other means had failed. Brecher notes that:

> The Prime Minister wrote to de Gaulle: 'Israel on her part will not initiate hostile acts but she is firmly resolved to defend her territory and her international rights. Our decision is that if Egypt will not attack us, we will not take action against Egyptian forces at Sharm-e-Sheikh—until or unless they close the Straits of Tiran to free navigation by Israel.'[33]

Foreign Minister Eban also sent correspondence to his French counterpart, Couvre de Murville. Again, according to Brecher,

> Eban reminded him that France had in the past confirmed, and identified herself with, former Foreign Minister Meir's statement of March 1957, in which Israel stated that "Interference with free passage will be regarded by Israel as an attack entitling it to exercise of the inherent right of self-defense under Article 51 of the United Nations Charter."[34]

In this respect, the diplomatic activity undertaken during the first stage of the conflict clearly shows that the Israeli government was concerned with acting within the confines of international law, and fully expected to get support from the law. The centrality of international law in the minds of Israeli decision makers is clear. Not only were they asking for the support of their friends and allies, but they were also laying the legal justifications for any future actions.

On May 22, after the announcement of the withdrawal of the UNEF forces from Sinai, but before the closure of the Straits of Tiran, Eshkol announced to the Knesset that he had authorized a partial mobilization of reserve troops in response to the developing crisis. During the debate that ensued, there were some who called for Israel to take a more activist policy in response to the Arab actions. MK Menachem Begin stated,

> [Israel] will not accept violations of our national sovereignty, acts of hostility or mines; it will act within its internationally-recognized rights to defend itself against this aggression.
>
> A week ago Egypt announced that it was sending its forces towards Israel … and that if Israel attacked Syria, Egypt would wage war on Israel … Everyone knows that Egypt is at war with Israel. If that country sends its troops, tanks, planes and cannon towards our border, that is an open and explicit threat of aggression. That is how the entire world understands troop movements of this kind on the border between two countries, one of which has announced that they are at war.[35]

33 Brecher, *Decisions in Crisis*, 111.

34 Ibid., 111.

35 Netanel Lorch (ed.), *Major Knesset Debates, 1948–1981* (Lanham Maryland: Jerusalem Center for Public Affairs and University Press of America, Inc., 1993), 1556.

Begin also discussed the notion of the erosion of Israeli deterrence:

> The enemy in the south threatens us with aggression if we use our right to defend ourselves against the aggression of the enemy in the north. If that threat were to succeed, if we were to accept acts of hostility orchestrated by Syria and implemented by its emissaries, because Egypt threatens us with aggression … not only would that be an unparalleled victory for the enemy but our state would be open to attack, Jewish blood could be shed freely and our sovereignty would be a mockery. That is why it must be said loud and clear that the threat of aggression from the south will not induce Israel to accept the aggression from the north. And if that aggression continues Israel will implement its right to self-defense.[36]

Begin, a member of the opposition at the time,[37] was setting out the argument for taking unilateral action (and the possibility of military action) to deal with the situation. While the argument was still couched in the framework of self-defense, it was predicated on the notion of self-reliance—the idea that Israel had to act to protect its own interests. At this stage in the crisis however, the Eshkol government was not yet prepared to abandon the diplomatic/multilateral approach in favor of Begin's preferred unilateral path. In this respect, the strategic elements that might seem to indicate the use of an AMA were overridden by a desire to continue to pursue non-military means at this point in the crisis.

The final element that Brecher includes in this first stage of the crisis was Nasser's decision on May 22 to close the Straits of Tiran.[38] This event also signaled a significant shift and escalation in the crisis.

Stage 2: May 23–28

On May 23, Nasser gave a speech where he announced the closure of the Straits to all ships traveling to Israel, which Spiegel describes as "technically an act of war".[39] During this speech, Nasser stated,

> Yesterday the armed forces occupied Sharm [el]-Shaykh. What does this mean? It is an affirmation of our rights of our sovereignty over the Gulf of Aqaba, which constitutes Egyptian territorial waters. Under no circumstances can we permit the Israeli flag to pass through the Gulf of Aqaba. The Jews threatened war. We say they are welcome to war, we

36 Lorch, *Major Knesset Debates*, 1557–58.

37 Begin would become a minister without portfolio in the National Unity government that would be formed on June 1, 1967.

38 It is interesting to note that, according to Quandt William B. Quandt, *Decade of Decisions: American Policy Toward the Arab-Israeli Conflict, 1967–1976* (Berkeley: University of California Press, 1977), 43, Johnson ordered the Sixth Fleet moved into the eastern Mediterranean on May 22. It is unclear, however, if the orders came before or after the Straits were closed to Israeli shipping. Regardless of the timing vis-à-vis the closure of the Straits, the movement of the Fleet, with its two aircraft carriers was indicative of the fears of impending escalation of the crisis.

39 Steven L. Spiegel, *The Other Arab-Israeli Conflict: Making America's Middle East Policy, From Truman to Reagan* (Chicago: University of Chicago Press, 1985), 137.

> are ready for war, our armed forces, our people, all of us are ready for war, but under no circumstances shall we abandon any of our rights. These are our waters.[40]

Not only did Nasser announce the blockade of Israel, but he also made it clear that Egypt was preparing for war with Israel, an event that clearly concerned the Israelis.[41]

While U Thant, the Secretary General of the United Nations, acquiesced to Nasser's request to remove UNEF troops from the Sinai, and the UN Security Council failed to take any action regarding either the removal of UNEF or the blockade of the Straits,[42] both the United States and the United Kingdom viewed the blockade as a violation of international law. In a statement on May 23, 1967, President Johnson stated that,

> The United States considers the gulf to be an international waterway and feels that a blockade of Israeli shipping is illegal and potentially disastrous to the cause of peace. The right of free and innocent passage of the international waterway is a vital interest of the entire international community.[43]

According to Quandt, "In an effort to build public support for the administration, the president contacted former President Eisenhower, who confirmed that in 1957 the United States had recognized that if force were used to close the strait, Israel would be within her rights under Article 51 of the UN Charter to respond with force."[44]

In this respect, Israel had some foundation within international law to take action in order to restore its legal rights to use what were viewed as international waters. At the time of the blockade, however, there was substantial pressure, particularly from the United States, not to take anticipatory action. Even though Johnson supported

---

40 Meron Medzini (ed.), *Israel's Foreign Relations: Selected Documents, 1947–1974* (Jerusalem: Ministry for Foreign Affairs, 1976), 740.

41 This created a situation similar to Schelling's description of why states might initiate surprise attacks. According to Schelling, fear that the other may be about to strike can create a situation where "it looks as though a modest temptation on each side to sneak in a first blow—a temptation too small by itself to motivate an attack—might become compounded through a process of interacting expectations, with additional motive for attack being produced by successive cycles of 'He thinks we think he thinks we think … he thinks we think he'll attack; so he thinks we shall; so we will; so we must." Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960), 207.

42 According to Safran, Soviet opposition prevented the passage of a US–sponsored resolution that would have prohibited Egypt from initiating the blockade while the Security Council discussed the issue. Nadav Safran, *Israel: The Embattled Ally* (Cambridge, MA: The Belknap Press of Harvard University Press, 1982), 389.

43 Medzini, *Israel's Foreign Relations*, 742. In June, 2007, the United States declassified a large number of documents related to internal discussions and debates about the Six Day War crisis. However, since the focus of this discussion is Israeli decision-making and not US decision-making, a full discussion of this new information is outside of the scope of this investigation. The text of these documents can be found at: http://www.fas.org/irp/congress/2007_hr/1967executive.pdf and http://www.state.gov/r/pa/ho/frus/johnsonlb/xix/28054.htm.

44 Quandt, *Decade of Decisions*, 44.

Israeli rights to use the waterway, he cautioned Israel against taking unilateral actions to secure those rights.[45] This element will be discussed in more depth below.

It was after Nasser's speech announcing the blockade of the Straits that Prime Minister Eshkol again addressed the Knesset with respect to the situation. Eshkol presented a summary of the events that had occurred between the 15th and 22nd of May, and the actions that the government had taken in response, up to and including the decision to mobilize reserve troops. In this address, Eshkol clearly linked international law and the blockade of the Straits. He stated that,

> [A]ny obstruction of freedom of navigation in the Gulf and the Straits is a grave violation of international freedom and the sovereign rights of other nations and an act of aggression against Israel.
>
> As the Knesset knows, since 1957 various governments, including those of the principal maritime nations, have declared their intention of implementing their rights to free navigation in the Straits of Tiran and the Gulf of Eilat. During the last few days Israel has been in close contact with those governments... In consequence, I can say that international support for those rights is serious and quite widespread.
>
> What is to be tested here is a clear and official international commitment on which international law and order depends. Thus, this is a fateful moment not only for Israel but for the whole world. In view of this situation, I hereby appeal to the Powers to act immediately to implement the right to free navigation to our southern port, a right which belongs to every nation, without discrimination.[46]

In this respect, Eshkol was making a clear and direct appeal to international law in order to resolve the crisis.[47] At this point in time, Israel could have chosen to take unilateral (and anticipatory) military action in response to Egyptian actions. It did not. Rather, it chose to pursue diplomatic and legal action, attempting to resolve the crisis through means other than resort to force.

At a Ministerial Defense Committee Meeting on the same day, Eban stated that it "is not whether we must resist, but whether we must resist alone or with the support and understanding of others."[48] According to Brecher, although the Egyptian actions

---

45 In fact, "restraining Israel" was one of the key elements of Johnson's strategy to deal with the crisis. According to Quandt, "A dilemma clearly existed. In order to keep Israel from acting on her own, as even the United States acknowledged she had a right to do in order to reopen the strait, an acceptable alternative had to be presented. The stronger the stand of the United States and the firmer its commitment to action, the more likely it was that Israel could be restrained; by the same token, the less likely it was that Nasser would probe further. Yet a strong American stand was incompatible with the desire for multilateral action, which had to be tried, in Johnson's view, in order to ensure congressional and public support. Such support was essential at a time of controversy over the United States role in Vietnam." Quandt, *Decade of Decisions*, 45.

46 Lorch, *Major Knesset Debates*, 1570.

47 The United States had already stated that it considered the Straits to be an international waterway, to which all states should be afforded equal access. It was this "right" to which Eshkol was referring.

48 Brecher, *Decisions in Crisis*, 120.

challenged Israel's deterrent capability—a fundamental component of Israel's security conception—"before Israel responded militarily, there were several powerful reasons for diplomatic activity: to explore Soviet intentions; to test the willingness of the Western powers to fulfill their 1957 commitments to break Israel's isolation; and to consult with friendly states, first and foremost the United states, in order to assure their diplomatic support if victory were achieved on the battlefield."[49]

To this end, the Cabinet made three decisions with respect to the blockade of the Straits of Tiran: 1) the blockade was an act of "formal aggression"; 2) a formal decision on how to respond to the blockade would be postponed for forty-eight hours while advice was sought from the United States; and 3) the Foreign Minister would explore the possibility of traveling to meet in person, with the President of the United States to discuss the situation.[50] There was much debate during the meeting and, although the formal decision was made to wait, it was by no means supported by all in attendance.

Even as Prime Minister Eshkol was receiving advice from his generals that the time was ripe to take anticipatory action,[51] he was being advised against such a course of action from the United States. According to Oren, the Israelis had received further correspondence from President Johnson that not only reiterated the United States' commitment to Israel's security, but also asked Israel to "manifest steady nerves." Furthermore, this letter assured the Israelis that the United States was working with others "to peaceably resolve the crisis 'in the United Nations or outside it.'"[52] Additionally, the United States was willing to provide both military and civilian assistance to Israel while attempts were made to diffuse the crisis diplomatically. However, there was a catch to this assistance. Again, according to Oren,

> Israel could not challenge the blockade with a test boat or under any circumstances precipitate war. 'Any Israeli unilateral action cold be justified only after all peaceful measures had been exhausted,' Undersecretary Rostow warned Eppy Evron. 'Such justification would have to be demonstrated before the people of the United States and the world.'[53]

As long as the primary threat remained only the blockade of the Straits, Eshkol and the Cabinet were content to wait for the United States and the other maritime states, such as the United Kingdom, to try to work out a solution.

---

49 Brecher, *Decisions in Crisis*, 120.

50 Brecher, *Decisions in Crisis*, 121–22; Abba Eban, *Abba Eban: An Autobiography* (New York: Random House, 1977), 337.

51 Wagner, *Crisis Decision-Making*, 73. Stein notes that Rabin, a major proponent of taking military action, "acknowledged that a 48–hour delay would impose little military cost. The additional time would be used to complete military preparations." Janice Gross Stein, "The Arab-Israeli War of 1967: Inadvertent War Through Miscalculated Escalation," in Alexander L. George (ed.), *Avoiding War: Problems of Crisis Management* (Boulder, CO: Westview Press, 1991), 140. Eban argues that this was not the case, stating that "Most were agreed that the moment for military reaction was not yet ripe, and that a political phase must first ensue… No proposal of immediate riposte was made that day." Eban, *Abba Eban*, 335.

52 Oren, *Six Days of War*, 87.

53 Ibid., 87.

On the other hand, had the Israelis not been concerned about the various political repercussions of their actions, i.e., the first-strike disadvantage discussed in the security literature, the situation could have provided a good justification and foundation for taking anticipatory military action. There was also a strong strategic basis for taking such action, such as the crossing of a declared red line, the maintenance of credible deterrent capability, or the first-strike advantage. While there was a legal foundation for such actions, i.e., the illegal blockade of the international Straits of Tiran, the normative constraints of all other reasonable alternatives being exhausted seemed to have been operating on the Israeli decision makers at this point in time. In other words, if the Israelis *had not been constrained* by the legal and normative elements, they could have taken anticipatory military action as soon as the Straits were blockaded, or as soon as the first Egyptian troops were deployed in the Sinai. But the Israelis decided to wait, at least for the time being, and pursue diplomatic measures to attempt to deal with the crisis.

During this period, there was a flurry of diplomatic activity, with frequent consultations between the Israelis, the Americans, the British, and the French.[54] Foreign Minister Eban was dispatched for consultations with the United States, and made stops in Paris and London on the way to Washington. From France and the United States, the message to the Israelis was the same: it is within Israel's best interest not to preempt. The British, on the other hand, told Eban what they were willing to do, but offered no advice as to what type of policy Israel should follow.

During his stop in Paris, Eban was warned by de Gaulle against taking unilateral, preemptive action. According to Eban,

> Even before I was seated near his desk… he said loudly, '*Ne faites pas la guerre*.' At that moment we had not even been introduced. We then exchanged greetings and the General went on as if completing his previous sentence, 'At any rate, don't shoot first. It would be catastrophic if Israel were to attack. The Four Powers must be left to resolve the dispute. France will influence the Soviet Union toward an attitude favorable to peace.'[55]

When asked by de Gaulle what Israel intended to do about the crisis, Eban stated,

> If the choice lies between surrender and resistance, Israel will resist. Our decision has been made. We shall not act today or tomorrow, because we are still exploring the attitude of those who have assumed commitments. We want to know whether we are to be alone or whether we shall act within an international framework. If Israel fights alone (and she does not recoil from this), she will be victorious, although the price in blood may be heavy. If the powers act in accordance with their engagements, Israel will harmonize her resistance with theirs. It is only in order to explore this prospect that we have not yet put our rights to the test.[56]

In this respect, Eban's message to the French clearly shows that the Israelis were concerned that any resort to force be viewed as being taken as a last resort, after all

54 If the Israelis had only been concerned with the reaction of the United States, it is unclear why time would have been spent trying to elicit support from other states.

55 Eban, *Abba Eban*, 341.

56 Ibid., 342.

other peaceful means had been exhausted. Additionally, there was a clear preference for a multilateral solution.

There is one other element of the discussion between Eban and de Gaulle that is important in this context. If the use of force in international law and in the just war tradition is limited to "self-defense," how is it to be determined what kind of actions are taken in self-defense and what types of actions are the "opening of hostilities?" Eban and de Gaulle presented opposing views on this matter. According to Eban's perspective,

> [Israel] could not be the first to "open hostilities," since these had already been opened: Nasser's blockade and declaration were acts of war. Whatever Israel did would be a reaction, not an initiative. A state could be attacked by many methods apart from gunfire. Civil law recognized no distinction between assault through strangulation and assault through shooting. Nor did international law.[57]

For de Gaulle, however, "Opening hostilities," implied "firing the first shot."[58] The differences in these two perspectives lies at the heart of the debate concerning the legality of anticipatory military activities.[59] With respect to the Six Day War, the fact that the United States and the United Kingdom recognized that the Straits of Tiran were an international waterway and that the blockade constituted a violation of international law seems to support, at least partially, Eban's position.

It was also during this period that the crisis escalated further. As long as the situation on the ground remained the same, i.e., as long as the most significant element of the crisis issue remained the blockade, the Israelis were content to heed the calls of the United States and other allies and wait for diplomatic activities to take their course. On May 25, however, the situation began to change.

Intelligence estimates received by the Israelis on May 25 indicated that the Egyptian 4th Armored Division had finally been deployed into the Sinai. According to Brecher, this event precipitated a shift in the views of the Israeli decision makers, leading them to believe that time for diplomatic actions was running out. Brecher notes that from this day on, "there was increasing pressure on Eshkol by Israel's military leaders… to go to war; the time limit given to he political decision-makers on the 23rd was running out."[60] As a result of the new facts, the Israeli government instructed Eban to apprise the United States of the new situation.

Eban was originally dispatched on his diplomatic mission to explore alternatives for dealing with the closure of the Straits. Now, however, his instructions had changed. A telegram was dispatched to Eban from Eshkol, requesting Eban to inform the Americans that the Israelis believed an attack was now believed to be imminent:

> As a result of events during the last twenty-four hours, be advised that *we expect a surprise attack from the Egyptians and Syrians at any moment.* The United States Government should declare at once that any attack on Israel would be regarded as an attack on the

57 Eban, *Abba Eban*, 342.

58 Ibid., 342–43.

59 See Chapter 4 for elaboration.

60 Brecher, *Decisions in Crisis*, 130.

> United States. It should also issue instructions that in that spirit to its forces in the area. It is recommended that you show this cable to the highest officials, the President himself or the Secretary of State.[61]

These pleas, however, were met with deaf ears, and skepticism, by the Americans. Later that same day, Eban was told by Secretary of State Rusk that the United States does "not share the appraisal that any Arab state was planning an immediate attack on Israel." Additionally, according to Brecher, Eban was told that

> The President would act to live up to American commitments, and he was taking a strong political and diplomatic stand in Cairo, as well as in other capitals. But it was absolutely essential for him to act with the approval of Congress and public opinion; and in the meantime, Israel should not take pre-emptive action.[62]

A more formal and explicit warning against taking anticipatory action was given to the Israelis by President Johnson himself. In an *aide-mémoire* given to Eban by Johnson, the United States warned the Israelis about taking preemptive action:

> *Regarding the Straits we plan to pursue vigorously the measures which can be taken by maritime nations to assure the Straits and the Gulf remain open to free and innocent passage of all nations. I must emphasize the necessity for Israel not to make itself responsible for the initiation of hostilities, Israel will not be alone unless it decides to do it alone. We cannot imagine that Israel will make this decision.*[63]

It appears, however, that Johnson did not believe that these warnings would be persuasive, as it is reported that "As Eban left the White House, Johnson turned to his advisers and stated: 'I've failed. They'll go.'"[64] Additionally, it is also interesting to note that the American warning seems to indicate that the United States still believed that they fundamental aspect of the crisis was the blockade of the Straits of Tiran, not the prospect of an invasion or imminent attack by the Arab forces.

As the Jerusalem's and Washington's fundamental beliefs about the nature of the crisis began to diverge, so too did the preferred methods for dealing with the crisis. Washington still held fast to the belief that the Straits could be reopened through multilateral action, while Israel was starting to feel pressed to take military action in response to the situation. According to Stein,

> Once the credibility of Israel's deterrent reputation became the central issue, a military response was imperative whether or not Egypt was planning to attack. Senior military leaders insisted that the damage to Israel's capacity to deter made an Arab attack inevitable,

---

61 Brecher, *Decisions in Crisis*, 131 (emphasis in original).

62 Brecher, *Decisions in Crisis*, 133.

63 Eban, *Abba Eban*, 359 (emphasis in original). Quandt discusses the internal American debates and discussions with respect to the Eban/Johnson meeting and notes that Rusk was particularly concerned with who was the first to fire. Quandt notes that "The view was expressed [by Rusk] that no overt act of aggression had yet occurred. Until Egypt resorted to the use of armed force, according to this argument, the United States commitment to Israel would not be activated." Quandt, *Decade of Decisions*, 52.

64 Quandt, *Decade of Decisions*, 54.

> sooner or later. In the analysis of military leaders, Israel's critical need to protect its capacity to deter blurred the distinction between preemptive and preventive war.[65]

In other words, as Egypt continued to mobilize and deploy troops into the Sinai, and Israel continued to take no response, in direct contradiction to its previous statements that such actions would be viewed as a *casus belli*, many in Israel were afraid that this was creating a situation whereby Egypt and the other Arab states would feel emboldened to strike Israel, and that Israel would offer no resistance. Such a situation would be unbearable for Israel. While the Israelis were now more concerned with the threat of an attack as opposed to the blockade, they also remained committed to seeing what would transpire out of Eban's consultations with the United States.

At the same time, however, the crisis continued to escalate. On May 26, 1967, Nasser gave a lengthy and vitriolic speech to the Arab Trade Unionists. In this speech, he stated,

> We were waiting for the day when we would be fully prepared and confident of being able to adopt strong measures if we were to enter the battle with Israel. I say nothing aimlessly. One day two years ago, I stood up to say that we had no plan to liberate Palestine and that revolutionary action was our only course to liberate Palestine...
>
> Recently we felt we are strong enough, that if we were to enter a battle with Israel, with God's help, we could triumph. On that basis, we decided to take actual steps.
> ...
> With regard to military plans, there is complete coordination of military action between us and Syria. We will operate as one army fighting a single battle for the sake of a common objective—the objective of the Arab nation.
>
> The problem today is not just Israel, but also those behind it. If Israel embarks on an aggression against Syria or Egypt, the battle against Israel will be a general one and not confined to one spot on the Syrian or Egyptian borders. *The battle will be a general one and our basic objective will be to destroy Israel.* I probably could not have said such things five or even three years ago. If I had said such things and had been unable to carry them out my words would have been empty and worthless.[66]

Coupled with the increased mobilization and deployment of Egyptian troops, Nasser's speech caused significant concern and alarm among Israeli leaders.

May 26 also turned out to be a pivotal day for Eban's mission to the United States as well as for the Israeli crisis decision-making process. With increasing domestic pressure to take some sort of response to the escalating crisis, Eban was instructed to return home the next day and report on his meetings. On the 26th of May, however, the American message of "help is on the way" and "Israel will only be alone if she acts alone" that had been conveyed previously would become murkier.

Over the course of a few hours, the Israelis would receive seemingly different messages from different messengers, albeit all ostensibly from the same ultimate

---

65 Stein, "The Arab-Israeli War of 1967: Inadvertent War Through Miscalculated Escalation," 141.

66 Medzini, *Israel's Foreign Relations*, 744 (emphasis added).

source.[67] At a meeting with officials at the Defense Department,[68] the distance between the American and Israeli positions was becoming clearer. What had previously been viewed as similar aims, i.e., the opening of the Straits, were now seen as similar outcomes, but of differing ultimate goals. For the Israelis the issue had now become much more serious than merely the blockade. As discussed above, it had now developed into a test of Israeli deterrence, a test that was becoming more real with the continued deployment of Egyptian troops into the Sinai. The Americans at this meeting seemed to grasp the changing nature of the situation. According to Brecher, at this meeting, "Because of fear of the charge of collusion, the Israelis were never told they should go to war, but neither did the Pentagon representatives say they should not."[69]

In preparation for the meeting between Eban and Johnson, Evron met with Johnson and cabled a report of the meeting back to Jerusalem. Evron reported the following in his cable about the meeting:

> When I entered his room, the President told me that he fully understood the gravity of Israel's position. His reaction to the Foreign Minister would be in accordance with what Mr. Eban had heard from Rusk and others that morning, namely that any American involvement would require Congressional support of the intentions and decisions of the President. The first step would have to be the laying of a Congressional basis for any support of Israel's position. The President emphasized that he was working energetically in that direction. The United States had pledged itself to preserve freedom of passage in the Straits of Tiran: and the United States would carry out that obligation. But anything involving even a possibility of force would be impractical and would boomerang unless the proper Congressional basis were laid in advance. The President agreed that the United Nations in its present composition would not be able to do anything; no result would come from its discussions. Yet those discussions were vital in order to give proper support to the President, in the Congress and the public, as well as in the international domain. The President spoke without confidence about the result of the Secretary-General's mission to Cairo, but said that it would be foolish to ignore the effect of his report. Any action by any member state before the report were published would be received badly in many places. The President spoke optimistically about the possibility of setting up a structure with the active support of Britain and other maritime powers after the conclusion of a quick debate at the United Nations. Here he mentioned several countries who might be willing to cooperate. He had taken counsel with some of his leading advisers. All of them could be described as friends of Israel. They had expressed their support in the following formulation: The objective is to open the Straits for navigation by all states including Israel and this objective shall be carried out. Mr. Johnson made it clear that the appraisal

---

67 The policy making process of the United States with regards to the Six Day War crisis is not under investigation for this study. Accordingly, the underlying causes for the contradictory—or at least confusing—messages given to the Israelis is not addressed at length in this work. For more information on American policy towards the crisis, see Quandt, *Decade of Decisions*; William B. Quandt, "Lyndon Johnson and the June 1967 War: What Color Was the Light?" *Middle East Journal*, 46, No. 2 (Spring 1992), 198–228; Spiegel, *The Other Arab-Israeli Conflict*.

68 According to Brecher, McNamara, General Wheeler, and other Pentagon officials were at this meeting. Brecher, *Decisions in Crisis*, 135–36.

69 Brecher, *Decisions in Crisis*, 136.

> in Jerusalem about an imminent Egyptian surprise attack was not shared by the United States. Israel was a sovereign Government, and if it decided to act alone, it could of course do so; but in that case everything that happened before and afterwards would be upon its responsibility and the United States would have no obligation for any consequences that might ensue. He refused to believe that Israel would carry out unilateral action which was bound to bring her great damage. But, he added, this was Israel's affair. As President of the United States he must carry out American commitments to Israel in a way which seemed to him best, within the framework of American interests. He emphasized several times, that Israel could depend on him. He said that he was not a coward and did not renege on his promises, but he was not prepared to act in a manner which seemed to him to endanger the security of the United States, or to bring about the intervention of the Soviet Union, in the event, simply because Israel has decided that Sunday is an ultimate date.[70]

Evron's cable presented an interesting quandary for the Israeli leadership. For the United States, the key problem appears to have been the opening of the Straits. For the Israelis, on the other hand, the situation had become more serious, as discussed above. In fact, it appears from Evron's message that Johnson was aware of the divergence between US and Israeli perceptions of the crisis, and what types of actions might be necessary to deal with the crisis.

According to Quandt, "Johnson was aware of the awkwardness of the policy he was pursuing." While it would take some time to establish a multilateral force to open the Straits, if such a force could even be established, the situation in the region could change, and Israel could be faced with different challenges, that needed to be dealt with differently. Quandt argues that Johnson "apparently still wanted the Israelis to hold off on military action, but as time went by he seems to have become resigned to letting the Israelis take whatever action they felt necessary."[71] These conflicting messages can clearly be seen in the statements discussed above. At this stage in the crisis, however, Johnson's admonitions against taking unilateral action were still persuasive in Jerusalem.

The Israeli Cabinet decided again on May 28 to delay taking any military action. Brecher notes that in an October 1967 interview with Israeli newspaper *Ma'ariv*, Eshkol clearly states that pressure from the United States was a key element in the decision to wait:

> Had we not received Johnson's letter and Rusk's message, I would have urged the Government to make the decision to fight; but their communications pointed out not only that unilateral [Israeli] action would be catastrophic but also that the United States was continuing with its preparations for multilateral action to open the Gulf to shipping of all nations. I could not forget that the letter was signed by the President who had once promised me face-to-face: 'We will carry out whatever I ever promise you.' I did not want him to come afterwards and say, 'I warned you in advance and now you cannot make any claims whatever on the United States and its allies.'[72]

---

70 Brecher, *Decisions in Crisis*, 137.

71 Quandt, "Lyndon Johnson and the June 1967 War: What Color Was the Light?" 214.

72 Brecher, *Decisions in Crisis*, 147.

The United States appeared to be telling Israel that not all options had been exhausted yet. Or, in other words, the United States was not convinced that any use of force would really be a last resort.

As discussed above, that threats of grave danger to a state's existence would be countered with anticipatory military actions, regardless of the legal and normative constraints. This hypothesis was based upon the structural/strategic arguments. The structural/strategic arguments about anticipatory military activities disregard what happens within the "black box" of the individual states, regarding them as irrelevant and inconsequential. As the crisis continued to escalate, and the threat became more severe and increasingly grave, according to this hypothesis, Israel should have taken anticipatory action at this point. However, the statement of Eshkol clearly shows that the government of Israel was concerned about the repercussions of its actions—that it was constrained not by the distribution of power or other elements of the international "structure," but by legal and normative principles, even if they were transmitted through a third party. This aspect of the case will be discussed in more depth below.

While Eban was abroad consulting with others about the crisis, Eshkol was facing an increasingly restless domestic audience. According to Brecher, "The Prime Minister knew that since the morning of May 27, the General Staff had been expecting the decision to go to war: In contacts during the last two days, they had been led to understand that such a decision was imminent."[73] Eshkol was now faced with the unenviable task of informing the military that the government had decided to wait a little longer.

Accounts of the meeting between Eshkol and the generals show that the meeting did not go very well. Brecher gives the following account of the meeting:

> [Eshkol] was told by Sharon, M. Peled, and Avraham Yaffee—with Allon, Rabin, and Bar-Lev standing aside silently—that there was no way to avoid war any more and that every day that passed might increase the losses. The generals expressed their concern with the effect of further waiting on the IDF's and the public's morale, and the possible effect on the enemy; and Yariv particularly stressed the dangers of a first Egyptian strike. Eshkol, clearly shaken, tried to reassure the generals. According to Bar-Lev, he answered substantially thus: 'We have to have patience. I am sorry that you feel the way you do. It is necessary to continue negotiations, in order to exhaust all other possibilities, before going to war. This was also necessary in order to avoid a repetition of the post-Suez [1956] Crisis, when Israel was forced to withdraw.'[74]

---

73 Brecher, *Decisions in Crisis*, 149. According to Kimche and Bawly, the army leadership was also skeptical as to how firm the US warnings really were: "they pointed to the fact that the Americans had not explicitly threatened Israel with reprisals or sanctions if she went to war. There was nothing like the tough line the United States had taken after the Suez War. If the Americans had really been so anxious that Israel refrain from any action, she could have made her point in a much clearer manner than she did, the army leaders concluded." David Kimche and Dan Bawly, *The Sandstorm: The Arab-Israeli War of June 1967: Prelude and Aftermath* (London: Secker and Warburg, 1968), 146.

74 Brecher, *Decisions in Crisis*, 150. There were concerns in Israel about the impact on both the public and the IDF of the prolonged mobilization and "crisis" period. Brecher notes that "The mood of Israel's public, under the pressure of virulent assaults by Arab media

Again, the impact of the normative constraint—that the use of an anticipatory military activity be used as a last resort—was clearly operating at this point in the crisis.

Stage 3: May 29–June 4

The third, and final stage for this analysis, of the Six Day War crisis began on May 29. This stage began with an address to the Knesset by Eshkol. In this speech, Eshkol summarized recent events, and detailed the actions that Israel took in response. Eshkol stated, in part:

> These actions and statements have altered the political and security situation in the region. Consequently, the Government has taken a series of political and defense steps designed to guarantee Israel's vital interests. The first condition for maintaining the peace and our interests is our military strength. For that reason, with the Government's consent, I have ordered the mobilization of the IDF's reserves. They are now ready to thwart the enemy's plans on all fronts and borders.
>
> Members of the Knesset, the Government of Israel has stated on more than one occasion that it will exercise its right to freedom of navigation in the Straits of Tiran and the Gulf of Eilat, and will defend it if necessary. That is a supreme national interest regarding which there can be no concession or compromise. It is clear to us—and I think to the world, too—that as long as the blockade exists peace is endangered. It is that grave situation, which I believe, obliges us first of all to clarify, with maximal urgency, with those Governments which undertook to support and implement freedom of navigation whether they are prepared to translate their commitments into action, in accordance with the international law which the Egyptian ruler has violated so blatantly.
>
> The purpose of the Foreign Minister's brief visits to Paris, London and Washington was to clarify that question. The Foreign Minister explained to the leaders of those countries that this is a matter of vital national importance and that we are resolved to ensure it, come what may. From the Foreign Minister's discussions it transpired that all the Governments with which he came into contact aspire to maintain the status quo which was recently broken. The President of the US and the Prime Minister of Britain issued firm public statements on the subject.
>
> The position of the US is especially interesting, since in 1957 its government was the first to issue an undertaking to Israel, through diplomatic contacts, in a letter from then-President and Secretary of State and in public statements at the UN and elsewhere.
>
> After having heard President Johnson's statement of May 23rd and our Foreign Minister's report on his talks in Washington, the Government had the firm impression that the US was unequivocally committed to ensuring freedom of navigation in those international waters. A similar attitude was evinced by the Prime Minister of Britain, Mr. Harold Wilson, in his public statement and in his talks with the Foreign Minister. Other maritime nations have informed us of their readiness to support freedom of navigation effectively. We have also been told that practical consultations are already being held on this issue. Given these

---

of communication, was that Israel was faced with the question of survival." Additionally, there were concerns that "Eshkol was not the right man to lead a nation fighting for its very existence." Brecher, *Decisions in Crisis*, 149.

> considerations, it is reasonable to expect that the countries which support freedom of navigation in principle will act effectively and quickly in order to ensure that the Straits and the Gulf will be open to the passage of the ships of their and other countries, without discrimination. *This expectation, which is based on explicit and official undertakings, has greatly influenced the position and actions of the Government at this stage.* There is no doubt that the expression of the Great Powers' readiness to guarantee freedom of navigation has been influenced by both their principles and the knowledge that Israel will ensure its rights.
>
> Our obligation was, first of all, to test the international commitment, and this will become apparent in the next few days. Israel regards the closing of the Straits as an act of aggression against it. The Israel Government's statement to the UN Assembly of 1 March 1957 continues to express our policy. We are currently involved in widespread political activity designed to restore freedom of navigation. This activity would not have been possible and its chances would have been minimal had it not been for our own strength and the justice of our demand. On the other hand, our mutual relations with the nations of the world have helped us to increase our strength and maintain our rights, and will continue to do so.
>
> The Egyptian ruler's announcement of the closure of the Straits, the terrorist activities, his aggressive intentions and the concentration of his army on our border have raised tension in the region to a peak. Nasser has brought war dangerously near. On various occasions I have reported to the Knesset and the nation about the IDF's growing strength. Today our Army is at the height of its strength in manpower, knowhow, fighting spirit and weaponry. Our attention must be focused not only on ensuring freedom of navigation but also on the danger of a military attack led by Egypt. Anyone with eyes in his head can see that as long as the huge concentration of forces of Egypt and its allies remains on the borders there can be a conflagration at any moment. Consequently, the IDF will remain armed and mobilized, ready for any test and, when necessary, able to repel any attack.[75]

Eshkol's address makes it clear that the Israeli government was prepared, if necessary, to use force to deal with the crisis, but was also committed to exploring all other alternatives first. The question remained, however, as to how long Israel should, or could, wait. Additionally, it would become increasingly difficult to determine how likely these other alternatives were to be successful, and what the costs would be for waiting for their implementation.

The crisis escalated again on May 30, when Jordan's King Hussein signed a defense agreement with Egypt. For Israel, this represented the crossing of yet another red line, the placement of Jordanian troops under foreign military control.[76] More and more the situation seemed to be one of impending war—and the Israelis were growing increasingly concerned.[77] According to Wagner, "As seen in Israel, the military union of two of the former enemies could serve no purpose but an attack on Israel."[78]

---

75 Lorch, *Major Knesset Debates*, 1573–74 (emphasis in original).

76 Wagner, *Crisis Decision-Making*, 142.

77 Brecher, *Decisions in Crisis*, 153–54.

78 Wagner, *Crisis Decision-Making*, 83.

At the same time, there was much confusion as to the stance of the United States. According to Quandt,

> To the Israelis, however, the lack of a new policy from Washington in the light of the new circumstances was tantamount to saying: 'We've tried all of our alternatives and have nothing new to offer.' The Israelis began to scrutinize Johnson's messages for indications that he really wanted Israel to act unilaterally, provided the United States would not be drawn in. After all, what was really meant by the curios oft-repeated phrase: 'Israel will only be alone if it decides to go alone.' It was not quite an absolute prohibition. It did not require a Talmudist to read into the phrase the hint of a 'green light' to Israel—and there were plenty of Talmudists in Israel who were convinced that the United States policy was precisely that. The multinational fleet was simply not plausible; and, besides, there were some reports that Eban had missed the point of Johnson's talk, assuming a stronger commitment than was intended. To check on these impressions and to follow up on earlier suggestions that intelligence liaison should be improved, the head of Israeli intelligence, Meir Amit, flew to Washington under an assumed name on May 30.[79]

With King Hussein's announcement coming just before Amit's departure, it would provide a good opportunity for the Israelis to determine the depth of the American commitment—and one last opportunity to determine if all other courses of action had been depleted before military actions needed to be utilized to deal with the crisis.

While the decision to take anticipatory military action was not taken at the May 30 Cabinet meeting, the seeds of such action were clearly in place at this time. Wagner notes that conflicting versions exist about when the decision to "preempt" was taken, with some arguing that the decision was taken on May 30, while others maintain that while a hard decision was not taken at this meeting, it was clear "that the Cabinet majority for diplomatic action no longer existed after the May 30 pact although no actual vote was taken."[80]

At the same time, Eshkol was faced with increasing pressures from within. The government found itself having to justify to the military, and the Israeli people, its policy of waiting in the face of the escalating crisis. While Eshkol, Eban, and other members of the Cabinet were willing to take virtually no action in response to what were seen as clear Arab provocations, members of the opposition and the military saw this a signs of Israeli weakness that would be exploited. As a result of these domestic pressures, coupled with the rapidly escalating crisis, a national unity government was created, which brought members of the opposition formally into the government. On June 1, 1967 the national unity government was created, with a new Minister of Defense, Moshe Dayan.[81]

Some point to the inclusion of Dayan in the government, who advocated the use of military strikes to deal with the crisis, as "a surrogate decision to launch the war."[82] Others, however, point to additional developments that smoothed the way

79 Quandt, *Decade of Decisions*, 55–56.

80 Wagner, *Crisis Decision-Making*, 85.

81 Prior to this point, Eshkol had served as both Prime Minister and Minister of Defense.

82 Wagner, *Crisis Decision-Making*, 86.

for the decision to be made. Specifically, new messages, albeit through informal channels, arrived from the United States, that removed the last obstacle to taking military action.

According to Oren, there were four elements that helped erode the remaining hesitancy in the Israeli cabinet against taking military action. The first was the prolonged inability of the United States to effectively mount an international flotilla to reopen the Straits. It was quickly becoming apparent to all involved that the multilateral plan to open the Straits was not going to happen, regardless of the best intentions of those involved. The numbers of states actively trying to implement the plan had significantly dwindled, and the plan was effectively irrelevant.

The next element that influenced the Israeli government was, according to Oren, "an off-the-cuff remark made by Secretary of State Rusk who, when asked whether the US would continue restraining Israel, replied 'I don't think it's our business to restrain anyone.'"[83] According to Bar-Zohar,

> On May 30 the United States began to wake up. As soon as the agreement between Nasser and Hussein had been signed, the Americans realized that they had been on the wrong track. Late that night Walt Rostow called Evron and confessed for the first time that he could see no solution.[84]

This shows a marked shift from the previous American position, whereby the United States placed definite pressure on the Israelis not to take anticipatory action. While the motives for this shift are not under investigation here, it is important to note that such a statement was viewed in Jerusalem as a crucial element in the decision to take anticipatory action.

Additionally, on June 1 Eban received "a document … which had a decisive effect on my attitude" that was from an American "known for his close contact with government thinking."[85] According to Eban, the document stated,

> If Israel had acted alone without exhausting political efforts it would have made a catastrophic error. It would then have been almost impossible for the United States to help Israel and the ensuing relationship would have been tense. The war might be long and costly for Israel if it broke out. If Israel had fired the first shot before the United Nations discussion she would have negated any possibility of the United States helping her. Israelis should not criticize Eshkol and Eban; they should realize that their restraint and well-considered procedures would have a decisive influence when the United States came to consider the measure of its involvement.[86]

Eban also adds,

> The American friend whose thinking seemed typical of the current Washington view understood that 'time was running out ad that it was a matter of days or even hours.' But

83 Oren, *Six Days of War*, 153.

84 Bar-Zohar, *Embassies in Crisis*, 157.

85 Oren identifies this individual as Abe Fortas. Oren, *Six Days of War*, 153.

86 Eban, *Abba Eban*, 384–85.

> he believed that 'if the measures being taken by the United States prove ineffective, the United States would now back Israel.'[87]

Eban was one of the last holdouts for maintaining the diplomatic course, and this statement seems to have convinced him that diplomacy had run its course and it was now time to pursue other alternatives.

The final element that convinced the Cabinet that the time for diplomacy had ended came from another statement from an American to the Israelis. According to Oren,

> Even 'greener' was the light that Arthur Goldberg seemed to be giving Israel. 'You must understand that you stand alone and you have to know the consequences,' he imparted to Gideon Rafael, explaining that Regatta [the multilateral plan to open the Straits] was dead and that only Israel could meet the existential threat Nasser now posed. American and world opinion would favor Israel, Goldberg concluded, especially if the Arabs were to fire first. 'I understand that if you do act alone you will know how to act.'[88]

With the messages of at least lukewarm support emanating from Washington, as opposed to the strongly worded warnings issued earlier in the crisis, the Cabinet felt less constrained about taking military action.

Additionally, on June 2nd, Eshkol sent another cable to de Gaulle asking for support. According to Bar-Zohar,

> The closing of the strait was in itself an act of aggression against Israel. 'We might have retaliated sooner,' Eshkol continued, 'but we followed the advice of our friends, including you, and we decided to wait. Unfortunately, the results of that decision have been disappointing. The Soviet Union has rejected your proposal for a conference of the four powers, and the Security Council is again paralyzed by futile debate. Destruction threatens Israel. One-third of the Jewish people were exterminated by the Nazis, and now the question of our survival has come up again.' The cable ended with a pathetic appeal: 'It grieves us to see that until now, France, the land of liberty and of the highest ideals of humanity, did not let its voice be heard. Mr. President, I beg you to act so that France may be heard, and show her loyalty to us as a friend and ally so that our friends as well as our enemies may see that your country is the friend and ally of Israel.'[89]

In response, the French sent back a message that stated, in part, "France will give neither approval nor aid to whatever nation takes up arms for any reason, and fires the first shot."[90] It was thus clear to the Israelis that they were not going to change the minds of the French.

The fact that the Cabinet was no longer afraid of condemnation by the United States does not mean that the government was not afraid of any condemnation that would arise from the use of anticipatory military action. In fact, the opposite is true. In the fateful Cabinet meeting where the decision to take anticipatory military action was made, the issue of international condemnation was raised and debated.

---

87 Eban, *Abba Eban*, 385.

88 Oren, *Six Days of War*, 153.

89 Bar-Zohar, *Embassies in Crisis*, 178–79.

90 Ibid., 179.

According to Oren, one minister suggested that Israel attempt to pass a ship through the Straits in order to officially establish a *casus belli*, one that could not be denied vis-à-vis international law. He offered the following rationale for this action:

> Better that one or two of our sailors get killed than that Israel get blamed for starting the war... I had no doubts about victory. It was the day after victory that worried me.[91]

It appears, however, that this fear now failed to convince the required majority needed to continue to delay military action. According to Oren, Allon responded to the above fears by stating, "They will condemn us… and we will survive."[92]

The Cabinet meeting of June 4 concluded with a formal vote that officially authorized the IDF to take anticipatory military action against Egypt, Syria, and Jordan. The resolution was passed unanimously. The text of the resolution is as follows:

> After hearing a report on the military and political situation from the Prime Minister, the Foreign Minister, the Defense Minister, the Chief of Staff and the head of military intelligence, the Government ascertained that the armies of Egypt, Syria and Jordan are deployed for immediate multi-front aggression, threatening the very existence of the State.
>
> The Government resolves to take military action in order to liberate Israel from the stranglehold of aggression which is progressively being tightened around Israel.
>
> The Government authorizes the Prime Minister and the Defense Minister to confirm to the General Staff of the IDF the time of action.
>
> Members of the Cabinet will receive as soon as possible the information concerning the military operation to be carried out.
>
> The Government charges the Foreign Minister with the task of exhausting all possibilities of political action in order to explain Israel's stand to obtain the support of the powers.[93]

The decision was thus made to employ an anticipatory military action. The Cabinet decision makes it very clear that the military response was in response to the aggressive acts taken by others, and that Israel viewed these acts as being a threat to its very existence.

From Diplomacy to Anticipatory Military Action

The Six Day War crisis raises a number of interesting, and important, questions vis-à-vis the interaction of structural/security, legal, and normative elements and anticipatory military activities. According to Brecher, Allon wrote a paper dealing with preemption in the spring of 1967, although it was not published until after the war. In this paper, Allon wrote,

---

91 Oren, *Six Days of War*, 157.

92 Ibid., 157.

93 Brecher, *Decisions in Crisis*, 168.

> I oppose a pre-emptive war morally and politically; morally, because as long as we can postpone the war without endangering Israel, there is no need to pre-empt, and by acting thus there is a possibility that the war will be postponed for many years… Politically it would be an historic mistake to become involved in an aggressive war. In that case we would lose friends in the world and there is a possibility that we might face an embargo.[94]

This passage clearly shows the predisposition *against* taking anticipatory action. At the same time, however, Allon also maintained that Israel must still keep the option of taking anticipatory action open, in certain circumstances:

> Israel has the right—and even the obligation—to go to war in six possible situations:
>
> 1. The concentration of offensive [Arab] forces which constitute a threat to Israel;
> 2. when it seems that the enemy is preparing a surprise attack on Israel's air bases;
> 3. in case of an aerial attack on nuclear reactors and scientific institutions;
> 4. when terror and shelling are of such a magnitude that passive defense and retaliatory acts could not overcome them;
> 5. if Jordan joins a military alliance with any other Arab state and permits foreign troops to be stationed on her territory; [and] especially west of the Jordan River;
> 6. if Egypt blockades the Straits of Tiran.[95]

Allon's writings show the dilemma that was faced by the Israeli leadership during this period. On the one hand, there was an acknowledgment that there were normative and legal constraints against taking anticipatory action. On the other hand, there was also an argument to be made for "going first" in certain instances. The question is, however, which side was more persuasive.

On the whole, the Six Day War crisis tends to support the idea that states are constrained by the legal and normative elements up to a certain point, i.e., until the attack is about to happen, or except when the state is faced with a sufficiently grave threat, such a threat to its existence. If the normative and legal constraints were not operating on Israeli decision makers during the Six Day War crisis, or, in other words, if the process was dominated by the security/structural elements, anticipatory action should have occurred earlier in the crisis.

In fact, there were three distinct points in the crisis where Israel could have taken anticipatory military action—indeed, instances where the security literature would predict that Israel would take anticipatory action. The first opportunity came when Nasser imposed the blockade of the Straits of Tiran on May 22nd. Not only was this a declared "red line" for the Israelis, one which they had gone to war over before, but it was also viewed as an act of aggression by other states, such as the United States and the United Kingdom. According to the ideas found in the security literature, Israel *should* have taken anticipatory military action in response to the closure of the Straits, regardless of the position of other states in the system.

The closure of the Straits was a direct challenge to one of Israel's expressed *casi belli*. A failure to act once one red line was crossed could erode Israel's deterrent

94 Brecher, *Decisions in Crisis*, 99.

95 Ibid., 99.

capability and serve to embolden Israel's adversaries to engage in increasingly belligerent and risky policies, believing that no response would be forthcoming—which is exactly what happened. But, instead of taking immediate action to deal with this threat, however, Israel was constrained by the legal and normative elements to attempt to try all non-military solutions first and work through legal institutions to try and find a solution to the crisis. Spiegel argues that "The Israeli Cabinet concluded that if the Western community would establish the international status of the waterway through action, Israel could avoid force."[96] In this respect, the Israeli government was clearly trying to work through the international community first, and only take unilateral action second.

The second opportunity for taking anticipatory military action came on May 25 with the receipt of information by Israeli intelligence with respect to the full deployment of the Egyptian 4th Armored Division in the Sinai. This event led the Israelis to conclude that the outbreak of war was a real possibility "at any moment."[97] The incentive to "preempt" such an attack was compounded the next day with Nasser's speech when he declared that the battle that Egypt and Syria were preparing for would be "a general one and our objective will be to destroy Israel."[98] In this instance, the incentives to engage in anticipatory action derived not as much from the need to maintain Israel's deterrence capability, but instead from the elements of the "first-strike advantage."

As discussed in the security literature, the first-strike advantage can be one of the most compelling reasons for a state to take anticipatory military actions. According to the first-strike advantage, states that fear an impending attack or war with an adversary would be better off striking first rather than waiting and having to absorb an enemy attack. The first-strike advantage was particularly salient for Israel in 1967 due to the small territorial size of the country and the fact that there was no "defense buffer" between its adversaries and its population centers. But, at this stage in the crisis, the political costs—again, the operation of legal and normative constraints—of taking anticipatory action were seen as outweighing the potential benefits of taking anticipatory action, and the decision was made to continue pursuing non-military means of resolving the crisis.

The third opportunity to take anticipatory military action came on May 30 when it was announced that Jordan had signed a defense pact with Egypt. The placement of Jordanian troops under the control of another country represented another "red line" for Israel and was viewed in Israel as foreshadowing the outbreak of war. Once again, according to the security literature, the first-strike advantage should have persuaded the Israelis to strike at this time. However, they did not. It is important to note, however, that unlike the two examples discussed above, after May 30, consensus among the Cabinet to pursue diplomatic efforts began to evaporate. In this respect, the events of May 30 may have tipped the scales so that the first-strike advantages began to outweigh the first-strike penalties that had kept the Israelis from acting in an anticipatory manner previously.

---

96 Spiegel, *The Other Arab-Israeli Conflict*, 142.

97 Brecher, *Decisions in Crisis*, 131.

98 Medzini, *Israel's Foreign Relations*, 744.

To be sure, it is difficult, if not impossible, to determine exactly what the underlying motivations were for the decisions made during the crisis. At the same time, however, there does appear to be support for the idea that the Israelis were at least influenced by international law and the normative aspects of the just war tradition. For example, the fact that the Israeli leadership sought the support of *multiple* states in resolving the crisis, repeatedly appealed to the framework of international law vis-à-vis specific elements of the crisis, and repeatedly undermined its own strategic situation and ignored its own declared red lines in deference to the constraints imposed by the requirements of international law and the just war tradition are indicative of this influence. With respect to international law, Harkavy notes,

> Faced with military imperatives impelling it to preempt, it also had to face the widely held prevailing norms, however hypocritical on the part of many, about the illegitimacy of 'aggression,' assumed to include preemptive action even where extreme provocations were involved, or for that matter even a 'legal' *casus belli* in the form of a blockade. Needless to say, the almost monolithic hostility of the bulk of nations represented in the United Nations simply exacerbated its position.
> ...
> Granted, the UN's writ is neither binding nor enforceable in such matters and it is solely the threat of big-power intervention looming behind the resolutions which gives them any force… Nevertheless, it is apparent that Israel, long rendered altogether cynical by lopsided UN declarations, still feels at least the psychological pressures of having to defy UN 'votes' and resolutions in order to ensure its survival.[99]

On the just war side, O'Brien states

> The means necessary to the defense of this just cause [the survival of the state] was a highly effective deterrence posture based on the credible threat of devastating preemptive action whenever the existence of Israel was in clear and present danger. The probability of success in June 1967 was acceptable by just war standards, *provided* Israel could carry out a pre-emptive first-strike against Egyptian air power. Anticipatory self-defense was, therefore, integral to the whole just war calculus.
> ...
> The just war requirement of exhaustion of peaceful remedies, akin to the provisions of UN Charter Article 33, was certainly met, perhaps to a fault. Eshkol's and Eban's efforts to resolve the crisis by diplomatic means apparently only increased the Arab appetite for aggression.[100]

In this respect, the legal and normative elements were important, and did influence the Israeli decision-makers.

---

99 Robert E. Harkavy, *Preemption and Two-Front Conventional Warfare: A Comparison of 1967 Israeli Strategy with the Pre-World War One German Schlieffen Plan*, Jerusalem Papers on Peace Problems No. 23 (Jerusalem: Leonard Davis Institute for International Relations, 1977), 49.

100 William V. O'Brien, "The Six Day War, Twenty Years After: Aggression or Self-Defense," *Middle East Focus*, 10, No. 1 (Fall/Winter 1987), 11.

Additionally, the pivotal role of the United States in the crisis must be addressed. Israeli leaders where particularly sensitive to the wishes of the American leadership—and were careful not to disregard explicit warnings given by the Americans. From this perspective, the primary factor influencing Israel's decision vis-à-vis the use of an anticipatory military action was *only* the position of the United States on the issue. It was only after the Israelis believed that the Americans had given their tacit approval (or at least would not openly dissent to such a move) did the Israelis decide to employ the anticipatory military activity. In this respect, it was only the patron-client relationship between the United States and Israel that determined what action was taken and when, with both sides paying lip service to international law and the just war tradition, but without really paying heed to either.

At the same time, however, it is also possible that American pressure was only one input into the Israeli decision-making calculus, albeit one that happened to follow a congruent trajectory with that of the legal and normative constraints discussed above. In this respect, it is possible that when trying to decide what type of response to take with respect to the crisis, the Israeli leadership was concerned with both the United States as well as the constraints found in international law and the just war tradition.

According to this perspective, it was not merely serendipitous that the "constraints" from the United States were lifted at the point when the Israeli leadership appeared to already be at the precipice of authorizing anticipatory action. Rather, the shift in the American position was due to the same changes in the crisis that caused increased alarm among the Israeli leadership. Perhaps the same elements that caused increased alarm for the Israeli leadership also convinced the Americans to ease the constraints and restrictions on Israeli action.

According to Handel, one of the key elements of the IDF's strategic military doctrine is that the "IDF will *undertake a pre-emptive (interceptive) attack if the security of the state is endangered.*"[101] While this may be the case, the IDF has been constrained by the political leadership from implementing this doctrine until the political leadership was satisfied that war was in fact the last resort and was truly imminent.

Opting for the Middle of the Road: India's Response in 1951

The second crisis to be discussed is called the Punjab War Scare I in the ICB crisis dataset. According to the ICB crisis summary,

> India's crisis was triggered on 7 July 1951 when Pakistan moved a brigade to within 15 miles of the Kashmir district of Poonch. These military movements, along with the perception of talk of jihad (holy war) and the growing evidence of political instability in

101 Handel, *Israel's Political-Military Doctrine*, 67. (emphasis in original) According to Dinstein, "an interceptive strike counters an armed attack which is 'imminent' and practically 'unavoidable'." Yoram Dinstein, *War, Aggression, and Self-Defence* (Cambridge: Cambridge University Press, 2001), 172.

> Pakistan, led Prime Minister Nehru to respond on 10 July with an order to move Indian troops to the Punjab border and to Jammu and Kashmir. Leaves for Indian army officers were canceled.[102]

The crisis trigger was classified as a "non-violent military act," thereby placing this crisis within the "imminent" threat category. India's decision to deploy troops in response to the crisis trigger was coded as an instance of an anticipatory military activity that did not include the use of force. In this respect, this crisis presents an interesting opportunity to explore a case where a state was faced with an imminent threat and decided to respond with a non-violent anticipatory military activity.

Unfortunately, very little information is available about this crisis. As such, it is not possible to draw too many conclusions from this case. What information is available, however, is instructive for the particular context of this study. The only source located that deals specifically with this particular iteration of the protracted conflict between India and Pakistan, except for the ICB crisis summary, was *Keesing's Contemporary Archives*.

From the material available in the *Keesing's* account, it appears that the conflict was primarily dealt with through the exchange of letters and correspondence between the two parties as well as extensive communications and related activities conducted via the United Nations. The majority of this correspondence consisted primarily of tit-for-tat exchanges of accusations of the other side being the aggressor.

For example, *Keesing's* provides the following summary of a July 15, 1951 press conference given by Liaquat Ali Khan:

> Mr. Liaquant Ali Kahn recalled at the press conference that over a year earlier smaller concentrations of Indian forces against Pakistan had led to so grave a situation that the two countries were brought to the brink of war. He had therefore tried to persuade Mr. Nehru to agree to an effective 'no war' declaration whereby all disputes between India and Pakistan would be settled by peaceful methods of negotiation, mediation, and arbitration, but Mr. Nehru had unfortunately rejected this formula. India, he declared, appeared 'determined to flout the wishes of the Security Council by deliberately creating a situation inimical to a just and peaceful settlement,' and in pursuance of this objective, extensive propaganda had been started that the Pakistani press was inciting to war against India, whereas in fact the Indian press and leaders were indulging in much more serious and violent incitement to war. This had been followed by a publicity campaign designed to magnify a few minor border incidents beyond all proportion and out of their context, ignoring the fact that Indian forces along the cease-fire line had been responsible for 'hundreds of incidents' during the previous 2½ years. In the light of the heavy concentration of Indian forces which had taken place on Pakistan's borders, it could be seen that all this propaganda had been part of a preconceived plan and had been intended as a cover for the forward movement of Indian forces, but Pakistan, which had demonstrated her earnest desire for a just and peaceful settlement of her dispute with India, would not allow herself to be intimidated or influenced by any threat of force.[103]

---

102 Michael Brecher and Jonathan Wilkenfeld, *International Crisis Behavior (ICB) Online*.

103 *Keesing's Contemporary Archives* (Keynsham, UK: Keesing's Publications Limited, 1952), 11648.

A summary of Nehru's July 17, 1951 reply is also provided:

> Mr. Nehru, in his reply on July 17 to Mr. Liaquat Ali Kahn, said that the latter's apprehensions were 'completely unjustified,' as India's policy continued to be 'to preserve and ensure peace and to avoid war.' Although the Indian Government had demonstrated this last year by reducing the Army, 'in the hope that this might have some effect on Pakistan,' 'continued and intensive efforts' had been made to increase Pakistan's armed forces, which had been largely massed on the Indian frontiers; an 'intensive and astonishing campaign for a *jehad* and war against India' had been carried on in Pakistan, 'not only in the press but by responsible authorities'; and during the previous five weeks raids into Kashmir across the cease-fire line and elsewhere had been intensified. The Indian Government could not ignore 'this continual talk of and preparation for war in Pakistan,' and therefore ordered certain troop movements for defensive purposes; they had no intention whatever of taking any aggressive action, but would resist any aggression against Indian territory. The letter to Mr. Liaquant Ali Kahn concluded: 'I would earnestly urge you to stop propaganda for *jehad* and war against India in Pakistan. This will help more than anything else in improving relations between our two countries.'[104]

Both countries ascribed aggressive motivations to the other, while at the same time announcing that they had no intention of taking "aggressive action" against the other.

No further escalation occurred during this crisis, and no violence was used by either side. While it is not possible to make any conclusive determination as to why India decided merely to deploy troops in response to the crisis trigger, as opposed to actually using military force, it is important to note that according to the ICB data, India was not faced with either a threat of grave danger or a threat to its existence. Rather, the Pakistani triggering event was classified as a "territorial threat." Perhaps this level of threat was not sufficient for the Indian leadership to warrant the use of an anticipatory military activity that included the use of force, but did call for the deployment of troops in case the situation worsened.

It is also instructive that both India and Pakistan made extensive use of the United Nations throughout the crisis.[105] Combined with the series of diplomatic exchanges between the leaderships of the two countries, it appears as if both India and Pakistan were at least somewhat constrained by the legal and normative elements—particularly as embodied in the United Nations.

Deciding to Wait: Israel in October 1973

As opposed to the two cases discussed above, the Israeli decision not to take any anticipatory action in October 1973 was not accompanied by any flurry of diplomatic activity or much political fanfare. No major Knesset debates were held to discuss the likelihood of an impending attack by Israel's Arab neighbors. Diplomats were not sent on urgent missions around the globe to secure assurances of aid in the event

104 *Keesing's Contemporary Archives*, 11648.

105 See *Yearbook of the United Nations, 1951* (New York: Department of Public Information, United Nations, 1952), 345–49.

of war, and no urgent appeal was made to the United Nations Security Council. The simple reason for this lies in the fact that until the very last moment before the Arab attack began, Israeli decision makers and intelligence officials did not believe that such an attack was likely. At the same time, however, it is important to stress that once these leaders realized that such an attack was likely, Prime Minister Meir *was* constrained against taking anticipatory action by the legal and normative elements.

Regardless of the fact that conflicting intelligence was being received, some of it indicating that Egypt and Syria seemed to be preparing to attack,[106] the political and military leadership failed to adjust their "attitudinal prism" away from the preexisting belief that war would not break out in the near future. In fact, in what has become one of the most widely studied and analyzed events in Israeli history, many have argued that the decision to wait was not one of prudence, influenced by legal and normative concerns and constraints, but rather one of the greatest political, diplomatic, intelligence, and military blunders in Israeli history.

At the time, Israeli political-military doctrine was based upon an idea known as "Ha'Conceptzia," or The Concept. According to this idea, Israeli decision makers were convinced that war would only break out if, and only if, certain conditions were met. According to Haber and Schiff, there were two main elements of Ha'Conceptzia: 1) Egypt needed the ability to attack Israeli airbases with both surface-to-surface missiles and attack aircraft and 2) Egypt would not go to war without Syria and vice versa.[107] And since these conditions were not met in September/October 1973, Israeli decision makers did not believe that war was a real possibility at that time. Rodman also notes that "The Meir government, of course, neglected to consider the idea that the Arab world might accept defeat on the battlefield in order to advance its political agenda."[108] Additionally, up until October 5, the Israeli leadership was continually reassured by the intelligence establishment that the likelihood of war in the near-term was low, if not negligible.[109]

The utility of Ha'Conceptzia, and the problems associated with it, are not particularly relevant for the limited scope of this particular discussion. What is important, however, is how Ha'Conceptzia dominated the decision-making process and influenced the leaders vis-à-vis the specific crisis under investigation. It is

---

106 The Egyptian/Syrian attack on Israel in October 1973 is not considered to be an anticipatory military activity for several reasons. First, it was not in response to a specific crisis trigger carried out by Israel. Second, it was not in response to an expected attack by Israel. In this respect, the Egyptian/Syrian attack is generally not considered to be "preemptive" or "preventive" in nature. Finally, the Egyptians and Syrians launched the attack not because of a fear that they were declining and would thus soon be unable to win, but rather because they felt that they were finally in a stronger position vis-à-vis Israel and could now be successful. This last element is explored in more detail in the discussion of the case.

107 Eitan Haber and Zeev Schiff, *Yom Kippur War Lexicon* (Hebrew) (Or Yehuda, Israel: Zmora-Bitan-Divr, Publishers, 2003), 365 (author's translation).

108 David Rodman, "The United States, Israel, and the Yom Kippur War," *Midstream*, 47, No. 6 (September/October 2001), 17.

109 Rodman, "The United States, Israel, and the Yom Kippur War," 366; P.R. Kumaraswamy, "Revisiting the Yom Kippur War: Introduction," *Israel Affairs*, 6, No. 1 (Autumn 1999), 3.

also important to note that while the entrenched nature of Ha'Conceptzia played a crucial role in explaining the actions taken, it was not the only relevant factor. Other elements, such as more recent interactions in the protracted conflict between Israel and the various Arab states (i.e., repeated and systematic mobilizations and escalations that failed to result in war), as well as changes in the relations between the superpowers, must also be taken into account. Since no action takes place within a vacuum, it is impossible to isolate the sole cause, or input, that led to a certain policy being adopted.

The contrasts with the situation in 1967 are striking. In the face of similar stimuli, Israel took different actions. Rather than trying to mobilize international support both bilaterally and through the use of international organizations in the face of increasingly disturbing signs of impending hostilities, Israeli leaders remained lackadaisical about the prospects of the outbreak of armed hostilities. This does not mean, however, that when the time came to make the decision vis-à-vis the use of an anticipatory military activity that the Israeli decision makers were not influenced, or constrained, by the legal and normative elements. In fact, as discussed below, when faced with the decision of whether or not to "preempt" the impending Egyptian and Syrian attack, Prime Minister Golda Meir was clearly constrained and influenced by the normative and legal elements.

Since the crisis itself was of a much shorter duration, there were fewer stages involved in its development and progression. As a result, the analysis of the October 1973 crisis is not as detailed as the Six Day War crisis discussed above. This fact, however, does not detract from the importance of the crisis within this analytical framework. Rather, it is merely indicative of the differing nature of the different crises.

Crisis Progression and Development

According to the ICB case description, the October-Yom Kippur War crisis for Israel was triggered on October 5, 1973[110] by the following events:

> a movement of Egyptian forces toward the Suez Canal and a change from a defensive to an offensive posture… At the same time, Israel's intelligence service belatedly reported an impending Egyptian attack across the Canal scheduled for the following day.[111]

These crisis triggers were classified as being "non-violent military threats," and thereby fit into the rubric of an imminent threat as used in this analysis. Additionally, the crisis triggers are strikingly similar to those that precipitated the Six Day War and Punjab War Scare crises discussed above.

In the Meir government, most decisions were made by the "Kitchen Cabinet," which included Defense Minister Moshe Dayan, Deputy Prime Minister Yigal

110 Wagner notes that the crisis began on October 2, 1973 "with an announcement by the Egyptian press that a 'high state of readiness' by Egyptian forces was in effect along the Suez Canal." Wagner, *Crisis Decision-Making*, 151.

111 Michael Brecher and Jonathan Wilkenfeld, *International Crisis Behavior (ICB) Online*.

Allon, and Minister without Portfolio Yisrael Galili. Also participating in these small meetings was Chief of Staff David Elazar.

The pre-war crisis period was short lived, with the outbreak of fighting coming the next day, in the afternoon on October 6. The major decision of consequence for this discussion was made during this brief crisis period, in fact, it was made the day the war started—October 6. According to Handel's timeline of the events of surrounding the Yom Kippur War, the decision not to take anticipatory military action was taken at about 9:30 in the morning on October 6.[112]

After the decision was made not to take anticipatory action, Meir informed the full Cabinet of the decision and gave instructions to inform the United States of Israel's decision.[113] Schiff notes that "Golda and her ministers have just made a decision exceptional in the history of warfare; Israel is to announce to her enemies that she knows of their intention to attack, and even the hour when the offensive is to begin." He goes on to add that the "assumption is that the Arabs may be deterred at the last moment when they realize that their plans are known."[114] This strategy did not work, and the war commenced a mere four and half hours after the decision was made, with the first shots being fired at 1:55 in the afternoon.[115]

Deciding Not to Take Anticipatory Action

According to Handel, there were multiple inputs that influenced the Israeli decision-makers vis-à-vis the use of an anticipatory military activity in this crisis. These elements included the IDF's confidence, or in Handel's words "overconfidence" in "its ability to overcome *any* attack."[116] Another element that contributed to the decision not to preempt was the altered geographical situation that developed as a result of the Six Day War. In this respect,

> the new borders … gave the IDF more time to react to external threats, thereby making pre-emption less critical than before. Given the general satisfaction with the *status quo*, anything less than a hundred percent guarantee of war was regarded as an insufficient cause to risk a pre-emptive strike—one which the Israelis feared would become a self-fulfilling prophecy.[117]

Stein also discusses the importance of the new post–1967 strategic situation. According to Stein,

> The change in the cease-fire lines in June 1967 removed centers of population from a direct line of fire and, in the south, provided a broad protective shield for defense on

112 Michael I. Handel, *Perception, Deception and Surprise: The Case of the Yom Kippur War*, Jerusalem Papers on Peace Problems No. 19 (Jerusalem: The Hebrew University of Jerusalem, 1976), 38.

113 Golda Meir, *My Life* (New York: G.P. Putnam's Sons, 1975), 427.

114 Zeev Schiff, *October Earthquake: Yom Kippur 1973*, translated by Louis Williams (Tel Aviv: University Publishing Projects Ltd., 1974), 42.

115 Handel, *Perception, Deception and Surprise*, 38.

116 Ibid., 51 (emphasis in original).

117 Ibid., 51–52 (emphasis in original).

> the ground. For the first time, military and civilian leaders began to speak of 'secure' or 'defensible' borders and reformulated concepts of deterrence and defense in response to changes in their strategic environment. Most significant was the increased emphasis on deterrence, a new concern with unintended war, and a major debate about an appropriate strategy of defense.[118]

Stein also discusses the role of the new borders and their impact on the use of anticipatory military activities: "Deputy Prime Minister Allon, one of the foremost exponents of a strategy of 'anticipatory counter-attack' before 1967, argued in the spring of 1973 that a strong and secure boundary '...lessens, in comparison with the past, the need to employ a strategy of a pre-emptive attack.'"[119]

Herzog offers a similar perspective, stating "The depth afforded by the territories taken by Israel in the Six Day War gave the country for the first time in its history a strategic option."[120] Herzog goes on to argue that "The Israeli General Staff could therefore now exercise an option by either launching a pre-emptive attack if war seemed imminent or alternatively allowing the enemy the first-strike—with all the international political disadvantages of such a move accruing to him—and thereafter utilizing the depth afforded by the Sinai Desert to manœuvre, concentrate and counter-attack."[121] In this respect, Israeli leaders felt that they had more flexibility vis-à-vis the policy options now available. The new borders allowed them the option to absorb some limited fighting, and therefore lessened the pressure to use anticipatory military activities to ensure that the fighting occurred on the adversary's territory.

To be sure, these two elements are important, and indicate that there were important strategic and structural reasons why Israel did not use an anticipatory military activity. But, according to Handel, these were not the primary influences. Instead, Handel offers the following perspective:

> Without a doubt, however, the major cause for deciding not to pre-empt was linked to the third level of the international system, the international environment. Israel's dependence on the goodwill of the United States for the supply of weapons and spare parts, as well as for political and economic support, led Israel's leaders to avoid pre-empting for fear of alienating the United States. If Israel had successfully pre-empted, it would have appeared as the aggressor, thus forfeiting American support. Given Israel's isolation in the international system, it could not afford, at any cost, to estrange its only reliable ally. To a lesser degree, it was also important for Israel not to appear to other countries as the invader.[122]

Stein echoes this argument, stating that not only were the new strategic boundaries an important element, but also "international political factors and the importance of

---

118 Janice Gross Stein, "'Intelligence' and 'Stupidity' Reconsidered: Estimation and Decision in Israel, 1973," *The Journal of Strategic Studies*, 3, No. 2 (September 1980), 155.

119 Ibid., 159.

120 Chaim Herzog, *The War of Atonement: October 1973* (Boston: Little, Brown and Company, 1975), 3.

121 Herzog, *The War of Atonement*, 4.

122 Handel, *Perception, Deception and Surprise*, 52.

great power support—long a concern of Israel's civilian leaders—militated against pre-emption".[123]

Dayan offers the following description of the October 6 meeting when the decision on whether to take anticipatory action was taken:

> We were faced with four principal issues: mobilization of our reserves and reinforcement of the fronts; a possible pre-emptive strike by our Air Force; evacuation of children and women from our frontier settlements in the Golan Heights and delivery of a warning to Egypt and Syria. There were two aspects to such a warning: it might move the two Arab states to call off their invasion. But if they nevertheless went ahead, the United States would know who was responsible, and this might ensure her support for us. At all events, it would avoid a situation in which America might believe that war could have been prevented but that, even though we had not initiated it, we had not done all in our power to forestall it.[124]

Dayan goes on to add,

> I rejected the idea of a pre-emptive strike by the Air Force as well as the mobilization of more reserves than were required for immediate defense. I feared that such moves would burden our prospects of securing the full support of the United States… And if American help was to be sought, then the United States had to be given full proof that it was not we who desired war—even if this ruled out pre-emptive action and handicapped us in the military campaign.[125]

Brecher notes that Meir, with much cynicism, "made her calculation by drawing upon Israel's experience in the 1967 crisis period, before the Six Day War, when, even with Nasser's provocative acts, 'we witnessed the 'great support' given to us by the whole world.'"[126] Israeli leaders remembered what had happened during the period before and after the Six Day War, and they did not want to have to go through that again.

Much has been written about the Yom Kippur War being the quintessential "intelligence failure."[127] And part of this fits with the decision not to take anticipatory

---

123 Stein, "'Intelligence' and 'Stupidity' Reconsidered: Estimation and Decision in Israel, 1973," 159.

124 Moshe Dayan, *Moshe Dayan: Story of My Life* (New York: Morrow, 1976), 460.

125 Dayan, *Moshe Dayan*, 461.

126 Brecher, *Decisions in Crisis*, 200.

127 Uri Bar-Joseph and Arie W. Kruglanski, "Intelligence Failure and Need for Cognitive Closure: On the Psychology of the Yom Kippur Surprise," *Political Psychology*, 24, No. 1 (March 2003), 75–99; Robert Jervis, "Perceiving and Coping with Threat," in Robert Jervis, Richard Ned Lebow and Janice Gross Stein (eds), *Psychology and Deterrence* (Baltimore, MD: The Johns Hopkins University Press, 1991); Schiff, *October Earthquake*; Avi Shlaim, "Failures in National Intelligence Estimates: The Case of the Yom Kippur War," *World Politics*, 28, No. 3 (April 1976), 348–80; Stein, "'Intelligence' and 'Stupidity' Reconsidered: Estimation and Decision in Israel, 1973;" Janice Gross Stein, "Military Deception, Strategic Surprise, and Conventional Deterrence: A Political Analysis of Egypt and Israel, 1973–73," *The Journal of Strategic Studies*, 5, No. 1 (March 1982), 94–121.

action: the signs of an impending attack were so clearly evident, how could any competent leader fail to take action to forestall such an attack? Without digressing too much, it is worth noting that during the two years that preceded the Yom Kippur War, a cycle of Arab mobilizations and alerts—but without actual war erupting—had taken place. In fact, according to Handel, during this period

> a 'cry wolf' situation developed at least three times: at the end of 1971 – [Sadat's] 'year of decision'; in December 1972; and in April-May 1973. From Israel's point of view, a continuous reaction to such false alarms was too expensive, and was viewed as part of an Arab war of nerves. The cumulative effect of those false alarms had a negative impact on Israel's alertness and attention, and also contributed to the underestimation of Arab capabilities.[128]

Schiff describes the situation in the following manner:

> Israeli intelligence data fell on deaf ears. There was no willingness to accept facts at face value. Perhaps Israeli commanders understood what was going on, but they built an impenetrable psychological wall around themselves. Intelligence Branch now became part of an almost inevitable process; instead of influencing they were influenced. They served as good eyes and ears, but the brain and heart assumed that the Egyptians would not dare start a war—as long as Sadat frequently promises it and doesn't deliver.[129]

In such a situation, the Israeli leadership needed to be absolutely certain that an attack was going to actually occur before taking anticipatory action. Wagner describes the situation in the following manner:

> In short, alerts and mobilizations by the Arab states, principally Egypt and Syria, came to be viewed as part of the 'normal' course of events, and not reflecting a separate crisis level as before. Thus, while Israeli intelligence continued to provide accurate information on such developments, it came to be interpreted as ebb and flow rather than in crisis terms.[130]

The fact that the recent interactions between Israel and the Arab states had been characterized by repeated increases in hostile rhetoric and troop mobilizations, but without an actual outbreak of armed hostilities, complicated the situation for the Israeli leaders.

The existing intelligence estimates of both Israel and the United States, coupled with elements of Ha'Conceptzia produced a situation that led Israeli leaders to downplay the possibility of the outbreak of war in the near term. The repeated mobilizations and deployments of Arab forces over the previous two years—i.e., escalations that did not culminate in war—created an even more difficult situation

128 Handel, *Perception, Deception and Surprise*, 54. According to Schiff, the April/May attack was postponed due to the fact that the Syrians were not yet prepared to go to war. Schiff, *October Earthquake*, 7.

129 Schiff, *October Earthquake*, 33–34.

130 Wagner, *Crisis Decision-Making*, 147.

for Israeli decision makers.[131] On the one hand, these actions seemed to reinforce the dominant perceptions—that the Arabs were not prepared for war, but were instead hoping to provoke Israel into striking first. Additionally, these elements reinforced the reluctance to go against the legal and normative traditions against taking anticipatory action. On the other hand, however, these same actions, and the sense of complacency they induced within Israel, left Israel vulnerable to the type of surprise attack that was carried out by Egypt and Syria.

International Law, Just War, and Golda Meir

Unlike the Six Day War, in this case there was not a long pre-war crisis period. If the crisis trigger was grave enough, this shortened pre-war crisis period could buttress the strategic-based rationales for the use of anticipatory military activities. Or, in other words, in this type of crisis, if the threat is grave enough and the time frame is compressed to such an extent that the actor does not have the luxury of dillydallying with diplomatic niceties, such as Eban's world tour in May/June 1967, the first-strike penalty could be eliminated, thus removing the constraints against taking anticipatory action.

At the same time, such a compressed crisis could create a situation where the use of an anticipatory action would be consistent with the requirements of the legal and normative traditions. If the crisis was precipitated by actions that were seen as foreshadowing an imminent attack, there is legal support for acting in an anticipatory manner. With respect to the normative element, as Walzer argued, last resort does not mean that *everything* needs to be tried, but everything that has a good likelihood of working needs to be tried. In this respect, if the crisis period is sufficiently compressed, and if war appears to be truly imminent in a matter of hours, does not the issue (i.e., constraint) of last resort collapse as well?

But, in the October-Yom Kippur War crisis, the compressed nature of the crisis did not sway the Israeli leadership towards the use of an anticipatory military activity. In fact, Meir *explicitly rejected using anticipatory military actions* to deal what was by then known to be an imminent threat of attack by Egypt and Syria. Moreover, her

131 For more information, see Uri Bar-Joseph, *The Watchmen Fell Asleep: The Surprise of Yom Kippur and Its Sources* (Hebrew) (Lod, Israel: Zmora-Bitan Publishers, 2001); Uri Bar-Joseph and Arie W. Kruglanski, "Intelligence Failure and Need for Cognitive Closure;" Yaacov Bar-Siman-Tov, "The Arab-Israeli War of October 1973," in Alexander L. George (ed.), *Avoiding War: Problems of Crisis Management* (Boulder, CO: Westview Press, 1991); Michael Brecher, *Decisions in Crisis*; Michael I. Handel, *Perception, Deception and Surprise*; Ephraim Kam, *Surprise Attack: The Victim's Perspective* (Cambridge, MA: Harvard University Press, 2004); Rodman, "The United States, Israel, and the Yom Kippur War;" Avi Shlaim, "Failures in National Intelligence Estimates: The Case of the Yom Kippur War," *World Politics*, 28, No. 3 (April 1976), 348–80; Janice Gross Stein, "'Intelligence' and 'Stupidity' Reconsidered: Estimation and Decision in Israel, 1973;" Janice Gross Stein, "Military Deception, Strategic Surprise, and Conventional Deterrence: A Political Analysis of Egypt and Israel, 1973–73," *The Journal of Strategic Studies*, 5, No. 1 (March 1982), 94–121; Janice Gross Stein, "Calculation, Miscalculation, and Conventional Deterrence II: The View from Jerusalem," in *Psychology and Deterrence*; Wagner, *Crisis Decision-Making*.

rejection of these activities was based primarily, if not solely, on both normative and legal elements: she did not want Israel to be seen as the aggressor.

The actions of the Israeli leadership during the period leading up to the outbreak of the October-Yom Kippur War are indicative of how low the threat was truly perceived to be in Israel. In sharp contrast with the crisis leading up to the outbreak of the Six Day War, there were no major Knesset debates regarding the prospect of war, and no full cabinet sessions on the matter. In fact, the decision not to take anticipatory action was taken by Meir at a meeting of the "Kitchen Cabinet," attended only by Meir, Allon, Dayan, Elazar, and Galili, as opposed to during a meeting of the full Cabinet.[132]

As was the case in the Six Day War crisis, the Israeli leadership was again influenced by the legal and normative constraints, as well as by the United States, against taking anticipatory military action. In this case, however, these constraints pushed the Israelis against taking action. According to Brecher, "The decision not to pre-empt was defined by the Prime Minister as a political decision, influenced mainly by prior experience, especially 1967, when Israel was accused of starting the Six Day War."[133] Brecher goes on to add that Meir later stated,

> I regret not launching it [an interceptive strike] because there is no doubt that the [military] position would have been much better. I do not regret [the decision] … because at least we do not have that argument with the world.[134]

Brecher also adds that Meir also stated during the war, "Will anyone dare, this time… to say the truth, that responsibility for this awful war rests with them [the Arabs]?"[135] Wagner reports that Meir stated, "This time it has to be crystal clear who began, so we won't have to go around the world convincing people our cause is just."[136]

In this respect, it is clear that the issue of culpability for initiation of the hostilities was of primary importance for the Israeli government—Israel did not want to be seen as the aggressor, or as "breaking the rules" in the eyes of the United States or the international community. At the same time, however, it is important to note that the elevation of the legal and normative elements above the strategic ones came only after Meir was assured that Israel's survival was not at risk.[137] Again, according to Brecher,

> There appears to have been a third perceptual component in the Prime Minister's approach to the decisional problem of pre-emption. Three times during the 6 October morning meeting she asked Elazar and Peled whether Israel's survival would be placed in jeopardy—and whether there would be long-run military disadvantages—if the decision

132 Brecher, *Decisions in Crisis*, 195–201; Schiff, *October Earthquake*, 40–41.

133 Brecher, *Decisions in Crisis*, 177.

134 Ibid., 177.

135 Ibid., 177.

136 Wagner, *Crisis Decision-Making*, 158.

137 According to the ICB data, the October-Yom Kippur War Crisis was classified as "threat of grave danger" for Israel, and not a "threat to existence."

> were not to pre-empt. When they answered in the negative, her primary concern was set at rest, and the two external inputs—US reaction and world opinion—held sway.[138]

The influence of the United States and "world opinion" are not necessarily wholly distinct and separate inputs. Rather, they can be viewed as component parts of a larger element. To be sure, the United States was viewed as being more important, and it's opinion carried more weight in Jerusalem, but the opinion of other actors in the system could not be dismissed out of hand either. Rather, both elements were important in the decision-making process that ultimately culminated in the decision not to take anticipatory action in October 1973.

This account supports the hypothesis that the constraints inherent in the legal and normative traditions are not total or absolute, but can be mitigated or limited if the strategic situation is grave enough. But, on the other hand, if the strategic situation is such that the survival of the state is *not* at risk, or if the threat is not of a similarly grave level, the state may, in fact, be constrained by the legal and normative elements.

Imminent Threats and Anticipatory Actions: Are States Constrained?

The case studies presented above indicate that states tend to be constrained by the legal and normative prohibitions against taking anticipatory military activities, at least to a certain point. As expected, states do appear to be constrained against taking anticipatory military activities unless the threat is both a) imminent and immediate and b) sufficiently grave to warrant losing potential support from friends and allies. Making that determination, however, is quite difficult—and is one of the primary difficulties facing leaders. If these two conditions are not met, however, the constraints against anticipatory military activities contained in international law and the just war tradition do appear to have a restraining effect on states' behavior.

It is important to note that both conditions, the imminence and gravity of the threat, are crucial elements of the equation. As the October 1973 case illustrates, imminence alone is not sufficient to override the legal and normative costs of taking anticipatory military action.

Additionally, as the Punjab and the October 1973 cases both demonstrate, it is often difficult for leaders to determine what constitutes an "imminent" threat. In both of these cases, the leaders were presented with situations that were strikingly similar to previous conflicts that did not culminate in the eruption of war. How were the leaders to know if this time would be different? How are leaders to know if the adversary's rhetoric and actions are to be taken seriously, i.e., indications of intentions to strike, or are merely evidence of posturing and bluster? The same can be said with respect to the defender's use of rhetoric with respect to international law. To be sure, these are amongst the most intractable—and important—questions that face international relations and foreign policy scholars, and as such they are not, and cannot be, answered here.

---

138 Brecher, *Decisions in Crisis*, 180.

But what does become clear from these cases is that with respect to undertaking an especially risky alternative (launching an anticipatory military action), leaders seem to need more than just merely a "feeling" that war is likely. In other words, it appears that before states are willing to use AMAs to counter an imminent threat, they need to be sure that the threat is real—i.e., they need some hard evidence that the attack is about to come. However, it needs to be emphasized again that even this evidence is not enough to convince states to engage in these activities.

Chapter 7

Strategic Necessity, Law, and Norms II: Anticipatory Military Activities and Distant Threats

Chapter 6 focused on the use/non-use of anticipatory military activities to counter imminent threats. This chapter shifts the focus away from imminent threats and looks at how states have responded to crises precipitated by more distant threats. All three cases examined in this chapter were triggered by events classified by the ICB project as "external change." This type of situation is defined as an "intelligence report, change in specific weapon, weapon system, offensive capability, change in global system or regional subsystem, [or] challenge to legitimacy by international organization."[1] In this respect, the threat that initiated the specific crisis was not *imminent* in nature, but rather was more distant, i.e., could develop in the future. Traditionally, military actions taken to deal with these types of threats have been labeled "preventive," or, in other words, the action is intended to prevent the threat from fully emerging or developing.

The divide between imminent and distant threats is crucial vis-à-vis both international law and the just war tradition. As was discussed in Chapters 4 and 5, there is general consensus that anticipatory action taken in response to an imminent threat is legitimate, while there is more debate amongst scholars as to the legitimacy of anticipatory action taken in response to a more distant threat. This is not to say that there is no support for anticipatory action taken in response to a more distant threat, but merely that this support is not as widespread. At the same time, however, *it is essential to stress that the point of this chapter is not to assess the legality or legitimacy of the actions taken by the individual states with respect to the particular crises studied*. Rather, the primary goal is to try and ascertain, to the extent possible, if the leaders were influenced and constrained by the legal and normative elements when deciding how to deal with the specific crises.

As with Chapter 6, three cases will be examined in this chapter, each representing a different type of response to the same type of triggering event. The first case is the Israeli strike on the Iraqi nuclear reactor in June 1981 (Iraq Nuclear Reactor), the second is the US naval quarantine of Cuba in October-November 1962 (Cuban Missiles), and the third is the US decision to take no military action after receiving reports concerning the construction of a Soviet submarine base in Cuba in September 1970 (Cienfuegos Submarine Base). The first case is an example of an anticipatory

1 Michael Brecher and Jonathan Wilkenfeld, *International Crisis Behavior (ICB) Online*, 2003 <http://www.cidcm.umd.edu/icb/dataviewer>.

military action that included the use of force, the second is an example of an anticipatory military action that did not include the use of force, and the third a "no response" case.

Striking the Reactor: The Israeli Raid on Osiraq in June 1981

On June 7, 1981, the Israeli Air Force destroyed the Osiraq nuclear reactor[2] located outside Baghdad. According to the ICB case information, the crisis began in January of 1981, when the French announced that the reactor would become fully operational as of July 14. Not only was this operation the first time that a state successfully destroyed the nuclear facility of another state, but it is also commonly viewed as being the textbook example of the use of preventive military force as a counterproliferation tool.[3]

Israeli concerns about the Iraqi nuclear project were voiced as early as January 1976.[4] On January 27, 1976, the matter was brought before the Knesset. During the debate that ensued, MK Nof gave details of the type of reactor that was under construction, as well as why Israel was concerned about the Iraqi project:

> The nuclear fuel used by the reactor is 93 percent enriched uranium and the core of the reactor is approximately seven pounds of uranium 235. Plutonium can be manufactured by a sophisticated reactor of this kind. Both the plutonium and the enriched uranium can serve as nuclear explosives.
>
> Five pounds of plutonium are sufficient to produce an atom bomb of approximately ten kilotons, the same size as the one dropped on Hiroshima…
>
> Apart from the plutonium, which requires a complicated separation installation, the bomb can be manufactured from enriched uranium. The latest information is that the French company which looked for uranium deposits in Iraq found a rich field there. Thus, if the plot to establish the nuclear center in Iraq is not foiled, that country will have technical knowhow, trained personnel and bombs… Iraq is one of the countries which waged war on Israel in 1948. It refused in 1949, and still refuses, to sign an armistice agreement with Israel. It conducts public hangings, massacres the Kurdish people, and its rulers are unstable and irresponsible…[5]

---

2 According to Snyder, the "Osiraq" name is used by the French, while the Iraqis refer to the reactor by its Arabic name "Tammuz." Jed C. Snyder, "The Road to Osiraq: Baghdad's Quest for the Bomb," *The Middle East Journal*, 37, No. 4 (Autumn 1983), 568. The Osiraq name is more prevalent in the literature, and will be used in this chapter.

3 Robert S. Litwak, "Non-Proliferation and the Dilemmas of Regime Change," *Survival*, 45, No. 4 (Winter 2003–2004), 18.

4 According to Perlmutter, et al., negotiations for the sale of the reactor were initiated in 1974, while the actual sale was concluded in 1975. Amos Perlmutter, Michael I. Handel, and Uri Bar-Joseph, *Two Minutes Over Baghdad* (London: Frank Cass, 2003), xxix–xxx.

5 Netanel Lorch (ed.), *Major Knesset Debates, 1948–1981* (Lanham Maryland: Jerusalem Center for Public Affairs and University Press of America, Inc., 1993), 2024–2025.

During the same session, Foreign Minister Yigal Allon stated,

> With alertness and concern, the Government of Israel is keeping track of the cooperation between Arab countries and countries with advanced nuclear technology. We have warned those countries of the dangers involved in giving nuclear technology to countries which could use it for aggressive purposes in the region.[6]

The matter was then referred to the Foreign Affairs and Defense Committee. In this respect, Israel put the world on notice a full five years *before* it acted that it considered the Iraqi reactor to be a significant threat.

Additionally, Israel would spend the next five years trying to convince other states of the threat posed by the Iraqi reactor and get the project stopped. According to Perlmutter, et al., on September 14, 1980,

> In the midst of Israeli diplomatic pressures aimed at limiting assistance provided to the Iraqi project by France and Italy, Deputy Defense Minister Zipori publicly warns: 'We will explore all legal and humane avenues. If pressure doesn't work, we will have to consider other means.'[7]

The attack on the reactor was not the proverbial bolt out of the blue, so to speak, but rather came at the end of a prolonged period of concerted effort by the Israelis to try to get the project halted.[8] Only after these efforts failed did Israel decide to strike the reactor. Accordingly, a brief discussion of the other avenues pursued is helpful in understanding why Israel eventually took the anticipatory action it did.

Watching, Waiting, and Warning: 1974–1980

According to Feldman, there were five elements that were central to Israel's belief that Iraq was trying to develop a nuclear weapons program as opposed to merely working to develop a civilian power source. These elements included:

- first, Iraq's initial desire to purchase the non-economical but [a] plutonium-producing gas-graphite power reactor from France;
- second, its purchase of a 70 megawatt (thermal) Material Testing Reactor, an extremely odd move for a nation not involved in the indigenous production of power reactors;
- third, Iraq's insistence that the *Osiraq* reactor be fuelled by 92 percent-enriched weapons-grade uranium rather than by the less enriched "Caramel" fuel;

6 Lorch, *Major Knesset Debates*, 2026.

7 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxix.

8 It is interesting to note that the June 1981 air strike is not believed to be the first time Israel used force against portions of Iraq's nuclear reactor. In fact, in April 1979, the reactor cores, still in France awaiting delivery to Iraq, were destroyed, delaying the Iraqi reactor project by six months. Most reports of the incident indicate that the Mossad was responsible for destroying the reactor cores. Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxiv.

- fourth, its purchase of some 250 tons of natural uranium, which, given the other components of Iraq's nuclear program, makes little sense unless plutonium production was intended; and,
- fifth, the acquisition of plutonium-separation "hot cell" simulators from Italy.[9]

Meanwhile, the development of the Iraqi reactor project was closely monitored by Israel.

At the first stages of the development, in the winter of 1974–1975, Israeli military intelligence (AMAN) and Israeli foreign intelligence (Mossad) viewed Iraq's nuclear project "high in their order of priorities, although at this stage the project is not regarded as an imminent threat."[10] In 1976, the issue was brought before the Knesset, but did not become a central element within the Israeli security agenda at this time.

The French-Iraqi "nuclear cooperation agreement" was finalized on April 4, 1976, and after this point, the Israelis brought the issue to the United States, asking "that all possible steps be taken to prevent the implementation of that agreement."[11] According to the report issued by the Israeli Government, during the course of 1976, "the United States administration shared Israel's concern about various aspects of the transaction, and that it apparently had approached the Government of France for clarifications."[12]

In February 1977, Foreign Minister Allon met with an Iranian official. Reports differ as to the substance of the meeting. Perlmutter, et al., report that the meeting was intended to determine if there was interest in "possible Israeli-Iranian cooperation against the Iraqi nuclear project." According to this account, "The Iranian response is lukewarm."[13] Nakdimon offers a different version of Allon's visit. According to Nakdimon, Allon went to Iran seeking information about Iraq's nuclear program. The Iranians, however, were not very forthcoming with such information, beyond confirming that the French were assisting in the building of a nuclear research facility, which served to further alarm the Israelis.[14] In March 1977, Allon met with French Foreign Minister de Guiringuad. During these meetings, Allon told the French that the Israelis were concerned that the Iraqis would be able to produce weapons-grade materials with the proposed reactor. The French, however, remained convinced that sufficient safeguards existed to prevent such an occurrence from happening.[15]

In May 1977, the right-wing Likud party won the national elections for the first time and Menachem Begin became prime minister. As a result of these elections, a new cast of characters were involved in the leadership of the Israeli government.

---

9 Shai Feldman, "The Bombing of Osiraq-Revisited," *International Security*, 7, No. 2 (Autumn 1982), 115.

10 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxx.

11 Ministry of Foreign Affairs and Atomic Energy Commission (Office of the Prime Minister), Government of Israel, *The Iraqi Nuclear Threat – Why Israel Had to Act* (1981), 31.

12 Ibid., 31.

13 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxi.

14 Shlomo Nakdimon, *First-strike: The Exclusive Story of How Israel Foiled Iraq's Attempt to Get the Bomb*, translated by Peretz Kidron (New York: Summit Books, 1987), 72.

15 Government of Israel, *The Iraqi Nuclear Threat*, 31.

One of the first elements on Begin's agenda was a meeting in early June with the directors of both AMAN and the Mossad concerning Iraq's nuclear project. This commitment would be extended in November with the establishment of a permanent committed designed specifically to deal with this "Iraqi threat." The primary duty of the committee was "to estimate, on the basis of intelligence information, the status of the Iraqi project and to find ways to hinder the Iraqi road to achieving nuclear capability."[16]

The first security cabinet meeting concerning the Iraqi reactor was held on August 23, 1978. Among those participating in this meeting were Prime Minister Begin, Deputy Prime Minster Yigal Yadin, Foreign Minister Moshe Dayan, Defense Minister Ezer Weizman, Deputy Defense Minister Mordechai Zipori, Agriculture Minister Ariel Sharon, and Finance Minister Simha Ehrlich. Additionally, Lieutenant-General Raphael Eitan, Chief of Staff of the Israel Defense Force (IDF), Military Intelligence Director Shlomo Gazit, Military Intelligence's expert on the Iraqi project Colonel David Bnaya, Director-General of the Israeli Atomic Energy Commission Brigadier-General (res.) Uzi Eilam, and Nahum Admoni, who was in charge of the committee charged with following the progress of the Iraqi project were also in attendance.

Opinions were divided among those present at the meeting as to how the issue should be dealt with. Sharon advocated "that Israel regard any Arab attempt to develop or acquire nuclear weapons as a clear *casus belli* to be met with appropriately forceful means."[17] At this time, however, support for the military option was limited to Sharon and Ehrlich. Others at the meeting, particularly Yadin, expressed concerns that the threat was not yet immediate, and that the costs of an attack at this point would outweigh the benefits, i.e., there would be a significant first-strike disadvantage in that the political costs would be significant. From this perspective, there was no time pressure to strike at the moment, and other alternatives could be pursued first. At the same time, however, the military option was not dismissed, and the Israeli Air Force (IAF) began to develop both operational and technical plans for the destruction of the reactor.[18]

Israeli leaders repeatedly and routinely expressed their concerns about the Iraqi reactor to both French and American officials. During a February 1979 visit to Paris, Foreign Minister Dayan broached the issue with French leaders but was unable to persuade them to halt the project. At the same time, Dayan also expressed concern about the continued animosity and hostility towards Israel expressed by Iraq, its increased arms purchases, and its increasingly close ties with the Soviet Union.[19]

In July 1980 Foreign Minister Shamir met with the French Chargé d'Affaires in order "to officially express Israel's 'profound concern' over the Osiraq reactor." In response, "France denied that any real danger of nuclear proliferation existed at Osiraq and a day later replied that 'Iraq, like any other country, has the right to the peaceful uses of nuclear energy and [France] does not see any reason for this right

16 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxiii.

17 Nakdimon, *First-strike*, 94.

18 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxiii.

19 Government of Israel, *The Iraqi Nuclear Threat*, 32.

to be refused.'"[20] The United States was also consulted vis-à-vis the Iraqi reactor during this period, with the Israelis asking the United States "to make every possible effort to prevent Iraq from acquiring a military nuclear potential." According to the Israeli Government report, "In those contacts US officials left little doubt that they viewed Iraq's nuclear development with concern."[21]

Shamir also met with Italian officials concerning the Iraqi program during the summer of 1980. The Israeli Government report notes that in his meetings with Italian Foreign Minister Colombo, Shamir

> pointed out that Iraq's hostility towards Israel, the character of its regime, its declared intention of destroying Israel and its active participation in three wars against Israel since 1948, all obliged Israel to express its deepest concern that Iraq was given a massive destructive capability. In view of the above, [Shamir] called upon the Government of Italy to refrain from strengthening Iraq's capacity to endanger Israel's existence.[22]

The Italian Government replied that its cooperation with Iraq was scientific in nature, and was in compliance with the requirements of the NPT. Additionally, Italy assured Israel that if it became apparent that the nuclear program was not designed for scientific purposes, its assistance would be terminated.[23]

In September 1980, Shamir met again with French leaders. In this meeting, Shamir raised concerns about a nuclear Iraq, particularly in light of the Iran-Iraq War, which had recently erupted. Shamir argued that the outbreak of the war "highlighted the extremist and aggressive character of Iraq, and … made Iraq's pursuit of a military nuclear capability even more disturbing." The French, however, were not persuaded:

> The Foreign Minister of France emphasized that, although he understood Israel's concern, France did not share it. He added that France furnished Iraq with nuclear technology and equipment for research purposes and that its nuclear cooperation with Iraq was based on France's evaluation that Iraq had no plans to manufacture nuclear weapons—at least not at that stage—though he could not take a stand with regard to possible developments in the distant future. He further stated that, in his country's judgment, the alternative of withholding nuclear technology from Iraq was unacceptable.[24]

The matter was raised again with French leaders in both October 1980 and January 1981, although to no avail.

Regardless of the assurances provided by France about the "peaceful nature" of the Iraqi nuclear program, in Israel concerns remained about the ultimate aim of the reactor. These concerns can be traced to both the type of technology acquired as well as the rhetoric of the Iraqi regime.

On the technological side, the primary concern was that the equipment purchased was intended for the production of fissile material. Additionally, the Israelis were

---

20 Snyder, "The Road to Osiraq: Baghdad's Quest for the Bomb," 581.

21 Government of Israel, *The Iraqi Nuclear Threat*, 32.

22 Ibid., 33.

23 Ibid., 33.

24 Ibid., 34.

unconvinced that the IAEA safeguards connected with the reactor would be sufficient to prevent the diversion of these materials to military projects. Shoham notes that not only were several weeks notice needed before any inspections could take place, but all inspectors had to apply for visas before they could enter Iraq to conduct inspections.[25] Additionally, there are three important limitations with respect to the agreement reached between Iraq and the IAEA with regards to inspections:

a) Inspection is intermittent and advance notice is given prior to the arrival of inspectors. This would have permitted Iraq to load Osiraq with natural uranium following each inspection and to unload it before the next. In this way, Iraq could have produced plutonium without the fear of being detected by IAEA inspectors.
b) Inspection procedures permit the use of television or photographic surveillance for monitoring between inspection visits. However, no such measures are foreseen under the present safeguards approach for [Materials Testing Reactors] such as Osiraq. As a result, no means are available to provide any indication of diversion between inspections.
c) The NPT does not provide for the possibility of carrying out special inspections on the basis of accusations.[26]

Additionally, since the IAEA has no enforcement powers of its own, and the United Nations Security Council would have to approve any sanctions—an outcome that appeared unlikely due to Soviet support for Iraq—the Israeli government stated that "Iraq could also abrogate its safeguards agreement with the IAEA—with no known back-up safeguards in force—without fear of sanctions or of incurring any other major risks."[27] As a result of these limitations, Feldman concludes that "Israel's decision to preempt the Iraqi program was clearly based on the assessment that these safeguards would not be an effective barrier to Iraq's efforts."[28]

Concerns also arose as a result of Iraqi statements and rhetoric. For example, in 1975, Saddam Hussein was reported as explicitly linking Iraq's purchase of a nuclear reactor as "the first Arab attempt at nuclear arming."[29] Additionally, another Iraqi leader stated:

> The Arabs must get an atomic bomb. The countries of the Arab world should possess whatever is necessary to defend themselves.[30]

---

25 Uri Shoham, "The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense," *Military Law Review*, 109 (Summer 1985), 211.

26 Government of Israel, *The Iraqi Nuclear Threat*, 20.

27 Ibid., 27.

28 Feldman, "The Bombing of Osiraq-Revisited," 118.

29 Lucien S. Vandenbroucke, "The Israeli Strike Against Osiraq: The Dynamics of Fear and Proliferation in the Middle East," *Air University Review*, September-October 1984, <www.airpower.au.af.mil/airchronicles/aureview/1984/sep-oct/vanden.html> (accessed March 28, 2005).

30 Ibid.

In this respect, Iraqi statements backed up Israeli fears that the nuclear reactor was designed for military purposes.

At the same time, the Israelis were clearly concerned that they would be the ultimate target of the nuclear weapons eventually produced by this reactor. Iraq had been a participant in multiple wars with Israel, and, unlike other Arab states such as Egypt, Syria, and Lebanon, had never signed a formal armistice with Israel. As such, Iraq was still "technically" at a state of war with Israel. In this respect, the legal elements were seen as somewhat different as opposed to the Israeli cases presented in the previous chapter. This is not to imply that the legal elements were not considered by Israeli leaders, but rather that in this case the legal elements were viewed from a different perspective: instead of operating in a situation where the crisis was precipitated by an adversary who had signed an armistice, and therefore was not technically still engaged in hostilities with Israel, in this case, the adversary was not a party to any formal termination agreement. The role of international law in the decision to strike is discussed in more depth below.

An additional source of concern for Israel was the fact that Iraqi leaders had joined repeatedly called for the destruction of Israel. In an interview published on January 31, 1980, Iraqi Foreign Minister Hamadi stated,

> Iraq cannot agree to the existence of Zionism – neither as a movement nor as a state… The Arab nation cannot agree to the amputation of any part from its body … because the land of Palestine is an Arab land and we cannot conceive giving it up… The struggle against Zionism is for us a struggle in which there can be no compromise.[31]

On March 27, 1980, Iraqi President Saddam Hussein told the "National People's Conference" in Baghdad

> I do not think that there is anyone who believes that the monstrous Zionist entity conquering our land really constitutes a state. On the contrary, we disagree with some Arab regimes and organizations because of our belief that Arabs must not give their signature and agreement to the monstrous Zionist entity, even within the borders of 5 June 1967.[32]

To be sure, the Iraqis were not alone using this type of rhetoric vis-à-vis Israel. Calls for Israel's destruction, or the destruction of the "Zionist entity," were not new and had long been a rhetorical tool used by many Arab leaders. However, Iraq was the only Arab state that was actively pursuing the development of an atomic program.[33]

Additionally, after the October 1973 War (in which Iraq was a participant), Iraq rejected the idea of any form of political settlement with Israel, becoming part of the "rejection front." The rejection front was a group of Arab states and Palestinian groups that argued that the conflict with Israel could only be solved by Israel's

---

31 Ibid., 4.

32 Government of Israel, *The Iraqi Nuclear Threat*, 4.

33 It is also important to note that there were also substantial intra-Arab rivalries between Iraq and many of the other Arab states, particularly Egypt and Syria. At the time that Iraq was pursuing the nuclear option, relations were particularly strained with both Egypt and Syria. For a detailed description of these relationships, see Avraham Sela (ed.), *Political Encyclopedia of the Middle East* (Jerusalem, Israel: The Jerusalem Publishing House, Ltd., 1999), 355–356.

destruction—not through diplomatic channels. According to Sela, the underlying motivation for many members of the rejection front was Pan-Arab nationalism, and a fear that "the diplomatic process would lead to effective legitimization of Israel by the Arab states…"[34] Since Iraq was one of the leading members of the rejection front,[35] along with Libya, it is clear why the Israelis would feel threatened by Iraq's attempts to acquire nuclear technology—and why they would try to get their friends and allies to help prevent this from happening.

The combination of the failure of Iraq to sign any armistice agreement with Israel and the consistently belligerent rhetoric coming out of Baghdad created a situation that caused great alarm in Israel. For the Israelis, these two elements indicated the hostile intent of the Iraqi regime. In this respect, the attempt to acquire a nuclear capability took on additional significance.

While the diplomats were working to get the project stopped through official channels, less "official" channels were also at work on the matter. In the summer of 1980, the Israelis began a concerted public relations campaign against the Iraqi nuclear program. The Israeli media was replete with articles with headlines including "A nuclear Arab bomb: A *casus belli* for Israel?" and "Israeli regards the French adventure [in Iraq] as introducing the Middle East to the age of the first nuclear strike".[36] The message was clear: "As *Time* magazine put it, Israel had given a silent warning that if it considered Iraq close to reaching the bomb, it might use a pre-emptive strike on Iraq's nuclear facility."[37]

Much of Israel's diplomatic maneuvering, both formal and informal, and was done publicly, to such an extent that even the Iraqis took notice. Shoham reports that,

> On October 4, 1980, an official Iraqi newspaper noting that 'the one who fears the Iraqi nuclear reactors is the Zionist entity,' concluded, 'This entity has raised heaven and hell against Iraqi attempts to acquire nuclear technology and it has threatened that it will not stand with hand tied towards that.'[38]

---

34 Sela, *Political Encyclopedia of the Middle East*, 636.

35 It is important to note that the Iraqi nuclear project was also partially motivated by its desire to "attain hegemony in the Arab world in the Persian Gulf." Government of Israel, *The Iraqi Nuclear Threat*, 7. This is not to imply, however, that the quest for regional hegemony was mutually exclusive with the struggle against Israel. In fact, to a certain extent, the two appear to have a somewhat symbiotic relationship—it has often been the case that Arab leaders posturing for leadership within the Pan-Arab community have often used anti-Israel rhetoric and low-level violence (at least initially) as tools to further their political ambitions. In this case, and with the ultimate outcome potentially being a nuclear-armed Iraq, the Israeli leadership was not willing to pass this off as merely another iteration of intra-Arab posturing.

36 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, 59.

37 Ibid., 61.

38 Shoham, "The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense," 213.

In this respect, the Israelis were making it very clear to all involved that they were trying to exhaust all possible non-military means to stop the progress of the Iraqi nuclear project.

Planning the Attack

The planning for an eventual attack on the Iraqi reactor began in earnest in late 1979. In October the IDF was instructed to begin developing a plan for an eventual strike on the reactor.[39] In January 1980 the idea of striking the reactor was discussed again, and Defense Minister Ezer Weitzman argued that "the situation was not yet ripe for such a strike."[40] On March 2, Prime Minister Begin was given a report that presented the potential costs and benefits of hitting the Iraqi reactor:[41]

> While the report confirms that the goal of the Iraqi project is to achieve nuclear capability, it concludes that, since the Iraqi project is accepted as legitimate by world opinion, its destruction by Israel might lead to some negative consequences. Specifically, the report warns of the following possible outcomes: an Iraqi attempt to take revenge by attacking sensitive targets in Israel, including the nuclear complex in Dimona; hostile world public opinion, especially if the destruction of the reactor when it is operational ('hot') causes large-scale radioactive contamination; international sanctions in response to the Israeli breaking of international norms whereby nuclear reactors should not be attacked; intensified anti-Israeli activity in the Arab world; breaking off the fragile peace process with Egypt; combined Arab military action, with Soviet backing; and damage to the US-Israeli relationship.[42]

It is reported that Begin concluded from the report that the rector must be destroyed before it became "hot" in order to minimize the possible adverse consequences of the action.[43] In other words, the first-strike disadvantages would be *greater* once the reactor was turned on.

On October 14, 1980, the security cabinet met again to discuss the Iraqi reactor. Begin reportedly told the cabinet that Israel had to make a decision between "two evils." The first, "evil" would be a military strike on the Iraqi reactor, "with the risk of adverse reactions." The second "evil" would be to take no action in response to Iraq's nuclear program. Begin told the cabinet

> I have come to the conclusion that we must choose the first of the two evils. Why? First, because now is an opportune moment. The Gulf War has weakened Iraq and has also

39 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxiv.

40 Ibid., xxxiv.

41 During the spring and summer of 1980, the first "practice" missions were also completed. In April, various elements of the operation were practiced, while in August a "model flight of the mission" was run. Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxix. The practice and planning for the mission steadily intensified, and by January 1981, the IAF has the capacity to fly the requisite 600 miles and return home without stopping to refuel, a critical element.

42 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xxxv–xxxvi.

43 Ibid., xxxvi.

> put a halt to work at the reactor, which is still 'cold.' That means it is feasible to bomb it without the risk of radioactive contamination of its vicinity. Who knows if such an opportune moment will reoccur? It must be clear that if Israel does not prevent it, Iraq will manufacture nuclear weapons. Everything points to that. Saddam Hussein is a vicious and bloodthirsty tyrant. Why does he need a nuclear reactor, and nuclear weapons?… Somewhere in the vicinity of Baghdad weapons of mass destruction are being prepared for use against us. Are we at liberty to sit by with folded arms in view of that terrible danger? It is our duty to our people to take the risk—and act.[44]

Begin's position was not supported by the entire cabinet, nor was it supported by all of the military and intelligence specialists also in attendance at the meeting. The primary argument against the strike was two-fold: first, since the reactor was not yet operational, there was still time to pursue the diplomatic course to get the project halted; second, it was unknown what kind of impact the strike will have on the Arab world, and the attack could actually ameliorate intra-Arab relations and solidify their "opposition to Israel."

Interestingly, opposition to the proposed strike was also expressed by the Mossad chief Hofi, the director of AMAN Saguy, and General Tamir who was the head of the national-security unit of the Defense Ministry. Their primary opposition to the strike came from the fact that they were unconvinced that Iraq was actually capable of building a bomb. Additionally, Hersh notes that Saguy argued that the "adverse reaction in Washington" would be more costly to Israel's national security than the Iraqi reactor.[45] At the same time, however, their deputies were advocating for a strike. Members of the security cabinet were also divided. When time came for a vote, Begin, Shamir, Sharon, Ehrlich, and Hurwitz voted in favor of the strike. Voting against were Yadin, Burg, Hammer, and Shostak. Without a clear majority in favor, Begin was compelled to bring the matter before the full cabinet.[46]

On October 28, 1980, Begin brought the issue before the full government. Begin began the meeting by telling the ministers that the topic under discussion was "of the highest confidentiality" and must not be leaked outside of the meeting. Begin went on to state,

> I want to put it in brief: a great clock is hanging over our heads, and it is ticking. Somewhere on the banks of the Tigris and the Euphrates, there are men plotting to annihilate us, and they are preparing the means for implementing their criminal design. Every passing day brings them closer to their goal.
>
> We must ask ourselves the significance of nuclear weapons being constructed by a state like Iraq. The significance is: a threat to the life of every man, woman and child in Israel. In another five years, or maybe just three years, the Iraqis will have two or three atomic bombs, each of the power of the bomb dropped on Hiroshima. Saddam Hussein is a bloodthirsty tyrant who seized power by killing his best friends with his own hands. He

---

44 Nakdimon, *First-strike*, 159.

45 Seymour M. Hersh, *The Samson Option: Israel's Nuclear Arsenal and American Foreign Policy* (New York: Random House, 1991), 10.

46 Nakdimon, *First-strike*, 160–61.

> will not hesitate to employ weapons of mass destruction against us. We must take that as our point of departure. It is our duty toward the nation which elected us to conduct its affairs.
>
> Employment of such weapons against concentrations of our civilian population will entail bloodshed the like of which there has not been since 'those days' in the forties [during the Holocaust]. In the face of such danger, are we at liberty to sit with arms folded? Will we discharge our duty by acting in such a manner?
>
> If nuclear weapons fall into Iraqi hands, one of two things can happen: we shall be obliged to either surrender to their demands or run the risks of mass annihilation. Atrocious! We must ask ourselves: is there no way of preventing it? Since the day I learned of Iraq's intentions, the matter has given me no rest. We have done much to delay those preparations. But a nation does not live on borrowed time. The hour has come to reach a decision. *To prevent the reconstruction of the reactor and its activation, there is no course other than military action*, and that is the proposal I submitted recently to the group of ministers which has followed the matter. Military action will entail great risks, above all to those carrying out the operation. We shall do everything to reduce those risks to a minimum. *In addition, there are political risks. It is necessary to take a calculated risk, and to realize that the risk of inaction exceeds the risk involved in acting. If the operation is followed by a diplomatic onslaught against us, we shall withstand it.* Even if the enemy attempts a military response, it will be immeasurably less severe than the terrible danger in store for Israel should nuclear weapons fall into the enemy's hands. If we do not act now, we shall not be able to excise this terrible danger to ourselves and our children.[47]

In his statement to the cabinet, Begin argued that the first-strike disadvantages were outweighed by the costs of inaction. Begin's comments are in line with the security literature that would predict that a state would take anticipatory action designed for counterproliferation in such a situation.

At the same time, the potential negative consequences of the strike were also discussed. These elements included the potential for UN sanctions, a decline or deterioration in US/Israeli relations, renewed hostilities with Egypt and the rest of the Arab world, and a retaliatory response by Iraq. An additional concern revolved around the fact that the Iraqis may already be possession of weapons-grade material, with which they could build a bomb regardless of the status of the reactor.[48]

After Begin made his statement, the cabinet discussed the available options. During the ensuing debate, Ehrlich stated,

> The reactor is a danger to our existence. We are duty-bound to destroy it.[49]

One of the hypothesized limitations on the constraining impact of the legal and normative elements is when a "threat to existence" is involved. Many in the Israeli

47 Nakdimon, *First-strike*, 163–164 (emphasis added).

48 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, 67–68; Nakdimon, *First-strike*, 165–166.

49 Nakdimon, *First-strike*, 165.

cabinet clearly viewed the Iraqi program as constituting such a threat.[50] For those supporting the strike option, the threat faced was sufficiently severe to outweigh the costs associated with actions taken in response. In this vein, and despite the concerns, the government approved the planned operation, by a vote of ten to six.[51] Opposition leader Peres was informed of the government's decision to strike the reactor on December 30, and reportedly did "not express explicit objection to the plan."[52]

In early- to mid-1981, there was another round of internal debate about both the utility and timing of a strike against the Iraqi reactor. In March another cabinet meeting was held to discuss the situation, although no official vote was taken on the matter. At the same time, there was also pressure from within to hold off on an attack, at least for the time being. The primary justification given for waiting was not that the Iraqi reactor was not a threat, but rather "there was no urgency to do it now."[53] In other words, there was still time to pursue other alternatives to try to deal with the situation and the point of "last resort" had not yet been reached.

Traditionally, Sunday is the day that the Israeli cabinet sits for its weekly meetings. On May 10, 1981, the chief of the Mossad attended the meeting to discuss the planned attack on the Iraqi reactor. During this meeting, Hofi again advised Begin and the cabinet against taking action until the reactor became "hot," which he believed would be in September. For Begin, there were not only security implications of this delay, such as increased risks associated with the destruction of the functioning reactor, but also adverse political implications.

With elections scheduled for June, Begin was afraid that the Likud would not do well. As a result, he feared that he would no longer be prime minister, that the new prime minister would not strike the reactor, and that Israel would be left facing an "existential threat."[54] It is interesting, although not surprising, that one of the main rationales used by Begin to buttress his argument in favor of striking the reactor was purely political. Although Begin would not concede to delay the mission until September, the cabinet did agree to postpone the mission for two weeks.

At the same time, there was also increased pressure for renewed diplomatic efforts to deal with the situation. Such calls were coming primarily from the opposition Labor Party. On May 10, 1981, Peres sent a letter to Begin asking him to reconsider striking the reactor. In the letter, Peres wrote

> I feel this morning that it is my supreme civic duty to advise you, after serious consideration and in weighing the national interest, to desist from this thing. I speak as a man of

50 According to the ICB data, the Iraqi Nuclear Reactor Crisis was coded as a "threat to existence" for Israel.

51 Those voting in favor were Begin, Ehrlich, Sharon, Shamir, Landau, Hurwitz, Nissim, Housing Minister David Levi, Minister of Religious Affairs Abu Hatzeira, and Minister of Energy and Infrastructure Yitzhak Moda'i. Those voting against the operation were Yadin, Burg, Labor and Welfare Minister Yisrael Katz, Commerce and Industry Minister Gideon Pratt, Hammer, and Shostak.

52 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xlii.

53 Ibid., xliv.

54 Ibid., xlv.

> experience. The deadlines reported by us (and I well understand our people's anxiety) are not the realistic deadlines. Materials can be changed for [other] materials. And what is intended to prevent can become a catalyst.
>
> On the other hand Israel would be like a tree in the desert—and we also have that to be concerned about.[55]

Peres explicitly addressed the potential consequences of the strike, both strategic, i.e., encouraging the program instead of preventing it, as well as political, i.e., the inevitable isolation and condemnation by the international community that would come after the strike. Begin and other members of the cabinet were not persuaded and remained committed to removing the threat by force. In fact, according to Perlmutter, et al., Sharon even threatened to resign if the operation were canceled.[56] The attack was carried out on June 7, 1981.[57]

Deciding to Strike: Opportunities and Constraints

The Israeli strike on the Iraqi nuclear reactor resulted from a variety of different factors. The first element is the extent to which the reactor was perceived to be a threat. The ICB dataset codes the threat level in this crisis as a "threat to existence" to Israel. Clearly, this is the way that the Israeli decision-makers viewed the situation. According to Rak, "Israeli officials believed that their national security required a preventive strike on Iraq's nuclear program as a necessary mission to protect their sovereignty."[58]

At the same time, the attack was taken only after a prolonged period of diplomacy aimed at halting the program. Furthermore, the timing of the attack was such that diplomacy was given as long as possible to work, but, the operation was carried out before the reactor became operational. Donnelly notes that "Begin maintained that peaceful measures had failed and that the attack could not further be delayed because the reactor was soon to be made operational; an attack subsequent to that event would expose the residents of Baghdad to radiation hazard."[59]

---

55 Amos Perlmutter, *The Life and Times of Menachem Begin* (Garden City, NY: Doubleday and Company, Inc., 1987), 364.

56 Perlmutter, Handel, and Bar-Joseph, *Two Minutes Over Baghdad*, xlv.

57 According to testimony given on June 18, 1981 by acting Secretary of State Walter J. Stoessel, Jr., the United States did not have advance warning of the Israeli strike against the Iraqi reactor. *Committee on Foreign Relations*, Ninety-Seventh Congress *The Israeli Air Strike* (First Session on The Israeli Air Strike and Related Issues Sess. Comm. Print 1981), 7. This is in marked contrast to the cases discussed in the previous chapter where there was extensive consultation between Israel and the United States prior to any action being taken, in the case of the Six Day War, or even before the decision not to take action in the case of the October-Yom Kippur War of 1973.

58 Claire Rak, "The Role of Preventive Strikes in Counterproliferation Strategy: Two Case Studies," *Strategic Insight* (Monterey, CA: Center for Contemporary Conflict, National Security Affairs Department at the Naval Postgraduate School, 2003).

59 Warren Donnelly, "The Israeli Raid Into Iraq," Report by Congressional Research Service of the Library of Congress, reprinted in *The Israeli Air Strike* (1981), 68.

The official Israeli report issued after the strike offered the following explanation as to why the operation was undertaken:

> Israel's action against Osiraq constituted a legitimate act of self defence, based on the principles of international law. The exercise of this right resulted from a specific constellation of factual circumstances which posed an intolerable threat to Israel. These circumstances included the imminent realization by Iraq of its plans to acquire a military nuclear capability, Iraq's declared maintenance of a state of war with Israel and its persistent denial of Israel's right to exist, and the failure of Israel's diplomatic efforts to prevent the extension of foreign assistance to Iraq in the implementation of its nuclear programme.
>
> Moreover, in addressing itself to this threat, Israel was faced with a situation in which the reactor was about to become operational, after which any Israeli action limited to material objectives only could have resulted in the release of lethal radioactive pollution causing injury to civilians. In these circumstances, the time factor became a crucial element in Israel's decision.[60]

Although these "official" reasons seem to indicate that the legal and normative elements did play a role in the decision to use an anticipatory military action, i.e., the legal state of war and the fact that the use of force was a last resort, some observers have been somewhat skeptical as to the extent to which this was actually the case.

Donnelly notes that there is a difference between a "technical" state of war and an "active" state of war. This distinction becomes important with respect to the Israeli claims of self-defense. While Iraq and Israel were (and still are) "technically" in a state of war, they were not actively engaged in a war, and therefore complicates the claims that the Israeli actions taken in response to the hostile actions of an adversary.[61] From this perspective, the Israeli action would not be considered a "legitimate" act of self-defense, since the action was taken outside of an actual conflict and no armed attack had taken place.

The Israeli position, however, relied on the notion of anticipatory self-defense and was justified using the definition of self-defense found in customary international law as well as instances of *opinio juris* that call for a reevaluation of

---

60 Government of Israel, *The Iraqi Nuclear Threat*, 37.

61 It is important to note that the point here is not to analyze the legality of the action taken. For more on this issue, see Louis Rene Beres and Yoash Tsiddon-Chatto, "Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor," *Temple International and Comparative Law Journal*, 9 (Fall 1995), 437–440; Michael Byers, "Terrorism, the Use of Force and International Law After 11 September," *International and Comparative Law Quarterly*, 51, No. 2 (April 2002), 401–414; Anthony D'Amato, "Israel's Air Strike Upon the Iraqi Nuclear Reactor," *The American Journal of International Law*, 77, No. 3 (July 1983), 584–588; Anthony D'Amato, "Israel's Air Strike Against the Osiraq Reactor: A Retrospective," *Temple International and Comparative Law Journal*, 10, Spring (1996), 259–264; Donnelly, "The Israeli Raid Into Iraq;" Timothy L. H. McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (New York: St. Martin's Press, 1996); John Quigley, "A Weak Defense of Anticipatory Self-Defense," *Temple International and Comparative Law Journal*, 10, Spring (1996), 255–257; "Hearings Before the Committee on Foreign Relations, United States Senate."; Government of Israel, *The Iraqi Nuclear Threat*.

the "armed attack" clause of Article 51 of the UN Charter in light of the advent of the nuclear and ballistic missile age. The official government report issued after the attack specifically referenced the positions of numerous legal scholars buttressing this argument. It is not clear, however, how much these arguments influenced the decision-makers during their deliberations, or to what extent these positions were offered as justifications after the fact. Additionally, it is important to note that the strike was uniformly condemned by the international community, including the United Nations Security Council.

Feldman argues that maintenance, or even furtherance, of Israel's deterrent capability was one of the main motivations for the attack.[62] According to this perspective, Israel's only surefire military advantage was its nuclear monopoly, and this needed to be maintained, as its conventional dominance might be eclipsed at some point in the future.[63] Or, in other words, it was the strategic elements that were clearly dominant in the decision calculus.

The destruction of the Iraqi nuclear facility became a cornerstone of Israeli defense policy. According to Feldman,

> In its June 9, 1981 announcement of *Osiraq's* destruction, Israel's government articulated its belief that, had Iraq's President Saddam Hussein acquired nuclear bombs, "[h]e would not have hesitated to drop them on Israel's cities and population centers." Yet, the assessment was viewed as also applicable to other leaders among Israel's opponents. Hence, the general preventive doctrine: "under no circumstances would we allow the enemy to develop weapons of mass destruction against our nation; we will defend Israel's citizens, in time, with all means at our disposal."[64]

In this respect, the strategic aspects of the threat—and the importance of the message that the response sent to other adversaries—were very important to Israeli leaders.[65]

These strategic reasons coupled with the failure of years of diplomatic efforts to stop the reactor project seem to have been sufficient to convince Begin and other leaders that the first-strike advantages were greater than the first-strike disadvantages, i.e., the political costs that they knew were coming as a result of the attack. Perlmutter notes that during the Cabinet meeting where the decision to strike was made, Begin told Sharon "All the responsibility of doing this will be ours. The problem is not France or the United States but the very existence of Israel."[66]

At the same time, however, many scholars have raised the issue that Begin's primary motivation for the strike was related to domestic politics rather than strategic

---

62 Feldman, "The Bombing of Osiraq-Revisited," 126–127.

63 Vandenbroucke, "The Israeli Strike Against Osiraq: The Dynamics of Fear and Proliferation in the Middle East."

64 Feldman, "The Bombing of Osiraq-Revisited," 122.

65 It is important to note that Israel, while publicly decrying the Iraq's project to develop a nuclear program, had been doing the same since at least the early 1950s. The program began indigenously, with French assistance coming in 1956–1957 with the sale of the reactor that would be built at Dimona. For a discussion of the Israeli nuclear program, see Hersh, *The Samson Option*.

66 Perlmutter, *The Life and Times of Menachem Begin*, 365.

necessity.[67] Fearing that the Likud might lose the next election and that the Labor party might not act against the reactor—as well as the possibility for a "bounce" in the polls from a successful strike on the reactor—the looming Knesset elections probably had some influence on the timing of the strike.[68] While this element cannot be discounted, it was not a major factor in determining how Israel would respond to the crisis in general.

Instead, the specific timing of the raid was based on a number of factors. According to the June 8, 1981 statement of the Israeli government announcing the attack,

> we learned of two dates when the reactor would be completed and put into operation. One: the beginning of July 1981; Two: the beginning of September 1981. In other words, within a short period of time, the Iraqi reactor would have been operational and "hot". Under such circumstances no government of Israel could contemplate bombing the reactor. Such an attack would have brought about a massive radioactive lethal fallout over the city of Baghdad and tens of thousands of its innocent residents would have been hurt. We would thus have been compelled to passively observe the process of the production of atomic bombs in Iraq, whose ruling tyrant would not hesitate to launch them against Israeli cities, the centers of its population. Therefore, the government of Israel decided to act without further delay to ensure our people's existence. The planning was exact. The operation was timed for Sunday on the assumption that the 100–150 foreign experts employed at the reactor would be absent on the Christian day of rest. This assumption proved to have been correct. No foreign experts were hurt.[69]

This statement clearly shows the influence of the normative elements consistent with the just war tradition, such as the need to distinguish between combatants and non-combatants (discrimination), reasonable chance of success, and last resort.

Additional support for the influence of the normative elements can be found in the fact the Israelis pursued the diplomatic route for an extended period of time before taking military action. Shoham notes

> There can be no doubt as to the concerted diplomatic efforts and other peaceful activities which Israel undertook from 1975 onward to prevent the aid to the Iraqi military nuclear program. Only after thoroughly but unsuccessfully exhausting those diplomatic channels did Israel resort to military force against the Iraqi reactor.[70]

---

67 This idea is similar to the diversionary theory of war. See Jack S. Levy, "The Causes of War: A Review of Theories and Evidence," in Philip E. Tetlock, et al. (eds), *Behavior, Society, and Nuclear War*, Volume I (New York: Oxford University Press, 1989).

68 Perlmutter, *The Life and Times of Menachem Begin*, 369–371; Snyder, "The Road to Osiraq: Baghdad's Quest for the Bomb," 583–584; Vandenbroucke, "The Israeli Strike Against Osiraq: The Dynamics of Fear and Proliferation in the Middle East."

69 "Statement by the Government of Israel on the Bombing of the Iraqi Nuclear Facility Near Baghdad, June 8, 1981," *Israel's Foreign Relations, Selected Documents 1981–1982*, June 8 1981, Ministry of Foreign Affairs, <http://www.mfa.gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1981–1982/26%20Statement%20by%20the%20Government%20of%20Israel%20on%20the%20Bo> (accessed March 25, 2005).

70 Shoham, "The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense," 216.

In this respect, the action would seem to at least partially satisfy the requirements of last resort.

While Israel was at least partially influenced by the normative elements, it is less clear to what extent, if any, the legal prohibitions against anticipatory action were operative. One of the difficulties in assessing the role of the legal elements lies in the nature of the case. The Israelis claimed that the action was taken in self-defense, and that the state of belligerency and the hostile rhetoric of Iraq coupled with the fact that the type of reactor under development seemed designed for the development of weapons, provided all the legal justification needed. From this perspective, the legal elements *would not constrain* Israel from using an anticipatory military action, since such an action was consistent with international law (or at least some interpretations of international law).[71]

Quarantine in Cuba

On October 16, 1962, President John F. Kennedy was presented with photographic evidence, captured by U-2 spy planes, indicating the presence of Soviet missiles in Cuba. According to the ICB case summary, this event triggered a crisis for the United States. The major response taken by the US was the imposition of a naval quarantine on military material destined for Cuba. It is important to note that this was a *military* response, in that the quarantine was carried out by the US Navy—i.e., the quarantine was imposed by US military ships who were given orders to fire upon ships that tried to evade the quarantine. However, the quarantine was not violated and force was not used during the crisis.

The US–imposed quarantine of Cuba in 1962 is often described as an example of anticipatory self-defense or a preemptive/preventive action. The United States took military action against a third party in order to prevent a developing threat from becoming an actuality. In an address to the American people on October 22, 1962, President Kennedy discussed the situation and the policy adopted. The following are excerpts from that speech:

> This Government, as promised, has maintained the closest surveillance of the Soviet Military buildup on the island of Cuba. Within the past week, unmistakable evidence has established the fact that a series of offensive missile sites is now in preparation on that imprisoned island. The purpose of these bases can be none other than to provide a nuclear strike capability against the Western Hemisphere.
> ...
> The characteristics of these new missile sites indicate two distinct types of installations. Several of them include medium range ballistic missiles capable of carrying a nuclear warhead for a distance of more than 1,000 nautical miles. Each of these missiles, in short, is capable of striking Washington, DC, the Panama Canal, Cape Canaveral, Mexico City, or any other city in the southeastern part of the United States, in Central America, or in the Caribbean area.

71 McCormack, *Self-defense in International Law*.

Additional sites not yet completed appear to be designed for intermediate range ballistic missiles—capable of traveling more than twice as far—and thus capable of striking most of the major cities in the Western Hemisphere, ranging as far north as Hudson Bay, Canada, and as far south as Lima, Peru. In addition, jet bombers, capable of carrying nuclear weapons, are now being uncrated and assembled in Cuba, while the necessary air bases are being prepared.

This urgent transformation of Cuba into an important strategic base—by the presence of these large, long range, and clearly offensive weapons of sudden mass destruction—constitutes an explicit threat to the peace and security of all the Americas, in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this Nation and hemisphere, the joint resolution of the 87th Congress, the Charter of the United Nations, and my own public warnings to the Soviets on September 4 and 13. This action also contradicts the repeated assurances of Soviet spokesmen, both publicly and privately delivered, that the arms buildup in Cuba would retain its original defensive character, and that the Soviet Union had no need or desire to station strategic missiles on the territory of any other nation.

...

Neither the United States of America nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small. *We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.*

...

But this secret, swift, and extraordinary buildup of Communist missiles—in an area well known to have a special and historical relationship to the United States and the nations of the Western Hemisphere, in violation of Soviet assurances, and in defiance of American and hemispheric policy—this sudden, clandestine decision to station strategic weapons for the first time outside of Soviet soil—is a deliberately provocative and unjustified change in the status quo which cannot be accepted by this country, if our courage and our commitments are ever to be trusted again by either friend or foe.

The 1930s taught us a clear lesson: aggressive conduct, if allowed to go unchecked and unchallenged ultimately leads to war. This nation is opposed to war. We are also true to our word. *Our unswerving objective, therefore, must be to prevent the use of these missiles against this or any other country, and to secure their withdrawal or elimination from the Western Hemisphere.*

Our policy has been one of patience and restraint, as befits a peaceful and powerful nation, which leads a worldwide alliance. We have been determined not to be diverted from our central concerns by mere irritants and fanatics. But now further action is required—and it is underway; and these actions may only be the beginning. We not prematurely or unnecessarily risk the costs of worldwide nuclear war in which even the fruits of victory would be ashes in our mouth—but neither will we shrink from that risk at any time it must be faced.

> Acting, therefore, in the defense of our own security and of the entire Western Hemisphere, and under the authority entrusted to me by the Constitution as endorsed by the resolution of the Congress, I have declared that the following initial steps be taken immediately:
>
> First: To halt this offensive buildup, a strict quarantine on all offensive military equipment under shipment to Cuba is being initiated. All ships of any kind bound for Cuba from whatever nation or port will, if found to contain cargoes of offensive weapons, be turned back. This quarantine will be extended, if needed, to other types of cargo and carriers. We are not at this time, however, denying the necessities of life as the Soviets attempted to do in their Berlin blockade of 1948.
> ...
> This nation is prepared to present its case against the Soviet threat to peace, and our own proposals for a peaceful world, at any time and in any forum—in the OAS, in the United Nations, or in any other meeting that could be useful—without limiting our freedom of action. We have in the past made strenuous efforts to limit the spread of nuclear weapons…
>
> But it is difficult to settle or even discuss these problems in an atmosphere of intimidation. That is why this latest Soviet threat—or any other threat which is made either independently or in response to our actions this week—must and will be met with determination. Any hostile move anywhere in the world against the safety and freedom of peoples to whom we are committed … will be met by whatever action is needed.
> ...
> The path we have chosen for the present is full of hazards, as all paths are—but it is the one most consistent with our character and courage as a nation and our commitments around the world. The cost of freedom is always high—and Americans have always paid it. And one path we shall never choose, and that is the path of surrender or submission.
>
> Our goal is not the victory of might, but the vindication of right—not peace at the expense of freedom, but both peace and freedom, here in this hemisphere, and, we hope, around the world. God willing, that goal will be achieved.[72]

Kennedy's statement clearly reflects elements from international security, international law, and the just war tradition. The primary question of interest in this context, however, is the extent to which the different elements influenced the specific policy adopted. In other words, was the decision to implement the "quarantine" based on strategic considerations, legal considerations, normative considerations, or some combination of them?

In this respect, it is essential to be clear what this case study *will not* explore. This case study will not examine events that took place within the context of the Cuban Missile Crisis after the decision to adopt the quarantine was made. Additionally, the following discussion will not address the legal status of the quarantine itself. The purpose is not to determine if the quarantine was congruent with international law, but rather if international law and elements of the just war tradition played a role in determining what type of response was adopted in response to the crisis trigger.

---

72 Laurence Chang and Peter Kornbluh (eds), *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York: The New Press, 1998), 160–64 (emphasis added).

Missiles in Cuba: Options and Alternatives

After the President was informed of the presence of Soviet missiles in Cuba on October 16, 1962, a select group of officials met in secret to begin discussions on how the United States should respond. This group would become known as the Executive Committee of the National Security Council, or ExCom.[73] The members of the ExCom included Vice President Lyndon Johnson, Secretary of State Dean Rusk, Secretary of Defense Robert McNamara, Attorney-General Robert Kennedy, Chairman of the Joint Chiefs of Staff General Maxwell D. Taylor, C.I.A. Director John McCone, Secretary of the Treasury C. Douglas Dillon, UN Ambassador Adlai Stevenson, Undersecretary of State for Economic Affairs George Ball, Assistant Secretary of Defense for International Security Affairs Paul H. Nitze, and advisors McGeorge Bundy, Ted Sorensen, Roswell Gilpatric, Llewellyn Thompson, Alexis Johnson and Edwin Martin. Other individuals and advisors would attend some of the meetings, including Former Secretary of State Dean Acheson, Robert Lovett, and Assistant Attorney General Nicholas Katzenbach. During the first meeting of the ExCom, the key decisions made were to increase surveillance of Cuba and to keep the knowledge of the missiles a secret. According to Abel, President Kennedy wanted a simultaneous disclosure of both the presence of the missiles and the steps that the United States was undertaking in response.[74]

In a private meeting on the same day, President Kennedy also informed US Ambassador to the United Nations Stevenson of the missiles in Cuba. Abel gives the following account of the meeting:

> 'We'll have to do something quickly,' the President said. 'I suppose the alternatives are to go in by air and wipe them out, or to take other steps to render the weapons inoperable.' Stevenson replied: 'Let's not go to an air strike until we have explored the possibilities of a peaceful solution.'[75]

From the outset of the crisis some members of the administration were cautioning against taking military action prematurely, i.e., before all other routes were explored. Stevenson would not be alone in this cautionary position, as would soon become evident in the discussions and debates held within the confines of the ExCom meetings.

At the same time, however, there was another group of officials who mirrored President Kennedy's initial response: the missiles represented a change in the strategic balance and should be dealt with accordingly. For this group, force should be met with force. They felt that the proper response to the deployment of the missiles in Cuba would be an air strike or another form of "direct armed action."[76]

---

73 The ExCom would not be "officially" established until October 22 when the existence of the missiles in Cuba became public. Until that point, the meetings—and the existence of the Soviet missiles in Cuba—were held in tight secrecy.

74 Elie Abel, *The Missile Crisis* (Philadelphia: J.B. Lippincott Company, 1966), 48.

75 Ibid., 49.

76 According to Abel, those in favor of the air strike included Taylor, Nitze, Dillon, and later McCone. Those against using force as a first step included McNamara, Ball and

According to Sorensen, on Wednesday October 16, Rusk presented a summary of the available options for dealing with the missiles in Cuba. Six alternatives were presented:

1. Do nothing.
2. Bring diplomatic pressures and warnings to bear upon the Soviets. Possible forms included an appeal to the UN or OAS for an inspection team, or a direct approach to Khrushchev, possibly at a summit conference. The removal of our missile bases in Turkey in exchange for the removal of the Cuban missiles was also listed in our later discussions as a possibility which Khrushchev was likely to suggest if we didn't.
3. Undertake a secret approach to Castro, to use this means of splitting him off from the Soviets, to warn him that the alternative was his island's downfall and that the Soviets were selling him out.
4. Initiate indirect military action by means of a blockade, possibly accompanied by increased aerial surveillance and warnings. Many types of blockades were considered.
5. Conduct an air strike—pinpointed against the missiles only or against other military targets, with or without advance warning. (Other military means of directly removing the missiles were raised—bombarding them with pellets that would cause their malfunctioning without fatalities, or suddenly landing paratroopers or guerrillas—but none of these was deemed feasible).
6. Launch an invasion—or, as one chief advocate of this course put it: "Go in there and take Cuba away from Castro."[77]

Of all the alternatives presented, only two were seriously considered: the air strike and the blockade. In a memo recorded after the October 17 morning meeting, McCone notes that the

> President seemed inclined to act promptly if at all, without warning, targeting on MRBM's and possibly airfields. Stated Congressional Resolution gave him all authority he needed and this was confirmed by Bundy, and therefore seemed inclined to act.[78]

Although the President seemed to support the idea of an air strike, there was a heated debate among the participants at the meeting over this option.

Two primary concerns were voiced with respect to the use of air strikes. One was the notion of a "surprise" American attack on the missile sites. The other included the possibility that it would lead to escalation.

There were, however, supporters of the air strike proposal. In a memorandum addressed to the President, Treasury Secretary Dillon expressed support of the air strike option:

Gilpatric. Abel, *The Missile Crisis*, 52–53.

77 Theodore C. Sorensen, *Kennedy* (New York: Harper and Row, Publishers, 1965), 682.

78 Central Intelligence Agency, *The Secret Cuban Missile Crisis Documents* (Washington: Brassy's, 1994), 165.

> It is my view that the Soviet Union has now deliberately initiated a public test of our intentions that can determine the future course of world events for many years to come.
>
> If we allow the offensive capabilities presently in Cuba to remain there, I am convinced that sooner or later and probably sooner we will lose all Latin America to Communism because all credibility or our willingness to effectively resist Soviet military power will have been removed in the eyes of the Latins. We can also expect similar relations elsewhere, for instance in Iran, Thailand, and Pakistan.
>
> I, therefore, believe that the survival of our nation demands the prompt elimination of the offensive weapons now in Cuba. This cannot be negotiated and any course of action leading to negotiation on this issue, which inevitably would be prolonged, would have the results outlined above.
>
> The question remains how best to achieve the prompt elimination of these weapons from Cuba. I recognize fully the public opinion difficulties involved in a surprise attack but believe that, if no other effective course is available, they must be accepted rather than run the grave risk to our national security involved in allowing the weapons to remain in Cuba.
>
> Accordingly, I would reject the blockade course insofar as it is designed to lead to negotiations either in the UN or direct with Khrushchev.
>
> If militarily acceptable, I would prefer to initiate action with a blockade and intensive low-level surveillance, coupled with a demand on Cuba to immediately remove the weapons and to accept international inspection beginning within 24 hours. In the event of Cuban refusal, the air strike would follow immediately, no later than 72 hours after the initial public statement.
>
> If this is not militarily acceptable only if such delay would involve inacceptable risks of the use of nuclear weapons from Cuba against the US, I would favor an early strike in accordance with the air strike course of action.
>
> In such a situation, I believe that, in the interests of the survival of the entire free world fabric, we must be prepared to accept the public opinion results of a surprise strike, placing the full blame on Cuba for ignoring our clear and repeated warnings as well as the strong views of the other American states.[79]

Dillon based his support for the air strike option on the strategic elements, while not fully discounting the relevance or importance of the legal or normative elements. Instead, he rather explicitly stated that the strategic requirements of the situation outweighed the first-strike disadvantages inherent in the use of a surprise attack.

At the same time, others were also making arguments against the use of air strikes that explicitly drew upon the legal and normative elements as well as for strategic reasoning. Ball, for example, not only argued against the use of air strikes for strategic reasons, but also for legal and normative reasons. In a written position statement dated October 18, 1962, Ball stated,

---

79 Chang and Kornbluh, *The Cuban Missile Crisis, 1962*, 126–128.

> I am persuaded that the disadvantages of an air strike are to great for us to undertake. I have, therefore, concluded that the blockade plan—while by no means wholly satisfactory—is the course we should follow.
>
> In reaching this conclusion I have begun with the assumption that the Soviet nuclear build-up in Cuba does not add up appreciably to the Soviet ability to impose destruction on the United States…
>
> If this assumption be valid – and I have heard no compelling arguments against it – then the menace we face is not the addition of new Soviet military capabilities so much as their moral and propaganda advantage. As I understand it, the proponents of the strike plan insist that what we are facing is a test of will that will be witnessed by all the world. Unless the United States is prepared to use decisive military power, the world will lose confidence in our strength and determination.
>
> But I think that – far from establishing our moral strength – we would, in fact, alienate a great part of the civilized world by behaving in a manner wholly contrary to our traditions, by pursuing a course of action that would cut directly athwart everything we have stood for during our national history, and condemn us as hypocrites in the opinion of the world.
>
> We tried Japanese as war criminals because of the sneak attack on Pearl Harbor. We condemned the Soviet action in Hungary. We took a strong moral line against the use of force by the French and British at Suez when they felt their vital interests were threatened. We have taken a strong line in the United Nations and in other world councils against the dangers of a surprise attack with nuclear weapons.
>
> It is my strongly held view that we cannot launch a surprise attack against Cuba without destroying our moral position and alienating our friends and allies. If we were to do so we would wake up the following morning to find that we had brought down in ruins the structure of alliances and arrangements and that our whole post-war effort of trying to organize the combined strength of the Free World was in shreds and tatters.
>
> I find the blockade plans unsatisfactory – primarily because it does not provide a way to prevent the Soviet missiles from becoming operational. But, on the assumption I have stated above, I do not believe that this is a [?] argument against it. While the blockade may [?] some [?] with other Free World nations, it will be generally accepted as a legal act and consistent with our traditions…[80]

Similar arguments were made by other participants in the discussions.

Rusk, for example, argued that the outcomes of any particular course of action must be carefully weighed against the costs such action would entail. At the 11am meeting of the ExCom on October 18, Rusk makes it very clear that the United States *should* respond, but that the type of response should be chosen with great care. In this respect, Rusk argued,

> Now, I think that, as far as I'm concerned, all I have to say to you would be: If we enter upon this path of challenging the Soviets, the Soviets themselves embarking on this fantastically dangerous course, that no one can surely foresee the outcome.

80 Chang and Kornbluh, *The Cuban Missile Crisis, 1962*, 131–132.

> ...
> Now, there's another part of this situation that bothers me considerably. I think the American people will willingly undertake great danger if necessary to go do something, if they have the deep feeling that we've done everything that was reasonably possible to determine whether this risk was necessary. Also that they have a clear conscience and a good theory of the case.
> ...
> The Rio Pact is, I think, clearly our strongest legal basis for action we can take. The other possibility is a straight, straight declaration of war, which carries with it many legal privileges that are useful to have… But I suppose the only way we have of [using that is] getting [a] two-thirds vote to take necessary action. But if we made an effort and failed to get the two-thirds vote [unclear], then at least we have tried as far as the American people are concerned. We'll have done that.[81]

In a similar vein, a statement written by Bohlen was also read at the same meeting. In this statement, Bohlen clearly stresses the necessity of exploring non-violent means before the use of an air strike:

> The existence of Soviet MRBM bases in Cuba cannot be tolerated. The objective therefore is their elimination by whatever means may be necessary.
> ...
> No one can guarantee that this can be achieved by diplomatic action, but it seems to me essential that this channel should be tested out before military action is employed. If our decision is firm (and it must be) I can see no danger in communication with Khrushchev privately, worded in such a way that he realizes that we mean business.
>
> This I consider an essential first step no matter what military course we determine on if the reply is unsatisfactory…
>
> My chief concern about a strike without any diplomatic effort is that it will immediately lead to war with Cuba and would not be the neat quick disposal of their bases, as was suggested. Furthermore, I am reasonably certain that the Allied reaction would be dead against us, especially if the [Soviets] retaliated locally (in Turkey or Italy or in Berlin).
>
> A communication with Khrushchev would be very useful for the record in establishing our case for action.
>
> In general I felt that a declaration of war would be valuable since it would open up every avenue of military action, air strikes, invasion or blockade. But we would have to make a case before our allies to justify such a declaration of war. If we acted first and sought to justify it later we would be in a spat of great consequence.
>
> Finally, I feel very strongly that any belief in a limited quick action is an illusion and would lead us into a full war with Cuba on a step-by-step basis which would greatly increase the probably of a general war.[82]

---

81 Ernest R. May and Philip D. Zelikow (eds), *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, MA: The Belknap Press of Harvard University Press, 1997), 128–129.

82 Chang and Kornbluh, *The Cuban Missile Crisis, 1962*, 130.

As the above statements show, even in the early stages of the crisis different individuals advocated different courses of action based on different rationales. Those in favor of a direct military response relied on the strategic elements. Others seemed to be influenced by the constraints contained in the legal and normative elements against taking military action as a first step.

In a memo dated October 19, McCone wrote, "A discussion among the principals on October 18 indicated a probable decision, if any action is taken against Cuba to initiate a limited blockade to prevent the importation into Cuba of additional arms."[83] McCone went on to argue that "The argument in favor of the blockade was principally that it initiated a positive action which could be intensified at our will or could be relaxed depending upon evolving circumstances." At the same time, "The obvious disadvantages are the protracted nature of the operation, the difficulties of sustaining our position in world opinion because of our own complex of foreign bases and our deployment of offensive missiles and nuclear weapons and finally, the action does not reverse the present trend of building an offensive capability within Cuba nor does it dispose of the existing missiles, planes, and nuclear weapons if the latter now exist there." McCone also discussed the air strike option, stating "Positive military action initiated now appeared undesirable because of the impact of current and future world opinion, the spectacle of a powerful nation attacking by surprise attack a weak and insignificant neighbor, engagement by the United States in a 'surprise attack' thus giving license to others to do the same, the indefendable position we would be in with our allies, and finally, the price to us of extreme actions of which the Soviets appear capable of executing."[84]

During an ExCom meeting held in the morning of October 19, President Kennedy summarized the problems inherent in both the air strike and blockade options:

> If we attack Cuban missies, or Cuba, in any way, it gives [the Russians] a clear line to go ahead and take Berlin, as they were able to do in Hungary under the Anglo war in Egypt. We will have been regarded as [unclear]. We would be regarded as the trigger-happy Americans who lost Berlin. We would have no support among our allies. We would affect the West Germans' attitude toward us. And [people would believe] that we let Berlin go because we didn't have the guts to endure a situation in Cuba… They don't give a damn about Cuba. But they do care about Berlin and about their own security. So they would say we endangered their interests and security. And the implication [would be] that all the rest [happened] because of the end reaction that we took in Cuba.
>
> So I think they've got … I must say I think it's a very satisfactory position from their point of view. If you take the view that what really… And clearly, if we do nothing then they'll have these missiles and they'll be able to say any time we ever try to do anything about Cuba, they'll fire these missiles. So that I think it's dangerous, but rather satisfactory, from their point of view.
>
> ...
>
> Now that's what makes our problem so difficult. If we go in and take them out on a quick air strike, we neutralize the chance of danger to the United States of these missiles being

83 Central Intelligence Agency, *The Secret Cuban Missile Crisis Documents*, 193.

84 Ibid., 194.

> used, and we prevent a situation from arising, at least within Cuba, where the Cubans themselves have the means of exercising some degree of authority in this hemisphere.
>
> On the other hand, we increase the chance greatly, as I think—there's bound to be a reprisal from the Soviet Union, there always is—[of] their just going in and taking Berlin by force. Which leaves me only one alternative, which is to fire nuclear weapons—which is a hell of an alternative—and begin a nuclear exchange, with all this happening.
>
> On the other hand, if we begin the blockade that we're talking about, the chances are they will begin a blockade and say that we started it. And there'll be some question about the attitude of the Europeans. So that once again they will say that there will be this feeling in Europe that the Berlin blockade has been commence by our blockade.
>
> So I don't think we've got any satisfactory alternatives. Whether we balance off that, our problem is not merely Cuba but it is also Berlin. And when we recognize the importance of Berlin to Europe, and recognize the importance of our allies to us, that's what has made this thing be a dilemma for 3 days. Otherwise, our answer would be quite easy.[85]

The remainder of the meeting again focused on debate and discussion on the various courses of action, but again no decision was reached on what type of response would be adopted. After a brief meeting, Kennedy left the ExCom group to attend to previous scheduled commitments.

A second meeting of the group shortly after the President left. Among the topics discussed were the legal implications of the various responses. According to the minutes of the meeting, recorded by the State Department's legal adviser Meeker, the following arguments were made:

> Mr. Katzenbach said he believed the President had ample constitutional and statutory authority to take any needed military measures. He considered a declaration of war unnecessary. From the standpoint of international law, Mr. Katzenbach thought the United States action could be justified on the principle of self-defense.
>
> I said that my analysis ran along much the same lines. I did not think a declaration of war would improve our position, but indeed would impair it. I said that a defensive quarantine of Cuba would involve a use of force, and this had to be considered in relation to the United Nations Charter. The Charter contained a general prohibition against the use of force except in certain limited kinds of situation. One of these was "armed attack", but the situation in Cuba did not constitute armed attack on any country. Another exception was collective action voted on by the competent United Nations organ to deal with a situation under Chapter VII of the Charter. Obviously, no resolution could be obtained from the Security Council. And it seemed quite problematical whether we could obtain a recommendation from the [UN] General Assembly.
>
> The Charter also contained Chapter VII on regional arrangements. Article 52 provided that regional arrangements could deal with "such matters relating to the maintenance of international peace and security as are appropriate for regional action". Thus a case could be made under the Charter for the use of force if it were sanctioned by the American Republics acting under the Rio Treaty. The Organ of Consultation, pursuant to Article

85 May and Zelikow, *The Kennedy Tapes*, 175–176.

> 6 and 8 of that Treaty, could recommend measures, including the use of armed force, to meet a situation endangering the peace of America…
>
> If the contention were advanced that a defensive quarantine voted under the Rio Treaty constituted 'enforcement action' under Article 53 of the United Nations Charter, and therefore required the authorization of the Security Council, we would be able to make a reasonably good argument to the contrary…[86]

Meeker also records the following exchange vis-à-vis the alternative response alternatives from the same meeting:

> There seemed to be three main possibilities as the Attorney General analyzed the situation: one was to do nothing, and that would be unthinkable; another was an air strike; the third was a blockade. He thought it would be very, very difficult for the President if the decision were to be for an air strike, with all the memory of Pearl Harbor and with all the implications this would have for us in whatever world there would be afterward. For 175 years we had not been that kind of country. He favored *action*, to make known unmistakably the seriousness of United States determination to get the missiles out of Cuba, but he thought the action should allow the Soviets some room for maneuver to pull back from their over-extended position in Cuba.
>
> Mr. Bundy, addressing himself to the Attorney General, said this was very well but a blockade would not eliminate the bases; an air strike would.[87]

At the end of the meeting, it was determined that both alternatives should be explored more, and that more discussions should be held with the President, since the ultimate decision would be his.

On October 20, Sorensen presented a summary of both the problems with the air-strike option as well as the advantages of the blockade option. There were two main problems with the air-strike proposal, which Sorensen notes "have never been answered:"

1. Inasmuch as no one has been able to devise a satisfactory message to Khrushchev to which his reply could not outmaneuver us, an air strike means an US-initiated "Pearl Harbor" on a small nation which history could neither understand nor forget.
2. Inasmuch as the concept of a clean, swift strike has been abandoned as militarily impractical, it is generally agreed that the more widespread air attack will inevitably lead to an invasion with all of its consequences.[88]

At the same time, Sorensen also noted that there were two "fundamental advantages to a blockade which have never been answered:"

---

86 Chang and Kornbluh, *The Cuban Missile Crisis, 1962*, 133–134.

87 Ibid., 135.

88 Ibid., 143.

1. It is a more prudent and flexible step which enables us to move to an air strike, invasion or any other step at any time it proves necessary, without the "Pearl Harbor" posture.
2. It is the step least likely to precipitate general war while still causing the Soviets – unwilling to engage our Navy in our waters – to back down and abandon Castro.[89]

Coupled with the legal and normative elements that seemed to bolster the blockade/quarantine option discussed above, it appeared that the scales were clearly tipped in favor of the second option.

At the October 20 afternoon meeting of the ExCom, the decision was made to implement the blockade, and to prepare for air strikes against the missile sites if they were deemed necessary. On October 22, President Kennedy announced to the American public the existence of the Soviet missiles and the planned response to deal with them.

The United States also brought the issue of the quarantine before the international organizations designed to deal with such issues. On October 22, the United States requested a meeting of the United Nations Security Council to deal with the issue of Soviet missiles in Cuba. Additionally, on October 23, the Organization of American States adopted a resolution that supported the withdrawal of the Soviet missiles through the use of all measures necessary.[90]

Air Strike vs. Quarantine: The Legal Elements

Chayes, who served as Legal Advisor to the State Department during the Cuban Missile Crisis, cautions that "We cannot ask for a demonstration that legal considerations dictated decision."[91] The same can also be said for the normative elements of the just war tradition, which will be discussed below. This sentiment is important to keep in mind for all the cases studied, and is particularly relevant vis-à-vis the Cuban Missile Crisis. With respect to the Cuban Missile Crisis, the primary question for this study is if the decision to implement the quarantine, as opposed to the air strike option, was influenced by the constraints against the use of anticipatory military force found in international law and the just war tradition.

It is important to recall the fundamental element of the crisis. The triggering event of the crisis was the delivery/deployment of Soviet missiles to Cuba, i.e., a threat that was not immediate or imminent. This element has important implications with respect to the legitimacy and permissibility of anticipatory military activities

89 Chang and Kornbluh, *The Cuban Missile Crisis, 1962*, 143.

90 The Cuban Missile Crisis was eventually resolved with an agreement between the United States an the Soviet Union that the missiles would be withdrawn from Cuba, that no "offensive weapons" would be placed in Cuba, that the United States would not invade Cuba, that the blockade/quarantine would be lifted. Chang and Kornbluh, *The Cuban Missile Crisis, 1962*, 300.

91 Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974), 4.

within the legal and normative traditions. As was discussed in Chapters 4 and 5, there is minimal, if any, support within the legal and normative traditions for the use anticipatory military activities against threats that are not imminent in nature.

There are, however, some exceptions, or at least possible exceptions, to these prohibitions that are applicable to this case. The first concerns the role of regional security organizations and their relationship with the United Nations. Chapter 8 of the UN Charter explicitly deals with the role of regional security organizations.

Article 52(1) of the UN 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.

Article 52(2) of the UN Charter goes on to add that

> The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.[92]

The United States and the other Latin American countries, including Cuba, were members of a regional security organization—the Organization of American States. Of primary importance here is the 1947 Inter-American Treaty of Reciprocal Assistance, also known as the Rio Pact. According to Oliver,

> The Rio Pact fixes the principles that are to govern the inter-American community when its security is threatened. It does not provide new organs of action or for an infrastructure. It does specify that the Organ of Consultation shall be the foreign ministers of the members, that a consultative meeting may be called by a simple majority of members, that decisions of the Organ shall be the same number required for a vote. There is no veto and no provision for the expulsion or suspension of a member. The Agreement is replete almost to the point of redundancy with assertions requiring congruity with the United Nations Charter.[93]

There is, however, one important difference between the Rio Pact and the UN Charter. While the UN Charter links self-defense with armed attack,[94] the Rio Pact

---

92 Valerie Epps, *Documentary Supplement to International Law*, 2nd edn. (Durham, NC: Carolina Academic Press, 2001), 12.

93 Covey Oliver, "Working Paper: The Inter-American Security System and the Cuban Crisis," in Lyman M. Tondeo, Jr. (ed.), *The Inter-American Security System and the Cuban Crisis* (Dobbs Ferry, NY: Oceana Publications, Inc. for The Association of the Bar of the City of New York, 1964), 13.

94 There is much debate as to the extent to which the right to "self-defense" is limited to a response to an actual armed attack or the threat of an imminent armed attack. See Chapter 4 for more discussion on this issue.

adopts a more expansive definition of aggression. Under the Rio Treaty, aggression is not limited to armed attack:

> *Article 6*. If the inviolability or the integrity of the territory or the political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America…[95]

In such a situation, the Organ of Consultation would be activated to determine what the appropriate course of action should be to deal with the situation. The Rio Pact, therefore, does give support for the use of anticipatory military activities.

This element of the OAS was known to the participants of the ExCom meetings, and was one of the reasons why the decision was made to bring the matter of the quarantine before the Organ of Consultation. Once the Organ of Consultation approved the quarantine, there would be "legal" justification and support for the action. In this regard, Robert Kennedy notes

> It was the vote of the Organization of American States that gave a legal basis for the quarantine. Their willingness to follow the leadership of the United States was a heavy and unexpected blow to Khurshchev. It had a major psychological and practical effect on the Russians and changed our position from that of an outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their position.[96]

Additionally, the United States was also aware of the need for UN sanction of any use, or potential use, of armed force. In this respect, the matter was also brought before the United Nations Security Council. However, with the ability of both the United States and the Soviet Union to veto any action in the Security Council, the UN was effectively powerless to take any action in this case.

The fact that the United States used international organizations to justify the action taken—after the decision on which course of action to use had already been made—does not necessarily indicate that the initial decision was influenced by the requirements of international law. Instead, it could be that these actions were use to rationalize policies that were going to be implemented regardless of the legal status of the actions. As Scott and Withana note, "According to realists, law is at best a disguise for interests based on calculations of power; foreign policy the manifestation of a rational assessment as to what will enhance the power of the state."[97]

Gerberding argues that this was exactly the case with the United States and the quarantine decision in the Cuban Missile Crisis. He states, "The United States, not unexpectedly, was conspicuously concerned with wrapping its policies in the mantle

---

95 Oliver, "Working Paper: The Inter-American Security System and the Cuban Crisis," 14.

96 Robert F. Kennedy, *Thirteen Days: Memoir of the Cuban Missile Crisis* (New York: W.W. Norton and Company, 1969), 121.

97 Shirley V. Scott and Radhika Withana, "The Relevance of International Law for Foreign Policy Decision-Making When National Security Is at Stake: Lessons from the Cuban Missile Crisis," *Chinese Journal of International Law*, 3, No. 1 (2004), 168–169.

of legal rectitude and with demonstrating the illegality of its adversaries' activities."[98] He goes on, adding that, "Whatever its legal status might be, there is little room for doubt that the United States decision to convene the Council of the OAS, acting as the Organ of Consultation under the Rio Pact, and to delay proclaiming the blockade officially until after the Latin ambassadors had sanctioned it, were politically prudent."[99]

Some scholars note that the decision to respond to the crisis with the quarantine was at least partially influenced by legal elements. For Scott and Withana, while the decision to implement the quarantine was not based entirely upon legal considerations, the legal element cannot be dismissed. They make the following arguments:

> Perhaps most clear, is the inadequacy of the realist assumption that international law did not have a role to play in US decision-making or implementation. An examination of the historical evidence has revealed that what can be broadly classified as realist writers are missing an important consideration in virtually ignoring international law; decision-makers did take legal factors into consideration alongside questions of realpolitik and public opinion. Excomm members were not prepared to do anything that were categorically illegal but were prepared to take a strategically less decisive action for which some relatively plausible legal justification could be found.[100]

Meeker notes that US decision makers "were concerned that any action taken by the United States should rest on the soundest foundation in law and should appear in that light to all the world, including the Government of the Soviet Union."[101] According to Fisher, "There can be little doubt that one of the considerations which restrained the United States from an immediate air strike against the missile sites in Cuba was the gross illegality of such action."[102]

Others, however, place the decision in a wholly different context, completely removed from the legal elements altogether. George, for example, describes the decision to adopt the quarantine option in the following manner:

> Although leaning toward an air strike at first, Kennedy soon saw the merits of limiting not only his objective but also the means to achieve it. The president's interest in the blockade option was caught by the possibility that it might rescue him from the policy dilemma confronting him: how to get the missiles out without possibly triggering escalation of the crisis to war.[103]

---

98 William P. Gerberding, "International Law and the Cuban Missile Crisis," in Lawrence Scheinman and David Wilkinson (eds) *International Law and Political Crisis: An Analytic Casebook* (Boston: Little, Brown and Company, 1968), 176.

99 Ibid., 197.

100 Scott and Withana, "The Relevance of International Law for Foreign Policy Decision-Making When National Security Is at Stake: Lessons from the Cuban Missile Crisis," 178.

101 Leonard C. Meeker, "Defensive Quarantine and the Law," *The American Journal of International Law*, 57, No. 3 (July 1963), 515.

102 Roger Fisher, *International Conflict for Beginners* (New York: Harper Colophon Books, 1970), 174.

103 Alexander L. George, "The Tension Between "Military Logic" and Requirements of Diplomacy in Crisis Management," in *Avoiding War*, 227.

George goes on to add that "In the end, Kennedy chose the blockade option because it enabled him to postpone and control the risk of a major war better than an air strike would have."[104]

Haas explains the quarantine decision in a similar manner, arguing that "Threatening the Soviets to force the removal of the missiles allowed the Kennedy administration to demonstrate its resolve (thereby alleviating the principal hazard of simply accepting a change in the status quo), while also giving Khrushchev more room to back down, as compared to the option of employing a military strike without warning."[105] Haas also notes that "Kennedy's decision to couple the blockade of Cuba with an ultimatum to Khrushchev to remove the missiles or face military hostilities thus seems to be a value-maximizing choice, and therefore seems to be sufficiently explained by expected-utility theory."[106]

Based on the transcripts of the ExCom meetings, and the associated memoranda generated by the participants in these meetings, it appears that the legal elements did play some role in the decision to adopt the quarantine.[107] To be sure, it is impossible to determine the exact extent to which the legal aspects influenced the eventual policy adopted. At the same time, however, the impact of the legal aspect cannot be fully dismissed. Chayes traces the ExCom deliberations and asks,

> whether law operated as a constraint on the choice of the quarantine as the United States' response in the Cuban missile crisis. One can conclude that it did, and substantially, but not decisively, and not directly in the sense that the President, or anyone else, turned to his lawyer and said, 'I am disposed to do thus-and-so, which I think would be in the best interests of the country, but if you tell me it would be illegal, I won't do it.'[108]

In this respect, it appears as if the United States was at least partially constrained by the legal prohibitions against the use of anticipatory military actions.

Air Strike vs. Quarantine: The Normative Elements

The legal constraints represent only one aspect of interest in this study. The other element is the normative constraints found in the just war tradition. The Cuban

---

104 George, "The Tension Between "Military Logic" and Requirements of Diplomacy in Crisis Management," 228.

105 Mark L. Haas, "Prospect Theory and the Cuban Missile Crisis," *International Studies Quarterly*, 45, No. 2 (June 2001), 259.

106 Ibid., 259.

107 Cohn argues that Kennedy made the decision to implement the quarantine outside of the ExCom setting, and that the ExCom meetings were primarily symbolic. According to this perspective, the deliberations of the ExCom should not be used to determine why any policy was adopted, since they did not really serve any purpose in the decision-making process. Since the vast majority of the existing scholarship on the Cuban Missile Crisis uses the ExCom meetings as a central part of the Crisis, this work also focuses on these meetings. For more on this argument, see Elizabeth Cohn, "President Kennedy's Decision to Impose a Blockade in the Cuban Missile Crisis: Building Consensus in the ExComm After the Decision," in James A. Nathan (ed.), *The Cuban Missile Crisis Revisited* (New York: St. Martin's Press, 1992).

108 Chayes, *The Cuban Missile Crisis*, 35.

Missile Crisis highlights two different aspects of the normative side of the question. The first concerns the issue of "last resort" and imminence in the age of ballistic missiles and nuclear weapons. It is worth recalling part of President Kennedy's statement announcing the quarantine. During this address, he noted,

> We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.[109]

In this respect, Kennedy is challenging the traditional notions of imminence and aggressive action on which much of the just war tradition is based. In this new world, a state can not wait for the missile to be fired to take action.[110] However, since the Kennedy Administration believed that the Soviets had deployed the missiles in Cuba for offensive purposes,[111] any action taken by the United States was in response to an aggressive act by the Soviet Union. While this aspect was clear to the members of the ExCom, it was important to them that the American people see the situation the same way.

The normative and moral aspects of the air strike option versus the quarantine were also discussed at length by the participants in the ExCom meetings. Robert Kennedy recalls that during these meetings,

> With some trepidation, I argued that, whatever validity the military and political arguments were for an attack in preference to a blockade, America's traditions and history would not permit such a course of action. Whatever military reasons he and others could marshal, they were nevertheless, in the last analysis, advocating a surprise attack by a very large nation against a very small one. This, I said, could not be undertaken by the US if we were to maintain our moral position at home and around the globe. Our struggle against Communism throughout the world was far more than physical survival—it had as its essence our heritage and our ideals, and these we must not destroy.[112]

Robert Kennedy also notes that "The strongest argument against the all-out military attack, and one no one could answer to [the President's] satisfaction, was that a surprise attack would erode if not destroy the moral position of the United States throughout the world."[113] Similar sentiments were expressed throughout the debates of the ExCom meetings, as discussed above.

It was not that the members of the Kennedy Administration refused to take military action, or were unwilling to strike at the missile sites. Rather, it appears that a consensus developed that other means should be tried first—i.e., force should be

---

109 Chang and Kornbluh, *The Cuban Missile Crisis, 1962*, 161.

110 See Chapters 4 and 5 for more on this element.

111 As reported in the "Joint Evaluation of Soviet Missile Threat in Cuba, 19 October 1962" Central Intelligence Agency, *The Secret Cuban Missile Crisis Documents*, 203–208.

112 Kennedy, *Thirteen Days*, 38–39.

113 Ibid., 49.

used as a last resort. In this sense, the "moral traditions" of the United States, which are similar to those found in the just war tradition, were clearly influential in the decision making process.

Was Kennedy Constrained?

It is impossible to determine *exactly* what caused Kennedy to make the decision to implement the quarantine. It does appear, however, that, at least to a certain extent, Kennedy was influenced by both the legal and normative traditions against taking direct military action as an immediate and first response to the delivery of Soviet missiles to Cuba.

The first-strike disadvantages that would accompany the air strike option appeared to be far more substantial than the shortcomings of the quarantine option. On the other hand, the quarantine option, which had more strategic shortcomings, did not have as many legal and normative liabilities. The fact that Kennedy chose the latter option lends support to the idea that the legal and normative elements were at least somewhat influential.

Additionally, the hypothesis that the influence of the legal and normative elements will fluctuate according to the level of threat a state faces is also supported by a statement made by President Kennedy in connection with the Cuban Missile Crisis. On November 20, 1962, in response to a question about the relationship between the United States and the United Nations, President Kennedy stated,

> Obviously, the United States has the means as a sovereign power to defend itself, and of course exercises that power. It has in the past and would in the future. We would hope to exercise it in a way consistent with our treaty obligations, including the United Nations Charter. But we of course keep to ourselves and hold to ourselves under the United States Constitution and under the laws of international law, the right to defend our security, on our own, if necessary, though we hope to always move in concert with our allies, but on our own if that situation was necessary to protect our survival or integrity, or other vital interests.[114]

In other words, President Kennedy was arguing that the United States will act within the framework of international law, but only up to a certain point. If the threat is grave enough, and if the United States feels that the law is too constricting, the United States will act unilaterally, i.e., outside of the legal framework established by the UN. In this respect, the legal constraints are not absolute, but rather more situational.

---

114 John F. Kennedy, *News Conference Number 45*, November 20 1962, <www.jfklibrary.org/jfk_press_conference_621120.html> (accessed March 3, 2005). It is interesting to note how similar this statement is to statements made by President George W. Bush between 2002–2005.

Cienfuegos Submarine Base: The Crisis that Never Was

On September 16, 1970, President Nixon was informed by National Security Advisor Henry Kissinger that the Soviets were building a submarine base in Cuba. According to the ICB case information, this triggered a crisis for the United States. The major response by the United States was diplomatic in nature, and took the form of reaffirmation of the 1962 agreement between the United States and the Soviet Union that no offensive weapons would be deployed in Cuba. No military action was taken by either side during this crisis.

The fact that the development of a Soviet submarine base in Cuba would drastically alter the strategic landscape was not lost on United States. According to Kissinger,

> The intelligence analysis that I received later in the day [September 18] concluded that the Soviets were "establishing a support facility [in Cienfuegos] for naval operations in the Caribbean and the Atlantic." It added ominously that "Soviet naval units, including nuclear powered submarines, may soon be operating regularly out of the Cuban port of Cienfuegos." Our naval experts pointed out that a permanent facility in Cuba would sharply reduce the time Soviet submarines lost in making long transits to operating areas in the Atlantic. The result would be to increase by approximately one-third the time that Soviet ballistic missile submarines could be on station in range of the United States, or to increase, also by approximately one-third, the number of submarines on station at any one time. This would be a quantum leap in the strategic capability of the Soviet Union against the United States.[115]

In one of the few works that examines the incident, Hirschbein argues that,

> Given this situation, surely Nixon could have convinced himself that Soviet actions undermined both his presidency and national security; the case was strong indeed. It could have been argued that just as Khrushchev was testing Kennedy in 1962, so Brezhnev was testing Nixon's courage and credibility in 1970—a bold, decisive response was essential. And, placing the challenge in broader perspective, it could have been maintained that if Nixon could not uphold the Monroe Doctrine and the informal understanding that resolved the 1962 episode, no friend or foe would take American leadership seriously.[116]

Thus, the situation seemed ripe for some sort of anticipatory military action to deal with a clear, albeit not yet imminent, threat.

No such response was forthcoming, however. Nixon notes in his memoirs, "In view of what happened in the 1962 crisis, I decided that I would not force a public confrontation unless I had no other choice, and I would not deal with the Soviets from anything less than a position of unyielding strength."[117] Accordingly, Nixon argues

---

115 Henry Kissinger, *White House Years* (Boston: Little, Brown and Company, 1979), 638–639.

116 Ron Hirschbein, *What If They Gave a Crisis and Nobody Came? Interpreting International Crises* (Westport, CT: Praeger, 1997), 152.

117 Richard Nixon, *The Memoirs of Richard Nixon* (New York: Grosset and Dunlap, 1978), 486.

that he gave the Soviets an opportunity—through private diplomatic channels—to dismantle the base and resolve the crisis peacefully.

Kissinger discusses the crisis in more depth than Nixon, detailing discussions held by the Washington Special Actions Group (WSAG) on the base issue. The WSAG was instructed to develop alternative courses of action to deal with the crisis, but the group was also told that Nixon preferred to delay action until after the upcoming November elections.[118] According to Hirschbein, Nixon "was adamant—there would be no crisis."[119]

In the end, the crisis was resolved through the use of diplomatic pressure on the Soviet Union to halt construction of the submarine base. Specifically, the major resolution of the crisis was a reaffirmation, and further solidification, of the understanding that had resolved the 1962 crisis over the Soviet missiles in Cuba, in which both the Soviet Union and the United States agreed not to deploy "offensive weapons" in Cuba.

A variety of reasons have been posited as to why the Cienfuegos crisis never became a "crisis," ranging from a shift towards détente in US–Soviet relations[120] to specific elements of the individual personalities involved.[121] What is important in this context, however, is that it seems clear that the legal and normative elements did not appear to have played a role in the response chosen to deal with the crisis—Nixon was not constrained by the legal and normative elements when he decided how to respond to the Cienfuegos crisis. Unlike the Israelis in the October-Yom Kippur War crisis, the legal and normative elements did not play a role in Nixon's decision not to use an anticipatory military action. Instead, it remains unclear as to why the crisis never fully developed. According to Hirschbein,

> There is little difficulty understanding why Nixon virtually ignored a Soviet nuclear submarine base. His liminal crises of meaning and identity were venal and personal: they were sparked by rejection and humiliation—situations that rubbed his face in the realization that he was not "well-liked."[122]

From this perspective, it is the individual characteristics of the particular leader that were a deciding factor in how the crisis was (or was not) handled.

According to Garthoff, the actions of the United States in this "crisis" were indicative of the new limits vis-à-vis what kinds of actions both the United States and the Soviet Union they could take in the light of "emerging parity" between the two states.[123] For Dominguez, the crisis represented a new stage in the bilateral relations between the United States and the Soviet Union, one that was characterized

---

118 Kissinger, *White House Years*, 642.

119 Hirschbein, *What If They Gave a Crisis and Nobody Came?* 152.

120 Raymond L. Garthoff, "Handling the Cienfuegos Crisis," *International Security*, 8, No. 1 (Summer 1983), 46–66.

121 Hirschbein, *What If They Gave a Crisis and Nobody Came?*

122 Ibid., 154.

123 Garthoff, "Handling the Cienfuegos Crisis," 65.

by restraint, and served to enhance the security of all parties involved.[124] In this respect, there were strategic/security reasons for dealing with the crisis in the manner that was ultimately chosen. At the same time, however, these are only the opinions of a very few analysts. Without more information on the crisis, it is hard to draw any firm conclusions.

Distant Threats, International Law, and Just War: Are Leaders Constrained?

The three case studies discussed above offer mixed results as to the constraining role of international law and the just war tradition with respect to distant threats and the use of anticipatory military activities. To varying extents, both cases where some form of anticipatory action was used (Osiraq and the Cuban Missile Crisis) showed some evidence of the constraining, or at least influencing, effects of legal and normative elements. At the same time, however, the states involved still found ways to take anticipatory action—even though the threats faced were not imminent in nature. Furthermore, not only did Israel and the United States take anticipatory action, but they were also able to place these actions within the frameworks of both international law and the just war tradition.

In the Osiraq case, the Israeli government was clearly influenced by the normative elements. This is shown by the protracted diplomatic campaign to halt the reactor that was employed before the use of force: force was used as a last resort. It is also indicated by the timing of the strike, designed to with discrimination of "combatants" from "non-combatants" in mind. The legal element is a bit trickier in the Osiraq case, since Israel felt that it was acting in self-defense against a threat emanating from an adversary still technically engaged in a state of war, even if this "war" had entered a dormant state. It seems clear, however, that the Israeli decision-makers did not feel that they were acting in a manner that was incongruent with international law, or if they were, they were more concerned with the consequences of *inaction* rather than the consequences of the action. In this respect, they were not constrained by international law.

In the Cuban Missile Crisis, the members of the ExCom were influenced, again at least to some extent, by both legal and normative traditions. Evidence of this can be seen in the transcripts of the ExCom meetings and the associated documents, stories, and memoirs that were generated with respect to these meetings. Whether or not these traditions were decisive in determining what policy would eventually be adopted can never be known, but the fact that they did exert some influence cannot be dismissed altogether.

Perhaps the most interesting outcome from the case studies in this chapter is the one case where no anticipatory action was taken is also the one case where legal and normative elements appeared to play no role at all. It is interesting that neither Kissinger nor Nixon mentioned these considerations when discussing possible ways to deal with the crisis.

---

124 Jorge I. Dominguez, "It Won't Go Away: Cuba on the US Foreign Policy Agenda," *International Security*, 8, No. 1 (Summer 1983), 115.

It is also important to note that it is precisely the types of threats addressed in these cases that are the most difficult to justify within the frameworks of international law or the just war tradition. At the same time, the fact that leaders *were* able to take action against these threats, yet were still cognizant of—and influenced by—the constraints contained within international law and the just war tradition indicates that the two are not mutually exclusive.

This page intentionally left blank

Chapter 8

Strategic Necessity, Law, and Norms III: Anticipatory Military Activities and the Bush Doctrine

The 2002 *National Security Strategy for the United States* (NSS), or the Bush Doctrine, coupled with the "Axis of Evil" established in the January 2002 "State of the Union Address," presents an interesting opportunity to examine use of anticipatory military activities (AMAs) in the contemporary American context. It was in the 2002 NSS that the Bush administration publicly and explicitly declared that US foreign and strategic policy would now be of an anticipatory nature.

The 2002 NSS, as well as other statements made by Bush administration officials in 2002, such as President Bush's Commencement Address given at West Point in June 2002,[1] argued that the United States was now faced with a "new" strategic environment. This world was characterized by not only the existence of weapons of mass destruction (which was not really a "new" threat), but was one in which WMD were now considered to be the "weapons of choice" rather than "weapons of last resort," as they had been during the Cold War. Additionally, in this new world, the United States faced not only states with WMD, but also non-state actors that were seeking to acquire WMD.[2]

The fact that a new type of actor was now added to the mix (the non-state actor) changed the calculus with respect to the policy options used to deal with these threats. The 2002 NSS argued that deterrence was no longer an option in this new threat environment, and that "The overlap between states that sponsor terror and those that pursue WMD compels us to action."[3] Furthermore, this action need not only be in response to an actual attack. According to the document, the United States was

---

1 It was at the West Point address that President Bush stated that deterrence "means nothing against shadowy terrorist networks with no nation or citizens to defend." He also went on to state that "Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies." Furthermore, President Bush also laid the ground work for the inclusion of an anticipatory element within the new strategy that the United States would soon adopt by stating, "If we wait for threats to fully materialize, we will have waited too long." George W. Bush, "President Bush Delivers Graduation Speech at West Point," (West Point, New York) June 1, 2002 <http://www.whitehouse.gov/news/releases/2002/06/20020601–3.html>.

2 George W. Bush, *The National Security Strategy of the United States of America* (Washington, DC: The White House, 2002), <www.whitehouse.gov/nsc/nss.pdf>, 15 (accessed September 25, 2002).

3 Ibid., 15.

now prepared to take anticipatory action in response to these threats—be it against a state pursuing WMD for its own "personal" use, to pass along to a non-state actor suspected of terrorist activities, or against the non-state actor itself. In other words, the United States was now prepared to take anticipatory military action against actors it deemed "threatening" with respect to not only WMD proliferation, but also their support of terrorism and the nature of their regimes. Of course, preemption or prevention are not new polices, nor is this the first time that they have had a place in US strategic doctrine. It is the first time, however, that they have been laid out so explicitly and publicly.

While the Bush Doctrine is unique in that it is the first time the United States has *publicly* proclaimed a strategy based on preemptive/preventive action (or even acknowledged that such elements play a role in any strategic doctrine), such elements have long been a part of toolbox of policy alternatives available to American leaders. In this respect, what makes the Bush Doctrine unique is not the fact that it includes the use (or potential use) of anticipatory military activities, but rather the fact that it draws such attention to these actions, and makes them a *public* element of American grand strategy. Anticipatory military activities also played a central role in American strategic doctrine throughout the Cold War.[4] However, during this period they were not publicized and remained part of classified plans designed to implement grand strategy, as opposed to actually being one of the key elements of the grand strategy. In this respect, the inclusion of preemption/preventive actions within the Bush Doctrine was not revolutionary *per se*, but rather demonstrated a shift with respect to their placement within the strategy frameworks under which administrations operate.

Furthermore, even before the Cold War, anticipatory military activities played a role within American foreign policy, albeit it was also one that was not touted at the level of grand strategy. According to Gaddis, anticipatory activities played a role in the strategic thinking of the United States in the early 1800s in order to deal with threats from both Spanish Florida as well as from non-state actors, such as various Native American groups. Furthermore, anticipatory action was also advocated at this time in order to deal with the possibility of "failed" or "failing" states. Gaddis notes that Polk used the "doctrine of preemption," as one of the reasons to justify the 1845 annexation of Texas, citing "concerns that the territory might not be able to retain the

4 Preemptive or preventive action occupied a central place within the nuclear strategy of the US during the Cold War as articulated within the Single Integrated Operational Plan, also known as SIOP. The first SIOP was issued in 1960. Successive SIOPs have been designed over the years, and much of the information contained within them (even within the first SIOP) remain classified. For more information on SIOP, see Fred Kaplan, *The Wizards of Armageddon* (New York: Simon and Schuster, 1983); Peter Pringle and William Arkin, *SIOP: The Secret US Plan for Nuclear War* (New York: W.W. Norton and Company, 1983); Desmond Ball and Robert C. Toth, "Revising the SIOP: Taking War-Fighting to Dangerous Extremes," *International Security*, 14, No. 4 (Spring 1990): 65–92; William Burr, "The Creation of SIOP–62: More Evidence on the Origins of Overkill," *National Security Archive Electronic Briefing Book No. 130*, July 13, 2004, The National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB130/index.htm> (accessed December 15, 2006).

independence it had won from the Mexicans nine years earlier, and that the British or the French might then take it over."[5] Gaddis goes on to add,

> Similar hypotheticals caused Polk to welcome—some historians say to provoke—the war with Mexico that soon followed, since it brought the opportunity to take California, whose great harbors at San Diego, Monterey, and San Francisco might also be vulnerable to seizure by Europeans. The taking of California, in turn, required the extension of American sovereignty over all the territory—present-day Arizona, New Mexico, Colorado, and Nevada—that lay in between. Now even the prospect of power vacuums invited preemption.[6]

At the same time, however, anticipatory activities were not limited to this period in American history. In fact, anticipatory activities had been undertaken by the United States by Theodore Roosevelt, William Howard Taft, and Woodrow Wilson in order to deal with the possibility of failing states or the rapid decline of other powers.[7] Gaddis goes on to note that,

> Concerns about 'failed' or 'derelict' states, then, are nothing new in the history of United States foreign relations, nor are strategies of preemption in dealing with them. So when President George W. Bush warned, at West Point in June 2002, that Americans must 'be ready for preemptive action when necessary to defend our liberty and to defend our lives,' he was echoing an old tradition rather than establishing a new one. Adams, Jackson, Polk, McKinley, Roosevelt, Taft, and Wilson would all have understood it perfectly well.[8]

It is important to remember, however, that even though there was an historical precedent for the placement of anticipatory activities within US strategic and foreign policy, before the Bush Doctrine, they had not been publicly presented as core elements of grand strategy.

In his 2002 "State of the Union" address, President Bush specifically mentioned three states by name as being particularly dangerous: Iran, Iraq, and North Korea. According to President Bush,

> Our second goal is to prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction. Some of these regimes have been pretty quiet since September the 11th. But we know their true nature. North Korea is a regime arming with missiles and weapons of mass destruction, while starving its citizens.
>
> Iran aggressively pursues these weapons and exports terror, while an unelected few repress the Iranian people's hope for freedom.
>
> Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax, and nerve gas, and nuclear weapons for over a

5 John Lewis Gaddis, *Surprise, Security, and the American Experience* (Cambridge, MA: Harvard University Press, 2004), 18–19.

6 Ibid., 19.

7 Ibid., 20.

8 Ibid., 21–22.

> decade. This is a regime that has already used poison gas to murder thousands of its own citizens—leaving the bodies of mothers huddled over their dead children. This is a regime that agreed to international inspections—then kicked out the inspectors. This is a regime that has something to hide from the civilized world.
>
> States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger.[9]

While the term "Axis of Evil" was idiosyncratic, and much maligned by many commentators at the time, this was not the first time that these states had been linked together in such a manner. In fact, during the Clinton administration, Iran, Iraq, and North Korea had also been categorized together as "the three toughest challenges the United States faced in curbing the spread of nuclear weaponry and missiles."[10] In this respect, President Bush was merely borrowing a page from the playbook of previous administrations with respect to grouping these states together. It was at this point, however, that the similarities end.

The 2002 NSS gives us the policy framework, and the "Axis of Evil" gives us the potential targets. While the NSS is a broad strategy document, presenting multiple goals as well as various options for achieving those goals, one of the alternatives presented in the NSS is the use of anticipatory military activities to counter various types of threats. The question remains, however, as to whether the policy as stated (at least with respect to the use of AMAs) would be carried out—or, in other words, if the United States would be constrained by the legal and normative prohibitions against taking anticipatory military action as had been the case in previous instances already discussed in the previous chapters.

Throughout the course of the presidency of George W. Bush, the United States was involved in interstate crises (as identified by the International Crisis Behavior project)[11] with Iran, Iraq, and North Korea—the members of the so-called "Axis of Evil." However, anticipatory military action was only taken against Iraq.[12] The decision for or against anticipatory action vis-à-vis each of these states will be

---

9 Bush, George W., January 29, 2002, "President Delivers State of the Union Address," The President's State of the Union Address <www.whitehouse.gov/news/releases/2002/01/print/20020129–11.html> (accessed April 27, 2003).

10 James Mann, *Rise of the Vulcans: The History of Bush's War Cabinet* (New York: Penguin Books, 2004), 242.

11 It is important to note that for the Iraq-US crisis, the United States was coded by the ICB project as the "triggering entity." Additionally, for the Iran and North Korea cases, the crises have not been coded to the same extent by the ICB project as the other cases examined in Chapters 6 and 7. No triggering entities are listed, nor are the type of trigger or the gravity of the crises coded. Even though these cases do not conform to the same requirements for inclusion in the analysis as the other cases examined, they are included due to their unique role within US policy. In other words, since the Bush Doctrine explicitly calls for the use of anticipatory military activities, and the United States specifically highlighted three countries as potential targets for this type of activity, these cases merited further examination, regardless of their coding within the dataset.

12 At least as of December 2006.

discussed in turn in order to determine the role that the legal and normative elements played (if any at all) in the formulation of policy. It is important to stress that as with the cases discussed in the previous chapters, it is not the entire lifespan of each of these crises that is under investigation. Rather, and to the extent possible, the focus is on the Bush administration's decision either for or against taking anticipatory military action with respect to each of the various crisis actors.

The Bush Doctrine: Anticipatory Military Activities as Strategic Doctrine

The Bush Doctrine illustrates many of the challenges currently facing both international law and the just war tradition. In the cover letter introducing the 2002 NSS, President Bush outlined the fundamental elements of what would become known as the Bush Doctrine:

> The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed. We will build defenses against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain, and curtail our enemies' efforts to acquire dangerous technologies. *And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.* We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.[13]

Within the text of the NSS, a direct connection is drawn between rogue states, terrorism, and WMD: "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends."[14] Later parts of the NSS also make explicit reference to both the use of anticipatory military action and its standing in international law, as well as clearly linking it with elements of the just war tradition.

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

13 Bush, *National Security Strategy* (2002), ii (emphasis added).

14 Ibid., 14.

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.
>
> The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.
>
> The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.[15]

The Bush Doctrine, at least as formally articulated, acknowledges the constraints on anticipatory action inherent in both international law and the just war tradition. In fact, the text is careful to make explicit reference to the *customary legal elements* that are viewed as permitting anticipatory self-defense, while at the same time ignoring the statutory limitations on this right. Whether this awareness of the constraints, however, would translate into limitations on actual behavior, is a different question—and one that will be discussed in more depth below.

There is much debate within the scholarly literature as to whether the Bush Doctrine[16] lies outside the boundaries of international law and the just war tradition, pushes the accepted margins of permissibility with respect to international law and the just war tradition, or is consistent with the requirements of international law and the just war tradition. By and large, the divide amongst these scholars is roughly analogous to the divide with respect to the interpretation of the standing of self-defense in the UN Charter discussed in Chapter 4 and the standing of anticipatory action within the just war tradition discussed in Chapter 5. Specifically, the key element is the notion of imminence.

The idea of imminence underlies not only the legal aspects, but also the *jus ad bellum* criteria as well. One of the main arguments in favor of a revision of both international law and the just war tradition today is that the traditional conceptualization of imminence is no longer sufficient to deal with today's threats. With the advent of weapons of mass destruction, ballistic missiles, and international terrorism, states are now faced with a different threat environment than was previously the case, when the traditional standards were initially developed. According to Greenwood,

> In assessing what constitutes an imminent armed attack, however, it is necessary to take into account two factors that did not exist at the time of the Caroline incident. The first is the gravity of the threat. The threat posed by a nuclear weapon, or a biological or chemical weapon, if used against a city, is so horrific that it is in a different league from the threats

15 Bush, *National Security Strategy* (2002), 15–16.

16 As spelled out in the 2002 *National Security Strategy*, and not necessarily as applied in specific instances.

> posed (as in the Caroline) by cross-border raids conducted by men armed only with rifles. Where the threat is an attack by weapons of mass destruction, the risk imposed upon a State by waiting until that attack actually takes place compounded by the impossibility for that State to afford its population any effective protection once the attack has been launched, mean that such an attack can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded. The second consideration is the method of delivery of the threat. It is far more difficult to determine the time scale within which a threat of attack by terrorist means would materialize than it is with threats posed by, for example, regular armed forces. These would be material considerations in assessing whether, in any particular case, an attack should be treated as imminent.
>
> Nevertheless, the requirement that an attack be imminent cannot be ignored or rendered meaningless. Even when taking into account [these] issues … the right of self-defense will justify action only where there is sufficient evidence that the threat of attack exists. That will require evidence not only of the possession of weapons but also of an intention to use them.[17]

The Bush Doctrine explicitly echoes this argument.[18] Specifically, the Bush administration is arguing that the situation today is different in kind from that of the past, and as such, it must be dealt with differently. In this respect, at least according to the perspective presented by the Bush administration, the underlying foundations of the current international legal system are no longer fully applicable. At the same time, however, the issue of imminence does not disappear completely. Rather, what is now required is two-fold: proof of possession, and proof of intention. The first requirement is fairly straightforward, but the second element is more difficult. It is impossible to fully ascertain the intention of other actors, and this uncertainty becomes even more troublesome to states facing the possibility of an adversary armed with WMD or even modern conventional weapons.

What becomes particularly interesting within current discussion is the standing of the concepts within the Bush Doctrine itself. Specifically, are the elements at the doctrinal level consistent with the requirements of international law and the just war tradition? If not, will this constrain the United States from implementing the doctrine, will the United States ignore the constraints, or will the United States try to shift the rules to fit the policy when applying the Bush Doctrine to particular cases?

The Bush Doctrine addresses at least three specific types of threats that could be dealt with in an anticipatory manner: terrorism, WMD, and rogue states. Specifically, according to the Bush Doctrine, the real threat is the potential for all

---

17 Christopher Greenwood, "International Law and the Pre-Emptive Use of Force, Afghanistan, Al-Qaida, and Iraq," *San Diego International Law Journal*, 4 (2003), 16.

18 It is interesting to note, however, that at least for some in the Bush administration, absolute proof of "possession" of the weapon is not really necessary. Rather, it is merely sufficient that actors are believed to *want* to possess or develop the weapon. This will be discussed in more depth below. For more on this element, which is an element of what has been dubbed the "Cheney Doctrine," see Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York: Simon and Schuster, 2006), 150.

three to combine and act together.[19] With respect to international law and the just war tradition, however, each presents its own challenge.

It is important to note a significant limitation of examining contemporary policy in the framework established in the preceding chapters. As opposed to the cases examined in Chapters 6 and 7, it is not possible to pinpoint exactly when the decision to take anticipatory action (in Iraq) or not to take such action (in Iran or North Korea) was made by the Bush administration. We do not have access to actual transcripts of minutes from the meetings of the decision-makers when they were debating policy options (as was the case with the Cuban Missile Crisis, for example), nor do we have writings or discussions from the decision makers themselves about when the decision was made (like in the October 1973 case). What we do have, however, are policy documents and speeches by administration officials, which lay out the progression of the policy. Coupled with secondary sources, based on interviews with principals in the policy process, these documents and speeches give us a fair amount of insight into the decision-making process. Even so, it is important to stress that we do not have the same levels of information for the decisions made by the Bush administration as for those in the other cases presented in the previous chapters.

Additionally, with the cases of North Korea and Iran, these crises are still on going, and there remains a possibility that anticipatory military action might be taken at some point in time in the future. In this respect, the descriptions and conclusions presented below represent the situations as they exist at the time of this writing[20]—with the full knowledge of the limitations posed by examining crises as they unfold. It is still instructive, however, to examine these cases within this framework. By including these cases within the larger context of anticipatory military activities presented here, and within the context of the Bush Doctrine, we can see the larger policy context where specific decisions were reached. The cases are presented in the chronological order in which they appear in the ICB Project dataset.

Iran: Give International Organizations a Chance?

The "nuclear" crisis with Iran that began in 2002 was merely one more iteration within what has been a long-standing adversarial relationship between the United States and the Islamic Republic of Iran. In this respect, the fact that the administration of George W. Bush decided to view Iran as hostile, or believed that Iran was a threat that warranted close monitoring was not new. What was new, however, was the policy adopted.

Throughout the Clinton administration, policy towards Iran was dictated by what was known as Dual Containment. Previous administrations had used friendly relations with Iraq (a perennial adversary of Iran) to limit the influence or power of

19 This was the initial rationale given by the Bush administration to justify the 2003 Iraq War. It has since come to light that Iraq did not have any weapons of mass destruction, and it appears as if Saddam Hussein did not have any real ties to Al Qaeda. It is important to keep in mind that the purpose here is to examine the path that led to the decision for or against the use of an AMA—not the subsequent evaluations of that decision.

20 In January 2007.

Iran. However, after its 1990 invasion of Kuwait and the 1991 Gulf War, this was no longer an option. Iraq could no longer be considered a reliable partner within a broader Middle East strategy. As a result, the Clinton administration decided on what it termed "Dual Containment," whereby the power and influence of both Iran and Iraq would be limited (i.e., both would be "contained") without relying on either one to implement the policy with respect to the other.

With the new administration of George W. Bush, it was decided that a new policy was in order. No longer would the United States be operating under the strategies of Clinton administration (or the long tradition of US foreign policy that they represented).[21] Or, according to one perspective, even as of 2006, the United States has still not yet decided on any formal "policy" vis-à-vis Iran, and "Despite concern about terrorism and non-proliferation and fulminations about the nature of the regime in Tehran, Washington has an attitude rather than a considered, measured policy."[22] Chubin goes on to add that, "Lukewarm support for European diplomacy, insistence on referral to the Security Council (without a strategy once there), and brandishing a military option (but refusing direct involvement) does not amount to a policy."[23]

Iran's inclusion in the "Axis of Evil," was based on several factors. Among the elements that influenced this decision were Iran's human rights record, its pursuit of weapons of mass destruction, long-standing support for terrorism and terrorist groups such as Hezbollah, Islamic Jihad, and Hamas, and active involvement and support in providing weapons to Yasser Arafat and the Palestinian Authority.[24] After receiving clear evidence that Iran had been illicitly supplying weapons to the Palestinian Authority for use against Israel in the second Intifada (discovered in the December 2001 aboard the *Karine A* bound for Gaza), and in conjunction with the elements listed above, Iran was "elevated" to become a member of the "Axis of Evil."[25] Iran presented exactly the confluence of regime type, WMD, and support for terrorism that the Bush administration had been warning about.

The 2006 *National Security Strategy* placed renewed focus on Iran. According to the updated NSS,

> We may face no greater challenge from a single country than from Iran. For almost 20 years, the Iranian regime hid many of its key nuclear efforts from the international community. Yet the regime continues to claim that it does not seek to develop nuclear weapons. The Iranian regime's true intentions are clearly revealed by the regime's refusal to negotiate

---

21 It is important to note at the outset that the Bush administration's decision to move away from any policy believed to be connected with the Clinton administration was not limited to Iran. Rather, the same would also hold true with respect to both Iraq and North Korea.

22 Shahram Chubin, *Iran's Nuclear Ambitions* (Washington, DC: Carnegie Endowment for International Peace, 2006), 4.

23 Ibid., 4.

24 Neil Docherty, "How Iran Entered the 'Axis'," in *Frontline: Terror and Tehran* May 2, 2002 <http://www.pbs.org/wgbh/pages/frontline/shows/tehran/axis/map.html> (accessed December 15, 2006).

25 Ann Scott Tyson, "US Drawing a Hard, Fast Line Around Iran." *Christian Science Monitor* (February 8, 2002), 2.

> in good faith; its refusal to come into compliance with its international obligations by providing the IAEA access to nuclear sites and resolving troubling questions; and the aggressive statements of its President calling for Israel to 'be wiped off the face of the earth.' The United States has joined with our EU partners and Russia to pressure Iran to meet its international obligations and provide objective guarantees that its nuclear program is only for peaceful purposes. This diplomatic effort must succeed if confrontation is to be avoided.
>
> As important as are these nuclear issues, the United States has broader concerns regarding Iran. The Iranian regime sponsors terrorism; threatens Israel; seeks to thwart Middle East peace; disrupts democracy in Iraq; and denies the aspirations of its people for freedom. The nuclear issue and our other concerns can ultimately be resolved only if the Iranian regime makes the strategic decision to change these policies, open up its political system, and afford freedom to its people. This is the ultimate goal of US policy. In the interim, we will continue to take all necessary measures to protect our national and economic security against the adverse effects of their bad conduct. The problems lie with the illicit behavior and dangerous ambition of the Iranian regime, not the legitimate aspirations and interests of the Iranian people. Our strategy is to block the threats posed by the regime while expanding our engagement and outreach to the people the regime is oppressing.[26]

However, the 2006 NSS also stated that while these types of threats must be addressed, anticipatory action is not be the only tool available, and does not even have to be the preferred course of action to deal with such threats:

> Taking action need not involve military force. Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners. If necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.[27]

In this respect, the Bush administration appears to be saying two different things with respect to Iran and how to deal with the "threat" it posed (or poses) to both the United States and the international community. While the discussion of Iran is placed almost directly after the discussion of anticipatory action[28] in the 2006 NSS, which if nothing else seems to "prime" the reader for a discussion as to why this type of action needs to be taken in Iran, this is not the case. Instead, what is offered are justifications as to why Iran is not a good candidate for anticipatory action. Rather,

---

26 George W. Bush, The National Security Strategy of the United States of America. (Washington, DC: The White House, 2006), 20–21, <http://www.whitehouse.gov/nsc/nss/2006/> (accessed March 16, 2006).

27 Bush, National Security Strategy (2006), 23.

28 It is worth noting that the type of action described in the 2006 NSS is clearly that of "preventive action," even though the term "preemption" is used.

the 2006 NSS presents an alternative approach to "dealing" with the Iranian threat, one that is based on the use of diplomacy and international cooperation, as opposed to the use of force.

In November 2006, Deputy Assistant Secretary of State for Nuclear Nonproliferation Policy and Negotiations Andrew K. Semmel gave a speech focusing on Iran and efforts designed to halt its nuclear program—especially the use of sanctions to induce Iranian compliance. In particular, Semmel listed five reasons why the United States believed that a "nuclear-armed Iran" would be "intolerable."

- A nuclear-armed Iran would represent a direct threat to US forces in the region, the greater Middle East, Europe and Asia, and eventually the United States itself.
- A nuclear-armed Iran could light a fuse for further proliferation, leading to a re-evaluation of security requirements across the region, and undermine the nuclear nonproliferation regime.
- A nuclear armed Iran would signal a failure of the international system designed to prevent a nuclear weapons break-out and would thereby weaken the credibility and effectiveness of the IAEA and the UN, institutions that underpin the nuclear nonproliferation regime.
- A nuclear-armed Iran could embolden the leadership in Tehran to advance its aggressive ambitions in and outside the region, both directly and through the terrorists it supports. Many believe that the current leadership in Tehran aspires to influence beyond the region.
- Finally, Iran is at the nexus of weapons of mass destruction and terrorism, pursuing weapons of mass destruction and actively supporting terrorist movements. If Iran has nuclear weapons or fissile materials, the likelihood of their transfer to a third party would increase—by design or through diversion.[29]

Semmel goes on to state that Iran has continually failed to comply with both the International Atomic Energy Association (IAEA) and the United Nations regarding prior decisions and resolutions that placed restrictions on Iran's nuclear program. According to Semmel,

> Iran's refusal to comply with UN Security Council Resolution 1696 (July 31) cannot go without a strong response. International credibility, and the credibility of the UN are at stake. Operative paragraph 8 of UNSCR 1696 included the Security Council's intention to pursue sanctions measures under Article 41 if Iran failed to comply. The Council must make clear to the Iranian regime that there will be consequences if it does not change course and step away from its nuclear ambitions.[30]

---

29 Andrew K. Semmel, "Building a Common Approach to the Iranian Nuclear Problem." Remarks at the International Institute for Strategic Studies Workshop. (New York City, November 28, 2006).

30 Ibid.

It is quite telling, however, that while Semmel makes it very clear that sanctions are only one piece of the puzzle with respect to dealing with Iran and its intransigence on the nuclear issue, he does not make even one mention of the use of force. Instead, he mentions the use of other diplomatic incentives and tools to try to convince Iran to change its behavior.

As of this writing, the Bush administration has reiterated time and again that all options remain "on the table," which would seem to imply that anticipatory military action remains a possibility. At the same time, however, these same officials have stated that their clear preference is for "diplomacy," and—in marked contrast to the process that occurred vis-à-vis Iraq—a concerted effort has been made to resolve this crisis not only diplomatically, but also multilaterally. The United States has consistently (and persistently) worked with its friends, allies, and even sometimes rivals/competitors (such as China and Russia) to resolve the conflict diplomatically. And it appears as if there may be at least some sort of pay off for this approach.

In late December 2006, the United Nations Security Council unanimously approved a resolution demanding that Iran halt its uranium enrichment program. According to this resolution, Iran must suspend "proliferation sensitive nuclear activities," including

(a) all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA; and
(b) work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water, also to be verified by the IAEA[31]

Additionally, the same resolution also included a strengthened sanctions regime against Iran until it (verifiably) halts its illicit military nuclear program. According to this part of the Resolution,

> all States shall take the necessary measures to prevent the supply, sale or transfer directly or indirectly from their territories, or by their nationals or using their flag vessels or aircraft to, or for the use in or benefit of, Iran, and whether or not originating in their territories, of all items, materials, equipment, goods and technology which could contribute to Iran's enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems…
> …
> …all States shall also take the necessary measures to prevent the provision to Iran of any technical assistance or training, financial assistance, investment, brokering or other services, and the transfer of financial resources or services, related to the supply, sale, transfer, manufacture or use of the prohibited items, materials, equipment, goods and technology specified… above;[32]

---

31 United Nations, December 23, 2006, "Security Council Imposes Sanctions on Iran For Failure to Halt Uranium Enrichment, Unanimously Adopting Resolution 1737 (2006)" (New York, December 23, 2006) <www.un.org/News/Press/docs/2006/sc8929.doc.htm> (accessed December 23, 2006).

32 Ibid.

In other words, the new sanctions would remain in place until Iran is deemed to be in compliance with the terms of both the NPT and other agreements reached with the IAEA.

It is not clear exactly what impact UN Security Council Resolution 1737 will have, or what would be the consequences for non-compliance. The Resolution states that the Security Council,

> *Welcomes* the commitment of China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the support of the European Union's High Representative, to a negotiated solution to this issue and encourages Iran to engage with their June 2006 proposals (S/2006/521), which were endorsed by the Security Council in resolution 1696 (2006), for a long-term comprehensive agreement which would allow for the development of relations and cooperation with Iran based on mutual respect and the establishment of international confidence in the exclusively peaceful nature of Iran's nuclear programme.[33]

As is the case with most Security Council resolutions, however, Resolution 1737 provides a great deal of detail on what Iran should do, but provides very little with respect to the consequences of non-compliance. In fact, the Resolution merely states that

> in the event that the report [of the Director General of the IAEA] shows that Iran has not complied with this resolution, [the Security Council] shall adopt further appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with this resolution and the requirements of the IAEA, and underlines that further decisions will be required should such additional measures be necessary;[34]

By saying that a "Chapter VII" action may be necessary, the Resolution does not rule out the use of force. However, the Resolution is also quite explicit in stating that *additional* "decisions," i.e., additional authorization by the Security Council would be necessary before such action could be carried out. And the United States was quick to note that it would not hesitate to go back to the UN if Iran fails to comply. In fact, on December 23, 2006,[35] Acting Permanent Representative to the United Nations, Alejandro Wolff stated, "if necessary, we will not hesitate to return to this body for further action if Iran fails to take steps to comply."[36]

What "further actions" the United Nations might take within the framework of Resolution 1737 are unclear. By referencing Article 41 of the United Nations Charter, Resolution 1737 rules out the use of force under the auspices of the United Nations. While there are provisions in the United Nations Charter that do authorize the collective use of force against a state viewed to be a threat to international peace

---

33 United Nations, "Security Council Imposes Sanctions on Iran For Failure to Halt Uranium Enrichment, Unanimously Adopting Resolution 1737 (2006)" (emphasis in original).

34 Ibid.

35 The same day Resolution 1737 was passed by the Security Council.

36 Alejandro Wolff, "Explanation of Vote on Iran and UNSC Resolution 1737." Remarks to the Security Council. (New York City, December 23, 2006).

and security, these are contained in Articles 42–51. Article 41, on the other hand, deals with "measures not involving the use of force" designed to enforce Security Council Resolutions.[37] In this respect, the Security Council seemed intent on keeping the crisis within the "nonviolent" realm, and avoiding the use of force as a tool of crisis reduction.

Can this be considered a "victory" for the legal and normative constraints against the use of AMAs to counter a "distant" threat? Or, in other words, does the Bush administration's behavior regarding Iran's nuclear program indicate that it might have been constrained by the legal and normative elements against taking anticipatory action? While it is impossible to say definitively either way (particularly since the crisis is still "in progress," and the use of force could be used in the future), it appears as if this is not the case. Rather, in this case there were significant *strategic* first-strike disadvantages, rather than *political* first-strike disadvantages. It does not make strategic sense to take anticipatory military action against Iran: there is no good military option. In fact, according to one report, both the CIA and the DIA conducted "war-games" designed to estimate the likely outcome of the use of an AMA against Iranian nuclear facilities. And, "As an Air Force source tells it, 'The war games were unsuccessful at preventing the conflict from escalating.'"[38] Hence the decision to rely on diplomacy and multilateralism.

Along the same lines, during testimony given at a June 2006 hearing on the "Iran Nuclear Issue" held by the House Armed Services Committee, those in attendance were warned that Iran would most likely retaliate in kind to any sort of military action directed towards Iranian enforcing compliance. According to the testimony of Patrick Clawson, "even if we do use military preemption against Iran's nuclear program, we still need [a commitment] to deterrence because it is possible that Iran will react to whatever military instruments we use against it, and we ought to be prepared for that eventuality."[39] Clawson went on to argue that the United States must clearly show the Iranians that it would defend its interests in the region, and that Iran would be unable to either destabilize the region or truly hurt US interests in the region. But, it is important to stress that from this perspective, if anticipatory action were to be taken, it could not be of the single, pinpoint, surgical strike variety. Iran's nuclear program is now dispersed across numerous sites, a situation that complicates the use of military force for counterproliferation purposes. While these types of strikes would surely be a component, in actuality, the operation would necessarily be more complex—and this where the first-strike disadvantages come into play.

To this must be added the fact that the Iranians have also threatened the United States and others with the possibility of its taking anticipatory action. According to news reports, in August 2004, the Iranian Defense Minister, Vice Admiral Ali

37 Epps Valerie Epps, *Documentary Supplement to International Law*, 2nd edn. (Durham, NC: Carolina Academic Press, 2001), 10.

38 "CIA, DIA Have War Gamed Pre-Emptive Strike on Iran," *The White House Bulletin* (September 20, 2004).

39 House Armed Services Committee, *US Representative Duncan Hunter (R-CA) Holds a Hearing on the Iran Nuclear Threat*, Hunter, Duncan, Chair. 109 Cong., 2nd session (2006) Political Transcript Wire.

Shamkhani put the world on notice that Iran might also be in the game in terms of using anticipatory military activities. According to Shamkhani, "We will not sit to wait for what others will do to us… Some military commanders in Iran are convinced that preventive operations which the Americans talk about are not their monopoly. Any nation, if it feels threatened, can resort to that."[40] This creates a situation reminiscent to the situation presented by Schelling in the security literature: he thinks we are going to strike, so we think he is going to strike, and he knows that we know that he knows… So we must strike now before it is too late. Or, in other words, it presents an environment that appears, at least on the surface, fairly enticing vis-à-vis the use of an anticipatory military activity—either by the United States or Iran. This is markedly different from both the Iraqi and North Korean cases where neither side was actively threatening to take anticipatory action against the United States or any other state. However, as of this writing, anticipatory military action has not yet been taken by either side.

There have been, however, reports about both the United States and Israel preparing to take anticipatory action against Iran. According to Seymour Hersh,

> The Bush administration, while publicly advocating diplomacy in order to stop Iran from pursuing a nuclear weapon, has increased clandestine activities inside Iran and intensified planning for a possible major air attack. Current and former American military and intelligence officials said that Air Force planning groups are drawing up lists of targets, and teams of American combat troops have been ordered into Iran, under cover, to collect targeting data and to establish contact with anti-government ethnic-minority groups. The officials say that President Bush is determined to deny the Iranian regime the opportunity to begin a pilot program, planned for [the spring of 2006], to enrich uranium.
> ...
> A government consultant with close ties to the civilian leadership in the Pentagon said that Bush was 'absolutely convinced that Iran is going to get the bomb' if he is not stopped. He said that the President believes that he must do 'what no Democrat or Republican, if elected in the future, would have the courage to do,' and 'that saving Iran is going to be his legacy.'
>
> One former defense official, who still deals with sensitive issues for the Bush administration, told me that the military planning was premised on a belief that 'a sustained bombing campaign in Iran will humiliate the religious leadership and lead the public to rise up and overthrow the government.' He added, 'I was shocked when I heard it, and asked myself, "What are they smoking?"'[41]

The Sunday Telegraph (UK) has also reported along similar lines, noting that "planners" in both Central Command and Strategic Command are "identifying targets, assessing weapon-loads and working on logistics for an operation" designed

40 Nazila Fathi, "Iran Says It May Pre-Empt Attack Against Its Nuclear Facilities," *New York Times* (August 20, 2004), A4.

41 Seymour M. Hersh, "The Iran Plans," *The New Yorker* (April 8, 2006) <www.newyorker.com/fact/content/articles/060417fa_fact> (accessed April 10, 2006).

to strike at Iran's nuclear program.[42] There are also reports that the Israelis are preparing for similar actions.[43]

Although there may be reports for planning for a strike against Iran there also appears to be a good deal of hesitation on the side of the Europeans with respect to taking action in Iran. Again according to Hersh, there appears to be European skepticism about the utility of military action designed for counterproliferation. Additionally, there also appear to be European concerns about the levels of intelligence possessed regarding either the Iranian nuclear capability or Iranian intentions with its nuclear program.[44] Furthermore, there are also concerns, which have been expressed by the British, that such an action could lead to further instability and violence in the region, and would not even fully eliminate Iran's nuclear program.[45] If this were to happen, the situation would be worse than it was to begin with.

However, the 2002 and 2006 *National Security Strategies* were framed in such a manner that the decision to rely on multilateralism and diplomacy was not wholly inconsistent with the "Bush Doctrine." In fact, Bush administration officials have always been careful to state that their preference is always for diplomacy first, and military action only when absolutely necessary.[46] In this respect, the pursuit of multilateral diplomacy through the framework of either the IAEA or the United Nations still remains entirely congruent with the Bush Doctrine—albeit not with the parts that were the most publicized. Furthermore, it is in this instance (and with the handling of the North Korean crisis discussed below) that the Bush administration's behaviors most closely emulate the traditional approaches that have guided much of American foreign policy.

Iraq: Testing Grounds for the Bush Doctrine

In March 2003, the Bush administration, along with several other states in what would be dubbed the "Coalition of the Willing," launched the first (and as of this writing, only) use of anticipatory military force through the framework of the Bush Doctrine. In fact, at least in some respects, it appears as if the Bush Doctrine was designed specifically for such an action—deliberately and systematically providing the rationales for the use of force in Iraq—either to halt the production of WMD, as an additional front in the Global War on Terrorism (GWOT), to remove Saddam Hussein from power in Iraq, to spread democracy to the Middle East, or all of the above.

---

42 Philip Sherwell, February 12, 2006, "US prepares military blitz against Iran's nuclear sites," *Telegraph* <www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/02/12/wiran12.xml&sSheet=/portal/2006/02/12/ixportaltop.html> (accessed February 12, 2006).

43 Uzi Mahnaimi, "Israel readies forces for strike on nuclear Iran," *The Sunday Times* (December 11, 2005) <www.timesonline.co.uk/article/0,2089–1920074,00.html> (accessed June 1, 2006).

44 Hersh, "The Iran Plans."

45 Sherwell. "US prepares military blitz against Iran's nuclear sites."

46 What would constitute an "absolutely necessity," however, would become a matter of great debate in the years subsequent to the start of the 2003 Iraq war.

It is important to stress that the Bush Doctrine, at least as articulated in President Bush's 2002 State of the Union and the 2002 NSS, was, to a very large extent, a product of the post-9/11 world. Or, in other words, it is important to keep in mind the context of the arena in which the Doctrine was formulated. It's a new world, the Bush administration reminds us, and yesterday's policies of deterrence and containment are no longer suitable for today's threats. The Bush Doctrine was, in this respect, supposed to be a new policy for a new era. At the same time, however, at least one of the concrete activities resulting from the Doctrine was not really all that new. In fact, with respect to wanting regime change in Iraq, it appears as if this might be an instance of "old wine in new bottles," or, in other words, a policy idea that had been floating around some Washington circles for many years that had now found its way to the top of the pile in terms of actual implementation. While regime change in Iraq may have been desirable, but unattainable before, it was now within reach.

Among conservative circles in Washington, Saddam Hussein had long been enemy number one, and his removal from power had been advocated for a number of years. Throughout much of the 1990s (i.e., during the years of the Clinton administration), elements of what would later become the Bush Doctrine—including the calls for Saddam's removal—were floating around parts of Washington under various guises, particularly as parts of documents and proposals generated by various individuals who would later become part of Bush's foreign policy team. For example, on January 26, 1998, the Project for the New American Century sent an open letter to the Clinton administration that called for taking action against Iraq—or more specifically, called for "the removal of Saddam Hussein's regime from power." The letter went on to state,

> The policy of 'containment' of Saddam Hussein has been steadily eroding over the past several months. As recent events have demonstrated, we can no longer depend on our partners in the Gulf War coalition to continue to uphold the sanctions or to punish Saddam when he blocks or evades UN inspections. Our ability to ensure that Saddam Hussein is not producing weapons of mass destruction, therefore, has substantially diminished... As a result, in the not-to-distant future we will be unable to determine with any reasonable level of confidence whether Iraq does or does not possess such weapons.
>
> Such uncertainty will, by itself, have a serious destabilizing effect on the entire Middle East. It hardly needs to be added that if Saddam does acquire the capability to deliver weapons of mass destruction, as he is almost certain to do if we continue along the present course, the safety of American troops in the region, of our friends and allies like Israel and the moderate Arab states, and a significant portion of the world's supply of oil will all be put at hazard. As you have rightly declared, Mr. President, the security of the world in the first part of the 21st century will be determined largely by how we handle this threat.
>
> ...The only acceptable strategy is one that eliminates the possibility that Iraq will be able to use or threaten to use weapons of mass destruction. In the near term, this means a willingness to undertake military action as diplomacy is clearly failing. In the long term, it means removing Saddam Hussein and his regime from power. That now needs to become the aim of American foreign policy.

> ...Although we are fully aware of the dangers and difficulties in implementing this policy, we believe the dangers of failing to do so are far greater. We believe the US has the authority under existing UN resolutions to take the necessary steps, including military steps, to protect our vital interests in the Gulf. In any case, American policy cannot continue to be crippled by a misguided insistence on unanimity in the UN Security Council...[47]

In fact, the policy advocated in this "letter" mirrored much of what would be included in the Bush Doctrine. More telling, however, is who was among those who "signed" this letter. Signatories included Richard L. Armitage, John Bolton, Zalmay Khalilzad, Richard Perle, Donald Rumsfeld, and Paul Wolfowitz—all of whom would go on to serve important roles in the crafting of not only the Bush Doctrine, but also policy vis-à-vis Iraq.

In this respect, the Bush administration's Iraq policy, or even the Bush Doctrine itself, was not necessarily novel, but merely the integration of already existing ideas into formal governmental policy. To be sure relationships between extra-governmental organizations, such as the Project for the New American Century and the executive branch have existed for some time. And the point here is not to argue that the integration of ideas from think tanks or outside sources is unusual or necessarily sinister. What is important in this context, however, is how these ideas played into the timelines concerning both the Bush Doctrine and the decision to use anticipatory force vis-à-vis Iraq. Or, to put it more bluntly, was the use of anticipatory force in Iraq more of a foregone conclusion once the Bush administration took office, just waiting for a justification to present itself, regardless of the legal and normative constraints against such action? On the other hand, it could be that there were voices within the Bush administration that were sympathetic towards the use of anticipatory force against Iraq, but only when the situation was ripe for such action.

According to Schlesinger, Iraq was on the Bush administration's agenda very early on—in fact, he reports that a conversation on Iraq was held only ten days after George W. Bush took office. Iraq was on the agenda of the first meeting of the National Security Council, and apparently, it was evident to those in attendance at this meeting that Saddam Hussein was on the Bush administration's radar screen.[48] Rice made a similar argument at this first meeting of the National Security Council meeting. While everyone agreed that there was a threat from Osama bin Laden, al Qaeda, and terrorism in general, these were not the types of threats that were conducive to easy or simple responses. According to reports, Rice deflected attention at this meeting away from bin Laden and towards Iraq. Not only did she discuss the "destabilizing" influence of Iraq on the region as a whole, but also on the need to overthrow the regime of Saddam Hussein.[49]

Furthermore, Schlesinger notes that both Rumsfeld and Wolfowitz "regarded Iraq as unfinished business left over from Bush I's administration" and that they

---

47 Micha L. Sifry, and Christopher Cerf (eds), *The Iraq War Reader: History, Documents, Opinions* (New York: Simon and Schuster, 2003), 199–200.

48 Arthur M. Schlesinger, Jr., *War and the American Presidency* (New York: W.W. Norton and Company, 2004), 17.

49 Suskind, *The One Percent Doctrine*, 22.

worked quickly to make "Iraq as the top priority on the presidential agenda."[50] The question remained, however, as to how to move action against Iraq from "desirable" to "doable." September 11, 2001 may have provided just the opportunity that the Iraq-interventionists had been looking for.

According to Western, during an emergency meeting of the National Security Council on September 12, 2001, Rumsfeld made just this argument. During this meeting, Rumsfeld asserted that the United States might now be presented with the perfect opportunity to not only "go after" al Qaeda and the Taliban, but also Iraq.[51] Rumsfeld was not alone in arguing that the tide might be shifting in terms of being able to take the long-sought action against Iraq. Wolfowitz was also making similar arguments. He argued that Iraq would provide an easier, identifiable target, and one where the regime was likely to "crumble quickly." This would be in marked contrast to the challenges posed by al Qaeda in Afghanistan, which would be fraught with both strategic and topographical challenges. Finally, Wolfowitz also argued that there was between a 10–50 percent likelihood that there was Iraqi involvement in the attacks carried out on September 11.[52]

However, regardless of the intensive lobbying conducted by Wolfowitz, Rumsfeld, or others in the Bush administration for taking action against Iraq immediately after September 11, 2001, Bush was initially hesitant about implementing such a policy. While he did not rule out an eventual operation against Iraq, he pushed aside any discussion of such operations for the time being. According to Woodward, on September 17, 2001, Bush effectively ended discussion about taking immediate action against Iraq, stating "I believe Iraq was involved [in the September 11 attacks], but I'm not going to strike them now. I don't have the evidence at this point."[53]

However, this did not close the book on Iraq as far as Bush was concerned. In fact, he did instruct those in attendance at the meeting to continue to develop the necessary plans for an eventual operation in Iraq—but apparently there was no rush on this front. Again, according to Woodward, Bush "indicated that there would be plenty of time" to take action against Iraq.[54] In a later account, Woodward notes that Bush instructed Rumsfeld to revisit existing war plans for Iraq on November 21, 2001:

> 'Let's get started on this,' Bush recalled saying that day. 'And get Tommy Franks looking at what it would take to protect America by removing Saddam Hussein if we have to.' He also wondered if this planning could be done so it would be kept secret. Rumsfeld said it could, because he was 'refreshing' all the US war plans.[55]

---

50 Schlesinger, *War and the American Presidency*, 27.

51 Jon Western, *Selling Intervention and War: The Presidency, the Media, and the American Public* (Baltimore: The Johns Hopkins University Press, 2005), 175.

52 Ibid., 176.

53 Bob Woodward, *Bush at War* (New York: Simon and Schuster, 2002), 99.

54 Ibid., 99.

55 Bob Woodward, *State of Denial: Bush at War: Part III* (New York: Simon and Schuster, 2006), 81.

Woodward argues that at was at this point in time that Bush formally set into motion the process that would culminate in the use of an anticipatory military activity in Iraq.[56] Western also marks November 2001 as the critical period when those within the Bush administration who wanted to take military action in Iraq began to "work and rework efforts to sustain public support" for such operations.[57]

In an attempt to try to ascertain exactly when the actual decision to use force against Iraq was made (as opposed to just engaging in planning for an operation that might or might not happen), Nicholas Lemann interviewed several people involved with (either key members of, or advisers to) the Bush foreign policy team. One of these individuals, Richard Haass, noted that he believed that the decision to go to war with Iraq was made as early as July 2002. Recalling a meeting that he had with then National Security Adviser Condoleezza Rice, Haass said, "…I raised this issue about where we really sure that we wanted to put Iraq front and center at this point, given the war on terrorism and other issues. And she said, essentially, that that the decision's been made, don't waste your breath." Haass went on to add, in his discussion with Lemann, "So then when Powell had his famous dinner with the President, in early August, 2002 [in which Powell persuaded Bush to take the question to the UN] the agenda was not whether Iraq, but how."[58]

Woodward dates the point at which military action against Iraq became viewed as a certainty a little later in 2002. He points to recollections of George Tenet to reach this conclusion. Woodward recounts a conversation between Tenet and another CIA official, who was taking over duties related to the Middle East. In this conversation, Tenet was asked about the possibility of going to war with Iraq. According to Woodward,

> 'You bet your ass,' Tenet said bluntly. 'It's not a matter of if. It's a matter of when. This president is going to war. Make the plans. We're going.'[59]

Tenet went on to argue that while he thought that there was a chance that Bush might still be "deliberating" about going to war with Iraq, others within the Administration, specifically Wolfowitz and Cheney, "had absolutely decided that war was coming."[60]

At the same time, however, while it may be that the actual decision to go into Iraq was not made until the spring/summer of 2002 (or some time even later in 2002, depending on who is telling the story), calls for preemptive action against Iraq as part of the larger GWOT were publicly articulated by individuals associated with the Bush administration as early as November 2001. On November 14, 2001, Richard Perle, chairman of the Defense Policy Board, gave a speech at the Foreign Policy Research Institute's Annual Dinner. During this speech, he discussed the GWOT and his belief that there needed to be a "second front" in this war: "So there must be

---

56 Woodward, *State of Denial*, 81.

57 Western *Selling Intervention and War*, 178.

58 Nicholas Lemann, "How It Came to War: When Did Bush Decide That He Had to Fight Saddam?" *The New Yorker* (March 31, 2003), 36.

59 Woodward, *State of Denial*, 89.

60 Ibid., 90.

a Phase 2, and there will be lots of debate and room for disagreement over exactly how to go about Phase 2." Additionally, he was not circumspect in terms of where he thought this "Phase 2" would lead the United States, saying, "At the top of the list for Phase 2 is Iraq," citing Saddam's hatred for the United States and possession of weapons of mass destruction as justification. Finally, Perle explicitly called for not only military action against Iraq, but *anticipatory military action*: "So the question in my mind is do we wait for Saddam and hope for the best, do we wait and hope he doesn't do what we know he is capable of, which is distributing weapons of mass destruction to anonymous terrorists, or do we take some preemptive action."[61] It is also interesting to note that at around this same period of time, in mid-November 2001, the idea of hypothetical military action directed against Saddam Hussein received substantial public support (at least as measured by Gallup public opinion polling).[62]

This public statement by someone associated with the administration that anticipatory action needed to be taken against Iraq as part of the GWOT mirrors what was reportedly going on behind closed doors within the administration at roughly the same time. According to one account, the idea of Iraq being the "Stage 2" of the GWOT was floated as early as September 15, 2001, and planning for such a possibility was quickly started at the Pentagon.[63] And, as discussed above, by November 2001, Rumsfeld would be tasked with developing a formal plan for the invasion of Iraq.[64]

While the administration was discussing Iraq in private, it has also been reported that it was beginning to operate under a different set of rules vis-à-vis when force should be used, or what constituted a imminent threat that worthy of a force response. In what has been termed the "Cheney Doctrine," new standards seem to have been set with respect to the use of information and "evidence." As discussed by Suskind, in November 2001, Cheney states, "If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response." He went on to add, "It's not about our analysis, or finding a preponderance of evidence. It's about our response."[65] Or, in other words, under the new rules, if the United States *thinks* that there is a one percent chance that something might be true, it must be accepted as true and acted upon as such. This new element of US decision-making has important implications, particularly with respect to both international law and the just war tradition in that it virtually negates the element of imminence from the equation.

These private discussions regarding place of Iraq in the GWOT were paralleled by a public relations campaign of sorts carried out in the public sphere that would connect the dots between WMD, terrorism, Saddam Hussein's Iraq, and the need

61 Richard Perle, "Next Stop, Iraq." Remarks at the FPRI Annual Dinner (Foreign Policy Research Institute, November 14, 2001).

62 Western, *Selling Intervention and War*, 178.

63 Michael R. Gordon, and Bernard E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (New York: Pantheon Books, 2006), 16–19.

64 Ibid., 26.

65 Ibid., 62.

to take action—preferably sooner rather than later. This campaign was conducted through the use of public speeches and appearances by administration officials, or even contributions to the op-ed pages of major newspapers, whereby each would present part of this argument. This "campaign" of sorts was necessary not only to prepare the public for a military campaign, but also to maintain the high levels of public support that had been appearing in the polls for this type of action.

On August 26, 2002, Vice President Dick Cheney gave a speech to the Veterans of Foreign Wars National Convention. In this speech, Cheney laid out not only not only the rationale for the Bush Doctrine, but also laid the groundwork for taking anticipatory action against Iraq. Cheney linked together the terrorism attacks of September 11, WMD, and Saddam Hussein's Iraq—the unique combination of rationales that the Bush administration hoped would suffice to convince the American public and international community to support taking action against Iraq.

According to Cheney, deterrence and containment are no longer viable policy choices when you are faced with adversaries with no fixed territories, or if these adversaries have WMD and are prepared to share them with terrorists with nefarious intentions. Furthermore, Cheney asserted "there is no doubt that Saddam Hussein now has weapons of mass destruction." He went on to say that "there is no doubt that he is amassing them to use against our friends, against our allies, and against us." Finally, Cheney argued that such weapons of mass destruction "in the hands of a terror network, or a murderous dictator, or the two working together, constitutes as grave a threat as can be imagined. The risks of inaction are far grater than the risks of action."[66]

It is worth recalling Greenwood's arguments vis-à-vis the standing of "imminence" in international law in today's world. While he argued that the idea of imminence should be reevaluated, two elements must be met before a state can use force in self-defense: proof that an adversary possesses WMD or another threatening technology *and* proof that the adversary intends to use those weapons against the state contemplating using force in self-defense. In this speech, Cheney was asserting not only possession, but also intention—the two elements that would be necessary to justify the use of force in self-defense. We can never know if the language chosen by Cheney (or, more generally, the elements highlighted by the Bush administration at this point in the crisis) was chosen to sway public opinion in favor of taking action against Iraq or to establish a "legal" case or justification for such action, or both. What is important, however, is that the case for taking action in Iraq was carefully developed to appear consistent with not only international law (at least as the Bush administration interpreted it), but also the just war tradition.

On October 1, 2002, National Security Adviser Condoleezza Rice gave a speech to the Manhattan Institute for Policy Research. In the course of this speech, she laid out not only the justifications for the Bush Doctrine, how striking against Iraq fit in with the GWOT, and the Bush Doctrine, but also how such action would be both legal and "just:"

---

66 Dick Cheney, "Vice President Speaks at VFW 103rd National Convention" (Nashville, TN, August 26, 2002).

> We will break up terror networks, hold to account nations that harbor terrorists, and confront aggressive tyrants holding or seeking nuclear, chemical, and biological weapons that might be passed to terrorist allies. These are different faces of the same evil. Terrorists need a place to plot, train, and organize. Tyrants allied with terrorists can greatly extend the reach of their deadly mischief. Terrorists allied with tyrants can acquire technologies allowing them to murder on an ever more massive scale. Each threat magnifies the danger of the other. And the only path to safety is to effectively confront both terrorists and tyrants.
>
> For these reasons, President Bush is committed to confronting the Iraqi regime, which has defied the just demands of the world for over a decade. We are on notice. The danger from Saddam Hussein's arsenal is far more clear than anything we could have foreseen prior to September 11th. And history will judge harshly any leader or nation that saw this dark cloud and sat by in complacency or indecision.
>
> The Iraqi regime's violation of every condition set forth by the UN Security Council for the 1991 cease-fire fully justifies—legally and morally—the enforcement of those conditions.
>
> It is also true that since 9/11, our Nation is properly focused as never before on preventing attacks against us before they happen.
>
> The National Security Strategy does not overturn five decades of doctrine and jettison either containment or deterrence. These strategic concepts can and will continue to be employed where appropriate. But some threats are so potentially catastrophic—and can arrive with so little warning, but means that are untraceable—that they cannot be contained. Extremists who seem to view suicide as a sacrament are unlikely to ever be deterred. And new technology requires new thinking about when a threat actually becomes 'imminent.' So as a matter of common sense, the United States must be prepared to take action, when necessary, before threats have fully materialized.
>
> Preemption is not a new concept. There has never been a moral or legal requirement that a country wait to be attacked before it can address existential threats. As George Shultz recently wrote, 'If there is a rattlesnake in the yard, you don't wait for it to strike before you take action in self-defense.' The United States has long affirmed the right to anticipatory self-defense—from the Cuban Missile Crisis in 1962 to the crisis on the Korean Peninsula in 1994.
>
> But this approach must be treated with great caution. The number of cases in which it might be justified will always be small. It does not give a green light—to the United States or any other nation—to act first without exhausting other means, including diplomacy. Preemptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action.[67]

It is also interesting to note that Rice *explicitly* addresses the legal and moral constraints on taking anticipatory action. She argues that there is no legal or moral prohibition against taking anticipatory action against a threat that is "existential."

---

67 Condoleezza Rice, "Dr. Condoleezza Rice Discusses President's National Security Strategy," (New York, NY, October 1, 2002).

However, what she fails to mention in this speech is the prohibition against taking such actions against threats that are distant in nature—the use of "preventive" actions. Rice is very careful to frame US policy (and potential action in Iraq) within the bounds of *customary* international law, which is more permissive regarding the use of anticipatory action. At the same time, she is also cautious in the language she uses to describe the exact nature of the threat posed by either Iraq or other "tyrants" or terrorists. Using both the terms "preempt" and "prevent," she does much to cloud the waters as to what kind of activity the United States would undertake, and how such action would fit within both international law and the just war tradition. Finally, her speech also set the stage for military intervention in Iraq, but alternative strategies in Iran and North Korea—while still maintaining doctrinal consistency (discussed in the other cases in this chapter).

On September 27, 2002, Secretary of Defense Donald Rumsfeld made a similar argument in a television interview in Atlanta, Georgia. It was during this interview that Rumsfeld made his statement equating preemption, preventive action, and anticipatory self-defense as all being the same thing. Additionally, however, Rumsfeld also used the opportunity to try to connect the dots between terrorism, WMD, and Saddam Hussein's Iraq—a critical mission with respect to garnering public support for the Iraq policy that was being discussed behind closed doors. Rumsfeld told the interviewer that not only was Saddam Hussein's regime one that had links with "terrorist networks," and had been on the United States State Department's "terrorist list" for some time, but also that it was "a regime that has a very aggressive weapons of mass destruction program."[68] Furthermore, Rumsfeld reminded the interviewer that legislation supportive of regime change in Iraq had been passed by Congress in 1998, and that "there's no question of the linkage between al Qaeda and the Iraqi regime goes back a decade or more," indicating that in actuality the Bush administration's policy was not new, but rather merely a continuation of that which was adopted, at least partially, during the Clinton administration.[69]

Earlier in 2002, Rumsfeld had also made similar claims. In a February 4, 2002 interview with Jim Lehrer, he argued that Saddam Hussein's Iraq was a threat to not only its neighbors, but also to its own people—and that it was pursuing a program to develop weapons of mass destruction. According to Rumsfeld, "Absent the world—someone, the United States, other countries—pointing out the danger they pose to their own people and to their neighbors, they would run free and they would invade Kuwait again to be sure."[70] Furthermore, other states in the region, such as Saudi Arabia, Jordan, and Israel were also at risk, at least according to Rumsfeld's take on the situation. So, in this respect, the United States and the world community had a duty to take action to protect not only the people in Iraq, but also the region as a whole.

---

68 Ibid.

69 Rumsfeld, "Secretary Rumsfeld Interview with NBC Affiliate – WXIA Channel 11, Atlanta, GA."

70 Donald Rumsfeld, "Sec. Donald Rumsfeld: Part Two," *Newshour Online* (February 4, 2002) <http://www.pbs.org/newshour/bb/military/jan-june02/rumsfeld_parttwo_2–4.html> (accessed December 15, 2006).

Other reports note that Bush administration officials also enlisted the help and support of individuals outside the government in order to not only drum up support for the desired policy with respect to Iraq, but also work on finding the right "justification" for this policy. According to one report, in November 2002, deputy national security adviser Stephen Hadley met with one influential Republican insider—however, one that did not have an actual governmental position. During this meeting, Hadley reportedly said that the Bush administration was "'going to war and [was] struggling with a rationale' to justify it." Additionally, Hadley went on to say that they "were 'still working out' a cause, too." Hadley asked that Bruce Jackson, the insider that he was meeting with, set up a committee of sorts to try to "come up with a rationale" to support the policy that the Bush administration seemed intent on adopting anyway. The idea of dealing with Iraq and Saddam Hussein was nothing new to Jackson, who had been the executive director of the Project for the New American Century at the time when PNAC had sent the "open letter" to President Clinton calling for action against Saddam Hussein.[71]

Congressional hearings[72] were also held regarding US policy vis-à-vis Iraq in September 2002, with both Secretary of Defense Rumsfeld and Secretary of State Powell testifying. In his testimony, Secretary Powell stated, that the United States preferred to resolve the crisis with Iraq multilaterally, through the United Nations. However, Powell also told the committee that "if the United Nations is not able to act and act decisively—and I think that would be a terrible indictment of the UN—then the United States will have to make its own decision, as to whether the danger posed by Iraq is such that we have to act in order to defend our country and to defend our interests." In case of this contingency, Powell was asking Congress for a resolution that would grant President Bush the authority to utilize any means he deemed necessary, including the use of force, to "enforce the United Nations Security Council resolutions Iraq is defying, and to defend the United States and its interests against the threat Iraq poses, and to restore international peace and security in the region."[73] In this respect, it appears that Powell's job in his testimony was to establish the legal framework (both domestically and internationally) for taking anticipatory action against Iraq.

At the same time, Rumsfeld testified before the Senate Armed Services Committee, and his testimony also appears to have been designed to legitimize the use of force against Iraq. For example, Rumsfeld noted that he wanted to discuss "the task of preventing attacks of even greater magnitude than what was experienced on September 11, attacks that could conceivably kill not just thousands of Americans, but potentially tens of thousands of our fellow citizens." He then went on to argue that the United States faced a threat posed by the efforts of chemical, biological,

---

71 Richard Cummings, "Lockheed Stock and Two Smoking Barrels," *Playboy* (February 2007) <http://www.playboy.com/magazine/features/lockheed/index.html> (accessed January 14, 2007).

72 These hearings ultimately led to Congressional passage of a bill that authorized President Bush to use force against Iraq if he deemed it necessary.

73 Henry J. Hyde, 107th *Cong.*, *Chairman Holds Hearing on US Policy Toward Iraq, Afternoon Session with Secretary of State Colin Powell Testifying, H.R.* (2nd session 2002).

and nuclear scientists "to give the world's most dangerous dictators weapons of unprecedented power and lethality." Rumsfeld went on to admit that there were numerous states pursuing WMD, such as Libya, Syria, North Korea, and Iran. However, according to Rumsfeld's testimony, "no terrorist state poses a greater or more immediate threat to the security of our people and the stability of the world than the regime of Saddam Hussein in Iraq."[74]

Rumsfeld also discussed the amount of information or "proof" needed before action could be taken against Iraq. He told the Committee that the traditional standards which had been previously used to justify action needed to be modified.

> If someone is waiting for a so-called smoking gun, it's certain that we will have waited too long. But the question raises another issue that's useful to discuss, and that's what kind of evidence ought we to consider appropriate in the 21st century? In our country, it's been customary to seek evidence that would prove guilt beyond a reasonable doubt in a court of law.[75]

For Rumsfeld, however, this is not necessary, because the adversaries of the United States do not deserve to be protected—and this is what would happen if such a strict standard of evidence were to be required before action was taken. Rumsfeld's argument about evidence sounds remarkably similar to the "Cheney Doctrine."

On October 7, 2002, President Bush gave a speech in Cincinnati titled "President Bush Outlines Iraqi Threat." While he did not directly say that Iraq was "responsible" for the attacks carried out on September 11, 2001, he strongly implied that Iraq was responsible for those attacks. In one paragraph, Bush stated that Iraq possesses WMD, gives "shelter and support to terrorism," is brutal towards its own people, and that the "entire world has witnessed Iraq's eleven-year history of defiance, deception and bad faith." The very next sentence jumps to September 11.

> We also must never forget the most vivid events of recent history. On September the 11th, 2001, America felt its vulnerability—even to threats that gather on the other side of the earth. We resolved then, and we are resolved today, to confront every threat, from any source, that could bring sudden terror and suffering to America.[76]

While President Bush was very careful not to say that Iraq was responsible for, or even complicit in, the September 11th attacks, he was walking a very fine line. And this was a vital component for getting public support for taking action against Iraq. In this respect, and by giving speeches like the one in Cincinnati, President Bush also played his role in the PR campaign necessary to develop and grow the domestic support necessary to take action.

---

74 Donald H. Rumsfeld, Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the House Armed Services Committee regarding Iraq. (September 18, 2002) <www.defenselink.mil/speeches/2002/s20020918/secdef2.html> (accessed September 28, 2002).

75 Ibid.

76 George W. Bush, "President Bush Outlines Iraqi Threat," Remarks by the President on Iraq (October 7, 2002) <www.whitehouse.gov/news/releases/2002/10/print/20021007–8.html Cincinnati, Ohio> (accessed November 7, 2002).

At the same time, however, there was a desire to have as much international support as possible for any operation in Iraq. While the United States did "go" to the United Nations in February 2003,[77] ostensibly in an attempt to resolve the crisis multilaterally and diplomatically before force was used—or at least to gain as much international support as possible for the use of force—it appears as if the outcome was preordained, regardless of what the UN decided. According to Suskind, "What was also clear, to anyone in the innermost circle around the President, was that [going to the UN] would be a faithless exercise; an exercise *for show* considering that it was now a guiding principle of the US government that suspicion was an adequate threshold for preventative action."[78]

The rapidity with which Iraq became elevated in terms of targets for the GWOT, the manner in which the eventual war in Iraq was planned (including the use of the United Nations), coupled with reports of the fixation of the Bush administration with Iraq, seem to indicate that the Bush administration was not constrained by elements of the just war tradition, nor international law. While it is true that elements of the JWT, such as last resort, are open to interpretation, it also seems clear that the idea of "last resort" was either dismissed out of hand by Bush officials, or interpreted in such a manner that it becomes virtually meaningless. For example, it is not clear that diplomacy had truly run its course, that the United Nations or other multilateral arenas could not be successful in resolving the crisis, or that non-violent means could not be implemented successfully.[79]

The same can be said for the idea of just cause. Inherent in the idea of just cause is that the action is taken in response to some sort of injury received, or in the extreme case, an injury about to be received (the anticipatory self-defense case). However, in the latter case, the threat must be truly imminent for any response to be "just." The idea of the "Cheney Doctrine" becomes particularly disturbing in this respect. Suskind argues that the anticipatory elements of the Bush Doctrine were mere extensions of the Cheney Doctrine: "a prevention policy was a corollary of the even more sweeping Cheney Doctrine—where a one percent chance of catastrophe must be treated 'as a certainty,' where firm evidence, of either intent or capability, is too high a threshold; where the doctrine is, in essence, prevention based on suspicion."[80] If this is indeed the case, and the Bush administration was operating under these parameters, there is no room for the rather strict constraints held within the just war tradition in the policy making process.

With respect to international law, the situation becomes more complicated. As discussed above, the 2002 NSS shows at least an awareness of international law. In

---

77 On February 5, 2003, Secretary of State Colin Powell made one final pitch to the United Nations Security Council asking for an additional resolution finding Iraq in material breach of previous Security Council resolutions, particularly UNSC Resolution 1441, and also linking Iraq to terrorism and Al Qaeda. It was hoped that this presentation would convince the United Nations Security Council to pass an additional resolution authorizing the use of force against Iraq.

78 Suskind, *The One Percent Doctrine*, 171 (emphasis in original).

79 Dolan, Chris J. Dolan, *In War We Trust: The Bush Doctrine and the Pursuit of Just War* (Burlington, VT: Ashgate, 2005), 107–18.

80 Suskind, *The One Percent Doctrine*, 150.

fact, it was written in such a manner so that it would be congruent with the *customary legal right* to anticipatory self-defense. At the same time, however, it makes no mention of the limitations on that right imposed by modern treaty law. Furthermore, the fact that at least some members or advisers of the Bush administration were compelled to try to obtain sanction from the United Nations before launching the Iraq war also complicates the situation. Was this a tacit acknowledgment (at least by those who were advocating the move) that such action might be "illegal?" Or, was it merely viewed as an avenue to obtain an additional level of political cover and a good way to get international and domestic political support?

Finally, with respect to international law, the Bush Doctrine as a whole appears to be advocating a two-tiered system of international law: one for the United States, another for everyone else. In this respect, the Bush administration may have believed that they were operating under the framework of "international law" as it applied to the United States. As the most powerful state in the system, who is anyone else to tell the United States what it can or cannot do anyway? Or, as Schlesinger argues, Bush's "conviction apparently is that the unique position of the United States as the planet's supreme military, economic, and cultural power creates an unprecedented opportunity for America to impose its values on other countries and thereby save them from themselves."[81] If this is the case, international law, as traditionally understood and represented by both customary and treaty law, was not really very much of a constraint on the Bush administration vis-à-vis policy in Iraq. Particularly with respect to the use of force and self-defense (as discussed in Chapter 4), this type of selective interpretation or application could create a potentially problematic precedent for the future. This interpretation of international law could substantially weaken the ability of the US to diffuse crises between other actors in the future where one side is contemplating the use of anticipatory action. Or, alternatively, it could make the United States seem quite hypocritical if it condemned another state for taking anticipatory actions when the same rationales were presented.

North Korea: The More the Merrier

The final member of the "Axis of Evil," North Korea, was also placed within this fraternity of sorts primarily due to its illicit pursuit of WMD and role as supplier of ballistic missiles to Iran.[82] However, it soon became apparent that the real concern from North Korea concerned nuclear proliferation. If the chosen strategy for Iran was multilateralism through the IAEA and the United Nations, the one for North Korea was similar, with one key difference. Instead of relying on international institutions to do the heavy lifting, the decision was made to pursue multilateral action, although outside the framework of a formal international institution. Rather, the Bush administration decided to pursue a strategy based on negotiations through multilateral negotiations amongst several states.

---

81 Schlesinger, *War and the American Presidency*, 25.

82 James Cotton, "The Second North Korean Nuclear Crisis." *Australian Journal of International Affairs*, 57, No. 2 (July 2003), 266.

According to a report released by the Congressional Research Service, the primary policy goal of the Bush administration vis-à-vis North Korea is the ultimate eradication of its nuclear programs. In this vein, there are four different strategies that have been adopted to reach this goal:

> (1) terminating the Agreed Framework; (2) withholding US reciprocal measures until North Korea takes steps to dismantle its nuclear programs; (3) assembling an international coalition, through six party negotiations, to apply diplomatic and economic pressure on North Korea; and (4) imposing financial sanctions on foreign banks that facilitate North Korea's illegal counterfeiting activities.[83]

Notice how the use of any military action, let alone anticipatory military action, is not part of the current strategy to counter the threat posed by this member of the "Axis of Evil." Others have argued that the United States has gone to great lengths to emphasize the point that not only can a "peaceful solution" be achieved, but at the same time has also attempted to "downplay the urgency of the situation".[84]

With respect to the policy described above, it is instructive to briefly discuss a couple of the elements. The Agreed Framework was the Clinton administration's "solution" for the North Korean problem. Under the terms of the 1994 Agreed Framework, the United States would exchange tangible "rewards," such as economic assistance, diplomatic representation, fuel supplies, and an extension of the American nuclear umbrella in return for North Korean promises that the nuclear program would be halted. Additionally, it was also stipulated in the Agreed Framework that the IAEA would monitor the situation to make sure that North Korea did, in fact, suspend the program.[85]

When George W. Bush took office, the decision was made to "halt" ongoing negotiations with North Korea about its nuclear and missile programs. The rationale behind this suspension was that the new administration wanted to "review the United States's North Korea policy." On June 6, 2001, however, the Bush administration stated that it was willing to talk to North Korea, but it wanted to discuss a broader range of issues than the Clinton administration had placed on the table. Negotiations would now include elements such as human rights and humanitarian issues as well as military issues such as conventional force posture and missile development and exports.[86]

As with much of the Bush administration's foreign policy, the early stages policy towards North Korea seemed to be driven by the dictate of "anything but Clinton." Or, in other words, moving foreign policy away from the direction or approaches

---

83 Larry A. Niksch, *North Korea's Nuclear Weapons Program*. (Washington, DC: Congressional Research Service, 2006), i.

84 Morton Abramowitz, James T. Laney, and Eric Heginbotham, *Meeting the North Korean Challenge : Report of an Independent Task Force* (Washington, DC: Council on Foreign Relations, 2003), 22.

85 Niksch, *North Korea's Nuclear Weapons Program*, 15–17.

86 US Department of State, "Background Note: North Korea" (October 2006) <www.state.gov/r/pa/ei/bgn/2792.htm> (accessed December 15, 2006).

pursued by the Clinton administration.[87] Some analysts have gone so far as to argue that, "engagement of North Korea, and the 'Agreed Framework' have become such a partisan issue that one cannot tell whether detractors object to the merits of the policy or the policy's association with the Clinton administration".[88] Others have noted that there was a belief amongst some within the new Bush administration that the Clinton approach basically rewarded the "bad behavior" of Kim Jong-Il.[89]

However, even though the stated policy goals include moving away from the Agreed Framework reached between the Clinton administration and the North Koreans, the policy eventually adopted by the Bush administration was remarkably similar to that of the Clinton administration. While there are substantive differences between Clinton's Agreed Framework and Bush's Six Party Talks, it is worth noting that at their core they are similar—at least to the extent that they both rely on diplomacy and negotiations as the primary tool of crisis/conflict resolution or reduction.

It is important to stress that the North Korean case is different in kind from either the Iranian or Iraqi cases in that instead of having suspicions that the state may be attempting to develop nuclear weapons, the North Koreans boldly admitted as much to the United States and the entire world. In October 2002, during a visit by Assistant Secretary of State James Kelly to Pyongyang, the North Koreans reportedly admitted that they did, in fact, have a nuclear weapons program—in violation of the 1994 Agreed Framework that had been concluded with the Clinton administration.[90] After this point, when it became clear that the North Koreans had not been carrying out their end of the Agreed Framework in good faith, the Bush administration decided that before any negotiations would take place, the nuclear weapons program would have to be verifiably dismantled.[91]

In January 2003, North Korea withdrew from the Nuclear Nonproliferation Treaty (as is its right as a sovereign state to do so), but it also evicted inspectors who had been monitoring the nuclear fuel supply from the country before the 90–day notification period of withdrawal from the treaty had expired.[92] Additionally, the North Koreans also resumed the reprocessing of spent nuclear fuel rods, ostensibly as part of a nuclear weapons project.[93] According to the CRS report, the North Koreans rationalized their withdrawal from the NPT and the other actions by saying that it was in response to US abrogation of the Agreed Framework (the suspension of heavy

---

87 James M. McCormick, *American Foreign Policy and Process*, 4th edn. (Belmont, CA: Thomson, 2005), 208; Michael E. O'Hanlon, "A 'Master Plan' to Deal With North Korea," Policy Brief No. 114 (Washington, DC: The Brookings Institution, 2003), 3.

88 Victor D. Cha, and David C. Kang, "The Debate Over North Korea" *Political Science Quarterly*, 119, No. 2 (Summer 2004): 231.

89 Cotton, "The Second North Korean Nuclear Crisis," 263.

90 US Department of State, "Background Note: North Korea;" Niksch, *North Korea's Nuclear Weapons Program*, 5; Cha and Kang, "The Debate Over North Korea," 234.

91 US Department of State, "Background Note: North Korea;" O'Hanlon, "A 'Master Plan' to Deal With North Korea," 4.

92 David E. Sanger, "Bush's Shift: Being Patient With Foes" *The New York Times* (July 10, 2006) A9.

93 US Department of State, "Background Note: North Korea."

oil transfers) as well as what they believed were plans by the Bush administration for a "preemptive nuclear attack" against North Korea.[94] Other reports note that the North Koreans viewed the "Axis of Evil" speech as verging on a declaration of war on North Korea by the United States.[95] Additionally, the North Koreans announced that they needed to resume the reprocessing of nuclear fuel in order to "bolster its 'nuclear deterrent force,'" a step they believed necessary in order to provide an adequate deterrent to an increasingly hostile United States.[96] Or, in other words, the public pronouncements of both the "Axis of Evil" and the Bush Doctrine may have pushed the North Koreans into a corner where they felt that they had no other policy options. North Korea's response in this situation provides an example of the security dilemma in action. The United States took actions it believed would make itself more secure against a perceived threat, which in turn caused the other party involved to feel more threatened and take its own action in response to what it then viewed as a threat. While the security dilemma can often spiral into war, this has not yet happened (nor is it likely to happen) in the North Korean case.

The Bush administration, however, did decide to engage in a diplomatic process to resolve this crisis—prior to verifiable disarmament by the North Koreans. In fact, verifiable disarmament became one of the agenda items within this process. Early in 2003, the Bush administration proposed multilateral negotiations with the North Koreans concerning the nuclear issue.[97] While the North Koreans were hesitant at first to join a multilateral process, maintaining that this was a "bilateral" issue, that should be solved by direct talks between the United States and North Korea, by August 2003, the Six Party Talks had commenced. Participating in these negotiations were not only the United States and North Korea, but also China, South Korea, Russia, and Japan.[98] The rationale behind including these other countries was that this was a regional problem that needed a regional solution, and all of the regional powers needed to be included in the process.

Multiple rounds of the Six Party Talks have been held, to various degrees of success. Perhaps the most successful (at least on paper) of these rounds was conducted between July-September 2005. This round of talks concluded with North Korea agreeing to not only abandon its nuclear weapons programs, but also to rejoin both the NPT and IAEA programs. In return, the other parties to the talks offered various incentives, including both "energy assistance" and "economic cooperation".[99]

However, the agreement that was formally reached in September 2005, has yet to actually be implemented. In fact, in July 2006, North Korea conducted a test of its long-range ballistic missiles. Additionally, on October 9, 2006, North Korea tested its first nuclear weapon. This action was quickly condemned by the United Nations

---

94 Niksch, *North Korea's Nuclear Weapons Program*, 6.

95 Maureen Hoch. "US Relations: Axis of Evil" in *Newshour Online: North Korea: Nuclear Standoff* (October 19, 2006) <http://www.pbs.org/newshour/indepth_coverage/asia/northkorea/relations5.html> (accessed December 15, 2006).

96 US Department of State, "Background Note: North Korea."

97 Interestingly enough, this was around the same time that the Bush administration was gearing up for the war with Iraq over ostensibly the same issues.

98 US Department of State, "Background Note: North Korea."

99 Ibid.

Security Council, which unanimously approved a resolution to impose economic sanctions on North Korea. However, the UN Security Council stopped short of including a provision within the resolution authorizing the use of force to enforce these sanctions.[100] While it is not clear how "successful" this test was, the fact that the North Koreans are even capable of being able to conduct a test, sets them apart from both Iran and Iraq.

Soon after this test, however, the Six Party Talks resumed yet again. According to reports, however, it was the North Koreans who requested that the talks be restarted.[101] The Six Party Talks were reconvened, again without any substantial progress, in December 2006. While the crisis has still not been successfully resolved, it is instructive that even after the *testing* of a nuclear weapon, the United States continued to pursue the diplomatic track with North Korea.

In a manner similar to that with Iran, there are significant strategic disincentives that would inhibit the United States from using an anticipatory military action in response to the crisis with North Korea. First, and perhaps most importantly, North Korea can inflict substantial retaliatory damage on US allies, and there are a significant number of US personnel in the vicinity. According to one report, "There is widespread recognition, both inside and outside the government, that it is too risky to launch a preemptive military attack on a country that may have one or two nuclear weapons and can deliver a rain of devastating artillery fire on the South Korean capital of Seoul."[102] To this must be added the fact that in the fall of 2006 North Korea tested a nuclear weapon, and is believed to have a small arsenal of additional nuclear weapons stashed away somewhere. The vulnerability of Seoul and Japan would probably be enough to prevent the United States from taking anticipatory military action against North Korea.

Additionally, as was discussed at the beginning of Chapter 6, anticipatory military action is unlikely to be taken against a state that is in possession of nuclear weapons. In a sense, once that threshold has been crossed, the potential retaliatory costs raise the first-strike disadvantages to such an extent that the use of an AMA is basically off the table. Furthermore, if the AMA would be intended to serve as a counterproliferation tool, once the target state has obtained nuclear weapons, the proliferation has successfully occurred, and the opportunity to "preempt" or "prevent" its development has passed.

At the same time, however, there are also other strategic rationales against using an AMA in this case. For all of their public posturing and saber-rattling, the North Koreans have kept their nuclear program remarkably well-hidden. The United States is unsure exactly how large the program is or where all of the elements are located.[103]

---

100 Schoof, Renee Schoof, "UN Slaps Sanctions on North Korea" *Lexington Herald-Leader* (October 15, 2006), A20.

101 Nicholas Burns, "US Official Discusses N. Korea's Return to Nuclear Talks," *Newshour Online* (October 31, 2006), <http://www.pbs.org/newshour/bb/asia/july-dec06/nkorea_10–31.html> (Accessed December 15, 2006).

102 Michael Dobbs, "N. Korea Tests Bush's Policy of Preemption; Strategy Seems to Target Weaker Nations," *The Washington Post* (January 6, 2003), A01.

103 Michael O'Hanlon, and Mike Mochizuki, *Crisis on the Korean Peninsula: How to Deal with a Nuclear North Korea* (New York: McGraw-Hill, 2003), 10; Jim Yardley, and

In other words, this does not present a very good strategic target for anticipatory military action in that it creates a nightmare of a logistical situation for the military planners. Unlike the Osiraq case,[104] where there was one target that was easily identifiable, in this case (as with Iran), there are an unknown number of potential targets, in unknown locations.

And administration officials, including the President, seem to be admitting that anticipatory military action might not really be a feasible policy option vis-à-vis North Korea. In early January 2003, President Bush acknowledged that anticipatory action could not be used everywhere, and that "different circumstances require different strategies, from the pressure of diplomacy to the prospect of force."[105] North Korea seems to fall in the first category.

The timeline of the North Korean crisis is also interesting. It was only *after* adding North Korea to the "Axis of Evil" in January 2002 that the North Koreans admitted to their weapons program and decided to withdraw from the Nuclear Nonproliferation Treaty. Which leads to the question, on the basis of what information was North Korea added to this list? While it is not clear, at least as of this writing, what kinds of information were used to make this determination, it does seem that, at least for the North Koreans, there were consequences to this "inclusion." Whether or not North Korea's inclusion as a member of the "Axis of Evil" was merely an afterthought, added at the last minute, as some have asserted,[106] the North Koreans seem to have taken the rhetoric of the Bush administration to heart—and feel threatened by it.

Interestingly enough, the North Korean case presents some of the strongest legal rationales for taking anticipatory action. Not only was North Korea in clear violation of an agreement reached with the United States, but it was also in violation of international law. While the withdrawal from the NPT and expulsion of the inspectors may not have been severe enough to warrant the use of force on their own, they could have triggered some response by the United States and the international community.

However, no such response occurred. Unlike Iran, North Korea was not brought before the United Nations Security Council and no talk of sanctions was raised at this point. Additionally, actions of this type (withdrawal from the NPT and expulsion of inspectors to monitor nuclear fuel and facilities) should have raised some red flags with respect to the intentions (or at least suspected intentions) of the North Koreans. This was compounded by the fact that North Korea was already branded as a member of the "Axis of Evil," and had recently acknowledged to the United States that it did in fact possess a small nuclear arsenal. This would seem to create a situation that would be ripe for implementation of the Bush Doctrine—or, in other words, striking first against a would-be rogue proliferator.

David E. Sanger, "US Tries a New Approach In Talks With North Korea." *New York Times* (July 27, 2005), 10.

104 The details of the Osiraq case are discussed in Chapter 7.

105 Dobbs, "N. Korea Tests Bush's Policy of Preemption; Strategy Seems to Target Weaker Nations."

106 Hendrik Hertzberg, "Axis Praxis," *New Yorker* (January 1, 2003) <www.newyorker.com/talk/content/articles/030113ta_talk_hertzberg> (accessed December 15, 2006).

However, as of this writing, by and large this has not yet happened. While United Nations sanctions were placed on North Korea after its nuclear test, this was a shift in policy. In fact, according to one report, when North Korea pulled out of the NPT in early 2003, there was not very much interest within the Bush administration for taking any sort of military action in response: "One senior official who was involved in the discussions said Mr. Bush was briefed on his military options to strike at the nuclear facilities before the spent fuel rods were moved—but the options looked bad, and he turned back to the Iraq invasion plan."[107] Or, in other words, even though the North Korean case would seem like a perfect opportunity to utilize the anticipatory portion of the Bush Doctrine, the strategic limitations posed by the situation seemed to preclude this course of action. Or, as one scholar has noted, the North Korean case shows that deterrence does in fact work, even in the post-9/11 world. However, it is the North Koreans who are deterring the United States.[108] And it seems as if the opportunity to use anticipatory force against North Korea might have passed—with the testing of a nuclear weapon, it is unlikely that the United States would risk a nuclear retaliation.

The Bush Doctrine vs. The Axis of Evil

While anticipatory action has only been taken against one member of the "Axis of Evil" as of this writing, that, of course, could change in the future. This course of action seems unlikely, however. Not only due to the strategic first-strike disadvantages discussed above, but also because of the significant costs that are now associated with the use of anticipatory action in Iraq. In other words, the implementation of the "preemption" part of the Bush Doctrine may also be less likely vis-à-vis both Iran and North Korea because of the Iraq experience.[109]

While a full discussion of the 2003 Iraq War goes beyond the scope of the discussion here, it is useful to note that the Iraq War did not go as the Bush administration had initially predicted, and to say the least, has highlighted many of the complications or at least potential pitfalls associated with the use of anticipatory military activities. In a manner reminiscent of Clausewitz's idea of the "fog of war," once the hostilities start, they tend to take on a life of their own, and the outcome is often hard to determine. And with Iraq, several years later, US and allied troops are still there and it is unclear how long they will remain. All this seems to have, at the bare minimum, made the Bush administration more cautious about the use of anticipatory military action against hostile adversaries who are believed to be more formidable opponents than Iraq was perceived to be in the Spring of 2003.

---

107 David E. Sanger, "Bush's Shift: Being Patient With Foes." *The New York Times* (July 10, 2006), A9.

108 Joseph S. Nye, "Hourglass Runs Low; The US Should Engage North Korea in Talks While There's Still Time," *Los Angeles Times* (March 12, 2003), B13.

109 James Sterngold, "Bush Tempers Argument for Pre-Emptive Strikes; Experts Say Iraq War Precludes Similar Future Engagements," *San Francisco Chronicle* (October 2, 2004), A10.

It is interesting to note that even within the Bush administration, there was at least one dissenting voice (at least at the beginning), arguing that there was a fairly high standard that must be met before anticipatory action could be undertaken. In June 2002, Powell told reporters from the *Washington Post* that if anticipatory action were to be taken, such action would have to be justified to the rest of the world—and that the United States should recognize "that there is a burden on those who take preemptive action to be able to show the world that there was a basis for the action, that it made sense, that it protected innocent people and the response was consistent with the kind of threat that was being presented."[110]

It is impossible to know to what extent to which either Powell's admonition about justification for anticipatory taking action, or the legal and normative elements in and of themselves influenced the Bush administration with respect to the cases presented above. What does seem apparent, however, is that with the Iraq case, a concerted and deliberate effort was made to at least make it appear as if the action conformed with both international law and the normative restrictions on the use of anticipatory force. At the same time, however, it appears that the legal and normative elements did not really do very much to constrain or limit the actions of the Bush administration. Rather, these elements show up more to as component parts of an elaborate PR campaign designed to build support (both domestic and international) for a policy that was under development long before it was implemented.

The same was not the case with the Iranian and North Korean cases, where neither the just war tradition, nor the idea of anticipatory self defense in the legal sense were discussed—primarily due to the fact that the strategic first-strike disadvantages precluded real consideration of anticipatory action in the first place. Since the strategic setting was not conducive to the use of AMAs in the first place, the prohibitions/limitations on their use contained in international law and the just war tradition become a moot point. In this respect, it does not appear as if these elements served as "constraints" on the actions of the Bush administration vis-à-vis Iran or North Korea.

110 Glenn Kessler, and Peter Slevin, "Preemptive Strikes Must Be Decisive, Powell," *Washington Post* (June 15, 2002), A16.

This page intentionally left blank

Chapter 9

Conclusions and Implications

In the newly released *National Military Strategy of the United States of America* and *National Defense Strategy of the United States of America*, the United States has further codified its military doctrine around the use of anticipatory military activities.[1] The *National Military Strategy* states, "The potentially catastrophic impact of an attack against the United States, its allies and its interests may necessitate actions in self-defense to preempt adversaries before they can attack."[2] The same document also states "Deterring aggression and coercion must be anticipatory in nature to prevent the catastrophic impact of attacks using biological, chemical or nuclear weapons on civilian population centers in the United States or in partner nations."[3] According to the *National Defense Strategy*, among the panoply of options currently available to "defeat adversaries" are "preventive actions to deny an opponent the strategic initiative or preempt a devastating attack…"[4] Similar sentiments are also expressed in the 2006 *Quadrennial Defense Review*. These documents represent a further codification of the broad-based policy based on the use of anticipatory military activities laid out in both the 2002 and 2006 *National Security Strategies*.

The findings presented in the previous chapters, however, raise questions as to whether or not this policy will, or can, be implemented. Specifically, since this policy appears to be designed to deal with distant, as opposed to imminent, threats, it is unclear how congruent this policy is with the requirements of both international law or the just war tradition. The traditional positions within both international law and the just war tradition hold that anticipatory action is only permitted in response to *imminent* threats. According to the position advanced by the Bush administration, as well as numerous scholars, however, today's world is markedly different, and the boundaries of "permissibility" within international law and the just war tradition must shift to accommodate this new reality.

---

1 Unclassified versions of these documents were released to the public on March 18, 2005.

2 Richard B. Myers, *The National Military Strategy of the United States of America* (Washington, DC: Joint Chiefs of Staff, 2004), <www.defenselink.mil/news/Mar2005/d20050318nms.pdf> (accessed March 28, 2005).

3 Myers, *The National Military Strategy of the United States of America*, 12.

4 Donald H. Rumsfeld, *The National Defense Strategy of the United States of America* (Washington, DC: Department of Defense, March 2005) <www.defenselink.mil/news/Mar2005/d20050318nds1.pdf> (accessed March 28, 2005).

General Conclusions

Anticipatory military activities occupy a gray area within international law, the just war tradition, and the international security literature. In each of these realms, questions about the legality, legitimacy, or utility of these activities are usually answered in an equivocal manner. For example, in the international law and just war literatures, there is consensus that these actions are permitted *in certain instances*; or in other words, the answer is "yes, but…" Maxon provides a "checklist" that can serve as a rough guide as to when force may be used in self-defense, or in anticipatory self-defense. However, even his guidelines are open to debate and interpretation.

Within the international security literature, the same type of phenomenon is also evident. There are numerous explanations as to why states would engage in anticipatory military activities, yet at the same time, there is also a caveat attached to much of this literature: there are "costs" attached to these actions that may make states less likely to engage in them, or the statistical analysis finds no relationship between the causal variable under investigation and the use of anticipatory military activities.[5]

With respect to the case studies, the situation is more interesting. One of the key objectives of the case studies was to try to ascertain if the leaders were constrained by the legal and normative elements. It is useful to remember Chayes's cautionary note: "We cannot ask for a demonstration that legal considerations dictated decision."[6] At the same time, however, Chayes goes on to argue evidence can be found that the legal, and by extrapolation, the normative, elements *influenced* decision-makers:

> One important piece of evidence for constraint would be to examine the conduct in terms of the asserted prohibition. If the conduct complies, there is at least a prima facie argument that the norm operated in its intended sense. The converse is even more compelling: if the conduct violates the norm, it would seem to be very strong evidence that the law did not constrain.[7]

In this respect, there was evidence within the cases for a constraining impact of the legal and normative elements. Within the cases examined, for the most part the actors did work within the requirements of international law and the just war tradition.

In the cases where anticipatory action was taken, except for the Punjab case and the US–Iraq case,[8] Chayes's standard for "constraint" is met. To be sure, there is a potential problem here. Since the cases examined all take place within the

5 Dan Reiter, "Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen," *International Security*, 20, No. 2 (Autumn 1995), 5–34; Douglas Lemke, "Investigating the Preventive Motive for War," *International Interactions*, 29, No. 4 (2003), 273–92.

6 Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974), 4.

7 Ibid., 35.

8 Even in the Punjab case, it appears as if Chayes's standard is met. However, due to the fact that a very limited amount of information was available, it is not prudent to draw any conclusions nor make any generalizations from this case. The US–Iraq case is discussed in more depth below.

framework of international crises, and all of the actions (except those within the context of the Bush Doctrine) were taken by states responding to crises triggered by other actors, there is the problem that each of the responses could potentially be justified as "self-defense." However, since none of the cases were triggered by direct violent military acts—i.e., none of the crises were triggered by an actual attack—the armed attack threshold set forth in the UN Charter was not met in any of the cases. In this respect, the "self-defense" claim that was advanced in these cases was of a more contentious nature in that it was of an "anticipatory" nature. This of course, raises a much larger, and potentially more important question: are states that *trigger* international crises constrained or influenced by international law and the just war tradition? This question was not addressed in the current study, but is one that needs to be addressed in the future.

It is also interesting to note that, except for the Bush Doctrine cases, the instances where an anticipatory action including the use of force was employed were coded in the ICB dataset as being a "threat to existence" for the crisis actor (in both cases, Israel, in the Six Day War and Iraq Nuclear Reactor cases). In the other cases examined, the threats experienced were at lower levels (such as a territorial threat in the Punjab War Scare case, or a threat of grave damage in the Cuban Missiles case, October-Yom Kippur War case, and the Cienfuegos Submarine Base case). As discussed at the beginning of Chapter 6, it was posited that threats to existence would be met with anticipatory actions, while less severe threats would be handled in other ways. This proved to hold true, at least in the cases examined here.

With respect to regime type and the use of anticipatory military activities, each of the case studies focused on the possibility of a democracy undertaking anticipatory action. Accordingly, it is difficult to draw too many conclusions about the influence of regime type on the propensity of a state to use AMAs, or the likelihood that the legal or normative elements will affect different regime types differently. While the legal and normative elements do appear to have at least some influence on democracies, it is not clear if this relationship would also hold true if the crisis actor in question was not a democracy.

As discussed in Chapter 4, there is debate amongst legal scholars as to the legality of "anticipatory self-defense." The general consensus appears to be that although the right to anticipatory self-defense is not explicitly spelled out, the customary right to take action in self-defense against *imminent* threats, regardless of whether or not an actual armed attack has already taken place, remains. The situation is somewhat parallel with respect to the just war tradition. Assuming that the threat is imminent, and that certain other conditions are met, such as pursuing other avenues to resolve the crisis first, states may respond to such threats with an anticipatory military activity.

At the same time, it is important to stress that states appear hesitant, at least in most of the cases presented, to take action based on a claim of anticipatory self-defense. Instead, states found other, more traditional, i.e., accepted, justifications upon which to base their actions. In the period leading up to the Six Day War, numerous events combined to create a situation that compelled Israel to act. Among these were the expulsion of UNEF forces from the Sinai and the blockade of the Straits of Tiran, both of which were considered to be violations of international law,

as well as clear indications that Egypt and Syria were preparing for war. Israel did not frame its action in terms of anticipatory self-defense, but rather as action taken in self-defense as a last resort to counter what it believed to be a truly imminent threat, and after all other means to solve the crisis non-militarily had been exhausted.

With respect to the Cuban Missile Crisis, the Kennedy Administration was very careful not to frame the crisis in terms of self-defense—nor was the action taken based on a claim of "anticipatory self-defense" by the United States. Rather, the missiles were described as "threats to the peace," or as a destabilizing element in the region. In fact, as Roberts notes, it was not the mere presence of the missiles that constituted a threat. Instead, it was the underlying intentions behind their deployment that constituted the true threat.[9] In this respect, the US action was predicated upon the notion of collective self-defense for the region, as opposed to American self-defense. The primary reason for this was the knowledge that such an argument would not be supported. Rather, there was legal support for acting in *collective self-defense*, i.e., for the entirety of the Rio Pact, rather than just for the United States—and the anticipatory action was approved and sanction by the OAS.

Furthermore, in the one case non-Bush Doctrine case where the anticipatory self-defense justification was most explicitly used, the Israeli strike on the Osiraq reactor, the argument was universally rejected by the international community at the time.[10] Begin and the Israeli government believed that Iraqi possession of a nuclear program constituted a clear danger and that the action taken against this program constituted a legitimate act of self-defense—even though this action was taken before the program came to fruition. While the Israelis believed that the nature of the threat compelled them to act sooner as opposed to later, in order to avoid harmful collateral damage from attacking a "hot" reactor, the international community was not persuaded that the threat was truly imminent. In this respect, the Osiraq case highlights what many see as the need for a reevaluation of "imminence" and related ideas in the light of modern weapons technology. This aspect will be discussed in more depth below.

The case of the 2003 use of anticipatory force by the United States in Iraq presents an interesting deviation from this, however. While the rationale for this AMA was

---

9 Roberts argues that "The record of the Soviet Union in Hungary and East Berlin, and Castro's well known support for terrorism and 'revolutionary' armies throughout central and South America demonstrated their aggressive intentions, and previous attempts at attacking or undermining regional peace and stability." Additionally, "The mere presence of these missiles in Cuba would have given Castro the opportunity for blackmail and other mischief in the region." Colonel Guy B. Roberts, "The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction," *Denver Journal of International Law and Policy*, 27 (Summer 1999), 528–29.

10 The United Nations Security Council unanimously condemned the strike on June 19, 1981. In Resolution 487 (1981), the Security Council "strongly condemned" the strike as "a clear violation of the Charter of the United Nations and the norms of international conduct." United Nations Security Council, "Resolution 487 (1981)," June 19, 1981, <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/418/74/IMG/NR041874.pdf?OpenElement> (accessed April 17, 2005). It is interesting to note that with hindsight, many have changed their opinion of the strike, and now look upon it more favorably, arguing that the first Gulf War would have been much different had Israel not taken out Iraq's nuclear program in 1981.

not completely couched in terms of anticipatory self-defense, this was clearly an important element in terms of the justifications presented to support the action. In this respect, this Iraq case could be viewed as being in a sort of middle ground—not quite fully based on the idea of anticipatory self-defense, but firmly rooted within the general framework of anticipatory self-defense.

With respect to the just war tradition, the case studies show, for the most part, that the actors were influenced by the normative elements. The "last resort" requirement appears to have been particularly salient, playing a role in virtually all of the cases examined. Two elements of "last resort" were of primary importance: a) that other non-military means of conflict resolution be employed first and b) that the military response be taken when the threat was seen as imminent. In the cases examined, it appears as if the leaders were influenced by these constraints, and acted in a manner consistent with these requirements.

The Bush Doctrine cases present interesting challenges for drawing too many conclusions, particularly since two of the crises examined are still on-going as of this writing. Except for the issue of anticipatory self-defense with Iraq noted above, it does not appear that either the normative elements nor international law played much of a role in terms of influencing the Bush administration. The reasons for this apparent "lack of influence" vary depending on the case involved, however. With respect to Iraq, it appears that the decision to use force in Iraq had been made early on in the Bush administration's tenure in office, and was waiting for a justification. This is directly at odds with the requirements of both international law and the just war tradition, regardless of the language used by the Bush administration to describe or rationalize the policy. With respect to the other two cases, Iran and North Korea, where anticipatory action has not been taken, it is difficult to conclude that either international law or the just war tradition had much to do with this decision either. Instead, there were significant strategic reasons that would dissuade most actors from using force in these situations, and it appears that this is exactly what has happened with the Bush administration.

Contemporary Challenges to International Law and the Just War Tradition

Many scholars have argued that the contemporary world is so fundamentally different from that within which the just war tradition and international law developed that it is now time to for them to adjust and adapt. Unlike yesteryear, when the primary threats to states came from the conventional mobilization and conventional attacks of conventional militaries, today's states are faced with different threats. According to Roberts,

> Regrettably, the prevailing patterns of statecraft and the fundamental change of circumstances in the past fifty years have created a radically different world from the one of the Cold War, so that the current legal constructs so optimistically and idealistically enshrined in the 1945 UN Charter are unworkable. A new paradigm is essential if we are to successfully meet the challenge of the WMD threat... A new legal regime or paradigm is necessary to reflect the new political environment in which national survival, regional

> security and world peace can, dictate the preventive or preemptive use of force to either deter acquisition plans, eliminate acquisition programs or destroy illicit WMD sites at any stage in the proliferator's acquisition efforts.
>
> This new counterproliferation self-help paradigm is not business-as-usual power politics validated by a legal construct but rather a common sense recognition that the law is not a suicide pact and that it is a process, more than just rules, that reflect and at the same controls state behavior. This new 'counterproliferation self-help' paradigm is fully consistent with the purposes of the Charter, since illicit WMD programs threaten international peace and security. The current legal paradigm is not responsive. So, if the law is to have any relevance, a paradigm shift is both necessary and possible.[11]

Taylor addresses the need for international law and the just war tradition to adopt to meet the new challenges of not only WMD, but also international terrorism and rogue states:

> Unlike international law on the conduct of war ... which has been adapted repeatedly to new weapons technology and types of warfare throughout the twentieth century, *jus ad bellum*, the justification for going to war in the first place, now confronts such evolutionary pressure in an unprecedented way, with the rise of international terrorism in 2001 and the proliferation of state and nonstate capacities to develop and use nuclear, biological, and chemical weapons. International law, by its inherent reactive nature, risks evolving too slowly to define the proper response to this already apparent challenge. There is a danger that the increasing uncertainty and existing disagreement on the use of force in anticipatory self-defense could be exploited by states and nonstate actors alike to sharpen the divisions among liberal democracies and exploit the resulting vulnerability.[12]

International terrorism, WMD, and "rogue states" are but a few of the issues that are now on the international agenda—and that many scholars feel international law and the just war tradition are ill-equipped to deal with in their present state. In fact, much of the current scholarship in the fields of both international law and the just war tradition are focusing on these issues and how the respective elements can (or, if they even should) evolve in order to take into account these new developments.

What makes these issues particularly relevant for this work is the fact that each of them could compel states to use anticipatory military activities. Much like the concepts of self-defense and imminence, there are problems pinning down an authoritative definition of "terrorism." According to Higgins,

> Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.[13]

---

11 Roberts, "The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction," 484–485.

12 Terence Taylor, "The End of Imminence?" *The Washington Quarterly*, 27, No. 4 (Autumn 2004), 59.

13 As reported in Gilbert Guillaume, "Terrorism and International Law," *International and Comparative Law Quarterly*, 53, No. 3 (July 2004), 541.

At the same time, however, Greenwood notes that

> In recent years, the Security Council has had no hesitation in treating acts of international terrorism, whether or not 'State-sponsored,' as threats to the peace for the purposes of Chapter VII of the Charter… In addition, the Council adopted a number of resolutions condemning international terrorism in general as a threat to international peace.[14]

In other words, the use of force can be taken in *response* to an actual terrorist attack. And, by extrapolation, if there is evidence of an *imminent* terrorist attack, there could be support for anticipatory action taken to forestall the attack. This aspect is discussed in more depth below. Yet the use of force in response to terrorism also raises several questions, for both international law and the just war tradition.

Is there a specific threshold of intensity that must be reached before the terrorist act becomes an "armed attack?" Terrorist groups are often highly dispersed and often notoriously hard to trace—against whom, and where, would the response be carried out? According to Paust, "unless the state is organizing, fomenting, directing, or otherwise directly participating in armed attacks by non-state terrorists, the use of military force against the state, as opposed to only the non-state terrorists, would be impermissible."[15] Additionally, this aspect raises questions about the need to discriminate between combatants and non-combatants. Even if the response action is taken against a state that *is* supporting the terrorists, there are still questions about the issue of discrimination. When engaging in counter-terrorist operations, it is often very difficult to distinguish "combatants" from "non-combatants," and terrorists often choose to operate out of "immune targets" such as hospitals, thereby causing complications with respect to the requirements of *jus in bello*.[16]

Can states take anticipatory action against terrorists? The Bush Doctrine argues that it will act preemptively to forestall future terrorist attacks. Biggio argues that anticipatory action can be taken against terrorist groups once they start to arm. Unlike state actors that can have legitimate reasons for acquiring arms, terrorists are not afforded this same right:

> The fact that terrorist organizations are amassing weapons and other tools of destruction should be reason enough for striking against them, even before they specify a target… The simple attempt by terrorists to acquire weapons should be a prima facie indication of their hostile intent and should be responded to swiftly and violently. Allowing for a pre-emptive right of self-defense will send the message to terrorists that they have no safe havens and that they will be held culpable for the acts they have committed or are contemplating.[17]

---

14 Christopher Greenwood, "International Law and the Pre-Emptive Use of Force, Afghanistan, Al-Qaida, and Iraq," *San Diego International Law Journal*, 4 (2003), 19–20.

15 Jordan J. Paust, "Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond," *Cornell International Law Journal*, 35 (Winter 2002), 540.

16 Anthony Clark Arend, "Terrorism and Just War Doctrine," in Elliott Abrams (ed.), *Close Calls: Intervention, Terrorism, Missile Defense, and 'Just War' Today* (Washington, DC: Ethics and Public Policy Center, 1998), 232.

17 Frank A. Biggio, "Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism," *Case Western Reserve Journal of International Law*, 34, No. 1 (Fall 2002), 35–36.

To be sure, this is a somewhat extreme position. But the underlying logic is the same as with threats presented by state actors: states should not have to wait until they are attacked before acting in self-defense. The difference here, however, is that Biggio appears to be arguing that terrorists automatically become a tangible threat once they start arming. This raises several concerns, not the least of which is the fact that if the terrorists have not "specified a target," it is unclear which state is supposed to be taking anticipatory action. Additionally, until specific information is collected to indicate that an attack is *imminent*, it is always possible that the "threat" from the terrorist group is not as real as it appears.

Biggio's position is at odds with both the just war tradition and international law, particularly since the action is not addressed at any specific threat or overt act. While there is room in international law and the just war tradition for anticipatory action, to fit Biggio's position in the fold would require expanding both concepts so much that they would lose virtually all meaning. According to Gross,

> A preemptive strike should not be carried out if other means are available to prevent the occurrence of the anticipated terrorist activity. In other words, a preemptive strike is allowed only when other measures which may prevent the terrorists from carrying out their plans are not available, including, for example, placing the terrorists on trial—in short, when no other means to prevent the terrorists from carrying out their intentions in practice.[18]

As with conventional threats, the use of force should be taken as a last resort. It is not entirely clear which position the Bush Doctrine advocates.

What about the issue of proportionality? According to Bonafede, there are three different ways to assess the proportionality of a response to a terrorist attack: "(1) the 'tit-for-tat,' or 'eye-for-an-eye' approach (2) the 'cumulative proportionality' approach, and (3) the 'eye-for-a-tooth' or 'deterrent proportionality' approach."[19] While the first approach is the most congruent with the requirements of both international law and the just war tradition—in that the response is of an analogous magnitude to the attack received—it appears as if the Bush Doctrine proposes a response based on the last type of response. In other words, the Bush Doctrine seeks an *expanded* view of proportionality, in order to send a clear message, i.e., use one response as a deterrent to prevent future attacks. This position, however, is the furthest from the traditional conceptualizations of proportionality in both the just war tradition and international law.

The other contemporary challenges explicitly addressed in the Bush Doctrine, weapons of mass destruction and rogue states, are closely linked within the Doctrine. Unlike terrorism, there is an elaborate legal framework established to deal with the proliferation of weapons of mass destruction. At the same time, however, as was

---

18 Emanuel Gross, "The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?" *Florida Journal of International Law*, 15 (Summer 2003), 464–465.

19 Michael C. Bonafede, "Here, There, and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism After the September 11 Attacks," *Cornell Law Review*, 88 (2002), 183.

illustrated in the Osiraq case, many states and scholars have argued that this system actually does little to prevent the proliferation of weapons to dangerous regimes or actors (i.e., rogue states and terrorists). According to Newcomb,

> At the outset, the Non-Proliferation Treaty suffered from two significant weaknesses. First, the Treaty was not ratified by all states possessing nuclear weapons. The failure to encompass all nuclear weapons states within the non-proliferation regime seriously weakened its effect, providing a source of fissionable nuclear materials and technologies to non-signatory states without nuclear weapons. Second, the Treaty did not provide the Agency with any positive mechanisms for enforcing safeguards agreements. Compliance with safeguards agreements is dependent upon the good will of signatory states, and sanctions for non-compliance are severely limited by diplomatic maneuvers and alliances. Nonetheless, in spite of its weaknesses, the Non-Proliferation Treaty has proven to be a reasonable and relatively effective counter to the proliferation of nuclear weapons technology.[20]

According to the Bush Administration, however, one of the problems with the NPT is that it

> is only effective between states that deal with one another in good faith. The treaty is not equipped to handle rogue states that cheat on their obligations, outlaw scientists who sell nuclear secrets to the highest bidder or terrorists trying to buy bombs on the black market.[21]

In this respect, it is in terms of exactly those states that pose a threat, or are least posited as posing a threat, i.e., "rouge states" that the NPT fails to work.

It is also important to note that as with "terrorism," there is no one agreed upon definition of "rogue state." According to Litwak, "The term 'rogue state' is an American political rubric without standing in international law that has gained currency since the end of the Cold War."[22] George notes that "Outlaw states and their rogue leaders refuse to accept and abide by some of the most important norms and practices of the international system."[23] Which states are designated as "rogue" shifts with time, as well as with respect to who is making the determination. This element has important consequences vis-à-vis the use of anticipatory military activity in that it becomes difficult to prove that there is an imminent threat from a "rogue state" if it is not clear that the state in question is "rogue" or if it really poses a threat to any other state.

---

20 Mark E. Newcomb, "Non-Proliferation, Self-Defense, and the Korean Crisis," *Vanderbilt Journal of Transnational Law*, 27 (October 1994), 608–09.

21 Mitchell B. Reiss, "Revisiting Waltz's Man, the State and War: New Images for a New Century," Remarks to the Fletcher School of Law and Diplomacy (October 6, 2004), <www.state.gov/s/p/rem/36915.htm> (accessed March 15, 2005).

22 Robert S. Litwak, *Rogue States and US Foreign Policy: Containment After the Cold War* (Baltimore, MD: The Johns Hopkins University Press, 2000), 3.

23 Alexander L. George, *Bridging the Gap: Theory and Practice in Foreign Policy* (Washington, DC: United States Institute of Peace Press, 1993), 49.

As discussed above and in Chapters 4 and 5, the nature of WMD and the possibility that "rogue states" may acquire these weapons has caused numerous scholars to call for a reevaluation of the criteria that must be met before force can be used in "self-defense." Additionally, many of the same issues that were discussed with respect to terrorism—such as proportionality and discrimination—are also relevant with respect to WMD. Unlike terrorism, however, these issues are discussed in Chapters 4 and 5 and do not need to be explored again. The general consensus appears to again rest on the idea of the centrality of the imminence factor. While the time element may shift somewhat, it still appears that there must be knowledge of both capability and intent in order for an anticipatory action to be justified. At the same time, however, there is no standardization with respect to these criteria.

According to Taylor, one of primary reasons why there is no clear standard with respect to the legality or permissibility of anticipatory self-defense is the fact that it has been invoked so rarely, and, therefore, there have not been very many instances for international jurists to "develop a comprehensive framework elucidating the strategic factors that must characterize a threat for it to qualify as imminent and, therefore, as a legitimate justification for anticipatory self-defense."[24] In fact, in the *Nicaragua* case, the ICJ stated,

> In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly Court expresses no view on that issue.[25]

In the one case where the ICJ did consider the issues of armed attack and self-defense, it remained agnostic about the issue of anticipatory self-defense.

The Bush Doctrine has placed the issue on the center stage. There is considerable debate about the "legality" of the Bush Doctrine, as well as the extent to which the Bush Administration is influenced by international law. According to Byers,

> the approach taken by the United States does provide some support for international law. By investing considerable intellectual resources in efforts to change the rules it is tacitly acknowledging that the rules matter, even to it and even though these rules on the use of force constitute the most highly politicized area of international law. It is also noteworthy that those who seek to change the rules on behalf of the United States are deliberately working within existing processes of legal change. They are taking account of reasonableness and reciprocity, promoting gradual rather than radical change, seeking the consent of other states and steering clear of deeply entrenched principles such as sovereign equality. As a result, there is nothing unusual or necessarily wrong about the approach taken by the United States: international law has always been a developing system that gradually grows and bends in response to changing political stimuli.[26]

---

24 Taylor, "The End of Imminence?" 58.

25 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (International Court of Justice June 27 1986), 93.

26 Michael Byers, "Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change," *The Journal of Political Philosophy*, 11, No. 2 (June 2003), 189.

In this respect, the Bush Doctrine, and its concrete application in Iraq and possibly elsewhere, could play an important role in the solidification of the legal and normative "rules of the game."

Concluding Thoughts

Although anticipatory military activities have always been a part of the panoply of policy options available, they have not been employed very frequently. Perhaps this is due to the legal and normative constraints against their use. The case studies presented in this study seem to suggest that there is some support for this idea. At the same time, it will be interesting to observe how—or if—international law and the just war tradition change and adapt with respect to the new challenges presented by today's world.

Finally, with respect to implications of the employment of an anticipatory military activity by the United States in Iraq, it is important not to read too much into this for the larger world community. As Lieber notes, "countries such as China and India have their own weighty lists of pros and cons in assessing whether to unleash the dogs of war, and in that calculation the precedent of American behavior is unlikely to be a decisive factor."[27] In other words, just because the US decided that it is now ok to take anticipatory action does not mean that everyone else will necessarily feel the same way. Even in the post-Bush Doctrine world,[28] the first-strike disadvantage still exists, and the legal and normative constraints on the actions still exist. Although international law and the just war tradition will evolve to deal with contemporary facts on the ground, it is unlikely that they will become permissive of any type of anticipatory activity by any actor in any crisis situation. In this respect, states are still likely to at least think twice about using anticipatory military activities, regardless of US policy.

---

27 Robert J. Lieber, *The American Era: Power and Strategy for the 21st Century* (New York: Cambridge University Press, 2007), 45.

28 It is also important to note that the Bush administration has been keen to adopt unilateral positions on numerous issues, such as with respect to environmental policy (Kyoto Protocol) and arms control (ABM treaty). In this respect, the decision of the Bush administration to act in a manner which was inconsistent with international law (or with the position of a majority of states) in one policy area, is not necessarily unique within the policy context of the Administration as a whole, and should not be construed as setting a precedent. Rather, it should be viewed as being consistent within the Bush administration's overall foreign policy behavior.

This page intentionally left blank

Bibliography

Abel, E. (1966), *The Missile Crisis* (Philadelphia: J. B. Lippincott Company).

Abramowitz, M., Laney, J. T. and Heginbotham, E. (2003), *Meeting the North Korean Challenge: Report of an Independent Task Force* (Washington, DC: Council on Foreign Relations).

Ackerman, D. M. (2003), *International Law and the Preemptive Use of Force Against Iraq* (Washington, DC: Congressional Research Service).

Adams, K. R. (2003/2004), 'Attack and Conquer? International Anarchy and the Offense-Defense-Deterrence Balance.' *International Security*, 28: 3, 45–83.

Allison, G. T., Carnesale, A. and Nye, J. S. (eds) (1985), *Hawks, Doves, and Owls: An Agenda for Avoiding Nuclear War* (New York: W.W. Norton and Company).

Arend, A. C., and Beck, R. J. (1993), *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge).

Arend, A. C. (2003), 'International Law and the Preemptive Use of Military Force,' *The Washington Quarterly*, 26: 2, 89–105.

Abrams, E. (ed.) (1998), *Close Calls: Intervention, Terrorism, Missile Defense, and 'Just War' Today* (Washington, DC: Ethics and Public Policy Center).

Azar, E. E., Jureidini, P., and McLaurin, R. (1978), 'Protracted Social Conflict; Theory and Practice in the Middle East,' *Journal of Palestine Studies*, 8: 1, 41–60.

Ball, D., and Toth, R. C. (1990, Spring), 'Revising the SIOP: Taking War-Fighting to Dangerous Extremes,' *International Security*, 14: 4, 65–92.

Barber, B. R. (2003), *Fear's Empire: War, Terrorism, and Democracy* (New York: W.W. Norton and Company).

Bar-Joseph, U., and Kruglanski, A. W. (2003), 'Intelligence Failure and Need for Cognitive Closure: On the Psychology of the Yom Kippur Surprise,' *Political Psychology*, 24: 1, 75–99.

Bar-Joseph, U. (2001), *The Watchmen Fell Asleep: The Surprise of Yom Kippur and Its Sources* ((Hebrew) Lod, Israel: Zmora-Bitan Publishers).

Bar-Zohar, M (1970), *Embassies in Crisis: Diplomats and Demagogues Behind the Six-Day War*, translated by Stearns, M. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc.).

Benvenisti, E. (2002), 'Iraq and the "Bush Doctrine" of Pre-Emptive Self-Defence,' Crimes of War Project [online] available from <www.crimesofwar.org/print/expert/bush-Benvenisti-print.html> [23 May 2004].

Beres, L. R. and Tsiddon-Chatto, Y. (1995), 'Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor,' *Temple International and Comparative Law Journal*, 9, 437–440.

Betts, R. K. (2003), 'Striking First: A History of Thankfully Lost Opportunities,' *Ethics and International Affairs*, 17: 1, 17–24.

_____ (1986), 'A Nuclear Golden Age? The Balance Before Parity,' *International Security*, 11: 3, 3–32.

_____ (1982), *Surprise Attack: Lessons for Defense Planning* (Washington, DC: The Brookings Institution).

Biggio, F. A. (2002), 'Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism,' *Case Western Reserve Journal of International Law*, 34: 1, 1–43.

Blainey, G. (1973), *The Causes of War* (New York: The Free Press).

Blinken, A. J. (2003), 'From Preemption to Engagement,' *Survival*, 45: 4, 33–60.

Bonafede, M. C. (2002), 'Here, There, and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism After the September 11 Attacks,' *Cornell Law Review*, 88, 155–214.

Boot, M. (2002), 'Who Says We Never Strike First?' *The New York Times*, October 4, A27.

Brecher, M. and Wilkenfeld, J. (1989), *Crisis, Conflict and Instability* (New York: Pergamon Press).

_____ (2003) *International Crisis Behavior (ICB) Online* [online] available from <http://www.cidcm.umd.edu/icb/dataviewer>.

Brecher, M. and James, P. (1988), 'Patterns of Crisis Management,' *Journal of Conflict Resolution*, 32: 3, 426–456.

Brecher, M. (1980), *Decisions in Crisis: Israel, 1967 and 1973* (Berkeley: University of California Press).

Brodie, B. (1959), 'The Anatomy of Deterrence,' *World Politics*, 11: 2, 173–191.

_____ (1973), *War and Politics* (New York: The Macmillan Company).

Brody, R. A. (1960), 'Deterrence Strategies: An Annotated Bibliography,' *The Journal of Conflict Resolution*, 4: 4, 443–457.

Brown, C. (2003), 'Self-Defense in an Imperfect World,' *Ethics and International Affairs*, 17: 1, 2–8.

Brown, S. (1987), *The Causes and Prevention of War* (New York: St. Martin's Press).

Brownlie, I. (1963), *International Law and the Use of Force by States* (Oxford: Clarendon Press).

Buhite, R. D. and Hamel, C. W. M. (1990), 'War for Peace: The Question of an American Preventive War Against the Soviet Union, 1945–1955,' *Diplomatic History*, 14: 3, 367–384.

Burns, N. (2006), 'US Official Discusses N. Korea's Return to Nuclear Talks,' in *Newshour Online* [online] available from <www.pbs.org/newshour/bb/asia/july-dec06/nkorea_10–31.html> [December 15, 2006].

Burr, W. (July 13, 2004) 'The Creation of SIOP–62: More Evidence on the Origins of Overkill,' *National Security Archive Electronic Briefing Book No. 130* (Washington, DC: The National Security Archive) [online] available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB130/index.htm> [December 15, 2006].

Burr, W. and Richelson, J. T. (2000), 'Whether to "Strangle the Baby in the Cradle": The United States and the Chinese Nuclear Program, 1960–64,' *International Security*, 25: 3, 54–99.

Bush, G. W. (2006), *The National Security Strategy of the United States of America* (Washington, DC: The White House) [online] available from <www.whitehouse.gov/nsc/nss/2006/> [March 16, 2006].

____ (2002), *The National Security Strategy of the United States of America* (Washington, DC: The White House) [online] available from <www.whitehouse.gov/nsc/nss.pdf> [September 25, 2002].

____ (2002), 'President Delivers State of the Union Address' (Washington, DC: Office of the Press Secretary) [online] available from <www.whitehouse.gov/news/releases/2002/01/print/20020129–11.html> [April 27, 2003].

_____(2002), 'President Bush Outlines Iraqi Threat' (Washington, DC: Office of the Press Secretary) [online] available from <www.whitehouse.gov/news/releases/2002/10/print/20021007–8.html> [November 7, 2002].

Butfoy, A. (1997), 'Offence-Defence Theory and the Security Dilemma: The Problem with Marginalizing the Context,' *Contemporary Security Policy*, 18: 3, 38–58.

Buzan, B. (1991), *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (2nd edn., Boulder, Colorado: Lynne Reinner Publishers).

Byers, Michael. (2003), 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change,' *The Journal of Political Philosophy*, 11: 2, 171–190.

_____ (2002), 'Terrorism, the Use of Force and International Law After 11 September,' *International and Comparative Law Quarterly*, 51: 2, 401–414.

_____ (2001), 'Introduction Power, Obligation, and Customary International Law,' *Duke Journal of Comparative and International Law*, 11, 81–88.

_____ (1999), *Custom, Power and the Power of Rules* (New York: Cambridge University Press).

Byers, M. (ed.) (2000), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press).

Carlsnaes, W. Risse, T. and Simmons, B. A. (eds) (2002), *Handbook of International Relations* (London: Sage Publications).

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (1986), International Court of Justice.

Central Intelligence Agency (1994), *The Secret Cuban Missile Crisis Documents* (Washington: Brassy's).

Cha, V. D. and Kang, D. C. (2004), 'The Debate over North Korea,' *Political Science Quarterly*, 119: 2, 229–254.

Chang, L. and Kornbluh, P. (eds) (1998), *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York: The New Press).

Chayes, A. (1974), *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press).

Cheney, D. (2002), Vice President Speaks at VFW 103rd National Convention (Nashville, TN).

Christopher, P. (1999), *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Upper Saddle River, NJ: Prentice Hall).

Chubin, S. (2006), *Iran's Nuclear Ambitions* (Washington, DC: Carnegie Endowment for International Peace).

'CIA, DIA Have War Gamed Pre-Emptive Strike on Iran' (2004), *The White House Bulletin*.

Cimbala, S. J. (1994), *Military Persuasion: Deterrence and Provocation in Crisis and War* (University Park, PA: Pennsylvania State University Press).

Claude, I. L. (1980), 'Just Wars: Doctrines and Institutions,' *Political Science Quarterly*, 95: 1, 83–96.

_____ (1962), *Power and International Relations* (New York: Random House.)

Cohan, J. A. (2003), 'The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law,' *Pace International Law Review*, 15, 283–357.

Committee on Foreign Relations, 97th Cong (1981), *The Israeli Air Strike* (First Session on The Israeli Air Strike and Related Issues Sess. Comm. Print)

Copeland, D. C. (2000), *The Origins of Major War* (Ithaca: Cornell University Press).

Coppieters, B, and Fotion, N. (eds) (2002), *Moral Constraints on War: Principles and Cases* (Lanham, MD: Lexington Books).

Cotton, J. (2003), 'The Second North Korean Nuclear Crisis,' *Australian Journal of International Affairs*, 57: 2, 261–279.

Crawford, N. C. (2003), 'Just War Theory and the US Counterterror War,' *Perspectives on Politics*, 1: 1, 5–26.

_____(2003), 'The Best Defense: The Problem with Bush's "Preemptive" War Doctrine,' *Boston Review*, 28: 1 [online] available from <www.bostonreview.net/BR28.1/crawford.html> [September 5, 2004].

Cullinan, J. F. (2002), *Preempt Iraq: Necessity, Law, and Justice. National Review* [online] available from <www.nationalreview.com/comment/comment-cullinan121602.asp> [August 1, 2004].

Cumings, B. (2003), 'Bush's Bomb,' *Nation*, 276: 19, 4–5.

_____(2003), 'North Korea: The Sequel,' *Current History*, 102; 663, 147–151.

Cummings, R. (2007), 'Lockheed Stock and Two Smoking Barrels,' *Playboy* [online] available from <www.playboy.com/magazine/features/lockheed/index.html> [January 14, 2007].

D'Amato, A. (1996), 'Israel's Air Strike Against the Osiraq Reactor: A Retrospective,' *Temple International and Comparative Law Journal*, 10, 259–264.

_____ (1983), 'Israel's Air Strike Upon the Iraqi Nuclear Reactor,' *The American Journal of International Law*, 77: 3, 584–588.

_____ (1971), *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press).

David, S. R. (2003), 'Israel's Policy of Targeted Killing,' *Ethics and International Affairs*, 17: 1, 111–126.

Dayan, M. (1976), *Moshe Dayan: Story of My Life* (New York: Morrow).

Department of Defense. (2003), *DOD Dictionary of Military Terms* [online] available from <www.dtic.mil/doctrine/jel/doddict/index.html> [April 5, 2004].

Dinstein, Y. (2001), *War, Aggression, and Self-Defense* (Cambridge: Cambridge University Press).

Dobbs, M. (2003), 'N. Korea Tests Bush's Policy of Preemption; Strategy Seems to Target Weaker Nations,' *The Washington Post*, January 6, A01.

Docherty, N. (2002, May 2), 'How Iran Entered the "Axis,"' in *Terror and Tehran* (Frontline) [online] available from <www.pbs.org/wgbh/pages/frontline/shows/tehran/axis/map.html> [December 15, 2006].

Dolan, C. J. (2005), *In War We Trust: The Bush Doctrine and the Pursuit of Just War* (Burlington, VT: Ashgate).

Dominguez, J. I. (1983), 'It Won't Go Away: Cuba on the US Foreign Policy Agenda,' *International Security*, 8: 1, 113–128.

Donnelly, W. (1981), *The Israeli Raid Into Iraq*. Report by Congressional Research Service of the Library of Congress. Reprinted in *The Israeli Air Strike*.

Doran, C. F. (1991), *Systems in Crisis: New Imperatives of High Politics at Century's End* (Cambridge: Cambridge University Press).

_____ (2003), 'Economics, Philosophy of History, and the "Single Dynamic" of Power Cycle Theory: Expectations, Competition, and Statecraft,' *International Political Science Review*, 24: 1, 13–49.

Doran, C. F. and Parsons, W. (1980), 'War and the Cycle of Relative Power,' *American Political Science Review*, 74: 4, 947–965.

Downs, G. W. (1991), *Arms Races and War.* In Tetlock et al. (eds) *Behavior, Society, and Nuclear War*, 2nd edn. (New York: Oxford University Press).

Doyle, M. W. (1997), *Ways of War and Peace* (New York: W.W. Norton and Company).

Eban, A. (1977), *Abba Eban: An Autobiography* (New York: Random House).

Eckert, A. E. and Mofidi, M. (2004), 'Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law,' *Tulane Journal of International and Comparative Law*, 12, 117–151.

Elshtain, J. B. (ed.) (1992), *Just War Theory* (New York: New York University Press).

Elshtain, J. B. (2003), *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books).

_____ (2001), 'Just War and Humanitarian Intervention,' in *Proceedings of the Annual Meeting*, 1–12 (Washington, DC: American Society of International Law).

Epps, V. (2001), *Documentary Supplement to International Law*, 2nd edn. (Durham, NC: Carolina Academic Press).

Evans, G. (2004), 'When is It Right to Fight?,' *Survival*, 46: 3, 59–82.

Falk, R. A. (2003), 'What Future for the UN Charter System of War Prevention,' *The American Journal of International Law*, 97: 3, 590–598.

Fathi, N. (2004), 'Iran Says It May Pre-empt Attack Against Its Nuclear Facilities,' *New York Times*, August 20, A4.

Fearon, J. D. (1995), 'Rationalist Explanations for War,' *International Organization*, 49: 3, 379–414.

Feldman, S. (1982), 'The Bombing of Osiraq-Revisited,' *International Security*, 7: 2, 114–142.

Fisher, R. (1970), *International Conflict for Beginners* (New York: Harper Colophon Books).

Foster, G. D. (2004), 'Just War Doctrine in an Age of Hyperpower Politics,' *The Humanist*, 64: 2, 23–25.

Franck, T. M. (2003), 'The Use of Force in International Law,' *Tulane Journal of International and Comparative Law*, 11, 7–19.

_____ (2002), *Recourse to Force: State Action Against Threats and Armed Attacks* (New York: Cambridge University Press).

_____ (1970), 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force By States,' *American Journal of International Law*, 64: 4, 809–837.

Freedman, L. (2004), *Deterrence* (Cambridge: Polity Press).

Gaddis, J. L. (2004), *Surprise, Security, and the American Experience* (Cambridge, MA: Harvard University Press).

Garthoff, R. L. (1983), 'Handling the Cienfuegos Crisis,' *International Security*, 8: 1, 46–66.

Geller, D. S. (1993), 'Power Differentials and War in Rival Dyads,' *International Studies Quarterly*, 37: 2, 173–193.

George, A. L. (ed.) (1991), *Avoiding War: Problems of Crisis Management* (Boulder, Co.: Westview Press).

George, A. L. (1993), *Bridging the Gap: Theory and Practice in Foreign Policy* (Washington, DC: United States Institute of Peace Press).

George, A. L. and Smoke, R. (1974), *Deterrence in American Foreign Policy: Theory and Practice* (New York: Columbia University Press).

Gerberding, W. P. (1968), *International Law and the Cuban Missile Crisis*, in Scheinman, L. and Wilkinson, D. (eds), *International Law and Political Crisis: An Analytic Casebook* (Boston: Little, Brown and Company).

Gilpin, R. (1983), *War and Change in World Politics* (New York: Cambridge University Press).

Glaser, C. L. (1992), 'Political Consequences of Military Strategy: Expanding and Refining the Spiral and Deterrence Models,' *World Politics*, 44: 4, 497–538.

Glennon, M. J. (2002), 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter,' *Harvard Journal of Law and Public Policy*, 25: 2, 539–558.

Goertz, G. and Diehl, P. F. (1993), 'Enduring Rivalries: Theoretical Constructs and Empirical Patterns,' *International Studies Quarterly*, 37: 2, 147–171.

Goldsmith, J. L. and Posner, E. A. (1999), 'A Theory of Customary International Law,' *University of Chicago Law Review*, 66, 1113–1177.

_____ (2001), 'Further Thoughts on Customary International Law,' *Michigan Journal of International Law*, 23, 191–200.

_____ (2000), 'Understanding the Resemblance Between Modern and Traditional Customary International Law,' *Virginia Journal of International Law Association*, 40, 639–672.

Goldstein, L. J. (2003), 'When China Was a 'Rogue State': The Impact of China's Nuclear Weapons Program on US-China Relations During the 1960s,' *Journal of Contemporary China*, 12: 37, 739–764.

Gordon, M. R. and Trainor, B. E. (2006), *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (New York: Pantheon Books).

Government of Israel, Ministry of Foreign Affairs and Atomic Energy Commission (1981) (Office of the Prime Minister), *The Iraqi Nuclear Threat – Why Israel Had to Act* (Jerusalem: Government of Israel).

Graham, T. (2003), 'Is International Law Relevant to Arms Control? National Self-Defense, International Law, and Weapons of Mass Destruction,' *Chicago Journal of International Law*, 4, 1–17.

Gray, C. (2000), *International Law and the Use of Force* (New York: Oxford University Press).

Greenwood, C. (2003), 'International Law and the Pre-Emptive Use of Force, Afghanistan, Al-Qaida, and Iraq,' *San Diego International Law Journal*, 4, 7–36.

Gross, E. (2003), 'The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?' *Florida Journal of International Law*, 15, 389–480.

_____ (2002), 'Self-Defense Against Terrorism – What Does It Mean? The Israeli Perspective,' *Journal of Military Ethics*, 1: 2, 91–108.

Grotius, H. (1925), *The Law of War and Peace De Jure Belli Ac Pacis Libri Tres*, translated by Kelsey, F. W. (Indianapolis, IN: The Bobbs-Merrill Company, Inc.).

Guillaume, G. (2004), 'Terrorism and International Law,' *International and Comparative Law Quarterly*, 53: 3, 537–548.

Guzman, A. T. (2002), 'A Compliance-Based Theory of International Law,' *California Law Review*, 90, 1823–1887.

Haas, E. B. (1953), 'The Balance of Power: Prescription, Concept, or Propaganda,' *World Politics*, 5: 4, 442–477.

Haas, M. L. (2001), 'Prospect Theory and the Cuban Missile Crisis,' *International Studies Quarterly*, 45: 2, 241–270.

_____ (1994), *Intervention: The Use of American Military Force in the Post-Cold War World* (Washington, DC: Carnegie Endowment for International Peace).

Haass, R. N. (2003), 'Sovereignty: Existing Rights, Evolving Responsibilities,' Remarks to the School of Foreign Service and the Mortara Center for International Studies (Georgetown University, Washington, DC).

Haber, E. and Schiff, Z. (2003), *Yom Kippur War Lexicon* (Hebrew), Or Yehuda (Israel: Zmora-Bitan-Divr, Publishers).

Handel, M. I. (1976), *Perception, Deception and Surprise: The Case of the Yom Kippur War* (Jerusalem Papers on Peace Problems No. 19. Jerusalem: The Hebrew University of Jerusalem).

_____ (1973), *Israel's Political-Military Doctrine* (Occasional Papers in International Affairs No. 30. Cambridge, MA: Center for International Affairs Harvard University).

Harkavy, R. E. (1977), *Preemption and Two-Front Conventional Warfare: A Comparison of 1967 Israeli Strategy with the Pre-World War One German Schlieffen Plan* (Jerusalem Papers on Peace Problems No. 23. Jerusalem: Leonard Davis Institute for International Relations).

Harvey, F. P. and Mor, B. D. (eds) (1998), *Conflict in World Politics: Advances in the Study of Crisis, War and Peace* (New York: Palgrave Macmillan).

Hebron, L. and James, P. (1997), 'Great Powers, Cycles of Relative Capability and Crises in World Politics,' *International Interactions*, 23: 2, 145–173.

Heisbourg, F. (2003), 'A Work in Progress: The Bush Doctrine and Its Consequences,' *The Washington Quarterly*, 26: 2, 75–88.

Henkin, L. (1979), *How Nations Behave: Law and Foreign Policy* (2nd edn., New York: Council on Foreign Relations by Columbia University Press).

_____ (1963), 'The United Nations and Its Supporters: A Self-Examination,' *Political Science Quarterly*, 78: 4, 504–536.

Hersh, S. M. (2006), 'The Iran Plans,' *The New Yorker*, April [online] available from <www.newyorker.com/fact/content/articles/060417fa_fact> [April 10, 2006].

_____ (1991), *The Samson Option: Israel's Nuclear Arsenal and American Foreign Policy* (New York: Random House).

Hertzberg, H. (2003), 'Axis Praxis,' *The New Yorker*, January 1 [online] available from <www.newyorker.com/talk/content/articles/030113ta_talk_hertzberg> [December 15, 2006].

Herz, J. H. (1950), 'Idealist Internationalism and the Security Dilemma,' *World Politics*, 2: 2, 157–180.

Herzog, C. (1975), *The War of Atonement: October 1973* (Boston: Little, Brown and Company).

Hirschbein, R. (1997), *What If They Gave a Crisis and Nobody Came? Interpreting International Crises* (Westport, CT: Praeger).

Hoch, M. (2006), 'US Relations: Axis of Evil,' in: *North Korea: Nuclear Standoff* (Online NewsHour) October 19 [online] available from <www.pbs.org/newshour/indepth_coverage/asia/northkorea/relations5.html> [December 15, 2006].

Hoffmann, S. (1981), 'States and the Morality of War,' *Political Theory*, 9: 2, 149–172.

Holliday, I. (2002), 'When is a Cause Just?,' *Review of International Studies*, 28, 557–575.

Holmes, R. L. (1992), *Can War Be Morally Justified? The Just War Theory*, in Elshtain, J. B. (ed.) *Just War Theory* (New York: New York University Press).

Hopf, T. (1991), 'Polarity, The Offense Defense Balance, and War,' *The American Political Science Review*, 85: 2, 475–493.

House Armed Services Committee (2006), *US Representative Duncan Hunter (R-CA) Holds a Hearing on the Iran Nuclear Threat*, 109th Congress, 2nd Session (Political Transcript Wire).

House International Relations Committee (2002), *Chairman Holds Hearing on US Policy Toward Iraq, Afternoon Session with Secretary of State Colin Powell Testifying*, 107th Congress, 2nd Session, September 19.

Howard, M. (1983), *The Causes of Wars and Other Essays* (Cambridge, MA: Harvard University Press).

Huth, P. K. (1988), *Extended Deterrence and the Prevention of War* (New Haven, CT: Yale University Press).

Huth, P. and Russett, B. (1993), 'General Deterrence Between Enduring Rivals: Testing Three Competing Models,' *American Political Science Review*, 87: 1, 61–73.

Hybel, A. R. (1986), *The Logic of Surprise in International Conflict* (Lexington, MA: Lexington Books).

International Court of Justice (1986), *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, in *Case Summaries* (Merits) [Online] available from <http://212.153.43.18/icjwww/icacases/inus/ inus_isummaries/inus_isummary_19860627.htm> [May 13, 2004].

Janssen, D. (2004), 'Preventive Defense and Forcible Regime Change: A Normative Assessment,' *Journal of Military Ethics*, 3: 2, 105–128.

Jennings, R.Y. (1938), 'The Caroline and McLeod Cases,' *The American Journal of International Law*, 32: 1, 82–99.

Jervis, R. (1982), 'Deterrence and Perception,' *International Security*, 7: 3, 3–30.

_____ (1976), *Perception and Misperception in International Politics* (Princeton, NJ: Princeton University Press).

Jervis, R., Lebow, R. N., and Stein, J. G. (eds) (1991), *Psychology and Deterrence* (Baltimore, MD: The Johns Hopkins University Press).

Jessup, P. C. (1948), *A Modern Law of Nations: An Introduction* (New York: The Macmillan Company).

Johnson, J. T. (2005), 'Just War, As It Was and Is,' *First Things*, 149, 14–24.

_____ (2003), 'Aquinas and Luther on War and Peace: Sovereign Authority and the Use of Armed Force,' *Journal of Religious Ethics*, 31: 1, 3–20.

_____ (1999), *Morality and Contemporary Warfare* (New Haven: Yale University Press).

_____ (1984), *Can Modern War Be Just?* (New Haven: Yale University Press).

_____ (1981), *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, NJ: Princeton University Press).

Kam, E. (2004), *Surprise Attack: The Victim's Perspective* (Cambridge, MA: Harvard University Press).

Kaplan, F. (1983), *The Wizards of Armageddon* (New York: Simon and Schuster).

Kastenberg, J. E. (2004), 'The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense and Preemption,' *The Air Force Law Review*, 55, 87–125.

Kearley, T. (2003), 'Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent,' *Wyoming Law Review*, 3, 663–733.

_____ (1999), 'Raising the Caroline,' *Wisconsin International Law Journal*, 17, 325–346.

Keesing's Contemporary Archives (1952) (Keynsham, UK: Keesing's Publications Limited).

Kegley, C. W. and Raymond, G. A. (2003), 'Preventive War and Permissive Normative Order,' *International Studies Perspectives*, 4: 4, 385–394.

Kelsay, J. and Turner Johnson, J. (eds) (1991), *The International Law of War as Related to the Western Just War Tradition.* In *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York: Greenwood Press).

Kelly, J. P. (2000), 'The Twilight of Customary International Law,' *Virginia Journal of International Law Association*, 40, 449–543.

Kelly, M. J. (2003), 'Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law,' *Journal of Transnational Law and Policy*, 13, 1–39.

Kennedy, J. F. (1962), *News Conference Number 45* [online] available from <www.jfklibrary.org/jfk_press_conference_621120.html> [March 3, 2005].

Kennedy, R. F. (1969), *Thirteen Days: Memoir of the Cuban Missile Crisis* (New York: W.W. Norton and Company).

Keohane, R. O. (1998), 'International Institutions: Can Interdependence Work?,' *Foreign Policy*, 110, 82–96.

Keohane, R. O. and Martin, L. L. (1995), 'The Promise of Institutional Theory,' *International Security*, 20: 1, 39–51.

Kessler, G. and Slevin, P. (2002), 'Preemptive Strikes Must Be Decisive, Powell,' *Washington Post*, June 15, A16.

Kim, W. and Morrow, J. D. (1992), 'When Do Power Shifts Lead to War?' *American Journal of Political Science*, 36: 4, 896–922.

Kimche, D. and Bawly, D. (1968), *The Sandstorm: The Arab-Israeli War of June 1967: Prelude and Aftermath* (London: Secker and Warburg).

King, G., Keohane, R. O., and Verba, S. (1994), *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton University Press).

Kissinger, H. (1979), *White House Years* (Boston: Little, Brown and Company).

Kohout, F. (2003), 'Cyclical, Hegemonic, and Pluralistic Theories of International Relations: Some Comparative Reflections on War Causation,' *International Political Science Review*, 24: 1, 51–66.

Kumaraswamy, P. R. (1999), 'Revisiting the Yom Kippur War: Introduction,' *Israel Affairs*, 6: 1, 1–10.

Kunz, J. L. (1951), 'Bellum Justum and Bellum Legale,' *American Journal of International Law*, 45: 3, 528–534.

_____ (1947), 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations,' *The American Journal of International Law*, 41: 4, 872–879.

Kydd, A. (1997), 'Game Theory and the Spiral Model,' *World Politics*, 49, 371–400.

_____ (1997), 'Sheep in Sheep's Clothing: Why Security Seekers Do Not Fight Each Other,' *Security Studies*, 7: 1, 114–154.

Kyle, K. (1991), *Suez* (New York: St. Martin's Press).

Lefever, E. W. (ed.) (1988), *National Interests and Moral Absolutes*, in *Ethics and World Politics: Four Perspectives* (Washington, DC: Ethics and Public Policy Center).

Langan, J. S. J. (2003), 'Is There a Just Cause for War Against Iraq,' *Georgetown Journal of International Law*, 4: 1, 87–93.

Lebow, R. N. (1984), 'Windows of Opportunity: Do States Jump Through Them?' *International Security*, 9: 1, 147–186.

_____ (1981), *Between Peace and War: The Nature of International Crisis* (Baltimore: The Johns Hopkins University Press).

Lemann, N. (2003), 'How It Came to War: When did Bush decide that he had to fight Saddam?' *The New Yorker*, March 31, 36.

Lemke, D. (2003), 'Investigating the Preventive Motive for War,' *International Interactions*, 29: 4, 273–292.

Leng, R. J. (1983), 'When Will They Ever Learn? Coercive Bargaining in Recurrent Crises,' *Journal of Conflict Resolution*, 27: 3, 379–419.

Levy, J. S. (1987), 'Declining Power and the Preventive Motivation for War,' *World Politics*, 40: 1, 82–107.

_____ (1984), 'The Offensive/Defensive Balance of Military Technology: A Theoretical and Historical Analysis,' *International Studies Quarterly*, 28: 2, 219–238.

_____ (1983), 'Misperception and the Causes of War: Theoretical Linkages and Analytical Problems,' *World Politics*, 36: 1, 76–99.

Levy, J. S., and Gochal, J. R. (2001), 'Democracy and Preventive War: Israel and the 1956 Sinai Campaign,' *Security Studies*, 11: 2, 1–49.

Lieber, R. J. (2007), *The American Era: Power and Strategy for the 21st Century* (New York: Cambridge University Press).

Litwak, R. S. (2003), 'Non-Proliferation and the Dilemmas of Regime Change,' *Survival*, 45: 4, 7–32.

_____ (2002), 'The New Calculus of Pre-Emption,' *Survival*, 44: 4, 53–80.

_____ (2000), *Rogue States and US Foreign Policy: Containment After the Cold War* (Baltimore, MD: The Johns Hopkins University Press).

Lorch, N. (ed.) (1993), *Major Knesset Debates, 1948–1981* (Lanham, Maryland: Jerusalem Center for Public Affairs and University Press of America, Inc.).

Lucas, G. R. (2003), 'The Role of the "International Community" in Just War Tradition—Confronting the Challenges of Humanitarian Intervention and Preemptive War,' *Journal of Military Ethics*, 2: 2, 122–144.

Lynn-Jones, S. M. (1995), 'Offense-Defense Theory and Its Critics,' *Security Studies*, 4: 4, 660–691.

Mahnaimi, U. (2005), 'Israel readies forces for strike on nuclear Iran,' *The Sunday Times*, December 11 [online] available from <www.timesonline.co.uk/article/0,2089–1920074,00.html> [June 1, 2006].

Mahoney, J. and Goertz, G. (2004), 'The Possibility Principle: Choosing Negative Cases in Comparative Research,' *American Political Science Review*, 98: 4, 653–669.

Mann, J. (2004), *Rise of the Vulcans: The History of Bush's War Cabinet* (New York, Penguin Books).

Martin, L. L. and Simmons, B. A. (1998), 'Theories and Empirical Studies of International Institutions,' *International Organization*, 52: 4, 729–757.

Maxon, R. G. (1995), 'Nature's Eldest Law: A Survey of a Nation's Right to Act in Self-Defense,' *Parameters*, 55–68 [online] available from <http://carlisle-www.army.mil/usawc /Parameters/1995/maxon.htm>.

May, E. R., and Zelikow, P. D. (eds) (1997), *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, MA: The Belknap Press of Harvard University Press).

McCormack, T. L. H. (1996), *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (New York: St. Martin's Press).

McCormick, J. M. (2005), *American Foreign Policy and Process*, 4th edn. (Belmont, CA, Thomson).

McGinty, M. (2003), 'That Was The War That Was: International Law, Pre-Emption and the Invasion of Iraq,' *RUSI Journal*, 148: 3, 20–25.

Mearsheimer, J. J. (2001), *The Tragedy of Great Power Politics* (New York: W.W. Norton and Company).

Medzini, M. (ed.) (1976), *Israel's Foreign Relations: Selected Documents, 1947–1974* (Jerusalem: Ministry for Foreign Affairs).

Meeker, L. C. (1963), 'Defensive Quarantine and the Law,' *The American Journal of International Law*, 57: 3, 515–524.

Meir, G. (1975), *My Life* (New York: G.P. Putnam's Sons).

Miller, L. H. (1964), 'The Contemporary Significance of the Doctrine of Just War,' *World Politics*, 16: 2, 254–286.

Mitchell, J. B. (2004), '"Preemptive War": Is It Constitutional?' *Santa Clara Law Review*, 44, 497–527.

Moore, M. (2003), 'Truman Got It Right,' *Bulletin of the Atomic Scientists*, 59: 1, 20–22.

Morgan, P. M. (2003), *Deterrence Now* (Cambridge: Cambridge University Press).

Morrow, J. D. (1989), 'A Twist of Truth: A Reexamination of the Effects of Arms Races on the Occurrence of War,' *The Journal of Conflict Resolution*, 33: 3, 500–529.

Myers, R. B. (2004), *The National Military Strategy of the United States of America*, Joint Chiefs of Staff [online] available from <www.defenselink.mil/news/Mar2005/d20050318nms.pdf> [March 28, 2005].

Nabati, M. E. (2003), 'Anticipatory Self-Defense: The Terrorism Exception,' *Current History*, 222–232.

Nakdimon, S. (1987), *First Strike: The Exclusive Story of How Israel Foiled Iraq's Attempt to Get the Bomb*, translated by Kidron, P. (New York: Summit Books).

Nathan, J. A. (ed.) (1992), *The Cuban Missile Crisis Revisited* (New York: St. Martin's Press).

Newcomb, M. E. (1994), 'Non-Proliferation, Self-Defense, and the Korean Crisis,' *Vanderbilt Journal of Transnational Law*, 27, 603–634.

Niksch, L. A. (August 1, 2006), *North Korea's Nuclear Weapons Program*, RL33590 (Congressional Research Service).

Nixon, R. (1978), *The Memoirs of Richard Nixon* (New York: Grosset and Dunlap).

Nye, J. S. (2003), 'Hourglass Runs Low: The US should engage North Korea in talks while there's still time,' *Los Angeles Times*, March 12, B13.

O'Brien, W. V. (1987), 'The Six Day War, Twenty Years After: Aggression or Self-Defense,' *Middle East Focus*, 10: 1, 6–13, 23.

_____ (1981), *The Conduct of Just and Limited War* (New York: Praeger).

O'Connell, M. E. (2002), 'American Exceptionalism and the International Law of Self-Defense,' *Denver Journal of International Law and Policy*, 31, 43–57.

_____ (2002), *The Myth of Preemptive Self-Defense*, ASIL Task Force Papers (Washington, DC: The American Society of International Law Task Force on Terrorism).

O'Hanlon, M. E. (2003), 'A "Master Plan" to Deal With North Korea,' *Policy Brief*, No. 114 (Washington, DC, The Brookings Institution).

O'Hanlon, M. and Mochizuki, M. (2003), *Crisis on the Korean Peninsula: How to Deal with a Nuclear North Korea* (New York, McGraw-Hill).

Oliver, C. (1964), *Working Paper: The Inter-American Security System and the Cuban Crisis*, in Tondeo, L. M. (ed.) *The Inter-American Security System and the Cuban Crisis* (Dobbs Ferry, NY: Oceana Publications, Inc. for The Association of the Bar of the City of New York).

Oppenheim, F. E. (1987), 'National Interest, Rationality, and Morality,' *Political Theory*, 15: 3, 369–389.

Oren, M. B. (2002), *Six Days of War: June 1967 and the Making of the Modern Middle East* (New York: Oxford University Press).

Organski, A. F. K. (1968), *World Politics* (2nd edn., New York: Alfred A. Knopf, Inc).

Organski, A. F. K. and Kugler, J. (1980), *The War Ledger* (Chicago: University of Chicago Press).

Osgood, R. E. (1985), *Force in International Relations: The Moral Issues* in Thompson, K. W. (ed.) *Ethics in Foreign Policy*, Vol. 2 of 'Ethics and International Relations' (New Brunswick: Transaction Books).

Paolucci, H. (ed.) (2002), *The Political Writings of St. Augustine* (Washington, DC: Regnery Publishing, Inc).

Paust, J. J. (2002), 'Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond,' *Cornell International Law Journal*, 35, 533.

Perle, R. (2001), 'Next Stop, Iraq,' Remarks at the FPRI Annual Dinner November 14 (Foreign Policy Research Institute).

Perlmutter, A., Handel, M. I., and Bar-Joseph, U. (2003), *Two Minutes Over Baghdad* (London: Frank Cass).

Perlmutter, A. (1987), *The Life and Times of Menachem Begin* (Garden City, NY: Doubleday and Company, Inc).

Pfaff, T. (2000), *Peacekeeping and the Just War Tradition* (Carlisle, PA: Strategic Studies Institute).

Posen, B. R. (1984), *The Sources of Military Doctrine: France, Britain, and Germany Between the World Wars* (Ithaca, NY: Cornell University Press).

Powers, G. (2003), *Would an Invasion of Iraq Be a 'Just War?'* (Special Report No. 98. Washington, DC: United States Institute of Peace).

Pringle, P., and Arkin, W. (1983), *SIOP: The Secret US Plan for Nuclear War* (New York: W.W. Norton and Company).

Przystup, J. J. (2002), *Anticipating Strategic Surprise on the Korean Peninsula* (Strategic Forum No. 190. Washington, DC: Institute for National Strategic Studies, National Defense University).

Quandt, W. B. (1992), 'Lyndon Johnson and the June 1967 War: What Color was the Light?,' *Middle East Journal*, 46: 2, 198–228.

_____ (1977), *Decade of Decisions: American Policy Toward the Arab-Israeli Conflict, 1967–1976* (Berkeley: University of California Press).

Quigley, J. (1996), 'A Weak Defense of Anticipatory Self-Defense,' *Temple International and Comparative Law Journal*, 10, 255–257.

Rak, C. (2003), 'The Role of Preventive Strikes in Counterproliferation Strategy: Two Case Studies,' *Strategic Insight* (Monterey, CA: Center for Contemporary Conflict, National Security Affairs Department at the Naval Postgraduate School).

Ramsey, M. D. (2002), 'Textualism and War Powers,' *The University of Chicago Law Review*, 69: 4, 1543–1638.

Record, J. (2003), 'The Bush Doctrine and War with Iraq,' *Parameters*, 33: 1, 4–21.

Reichberg, G. M. (2004), 'Preemptive War: What Would Aquinas Say?' *Commonweal*, 131: 2, 9–10.

Reiss, M. B. (2004), *Revisiting Waltz's Man, the State and War: New Images for a New Century*, Remarks to the Fletcher School of Law and Diplomacy [online] available from <www.state.gov/s/p/rem/36915.htm> [March 15, 2005].

Reiter, D. (1995), 'Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen,' *International Security*, 20: 2, 5–34.

Rengger, N. (2002), 'On the Just War Tradition in the Twenty-First Century,' *International Affairs*, 78: 2, 353–363.

Rice, C. (2002), 'Dr. Condoleezza Rice Discusses President's National Security Strategy,' October 1 (New York, NY).

Roberts, A. E. (2001), 'Traditional and Modern Approaches to Customary International Law: A Reconciliation,' *The American Journal of International Law*, 95: 4, 757–791.

Roberts, G. B. (1999), 'The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction,' *Denver Journal of International Law and Policy*, 27, 483–539.

Rodman, D. (2001), 'The Diplomatic Prelude to the Six-Day War,' *Midstream*, 47: 4, 8–10.

_____ (2001), 'The United States, Israel, and the Yom Kippur War,' *Midstream*, 47: 6, 17–19.

Rotberg, R. I., and Rabb, T. K. (eds) (1993), *The Origin and Prevention of Major Wars* (New York: Cambridge University Press).

Rumsfeld, D. H. (2005), *The National Defense Strategy of the United States of America*, Department of Defense [online] available from <www.defenselink.mil/news/Mar2005/d20050318nds1.pdf> [March 28, 2005].

_____ (2002), *Secretary Rumsfeld Interview with NBC Affiliate – WXIA Channel 11, Atlanta, GA*, United States Department of Defense News Transcript, September 27, 2002 [online] available from <www.defenselink.mil/transcripts/2002/t09302002_t927wxia.html> [17 October 2004].

_____ (2002), 'Sec. Donald Rumsfeld: Part Two,' (Online NewsHour) February 4 [online] available from <www.pbs.org/newshour/bb/military/jan-june02/rumsfeld_parttwo_2–4.html> [December 15, 2006].

Russett, B. M. (1962), 'Cause, Surprise, and No Escape,' *The Journal of Politics*, 24: 1, 3–22.

Safran, N. (1982), *Israel: The Embattled Ally* (Cambridge, MA: The Belknap Press of Harvard University Press).

Sanger, D. E. (2006), 'Bush's Shift: Being Patient With Foes,' *The New York Times*, July 10, A9.

Sapiro, M (2003), 'Iraq: The Shifting Sands of Preemptive Self-Defense,' *The American Journal of International Law*, 97: 3, 599–607.

Schachter, O. (1989), 'Self-Defense and the Rule of Law,' *The American Journal of International Law*, 83: 2, 259–277.

_____ (1999), 'The Role of Power in International Law,' in *Proceedings of the Annual Meeting*, ASIL Proceedings, 200–2005, American Society of International Law.

Schell, J. (2003), 'A Nuclear Education: Letter from Ground Zero,' *Nation*, 276: 20, 7.

Schelling, T. C. (1966), *Arms and Influence* (New Haven: Yale University Press).

_____ (1960), *The Strategy of Conflict* (Cambridge, MA: Harvard University Press).

Schiff, Z. (1974), *October Earthquake: Yom Kippur 1973* (translated by Louis Williams. Tel Aviv: University Publishing Projects Ltd.).

Schlesinger, A. M., Jr. (2004), *War and the American Presidency* (New York, W.W. Norton and Company).

_____ (2002), 'The Immorality of Preemptive War,' *NPQ: New Perspectives Quarterly*, 19: 4, 41–42.

Schmitt, M. N. (2003), 'International Law and the Use of Force: Attacking Iraq,' *RUSI Journal*, 148: 1, 12–15.

Schroeder, P. W. (2002), *Iraq: The Case Against Preemptive War. The American Conservative* [online] available from <http://www.amconmag.com/10_21/iraq.html> [April 29, 2003].

Schweller, R. L. (1996), 'Neorealism's Status-Quo Bias: What Security Dilemma?' *Security Studies*, 5: 3, 90–121.

_____ (1992), 'Domestic Structure and Preventive War: Are Democracies More Pacific?' *World Politics*, 44: 2, 235–269.

Schoof, R. (2006), 'UN slaps sanctions on North Korea,' *Lexington Herald-Leader*, October 15, A20.

Scott, S. V. and Withana, R. (2004), 'The Relevance of International Law for Foreign Policy Decision-Making When National Security Is at Stake: Lessons from the Cuban Missile Crisis,' *Chinese Journal of International Law*, 3: 1, 163–187.

Sela, A. (ed.) (1999), *Political Encyclopedia of the Middle East* (Jerusalem, Israel: The Jerusalem Publishing House, Ltd.).

Semmel, A. K. (2006), 'Building a Common Approach to the Iranian Nuclear Problem,' Remarks at the International Institute for Strategic Studies Workshop November 28 (New York City).

Sherwell, P. (2006), 'US prepares military blitz against Iran's nuclear sites,' *The Sunday Telegraph* (UK), February 12 [online] available from <www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/02/12/wiran12.xml&sSheet=/portal/2006/02/12/ixportaltop.html> [February 12, 2006].

Shlaim, A. (1976), 'Failures in National Intelligence Estimates: The Case of the Yom Kippur War,' *World Politics*, 28: 3, 348–380.

Shoham, U. (1985), 'The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense,' *Military Law Review*, 109, 191–223.

Sifry, M. L. and Cerf, C. (eds) (2003), *The Iraq War Reader: History, Documents, Opinions* (New York, Simon and Schuster).

Simma, B. (ed.) (2002), *The Charter of the United Nations: A Commentary*, 2nd edn., Vol. I (Oxford: Oxford University Press).

Snyder, G. H. (1961), *Deterrence and Defense: Toward a Theory of National Security* (Princeton, NJ: Princeton University Press).

Snyder, J. (2003), 'Imperial Temptations,' *The National Interest*, 71, 29–40.

_____ (1991), *Myths of Empire: Domestic Politics and International Ambition* (Ithaca, NY: Cornell University Press).

Snyder, J. C. (1983), 'The Road to Osiraq: Baghdad's Quest for the Bomb,' *The Middle East Journal*, 37: 4, 565–593.

Sofaer, A. D. (2003), 'On the Necessity of Pre-Emption,' *European Journal of International Law*, 14: 2, 209–226.

Sorensen, T. C. (1965), *Kennedy* (New York: Harper and Row, Publishers).

Spiegel, S. L. (1985), *The Other Arab-Israeli Conflict: Making America's Middle East Policy, From Truman to Reagan* (Chicago: University of Chicago Press).

Statement by the Government of Israel on the Bombing of the Iraqi Nuclear Facility Near Baghdad (1981), in *Israel's Foreign Relations, Selected Documents 1981–1982*, Ministry of Foreign Affairs [online] available from <http://www.mfa.

gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1981–1982/26%20Statement%20by%20the%20Government%20of%20Israel%20on%20the %20Bo> [March 25, 2005].

Stein, J. G. (1982), 'Military Deception, Strategic Surprise, and Conventional Deterrence: A Political Analysis of Egypt and Israel, 1973–73,' *The Journal of Strategic Studies*, 5: 1, 94–121.

_____ (1980), 'Intelligence' and 'Stupidity' Reconsidered: Estimation and Decision in Israel, 1973,' *The Journal of Strategic Studies*, 3: 2, 147–177.

Stein, Y. (2003), 'By Any Name Illegal and Immoral,' *Ethics and International Affairs*, 17: 1, 127–137.

Stern P. C. et al. (eds) (1989), *Perspectives on Deterrence*, 98–133 (New York: Oxford University Press).

Sterngold, J. (2004), 'Bush Tempers Argument for Pre-emptive Strikes; Experts say Iraq War Precludes Similar Future Engagements,' *San Francisco Chronicle*, October 2, A10.

Suskind, R. (2006), *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York, Simon and Schuster).

Taft, W. H. IV. (2002), *The Legal Basis for Preemption*, Memorandum to American Society of International Law-Council on Foreign Relations Roundtable on Old Rules, New Threats [online] available from <www.cfr.org/publication.php?id=5250> [May 30, 2004].

Taylor, T. (2004), 'The End of Imminence?' *The Washington Quarterly*, 27: 4, 57–72.

Tetlock, P. E. et al. (eds) (1989), *Behavior, Society, and Nuclear War*, Vol. 1 (New York: Oxford University Press).

Tessman, B. F. and Chan, S. (2004), 'Power Cycles, Risk Propensity, and Great-Power Deterrence,' *Journal of Conflict Resolution*, 48: 2, 131–153.

The Covenant of the League of Nations (2004) [online] available from <www.yale.edu/lawweb/avalon/ leagcov.htm>.

Tucker, R. W. (1960), *The Just War: A Study in Contemporary American Doctrine* (Baltimore, MD: The Johns Hopkins Press).

Tyson, A. S. (2002), 'US Drawing a Hard, Fast Line Around Iran,' *Christian Science Monitor*, February 8, 2.

United Nations (2006), 'Security Council Imposes Sanctions on Iran For Failure to Halt Uranium Enrichment, Unanimously Adopting Resolution 1737 (2006),' [online] available from <www.un.org/News/Press/docs/2006/sc8929.doc.htm> [December 23, 2006].

United Nations Security Council (1981), 'Resolution 487' [online] available from <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/418/74/IMG/NR041874.pdf?OpenElement> [April 17, 2005].

United States Department of State (2006), 'Background Note: North Korea' [online] available from <www.state.gov/r/pa/ei/bgn/2792.htm> [15 December 2006].

Utgoff, V. A. (ed.) (2000), *The Coming Crisis: Nuclear Proliferation, US Interests, and World Order* (Cambridge MA: MIT Press).

Vagts, A. (1956), *Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations* (New York: King's Crown Press).

Van Den Hole, L. (2003), 'Anticipatory Self-Defence Under International Law,' *American University International Law Review*, 19, 69–106.

Van E. S. (1999), *Causes of War: Power and the Roots of Conflict* (Ithaca, NY: Cornell University Press).

_____ (1998), 'Offense, Defense, and the Causes of War,' *International Security*, 22: 4, 5–43.

_____ (1984), 'The Cult of the Offensive and the Origins of the First World War,' *International Security*, 9: 1, 58–107.

Vandenbroucke, L. S. (1984), 'The Israeli Strike Against Osiraq: The Dynamics of Fear and Proliferation in the Middle East,' *Air University Review* [online] available from <www.airpower.au.af.mil/airchronicles/aureview/1984/sep-oct/vanden.html> [March 28, 2005].

Vasquez, J. A. (1996), 'Distinguishing Rivals That Go to War from Those That Do Not: A Quantitative Comparative Case Study of the Two Paths to War,' *International Studies Quarterly*, 40: 4, 531–558.

_____ (1997), *The War Puzzle* (New York: Cambridge University Press).

Vattel, E. (1844), *The Law of Nations: Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, translated by Chitty, J. (West Brookfield, MA: Merriam and Cooke).

Von Glahn, G. (1976), *Law Among Nations: An Introduction to Public International Law* (Third. New York: Macmillan Publishing Co., Inc).

Wagner, A. R. (1974), *Crisis Decision-Making: Israel's Experience in 1967 and 1973* (New York: Praeger Publishers).

Waltz, K. N. (1959), *Man, the State, and War: A Theoretical Analysis* (New York: Columbia University Press).

_____ (1983), *Theory of International Politics* (New York: McGraw-Hill).

Walzer, M. (2004), 'Words of War: Challenges to the Just War Theory,' *Harvard International Review*, 26: 1, 36–38.

_____ (2002), 'The Triumph for Just War Theory (and the Dangers of Success),' *Social Research*, 69: 4, 925–944.

_____ (1992), *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Second. New York: Basic Books).

Weigel, G. (2003), *Getting 'Just-War' Straight and Pre-Emption, Just War and the Defense of World Order*, Catholic Educator's Resource Center [online] available from <www.catholiceducation.org/articles/social_justice.sj0008.html> [October 17, 2003].

_____(2002), *Just War and Pre-Emption: Three Questions. The Catholic Difference* [online] available from <www.eppc.org/news/newsID.1407/news_detail.asp> [August 1, 2004].

_____ (2002), 'The Just War Tradition and the World After September 11th,' *Logos: A Journal of Catholic Thought and Culture*, 5: 3, 13–44.

Western, J. (2005), *Selling Intervention and War: The Presidency, the Media, and the American Public* (Baltimore, The Johns Hopkins University Press).

Wirtz, J. J., and Russell, J. A. (2003), 'US Policy on Preventive War and Preemption,' *The Nonproliferation Review*, 10: 1, 113–123.

Wolfers, A. (1962), *Discord and Collaboration: Essays on International Politics* (Baltimore, MD: The Johns Hopkins University Press).

Wolff, A. (2006), 'Explanation of Vote on Iran and UNSC Resolution 1737,' Remarks to the Security Council, December 23 (New York City).

Woodward, B. (2006), *State of Denial: Bush at War: Part III* (New York, Simon and Schuster).

_____ (2002), *Bush at War* (New York, Simon and Schuster).

Wright, Q. (1933), 'Meaning of the Pact of Paris,' *American Journal of International Law*, 27, 39–61.

_____ (1952), *Yearbook of the United Nations, 1951* (New York: Department of Public Information, United Nations).

_____ (1966), *A Study of War* (Chicago: University of Chicago Press).

Yardley, J. and Sanger, D. E. (2005), 'US Tries a New Approach in Talks with North Korea,' *New York Times*, July 27, 10.

Yoon, Y. (2003), 'Introduction: Power Cycle Theory and the Practice of International Relations,' *International Political Science Review*, 24: 1, 5–12.

Index