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### Anticipatory action in self-defence: The law of self-defence - past, presence and future

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## 9 Self-defence and weapons of mass destruction

### 9.1 Introduction

Arguably the most important development of twentieth century warfare was the creation of the atomic bomb and the development of nuclear weapons. After the 1945 bombing of Hiroshima and Nagasaki, both the United States and the USSR entered into a (nuclear) arms race that saw the development of the thermonuclear (hydrogen) bomb, long-range bombers and ballistic missiles. The global dimension of the arms race was increased by the emergence of other nuclear weapon states (Britain in 1952, France in 1960 and China in 1964).<sup>1</sup> Despite the adoption of the Nuclear Non-Proliferation Treaty in 1970, several other states are known to have developed nuclear weapons (such as Israel, India and Pakistan) and others have invested considerable effort in doing so (North Korea, Iraq).<sup>2</sup>

As a consequence of the ongoing arms race, the fear that one side would have sufficient weapons of sufficient accuracy to destroy the other side's nuclear arsenal became mutual between the US and the USSR during the Cold War. The objective for both sides was to prevent the other acquiring a position of meaningful superiority.<sup>3</sup> Part and parcel of this objective were the theory of deterrence and the principle of mutually assured destruction (MAD). The central concern of the former was to dissuade the other side from undertaking an attack.<sup>4</sup> The gist of the latter was that each side would have the capacity to destroy the other after being attacked.<sup>5</sup> These two theories intrinsically connected the use of force to the issue of nuclear weapons. Despite this, states have been very cautious in resorting to force in crises connected to such weapons. The threat posed by nuclear weapons was later coupled with the dangers created by chemical and biological weapons. This way, one of the main security themes of the post-Charter era was the tackling of conflict which could involve the use of weapons of mass destruction (WMD).

The aim of this chapter is to examine those conflicts of the twentieth and twenty-first centuries that involved the threat posed by such weapons and in which claims of self-defence were contemplated or used. The aim of this chapter is to examine the temporal dimension of self-defence as interpreted by the state practice involving WMD. The specific cases will be tested against the variables identified in the introductory remarks of Part II. Accordingly, each instance of state practice will be analysed on the basis of necessity (the conditionality of an armed attack and immediacy) as well as proportionality. There were two instances during the twentieth century and one instance

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<sup>1</sup> Baylis and Smith, p. 85.

<sup>2</sup> Ibid., pp. 85-86.

<sup>3</sup> Ibid., p. 86.

<sup>4</sup> Ibid., p. 322; G.T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston, Little, Brown 1971) pp. 98-99. Structural realist approach: K.N. Waltz, 'Nuclear Myths and Political Realities', 84 *American Political Science Review* (1990) pp. 732-736. For a social constructivist discussion of nuclear deterrence in general, see N. Tannenwald, 'The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use', 53 *International Organization* (1999) pp. 433-468; T. Farrell and H. Lambert, 'Courting Controversy: International Law, National Norms and American Nuclear Use', 27 *Review of International Studies* (2001) pp. 309-326.

<sup>5</sup> Baylis and Smith, p. 86; Waltz, pp. 732-733; Farrell and Lambert, pp. 321-322.

during the twenty-first century when self-defence against the threat posed by WMD was contemplated. During the Cuban missile crisis, the emplacement of Soviet nuclear missiles in Cuba was met without resort to self-defence, although such an option was considered at some point. In the other two instances, the perceived threat of WMD led to armed action. Israel justified the 1981 bombing of the Osirak reactor as self-defence, whereas in 2003 the US claimed, *inter alia*, self-defence against the threat posed by alleged Iraqi possession of nuclear weapons.

None of these cases involved an actual attack or the imminent threat thereof. Nevertheless, their analysis is necessary in order to assess the validity of a claim of self-defence against *possession* and *development* of nuclear weapons. This analysis is very pertinent for the temporal dimension of self-defence, because it involves resort to defensive action well before an imminent threat of an armed attack is perceived.

## 9.2 The Cuban Missile Crisis (1962)

Soviet arms shipment to Cuba was not a novelty by 1962, but the United States government believed that such a build-up was confined to defensive systems.<sup>6</sup> The shipments had been discontinued in early 1962, but were resumed in July that year, after Raul Castro and other representatives of the Cuban government met with the Soviet Premier in Moscow and discussed a detailed plan for the deployment of Russian missiles in Cuba.<sup>7</sup> In particular, around 15 July 1962, Soviet cargo ships began moving out of the Black Sea for Cuba. Aerial reconnaissance showed that they were ‘riding high in the water,’ meaning that the vessels carried unusually light cargo, typically a sign that military equipment was being transported.<sup>8</sup> The first clear sign that Soviet missiles were being transported to Cuba came in August 1962, when US surveillance flights discovered the presence of Soviet surface-to-air missile (SAM) batteries in several locations in Cuba.<sup>9</sup> The director at that time of the Central Intelligence Agency (CIA), John McCone, assumed that such sites were potentially guarding valuable military equipment.<sup>10</sup> Clear evidence of the veracity of that assumption came on 14 October, when a U-2 aircraft photographed Soviet medium-range ballistic missile (MRBM) sites under construction around the island.<sup>11</sup> Three days later, US intelligence found out that intermediate-range ballistic missile (IRBM) sites were under construction as well.<sup>12</sup> While the construction of the MRBM sites was expected to be finished in one week’s time, the finalization of the IRBM sites was calculated for December 1962. The MRBMs had ranges up to 1100 nautical miles, whereas the range of the IRBMs was up to 2200 nautical miles.<sup>13</sup> Both missile types could reach targets beyond the eastern seaboard and deep in the United

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<sup>6</sup> A. Chayes, *The Cuban Missile Crisis* (London, Oxford University Press 1974) p. 8.

<sup>7</sup> Chayes 1974, p. 8; R.L. Garthoff, ‘Cuban Missile Crisis: The Soviet Story’, 72 *Foreign Policy* (1988) p. 67.

<sup>8</sup> ‘The Cuban Missile Crisis: A Chronology of Events’, in L. Chang and P. Kornbluh, eds., *The Cuban Missile Crisis 1962, A National Security Archive Documents Reader* (New York, The New Press 1992) p. 352.

<sup>9</sup> Chang and Kornbluh 1992, p. 353.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, p. 358; Mueller et al., pp. 172-173.

<sup>12</sup> Chang and Kornbluh, 1992, p. 361.

<sup>13</sup> Allison, p. 104.

States.<sup>14</sup> By 21 October, the inventory prepared by US intelligence showed that the Soviet arms build-up included 42 MRBMs, 12 IRBMs, 42 IL-28 jet light bombers, 144 SAM launchers, thirty-nine MIG-21 jet fighters and 22,000 Soviet troops for the construction, operation and defence of these weapons.<sup>15</sup>

Several reasons were advanced by contemporary commentators to explain the Soviet build-up in Cuba.<sup>16</sup> The most widely accepted explanation was that the USSR was attempting to change the balance of power by altering the unfavourable strategic environment in which it found itself at the time.<sup>17</sup> The USSR wanted to achieve missile power parity by doubling the Soviet missile capability against the US and by counterbalancing the presence of US missiles in Turkey.<sup>18</sup> Although American strategic superiority was not altered by the Soviet move, attacks from Cuba would have outflanked the US Ballistic Missile Early Warning System (BMEWS).<sup>19</sup>

Despite the fact that the Soviet build-up created a highly undesirable situation for the United States, at no time was there an imminent threat of a nuclear attack from the Soviet side. Nonetheless, two of the options considered by the president and the executive committee involved the use of force.<sup>20</sup> Several members of the committee proposed airstrikes against Cuba, either in the form of limited ('surgical') strikes against the relevant sites or a large air campaign against a multitude of targets. Moreover, a general ground invasion of Cuba was also considered.<sup>21</sup> The options of remaining passive or relying on diplomatic exchanges were also put forward.<sup>22</sup> All these options were, however, excluded. Apart from constituting costly and highly dangerous measures that could easily lead to devastating retaliation, airstrikes were also seen as difficult to justify to other states and the UN on behalf of a law-abiding US.<sup>23</sup>

As Abram Chayes, then Legal Adviser to the State Department noted, the central difficulty with justifying direct use of force as self-defence was that it seemed to create a very dangerous form of legal justification. Chayes explained that although the phrase 'armed attack' had to be construed broadly enough to permit some anticipatory response, the particularities of the Cuban crisis would have required an exaggeratedly expansive view on the issue. Anticipatory response could not be expanded 'to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome.'<sup>24</sup> Chayes believed that to accept such an interpretation would have meant to make forceful response subject to unilateral national discretion. It would have also signalled that the US did not take the legal issues very seriously and values other than law would have been chiefly relied on as justification for action.<sup>25</sup>

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<sup>14</sup> Mueller et al., p.175; SCOR, 17<sup>th</sup> Sess., 1022<sup>nd</sup> mtg., UN Doc. S/PV.1022(OR) (23 October 1962) paras. 13, 71.

<sup>15</sup> Chang and Kornbluh 1992, p. 364; Chayes 1974, p. 8.

<sup>16</sup> For an overview of these hypotheses, see Allison, pp. 43-56.

<sup>17</sup> *Ibid.*, pp. 50-56.

<sup>18</sup> *Ibid.*, p. 54; Mueller et al., p. 174.

<sup>19</sup> Allison, p. 54.

<sup>20</sup> *Ibid.*, pp. 58-61. For a composition of the Executive Committee, see Chayes 1974, pp. 13-14.

<sup>21</sup> Allison, pp. 59-60; Mueller et al., pp.176-177.

<sup>22</sup> Allison, pp. 58-59; Mueller et al., pp.176-177.

<sup>23</sup> Chayes 1974, p. 65; Mueller et al., pp.176-177.

<sup>24</sup> Chayes 1974, p. 65.

<sup>25</sup> *Ibid.*, pp. 65-66.

The final decision was to impose a naval quarantine against Cuba.<sup>26</sup> That measure was communicated to the Security Council as well. The US requested an urgent meeting of the Security Council to ‘deal with the dangerous threat to the peace and security of the world caused by the secret establishment in Cuba by the Union of Soviet Socialist Republics of launching bases and the installation of long-range ballistic missiles capable of carrying thermonuclear warheads to most of North and South America.’<sup>27</sup> The US invoked Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty)<sup>28</sup> and signalled its reliance on the institution of regional arrangements provided by Articles 52 and 53 of the UN Charter.<sup>29</sup> On that basis, the US announced that it was initiating a ‘strict quarantine of Cuba to interdict the carriage of offensive weapons to that country.’<sup>30</sup>

Cuba riposted to the naval quarantine and characterised the American action as ‘an act of war’, a ‘unilateral and direct aggression’ that created an ‘imminent danger of war.’<sup>31</sup> The Soviet Union also characterized the quarantine as an unlawful naval blockade aimed at interfering in the internal affairs of Cuba to pursue aggressive American aims.<sup>32</sup> The USSR further contended that all weapons in its possession were serving ‘the purposes of defence against aggressors’ and that the assistance given to Cuba was ‘exclusively designed to improve Cuba’s defensive capacity.’<sup>33</sup>

The Security Council did not adopt any resolution given the obvious and insurmountable deadlock between two of its permanent members. The Council of the Organization of American States (OAS) did, however, adopt a resolution on 23 October 1962 in which it recommended that the member states ‘take all measures, individually or collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the

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<sup>26</sup> Chang and Kornbluh 1992, pp. 364-365.

<sup>27</sup> Letter dated 22 October 1962 from the Representative of the United States of America addressed to the President of the Security Council, UN Doc. S/5181 (1962).

<sup>28</sup> The Inter-American Treaty of Reciprocal Assistance (commonly known as the Rio Treaty) was signed in 1947 between several American countries, including the US. The declared purpose of the Treaty was ‘to provide for effective reciprocal assistance to meet armed attacks against any American State, and in order to deal with threats of aggression against any of them’ (preamble). According to Art. 6 of the Rio Treaty, in the event of an aggression, extra- or intra-continental conflict or other situation not amounting to an armed attack that affected the inviolability, territorial integrity, sovereignty or political independence of any American State, the Organ of Consultation had to meet up and discuss necessary measures. Art. 8 of the Rio Treaty offered a list of measures that could be taken by the Organ of Consultation: ‘recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force.’

<sup>29</sup> Letter dated 22 October 1962 from the Representative of the United States of America addressed to the President of the Security Council, UN Doc. S/5181 (1962); Chayes 1974, pp. 16, 20.

<sup>30</sup> Letter dated 22 October 1962 from the Representative of the United States of America addressed to the President of the Security Council, UN Doc. S/5181 (1962).

<sup>31</sup> Letter dated 22 October 1962 from the Representative of Cuba addressed to the President of the Security Council, UN Doc. S/5183 (1962).

<sup>32</sup> Letter dated 23 October 1962 from the Representative of the Union of Soviet Socialist Republics addressed to the President of the Security Council, UN Doc. S/5186 (1962).

<sup>33</sup> *Ibid.*

Continent and to prevent the missiles in Cuba from ever becoming an active threat to the peace and security of the Continent.<sup>34</sup>

The decision to refrain from other measures proved to be successful. On 23 October an exchange of correspondence between Kennedy and Khrushchev ensued, which resulted in sixteen Soviet ships being returned from Cuba the next day.<sup>35</sup> On 26 October, the Soviet premier offered to withdraw missiles if the US pledged not to invade Cuba and to remove its missiles from Turkey. The next day, US President Kennedy publicly agreed not to invade Cuba and privately pledged to initiate the removal of missiles from Turkey.<sup>36</sup> From that point onwards, the pressure slowly started to drop. Evidence of that is the very cool-headed reaction of the US administration to the news of Soviet air defences being triggered by an American U-2 crossing into Russian air space, a SAM shooting down another U-2 aircraft over Cuba and US F-8 Crusaders taking antiaircraft fire when flying over the island.<sup>37</sup>

The Cuban missile crisis unfolded because of the prospect of nuclear weapons being deployed in Cuba by the Soviet Union. There was no threat of an imminent nuclear attack, but for the United States the presence or deployment of nuclear weapons in Cuba was a serious concern. Although several policy options were discussed, the US president decided to rely on the effects of a naval quarantine rather than resort to armed action in self-defence.

Several commentators analysed the US quarantine under Article 51 of the Charter.<sup>38</sup> A number of authors found that the quarantine could have been justified under the law of self-defence if 'traditional general community expectations' were considered.<sup>39</sup> Others asserted that the naval quarantine could not be justified as a measure of self-defence under Article 51, because it constituted a veritable naval *blockade*, which amounted to a resort to armed force without a prior armed attack taking place.<sup>40</sup> Both groups of authors relied on the assumption that the naval quarantine was tantamount to a naval blockade and that it amounted in some way to the use of force.<sup>41</sup> Then Deputy Legal Adviser to the US Department of State, Leonard Meeker explained, however, that the naval quarantine was not synonymous to a naval blockade and that it relied on provisions relating to regional arrangements rather than those connected to the use of force.<sup>42</sup> Accordingly, Meeker specified that the US naval quarantine was a lawful measure adopted by a regional organization in conformity with the provisions of the Rio Treaty and thus Chapter VIII of the UN Charter.<sup>43</sup> Although the quarantine relied on the use of naval

<sup>34</sup> Chayes 1974, p. 88; Q. Wright, 'The Cuban Quarantine', 57 *American Journal of International Law* (1963) p. 558.

<sup>35</sup> Mueller et al., pp. 174, 179.

<sup>36</sup> Chang and Kornbluh 1992, pp. 377-380; Mueller et al., p. 180.

<sup>37</sup> Mueller et al., p. 180; Allison, pp. 106.

<sup>38</sup> J.S. Campbell, 'The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position', 16 *Stanford Law Review* (1963) pp. 160-176; M.S. McDougal, 'The Soviet-Cuban Quarantine and Self-Defense', 57 *American Journal of International Law* (1963) pp. 597-604; L.C. Meeker, 'Defensive Quarantine and the Law', 57 *American Journal of International Law* (1963) pp. 515-524; Wright 1963, pp. 546-565.

<sup>39</sup> McDougal, p. 603; Campbell 1963, p.176.

<sup>40</sup> Wright 1963, pp. 554-557, 559-563; Dinstein 2005, p. 186; Alexandrov, pp. 156-157.

<sup>41</sup> McDougal, p. 603; Campbell 1963, p. 160; Wright 1963, pp. 554-556.

<sup>42</sup> Meeker, pp. 515-516, 523-524.

<sup>43</sup> *Ibid.*, pp. 523-524.

force, it was a proportionate measure with a very clearly outlined objective and designed solely to prevent further build-up of strategic missile bases in Cuba.<sup>44</sup>

Despite the ‘eyeball-to-eyeball’ stance of the two sides in the Cuban missile crisis, the deployment of nuclear missiles was never perceived as an imminent threat of a nuclear attack that created a present and inevitable necessity to act pre-emptively in self-defence. As Chayes explained, anticipatory action in self-defence could not be expanded ‘to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome.’<sup>45</sup> In other words, the necessity requirement of self-defence was not met, because there was neither an imminent threat of an armed attack nor a present and inevitable necessity to ward the attack off. The availability of (tense) diplomatic communications never disappeared. Multiple discussions and deliberations at both the executive committee level and between envoys occurred, thus there was no lack of choice of means to resolve the conflict. Moreover, launching a full-scale invasion or limited airstrikes because of the deployment of nuclear missiles in Cuba, would have exceeded the limits of proportionality of the defensive action.

### **9.3 The Israeli bombing of the Iraqi reactor (1981)**

By the beginning of the 1980s, the number of nuclear states had grown to include several other states that either had developed (openly or covertly) nuclear weapons or were on their way to do so. Israel was suspected to belong to the first category, whereas Iraq was believed to pertain to the latter.<sup>46</sup>

Starting with the 1970s, the Iraqi President, Saddam Hussein embarked on an ambitious plan to develop nuclear weapons. Osirak, the nuclear reactor near Baghdad, was used by the Iraqi government to produce the fissile material for the future weapons.<sup>47</sup> According to Israeli intelligence, by July or September 1981, the Osirak reactor was to be fully fuelled and operational.<sup>48</sup> After that time, an attack on the reactor would have caused extensive civilian damage, because of the release of large amounts of nuclear fallout.<sup>49</sup> Such a consequence would have resulted in serious repercussions for Israel on an international level.<sup>50</sup>

The threat perceived by the Israelis was connected to the reasons why Iraq was developing nuclear weapons and to Saddam Hussein’s attitude towards Israel. Accordingly, the Israelis feared that, once in possession of a nuclear weapon, the Iraqi president would undoubtedly decide to use it against Israel and that retaliatory damage to the population of his own country would not deter him.<sup>51</sup> As grave as the threat sounded, there was no sign whatsoever of it being more than a mere possibility. Israeli intelligence did not acquire any sort of information that would suggest that Saddam Hussein had a

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<sup>44</sup> Ibid., p. 524. Also see Franck 2002, pp. 99-100.

<sup>45</sup> Chayes 1974, p. 65.

<sup>46</sup> Baylis and Smith, p. 86.

<sup>47</sup> Mueller et al., p. 212.

<sup>48</sup> Letter dated 8 June 1981 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc. S/14510 (1981).

<sup>49</sup> Ibid.

<sup>50</sup> Mueller et al., pp. 212, 214; Gill 2007, p. 140.

<sup>51</sup> Mueller et al., p. 213.

plan of attack.<sup>52</sup> The circumstances were similar to the Cuban crisis inasmuch as the danger of *possessing* nuclear weapons was the threat and not the imminent possibility of *using* them. Nonetheless, the situation differed from the Cuban precedent in that Iraq was far from possessing such weapons. Israeli intelligence estimated that a crude nuclear device was to be finalized by 1985, thus four years away from even considering the imminence of an attack.<sup>53</sup>

Nonetheless, the Israelis decided to carry out a surgical strike on the reactor.<sup>54</sup> On 6 June 1981, eight fighter-bombers (F-16A) and six fighters (F-15A) flew across Jordanian and Saudi airspace and into Iraqi airspace at low level (to avoid detection), struck the target and returned to base without loss. The reactor was destroyed and ten people were killed.<sup>55</sup>

International reaction was negative, although Israel tried to justify its action as self-defence.<sup>56</sup> Before the Security Council, several states expressed their criticism as to the Israeli action.<sup>57</sup> Some representatives asserted that the Israeli action went well beyond the limits of pre-emptive or anticipatory defensive action against an imminent attack, without rejecting the legality of such options *per se*.<sup>58</sup> The Israeli airstrike was also coined as ‘preventive war’ the legality of which was seen as abolished by the Charter.<sup>59</sup> The Ugandan representative expressly referred to the *Caroline* incident and emphasized that ‘the mere fact of having a nuclear research centre’ could not, in any way, satisfy the requirements of the Webster-formula.<sup>60</sup> The Security Council unanimously adopted a resolution that condemned the Israeli action and found it to be in clear violation of the Charter and the norms of international conduct.<sup>61</sup>

The bombing of the Iraqi reactor further expanded the question whether the mere possession of nuclear weapons could legitimize the use of force. Iraq did not even possess a nuclear weapon at that time; it was – arguably – in the process of building one. The feasibility of a potential nuclear attack on Israel was never thoroughly explored, because Israel, just like the US in 1962, was concerned by the fact of *possession*, before any questions of actual use might have been raised. The airstrikes were carried out in order to prevent the reactor from ever delivering a nuclear bomb. They thus amounted to a veritable preventive action against a threat not materialized and far from imminent.

Several commentators pointed out that the bombing did not fulfil the conditions of anticipatory or pre-emptive self-defence.<sup>62</sup> The more important question is, however, whether the airstrike fulfilled any of the conditions – necessity and proportionality – of

<sup>52</sup> Franck 2002, p. 106; Gill 2007, p. 141.

<sup>53</sup> Mueller et al., p. 212.

<sup>54</sup> Gill 2007, p. 141.

<sup>55</sup> Mueller et al., p. 213.

<sup>56</sup> SCOR, 36<sup>th</sup> Sess., 2280<sup>th</sup> mtg., UN Doc. S/PV.2280 (12 June 1981) para. 58.

<sup>57</sup> Ibid., 2280<sup>th</sup>–2288<sup>th</sup> mtg., UN Doc. S/PV.2280–S/PV.2288 (12–19 June 1981).

<sup>58</sup> SCOR, 36<sup>th</sup> Sess., 2282<sup>nd</sup> mtg., UN Doc. S/PV.2282 (15 June 1981) paras. 14–19; 2283<sup>rd</sup> mtg., S/PV.2283 (15 June 1981) paras. 23–27; 2284<sup>th</sup> mtg., S/PV.2284 (16 June 1981) para. 11.

<sup>59</sup> SCOR, 36<sup>th</sup> Sess., 2283<sup>rd</sup> mtg., UN Doc. S/PV.2283 (15 June 1981) paras. 46, 117, 146; 2288<sup>th</sup> mtg., S/PV.2288 (19 June 1981) para. 115. In one instance, the concepts of ‘anticipation’ and ‘preventive aggression’ were equated and deemed unlawful: 2283<sup>rd</sup> mtg., S/PV.2283 (15 June 1981) para. 146 (Sierra Leone).

<sup>60</sup> SCOR, 36<sup>th</sup> Sess., 2282<sup>nd</sup> mtg., UN Doc. S/PV.2282 (15 June 1981) paras. 14–19.

<sup>61</sup> SC Res. 487 (1981) para. 1.

<sup>62</sup> Alexandrov, p. 162; Franck 2002, pp. 105–106; Gill 2007, pp. 141–142; Greenwood 2003, p. 14.

the right of self-defence *per se*. There was no imminent threat of a nuclear attack by Iraq, thus there was no *present* need to act. Without that element of emergency, as grave the security concerns of Israel might have been, there was no clear proof that in the foreseeable future other means to address the problem might not have become available. Thus there was no clear proof that the need to act was also *inevitable*. Without a present and inevitable need to act, the immediacy element of necessity was clearly missing.<sup>63</sup> In other words, even if the gravity of the danger was perceived as raising serious concerns, action in self-defence could not be justified solely on the eventuality of an attack. The immediacy element also had to be present. Although the Israeli airstrikes were carried out in a surgical manner, not exceeding the force needed to destroy the reactor, such an action could not be regarded proportionate in self-defence, because the danger it was warding off lied not in the imminent use of force, but in the development and future possession of nuclear weapons.

Even though, with the benefit of hindsight, one might realize that had Israel not struck in 1981, the reversal of Iraq's invasion of Kuwait a decade later might have been impossible, the legality of the use of force has to be assessed on the basis of the information available at the time of the forceful response interpreted in good faith by the targeted state.<sup>64</sup>

Consequently, on the basis of the information available in 1981, the Israeli airstrike resembled rather an instance of preventive use of force, which sought to prevent the mere possibility of a future threat (however great that could be) and to strengthen a certain security balance in favour of the attacker.

#### 9.4 The Nuclear Weapons Advisory Opinion (1996)

The relationship between the rules regarding the use of force and nuclear weapons was explored by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>65</sup> Although this is not an instance of state practice, it is important to discuss it as part of Chapter 9, because it addresses many issues regarding the use of self-defence against nuclear weapons. It also sheds light on the way the Court viewed the threat posed by such weapons.

Before addressing the legality of the threat or use of nuclear weapons under *jus ad bellum* and *jus in bello*, the Court noted that the nature of such weapons rendered them 'potentially catastrophic'.<sup>66</sup> The Court went on to specify that the provisions of the Charter relating to the threat or use of force did not refer to specific weapons. Nevertheless, 'a weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.'<sup>67</sup>

Concerning *jus ad bellum*, the Court found no rule in international customary or treaty law that would expressly authorize or prohibit the threat or use of nuclear weapons

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<sup>63</sup> Franck 2002, p. 106.

<sup>64</sup> *Ibid.*, p. 107; Gill 2007, p. 141.

<sup>65</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. (1996) p. 226 (hereafter, *Nuclear Weapons*).

<sup>66</sup> *Ibid.*, para. 35.

<sup>67</sup> *Ibid.*, para. 39.

as such. The use of nuclear weapons was found to be unlawful if it was contrary to Article 2(4) of the Charter and if it failed to meet all the requirements of Article 51.<sup>68</sup> Regarding the threat to use nuclear weapons, the Court found it enough to only specify that if the envisaged use of force was itself unlawful according to the provisions of the Charter, then the stated readiness to use it would also be considered a threat prohibited by Article 2(4).<sup>69</sup>

The advisory opinion also addressed the question of the legality of possession of nuclear weapons. First, the Court admitted that possession of nuclear weapons could justify an inference of preparedness to use them. Nonetheless, an effective policy of deterrence had to discourage military aggression and thus necessitated that the intention to use nuclear weapons be credible.<sup>70</sup> Secondly, the Court contended that such a possession could only be rendered an unlawful threat under Article 2(4) if ‘the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality.’<sup>71</sup>

In connection with the right of self-defence, the opinion discussed the relevance of the principle of proportionality for the threat or use of nuclear weapons. The Court contended that the proportionality principle could not in itself exclude the use of nuclear weapons in self-defence in all circumstances.<sup>72</sup> That statement was found to be correct by Matheson, who argued that the judgment of proportionality could not be made in the abstract for all possible uses of nuclear weapons, without knowing the circumstances of the particular case.<sup>73</sup> At the same time, the Court noted that a use of force that was proportionate under the law of self-defence had to, in order to be lawful, also meet the requirements of international humanitarian law.<sup>74</sup> The claim of certain states that the extremely strong risk of devastation that nuclear weapons posed rendered the compliance with the principle of proportionality impossible *per se* was thus not upheld. The Court only asserted, rather vaguely, that ‘the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by states believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.’<sup>75</sup>

Regarding *jus in bello*, it was held that the threat or use of nuclear weapons ‘would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of international humanitarian law.’<sup>76</sup> Nonetheless, the Court emphasized that it could not lose sight of the fundamental right of every state to survival, and thus the right to resort to self-defence, in accordance with Article 51 of the

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<sup>68</sup> *Ibid.*, para. 105 (C).

<sup>69</sup> *Ibid.*, para. 47.

<sup>70</sup> *Ibid.*, para. 48.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, para. 42.

<sup>73</sup> M.J. Matheson, ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons’, 91 *American Journal of International Law* (1997) p. 424.

<sup>74</sup> *Nuclear Weapons*, ICJ Rep. (1996) para. 42.

<sup>75</sup> *Ibid.*, para. 43.

<sup>76</sup> *Ibid.*, paras. 53-95 (discussion of the international law applicable in armed conflict), and 105 (E).

Charter, 'when its survival is at stake.'<sup>77</sup> The Court thus held that it could not conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence.<sup>78</sup>

This conclusion was criticized by a number of publicists.<sup>79</sup> Even some of the judges chose to distance themselves from this particular finding.<sup>80</sup> Judge Higgins regretted the vague formulation of rendering nuclear weapons 'generally' to be 'contrary to the rules of international law applicable in armed conflict.'<sup>81</sup> More importantly, Judge Higgins criticized the formula used by the Court in reserving the possibility to use nuclear weapons in an extreme circumstance of self-defence. Accordingly, she asserted that through this formula the Court necessarily left open the possibility that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful.<sup>82</sup> She noted that this conclusion went beyond anything that was claimed by the nuclear weapon states appearing before the Court, who fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the *jus ad bellum* and the *jus in bello*.<sup>83</sup> Similarly, Judge Weeramantry pointed out that the same formula opened 'a window of permissibility, however narrow' in which 'a nation may seek refuge, constituting itself the sole judge in its own cause.'<sup>84</sup>

Falk lamented the Court's failure to clarify its understanding of the restrictions to be placed upon a potential self-defence argument. He pointed out the contradiction between paragraph 97, where the use of nuclear weapons by a state was discussed in case *its* survival was at stake and the *dispositif* of the opinion, where self-defence was referred to in case the survival of 'a State' was at risk.<sup>85</sup> According to Falk, the wording of the *dispositif* allowed for collective self-defence, whereas paragraph 97 did not.<sup>86</sup> Matheson disagreed and considered that the Opinion clearly permitted collective self-defence in which a nuclear weapon state used nuclear weapons to deter or defeat an armed attack that threatened the survival of an ally.<sup>87</sup>

Grief criticized the opinion for not elaborating on the 'extreme circumstances' of self-defence.<sup>88</sup> Matheson also acknowledged that the phrase 'the very survival of the state' was not specific enough, but he offered examples of state practice in which such a circumstance was present (the Korean War and the Persian Gulf War).<sup>89</sup>

<sup>77</sup> Ibid., para. 96.

<sup>78</sup> Ibid., para. 105 (E).

<sup>79</sup> R.A. Falk, 'Nuclear Weapons, International Law and the World Court: A Historic Encounter', 91 *American Journal of International Law* (1997) pp. 64-75; N. Grief, 'Legality of the Threat or Use of Nuclear Weapons', 46 *International and Comparative Law Quarterly* (1997) pp. 681-688; B.H. Weston, 'Nuclear Weapons and the World Court: Ambiguity's Consensus', 7 *Transnational Law and Contemporary Problems* (1997) pp. 383-392. For a more positive opinion, see Matheson, pp. 417-435.

<sup>80</sup> *Nuclear Weapons*, ICJ Rep. (1996) pp. 589-590 (dissenting opinion of Judge Higgins), 321-323 (dissenting opinion of Vice-President Schwebel), 376-377 (dissenting opinion of Judge Shahabuddeen), and 435 (dissenting opinion of Judge Weeramantry).

<sup>81</sup> Ibid., p. 589 (dissenting opinion of Judge Higgins).

<sup>82</sup> Ibid., p. 590.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid., p. 435 (dissenting opinion of Judge Weeramantry).

<sup>85</sup> Falk 1997, p. 68.

<sup>86</sup> Ibid.

<sup>87</sup> Matheson, p. 431.

<sup>88</sup> Grief, p. 687.

<sup>89</sup> Matheson, p. 430.

There are several important inferences to be made from the Court's advisory opinion. First of all, the judges did not assign to nuclear weapons any 'special' illegality under *jus ad bellum*. The legality of the threat or use of such weapons was said to be governed by the Charter and customary law.<sup>90</sup>

Secondly, their use in self-defence had to meet the requirements of necessity and proportionality. The content of the necessity requirement was not expressly discussed by the Court, although its reference to the 'extreme circumstance' of self-defence when the 'very survival' of a state was at risk was interpreted as restricting the exercise of self-defence to instances where attacks impinged upon the continued existence of the state.<sup>91</sup> The proportionality requirement was interpreted as intrinsically connected to the observance of the laws of armed conflict. The use of nuclear weapons in self-defence was thus proportionate only if it respected the rules of armed conflict.<sup>92</sup>

Thirdly, the possession *per se* of nuclear weapons was not unlawful. One could thus conclude that neither was the development of such weapons. The Court went as far as to acknowledge the importance of the policy of deterrence that necessitated a credible intention to use nuclear weapons. In other words, the Court acknowledged that in certain circumstances the possession and threat of nuclear weapons was important to discourage military aggression.<sup>93</sup> The possession of nuclear weapons was unlawful only if the use of force 'envisaged' was directed against the territorial integrity or political independence of a state or was contrary to the purposes of the Charter or, if intended as a means of defence, it would have exceeded the requirements of necessity and proportionality.<sup>94</sup> The Court did not specify whether this 'envisaged' use of force had to be imminent on a short or medium term. Nor did it elaborate on the options available for states to handle such a situation. Nonetheless, it would be far-fetched to conclude that by rendering possession under such circumstances unlawful, the Court permitted the use of self-defence against the possessor state. Nor could the conclusion be drawn that self-defence was permitted against a state that was developing nuclear weapons for whatever purpose.

Lastly, the Court rendered the use of nuclear weapons to be 'generally' contrary to the laws of armed conflict.<sup>95</sup> If one corroborates this conclusion with the one made on the proportionality requirement of self-defence, it can be inferred that the use of nuclear weapons in self-defence would never be proportionate, because such weapons were generally contrary to the laws of armed conflict. Nonetheless, the *dispositif* of the opinion hinted at an exception to this qualification: in cases of an 'extreme circumstance' of self-defence when the 'very survival' of a state was at risk the Court declined to decide whether the use of nuclear weapons could be lawful or not.<sup>96</sup>

The Court shied away from making any reference to pre-emptive or anticipatory action under self-defence. Nor did it discuss the temporal dimension of self-defence ('extreme' or not) in warding off a threat of a nuclear attack. The importance of the advisory opinion lies however in its restrictive view on the proportionality of the use of

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<sup>90</sup> *Nuclear Weapons*, ICJ Rep. (1996) para. 105 (C).

<sup>91</sup> Green, p. 77.

<sup>92</sup> *Nuclear Weapons*, ICJ Rep. (1996) para. 42.

<sup>93</sup> *Ibid.*, para. 48.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, para. 105 (E).

<sup>96</sup> *Ibid.*

nuclear weapons and in its conclusion that possession of nuclear weapons was not unlawful *per se*.

## 9.5 The War against Iraq (2003)

The 2003 Iraqi War (Second Gulf War) involved several complex legal arguments advanced by mainly the US and the UK. Primarily, the two governments relied on the effect of relevant Security Council resolutions calling upon Iraq to put an end to its nuclear, chemical and biological weapons programmes. Additionally, claims of self-defence against the threat of weapons of mass destruction and terrorism were also advanced by the United States. Lastly, the Iraqi invasion was also depicted as an armed intervention on humanitarian grounds.<sup>97</sup>

It is not the purpose of this book to elaborate on the claims pertaining to the effect of Security Council resolutions and humanitarian intervention. The main emphasis will be accorded to the claims of self-defence. Nonetheless, some preliminary points are necessary to be made. First, the claims of self-defence (against weapons of mass destruction and terrorism) were not as consistent and direct as the principal claim relying on SC resolutions.<sup>98</sup> Secondly, in order to put in the relevant context the claims of self-defence, a short review of relevant public statements and strategy documents will have to be conducted. Thirdly, in order to assess the sustainability of the claim of self-defence against WMD, a succinct summary of the relevant Security Council resolutions and the last-minute UN and IAEA arms inspections will have to be made.

The following paragraphs will analyse the US claims of self-defence regarding the threat of Iraqi WMD. In Chapter 10 the US claims of self-defence regarding the threat of terrorism stemming from Iraq will be discussed.<sup>99</sup>

### 9.5.1 The 2003 Iraqi War – Setting the context

In his State of Union Address on 29 January 2002, President Bush characterized Iraq as one element of the ‘axis of evil’ that seeks weapons of mass destruction and poses a grave and growing danger to the entire world.<sup>100</sup> Several months later, on 1 June 2002, the president declared in his US Military Academy speech that deterrence and containment meant nothing when ‘unbalanced dictators with weapons of mass-destruction’ could deliver such weapons on missiles or secretly provide them to ‘terrorist

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<sup>97</sup> C. Greenwood, ‘Legality of the Use of Force: Iraq in 2003’, in M. Bothe, M.E. O’Connell and N. Ronzitti, eds., *Redefining Sovereignty: The Use of Force after the Cold War* (Ardsley, N.Y., Transnational 2005) pp. 399-404; M. Ignatieff, ‘I am Iraq’, in *New York Times*, 23 March 2003, available at <[www.nytimes.com/2003/03/23/magazine/the-way-we-live-now-3-23-03-i-am-iraq.html](http://www.nytimes.com/2003/03/23/magazine/the-way-we-live-now-3-23-03-i-am-iraq.html)> (accessed 3 June 2010).

<sup>98</sup> Greenwood 2005, pp. 399-403.

<sup>99</sup> See *infra* 10.5.3.

<sup>100</sup> President George W. Bush, State of the Union Address (29 January 2002), available at <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/print/20020129-11.html>> (accessed 13 April 2010).

allies'.<sup>101</sup> Bush was thus suggesting that in a world of 'unbalanced dictators' and 'terrorist allies' the cornerstone principles of the Cold War were not valid anymore.

The new approach of the Bush administration to tackle these dangers became apparent with the publishing of the 2002 US National Security Strategy. After enunciating the obsolete nature of the Cold-War principles of deterrence and mutually assured destruction, Part V of the 2002 Security Strategy warned that 'new deadly challenges have emerged from rogue states and terrorists.'<sup>102</sup> Although none of the new dangers rivalled the threat posed in the past by the Soviet Union, the nature and motivations of the new adversaries and the greater likelihood that they could use weapons of mass destruction against American citizens, made the security environment more complex and dangerous.<sup>103</sup> Therefore, it was necessary '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.'<sup>104</sup>

The new comprehensive strategy to tackle these threats also involved a reinterpretation of existing law of self-defence. The Security Strategy openly admitted the legality of self-defence in the face of an imminent threat, but asserted that the rule was bound to be revisited given the new security concerns.<sup>105</sup>

'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 pre-emption 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.'<sup>106</sup>

The Strategy document went on to present the advantages of 'pre-emptive actions'. It is important to note at this point, however, that the document used the terms 'pre-emptive actions' and 'anticipatory action' to describe the need to *prevent* hostile acts even if uncertainty remained as to the time and the place of the attack. The Strategy document thus made a deliberate confusion between pre-emptive or anticipatory action and the preventive use of force.<sup>107</sup>

<sup>101</sup> Ibid., Graduation Speech at West Point (1 June 2002), available at <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/print/20020601-3.html>> (accessed 12 April 2010).

<sup>102</sup> The National Security Strategy of the United States of America (Washington, D.C., The White House 2002) Part V, pp. 13-16 (hereafter, US National Security Strategy 2002), available at <<http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>> (accessed 12 April 2010).

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> M.N. Schmitt, 'Preemptive Strategies in International Law', 24 *Michigan Journal of International Law* (2003) pp. 518-519.

<sup>106</sup> US National Security Strategy 2002.

<sup>107</sup> R.N. Gardner, 'Neither Bush Nor the "Jurisprudes"', 97 *American Journal of International Law* (2003) p. 587; F. Heisbourg, 'A Work in Progress: The Bush Doctrine and Its Consequences', 26 *Washington Quarterly* (No. 2, 2003) p. 77.

‘The United States has long maintained the option of pre-emptive 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 pre-emptively.

The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption 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.’<sup>108</sup>

Lastly, the Security Strategy emphasized that:

‘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.’<sup>109</sup>

The new strategy was clearly one of preventive use of force, although the terms employed (pre-emptive, anticipatory) were the ones usually used to describe armed action against an imminent threat.<sup>110</sup> The new formula became to be known among legal scholars as the ‘Bush doctrine’ and played an important role in the 2003 invasion of Iraq.<sup>111</sup>

### 9.5.2 The 2003 Iraqi War – Disarmament and Security Council resolutions

On 12 September 2002, a year after the 9/11 attacks, President Bush addressed the UN General Assembly.<sup>112</sup> In his speech, Bush warned that Iraq continued to withhold important information about its nuclear program and that it retained the physical infrastructure needed to build a nuclear weapon. If Iraq acquired fissile material, claimed Bush, it would be able to build a nuclear weapon within a year.<sup>113</sup> The US president noted that as early as 1991, Iraq had promised UN inspectors immediate and unrestricted access to verify its commitment to rid itself of weapons of mass destruction and long-range missiles. Nonetheless, Bush emphasized ‘Iraq broke this promise, spending seven years deceiving, evading, and harassing UN inspectors before ceasing cooperation entirely.’<sup>114</sup> The president then listed the occasions on which the Security Council reiterated its demands that the Iraqi regime cooperate fully with UN inspectors: twice in 1991, once in 1994, twice more in 1996 and three more times in both 1997 and 1998.<sup>115</sup> Bush also pointed out that it had been four years ‘since the last UN inspector set foot in Iraq’ and

<sup>108</sup> US National Security Strategy 2002.

<sup>109</sup> Ibid.

<sup>110</sup> Gardner 2003, p. 587; M. Sapiro, ‘Preempting Prevention: Lessons Learned’, 37 *NYU Journal of International Law and Politics* (2005) p. 366.

<sup>111</sup> Gardner 2003, pp. 585-586; C. Henderson, ‘The Bush Doctrine: From Theory to Practice’, 9 *Journal of Conflict & Security Law* (2004) p. 6.

<sup>112</sup> George W. Bush, Remarks at the United Nations General Assembly, New York (12 September 2002), available at <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html>> (accessed 13 April 2010) (hereafter, US President’s Remarks 2002).

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

that was enough time for Saddam Hussein's regime to plan, develop and test weapons of mass destruction 'under the cloak of secrecy.'<sup>116</sup> After such a powerful exposé, the US president characterized the actions of the Iraqi regime as a threat to the authority of the United Nations and a threat to peace. Therefore, if Iraq wished peace, it was obliged to: (1) disclose and remove or destroy all weapons of mass destruction; (2) end all support for terrorism and act to suppress it; and (3) cease persecution of its civilian population.<sup>117</sup> The General Assembly speech of President Bush is noteworthy for two reasons. First, it summarized the main US arguments as to the possession of nuclear (and other mass destruction) weapons by Iraq. Secondly, the three main demands made by Bush are identical to the three main claims of legality advanced expressly or implicitly by the US in justification of the invasion of Iraq. The failure to disarm and the threat of nuclear (and other mass destruction) weapons became the main US argument calling for a use of armed force. Additionally, Saddam Hussein's links to terrorist organizations and the necessity of humanitarian intervention were also employed as justifications for the war.<sup>118</sup> In the subsequent months after the president's General Assembly speech, the situation in Iraq became the focus of world attention.<sup>119</sup> European states were divided on the issue. France, Germany and Russia opposed the invasion of Iraq without further Security Council authorization. Britain, Italy, Portugal, Spain and several Central and Eastern European states expressed their support.<sup>120</sup> Most other states were opposed to the invasion.<sup>121</sup>

The Security Council adopted several resolutions dealing with Iraq before the invasion began.<sup>122</sup> Some of these resolutions dealt with the emergency of humanitarian supplies to the Iraqi people; none referred to the possibility of armed intervention on humanitarian grounds.<sup>123</sup> Resolution 1441 of November 2002 dealt with Iraq's failure in its disarmament obligations related to its weapons of mass destruction and long-range missile programs. The resolution found Iraq to be in 'material breach' of its obligations under various resolutions, including Resolution 687 (1991), in particular through its failure to cooperate with UN and IAEA inspectors.<sup>124</sup> The Security Council resolution put forward several reiterated and novel demands with which Iraq was called upon to comply.<sup>125</sup> In its last paragraph it warned Iraq that it would face serious consequences if it continued to disregard its obligations.<sup>126</sup> Although the findings and demands were made

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid. The US president made two other demands: disclosure of information about missing Gulf War personnel (from the 1990-1991 war) and end to the illicit trade outside the oil-for-food program.

<sup>118</sup> Greenwood 2005, pp. 399-404.

<sup>119</sup> R.A. Falk, 'What Future for the UN Charter System of War Prevention?', 97 *American Journal of International Law* (2003) p. 592.

<sup>120</sup> D. McGoldrick, *From "9-11" to the Iraq War 2003: International Law in an Age of Complexity* (Oxford, Hart 2004) pp. 13-15; Yoo, p. 563.

<sup>121</sup> I. Johnstone, 'Jus Ad Bellum: The Next Iraq', 11 *ILSA Journal of International and Comparative Law* (2005) p. 397; McGoldrick, p. 62.

<sup>122</sup> SC Res. 1441, 1443, 1447 and 1454 (2002).

<sup>123</sup> SC Res. 1443, 1447, 1454 (2002).

<sup>124</sup> SC Res. 1441 (2002) para. 1.

<sup>125</sup> Ibid., paras. 2-5, 8.

<sup>126</sup> Ibid., para. 13.

under Chapter VII, the Security Council made no reference whatsoever to collective enforcement actions, whether armed or not.<sup>127</sup>

Iraq agreed to comply with Resolution 1441 and re-admitted UN and IAEA inspectors in the country.<sup>128</sup> On 7 December 2002, Iraq published a report relating to its relevant weapons programs.<sup>129</sup> While the IAEA report was generally positive, the report presented by Hans Blix, Executive Chairman of UNMOVIC found that a genuine acceptance of the disarmament was still lacking.<sup>130</sup> Further reports were presented by UNMOVIC and IAEA in February and March 2003 noting that Iraq had still not taken all the steps required by Resolution 1441.<sup>131</sup> None of these reports, however, ascertained the existence of functional nuclear, chemical or biological weapons programs in Iraq.<sup>132</sup>

At the Security Council meeting of 7 March 2003, despite his numerous criticisms as to the Iraqi compliance with Resolution 1441, Hans Blix was forced to acknowledge that ‘no evidence of proscribed activities has so far been found’ in Iraq.<sup>133</sup> At the same meeting, a number of states saluted the improvements in Iraq’s cooperation with the UN and IAEA inspectors and emphasized the need for the inspections to continue. Needless to say, these states – Germany, France, Russia, China, Syria and Pakistan – advocated a peaceful disarmament as opposed to the use of armed force.<sup>134</sup> The opinions expressed made the US and the UK understand that there was not going to be a Security Council endorsement of the use of force against Iraq.<sup>135</sup> In these circumstances, the US, the UK and Australia, supported by a number of other states (the ‘coalition of the willing’),

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<sup>127</sup> An earlier draft of what became paragraph 4 of Resolution 1441 had stated that ‘such breach authorizes member states to use all necessary means to restore international peace and security in the area.’ The text was opposed by France and Russia, thus was erased from the final version of the resolution. McGoldrick, p. 62.

<sup>128</sup> ‘Defiant Saddam accepts UN team’, in *Guardian*, 14 November 2002; ‘UN weapons inspectors arrive in Iraq’, in *Guardian*, 18 November 2002.

<sup>129</sup> ‘Saddam risks war over arms dossier’, in *Guardian*, 8 December 2002; Greenwood 2005, p. 394.

<sup>130</sup> Mohamed ElBaradei, Director General IAEA, Statement to the United Nations Security Council: The Status of Nuclear Inspections in Iraq (27 January 2003), available at <<http://www.iaea.org/NewsCenter/Statements/2003/ebsp2003n003.shtml>> (accessed 14 April 2010); Hans Blix, Executive Chairman UNMOVIC, Briefing of the Security Council: An update on Inspections (27 January 2003), available at <[http://www.un.org/Depts/unmovic/new/pages/security\\_council\\_briefings.asp#5](http://www.un.org/Depts/unmovic/new/pages/security_council_briefings.asp#5)> (accessed 14 April 2010); Greenwood 2005, p. 394.

<sup>131</sup> Mohamed ElBaradei, Director General IAEA, Statement to the United Nations Security Council: The Status of Nuclear Inspections in Iraq – An Update (14 February 2003), available at <<http://www.iaea.org/NewsCenter/Statements/2003/ebsp2003n005.shtml>> (accessed 14 April 2010); Hans Blix, Executive Chairman UNMOVIC, Briefing of the Security Council: An update on Inspections (14 February 2003), available at <[http://www.un.org/Depts/unmovic/new/pages/security\\_council\\_briefings.asp#6](http://www.un.org/Depts/unmovic/new/pages/security_council_briefings.asp#6)> (accessed 14 April 2010); Twelfth quarterly report of UNMOVIC, UN Doc. S/2003/232 (2003); Mohamed ElBaradei, Director General IAEA, Statement to the United Nations Security Council: The Status of Nuclear Inspections in Iraq – An Update (7 March 2003), available at <<http://www.iaea.org/NewsCenter/Statements/2003/ebsp2003n006.shtml>> (accessed 14 April 2010); Hans Blix, Executive Chairman UNMOVIC, Briefing of the Security Council: Oral Introduction of the 12th Quarterly Report of UNMOVIC (7 March 2003), available at <[http://www.un.org/Depts/unmovic/new/pages/security\\_council\\_briefings.asp#7](http://www.un.org/Depts/unmovic/new/pages/security_council_briefings.asp#7)> (accessed 14 April 2010) (hereafter, Jan-March 2003 UNMOVIC and IAEA reports on Iraq). See also Greenwood 2005, pp. 394-395.

<sup>132</sup> Jan-March 2003 UNMOVIC and IAEA reports on Iraq.

<sup>133</sup> SCOR, 58<sup>th</sup> Sess., 4714<sup>th</sup> mtg., UN Doc. S/PV.4714 (7 March 2003) p. 3.

<sup>134</sup> *Ibid.*, pp. 9 (Germany), 11 (Syria), 17 (Russia), 18-19 (France), 21 (China), 32-33 (Pakistan).

<sup>135</sup> Falk 2003, p. 595; Greenwood 2005, p. 395.

decided to take military action without a further resolution of the Security Council expressly endorsing it.<sup>136</sup>

Circumventing the absence of a Security Council resolution expressly approving the action, US and the UK put forward a complex legal argument on the basis of which the ‘material breach’ of Resolution 687 (1991) ascertained by Resolution 1441 (2002) in fact revived the mandate of Resolution 678 (1990) that authorized the use of force against Iraq.<sup>137</sup> By not complying with Resolution 1441, they argued that Iraq had squandered the last opportunity for a peaceful solution, thus reviving the mandate of Resolution 678 (1990) was the only option left.<sup>138</sup>

*Operation Iraqi Freedom* commenced on 19 March 2003. The inter-state conflict lasted only a few weeks. On 1 May 2003, President Bush announced the end of ‘major combat operations.’ In June 2004, the US transferred sovereignty to Iraq, while the US combat mission ended in August 2010.<sup>139</sup>

### 9.5.3 The 2003 Iraqi War – ‘Self-defence’ against WMD

In a memorandum published on 18 November 2002, Legal Adviser of the US State Department, William H. Taft IV, claimed that the 2002 National Security Strategy relied upon ‘the same legal framework applied to the British in *Caroline* and to Israel in 1981.’<sup>140</sup> He further elaborated that ‘after the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take pre-emptive action to defend its nationals from unimaginable harm.’<sup>141</sup>

The first statement was intriguing for several reasons. First, it claimed that the 2002 National Security Strategy was written on the basis of the customary right of self-defence

<sup>136</sup> Greenwood 2005, p. 395.

<sup>137</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (2003); Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350 (2003); McGoldrick, pp. 53-55, p. 286 (Appendix VII: The Advice of the United Kingdom Attorney-General, Lord Goldsmith, on ‘The Legal Basis for the Use of Force against Iraq’, 17 March 2003).

<sup>138</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (2003); McGoldrick, pp. 53-55, pp. 264-280 (Appendix V: Presentation of Colin Powell, US Secretary of State to the United Nations Security Council on ‘Iraq – Failing to Disarm’, 5 February 2003). Greenwood asserted that the governments who resorted to force against Iraq were right to conclude that they could rely on the authorization of military action in Res. 678, read together with Res. 687 and Res. 1441. Greenwood 2003, p. 36. For similar opinions, see Hill, pp. 329-331; Pierson, pp. 154-155; Taft and Buchwald, pp. 557-563, Wedgwood 2003, pp. 576-585; Yoo, pp. 571-574. For the rejection of the US argument see: Rapport Commissie van Onderzoek Besluitvorming Irak (Rapport Commissie-Davids), Conclusions (January 2010), available at <http://www.rijksoverheid.nl/onderwerpen/irak/documenten-en-publicaties/rapporten/2010/01/12/rapport-commissie-davids-conclusions.html>, paras. 18-20.

<sup>139</sup> ‘US combat mission in Iraq ends’, *CNN*, 31 August 2010, available at [http://articles.cnn.com/2010-08-31/politics/iraq.us\\_1\\_training-of-iraqi-security-iraqi-violence-united-states-and-iraq?\\_s=PM:POLITICS](http://articles.cnn.com/2010-08-31/politics/iraq.us_1_training-of-iraqi-security-iraqi-violence-united-states-and-iraq?_s=PM:POLITICS).

<sup>140</sup> W.H. Taft IV, ‘The Legal Basis for Preemption’, Council on Foreign Relations (18 November 2002), available at [www.cfr.org/publication/5250/legal\\_basis\\_for\\_preemption.html](http://www.cfr.org/publication/5250/legal_basis_for_preemption.html) (accessed 15 April 2010).

<sup>141</sup> *Ibid.*

and following the conditions of the Webster-formula. In truth, what the 2002 Security Strategy advocated was a much broader right of unilateral use of preventive force that had hardly anything to do with the strict criteria set forth by Webster. Secondly, the Legal Adviser purported that the *Caroline* incident of 1837 and the Israeli bombing of the Osirak reactor in 1981 shared the same legal framework. That statement was overlooking the controversy surrounding the Israeli action and the condemnation expressed by the Security Council.<sup>142</sup>

In his 20 March 2003 letter to the Security Council, US Ambassador Negroponte made no explicit reference to the right of self-defence in justifying the invasion of Iraq. Nonetheless, he emphasized that the actions of the coalition forces were necessary steps ‘to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.’<sup>143</sup> This timid allusion to the necessity of self-defence was more robustly acknowledged by Taft, who, on the same day, maintained before the US National Association of Attorneys General that ‘the President may also, of course, always use force under international law in self-defence.’<sup>144</sup> These statements were interpreted by many commentators as the first application of the 2002 National Security Strategy put forward by the Bush administration.<sup>145</sup>

In order to assess the legality of the self-defence claim against the threat posed by Iraqi WMD, several issues have to be addressed. First, the nature of the danger US and its allies were allegedly facing needs elaboration. For that purpose, the question whether Iraq *possessed* such weapons and the threat stemming from that possible possession needs to be analysed. Secondly, the immediacy factor has to be given attention. In other words, the imminence of an Iraqi armed attack against the US or its allies has to be addressed. Thirdly, the proportionality of the 2003 invasion of Iraq has to be examined against the actual threat.

### 9.5.3.1 Necessity

#### 9.5.3.1.1 Possession of WMD

According to the International Court of Justice, the possession of nuclear weapons was illegal only if it was intended for a threat or use for force unlawful under the rules of the Charter.<sup>146</sup> Since no armed attack had occurred, the US was bound to prove not only that Iraq was developing, possessed or was about to acquire WMD, but also that Saddam Hussein planned to use them against the US or other allied states.

<sup>142</sup> Franck 2002, pp. 105-106; Greenwood 2003, p. 14; Gill 2007, pp. 141-142; Alexandrov, p. 162; SCOR, 36<sup>th</sup> Sess., 2280<sup>th</sup>-2288<sup>th</sup> mtg, UN Doc. S/PV.2280-S/PV.2288 (12-19 June 1981).

<sup>143</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (2003).

<sup>144</sup> W.H. Taft IV, Legal Adviser to the State Department, Remarks to the National Association of Attorneys General, Washington (20 March 2003), available at <<http://usinfo.org/wf-archive/2003/030321/epf516.htm>> (accessed 15 April 2010) (hereafter, Taft, Remarks 2003).

<sup>145</sup> Gardner 2003, p. 588; Henderson, p. 12; McGoldrick, p. 68; M. Sapiro, ‘Iraq: The Shifting Sands of Preemptive Self-Defense’, 97 *American Journal of International Law* (2003) p. 602.

<sup>146</sup> *Nuclear Weapons*, ICJ Rep. (1996) para. 48.

At no time before the commencement of hostilities did the US or its allies demonstrate the possession of WMD by the Iraqi government. Moreover, the absence of such weapons was confirmed in an official report of the US Central Intelligence Agency after the war.<sup>147</sup> The UNMOVIC and IAEA reports preceding the invasion mentioned several difficulties in the disclosure of information and concerning compliance with SC resolutions in general. Nonetheless, none of the reports concluded that WMD existed at that time in Iraq. Moreover, none of the reports could infer that programs developing such weapons were functional in Iraq.<sup>148</sup>

Without demonstrating the possession of WMD, the US could have at least proven the ongoing development of such weapons and advance a precise time-table as to the dates when such weapons could have been ready for use. That is what Israel did in 1981 and was nevertheless criticized for not proving irrefutably the existence of an imminent threat of a nuclear attack.<sup>149</sup> Alternatively, the US could have shown that Iraq was about to acquire WMD from an external source. None of these scenarios were proven.

What the inspectors did find in Iraq were 12 empty chemical warheads (16 January 2003) and a number of al-Samoud II missiles that exceeded the maximum range of 150 km set down in the 1991 Gulf war ceasefire agreement (12 February 2003).<sup>150</sup> The warheads were empty, thus no evidence of chemical weapons was found.<sup>151</sup> The al-Samoud II missiles exceeded the 150 km maximum range with 33 km, difference which was largely insignificant, because the 150-km range already allowed Iraq to hit targets in the border area of neighbouring countries.<sup>152</sup> The possession of the warheads and the missiles were indeed in contravention of Iraq's disarmament obligations, but neither could have been construed as evidence of existence of WMD. Likewise, inconclusiveness of information disclosed or gaps in the declarations of Iraq could not amount to enough evidence to conclude that WMD were hidden in the country.

The US had several times stressed that the possession of weapons of mass destruction by Iraq amounted to such a threat that not only the US but the entire world was endangered by it.<sup>153</sup> The Bush administration several times warned against the

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<sup>147</sup> *Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD* (September 2004), available at <[www.globalsecurity.org/wmd/library/report/2004/isg-final-report](http://www.globalsecurity.org/wmd/library/report/2004/isg-final-report)> (accessed 14 April 2010). The report concluded that Saddam Hussein did not possess stockpiles of illicit weapons at the time of the US invasion in March 2003 and had not begun any program to produce them.

<sup>148</sup> Jan-March 2003 UNMOVIC and IAEA reports on Iraq.

<sup>149</sup> Letter dated 8 June 1981 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc. S/14510 (1981); Mueller et al., p. 212.

<sup>150</sup> Special Report Iraq, 'Iraq timeline: July 16, 1979 to January 31, 2004', in *Guardian*, available at <[www.guardian.co.uk/Iraq/page/0,12438,793802,00.html](http://www.guardian.co.uk/Iraq/page/0,12438,793802,00.html)> (accessed 14 April 2010); 'Iraq weapons inspectors find empty chemical warheads', in *Guardian*, 17 January 2003, available at <[www.guardian.co.uk/world/2003/jan/17/iraq.ewenmacaskill](http://www.guardian.co.uk/world/2003/jan/17/iraq.ewenmacaskill)> (accessed 14 April 2010); 'UN team finds Iraq has illegal missiles', in *Guardian*, 13 February 2003, available at <[www.guardian.co.uk/world/2003/feb/13/iraq.garyyounge](http://www.guardian.co.uk/world/2003/feb/13/iraq.garyyounge)> (accessed 14 April 2010).

<sup>151</sup> 'Iraq weapons inspectors find empty chemical warheads', in *Guardian*, 17 January 2003, available at <[www.guardian.co.uk/world/2003/jan/17/iraq.ewenmacaskill](http://www.guardian.co.uk/world/2003/jan/17/iraq.ewenmacaskill)> (accessed 14 April 2010).

<sup>152</sup> 'Iraq's al-Samoud missile', *BBC World News*, 3 March 2003, available at <[http://news.bbc.co.uk/1/hi/world/middle\\_east/2756987.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2756987.stm)> (accessed 14 April 2010).

<sup>153</sup> *A Decade of Deception and Defiance: Saddam Hussein's Defiance of the United Nations* (Washington, D.C., The White House 2002) available at <[www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB80/wmd13.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB80/wmd13.pdf)> (accessed 14 April 2010); US President's Remarks 2002; McGoldrick, pp. 53-55, pp. 264-280 (Appendix V

willingness and determination of Saddam Hussein to use such weapons once developed or acquired.<sup>154</sup> Determination to use WMD once acquired could indeed be viewed as a serious threat. The International Court of Justice also acknowledged that possession of nuclear weapons could indicate the preparedness to use them.<sup>155</sup> Nonetheless, as Franck said, propensity was immaterial in establishing conclusive evidence.<sup>156</sup> The fact that Saddam Hussein was inclined to use WMD did not offer irrefutable evidence of the fact that he *would* and *could* choose such an option.

### 9.5.3.1.2 The immediacy factor

For maintaining a claim of self-defence, the US should have also proven that the existing threat was also imminent. The US did not demonstrate the ongoing development, the possession or the nature of the threat of possessing and acquiring WMD by Iraq. The Bush administration offered even less evidence as to the feasibility – let alone imminence – of a future armed attack involving WMD.<sup>157</sup> As Beatty pointed out, the Iraqi war was ‘fought in the subjunctive, based on a string of *ifs*’:

‘If Saddam possesses usable weapons of mass destruction and if, to take a scenario George W. Bush takes seriously, he builds a fleet of pilotless drones and if he somehow gets them out of Iraq and if he builds or hires ships and launches his drones from them and if he has found a way to make the drones spread weapons of mass destruction and if it is not a windy day and if our Army, Navy, Air Force, Coast Guard, CIA, and DIA are as asleep as they were on September 11, then Saddam will attack us.’<sup>158</sup>

During the months preceding the invasion, Iraq signalled its willingness to comply with Resolution 1441 (2002).<sup>159</sup> It allowed weapons inspectors to return to the country, it provided declarations as to the weapons it possessed and asserted its openness to continue the inspection and disclosure procedure.<sup>160</sup> There were, obviously, criticisms as to its cooperation and straightforwardness.<sup>161</sup> Nonetheless, it never refused to continue the dialogue with UNMOVIC, the IAEA and the Security Council. Moreover, several members of the Security Council believed that the situation could be solved by peaceful

– Presentation of Colin Powell, US Secretary of State to the UN Security Council on ‘Iraq: Failing to Disarm’, 5 February 2003); Falk 2003, p. 592.

<sup>154</sup> *A Decade of Deception and Defiance, Saddam Hussein’s Defiance of the United Nations* (Washington, D.C., White House 2002); US President’s Remarks 2002; McGoldrick, pp. 53-55, pp. 264-280 (Appendix V).

<sup>155</sup> *Nuclear Weapons*, ICJ Rep. (1996) para. 48.

<sup>156</sup> Franck 2002, p. 106.

<sup>157</sup> Henderson, p. 14; Sapiro 2003, p. 603.

<sup>158</sup> J. Beatty, ‘In the name of God’, *Atlantic Online*, 5 March 2003, available at <[www.theatlantic.com/magazine/archive/2003/03/in-the-name-of-god/3167](http://www.theatlantic.com/magazine/archive/2003/03/in-the-name-of-god/3167)> (accessed 13 April 2010).

<sup>159</sup> ‘Defiant Saddam accepts UN team’, in *Guardian*, 14 November 2002, available at <[www.guardian.co.uk/world/2002/nov/14/iraq.ewenmacaskill](http://www.guardian.co.uk/world/2002/nov/14/iraq.ewenmacaskill)> (accessed 14 April 2010).

<sup>160</sup> *Ibid.*; ‘UN weapons inspectors arrive in Iraq’, in *Guardian*, 18 November 2002, available at <[www.guardian.co.uk/world/2002/nov/18/iraq](http://www.guardian.co.uk/world/2002/nov/18/iraq)> (accessed 14 April 2010); ‘Saddam risks war over arms dossier’, in *Guardian*, 8 December 2002, available at <[www.guardian.co.uk/world/2002/dec/08/iraq](http://www.guardian.co.uk/world/2002/dec/08/iraq)> (accessed 14 April 2002); SCOR, 58<sup>th</sup> Sess., 4714<sup>th</sup> mtg., UN Doc. S/PV.4714 (7 March 2003) pp. 34-36.

<sup>161</sup> Jan-March 2003 UNMOVIC and IAEA reports on Iraq.

disarmament.<sup>162</sup> There was always a choice of means to solve the conflict in a non-forceful manner. There was never a present and inevitable need to use force.<sup>163</sup>

The remoteness and vagueness of the future threat of an armed attack was indeed a vindication of the new Bush doctrine advocating preventive use of force against potential threats.<sup>164</sup> The threat perceived by the US was along the lines of the 2002 Security Strategy: compelling, even though ‘uncertainty remains as to the time and place of the enemy’s attack.’<sup>165</sup> As Sapiro noted, such a reinterpretation of limits eliminates the requirement that an impending threat be imminent.<sup>166</sup> Indeed, the administration did not put emphasis on the imminence of the threat. President Bush even asserted that ‘in one year, or five years, the power of Iraq to inflict harm on all free nations will be multiplied many times over. [...] We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities.’<sup>167</sup>

Notwithstanding the frequent reference to the magnitude of the Iraqi threat, by failing to demonstrate that Iraq was in possession or was developing WMD, the US failed to prove not only *when* and *where* the attack would occur, but also *if* it would ever happen. There was no resemblance whatsoever of the new preventive approach with the anticipatory action permitted by the pre-Charter customary right of self-defence.<sup>168</sup> Nor was any resemblance between the anticipatory action accepted as legitimate in the Six-Day War and the US preventive approach.<sup>169</sup> Moreover, the US action exceeded even the limits of the 1981 Israeli bombing of the Osirak reactor, an instance of state practice condemned at a time for failing to demonstrate the immediacy factor.<sup>170</sup> The 2003 US action departed from the limits observed by the same country in the Cuban missile crisis. In 2003, the US administration chose to discard the view that anticipatory action in self-defence could not be expanded ‘to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome.’<sup>171</sup> The justification of the Iraqi war under the new doctrine of preventive use was not self-defence.<sup>172</sup> It could rather be described as a unilateral use of preventive force to tackle a situation that could – at an unknown point in time – become dangerous.<sup>173</sup> As Gardner observed, by expanding the right of pre-emption against an imminent attack into a right of preventive war against potentially dangerous adversaries, the Bush administration

<sup>162</sup> SCOR, 58<sup>th</sup> Sess., 4714<sup>th</sup> mtg., UN Doc. S/PV.4714 (7 March 2003) pp. 9 (Germany), 11 (Syria), 17 (Russia), 18-19 (France), 21 (China), 32-33 (Pakistan).

<sup>163</sup> Henderson, p. 14.

<sup>164</sup> Gardner 2003, p. 588; Henderson, p. 12; Sapiro 2003, p. 602.

<sup>165</sup> US National Security Strategy 2002; Sapiro 2005, p. 367.

<sup>166</sup> Sapiro 2005, p. 367.

<sup>167</sup> President George W. Bush, Saddam Hussein Must Leave Iraq Within 48 Hours, Remarks by the President in Address to the Nation (17 March 2003), available at <<http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030317-7.html>> (accessed 15 April 2010) (hereafter, US President’s Remarks 2003).

<sup>168</sup> Gardner 2003, p. 587; Sapiro 2005, p. 367.

<sup>169</sup> See *supra* 8.7.

<sup>170</sup> See *supra* 9.3.

<sup>171</sup> Chayes 1974, p. 65.

<sup>172</sup> V. Lowe, ‘The Iraqi Crisis: What Now?’, 52 *International and Comparative Law Quarterly* (2003) p. 865.

<sup>173</sup> For author with similar views, see Gardner 2003, p. 588. For authors defending the new doctrine, see Hill, pp. 329-331; Pierson, pp. 174-176; Taft and Buchwald, pp. 557-563; Wedgwood 2003, p. 584; Yoo, pp. 571-574.

created a ‘loaded weapon’ that could be used against the United States and against the general interest in a stable world order.<sup>174</sup>

### 9.5.3.2 Proportionality

Assuming, for the sake of the argument, that the US invasion of Iraq could have been characterized an instance of self-defence, the question remains whether its exercise was proportionate.

In 1981, Israel was criticized for carrying out a surgical airstrike against the Osirak reactor. The airstrike targeted one reactor facility that was believed to produce the fissile material for the future weapons.<sup>175</sup> In 2003, the US and other coalition states launched a full-scale invasion against Iraq without having identified any facilities that were developing weapons of mass destruction. Putting aside all the other requirements for the legality of a claim of self-defence, the US war against Iraq lacked any proportionality whatsoever. It invaded a country, it toppled and replaced the incumbent regime and it assumed the responsibilities of an occupying power for several years without having the slightest proof that an imminent threat of an armed attack existed.

## 9.6 Concluding remarks

This chapter analysed three instances of state practice which had two common elements. First, as with all instances analysed in Part II, they involved a claim of self-defence – used or contemplated. Secondly, specific for this chapter, they pertained to conflicts involving weapons of mass destruction.

The instances of state practice presented above show a tendency to exceed the temporal dimension of self-defence when it comes to the use of force against weapons of mass destruction. In the Cuban missile crisis, the US government decided not to resort to self-defence, because it believed that there was no legal basis for anticipatory action in the absence of the threat of an imminent attack.<sup>176</sup> That instance of state practice followed the pre-Charter understanding of the temporal dimension of self-defence. The Israeli bombing of the Osirak reactor went one step further. The airstrikes were justified as self-defence against the possibility of Iraq developing a nuclear weapon in the foreseeable future.<sup>177</sup> As grave the threat of such a possibility would have been, self-defence does not allow use of force against dangers that do not create a present and inevitable need to ward them off. In other words, without the immediacy factor, such an action could not meet the requirement of necessity in self-defence. The Israeli airstrikes were criticized by states before the Security Council as exceeding the limits of anticipatory action. The parameters on the basis of which members of the Security Council put forward their criticism was in line with the pre-Charter understanding of anticipatory action.<sup>178</sup> One member even made reference to the *Caroline* incident in that respect.<sup>179</sup> The 2003 US invasion of Iraq

<sup>174</sup> Gardner 2003, p. 588.

<sup>175</sup> See *supra* 9.3. Mueller et al., p. 212.

<sup>176</sup> See *supra* 9.2.

<sup>177</sup> See *supra* 9.3.

<sup>178</sup> SCOR, 36<sup>th</sup> Sess., 2282<sup>nd</sup> mtg., UN Doc. S/PV.2282 (15 June 1981) paras. 14-19; 2283<sup>rd</sup> mtg., S/PV.2283 (15 June 1981) paras. 23-27; 2284<sup>th</sup> mtg., S/PV.2284 (16 June 1981) para. 11.

<sup>179</sup> SCOR, 36<sup>th</sup> Sess., 2282<sup>nd</sup> mtg., UN Doc. S/PV.2282 (15 June 1981) paras. 14-19.

exceeded even the limits of the 1981 Israeli action. The ‘Bush doctrine’ served as basis for the invasion and occupation of a country as well as the toppling of its regime without any evidence as to the existence – let alone imminent threat to use – weapons of mass destruction. The two latter examples of state practice show a tendency to exceed the temporal dimension of self-defence by advocating preventive use of force against the development or possession of WMD. While state-to-state conflicts involving claims of self-defence (Chapter 8) have strengthened the remedial dimension of self-defence, conflicts involving WMD push that dimension towards prevention. That trend, however, is not conclusively supported by UN organs or legal doctrine. Comments characterizing such trend as signalling a lawful alteration of the temporal dimension of self-defence have been voiced in legal literature, but the opinion is still in minority.<sup>180</sup> The approach of the Security Council has been negative; it condemned the Israeli reaction and it failed to endorse the US-led invasion of Iraq.<sup>181</sup> The International Court of Justice stopped short of characterizing possession of nuclear weapons unlawful *per se*, thus implicitly restricted the exercise of self-defence in such situations.<sup>182</sup> The majority of the legal doctrine is also considerably sceptical as to the lawfulness of the use of force against development and possession of nuclear weapons.<sup>183</sup>

The three instances of state practice presented in Chapter 9 are also important for the perceived limits of anticipatory action in self-defence. Accordingly, as specified in the introductory remarks of Part II, the requirements of necessity and proportionality pertain to three limits: the conditionality of the attack, the immediacy factor and moderate use of force. When it comes to conflicts involving weapons of mass destruction, the immediacy factor is the one affected the most. In the Cuban missile crisis, the US government chose to observe this element (in its pre-Charter form) and abstained from invoking self-defence because there was no present and inevitable need to resort to anticipatory action in self-defence. The immediacy factor was ignored both by Israel in 1981 and by the US in 2003. In fairness, the threat perceived by the Israeli government was considerably more realistic and possible than the one alleged by the US government in 2003. Nonetheless, on the basis of the available information at the time, there was no present and inevitable need to launch airstrikes against the Osirak reactor, because there was no imminent threat of an armed attack. Even if – from a strategic point of view – destroying the reactor was a crucial move, that action cannot be justified as self-defence. Without the immediacy element (present and inevitable need to act), the use of force cannot meet the necessity requirement. Even if the conditionality of the attack is present (it was shown that in four years’ time, the reactor could have produced a nuclear weapon), that conditionality has to create an immediate need for action. This immediacy does not have to be measured in days or weeks, it only has to qualify the situation as creating a present and inevitable need for action. That qualification was not present in the 1981 and 2003 instances of state practice presented above. For that reason, it can be concluded that

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<sup>180</sup> Hill, pp. 329-331; Pierson, pp. 154-155; Taft and Buchwald, pp. 557-563, Taft, Remarks 2003; Wedgwood 2003, p. 584; Yoo, pp. 571-574.

<sup>181</sup> See *supra* 9.3 and 9.5.

<sup>182</sup> See *supra* 9.4.

<sup>183</sup> Gardner 2003, pp. 587-588; Henderson, p. 14; Lowe, p. 865; Sapiro 2005, p. 367; A.-M. Slaughter, ‘The Use of Force in Iraq: Illegal and Illegitimate’, 98 *American Society of International Law Proceedings* (2004) pp. 262-263.

conflicts involving weapons of mass destruction push the temporal dimension of self-defence towards prevention by putting a strain on the immediacy factor of the requirement of necessity.