

REMARKS ON CUSTOMARY INTERNATIONAL LAW AND THE USE OF FORCE AGAINST TERRORISTS AND ROGUE STATE COLLABORATORS

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SYNOPSIS: State practice and patterns of cooperation over the last forty-five years have led to the development of rules of customary international law governing the use of force, in anticipatory self-defense, against terrorists and rogue state collaborators. Although the earlier general rules may have prohibited states from using force except in anticipation of an imminent attack, in more recent practice, the imminence standard has changed. States have initiated and cooperated in the use of force to extend self-defense to instances in which the possibility of an attack is not imminent, but merely expected. These actions are based on an assessment of the following factors:

- 1) The protection of nationals;
- 2) The probability of an attack;
- 3) The magnitude of potential harm;
- 4) The need to disrupt terrorist planning and activities; and
- 5) The need to eliminate safe havens.

REMARKS

This presentation is a case study on the application of customary international law to a specific issue, the use of force, in anticipatory self defense, against terrorists and rogue state collaborators.

Some of the hard questions that arise on terrorism issues come from the strain of trying to impose traditional legal structures on new threats. The Administration's choice is war law, the law of armed conflict. Its critics prefer a blend of criminal law and humanitarian law. But another way to think about it is that the rules are developing through customary international law, as reflected in the conduct, and patterns of cooperation, of the states most actively

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concerned with the threat. I will suggest that this is producing norms which are reasonable adaptations and extensions of past norms—even though they are inconsistent with the conventional wisdom, derived from the so-called *Caroline* standard. I will invite you to consider the argument and push back.

We should start with the central tension in customary international law, which is that it can be created by being broken. As Justice Jackson said at the beginning of the Nuremberg Trials, “every custom has its origin in some single act Innovations and revisions in international law are brought about by the action of governments designed to meet a change in circumstances.”¹

In today’s jargon, there is always a first move to a paradigm shift. If a state takes an action that modifies or contravenes international law, the rest of the world may or may not respond. If the action is accepted, then arguably, a new norm has emerged.

Let’s go to the United Nations Charter, and the general prohibition on the use of force in Article 2(4). It says: “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²

There’s an exception for actions authorized by the Security Council, which is rarely invoked, except for after-the-fact peacekeeping operations.

There’s another, vastly more meaningful exception, which appears in Article 51, which says that: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member”³

There are serious scholars from across the ideological spectrum who conclude that Article 51 recognizes one form of self-defense, *i.e.*, in response to an armed attack, but also recognizes the more general pre-existing right of self-defense in customary international law. That’s why the word “inherent” was used.

The International Court of Justice has never addressed Article 51 directly. Judge Schwebel, in his dissent in the *Nicaragua* case, is the only Judge to speak to it. He said Article 51 does not authorize force “if, and only if, an armed attack occurs,” but rather there remains a general right under customary international law.⁴

1. Justice Robert H. Jackson, Chief Counsel for the Prosecution of Axis War Criminals, Report of June 7, 1945, reprinted in 39 AM. J. INT’L L. (Supp.) 178, 187 (1945).

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

3. U.N. Charter art. 51.

4. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 347 (June 27) (dissenting opinion of Judge Schwebel).

And in any event, in a consent-based system of international law, no meaningful definition of the right of self-defense can be made without reference to the actual conduct of states.

Most of you will be familiar with the so-called *Caroline* Standard.⁵ In 1837, the British were crushing a rebellion in Canada. An informal militia from New York used the steamboat *Caroline* to transport men and material to rebels in Canada. In a night raid, British forces captured and destroyed the steamboat in port in New York, and killed an American in the process. One of the British officers was arrested and threatened with prosecution, but was released following an exchange of correspondence between Secretary of State Daniel Webster and British Special Minister Lord Ashburton. In the correspondence, Webster said that the use of force should be confined to cases in which the “necessity of self-defence, [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation,” and that nothing “unreasonable or excessive” should be done.⁶

One aspect of this case is especially interesting. The British launched a deliberate, planned raid, at a time and place of their choice, against intermittent hostile acts. This is, on its face, inconsistent with the words “instant, overwhelming, leaving no choice of means, and no moment for deliberation.” To get around that, Lord Ashburton asserted that the intention was to seize the *Caroline* in British waters, but the ship was not where it was expected to be. Instead, it was docked on the American side, and the British captain made a decision to forge ahead. This shows that even as the *Caroline* test was being established, it was being interpreted creatively.

Based primarily on this test, most commentators describe the commonly accepted parameters for the use of force in anticipatory self-defense as follows:

- 1) Necessity;
- 2) Imminence;
- 3) Proportionality; and
- 4) Exhaustion of peaceful options.

As I am about to show, these requirements have been modified substantially by state practice in the last forty-five years.

I’ll start with the 1962 Cuban Missile Crisis and the U.S. naval blockade. The Security Council never reached the question of self-defense, even though

5. Of the many recitations of the *Caroline* Incident, one of the most thoughtful, nuanced and comprehensive is Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defense in Contemporary International Law*, 1:2 MISKOLC JOURNAL OF INTERNATIONAL LAW 104 (2004).

6. *Id.* at 110 citing Letter of Secretary of State Daniel Webster to Special Minister Ashburton (Apr. 24, 1841), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm#web2> (last visited Mar. 17, 2007).

it did not authorize the blockade. Even states that opposed the blockade did not denounce it. This was the beginning of a much more elastic concept of imminence and necessity than that set by the *Caroline* test.

With one exception, I will not review the actions of Israel, because they are taken in a context that is *sui generis*. But one action is noteworthy because of the broad principle it established. This was the 1976 Israeli Rescue in Entebbe, Uganda. An Air France plane was hijacked and forced to land in Entebbe. The hijackers demanded the release of pro-Palestinian terrorists, and threatened to kill the hostages. Idi Amin, dictator of Uganda, did nothing.

Israeli commandos landed, stormed the plane, and killed the hijackers. Israel claimed that international law allowed it to use force to protect its nationals in another state, if the government in that state was unwilling or unable to do so. There was a draft U.N. resolution condemning the violation of Uganda's territorial integrity, and requiring Israel to pay compensation for damages, but the Security Council never voted on it.

This decisively extended the right of self-defense to include the protection of nationals abroad. For example, even France has used force for this purpose at least five times.⁷

In 1986, the United States responded to a series of terrorist attacks by bombing specific targets in Libya's command and control structure. The United States claimed it was acting in anticipatory self-defense against future attacks, consistent with Article 51.⁸ The U.S. bombers flew over British airspace, which I remember vividly, because I was taking depositions in London at the time. There were security concerns throughout London for weeks. The United States, Great Britain, France, Australia and Denmark vetoed a proposed Security Council condemnation.

This was clearly a paradigm shift in state thinking. Past attacks were used as evidence of the likelihood of future attacks. There is no reason why intelligence reports would not have served the same purpose.

In 1993, in response to compelling evidence that Iraq attempted to assassinate George H.W. Bush, cruise missiles were fired at Iraq's Intelligence Service Headquarters. The United States—and this was President Clinton—again relied on Article 51, even though the response was two months after the assassination attempt. Germany and Japan expressed support. The Arab League expressed “extreme regret,” but the Security Council rejected Iraq's plea for a condemnation. The General Assembly took no action.

One could argue that this extended the right of self-defense to the period following an attempted attack on nationals.

7. MICHAEL BYERS, *WAR LAW* 58 (Grove Press 2005) (2005).

8. Letter to the Speaker of the House and the President Pro Tempore of the Senate, 1 PUB. PAPERS 499 (Apr. 16, 1986).

In 1998, terrorists bombed U.S. embassies in Kenya and Tanzania. The United States fired cruise missiles on six terrorist training camps in Afghanistan, and a facility in Sudan believed to be used to produce chemical weapons. President Clinton expressly invoked Article 51, saying that “[t]hese strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.”⁹ Great Britain, France and Germany were all consulted before the strikes, and all agreed. Each made concurring public statements. A few states denounced the strikes, but most remained silent. The Security Council took no formal action, nor did the General Assembly.

This was another important development, arguably supporting the use of force against states that harbor or otherwise enable terrorists.

2001 Afghanistan: Following 9/11, a Security Council Resolution recognized the inherent right of self-defense in accordance with the U.N. Charter. Troops were deployed against the Taliban in Afghanistan by twenty-seven states. This time, the use of force extended to Regime Change, and it decisively extended the right of self-defense to include force against countries that provide a safe haven for terrorist groups that have already struck.

2003 Iraq: I don’t want to make this about Iraq, certainly not in this room. But I will note that even though Canada, France and Germany opposed the war, they left their airspace open to U.S. military aircraft. The coalition included thirty-three states. (Compare this to the coalition in the Korean War, which included only sixteen states.) And as controversial as this was, it cannot be said that it found no support in past state practice.

So that’s the history. Let’s compare it to the theory.

The conventional wisdom makes a distinction between two kinds of self-defense: pre-emptive, which is intended to stop an imminent attack; and preventive, which is intended to stop a possible attack. The first is permissible, but the second is not, because of the lack of temporal imminence, or at least that’s the argument.

But in practice, states have not focused on temporal imminence. Rather, they focus on:

- 1) The protection of nationals;
- 2) The probability of an attack;
- 3) The magnitude of potential harm;
- 4) The need to disrupt terrorist planning and activities; and
- 5) The need to eliminate safe havens.

9. Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464 (Aug. 21, 1998).

Of these, probability is the most difficult to assess, because that assessment must, by necessity, be based on imperfect information concerning capability and intent.

In the real world, states have acted in ways that can only seriously be understood as preventive self-defense. There has been no definitive rejection of these actions, so a substantial argument can be made that there is no current controlling norm prohibiting preventive self-defense.

Let me anticipate some questions that you may have. First, Article 51 recognizes the inherent right of self-defense, as of the time of the Charter. But can the Charter be modified by subsequent state practice? There are several arguments that it can. First, any "inherent" right must by definition be applied on a fact-specific, case-by-case basis, with no bright lines, and will inevitably evolve over time. Next is the doctrine of desuetude, which recognizes that treaties may become ineffective as a result of non-observance. A third argument is that the circumstances in place at the time the U.N. Charter was drafted do not exist. For example:

- 1) The intended safeguard against unlawful threats of force, which was a muscular Security Council, with an enforcement apparatus, never materialized;
- 2) Modern methods of intelligence collection make it unnecessary to wait for an actual attack in order to make a good guess about hostile intent;
- 3) WMD can make the first blow devastating; and
- 4) Terrorist organizations of global reach were simply unknown when the Charter was drafted.¹⁰

Even the venerable Professor Franck has argued that, like any foundational instrument, over time the Charter has been construed to conform to evolving state practice. He has written that the emergence of the threat of global terrorism, especially combined with the development of weapons of mass destruction by rogue states, has made it imperative that there be changes in the way the Charter is construed.¹¹

Finally, and most importantly, it simply makes no sense to call something a rule of law, in a consent-based system of international law, when states do not follow it.

As an example of how these dynamics have worked in another context, let's look at the use of force for humanitarian intervention, as reflected in the

10. See Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, THE WEEKLY STANDARD, Jan. 28, 2002, at 24.

11. Thomas M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INT'L & COMP. L. REV. 425, 432 (2003-2004).

1999 Bombings of Kosovo, Serbia and Montenegro. Any legal justification for the bombings has to be based on a theory outside the U.N. Charter. The bombings never received Security Council authorization. Yet nineteen NATO democracies, representing 780 million people, participated.

The United States refused to provide any legal justification. Reportedly, when British Foreign Secretary Cook told U.S. Secretary of State Albright of problems “with our lawyers,” she told him to “get new lawyers.”¹² Ultimately, many liberal internationalists argued that state practice can amend the U.N. Charter.

To anticipate a second question, since there have been at least some objections to the state actions I’ve described, is there really a customary norm? The response is that you just cannot realistically expect unanimity. Even in the academic formulation, interim rules become customary international law once a large enough number of states having an interest in them act in accordance with them. I once asked Balthazar Garzon, the Spanish prosecutor who leads the world in successful terrorist prosecutions, how he did that, in the absence of agreement on the definition of terrorism. We were working through interpreters, but as best as I can tell, his answer came down to “customary international law.” He said: “[t]here will always be differences, but all custom exists in that eighty percent of commonality among nations.” To which I might add, the commonality among nations that actually use force, because for the others, the issues are truly academic.

Since 9/11, the United States has made it an official policy to recognize the realities of state practice by announcing an “emerging threat” standard. The attack need not be imminent, or even overtly threatened, but merely expected. *The National Security Strategies* of September 2002¹³ and March 2006¹⁴ set forth the rationale. In essence, they say that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries . . .”¹⁵ and “[t]he 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.”¹⁶

This position has been heavily criticized, but I would suggest that it actually breaks little, if any, new ground. It is merely an adaptation of the existing rules as applied in practice.

12. BYERS, *supra* note 7, at 47.

13. George W. Bush, *Prevent our Enemies from Threatening us, our Allies, and our Friends with Weapons of Mass Destruction* (June 1, 2002) in *The National Security Strategy of the United States of America*, Sept. 2002, at 14–16, available at www.whitehouse.gov/nsc/nssall.html (last visited Feb. 7, 2007).

14. See George W. Bush, *The National Security Strategy of the United States of America*, Mar. 2006, available at www.whitehouse.gov/nsc/nss/2006 (last visited Feb. 7, 2007).

15. Bush, *supra* note 13, at 15.

16. Bush, *supra* note 14, at 18.

Where I come out is that there is at least implicit agreement to the standard, as I've described it. The disagreements come from the application of the standard to particular facts and circumstances, especially in the weighing of the magnitude of potential harm and the probability of attack. And in a given case, reasonable minds might indeed differ.

But one thing is clear: the "imminence" standard is meaningless as against terrorists. Preparation is covert. There are no clear indications of when an attack is about to occur. There are no troop movements, only individuals with backpacks. At best, there is only imperfect and sometimes contradictory intelligence.

In today's world, the *Caroline* standard makes no sense. Is there anyone in this room who wants the government to wait to save New York until the danger is "instant, overwhelming, leaving no choice of means and no moment for deliberation?" At times—and we will not all agree on precisely when—this will involve a preventive attack on an intentional or unintentional host state.