

Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter

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INTRODUCTION

Since September 11, 2001, the United States has justifiably taken a very aggressive stance against the proliferation of weapons of mass destruction (WMD).¹ Like most forms of global trade, the black market for weapons relies heavily on merchant vessels and the freedom of the seas. Worldwide, an estimated fifteen million railcar-sized containers are in transit or in a seaport every day; ninety percent of global trade travels by sea. At the same time, terrorist networks own or control a number of merchant vessels. Experts believe that al-Qaeda maintains a fleet of between a dozen and fifty ships.² Armed with the largest navy in the world, the United States would prefer a broad right to interdict foreign shipping to protect against illicit trafficking in nuclear or other superdestructive devices.

Unfortunately, the customary law of the sea firmly rejects that idea. As recognized in the *Case of the S.S. Lotus* in 1927, ships on the high seas are generally not subject to any authority other than that of their flag state.³ Traditionally, nations jealously guard their vessels' sovereignty on the high seas, and more than one war has been started by the illegal boarding of another nation's ship.⁴ Further, Article 92 of the UN Convention on the Law of the Sea (UNCLOS) expressly reserves jurisdiction over ships on the high seas to their own flag states.⁵ More spe-

1. During a debate between President George W. Bush and Senator John Kerry in 2004, they agreed that terrorist networks in possession of WMD posed the greatest potential danger to the United States. Steven Komarow, *Candidates' Terrorism Policies Differ Very Little*, USA TODAY, Nov. 1, 2004, at A11; Commission on Presidential Debates, 2004 Debate Transcript, The First Kerry-Bush Presidential Debate (Sept. 30, 2004), at <http://www.debates.org/pages/trans2004a.html>. Anti-proliferation has continued to be a key goal of the Bush administration, culminating in an agreement with North Korea made in February and October of 2007; whether that agreement will succeed remains open for debate as of October 2008. See generally Associated Press, *U.S. Nuclear Envoy Meets North Korean Counterpart*, N.Y. TIMES, Feb. 20, 2008, at A6.

2. See Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131, 145 (2005).

3. Piracy, statelessness, and self-defense are some of the very limited exceptions to ships' freedom from foreign interference on the high seas. See *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 1927), reprinted in WOLFGANG G. FRIEDMANN ET AL., CASES AND MATERIALS ON INTERNATIONAL LAW 42, 49 (1969); see also Carl S. Fitzgerald, *The Right of Self-Defense in International Law* 17 (Apr. 1960) (unpublished LL.M. thesis, Judge Advocate General's Legal Center and School, United States Army) (on file at Morris Law Library, University of Virginia).

4. Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT'L L. 771, 803-04 (2006).

5. United Nations Convention on the Law of the Sea art. 92, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm.

cifically, Article 110 of UNCLOS states that unless a treaty makes an exception, “a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it” unless there is reasonable suspicion that the ship is involved in piracy, the slave trade, unauthorized broadcasting, or is without nationality.⁶ Assuming that a foreign-flagged ship is not a pirate or a slaver, its possession of WMD cargo alone cannot legally justify boarding it under UNCLOS.⁷ Therefore, unless the U.S. government can find some other basis for boarding foreign-flagged ships, the action is presumptively illegal.

Striving to find a legal avenue for boarding foreign ships, the United States recently turned to a system of treaties as a way to contract around the UNCLOS default. In 2003, the Bush administration launched its Proliferation Security Initiative (PSI), a series of bilateral treaties under which several major flag-of-convenience nations, beginning with Panama, Liberia, and the Marshall Islands, signed their boarding rights over to the United States.⁸ Since its creation, the PSI has expanded significantly, and this diplomatic success puts nearly fifty percent of the world’s shipping within the reach of the U.S. Navy.⁹ The PSI has netted at least one ship, the *BBC China*, a German vessel¹⁰ that was intercepted while carrying centrifuge parts for Libya’s nuclear program.¹¹

Legal boarding under the PSI is limited to cooperative nations, however, and a handful of known and aspiring nuclear states are conspicuously absent from the agreement. India and Pakistan have not signed on, and both nations strongly oppose any outside influence on their nuclear programs.¹² North Korea has called the PSI “a brigandish naval blockade”¹³ and, along with Iran, has cited a sovereign right to develop and export weapons.¹⁴

6. *Id.* art. 110.

7. See Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT’L L. & POL’Y 253, 268 (2005).

8. The PSI is also a broader statement of principles against proliferation of and trafficking in nuclear and other weapons. Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. CONFLICT & SECURITY L. 125, 126–29 (2005).

9. *Id.* at 128 n.11; Logan, *supra* note 7, at 273.

10. Germany is a party to the PSI. U.S. Dep’t of State, Proliferation Security Initiative Participants (Oct. 6, 2008), at <http://www.state.gov/t/isn/c19310.htm>.

11. See David E. Sanger, *U.S. and Russia Will Police Potential Nuclear Terrorists*, N.Y. TIMES, July 15, 2006, at A8.

12. *Id.*

13. Shulman, *supra* note 4, at 804.

14. See Logan, *supra* note 7, at 273; see also Parisa Hafezi, *Iran says atomic drive brings powers “to their knees,”* REUTERS, Feb. 20, 2008, at <http://www.reuters.com/article/worldnews/>

Further, both Iran and North Korea have provided weapons to countries in the Middle East and to Islamic radicals. In January 2002, the Israeli Navy intercepted a shipload of Iranian arms bound for the Palestinian Authority or for Hezbollah. Loaded aboard a freighter called the *Karin-A*, eighty-three crates of Iranian weapons, including thousands of pounds of C-4 explosives, had been packed into waterproof plastic containers and attached to buoys for clandestine drop off and retrieval at sea.¹⁵ Similarly, in December 2002 the Central Intelligence Agency and National Security Agency learned that North Korean Scud missiles and chemicals were aboard an unflagged freighter called the *So San* in the Arabian Sea. Unable to determine the buyer of these munitions, the U.S. government enlisted nearby Spanish commandos to board and seize the ship. As it turned out, the cargo was bound for Yemen, an ostensible U.S. ally, and was allowed to proceed.¹⁶ Most recently, in September 2007 North Koreans arrived in the Syrian desert to work on what some believe was an advanced weapons system. The situation was dire enough to spark an Israeli air raid on the location and prompted the suggestion that the North Koreans were helping Syria with an infant nuclear program.¹⁷

In short, though the PSI demonstrates that the U.S. government places a very high priority on WMD interdiction, the fact remains that the most dangerous nuclear and aspiring nuclear nations in the world are not within the agreement and have aggressively guarded every bit of their sovereign power. Worse, in comparison to nuclear weapons, lesser nonconventional agents—including chemical, radiological, and biological weapons—are far easier to develop and to secretly transport by these nations or others outside the PSI.

Faced with this threat, the American government has indicated that the U.S. Navy may legally stop a foreign-flagged ship suspected of WMD trafficking. In 2003, then Undersecretary of State John Bolton told the news media that, regarding boarding ships suspected of carrying weapons of mass destruction to nonstate actors, “if we had actionable

idusl2061801920080220 (quoting Iranian President Mahmoud Ahmadinejad as saying, “The Iranian nation’s will to continue nuclear work has won over the will of the big powers . . . [and] brought them to their knees”).

15. James Bennet & Joel Greenberg, *Israel Seizes Ship It Says Was Arming Palestinians*, N.Y. TIMES, Jan. 5, 2002, at A5; William Safire, Op-Ed., *Arafat’s Implausible Denials*, N.Y. TIMES, Jan. 10, 2002, at A27.

16. William Safire, Op-Ed., *Bush’s Stumble: The So San Affair*, N.Y. TIMES, Dec. 19, 2002, at A39.

17. See Mark Mazzetti & Helene Cooper, *An Israeli Strike on Syria Kindles Debate in the U.S.*, N.Y. TIMES, Oct. 10, 2007, at A1.

intelligence and it was appropriate, we would do it now.”¹⁸ Pressed for a legal justification, Bolton stated informally that the United States could use Article 51 of the UN Charter—the self-defense provision—to authorize such an interdiction.¹⁹ Article 51 of the UN Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”²⁰

But the U.S. government has never offered a full justification under Article 51 for stopping such ships.²¹ Because the language of Article 51 lacks specifics, any reliance on its provisions requires a two-part analysis, first to determine the parameters of the doctrine, especially the “inherent right of self-defense” and “if an armed attack occurs,” and second to demonstrate that, logically and historically, the action fits within those parameters. This Note posits that interdicting a foreign-flagged ship transporting WMD to a terrorist organization is within the scope of Article 51.

I. THE “INHERENT RIGHT OF SELF-DEFENSE” AND THE *CAROLINE* PRINCIPLES

The historical locus of the general principles of anticipatory self-defense derives from correspondence between the British and American governments in response to the *Caroline* incident in 1837.

The facts were never disputed. In 1837, Canada revolted from British rule, and several Canadian rebel leaders managed to organize a force of nearly a thousand New Yorkers to support their cause. On December 13, these rebels seized Navy Island, a British possession in the Niagara River. Two weeks later, on December 29, they fired on a passing British ship while the American steamboat *Caroline* ferried men and munitions to the island in full view of the Canadian shore. That night, while the *Caroline* was docked on the American side, several boatloads of British soldiers rowed across the river and attacked the ship. According to the

18. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 545 (2004).

19. Garvey, *supra* note 8, at 134.

20. U.N. Charter art. 51.

21. Nations tend to act first and justify later in order to act surprised if their justifications are not accepted by other states. *See, e.g.*, Michael T. Wawrzycki, *The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony*, 14 TUL. J. INT’L & COMP. L. 579, 605–09 (2006).

Caroline's captain, she was boarded by seventy or eighty men, "who 'immediately commenced a warfare with muskets, swords, and cutlasses.'"²² Two Americans on board were shot to death, including a cabin boy; some thirty other crewmen and passengers escaped before the British cut the *Caroline* from her moorings, set her afire, and towed her into the current of the river, where she descended Niagara Falls. The British colonel who ordered the attack justified it as necessary to cut off the supply of men and munitions to the rebels on Navy Island and to eliminate any means for the rebels to invade the Canadian side of the river.²³

In response, the U.S. Secretary of State demanded redress, and the British Minister in Washington responded, among other things, that the principle of self-preservation justified the colonel's action.²⁴ The Americans then forced the issue by arresting Alexander McLeod for murder and arson in connection with the burning of the *Caroline*. By 1841 Daniel Webster was the Secretary of State, and he attacked the amorphous self-defense and self-preservation claims made by the British government and vigorously supported by the law officers of the Crown.²⁵ In an apparent effort to pin down the British government, Webster penned his own statement of the law of self-defense. Specifically, for the British government to use self-defense as a justification for its aggressive action, Webster demanded that it show a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . [and that it do] nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."²⁶ In light of the surprise midnight attack, Webster asked the British to carry the burden of showing that making threats or giving warning would have been "impracticable, or . . . unavailing," that "day-light could not be waited for," and that "it would not have been enough to seize and detain the vessel."²⁷ In asking the British to bear such a heavy burden, Webster

22. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 84 (1938) (quoting the captain's deposition before Congress).

23. *Id.* at 83–84.

24. U.S. Secretary of State John Forsyth demanded redress in a letter dated January 5, 1838. Letter from John Forsyth, U.S. Sec'y of State, to Henry Fox, British Minister (Jan. 5, 1838). The response from British Minister Henry Fox came on February 6 and dismissed the claim generally, without lengthy consideration. Jennings, *supra* note 22, at 85 (citing Letter from Henry Fox, British Minister, to John Forsyth, U.S. Sec'y of State (Feb. 6, 1838)).

25. *Id.* at 87.

26. *Id.* at 89.

27. Webster's letter was dated July 27, 1842, and included a copy of previous correspondence

likely believed he was defining self-defense so narrowly as to clearly exclude the *Caroline* event.

Lord Ashburton responded, however, by arguing that the *Caroline* event actually did fit within the legal framework invented by Webster.²⁸ Ashburton noted that American authorities had failed entirely to intervene in the illegal armament of the rebels by the *Caroline*; thus, British troops were forced to take matters into their own hands. The choice of means—by surprise and at night—was selected to minimize casualties on all sides, and the burning was forced because the strong current of the Niagara River prevented towing the vessel away. Finally, there was no moment for deliberation because the British force expected to find the *Caroline* in British waters, rather than American; thus, the British force was surprised at her location once the mission was underway and had no chance to reconsult its higher command.²⁹ Most importantly, the British letter ended with a sincere apology and closed on a very conciliatory note. Webster never renewed his initial argument that the attack was unjustified. Instead, he settled for the satisfaction that his principle of law had received British acquiescence.³⁰

A. *The Caroline Principles and Article 51*

History has parsed the *Caroline* incident into two core principles of legal international self-defense: necessity and proportionality.³¹ Necessity demands that the danger be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”³² Proportionality means that “nothing unreasonable or excessive” may be done because the act must be distinctly limited by the necessity causing it.³³

to update Lord Ashburton on the situation. *Id.*

28. *Id.* at 89–90. Lord Ashburton responded to Webster the next day, July 28, 1842. His letter can be found in 30 BRITISH AND FOREIGN STATE PAPERS 195 (1841–1842). *Id.*

29. *Id.* at 90. This argument was Lord Ashburton’s most dubious. Likely, it was quite obvious where the ship was docked. *Id.* at 90 n.23.

30. *Id.* at 91. Webster’s final letter was dated August 6, 1842, and simply accepted the apology.

31. Some scholars have attempted to add other factors to the mix, such as “reasonableness” and “immediacy.” It appears that none of these have caught on; after all, reasonableness is easily subsumed in proportionality, and immediacy is a part of the “instant and overwhelming necessity.” *But see* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 209 (4th ed. 2005); Uri Shoham, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191, 193 (1985).

32. Jennings, *supra* note 22, at 89 (citing Letter from Daniel Webster, U.S. Sec’y of State, to Lord Ashburton, British Plenipotentiary (July 27, 1848)).

33. *Id.*

In the years after the *Caroline* attack, these principles were widely used in international disputes and rapidly came to represent the customary law of self-defense.³⁴ Accordingly, Article 51 of the UN Charter, adopted in 1945, incorporated the *Caroline* principles as pillars of the “inherent” state right of self-defense.³⁵ Since 1945, states have continued to consider necessity and proportionality the defining parameters of appropriate self-defense.³⁶ Most famously, the International Military Tribunal at Nuremberg in 1947 stated that “preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation.”³⁷ The 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* notes expressly the “principles of necessity and proportionality” in its restatement of self-defense law.³⁸

Within the context of Article 51 specifically, the International Court of Justice (ICJ) has also repeatedly embraced necessity and proportionality. In *Military and Paramilitary Activities in and Against Nicaragua* (the *Nicaragua* case), the Court stated that despite the fact that Article 51 lacks “any specific rule whereby self-defence” is limited by necessity and proportionality, such a rule is “well established in customary international law.”³⁹ In 1996, the ICJ expressly noted that necessity and proportionality, though stemming from customary international law, “appl[y] equally to Article 51 of the Charter, whatever the means of force employed.”⁴⁰ Thus, the inherent right of self-defense reserved in

34. See Jane Gilliland Dalton, *The United States National Security Strategy: Yesterday, Today, and Tomorrow*, 52 NAVAL L. REV. 60, 70–71 (2005). Parties cited the *Caroline* principles in the *Mary Lowell* case in 1879, the *Fur Seal* arbitration in 1893, and the *Kelly* case in 1930. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 87 n.58 (Cambridge Univ. Press 1994) (1987).

35. See Dalton, *supra* note 34, at 71.

36. See, e.g., Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 120 (1986); Holly S.G. Coffey, *Peacetime Reprisals Under Article 51: An Argument for Legal Legitimacy in Cases of Terrorism* 34 (Apr. 1997) (unpublished LL.M. thesis, Judge Advocate General’s Legal Center and School, United States Army) (on file at Morris Law Library, University of Virginia).

37. Shoham, *supra* note 31, at 196 n.28.

38. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA pt. 1, § 2 (Louise Doswald-Buck ed., 1995), reprinted in DOCUMENTS ON THE LAWS OF WAR 573, 575 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

39. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 (June 27).

40. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8). This opinion is also discussed in DINSTEIN, *supra* note 31, at 209 and in THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 98 (2002). Professor Yoram Dinstein adds that necessity and proportionality were again affirmed by the Court in 2003. DINSTEIN, *supra* note 31, at 209; see also *Oil Platforms (Iran v. U.S.)*, 2003

Article 51 fully embodies the *Caroline* principles of necessity and proportionality.

B. Interdiction of Foreign-Flagged Ships Under the Caroline Principles

Requiring a great and immediate necessity and allowing only a response proportional to the threat, the *Caroline* standards define the inherent right of international self-defense.⁴¹ In the unchallenged view of the British government, the *Caroline* attack was justified under these principles.⁴² I argue the *Caroline* doctrine suggests that stopping a foreign-flagged ship suspected of trafficking WMD to nonstate organizations falls within the United States' inherent right of self-defense.

First, boarding a ship could certainly be necessary within the *Caroline* parameters. Indeed, the British successfully argued that it was "overwhelmingly necessary" to stop the *Caroline* from making further trips to Navy Island, where she off-loaded raw American volunteers and small arms.⁴³ A few rebels who had caused no disturbance on the British shore and taken no aggressive action beyond camping on a provincial island and firing once at a passing ship posed enough of a threat to meet the necessity requirement. By comparison, loose nuclear, chemical, and biological weapons pose a terrifically greater threat. "[T]he WMD threat is overwhelming in a way that . . . other modes of disorder . . . simply are not."⁴⁴

Additionally, the *instant* necessity required under the *Caroline* principles has been interpreted to require an excellent reason to act at the moment chosen. In the *Caroline* incident, the *instant* requirement was met by the British decision to attack during the night, mainly to attain surprise and minimize casualties, but also to act before the *Caroline* had a chance to make any further ferries the next day. Thus, the *instant* aspect of necessity has never demanded the full paralysis that the language seems to imply; if it did, the British could not have acted until the

I.C.J. 161, 198–99 (Nov. 6).

41. See, e.g., FRANCK, *supra* note 40, at 67 n.82; 1 OPPENHEIM'S INTERNATIONAL LAW 420 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); MALCOLM N. SHAW, INTERNATIONAL LAW 1025 (5th ed. 2003); Shoham, *supra* note 31, at 192–93; Jeffrey S. Brady, Legal Bases for the Use of Force Against International Terrorism: The U.S. Paradigm of Humanitarian Self-Defense 16–17 (Apr. 1999) (unpublished LL.M. thesis, Judge Advocate General's Legal Center and School, United States Army) (on file at Morris Law Library, University of Virginia).

42. A number of modern scholars share this view held by the British government. See, e.g., Jennings, *supra* note 22, at 89–90.

43. *Id.* at 89–91.

44. Becker, *supra* note 2, at 224.

Caroline finally approached the main Canadian shore.⁴⁵ Accordingly, stopping a ship could satisfy the instant necessity requirement largely because the high seas provide the least dangerous opportunity, as opposed to seizing a ship in a populated port or waiting for the device to reach a nonstate actor.

Further, providing special weapons to nonstate organizations is an “instant” threat.⁴⁶ The final delivery mechanism would presumably be secret, meaning that after the weapons leave state control, the United States might never be able to *more* instantly anticipate an attack and stop it.⁴⁷ Forcing the United States to wait for a more “instant” threat would amount to waiting for the WMD’s actual use, a position unnecessary under the *Caroline* doctrine and untenable in light of the destructive capability of modern weapons.⁴⁸ Even in 1837, the British did not wait for invasion, but satisfied the instant necessity requirement by attacking the *Caroline* at the time and place holding the least danger and greatest opportunity. The same would be true for the interception of a rogue state’s ship on the high seas, far from any land and before the cargo could reach a more shadowy intermediary.⁴⁹ Thus, such an interdiction would meet all of necessity’s detailed demands.

Second, proportionality would also be satisfied. In the *Caroline* incident, two men were killed and the ship was burned and sent over Niagara Falls—all to prevent the delivery of a few volunteers and small arms to an infant rebel force. Further, the *Caroline* was attacked and burned in sovereign territory, at an American dock. By comparison, the United States proposes to act in the open sea against a much greater threat and

45. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 217–18 (New Haven Press 1994) (1961); Dalton, *supra* note 34, at 71.

46. The actions taken and statements made by terrorists in the past few years create no reason to doubt that the most severe weapons they can build or buy will be quickly utilized or leveraged against the United States or the Western world. See *United States v. Usama bin Laden*, No. S(7)98 CR.1023(LBS), 2001 WL 1160604 (S.D.N.Y. Oct. 2, 2001).

47. See Douglas Guilfoyle, *The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?*, 29 MELB. U. L. REV. 733, 758 (2005).

48. See the ICJ’s discussion in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8). The Court expressly refused to hold that preemptive nuclear strikes would always be illegal, noting instead that the necessity and proportionality requirements of Article 51 would govern such use. *Id.*

49. For instance, combined with the historic unwillingness of North Korea to back away from developing WMD, its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), its recent nuclear weapons test, and its known past exportation of munitions, there is no better “choice of means” for an American response than simply stopping and seizing North Korean shipments.

is unlikely to attack any docks or burn any ships. If a destructive incursion such as the *Caroline* attack can be made onto foreign soil, a less destructive act with less insult to the target's sovereignty must be available on the high seas.⁵⁰ In *Legality of the Threat or Use of Nuclear Weapons* (*Nuclear Weapons* case), the ICJ even conceded that a launch of nuclear weapons could in some imaginable cases be a legitimately proportional response to non-nuclear provocation.⁵¹ Therefore, using conventional naval weapons to combat WMD provocation must be proportional.

Accordingly, a relatively nondestructive, noninvasive procedure such as stopping foreign-flagged ships and confiscating weapons bound for nonstate organizations meets the *Caroline* principles and thus is within the "inherent" right of self-defense noted in Article 51.

II. THE BROAD VIEW OF "ARMED ATTACK" IN THE MODERN ERA

Following its reference to the inherent right of self-defense, the second part of Article 51 appears to limit that right to situations where there has been an "armed attack."⁵² The plain connotation is that weapons shipments are not armed attacks on the United States and thus do not trigger Article 51. However, the context of Article 51 combined with the framers' intentions and an extensive record of state practice demonstrate that "armed attack" does not severely restrict the inherent right of self-defense. Instead, "armed attack" can be appropriately understood in an adaptable and broad light under which the shipment of WMD to a dangerous nonstate organization qualifies as an armed attack.

50. See Thomas E. Donahue Jr., *Self-Defense and Freedom of the Seas* 19 (Apr. 1964) (unpublished LL.M. thesis, Judge Advocate General's Legal Center and School, United States Army) (on file at Morris Law Library, University of Virginia). Lieutenant Donahue points out that *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234-35 (1804), applies self-defense principles to the high seas. Donahue, *supra*, at 19.

51. *Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 245. For a similar implication, that anticipatory self-defense could conceivably be justified by unambiguous evidence of an impending, highly destructive attack, see IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 259 (Oxford Univ. Press 1981) (1963).

52. Article 51 of the UN Charter states: "Nothing in the present Charter will impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." U.N. Charter art. 51.

A. *Ambiguity of the Text of Article 51*

At first, Article 51, which states that “[n]othing in the present Charter will impair the inherent right of individual or collective self-defense *if an armed attack occurs*” appears to preclude anticipatory self-defense.⁵³ A closer examination, though, reveals that the text is ambiguous. As shown by the continued use of the *Caroline* principles, the customary “inherent” right of self-defense is not limited to responses to actual armed attacks, but instead is circumscribed only by the requirements of necessity and proportionality. The terms “inherent right of self-defense” and “if an armed attack occurs,” therefore, threaten to allow Article 51 to be read in two very different and conflicting ways.⁵⁴ In other words, if “armed attack” is meant to restrict the inherent right of self-defense, then the term “inherent right” is entirely superfluous and inaccurate, because any right to self-defense that is limited to responses to an armed attack does not represent the inherent right of self-defense as described by the *Caroline* principles. This problem has caused confusion about the actual meaning of the two terms. Arguments have focused primarily on “armed attack” because the *Caroline* doctrine so clearly defines the “inherent right of self-defense.” The remaining issue is whether “armed attack” can be interpreted broadly enough to avoid overrunning the rest of Article 51.⁵⁵

B. *Adaptivity of the UN Charter*

It is logical that in 1945 the drafters thought “armed attack” was self-evident.⁵⁶ The Second World War, characterized by Hitler’s *blitzkrieg* invasions, offered, at that time, the most recent and memorable model of warfare.⁵⁷ In fact, before 1945, great wars in Western history had usu-

53. *Id.* (emphasis added).

54. Professors Myres McDougal and Florentino Feliciano express this tension very well by pointing out that “armed attack” is a poor substitute for the prior rule of necessity; it presupposes that “in no possible context can . . . [other events] take on efficacy, intensity, and proportions comparable to those of an ‘armed attack.’” MCDUGAL & FELICIANO, *supra* note 45, at 240–41. The *Caroline* principle of necessity, of course, is not handicapped in this way.

55. This is related to the rule of statutory interpretation that one word or phrase in a statute should not be given significance repugnant to the rest of the statute or destructive of the obvious intent of the legislative body that created that law. A statute should be read with its full context superseding the most literal meaning of the words, provided that the words have enough semantic leeway to carry the broader meaning. *See Moore v. Harris*, 623 F.2d 908, 914 n.29 (4th Cir. 1980); *Norfolk S. Ry. Co. v. Lassiter*, 68 S.E.2d 641, 646 (Va. 1952).

56. *See Schachter*, *supra* note 36, at 133 (noting that, in the context of echelons of soldiers, planes, and tanks, “armed attack” would be a factual, objective condition that is easily verifiable).

57. Stuart G. Baker, Note, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of*

ally started with arms races, mobilization, and large-scale invasions, often accompanied by open declarations of war.⁵⁸ From this perspective, “armed attack” was a reasonable proxy for dangerous aggression, and without nuclear weapons to give them pause,⁵⁹ the drafters may have believed that requiring an armed attack was a good method for maintaining healthy self-defense rights without encouraging nations to move too quickly.

But the UN Charter is designed in part to be flexible, so “armed attack” need not be permanently limited to the situations immediately expected by the drafters. In form and substance, the Charter is more of a constitution than an ordinary international treaty or contract.⁶⁰ Article 103 is a supremacy clause, expressly noting that obligations under the Charter, when in conflict with any ordinary treaty, must prevail.⁶¹ Further, the UN Charter allows interpretation by at least three distinct entities: the United Nations, the ICJ, and the member nations themselves as sovereigns.⁶² Given this built-in supremacy and capacity for different or changing interpretations, the UN Charter need not be, and has not been, interpreted statically.

C. *Reductio Ad Absurdum Results of a Narrow Reading of Article 51*

Given the adaptability of the UN Charter, requiring an “armed attack” cannot limit self-defense to responding to pre-1945 scale invasions. So interpreted, the UN Charter is not workable in the modern era. Such an interpretation would outlaw all anticipatory self-defense and amount to a *reductio ad absurdum*.

Libya: The New Interpretation of Article 51, 24 GA. J. INT'L & COMP. L. 99, 107–08 (1994).

58. Norman Menachem Feder, Note, *Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L L. & POL. 395, 413 (1987).

59. The San Francisco meetings during which the UN Charter was drafted took place in early 1945 and culminated in June, two months before the atomic age arrived in August 1945. United Nations, Sixtieth Anniversary of the San Francisco Conference, at <http://un.org/aboutun/sanfrancisco/> (last visited Oct. 21, 2008).

60. See FRANCK, *supra* note 40, at 5–9.

61. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

62. FRANCK, *supra* note 40, at 7. Professor Thomas Franck notes that states retain their “sovereign equality” under Articles 2(1) and 18, and that they are left to their own devices under the self-defense provision of Article 51. *Id.*; see also Coffey, *supra* note 36, at 36 n.107.

Losing anticipatory self-defense entirely as a legal method of national defense has been unpalatable to both leaders and scholars.⁶³ Professor Brunson MacChesney relied on “[r]ealism, common sense, and the destructive nature of modern weapons” to assault a strict reading of “armed attack.”⁶⁴ Professor C.H.M. Waldock called it a “travesty” that Article 51 might be read to protect an aggressor’s first blow,⁶⁵ and it has been argued that the overall danger from rogue states far exceeds that of allowing powerful nations to define “armed attack” more broadly in order to defend themselves proactively.⁶⁶ Professor Timothy McCormack argued that Article 51, by incorporating the *Caroline* principles only implicitly in its “inherent right of self-defense,” does not even attempt to fully restate self-defense law, and thus cannot be read to, by the simple connotation of “armed attack,” rewrite at a blow the entire customary law of self-defense.⁶⁷

In accordance with this outcry, international courts tend to either take a broad view of “armed attack” or just ignore the tension and apply the customary international law of self-defense. At Nuremberg, the International Military Tribunal elected this path just two years after the drafting of the UN Charter when it openly discussed “preventive action in foreign territory.”⁶⁸ In the *Nuclear Weapons* case, the ICJ focused primarily on the traditional principle of proportionality in holding that under Article 51, nuclear weapons might be legally used in response to non-nuclear provocation.⁶⁹ Thus, it is not necessary to read Article 51 as eliminating all anticipatory self-defense.⁷⁰

63. See e.g., D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 186–92 (1958); Brunson MacChesney, *Some Comments on the “Quarantine” of Cuba*, 57 AM. J. INT’L L. 592, 594–96 (1963); Shoham, *supra* note 31, at 199; Baker, *supra* note 57, at 116; Coffey, *supra* note 36, at 45. Such broad rejections of “armed attack” are generally far more result-oriented than text-based, but then so is the entire doctrine of *reductio ad absurdum*.

64. MacChesney, *supra* note 63, at 595.

65. Shoham, *supra* note 31, at 199.

66. Baker, *supra* note 57, at 116.

67. TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 183–84 (1996).

68. Shoham, *supra* note 31, at 196 n.28. Admittedly, the IMT was dealing with pre-1945 events; however, it has been cited repeatedly after 1945 for its holdings in the field of self-defense. These holdings were used by some defendants to justify German actions.

69. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8).

70. See Book Note, *Aggression and World Order*, 72 HARV. L. REV. 1403, 1405 (1959) (reviewing BOWETT, *supra* note 63, and JULIUS STONE, A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION (1958)); Donahue, *supra* note 50, at 29.

D. Intent of the Framers of Article 51

By 1945, the law of anticipatory self-defense had existed for hundreds of years; even the relatively modern *Caroline* principles had lasted a century. Therefore, if the framers of Article 51 intended a strict reading of “armed attack,” this strict reading would have been revolutionary and should have sparked substantial debate or comment.⁷¹ Instead, the phrase slipped through in relative oblivion, and some delegates actually used it interchangeably with “aggression.”⁷² Thus, in accord with the familiar prior condition of self-defense law, it appears that most framers who considered the implications of “armed attack” assumed a broad, inclusive definition of it.

General acceptance of anticipatory self-defense dates to Grotius, who noted in 1625 that “[a] just cause . . . of war is an injury, which though not actually committed, threatens our persons or property with danger.”⁷³ The Westlake treatises also state that a nation may defend itself against any attack and carefully define attack to include all violations against the legal rights of the state or its citizens.⁷⁴ As recently as 1928, when the Kellogg-Briand Pact outlawed war without reference to self-defense,⁷⁵ Secretary of State Frank Kellogg’s notes expressly indicated that nothing in the treaty limited America’s right of self-defense.⁷⁶ Combining this history with the *Caroline* principles makes it clear that no strand of law limiting self-defense strictly to cases of armed attack had ever emerged from customary international law or the treaty-based past. Thus, if any such limitation occurred at San Francisco in 1945, one presumes that it would have been both intentional and a significant point of contention.

Instead, the preparatory work for Article 51 lacks any indication that its framers intended to narrow the law of anticipatory self-defense. “[I]t was made quite clear at San Francisco that the traditional permission of self-defense was not intended to be abridged and attenuated but, on the

71. This is similar to Justice Antonin Scalia’s view of statutory interpretation that Congress “does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

72. BROWNLIE, *supra* note 51, at 271.

73. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 76 (A.C. Campbell trans., M. Walter Dunne 1901) (1625).

74. JOHN WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 114–19 (1894); *see also* BROWNLIE, *supra* note 51, at 231.

75. *See Treaty Providing for the Renunciation of War as an Instrument of National Policy* art. I, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

76. Donahue, *supra* note 50, at 16 n.34.

contrary, to be reserved and maintained.”⁷⁷ The drafting committee stated, with regard to Articles 2(4) and 51, that “the use of arms in legitimate self-defence remains admitted and unimpaired.”⁷⁸ Though legitimate self-defense, in the eyes of the drafters, could theoretically be limited to cases of armed attack, the UN Charter’s failure to define “armed attack” lends further credence to the idea that the drafters believed they were characterizing the existing law of self-defense rather than making a dramatic change to it.

Delegates’ interchangeable use of “attack” and “aggression” in discussions of the Charter also point to this conclusion, because “armed aggression” is a far better approximation of the *Caroline* principles than “armed attack.”⁷⁹ Yet no real consideration appears to have been given to the difference; in fact, the French text actually uses “aggression armée” rather than a more exact translation, such as “attaque armée.”⁸⁰ By contrast, delegates made great efforts to reconcile the English and French wording of phrases in the UN Charter that were understood to be crucial.⁸¹ In sum, the framers’ broad statements, interchanging use of aggression and attack and failure to reconcile the languages of the text demonstrate that the goal of the drafting committee was not to initiate a severe new restriction on the customary law of self-defense.

Instead, it has been suggested that the roots of “armed attack” may be found in the Act of Chapultepec, a preexisting collective defense treaty between American nations.⁸² If it refers to the Act of Chapultepec’s use of the term “attack,” then “armed attack” may be designed simply to expressly include that treaty within Article 51 and provide generally for the inclusion of such regional arrangements.⁸³ Others suggest that per-

77. Myres S. McDougal & Florentino P. Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L.J. 1057, 1145–46 (1959); see also BOWETT, *supra* note 63, at 188; Daniel G. Partan, *The Cuban Quarantine: Some Implications for Self-Defense*, 4 DUKE L.J. 696, 697 (1963); Fitzgerald, *supra* note 3, at 40; John L. Muehlheuser, *Self-Defense by Any Other Name is Still Self-Defense* 14 (Apr. 2003) (unpublished LL.M. thesis, Judge Advocate General’s Legal Center and School, United States Army) (on file at Morris Law Library, University of Virginia).

78. BOWETT, *supra* note 63, at 185; see also Shoham, *supra* note 31, at 198.

79. BROWNIE, *supra* note 51, at 271.

80. MCCORMACK, *supra* note 67, at 179–80.

81. *Id.* Article 2(4) received a very careful consideration on this point, for instance. *Id.* at 176.

82. See Final Act of the Inter-American Conference on Problems of War and Peace, Mar. 8, 1945, 60 Stat. 1831.

83. See, e.g., MCCORMACK, *supra* note 67, at 179; Partan, *supra* note 77, at 697; Coffey, *supra* note 36, at 37.

haps “armed attack,” in approximating “armed aggression,” was merely an attempt to characterize the existing law of self-defense.⁸⁴

Neither of these explanations provides much insight about how best to interpret the meaning of “armed attack” in the modern era, beyond the presumption that the lack of outcry implies a broad view of “armed attack.” Some scholars, having convincingly disparaged the roots of the phrase, seem to prefer to ignore it entirely.⁸⁵ However, because the UN Charter is constitutional and adaptive, there is no reason to disregard the text.⁸⁶ Any degree of faithfulness to the text requires that “armed attack” be interpreted in some way. But the framers have provided no reason why “armed attack” cannot be read broadly so as to encompass offensive and highly dangerous provocations such as shipping WMD materials to nonstate organizations.

E. State Practice

Lacking a clear mandate from the drafters of the UN Charter, state practice suggests the best way to interpret “armed attack.” State practice demonstrates that strong powers have, before and after Article 51, always taken a broad view of threats to their security and have responded in a way that clearly implies a broad reading of “armed attack.” During the Cold War, fear of a nuclear holocaust limited broad readers to a distinct minority, primarily the great powers. The end of the Cold War and the rise of asymmetric warfare and terrorism have created unprecedented international support for assertive anticipatory self-defense. Accordingly, the best way to read “armed attack” in the modern era is broadly, to include events such as shipping WMD to nonstate organizations.

Since 1945, state practice, acting as the “real world test of international law,”⁸⁷ offers the best framework in which to view Article 51. In effect, state practice is both the “leading edge of international law” and the key to demonstrating any customary norm.⁸⁸ It takes precedence over scholarly views and arcane textual arguments.⁸⁹ More specifically, Article 31 of the Vienna Convention on the Law of Treaties indicates

84. See BOWETT, *supra* note 63, at 184–92; MCCORMACK, *supra* note 67, at 238.

85. See BOWETT, *supra* note 63, at 184.

86. FRANCK, *supra* note 40, at 5.

87. John T. Oliver, Freedom of Navigation, Rights of Passage, International Security, and the Law of the Sea 85 (Apr. 23, 1993) (unpublished S.J.D. dissertation, University of Virginia School of Law) (on file at Morris Law Library, University of Virginia).

88. *Id.*

89. See Feder, *supra* note 58, at 401–02; Muehlheuser, *supra* note 77, at 9.

that the correct interpretation of a treaty involves examining the subsequent practice of states.⁹⁰ Allowing state practice to inform the reading of Article 51 also comports well with the constitutional nature of the UN Charter and the built-in involvement of many different parties holding interpretive power.

1. *Great Powers*

The beginning of the atomic age and the ratification of the UN Charter in 1945 had relatively little effect on states' practice of anticipatory self-defense, especially by the great powers. Though powerful nations generally have respected the language of Article 51 by crafting arguments that their actions fit within its parameters, they have always treated it as adaptable and broad.

During the Second World War, nations alleged a necessity for self-defense under the *Caroline* principles to attempt to justify invasions of neutral countries. The Germans alleged a threat to themselves from Allied violations of neutrality in Denmark, Norway, Belgium, Holland, and Luxembourg and occupied those nations on this justification. In 1940, Britain occupied Iceland in self-defense against a potential German attack; in 1942, the Japanese used self-defense to justify their battle against Allied forces in neutral Portuguese Timor.⁹¹ In fact, at Nuremberg, the defense of certain German actions hinged on such an aggressive view of self-defense. The International Military Tribunal agreed with the arguments themselves, framed by the *Caroline* principles, and rejected their thrust only because the facts did not support their application.⁹² Thus, in 1945, when Article 51 overlaid the *Caroline* principles, great powers retained their familiar self-defense arguments and immediately took a necessarily broad and adaptive view of Article 51 to preserve their freedom to take defensive action.

As early as 1946, nations were already revisiting the issue of "armed attack" in light of the new atomic age. A State Department memorandum stated: "It is equally clear that an 'armed attack' *is now something entirely different* from what it was prior to the discovery of atomic wea-

90. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The Vienna Convention does not per se include the 1945 UN Charter because it is not retroactive; however, Article 31 was no innovation but rather a restatement of recognized law of treaties, which would clearly apply to the UN Charter. See MCCORMACK, *supra* note 67, at 211–12.

91. BROWNLEE, *supra* note 51, at 310–12.

92. *Id.* at 311.

pons.”⁹³ The memorandum called it “both important and appropriate” to define “armed attack” to include “not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.”⁹⁴ As the Cold War dragged on, strong nations continued to maintain the *Caroline* principles in defining their actions as self-defense. The “armed attack” requirement was minimized.

In the late 1950s, France, facing a strong insurgency in Algeria, asserted that its right to self-defense extended to stopping ships suspected of carrying arms to the Algerian rebels.⁹⁵ In a single year, nearly 5,000 ships were stopped on the high seas, 1,300 were fully searched, and 180 were diverted away from Algeria based on their cargoes. Flag states protested. In the end, however, no action was taken to stop the French interdictions, and the UN Security Council never declared them illegal.⁹⁶ Indeed, critics of the French action focused on the dubious presence of immediate necessity and proportionality, rather than bringing up any limitation based on the “armed attack” language in Article 51.⁹⁷

One of the best examples of the great powers taking a broad view of “armed attack” is the Cuban Missile Crisis. On October 22, 1962, in response to the emplacement of Soviet missiles in Cuba, President John F. Kennedy ordered a naval quarantine to stop incoming Soviet ships and to repel any that carried additional offensive weapons to the island.⁹⁸ The State Department avoided using Article 51 as the justification for this action, instead relying on a unanimous vote of the Organization of American States (OAS).⁹⁹ The decision not to rely on Article 51 was, however, primarily a strategic one made to keep the enemy Soviet Union from building on such a broad precedent to further more aggression. Kennedy’s advisors thought it wiser to use the OAS, despite the fact that many of them believed Article 51 could legitimately be invoked.¹⁰⁰

93. DEP’T OF STATE, PUBLICATION NO. 2702, INTERNATIONAL CONTROL OF ATOMIC ENERGY: GROWTH OF A POLICY 164 (1946), *quoted in* PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 166–67 (1948) (emphasis added).

94. *Id.*

95. R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 216–17 (3d ed. 1999).

96. Becker, *supra* note 2, at 216–17. Admittedly, the Security Council’s lack of action was perhaps due to the French veto power, but apparently the issue was never directly raised.

97. *Id.* at 217.

98. Proclamation No. 3504, 3 C.F.R. 232 (1959–1963), *reprinted in* 50 U.S.C. § 1 app. at 378 (2000).

99. Feder, *supra* note 58, at 422.

100. See MCCORMACK, *supra* note 67, at 221. The Deputy Secretary of the Department of Justice, Nicholas Katzenbach, recommended relying on Article 51. Though possibly in agreement with him on legal grounds, Professor Abram Chayes, Legal Advisor to the Department of State, suggested avoiding the Article 51 justification for strategic reasons. Chayes’s views mix law and

Obviously this move was strategic rather than legal, because the vote of the OAS took place the day *after* Kennedy ordered the quarantine.¹⁰¹ Further, Kennedy's speeches and proclamation justifying the U.S. action, while not referring to Article 51 specifically, characterized the quarantine as "in the defense of our own security."¹⁰² In light of the posture of the United States during the crisis, the fact that a political stratagem kept Kennedy from publicly using Article 51 cannot detract from the fact that the U.S. action practiced a broad view of permissible self-defense under Article 51. Clearly, the quarantine was based on American self-defense and the "imminent threat" of a nuclear launch from Cuba.¹⁰³ Speaking in the Security Council, American ambassador Adlai Stevenson angrily decried Soviet "aggression" and justified the quarantine as regional and national self-defense.¹⁰⁴ For their part, the Soviets justified the missile placements as part of Cuba's legitimate right of self-defense, pointing to the Bay of Pigs debacle a year earlier as evidence that Cuba was under imminent threat from the United States.¹⁰⁵

In several of its own conflicts, the British government also demonstrated a broad view of Article 51. In defense of its military actions in Egypt in 1956, and ignoring any possible restriction added by the "armed attack" requirement, the British government cited the customary right of self-defense under the *Caroline* principles.¹⁰⁶ In 1982 the entire naval conflict over the Falkland Islands was fought by the British asserting their inherent right of self-defense under Article 51. In response to the Argentine attack, the British first created a two-hundred-mile "Total Exclusion Zone" from which all Argentine military or supply ships were banned at risk of being sunk.¹⁰⁷ In maintaining a broad view of "armed attack," the British then sank the Argentine cruiser *General Belgrano* while it was well outside the two-hundred-mile zone because it posed an "imminent threat" to British forces.¹⁰⁸

strategy and are hard to parse. *Id.*

101. FRANCK, *supra* note 40, at 99.

102. Feder, *supra* note 58, at 422. Scholars widely concede that the action was anticipatory self-defense and did not hinge primarily, before the fact, on OAS approval. *See, e.g.*, MCCORMACK, *supra* note 67, at 223 (questioning the validity of the OAS approval by considering the OAS in comparison to the Warsaw Pact); Donahue, *supra* note 50, at 39.

103. Partan, *supra* note 77, at 701 (quoting Abram Chayes, *The Legal Case for U.S. Action in Cuba*, 47 DEP'T ST. BULL. 763, 764 (1962)).

104. FRANCK, *supra* note 40, at 100.

105. *Id.*

106. *See* BROWNLIE, *supra* note 51, at 265.

107. CHURCHILL & LOWE, *supra* note 95, at 423-25.

108. *Id.* at 424.

Israel is another nation that has historically taken a broad view of “armed attack,” especially in response to threats from surrounding nations.¹⁰⁹ In 1981 Israeli F-16s dropped a dozen one-ton bombs on Iraq’s nuclear reactor under construction at Osiraq, destroying it and ending Iraqi nuclear capability. The attack was a complete surprise and a complete success. From the Israeli perspective, the prospect of Iraq possessing a nuclear reactor, given its known history of support for virtually all state and nonstate enemies of Israel, simply posed too great and too imminent a threat to the security of Israel.¹¹⁰ Israelis argued that, under the *Caroline* principles, the raid was proportional in comparison to the nuclear threat, especially considering that it killed only a handful of workers.¹¹¹ They also argued that it was immediately necessary because the reactor was close to completion, after which destroying it would have fallout consequences for nearby Baghdad. Again, the “armed attack” requirement was minimized, as the Israelis asserted that the phrase was not intended to limit the inherent right of self-defense at all.¹¹²

2. *Cold War Influence*

During the Cold War, however, most lesser powers, especially those not completely dependent on their superpower allies, generally took a much more restrictive view of Article 51 and believed that military actions not responding to a clear “armed attack” violated international law. This restrictive view stemmed directly from the global situation during the Cold War, and has waned in the years since 1989 such that in the modern era the ever-present broader view of Article 51 is much more widely held.

Most minor powers and scholars found some solace against the prospect of nuclear war—or at least, against the idea that a preemptive nuclear strike might ever be *legal*—by viewing “armed attack” restrictively.¹¹³ They reasoned that if the only lawful nuclear action under

109. See Feder, *supra* note 58, at 396, 417.

110. MCCORMACK, *supra* note 67, at 15–16; Shoham, *supra* note 31, at 191.

111. According to Iraqi President Saddam Hussein, at least one French technician and up to three Iraqi civilians were killed. W.T. Mallison & Sally V. Mallison, *The Israeli Air Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT’L L. 417, 418 (1982).

112. Shoham, *supra* note 31, at 191, 223. International outcry against the raid is discussed below. See *infra* notes 121–23 and accompanying text.

113. See Don Wallace Jr., *International Law and the Use of Force: Reflections on the Need for Reform*, 19 INT’L LAW. 259, 263 (1985); see also JESSUP, *supra* note 93, at 165–66; MCCORMACK, *supra* note 67, at 122; Schachter, *supra* note 36, at 133; Coffey, *supra* note 36, at 44.

Article 51 involved being the *second* nation to fire its missiles, it might discourage either country from being willing to shoot first in case of miscommunication or mistake. In all, most of the strongest “restrictivist” views of “armed attack” are framed in the era of the Cold War, when the complete destruction of the earth was a widely feared and very real possibility. Broad legalization of anticipatory self-defense during the Cold War, given Soviet aggression, was a frightening proposition, likely to yield only “fabrication . . . paranoia . . . [and] confusion of aggressor and victim in every situation of tension in a conflict-ridden world.”¹¹⁴ This exact fear also explains the U.S. government’s hesitance to openly rely on Article 51 when it quarantined Cuba in 1962.

Accordingly, during the Cold War many self-defense actions were widely decried by scholars and minor powers. Israel, especially, received a wave of negative responses to its assertions that its aerial attacks on the Palestine Liberation Organization (PLO) in Lebanon in July 1981, and later its invasion and occupation of Lebanon from 1982 to 1985, were in legitimate self-defense.¹¹⁵ Taking a relatively restrictive view of “armed attack,” the Security Council refused to concede that minor but repeated terrorist attacks and crimes could be viewed in sum as one significant “armed attack.” Thus, it found Israel’s actions illegal because such actions lacked any precipitating armed attack and were out of proportion to any individual terrorist crime that Israel had suffered. Even at the time, this position was extreme, and led some to respond that Article 51, read so restrictively, was deficient and that revision was necessary.¹¹⁶

In 1986 the United States faced strong opposition to its Libya raid, which President Ronald Reagan justified on self-defense grounds. In response to a West Berlin terrorist bombing ten days earlier, American planes bombed multiple targets in Libya, including military bases, headquarters, and airports in Tripoli and Benghazi.¹¹⁷ President Reagan, citing Article 51, called the raid a “necessary and appropriate” mission “designed to deter acts of terrorism by Libya.”¹¹⁸ Again, taking a restrictive view of “armed attack,” many nations believed that the raid violated

114. Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 57 AM. SOC’Y INT’L L. PROC. 147, 166 (1963); see also Wallace, *supra* note 113, at 263; Coffey, *supra* note 36, at 44.

115. Feder, *supra* note 58, at 396, 415.

116. *Id.* at 417–18.

117. MCCORMACK, *supra* note 67, at 226.

118. Coffey, *supra* note 36, at 76. The targets and the time of attack, 2 a.m. local time, were chosen to minimize civilian casualties. *Id.*

Article 51, and they expressed strong disapproval. Led by the Soviet Union, which called the raid “a new criminal action, fraught with a serious threat to universal peace and security,” the UN General Assembly drafted a resolution, supported by seventy-eight states, to condemn the American action.¹¹⁹ Only close U.S. allies such as Britain, Israel, South Africa, and Canada—with reservation—agreed with Reagan’s Article 51 justification.¹²⁰

Perhaps the strongest negative reaction was to the 1981 Osiraq bombing, in which Israel destroyed Iraq’s nuclear reactor. At the time, the raid met nearly unanimous disapproval; the Security Council passed Resolution 487 “strongly condemning” Israel’s action as a violation of the UN Charter.¹²¹ Of course, Israel lacked even an ostensible “armed attack” to proffer as a precipitating event. Focusing on the *Caroline* principles alone, Israel responded to the severe threat of a nuclear weapon in the hands of Iraqi President Saddam Hussein, whose aggressive and terrorist-supporting stance toward Israel was widely known.¹²² Nonetheless, to the rest of the world, the attack seemed somehow too destabilizing—the Soviet Union had first agreed to help the Iraqis go nuclear in 1957—too preemptive, and just plain too nuclear. Notably, however, even in condemning the Israeli action, neither the Soviet Union nor the United States addressed Article 51 or offered any opinion on the customary scope of anticipatory self-defense.¹²³ Presumably neither wanted to spark accusations of hypocrisy relating to their own actions.

The underlying tension, fear, and U.S.-Soviet dominance of the Cold War is unmistakable in all of these international condemnations of uses of force. After the dissolution of the Soviet Union, the logical underpinnings of that narrower view of “armed attack” faded.¹²⁴ Fear of accident, mistake, or Soviet aggression leading quickly to a doomsday scenario was no longer justified. In place of these problems, asymmetric warfare and potential terrorism involving weapons of mass destruction have entered the global scene.¹²⁵ No longer can nations afford to hope that they

119. Baker, *supra* note 57, at 105 n.37.

120. *Id.* at 105–06.

121. MCCORMACK, *supra* note 67, at 25, 30.

122. In fact, Hussein had, as recently as eight months before the Osiraq raid, given a speech in which he declared, “[We must] destroy Tel Aviv with bombs. But we have to use the weapons available until it is actually possible to respond to the enemy with bombs.” Shoham, *supra* note 31, at 208. The Iraqi Information Ministry went a step further, releasing a statement that concluded, “The one who fears the Iraqi nuclear reactor is the Zionist entity [Israel].” *Id.*

123. MCCORMACK, *supra* note 67, at 31.

124. See Coffey, *supra* note 36, at 44.

125. See generally Achilles Skordas, *Hegemonic Intervention As Legitimate Use of Force*, 16

will not be attacked with nuclear weapons simply because the other side has too much to lose. Now virtually all of the great powers are, or have the potential to be, allies against terrorism; the likelihood of nuclear war between nations has greatly receded. Meanwhile, the potential threat from terrorist-deployed WMD devices has not lessened at all.

3. *End of the Cold War and the Modern View*

In the modern era, therefore, it seems reasonable to take preliminary action against certain extreme threats. Who would question the Osiraq raid now, in light of Hussein's despotism, international aggression, intransigence toward UN weapons inspectors, and the final U.S. invasion of his country in 2003? Since the end of the Cold War more nations have concluded that the wisest interpretation of Article 51 is that "armed attack" is a broad phrase. While it still includes armadas and tank invasions, as it did in 1945, and nuclear missile launches, as in 1960, "armed attack" now also includes certain super-aggressive acts preliminary to the actual employment of WMD—namely, the act of giving those weapons to terrorists. The same states that found it wise to take a restrictive view during the Cold War—even a view unquestionably more restrictive than the drafters of Article 51 envisioned—find no logical reason not to adapt their stance and broaden it so that Article 51 remains relevant today.

Even shortly before the end of the Cold War, as international terrorism grew, scholars began calling for a broader view of "armed attack" so as to allow states to respond more aggressively to terrorist threats.¹²⁶ This goal was also consistent with the original *Caroline* principles. For instance, Professor Oscar Schachter argued that an armed attack could "be reasonably construed to include both an imminent attack . . . and indirect attacks."¹²⁷ International frustration with terrorism and release from Cold War fears resulted in a marked shift in opinion, even between the late 1980s and early 1990s.

At least twice during the 1990s, in 1993 and 1998, the United States responded to terrorist threats with missile attacks. In 1993 President Bill Clinton ordered more than twenty Tomahawk missiles fired at Iraqi in-

MINN. J. INT'L L. 407, 412–15 (2007).

126. See, e.g., Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the U.N. Charter)*, 10 HOUS. J. INT'L L. 25, 47–49 (1987); Timothy M. Malloy, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 306 (1987); Wallace, *supra* note 113, at 270; Feder, *supra* note 58, at 397.

127. Schachter, *supra* note 36, at 141.

telligence headquarters in response to a plot to assassinate former President George H.W. Bush.¹²⁸ In stark contrast to the very similar raid on Libya in 1986, which also involved destroying enemy military intelligence buildings in midnight bombings in an effort to discourage future terrorist attacks, this time the international community offered little objection. Unlike the hundreds injured in the 1986 “armed attack,” in 1993 the provocation was no more than a foiled plot against an American ex-president. Yet in 1993, the United Nations failed to offer any harsh words in response to the U.S. action. Suddenly, as the U.S. Ambassador to the United Nations argued, “armed attack” *could* be defined to include a criminal plot never brought to fruition.¹²⁹ Even the Russians conceded that the missile strike was justified under Article 51.¹³⁰

Again in 1998, President Clinton ordered missile strikes, this time against terrorist sites in Afghanistan and Sudan. Clinton used Article 51 to justify these strikes as a response to terrorist suicide bombings against American embassies in Tanzania and Kenya and as a warning against further attacks.¹³¹ Possibly because state sponsorship of the dead terrorists was somewhat less clear in this case than in 1993, international reaction was slightly more divided. While U.S. allies broadly supported the action, a few other parties, including Malaysia, Indonesia, Sudan, and not surprisingly, Hamas, offered criticism.¹³² Most of the criticism, however, remained in the news media, and there was no UN censure of any kind.¹³³ Further, the main issues appeared to be factual, namely whether the targeted Sudanese chemical plant was actually in terrorist use or not.¹³⁴ Even critical nations generally did not resort to legal arguments about the scope of Article 51.

Since September 11, 2001, a broader view of “armed attack” has garnered even wider support. UN Secretary-General Kofi Annan stated on October 1, 2001, that “there is much . . . [the world] can do to help prevent future terrorist attacks carried out with weapons of mass destruction.” He added in 2005 that we have “a last chance to take effective preventive action [against nuclear terrorism].”¹³⁵ To demonstrate the

128. Coffey, *supra* note 36, at 86.

129. Baker, *supra* note 57, at 112.

130. Coffey, *supra* note 36, at 87.

131. FRANCK, *supra* note 40, at 66; Brady, *supra* note 41, at 2.

132. Brady, *supra* note 41, at 4–7.

133. FRANCK, *supra* note 40, at 66.

134. Brady, *supra* note 41, at 5 n.13.

135. Jayantha Dhanapala, *WMD and Terrorism: Can the UN Help to Keep the Genie in the Bottle?*, in *IRRELEVANT OR INDISPENSABLE? THE UNITED NATIONS IN THE 21ST CENTURY* 79, 80–81 (Paul Heinbecker & Patricia Goff eds., 2005).

new perspective, Major John Muehlheuser, writing in 2003, denied all tension between the *Caroline* principles and the armed attack requirement. He expressed disbelief that “armed attack” could *ever* be interpreted in such a restrictive manner as to demand the loss of life, property, or sovereignty to an aggressor before allowing a legal response.¹³⁶ Together, events since 2001 demonstrate that nations widely recognize more leeway than ever before under Article 51.

For instance, in 2002, Israel stopped an Iraqi-flagged freighter named the *Karin-A* on the high seas and seized its cargo, alleging that the rockets and antitank missiles aboard were bound for the Palestinian Authority.¹³⁷ Israeli Prime Minister Ariel Sharon justified the seizure as legal under Article 51: the ship allegedly posed an imminent threat and was a “ticking bomb.”¹³⁸ Despite the Palestinian Authority’s denial of involvement, the international response was virtually nonexistent. The world collectively yawned; the U.S. government declined to comment at all and referred questions about the legality of the operation to the Israeli government.¹³⁹

The United States, in fact, has built a national security strategy based in large part on such preemptive measures against terrorism.¹⁴⁰ The invasion of Afghanistan was directly justified using Article 51, and the occupation of Iraq certainly stems from the same sentiment, though the proffered legal justification of the Iraq war is far murkier.¹⁴¹ The general American focus on expanding the self-defense doctrine also explains the PSI, and indeed the relevance of the topic of this Note. While America’s coalitions of the willing have not always been unanimous, there is little question that greater recognition of a need for more legal room to defend against terrorism and terrorist possession of WMD has created an international atmosphere in which “armed attack” can be read broadly enough to encompass stopping foreign-flagged ships suspected of carrying WMD to terrorist organizations.

136. Muehlheuser, *supra* note 77, at 8–9.

137. Byers, *supra* note 18, at 533–34.

138. *Id.* at 534.

139. *Id.*

140. See SHAW, *supra* note 41, at 1028. Though September 11, 2001, was widely recognized as an armed attack, most notably by Security Council Resolutions 1368 and 1373, as time has passed since 2001 and the conflict has expanded beyond the al-Qaeda bases in Afghanistan, the preemptive nature of the war on terrorism has arguably become more pronounced.

141. Some scholars argue that the American legal justification for the use of force in Iraq is intentionally unclear. See, e.g., Wawrzycki, *supra* note 21, at 605–09.

F. *Application to Modern WMD Trafficking*

The question remains as to how to define armed attack in a way reasonably respectful of the text of Article 51, yet still encompassing modern state practice. The best way to resolve this residual tension between the “inherent right of self-defense” and “if an armed attack occurs” is to read the *Caroline* principles into “armed attack.” In other words, “armed attack” should be read as meaning any attack or potential attack involving instant and overwhelming necessity to respond. Indeed, scholars have been inserting the *Caroline* principles into the idea of armed attack for some time now. The concept that an aggressive move may amount to an “imminent” attack is common¹⁴² and includes the view of a recent high level panel of the United Nations.¹⁴³

Thus, what “armed attack” requires is that a course of action, imminently leading to a destructive event, has been knowingly initiated. The armed attack begins at the crossing of the Rubicon, not the crossing of the swords.¹⁴⁴ Shipping weapons of mass destruction to al-Qaeda, not a nuclear fallout in San Francisco Bay, triggers a legal self-defense response. Further, there is no requirement that the aggressor nation be the same party that carries out the destruction; aiding and abetting the individual attackers, if an important role is played, can amount to an attack in itself. The ICJ recognized this proposition in the *Nicaragua* case, in which the Court decided that “armed attack” need not involve regular troops but could include armed bands or irregulars sent by one state against another.¹⁴⁵ While the ICJ stated that it did not believe “armed attack” included merely arming or supplying such irregulars, the *Nicaragua* case involved guerilla warfare waged with conventional weapons.¹⁴⁶ The Court carefully noted that a state’s action “sending” bands of irregulars against another state, or being substantially involved in any action that causes destruction of similar gravity to an attack by a regular military force, *would* be considered an “armed attack.” Thus, the ICJ’s

142. See, e.g., Garvey, *supra* note 8, at 135 (stating that an imminent attack is required, or at least must be probable, to trigger an appropriate Article 51 response). Major John Muehlheuser argues that if there is evidence that an aggressor intends to attack “with massive force, has the ability to do so, and has taken a step in that direction, the defender state is justified.” Muehlheuser, *supra* note 77, at 20

143. Tom Farer, *Legal and Legitimate Use of Force*, in *IRRELEVANT OR INDISPENSABLE? THE UNITED NATIONS IN THE 21ST CENTURY*, *supra* note 135, at 89, 98–99.

144. This view is shared by Professor Dinstein, as quoted approvingly in Feder, *supra* note 58, at 413.

145. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27).

146. *Id.* at 103–04; Muehlheuser, *supra* note 77, at 16.

opinion strongly suggests that a state taking an indispensable role—such as providing a centerpiece nuclear, biological, or chemical weapon—should be considered to have undertaken an “armed attack.”¹⁴⁷

So, read all together, Article 51 can be paraphrased: Nothing in the present Charter will impair the right of states to take forceful defensive measures in the face of instant and overwhelming necessity, provided such action is proportional to the threat, if an aggressor has initiated a course of action leading imminently to a destructive strike.¹⁴⁸ This definition encompasses the interdiction of foreign-flagged ships laden with weapons of mass destruction bound to terrorists. Admittedly, a weapons sale alone, even of WMD, in some contexts may not trigger Article 51 because a sale alone may not necessarily begin a path to the imminent use of such weapons. However, in selling WMD to nonstate actors known to lack any homeland, constituency, or other reason not to use them and knowing that the terrorists are interested in owning WMD expressly so they may be used against the West,¹⁴⁹ a supplier nation would effectively, indeed optimally, be contracting for an attack. Such a conspiracy between a nation-state and a terrorist organization would be little more than an international murder for hire, offering the supplier a chance to disavow the explosion and hope to avoid massive retaliation, yet still giving it the chance to use its most dangerous weapons against its enemy. Such a maneuver would be exactly the type of support for irregulars that has long been recognized as an “armed attack.”¹⁵⁰ War by a thinly veiled proxy, fully dependent on a nation-state for its key weapon, should not be a loophole in Article 51.¹⁵¹ In other words, a supplier nation could fairly be said to have knowingly initiated a course of action leading imminently to a nuclear, biological, or chemical weapons strike against the West.¹⁵² Thus, both prongs of the modern Article 51 test are satisfied and would allow the United States to legally stop such ships.

147. See *Military and Paramilitary Activities*, 1986 I.C.J. at 103–04.

148. See *supra* note 52.

149. Of course, the North Atlantic Treaty Organization, its mutual defense commitment, and the collective action allowance in Article 51 make it less important which Western power exactly the terrorists might target.

150. See BROWNLIE, *supra* note 51, at 279.

151. See, e.g., John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 86–87 (1986). But see DINSTEIN, *supra* note 31, at 203; John P. Rowles, “Secret Wars,” *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AM. J. INT'L L. 568, 579 (1986).

152. See Logan, *supra* note 7, at 270.

III. ANALOGY TO PREVIOUS ARTICLE 51 INTERDICTIONS AND BELLIGERENT RIGHTS

The record of historical interdictions provides more than just grounds for inferring that nations have adopted a broad reading of the “armed attack” in Article 51. History also allows open comparison, such that stopping foreign-flagged ships can be compared not only to the abstract *Caroline* principles or to that single event 170 years ago, but to modern events that have sparked similar defensive actions on the high seas. Interdicting ships carrying weapons of mass destruction to terrorist organizations compares favorably with the broad historical record of stopping ships carrying arms to a nation’s active enemies.

The Cuban Missile Crisis and the international reaction to it offer one obvious comparison. Though there was great dissension about whether the U.S. quarantine was legal under Article 51 as it was understood at that time, even the arguments of the doubters implicitly show that the situation would be different if terrorists and criminals were involved rather than balancing superpowers. A perceived lack of “imminence” in the threat to the United States constituted the greatest criticism of the American action.¹⁵³ Critics believed that the simple emplacement of missiles in Cuba, while clearly an aggressive move, did not signal any imminent launch. Presumably, the same motive of avoiding nuclear obliteration would apply to Cuba as it had to the superpowers, and arguments that the Soviet Union would soon attack were nothing but mere speculation. Indeed, it was possible to explain the missiles’ location in Cuba as a defense mechanism for that state against increasing *American* adventurism and the threat of invasion.¹⁵⁴ Conversely, those who believed that the past record of the Soviet Union showed consistently building aggression and disregard for international law tended to infer an imminent attack from the missiles’ location in Cuba.¹⁵⁵ Thus, it was generally agreed that the key was the questionable intent of the Soviet Union in arming Cuba. Neither side seemed to question that self-defense could legally be invoked, even without knowing the exact date

153. Garvey, *supra* note 8, at 135; Shoham, *supra* note 31, at 203.

154. Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT’L L. 546, 553 (1963).

155. See, e.g., C.G. Fenwick, Editorial Comment, *The Quarantine Against Cuba: Legal or Illegal?*, 57 AM. J. INT’L L. 588, 589 (1963); Myres S. McDougal, Editorial Comment, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597, 601 (1963); Shoham, *supra* note 31, at 202–04.

of the impending attack, if it could be shown convincingly that such a launch was being planned.

As applied to the nations most likely to supply arms to terrorists, this distinction becomes meaningless. For instance, North Korea has demonstrated a repeated disregard for international law, including its voluntary membership in the Treaty on the Non-Proliferation of Nuclear Weapons then its blatant violation of it before withdrawing in 2003.¹⁵⁶ But even beyond North Korea, no one believes that selling WMD to a known terrorist organization openly in the market for such weapons and with the universally understood target of the United States could be justified defensively by any nation. What motive other than a direct chain of events leading to bloodshed in the United States would prompt a state to undertake such a sale? Even those who questioned the Cuban quarantine would likely agree that Article 51 does not proscribe a response to a deadly attack as imminent as it would be if such weapons were placed in the hands of terrorist networks.

Though the Cuban quarantine is the closest analogue in terms of the scope of threat to the United States, history is spotted with a series of quite assertive interdictions carried out against shipments of conventional weapons. That history begins with the *Caroline* and *Virginius* incidents in the 1800s¹⁵⁷ and continues steadily beyond the enactment of Article 51 in 1945.

In response to the threat posed by conventional arms flowing to the Algerian insurgency in the late 1950s, France stopped nearly five thousand ships in a single year and boarded them on the high seas as far

156. See Christopher A. Ford, Principal Deputy Assistant Sec'y of State, U.S. Dep't of State, Nuclear Non-Proliferation and Unique Issues of Compliance: Compliance Assessment Enforcement: The Challenge of Nuclear Noncompliance, Remarks at the House of the Association of the Bar of the City of New York: International Law Weekend (Oct. 20–22, 2005), in 12 J. INT'L & COMP. L. 583, 586–87 (2006); Chamundeeswari Kuppuswamy, *Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking After the 2005 NPT Review Conference*, 11 J. CONFLICT & SECURITY L. 141, 148–49 (2006). The NPT, signed by 187 nations as of 2002 and in force since 1970, is a pillar of international law. Kuppuswamy, *supra*, at 156. The NPT includes an express agreement not to transfer nuclear weapons “to any recipient whatsoever.” *Id.*

157. The *Virginius* incident is an often-cited case from 1873 in which the Spanish seized an American vessel on the high seas near Cuba. The vessel, with a mostly American and British crew, was carrying arms and volunteers to join the insurgency in Cuba. The Spanish executed the crew, a move decried by the U.S. and British governments. The British did not otherwise oppose the seizure, believing it a legitimate exercise of self-defense, but the U.S. government did not accept this rationale. See BROWNLIE, *supra* note 51, at 306–07. The precedent is cast into doubt, however, by allegations of other scholars that the principal justification used for the use of force by the Spanish was piracy, not self-defense. See 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 41, at 420 n.15.

away as the English Channel.¹⁵⁸ In all likelihood, the number of ships stopped suggests that France may have attempted to examine nearly every ship bound for Algerian ports during that time. The scale of these interdictions is analogous to the United States deciding to search every North Korean ship departing a North Korean port. Yet such a scale has never been suggested and likely will not be. Any boarding of a North Korean ship will probably be based on reasonable intelligence supporting the presence of WMD.¹⁵⁹

Since the terrorist attacks in 2001, there is even some precedent for stopping foreign-flagged ships carrying weapons to international terrorists. In the *Karin-A* affair, which received virtually no international condemnation, an Iraqi-flagged freighter in the Red Sea was boarded and seized by Israeli forces who alleged that its cargo of rockets and missiles was bound for the Palestinian Authority.¹⁶⁰ Again, though only conventional weapons were at hand, and despite the unique explosiveness of the Middle East situation generally, international comment was almost nonexistent. Instead, nations recognized that dealing arms to terrorists was blatantly illegal under the UN Charter and was appropriately addressed by the endangered party under Article 51.¹⁶¹ Against enemy-supplied terrorists, the United States sits in an even more dangerous and thus legally sound zone because the scope of the threat from even a single nuclear or radiological device is thousands of times greater than the threat to Israel from a handful of antitank missiles. Yet, the same principles of imminent necessity and proportionality apply to the 2002 Israeli interdiction and potential future American ones.

A further analogy can be drawn to nations taking forceful measures in self-defense against arms shipments that violate neutrality. One recognized avenue for the assertion of self-defense is the interdiction of armaments being shipped to a nation's enemy in violation of the purported neutrality of the arms supplier.¹⁶² Historically, such interdictions,

158. Becker, *supra* note 2, at 216–17.

159. American intelligence has shown some proficiency for determining what is aboard North Korean ships, as evidenced by the *So San* incident in 2002, in which American-supported Spanish commandos boarded a “stateless” North Korean freighter and discovered Scud missiles hidden below forty thousand bags of concrete. In the end, the missiles were for the Yemeni government—an ostensible ally of the United States—and the ship was allowed to proceed. See Byers, *supra* note 18, at 526.

160. *Id.* at 533–34.

161. See Shoham, *supra* note 31, at 217–18 (citing U.N. Charter art. 2(4) and *The Israeli Air Strike: Hearing Before the S. Comm. on Foreign Relations*, 97th Cong. iv–132 (1981) (statement of Professor John Norton Moore)).

162. BROWNLEE, *supra* note 51, at 313.

also justifiable on self-defense grounds, were regarded as “belligerent rights” when applied to declared wars between nations.¹⁶³ Though the United States refuses to recognize a “belligerency” against al-Qaeda, the situation is similar enough to use those precedents by analogy because the root of that law is self-defense.¹⁶⁴

As early as 1795, in the *Sally* case, British courts considered property owned by a neutral but en route to a belligerent as available for seizure.¹⁶⁵ The implication was that the party threatened by the violation of neutrality need not wait for the property to arrive in the hands of the enemy, but instead could legally seize it on the high seas. In the *Peterhoff* case, this idea was extended by the Supreme Court to incorporate a doctrine of “ultimate destination,” under which contraband could be seized on the high seas if it could be shown that its ultimate destination was an enemy force, even if the cargo was not immediately en route to it.¹⁶⁶ Though this line of British and U.S. cases, along with Article 6 of Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, which in 1907 codified their premises, are all stated in the context of warfare between nations, the underlying rationale applies equally to the war against al-Qaeda and international terrorism.¹⁶⁷ Actually, the fact that the warring recipients of the goods in the *Sally* and *Peterhoff* cases were recognized governments appears to be of minimal importance to the doctrine.¹⁶⁸ The focus is instead on the nation put at risk by the shipments and thus allowed to seize them. Since 2001, the United States has faced a very real threat from al-Qaeda, which has demonstrated that it is capable of mounting a coordinated attack and inflicting war-scale devastation on the United States. If the Hague Conventions fail to encompass an international situation like the one the United States now faces, it is more likely from lack of conception of

163. Becker, *supra* note 2, at 212–13.

164. *See id.* at 213 & n.404. The United States refuses to recognize a belligerency against al-Qaeda largely in order to avoid having to accord that organization other rights that can attach to being a recognized belligerent, especially with regard to detainees, who the United States prefers to treat as international criminals rather than prisoners of war. *Id.* at 203 n.404. *But see* Dalton, *supra* note 34, at 63–64.

165. *See Sally*, 165 Eng. Rep. 471 (H.L. 1795), reprinted in 2 PITT COBBETT & WYNDHAM LEIGH WALKER, CASES ON INTERNATIONAL LAW 202–03 (5th ed. 1937).

166. *Peterhoff*, 72 U.S. (5 Wall.) 28 (1866), reprinted in 2 COBBETT & WALKER, *supra* note 165, at 477–79, 480.

167. Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War art. 6, Oct. 18, 1907, 36 Stat. 2415, 205 Consol. T.S. 395.

168. The respective parties were in the *Sally* case, the French government; and in the *Peterhoff* case, the Confederate States of America. 2 COBBETT & WALKER, *supra* note 165, at 202, 477.

such a situation than an intent to distinguish it. Alternatively, perhaps the Hague drafters in 1907 did not think to include shipping WMD to stateless international terrorists known to plot against a specific state because they would have considered such an act a war-initiating attack in its own right. Either way, in 1994 the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* broadly incorporated the *Sally* and *Peterhoff* principles by noting that any “contraband” destined for the control of the undefined “enemy” could be legally captured.¹⁶⁹

In sum, the close analogy of this right of seizure, useful against neutral nations giving contraband to a warring party, applies also to the belligerent situation between the United States and al-Qaeda. The present situation is no less dangerous to America than many conceivable wars between nations might be, and if anything represents an even bolder move by a WMD supplier because attacking the United States using an unaccountable proxy is even more aggressive than offering assistance to a nation-state combatant which can be responsible in its own right.

CONCLUSION

Though the U.S. government has never elaborated the argument, it is clear that interdicting foreign-flagged ships transporting WMD to non-state organizations is covered by the modern interpretation of Article 51 as informed by the *Caroline* principles, the drafters of the UN Charter, and state practice. Recent events, especially Iran’s belligerency and North Korea’s intransigent attraction to creating, hiding, and exporting weapons, suggest strongly that the United States will eventually face just such a situation. Given that the government has already asserted that the U.S. Navy would undertake such an interdiction, it is perhaps somewhat more comforting to know that there is substantial legal justification. This legal justification provides the United States with a defense for its actions in the court of world opinion and also provides a reason for the rest of the world to understand such a naval maneuver as appropriate, justified, and primarily defensive.

169. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, *supra* note 38, pt. 3, § 5; *see also* Guilfoyle, *supra* note 47, at 746.