

# **Recourse to Force**

State Action Against Threats and  
Armed Attacks

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## *Contents*

*Acknowledgments*

*page xii*

<b>1 The United Nations' capacity for adapting to radical changes of circumstance</b>	<b>1</b>
The legacy of Sir Hersch Lauterpacht	1
The use of force under the UN Charter system	2
Adaptability of the Charter as a quasi-constitutional instrument	5
War in the pre-Charter era	9
The Charter's constraints on violence	11
Anticipated problems in banning violence: between the desiderata of perpetual peace and perfect justice	14
The drafters' vision	19
<b>2 Use of force by the United Nations</b>	<b>20</b>
The Charter and uses of force	20
Collective use of armed force: original intent	21
The practice: uncoupling Article 42 from Article 43	24
The role of the General Assembly: original intent	31
Adapting General Assembly powers: "Uniting for Peace"	33
Inventing "Chapter 6 1/2"	39
Expanding the concept of threats to the peace, breaches of the peace, and acts of aggression	40
<b>3 The original parameters of self-defense</b>	<b>45</b>
Self-defense: the drafting history	45
Analyzing practice of collective self-defense	51

## Contents

<b>4 Self-defense against state-sponsored terrorists and infiltrators</b>	53
Israel–Egypt (1956)	55
OAS–Dominican Republic (1960)	56
Israel–Lebanon (1982)	57
US–Nicaragua (1980–1986)	60
Turkey–Iraq (1995)	63
The law of countermeasures against terrorism	64
<b>5 Self-defense against ideological subversion</b>	69
Warsaw Pact–Hungary (1956)	70
US–Dominican Republic (1965)	72
USSR–Czechoslovakia (1968)	73
Conclusions	75
<b>6 Self-defense against attacks on citizens abroad</b>	76
Belgium–The Congo (1960, 1964)	78
Turkey–Cyprus (1964)	79
US–Dominican Republic (1965)	81
Israel–Uganda (1976)	82
US–Grenada (1983)	86
US–Egypt (1985–1986)	88
US–Libya (1986)	89
US–Panama (1989)	91
US attack on Iraqi Intelligence Headquarters (1993)	94
US–Afghanistan and Sudan (1998)	94
Conclusions	96
<b>7 Anticipatory self-defense</b>	97
The typology	97
Anticipatory use of force in self-defense as a legal concept	97
Anticipatory self-defense: post-Charter practice	99
The Cuba missile crisis (1962–1963)	99
Israeli–Arab War (1967)	101
Israel–Iraq (nuclear reactor) (1981)	105
Conclusions	107
<b>8 Countermeasures and self-help</b>	109
The “self-help” dilemma	109

## Contents

Self-help: post-Charter practice	112
Israel–Argentina (1960)	112
India–Portugal (1961)	114
Turkey–Cyprus (1974)	117
Morocco (Mauritania)–Spain (1975)	121
Indonesia–East Timor (1975)	127
Argentina–UK (Malvinas/Falklands) (1982)	129
Conclusions	131
 <b>9 The “purely humanitarian” intervention</b>	 135
Definition	135
Humanitarian intervention: post-Charter practice	139
India–Bangla Desh (1971)	139
Tanzania–Uganda (1978)	143
Vietnam–Kampuchea (1978–1979)	145
France–Central African Empire (1979)	151
France, UK, and US–Iraq (the Kurds, 1991)	152
ECOMOG–Liberia, Sierra Leone (1989–1999)	155
NATO–Yugoslavia (Kosovo) (1999)	163
Conclusions	171
 <b>10 What, eat the cabin boy? Uses of force that are illegal but justifiable</b>	 174
 <i>Index</i>	 192

## Anticipatory self-defense

### **The typology**

Earlier chapters of this study have employed a typology for examining the UN system's response to states' "unauthorized" resort to force, i.e. in circumstances in which the state has not been the victim of a traditional armed attack and the Security Council has not voted to invoke collective measures under Charter Chapter VII. Chapter 3 has identified five clusters of justification advanced in support of such unauthorized recourse to force. Using this analytic typology, the study seeks to ascertain the extent to which each kind of unconventional justification has been validated in systemic practice.

From the foregoing examination of some of this practice, it appears that the principal organs of the United Nations have responded in accordance with the nuanced situational merits of each crisis, rather than in compliance with any general redefinition of the concept of "self-defence" contained in Article 51. Although the role of political horse-trading cannot be discounted, it appears that most countries have reacted with integrity, instance-by-instance, to the weight of factual and contextual evidence presented by advocates and critics of each use of force. This is also true in those instances in which the use of force has been justified as "anticipatory self-defence."

### **Anticipatory use of force in self-defense as a legal concept**

Anticipatory self-defense has a long history in customary international law. As early as 1837, it was canvassed by US Secretary of State Daniel Webster in the *Caroline* dispute. In a classical attempt to define but also to

limit it, Webster concluded that such a right arises only when there is a “necessity of self-defence . . . instant, overwhelming, leaving no choice of means and no moment for deliberation.” He cautioned that it permits “nothing unreasonable or excessive.”<sup>1</sup>

Has recourse to such anticipatory self-defence in circumstances of extreme necessity been preserved, or repealed, by the Charter?<sup>2</sup> Common sense, rather than textual literalism, is often the best guide to interpretation of international legal norms. Thus, Bowett concludes that “no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardise its very existence.”<sup>3</sup> In 1996, the International Court of Justice indirectly touched on this question in its *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict*. A majority of judges was unable to conclude that first-use of nuclear weapons would invariably be unlawful if the very existence of a state were threatened.<sup>4</sup> Despite its ambiguity, the Court appears to have recognized the exceptional nature and logic of a state’s claim to use means necessary to ensure its self-preservation. The same reasoning can lead to the logical deduction that no law – and certainly not Article 51 – should be interpreted to compel the *reductio ad absurdum* that states invariably must await a first, perhaps decisive, military strike before using force to protect themselves.

On the other hand, a general relaxation of Article 51’s prohibitions on unilateral war-making to permit unilateral recourse to force whenever a state feels potentially threatened could lead to another *reductio ad absurdum*. The law cannot have intended to leave every state free to resort to military force whenever it perceived itself grievously endangered by actions of another, for that would negate any role for law.<sup>5</sup> In practice, the UN

<sup>1</sup> For a discussion see Sir Robert Jennings and Sir Arthur Watts, 1 *Oppenheim’s International Law* 420–27 (9th edn., 1992).

<sup>2</sup> See generally Derek Bowett, *Self-Defense in International Law* 118–92 (1958); Yoram Dinstein, *War, Aggression and Self-Defense* (1988).

<sup>3</sup> Bowett, *Self-Defense in International Law* at 185–86.

<sup>4</sup> *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, 1996 I.C.J. 26 at 265, para. 105(2)E: “The Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”

<sup>5</sup> This is the valid point made by Ian Brownlie, *International Law and the Use of Force by States* 275 (1963).

system has sought, with some success, to navigate between these two conceptual shoals. Three instances may be indicative: the US (and OAS) blockade against Cuba during the 1962 missile crisis, Israel's attack on its Arab neighbors in 1967, and Israel's raid on the Iraqi nuclear reactor in 1981. These provide some evidence by the UN system – what was said, what was done, and what was left unsaid or undone – of its way of responding to a claim of “anticipatory self-defence.”<sup>6</sup>

### **Anticipatory self-defense: post-Charter practice**

#### The Cuba missile crisis (1962–1963)

On October 22, 1962, President John F. Kennedy announced his intention to impose a naval quarantine on Cuba to compel the removal of secretly emplaced Soviet missiles said to pose an imminent threat to US national security.<sup>7</sup> A day later, the Council of the OAS supported this US resort to force. It “recommended” that members “take all measures, individually and collectively including the use of armed force which they may deem necessary” to prevent the missiles “from ever becoming an active threat to the peace and security of the Continent.”<sup>8</sup>

The US argued that this military action, carefully called a “quarantine,” did not constitute use of force in violation of Article 51. Since no ship had actually tried to run its blockade,<sup>9</sup> none had been seized.

<sup>6</sup> It may be significant, for example, that states that could have been expected to seek approval for a normative enunciation of a right to anticipatory self-defense chose not to do so during the drafting of key resolutions of the General Assembly such as the *Declaration on Friendly Relations*, the *Definition of Aggression* and the *Declaration on the Non-Use of Force*, or during the International Law Commission's work on State Responsibility. Christine Gray, *International Law and the Use of Force* 112 (2000). See also Pierre Cot and Alain Pellet (eds.), *La Charte des Nations Unies* 779 (1991). This may simply demonstrate that states prefer to argue, case by case and in the context of specific facts, that an anticipatory recourse to self-defense was demonstrably necessary as a measure of self-preservation or, even better, that the defensive recourse to force was not anticipatory but in response to hostile actions analogous to an armed attack, such as a blockade. See Malcolm Shaw, *International Law* 694–95 (3rd edn., 1991).

<sup>7</sup> Presidential Proclamation 3504 of October 23, 1962, 57 Am. J. Int'l L. 512 (1963).

<sup>8</sup> Resolution on the Adoption of Necessary Measures to Prevent Cuba from Threatening the Peace and Security of the Continent, OAS Council, Annex A, OEA/Ser.G/V/C-d-1024 Rev. 2 (23 October 1962).

<sup>9</sup> On October 26, a Soviet-chartered Lebanese vessel was boarded peacefully in the only physical encounter between the adversaries.



## Recourse to Force

Moreover, Washington argued, the “quarantine,” had been legitimated by endorsement of the regional organization.<sup>10</sup>

In the Security Council, US Ambassador Adlai Stevenson relied less on such technical legal arguments than on the right of the US and the OAS to respond preventively to “this transformation of Cuba into a base for offensive weapons of sudden mass destruction,”<sup>11</sup> mounted on missiles “installed by clandestine means”<sup>12</sup> in pursuit of a Soviet “policy of aggression.”<sup>13</sup> Despite “categorical assurances”<sup>14</sup> by Moscow that its missile deployment was solely of a “defensive character,”<sup>15</sup> Stevenson insisted that it was “clearly a threat to [the Western] hemisphere. And when it thus upsets the precarious balance in the world, it is a threat to the whole world.”<sup>16</sup> He characterized America’s role as standing firm against “this new phase of aggression...,”<sup>17</sup> and sought to place the quarantine in a posture of national and regional self-defense against a threatening, hostile new deployment of armed force by Moscow.

The weakness in this claim was that the Soviet missile deployment in Cuba could quite credibly be explained in defensive, rather than offensive, terms. A year earlier, the US had sponsored an attempt to invade Cuba at the Bay of Pigs. The Soviet representative, pointedly referring to that “April fiasco,”<sup>18</sup> reiterated his country’s pledge to ensure against further such efforts to overthrow the Castro regime. Asserting “that [the new] arms and military equipment are intended solely for defensive purposes”<sup>19</sup> in response to “continuous threats and acts of provocation by the United States,”<sup>20</sup> he added:

No State, no matter how powerful it may be, has any right to rule on the quantity or types of arms which another State considers necessary for its defence. According to the United Nations Charter, each State has the right to defend itself and to possess weapons to ensure its security.<sup>21</sup>

<sup>10</sup> See L. Meeker, “Defensive Quarantine and the Law,” 57 Am. J. Int’l L. 515, 518–24 (1963); A. Chayes, “The Legal Case for U.S. Action in Cuba,” 47 Department of State Bull. 763 (1962); A. Chayes, “Law and the Quarantine of Cuba,” 41 For. Aff. 550, 553–57 (1963).

<sup>11</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 3, para. 14.

<sup>12</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 12, para. 61.

<sup>13</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 6, para. 29.

<sup>14</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 14, para. 71.

<sup>15</sup> *Ibid.* <sup>16</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 15, para. 74.

<sup>17</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 15, para. 77.

<sup>18</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 28, para. 146.

<sup>19</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 30, para. 155.

<sup>20</sup> *Ibid.* <sup>21</sup> S.C.O.R. (XVII), 1022nd Meeting, 23 October 1962, at 35, para. 178.

### Anticipatory self-defense

Three draft resolutions were put before the Security Council, proposed, respectively, by the United States, the Soviet Union, and by Ghana with the United Arab Republic (UAR). The US draft called for UN supervision of “the withdrawal from Cuba of all missiles and other offensive weapons.”<sup>22</sup> The Soviet resolution condemned the quarantine and demanded its revocation,<sup>23</sup> while the Ghana–UAR draft studiously refrained from taking sides but called on the Secretary-General to mediate and on the parties “to refrain . . . from any action which might . . . further aggravate the situation.”<sup>24</sup> Acting UN Secretary-General U Thant, supporting the African lead, called on the US and USSR to negotiate a peaceful solution and on Cuba to halt construction and development of new missile installations. None of the three resolutions was put to a vote while vigorous bilateral negotiations were pursued. On January 7, 1963, the US and USSR, having worked out a settlement, sent a joint letter to the Secretary-General thanking him for his efforts and “in view of the degree of understanding between them” requesting deletion of the item from the Security Council’s agenda.<sup>25</sup>

What little the crisis revealed about states’ attitude to anticipatory self-defense seemed to indicate that very few, outside the Soviet bloc, relied on a strict interpretation of Articles 2(4), 51, and 53.<sup>26</sup> Instead Western European and Western Hemisphere states rallied behind the US action while many of those in Africa and Asia supported the neutral initiative of the Secretary-General.<sup>27</sup>

### Israeli-Arab War (1967)

On May 18, 1967, the Secretary-General received a message from Cairo’s Foreign Minister requesting withdrawal of the United Nations’ Emergency Force (UNEF) that had served as a buffer between Israelis and Egyptians in the Sinai since the war of 1956.<sup>28</sup> Although expressing his misgivings, U Thant felt required to comply. Immediately, UAR

<sup>22</sup> S/5182 of 22 October 1962.      <sup>23</sup> S/5187 of 23 October 1962.

<sup>24</sup> S/5190 of 24 October 1962.      <sup>25</sup> S/5227, 7 January 1963.

<sup>26</sup> Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* 342–43 (1996).

<sup>27</sup> For example, twelve Francophone African states communicated this position of support to the Secretary-General, 1962 UN Yearbook 108. See also A. Mark Weisburd, *Use of Force: The Practice of States Since World War II* 215–18 (1997).

<sup>28</sup> The letter is reproduced in A/6669 and Add.1, special report of the Secretary-General to General Assembly’s 22nd session, 18 May 1967.

forces redeployed to occupy the former buffer zone and thereby directly confronted Israeli forces.<sup>29</sup> This confrontation spread from land to sea. With UN forces withdrawn from their Sinai base at Sharm El Sheikh, Cairo declared the Gulf of Aqaba and Strait of Tiran closed to Israeli shipping.<sup>30</sup> At the same time, there was an ominous increase in Palestinian forces' infiltration along the border between Israel and Syria, where peacekeepers of the UN Truce Supervisory Organization (UNTSO) were still uncomfortably positioned.<sup>31</sup> An orchestrated Arab assault on Israel seemed inevitable and, as Professor Malcolm Shaw points out, it "could of course, be argued that the Egyptian blockade itself constituted the use of force, thus legitimising Israeli actions without the need for 'anticipatory' conceptions of self-defence."<sup>32</sup>

At approximately 3 a.m. on June 5, 1967, Israel and Egypt each notified the President of the Security Council that an armed attack had been launched by the other. When, a few hours later, the Security Council met in emergency session, the Secretary-General reported that, since his personnel had been evacuated at Egypt's request, he could not ascertain which party had initiated hostilities. Fighting quickly spread to Israel's other fronts, including Jerusalem.<sup>33</sup> On the following day the Council unanimously passed a resolution placing blame on none of the parties, but calling on all "to take forthwith as a first step all measures for an immediate cease-fire..."<sup>34</sup>

Israel argued that it was merely responding as victim of a concerted armed attack by forces of the UAR, Jordan, and Syria. This argument was difficult to credit, given its forces' large successes in the first days of fighting. Alternatively, Israel argued a right of anticipatory self-defense: that the sudden withdrawal of UNEF from the Sinai at Cairo's insistence had gravely prejudiced Israel's vital interests, leaving it with few options but to pre-empt an Arab attack by launching one of its own.

The Council took no position on this argument. Its second resolution, introduced by the Soviet Union, and passed unanimously on June 7, again demanded a cease-fire but carefully refrained from either apportioning blame or granting exculpation. It notably did not call for the withdrawal of Israeli troops from newly occupied territory.<sup>35</sup> Israel and Jordan mutually accepted this demand on condition that all other parties

<sup>29</sup> 1967 U.N.Y.B. 166.      <sup>30</sup> 1967 U.N.Y.B. at 168.      <sup>31</sup> 1967 U.N.Y.B. at 164.

<sup>32</sup> Shaw, n. 6 above, at 694; Gray, n. 6 above, at 112.      <sup>33</sup> 1967 U.N.Y.B. 175.

<sup>34</sup> S. Res. 233 of 6 June 1967.      <sup>35</sup> S. Res. 234 of 7 June 1967.

follow suit. Egypt hesitated for two days, then accepted conditionally.<sup>36</sup> A few parties to the conflict (Syria, Iraq, Kuwait) altogether rejected, or failed to accept, the cease-fire<sup>37</sup> even as Israeli forces occupied Gaza, the West Bank, Sinai, and Golan Heights. On June 9, Syria signalled its acceptance of the two cease-fire resolutions, yet fighting continued. Meanwhile, inside and outside the Council, the Soviet Union, with increasing stridency, called for condemnation of Israel and a roll-back of the parties to the *status quo ante*. Nevertheless, a unanimous Security Council, on June 11, again impartially demanded all-party observance of the cease-fire, the freezing of the combatants' positions, but not a roll-back of the gains made by Israel.<sup>38</sup>

In his study of these events, Professor Weisburd has concluded that the war had begun with "a preemptive air strike" by Israel against Egypt's airfields that completely destroyed the Egyptian air force. A misguided effort to come to Egypt's aid then led to the annihilation of Jordan's air force. The land war ended with Israeli occupation of territories more than four times its previous size. "Israel initially justified its actions before the United Nations," he reports, "by claiming, falsely, that it had been attacked first, though it subsequently reinforced this argument by stressing both the character of the Egyptian blockade [of the Strait of Tiran] as an act of war and the very dangerous situation in which Israel found itself on June 5."<sup>39</sup>

Although Israel also based its justification on actual self-defense against such aggressive acts as the closure of the Strait of Tiran, its words and actions clearly asserted a right to anticipatory self-defense against an imminent armed attack. It is difficult not to conclude that the Council members gave credence to this latter argument, since none of its resolutions spoke of the return of captured territory or censured the Israeli action despite urgent demands to that effect by the Soviet Union and its Eastern European allies.<sup>40</sup> The Soviet resolution condemning Israel and demanding return of all captured territory garnered only 4 of 15 Council votes, with even a bare-bones call for simple withdrawal supported by only 6 states.<sup>41</sup>

At the Fifth Emergency Special Assembly, convened at Soviet insistence on 17 June, 1967,<sup>42</sup> only a resolution regarding humanitarian

<sup>36</sup> S/7953, 8 June 1967 (UAR).

<sup>37</sup> S/7945, 7 June 1967 (Israel); S/7946, 7 and 8 June 1967 (Jordan); S/7948, 8 June 1967 (Kuwait).

<sup>38</sup> S. Res. 236 of 11 June 1967. <sup>39</sup> Weisburd, n. 27 above, at 137.

<sup>40</sup> 1967 U.N.Y.B. 110–11. <sup>41</sup> 1967 U.N.Y.B. 179, 190. <sup>42</sup> A/6717 of 13 June 1967.

## Recourse to Force

assistance and another calling on Israel to rescind its annexation of East Jerusalem were able to round up the requisite two-thirds majority.<sup>43</sup> Numerous condemnatory resolutions and demands for pull-back proposed by the Soviet Union<sup>44</sup> and Albania<sup>45</sup> failed to be adopted. A similar non-aligned initiative was voted down with the help of states in Western Europe, the Western Hemisphere, and Africa.<sup>46</sup>

In the ensuing period, as Weisburd summarizes it, “the international consensus that emerged was, in effect, that while Israel could not be permitted to retain the land seized from the Arabs, any return of the land had to be linked to satisfaction of Israel’s reasonable security concerns.” Thus, “the international community was unwilling to focus solely on the fact that Israel acquired the Arab lands by force without reference to the underlying political situation that led up to the use of force.”<sup>47</sup>

On July 9, the Security Council, by consensus, authorized the Secretary-General to “work out with the Governments of the United Arab Republic and Israel...the necessary arrangements to station United Nations military observers in the Suez Canal sector...,”<sup>48</sup> thereby, for the time being, *de facto* accommodating the Israeli gains. On November 22, it unanimously adopted a further resolution that, while confirming the “inadmissibility of the acquisition of territory by war,” linked withdrawal of Israeli forces to the “[t]ermination of all claims or states of belligerency” against Israel and respect for its “right to live in peace within secure and recognized boundaries free from threats or acts of force...”<sup>49</sup> Professor Malcolm Shaw concludes that in this instance the system “apportioned no blame...and specifically refused to condemn...” the Israeli recourse to force.<sup>50</sup> While some experts have pointed out that neither the Council nor the Assembly formally embraced the principle of anticipatory self-defense – indeed, that the Israelis did not exclusively justify their action as such, but also claimed to be acting in *actual* self-defense<sup>51</sup> – the primary facts speak for themselves. Israel had not yet been attacked militarily when it launched its first strikes. As for

<sup>43</sup> G.A. Res. 2253 (ES-V) and G.A. Res. 2252 (ES-V).

<sup>44</sup> A/L.519 rejected 4 July 1967, paragraph by paragraph. 1967 U.N.Y.B. 209.

<sup>45</sup> A/L.521 rejected 4 July 1967 by 71 against to 22 for with 27 abstentions.

<sup>46</sup> A/L.522 rejected 4 July 1967 by 53 in favor, 46 against and 20 abstentions (a two-thirds majority being necessary to adoption).

<sup>47</sup> Weisburd, n. 27 above, at 139. <sup>48</sup> S/8047, S.C. Meeting 1366 of 9 July 1967.

<sup>49</sup> S. Res. 242 of 22 November 1967. <sup>50</sup> Malcolm Shaw, *International Law* 429 (1977).

<sup>51</sup> Professor Christine Gray asserts that, while the Israeli action “was apparently a pre-emptive strike against Egypt, Jordan and Syria,...it did not seek to rely on

### Anticipatory self-defense

the Straits of Tiran, Israel had not begun to exhaust its diplomatic remedies. Its attack on Egypt was in anticipation of an armed attack, not a reaction to it. Most states, on the basis of evidence available to them, did however apparently conclude that such a armed attack was imminent, that Israel had reasonably surmised that it stood a better chance of survival if the attack were pre-empted, and that, therefore, in the circumstances, it had not acted unreasonably. This does not amount to an open-ended endorsement of a general right to anticipatory self-defense, but it does recognize that, in demonstrable circumstances of extreme necessity, anticipatory self-defense may be a legitimate exercise of a state's right to ensure its survival.

### Israel–Iraq (nuclear reactor) (1981)

On June 7, 1981, nine aircraft of the Israeli air force bombed the Tuwaitha research center near Baghdad. In a note to the Secretary-General, the Israeli Government claimed to have destroyed the “Osirak” (Tamuz-1) nuclear reactor<sup>52</sup> which, it said, was developing atomic bombs that were to be ready for use against it by 1985.<sup>53</sup>

Iraq, in asking for an immediate meeting of the Security Council, described the attack as a grave act of aggression, pointing out that it, unlike Israel, was a party to the 1968 Treaty on Non-Proliferation of Nuclear Weapons (NPT) and that its reactor, registered with the International Atomic Energy Agency (IAEA), was subject to IAEA inspection, and had never been found in violation of the nuclear safeguards agreement.<sup>54</sup> Israel, however, claimed that Iraq's uranium purchases were more consistent with weapons production than with peaceful use and that its government's bellicose rhetoric had confirmed an intent to use the weapons.<sup>55</sup> As for the IAEA inspections, Israel argued that these were easy to circumvent,<sup>56</sup> making the pre-emptive strike necessary.

States' reactions, however, were highly negative. On June 19 the Council unanimously adopted a strongly condemnatory resolution that affirmed Iraq's inalienable “sovereign right” to develop a peaceful

anticipatory self-defence.” Gray, n. 6 above, at 112. She surmises that states acting in this way are reluctant to invoke anticipatory self-defense as a principled justification because “they know [it] will be unacceptable to the vast majority of states.” *Ibid.*

<sup>52</sup> A/36/313, S/14510, 8 June 1981. <sup>53</sup> A/36/610, S/14732, 19 October 1981.

<sup>54</sup> 1981 U.N.Y.B. 275–76; Weisburd, n. 27 above, at 287–89.

<sup>55</sup> Weisburd, n. 27 above, at 288. <sup>56</sup> *Ibid.*

nuclear capacity and called on Israel to place its own nuclear reactors under IAEA control by adhering to the NPT.<sup>57</sup> In November, the General Assembly endorsed an even stronger resolution containing a “solemn warning” against repetition of such action.<sup>58</sup> It received 109 votes in favor with only the US and Israel opposed and 34 abstentions.

In stating its case, Israel was not able to demonstrate convincingly that there was a strong likelihood of an imminent nuclear attack by Iraq. The negative response reflected this, as well as a sense that Israel – a nuclear power deliberately remaining outside the NPT safety network – was trying to dictate to another sovereign state whether it could develop a nuclear capability. Even so, neither the Council nor the Assembly imposed any sanctions. The Assembly’s only action was to request the Secretary-General “to prepare with the assistance of a group of experts, a comprehensive study of the consequences of the Israeli armed attack against the Iraqi nuclear installations devoted to peaceful purposes...”<sup>59</sup>

The attack on Iraq can be seen in the same legal context of anticipatory self-defense as other instances noted in this chapter. Israel claimed to have acted to pre-empt an imminent, crippling, use or threat of use of a nuclear weapon against it by Iraq – a state which still regarded itself as at war with “the Zionist state.” Iraq, to the contrary, denied any intent to produce, let alone to deploy, weapons of mass destruction. No conclusive, or even highly probabilistic, evidence was produced by Israel to support its claim of extreme necessity, although, for both Israel’s supporters and opponents, the question less concerned Iraq’s nuclear-weapons capability than its propensity to use it. Propensities, however, are obdurately unamenable to conclusive proof.<sup>60</sup>

Sometimes views of the probity of evidentiary proof change with the passage of time and as more evidence comes to light. By the time Iraq invaded Kuwait in 1990, the UN’s harsh judgment of Israel’s anticipatory strike was being reappraised, especially as it became apparent that Baghdad, possessing a sophisticated medium-range ballistic delivery system, indeed had developed an extensive array of nuclear, biological, and chemical weapons and that its *animus* evidently was not peaceful.

<sup>57</sup> S.C. Res. 487 of 19 June 1981. <sup>58</sup> G.A. Res. 36/27 of 13 November 1981.

<sup>59</sup> G.A. Res. 37/18 of 16 November 1982.

<sup>60</sup> The distinction is clarified by Weisburd, n. 27 above, at 299. He states that anticipatory self-help differs from reprisal in that the state asserting it must show “that it had reason to believe that it was to be the target of future actions by the group against whom retaliatory action had been taken and that the attack was to deter these future attacks.”

Had Israel not struck in 1981, the reversal of Iraq's invasion of Kuwait a decade later might well have been impossible.

Again, however, evidence, rather than abstract principle, seems to determine the response to each instance in which a state claims the right to use force in anticipatory self-defense. States seem willing to accept strong evidence of the imminence of an overpowering attack as tantamount to the attack itself, allowing a demonstrably threatened state to respond under Article 51 as if the attack had already occurred, or at least to treat such circumstances, when demonstrated, as mitigating the system's judgment of the threatened state's pre-emptive response. This is made more likely if the response is proportionate and avoids collateral damage. The practice of UN organs also makes clear, however, that it is for them – collectively responding to the evidence – and not for an attacking state to determine the propriety or culpability of such anticipatory use of force.

### **Conclusions**

The problem with recourse to anticipatory self-defense is its ambiguity. In the right circumstances, it can be a prescient measure that, at low cost, extinguishes the fuse of a powder-keg. In the wrong circumstances, it can cause the very calamity it anticipates. The 1967 Israeli “first-strike” against Egypt's air force was widely seen to be warranted in circumstances where Cairo's hostile intention was evident and Israel's vulnerability patently demonstrable. In the end, the UN system did not condemn Israel's unauthorized recourse to force but, instead, sensibly insisted on its relinquishing conquered territory in return for what was intended to be a securely monitored peace. The system balanced Egypt's illegitimate provocations against Israel's recourse to illegal preventive measures. Most states understood that a very small, densely populated state cannot be expected to await a very probable, potentially decisive attack before availing itself of the right to self-defense.

In the case of the Cuba missile crisis, the international system appears to have been less than convinced that the Soviets' introduction of nuclear-armed missiles – albeit stealthy – genuinely and imminently threatened the US. It was apparent, for example, that deployment of nuclear-armed missiles on US and Russian submarines off each other's coasts had not engendered similar claims to act in “anticipatory self-defence.” Still, the covert way Soviet missiles were introduced in Cuba and the disingenuousness with which their deployment had at first been



denied, strengthened the US claim to be responding to an imminent threat. That claim was so strongly supported by other states in the Americas as to impede the usual third world rush to judgment against the US. Most important, the forceful countermeasures taken, although probably an act of war in international law and a violation of the literal text of Articles 2(4) and 51, was also seen as cautious, limited, and carefully calibrated. No shots were fired by the ships implementing the blockade. In the end, the outcome – the withdrawal of Soviet missiles from Cuba in return for a reciprocal dismantling of US missiles on the Turkish–Soviet border, together with Washington’s promise not again to attempt an invasion of Cuba – was seen by most states (except Cuba) as a positive accomplishment.

Only in the instance of Israel’s aerial strike against the Iraqi nuclear plant did the system categorically condemn and deny both the legality and legitimacy of recourse to anticipatory self-defense. In doing so, however, even vociferous critics of Israel made clear that they were not opposed to a right of anticipatory self-defense in principle but, rather that they did not believe that Iraq’s nuclear plant was being used unlawfully to produce weapons and that a nuclear attack on Israel was neither probable nor imminent. In this conjecture they may have been wrong, but they were surely right in subjecting to a high standard of probity any evidence adduced to support a claim to use force in anticipation of, rather than as a response to, an armed attack.