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ON THE LAWFULNESS OF FORCEFUL REMEDIES
FOR VIOLATIONS OF ARMS CONTROL
AGREEMENTS: "STAR WARS" AND
OTHER GLIMPSES AT THE FUTURE

REX J. ZEDALIS*

Since March 23, 1983, when President Reagan announced his Administration's commitment to a new generation of space-based ballistic missile defensive weapons, a national and international debate has swirled around the implications of the Strategic Defense Initiative (SDI). Some have argued that placing defensive weapons in space will violate arms control agreements, particularly the Anti-Ballistic Missile Systems Treaty. Professor Zedalis looks one step further and asks whether, given such a violation, the Soviet Union might be permitted under international law to remove forcefully the components of the SDI system. In addition, Zedalis posits a scenario in which the Soviet Union seeks to improve its strategic posture by deploying anti-submarine warfare (ASW) devices on the U.S. continental shelf. Assuming that this deployment violates the 1958 Law of the Sea Conventions (as well as the pending 1982 Law of the Sea Convention), Zedalis assesses whether the United States might be permitted under international law to remove the ASW devices using force. To determine the validity of forceful measures to remedy violations of arms control agreements in general, Zedalis evaluates the contemporary vitality of reprisal and anticipatory self-defense doctrines in light of the U.N. Charter and the agreements themselves. He concludes that although the right of anticipatory self-defense remains legally viable, the right of reprisal probably is no longer valid. International law notwithstanding, Zedalis finds some support for retaining customary law's right of reprisal as a policy option, particularly in light of its

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possibly stabilizing effects in the strategic nuclear equation. Zedalis then applies his legal and policy conclusions to the SDI scenario and the ASW hypothetical in the context of strategic doctrine and the current and near-future profiles of the U.S. and U.S.S.R. nuclear stockpiles.

I. INTRODUCTION

What would happen if the United States began to deploy components of the space-based ballistic missile defense (BMD) system (known popularly as "Star Wars") currently under consideration by the Reagan Administration?¹ Unless the United States had previously exercised its right under Article XV(2) of the Anti-Ballistic Missile (ABM) Treaty² to withdraw from the Treaty to protect "supreme interests," such a deployment would violate the Treaty's prohibition on space-based BMD systems.³ Would this violation of the ABM Treaty then legitimate Soviet efforts to remove forcibly the system's components?

What if Moscow, in order to add the United States' ballistic missile launching nuclear submarine force to the list of strategic weapons already jeopardized by the destructive capability of Soviet strategic forces, placed a network of advanced anti-submarine warfare (ASW) detection devices and

1. For a discussion of the "Star Wars" BMD system, see *infra* text accompanying notes 280-303. On space-based weapons technology, see D. GRAHAM, *THE NON-NUCLEAR DEFENSE OF CITIES: THE HIGH FRONTIER SPACE-BASED DEFENSE AGAINST ICBM ATTACK* 101-21 (1983); C. GRAY, *AMERICAN MILITARY SPACE POLICY 1-75* (1983); Buirrows, *Ballistic Missile Defense: The Illusion of Security*, 62 *FOREIGN AFF.* 843 (1984); Carter, *BMD Applications: Performance and Limitations*, in *BALLISTIC MISSILE DEFENSE* 174-77 (A. Carter & D. Schwartz ed. 1984) [hereinafter cited as *BALLISTIC MISSILE DEFENSE*]; Davis, *Reactions and Perspectives*, in *BALLISTIC MISSILE DEFENSE*, *supra*, at 382-84; Garwin, *Reactions and Perspectives*, in *BALLISTIC MISSILE DEFENSE*, *supra*, at 391-97; Garwin, Gottfried & Hafner, *Antisatellite Weapons*, *SCI. AM.*, June, 1984, at 45; Payne & Gray, *Nuclear Policy and The Defensive Transition*, 62 *FOREIGN AFF.* 820 (1984); Thompson, "Directed Energy" Weapons and the Strategic Balance, 23 *ORBIS: J. WORLD AFF.* 697 (1970); Weiner, *Systems and Technology*, in *BALLISTIC MISSILE DEFENSE*, *supra*, at 91-97.

2. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 *U.S.T.* 3435, T.I.A.S. No. 7503 [hereinafter cited as *ABM Treaty*].

3. See generally Meredith, *The Legality of a High-Technology Missile Defense System: the ABM and Outer Space Treaties*, 78 *AM. J. INT'L L.* 418 (1984).

weapons⁴ on America's continental shelf? Such an undertaking might violate two of the 1958 Geneva Law of the Sea Conventions (the Continental Shelf and High Seas Conventions),⁵ as well as the pending 1982 United Nations Convention on the Law of the Sea.⁶ Would this violation of interna-

4. For a discussion of advanced ASW, see *infra* text accompanying notes 350-69. On sea-based military technology, see *Fiscal Year 1982 Arms Control Impact Statements: Hearings Before the Senate Comm. on Foreign Relations and the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 352-78 (1981) [hereinafter cited as 1982 ACIS]; *Fiscal Year 1980 Arms Control Impact Statements: Hearings Before the Senate Comm. on Foreign Relations and the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 104-18, 194-205 (1979) [hereinafter cited as 1980 ACIS]; *Evaluation of Fiscal Year 1979 Arms Control Impact Statement: Toward More Informed Congressional Participation in National Security Policymaking: Hearings Before the House Comm. on International Relations*, 95th Cong., 2d Sess. 103-20 (1979) [hereinafter cited as 1979 ACIS]; K. TSIPIS, TACTICAL AND STRATEGIC ANTISUBMARINE WARFARE (1974); *Anti-submarine Warfare*, in STOCKHOLM INT'L PEACE RESEARCH INST., 1974 Y.B. WORLD ARMAMENTS & DISARMAMENT 303-17 (1974) [hereinafter cited as SIPRI 1974].

5. The two conventions are: Law of the Sea: Convention on the Continental Shelf, Apr. 29, 1958 [1964], 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as 1958 Continental Shelf Convention]; and Law of the Sea: Convention on the High Seas, Apr. 29, 1958 [1962], 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as 1958 High Seas Convention].

For arguments suggesting that this Soviet action would violate these Conventions, see R. Zedalis, Foreign State Military Use of Another State's Continental Shelf and International Law of the Sea (1985) (unpublished manuscript; forthcoming in 16 *Rutgers Law Journal*) (available in the Author's file at the offices of the *Journal of International Law and Politics*, New York University School of Law) [hereinafter cited as R. Zedalis, Foreign State Military Use]; see also M. McDUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 719, 724 (1962); Zedalis, *Military Installations, Structures, and Devices on the Continental Shelf: A Response*, 75 AM. J. INT'L L. 926 (1981) [hereinafter cited as Zedalis, *Military Installations*].

6. Third United Nations Convention on Law of the Sea, 21 I.L.M. 1261 (1982) [hereinafter cited as LOS Convention].

For arguments suggesting that the hypothetical Soviet action would violate this Convention, see Zedalis, *Military Installations*, *supra* note 5; R. Zedalis, Foreign State Military Use, *supra* note 5.

The LOS Convention, *supra*, contains several provisions which may prohibit military use of the continental shelf, including Articles 60, 80, 81, 86, 88, and 141. Article 60(1) states:

In the exclusive economic zone [and, under Article 80, on the continental shelf], the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands, . . . (c) installations

tional commitments justify United States attempts to remove the Soviet ASW network?

and structures which may interfere with the exercise of the rights of the coastal State in the zone.

Article 81 states: "The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf [and, according to Article 56(1)(c), in the exclusive economic zone] for all purposes."

Article 60(1)(a) and (c), and Article 81 make no exceptions for artificial islands, installations or structures, or drilling for military objectives. That a coastal state's right is "exclusive" means that without a coastal state's consent, a foreign state may not do anything included in any of these provisions. For discussion of Article 60(1)(a) and (c), see Treves, *Military Installations, Structures and Devices on the Seabed*, 74 AM. J. INT'L L. 808, 840-41 (1980); R. Zedalis, *Foreign State Military Use*, *supra* note 5. For a discussion of Article 81, see R. Zedalis, *Foreign State Military Use*, *supra* note 5.

Articles 88 and 141 of the LOS Convention reserve the use of the high seas and deep seabed for "peaceful purposes." Article 58(2) applies the reservation of Article 88 to the exclusive economic zone, and Article 86 applies the same reservation to the continental shelf when it extends beyond the economic zone. On the meaning of "peaceful purposes" in the context of the LOS Convention, see Dore, *International Law and the Preservation of the Ocean Space and Outer Space as Zones of Peace: Progress and Problems*, 15 CORNELL INT'L L.J. 1, 21-24 (1982); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57, 73 (1978); Zedalis, "Peaceful Purposes" and Other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and the Proposed Military Regime for the High Seas, 7 SYRACUSE J. INT'L L. & COMM. 1, 18-20, 26-32 (1979).

Article 87 of the LOS Convention, though not explicitly addressing the continental shelf, enumerates the freedoms applicable to the use of all areas of the high seas. It states in paragraph 2: "These freedoms shall be exercised by all States with *due regard* for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area." (Emphasis added.) This provision may prohibit some military uses of the areas subject to the high seas regime.

The 1958 Continental Shelf and High Seas Conventions, *supra* note 5, do not contain provisions similar to Articles 60, 80, 81, 86, 88 and 141 of the LOS Convention. Article 2 of the High Seas Convention does, however, employ a standard similar to the "due regard" standard of Article 87(2) of the LOS Convention. Article 2 enumerates the freedoms all states may exercise, and then provides that "[t]hese freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with *reasonable regard* to the interest of other States in their exercise of the freedom of the high seas." (Emphasis added.) See Treves, *supra*, at 851-52, on the effectiveness of the "reasonable regard" standard in limiting military uses of high seas. In most situations,

These questions are not unique to the ABM Treaty, the 1958 Continental Shelf and High Seas Conventions, or the 1982 Convention on the Law of the Sea. Several other international agreements prohibit certain military uses of transnational spatial areas,⁷ and thereby present the bases for similar scenarios and questions. These agreements include the Limited Test Ban Treaty,⁸ the Seabed Arms Control Treaty,⁹

military uses of the high seas are considered "reasonable." See M. McDUGAL & W. BURKE, *supra* note 5, at 753-63; Zedalis, *Military Uses of Ocean Space and the Developing International Law of the Sea: An Analysis in the Context of Peacetime ASW*, 16 SAN DIEGO L. REV. 575, 605-11 (1979) [hereinafter cited as Zedalis, *Military Uses of Ocean Space*].

With specific regard to the continental shelf and the exclusive economic zone (hereinafter the EEZ), neither the 1958 Continental Shelf Convention nor the LOS Convention enunciates a "reasonable regard" or "due consideration" standard applicable to conflicts of uses arising from military activity. What standard applies under the LOS Convention, then, if the military activity does not fall within Articles 60, 80, 81, 86, 88 or 141? Similarly, what standard applies under the 1958 Continental Shelf Convention, which contains no provisions comparable to the articles of the LOS Convention mentioned above? Some commentators have argued that in such situations an implicit balancing test applies and prohibits the initiation or continuation of certain military uses. See M. McDUGAL & W. BURKE, *supra* note 5, at 719-20, 724; Zedalis, *Military Installations*, *supra* note 5, at 928-29; R. Zedalis, *Foreign State Military Use*, *supra* note 5. The express provisions and the implicit balancing test discussed herein together prohibit a wide range of foreign state military activity conducted on another state's continental shelf and EEZ.

7. In this Article, "transnational spatial areas" includes the oceans and the seabed beyond the territorial sea, polar zones, outer space, and celestial bodies.

8. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 [hereinafter cited as LTB Treaty]. The LTB Treaty provides in Article I(1):

Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

(a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or

(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted.

The effect of this language is to prohibit nuclear test explosions everywhere, including the oceans, the atmosphere, and outer space. The only exception is for tests conducted underground. Even underground tests,

the Outer Space Treaty,¹⁰ the Antarctic Treaty,¹¹ and the

however, are prohibited if they cause "radioactive debris to be present outside the territorial limits" of the conducting state. See generally Schwelb, *The Nuclear Test Ban Treaty and International Law*, 58 AM. J. INT'L L. 642 (1964); X, *Nuclear Test Ban Treaties*, 39 BRIT. Y.B. INT'L L. 449 (1963).

The Strategic Arms Limitations Treaty II Agreement, June 18, 1979, reprinted in BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 8986, SELECTED DOCUMENTS NO. 12B (1979) [hereinafter cited as SALT II], contains provisions designed to prohibit specific military uses of transnational spatial areas. Article IX(1) provides in part:

Each Party undertakes not to develop, test, or deploy:

* * *

(b) fixed ballistic or cruise missile launchers for emplacement on the ocean floor, on the seabed, or on the beds of internal waters and inland waters, or in the subsoil thereof, or mobile launchers of such missiles, which move only in contact with the ocean floor, the seabed, or the beds of internal waters and inland waters, or missiles for such launchers;

(c) systems for placing into Earth orbit nuclear weapons or any other kind of weapons of mass destruction, including fractional orbital missiles;

* * *

Id. at 38. Cyrus Vance, Secretary of State at the time SALT II was negotiated, indicated that Article XI(1)(b) was intended, *inter alia*, to enhance the obligations of the SACT of 1971. *Id.* at 39. SALT II has never entered into force.

9. Seabed Arms Control Treaty, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337 [hereinafter cited as SACT]. The SACT prohibits emplacement of weapons of mass destruction and facilities designed to store such weapons anywhere on the ocean floor twelve miles or farther from the shore-line. Article I(1) details these prohibitions:

The States Parties to this Treaty undertake not to emplace or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of a seabed zone, as defined in article II [*i.e.*, twelve miles], any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.

See generally Goralczyk, *Legal Problems of the Peaceful Uses of the Sea-bed and the Ocean Floor: Denuclearization*, 5 POLISH Y.B. INT'L L. 43 (1972-73); Krieger, *The United Nations Treaty Banning Nuclear Weapons and Other Weapons of Mass Destruction on the Ocean Floor*, 3 J. MARITIME L. & COMM. 107 (1971); Rao, *The Seabed Arms Control Treaty: A Study in the Contemporary Law of the Military Uses of the Seas*, 4 J. MARITIME L. & COMM. 67 (1972).

10. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S.

Moon Treaty.¹² If either superpower deploys nuclear or

205 [hereinafter cited as OST]. The first paragraph of Article IV of the OST reads:

State Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The provision's purpose is to denuclearize outer space, the moon, and other celestial bodies. See Dembling & Arons, *The Evolution of the Outer Space Treaty*, 33 J. AIR L. & COMM. 419, 432-33 (1967); Vlastic, *The Space Treaty: A Preliminary Evaluation*, 55 CALIF. L. REV. 507, 513-15 (1967); cf. Stein, *Legal Restraints in Modern Arms Control Agreements*, 66 AM. J. INT'L L. 255, 260-64 (1972) (arguing nuclear weapons of mass destruction, but not anti-satellite measures, proscribed).

The second paragraph of Article IV of the OST contains a "peaceful purposes" provision similar to that in Articles 88 and 141 of the LOS Convention, see *supra* note 6. On the meaning of "peaceful purposes" in the context of the OST, see C. CHRISTOL, *THE MODERN INTERNATIONAL LAW OF OUTER SPACE* 22-37 (1982); M. LACHS, *THE LAW OF OUTER SPACE* 105-12 (1972); Dore, *supra* note 6, at 46-57; Finch, *Outer Space for "Peaceful Purposes,"* 54 A.B.A. J. 365 (1968); Markoff, *Disarmament and "Peaceful Purposes" Provision in the 1967 Outer Space Treaty*, 4 J. SPACE L. 3, 4 (1976); Markov, *Against the So-Called "Broader" Interpretation of the Term "Peaceful" in International Space Law*, in PROC. ELEVENTH COLLOQUIUM L. OUTER SPACE 73, 75 (1968); Meyer, *Interpretation of the Term "Peaceful" in the Light of the Space Treaty*, in PROC. ELEVENTH COLLOQUIUM L. OUTER SPACE 24 (1968); Zedalis & Wade, *Anti-Satellite Weapons and the Outer Space Treaty of 1967*, 8 CAL. W. INT'L L.J. 454, 467-78 (1978).

11. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The Antarctic Treaty provides for complete demilitarization of the southernmost continent. Article I(1) reads:

Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

Article VI of the Treaty applies the prohibition of Article I to the area south of 60 degrees South Latitude, but states that nothing in the agreement affects rights under international law regarding the high seas within that area. See generally Wilson, *Antarctica, The Southern Ocean and the Law of the Sea*, 30 JAG J. 47 (1978); Comment, *The Polar Regions and the Law of the Sea*, 8 CASE W. RES. J. INT'L L. 204 (1976).

12. Agreement Governing Activities of States on the Moon and Other Celestial Bodies, G.A. Res. 64, 34 U.N. GAOR Annex I at 4, U.N. Doc. A/RES/34/68 (1979) (entered into force July 11, 1984) [hereinafter cited as Moon Treaty]. See generally Christol, *The Moon Treaty Enters into Force*, 79 AM. J. INT'L L. 163 (1985). Article III of the Moon Treaty states:

other weapons of mass destruction in outer space or on the ocean floor, whether states targeted by such weapons will be able to remove those weapons with international legal sanction may become an issue. Similarly, if either superpower begins to test nuclear weapons in the atmosphere, outer space, the oceans, or Antarctica, targeted states may ask whether international law authorizes them to take actions to

2. Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or to engage in any such threat in relation to the earth, the moon, spacecraft, the personnel of spacecraft or man-made space objects.

3. States parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.

4. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the moon shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration and use of the moon shall also not be prohibited.

See generally Wassenbergh, *Speculation on the Law Governing Space Resources*, 5 ANNALS AIR & SPACE L. 611, 619-20 (1980); Zedalis, *Will Article III of the Moon Treaty Improve Existing Law?: A Textual Analysis*, 5 SUFFOLK TRANSNAT'L L.J. 53 (1980). The OST and the Moon Treaty clearly apply to military uses of outer space.

The Soviet Union has proposed what it terms an "Anti-Satellite Treaty," containing provisions directed at military uses of outer space. See C. GRAY, *supra* note 1, at 115 (Draft Treaty on the Prohibition of the Stationing of Weapons of Any Kind in Outer Space). Article 1(1) of this proposed treaty (hereinafter Anti-Satellite Treaty) provides:

States Parties undertake not to place in orbit around the earth objects carrying weapons of any kind, install such weapons on celestial bodies, or station such weapons in outer space in any other manner, including on reusable manned space vehicles of any existing type or of other types which States Parties may develop in the future.

Article 3 states:

Each State Party undertakes not to destroy, damage, disturb the normal functioning or change the flight trajectory of space objects of other States Parties, if such objects were placed in orbit in strict accordance with article 1, paragraph 1, of this treaty.

For an analysis of these provisions see Strode, *Commentary on the Soviet Draft Space Treaty of 1981*, in C. GRAY, *supra* note 1, at 85.

stop such activities. As yet, no state has violated the international agreements mentioned. Nevertheless, the issues to which such violations might give rise deserve careful attention, particularly in light of recent advances in technology, which make the scenarios sketched above more than merely fanciful hypotheticals.

At least two types of factual situations would raise questions about the legality of a targeted state's response to violations of international conventions. The first concerns a targeted state's perception that a violative military use poses an imminent risk of attack. In such a situation the targeted state's right of self-defense under Article 51 of the United Nations Charter¹³ would become relevant. Under Article 51, a targeted state's resort to armed force in self-defense is permissible if the initial violative military use constitutes an attack which the targeted state is in the midst of absorbing.¹⁴ Self-defense might also be permissible if the initial military use led to the launching of an attack which the targeted state had not yet absorbed.¹⁵ But whether a violative military use which has not yet led to the launching of an attack can in fact

13. Article 51 states:

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

U.N. CHARTER art. 51.

Article 51 is also relevant when a military use does not violate an international agreement because the state engaging in the use has withdrawn from the relevant arms control agreement. Article 51 is relevant in such cases because it covers every case of self-defense.

14. Article 51's reference to "if an armed attack *occurs*" (emphasis added) makes this a rather self-evident proposition. Moreover, to deny a state the right to defend itself when it is absorbing an attack would make self-defense a meaningless concept.

15. Justification in those instances in which an attack has been launched but not yet absorbed may be found in either the notion of anticipatory self-defense, *see infra* text accompanying notes 56-139, or the view that an "armed attack" justifying resort to self-defense has occurred at the moment launching commences.

pose an imminent risk to a targeted state's security, and, if it can, whether such an imminent risk justifies a targeted state's use of armed force in anticipation of the launching of an attack, prove especially nettlesome questions. The importance of these questions, brought on by the shift of military power from men and artillery to jets and rockets, has clearly been intensified by the prospects of lasers, particle-beam weapons, and other military ordnance capable of performing missions with swiftness approaching the speed of light.

The second type of factual situation in which the lawfulness of efforts by a targeted state to remove deployed weapons or terminate ongoing military activities might come into question, concerns violative military uses which destabilize the military equilibrium. A non-exclusive list of such situations would include: cases in which military hardware threatening to the targeted state cannot be removed or military activities threatening to the targeted state cannot be terminated, because the targeted state lacks the technological sophistication to do so; cases in which military hardware is left unprotected by the deploying state and therefore subject to clandestine removal; cases in which threatening military hardware is considered sufficiently important to the deploying state such that it will resist any removal effort; and cases in which the deployment of military hardware or the conduct of military activity necessitates the constant presence of the deploying state's armed forces.

It is of course not always possible to separate these two types of factual situations from one another. The cases arising in the second of the two broadly defined factual situations may exist in conjunction with a perceived imminent threat of attack. Nevertheless, when confined to a destabilizing scenario insufficient to pose an imminent threat of attack, the cases in the second category raise several general concerns: whether international law has established dispute resolution procedures to deal with arms control violations; whether the targeted state is obligated to use such procedures before resorting to the unilateral use of responsive armed force; and, most important, whether the failure of the deploying state to rectify its violation of international law after dispute resolution has been attempted entitles the targeted state to undertake its own corrective measures. This latter concern, which involves the idea of reprisals as

self-help measures to enforce international law, merits special attention, for "self-help" reprisals may easily be abused; permitting them also presents the risk that removal or termination efforts will lead to full-scale military conflict.

The legal analysis of both types of broad factual situations must begin with Article 2(4) of the United Nations Charter.¹⁶ This provision prohibits states from threatening or using "force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." At the outset, it is important to point out that whether Article 2(4) may be applied to the factual situations under discussion is subject to question for two reasons: first, because it is unclear how literally Article 2(4) should be read; and second, because Article 2(4) must be read in conjunction with other Charter provisions. In view of this, several specific issues arise: Is removal by a targeted state of military objects left unprotected by the deploying state a use of "force" if accomplished without discovery? Does Article 2(4) prohibit the use of force by the targeted state to remove objects or personnel in a spatial area over which the deploying state has no claim of control? If the concluding clause of Article 2(4)—"or in any other manner inconsistent with the Purposes of the United Nations"—is the source of such a prohibition, is a targeted state's contention that its use of force is merely designed to put an end to another state's violation of an international commitment a legally sufficient justification insofar as such a purpose is consistent with the Charter?

Part II of this Article examines these questions and argues that, with the possible exception of clandestine removal, a targeted state's efforts to remove illegally deployed military objects, or terminate illegally undertaken military activities, is prohibited by Article 2(4). Part III then asks whether Article 51 envisions states exercising the right of self-defense in anticipation of imminent attack. It is suggested that both law and policy support such a right in the

16. U.N. CHARTER art. 2, para. 4 states:

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

contemporary world. Reprisals as a self-help measure are discussed in Part IV. Although the law appears to disfavor reprisals, it is suggested that the policy argument against reprisals has yet to be fully and convincingly developed. Part V explores dispute resolution. Specific consideration is given to Chapter VI of the United Nations Charter¹⁷ and the dispute resolution provisions of those international agreements that would be violated by the military use of a transnational spatial area. The discussion therein suggests that, except when a targeted state justifiably invokes anticipatory self-defense, there is an obligation to attempt to end the other state's violation amicably before resorting to force. Finally, Part VI focuses on whether the "Star Wars" space-based ballistic missile defense (BMD) system and the various anti-submarine warfare (ASW) devices capable of deployment on the ocean floor, may so jeopardize a targeted state's security as to justify that state's use of force to effect removal. It is argued that under the questionable concept of reprisal, a Soviet use of force to remove an American space-based BMD system—though unlikely—would be lawful. Similarly, reprisal might justify the use of force by the United States to remove any future Soviet ASW network deployed on America's continental shelf. There is, however, some doubt as to whether a Soviet use of force to remove an American BMD system or an American use of force to remove a Soviet ASW network would be justifiable under the considerably more established right of anticipatory self-defense. But during a time of crisis removal of a Soviet ASW network might approach lawfulness.

II. ARTICLE 2(4) AND THE USE OF FORCE

Commentators have expressed three views of the prohibition on the use of force articulated in Article 2(4) of the Charter. The first view is that the injunctions of Articles 1(1)¹⁸ and 2(3)¹⁹, which relate respectively to the mainte-

17. *Id.* ch. VI. Chapter VI (Articles 33 through 38) concerns the peaceful settlement of disputes.

18. Article 1(1) states:

The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to

nance of peace and the peaceful settlement of international disputes, indicate that the Charter's preeminent concern is the promotion of international peace.²⁰ The prohibition of Article 2(4) is therefore said to be absolute and complete, admitting only those exceptions expressly provided elsewhere in the Charter²¹—and those exceptions are to be read narrowly.²² The second view holds that the Charter is not

the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace[.]

U.N. CHARTER art. 1, para. 1.

19. Article 2(3) states: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." *Id.* art. 2, para. 3.

20. *See, e.g.*, D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 154-55 (1958) (describing peace as the "paramount" purpose).

21. Specific reference is made here to individual or collective self-defense, pursuant to Articles 51 and 52, and United Nations enforcement action, pursuant to Articles 42 and 94(2).

22. *See* I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275-79 (1963) (rejecting anticipatory self-defense), 301 (rejecting right of intervention to protect nationals), 341-42 (rejecting right of intervention for humanitarian purposes in protecting non-nationals); L. HENKIN, *HOW NATIONS BEHAVE* 141-44 (2d ed. 1979) (rejecting anticipatory self-defense except in certain extreme circumstances), 145 (expressing doubt about the lawfulness of intervention to protect lives and property); P. JESSUP, *A MODERN LAW OF NATIONS* 166-67 (3d ed. 1968) (rejecting anticipatory self-defense), 169-70 (rejecting intervention to protect lives or property); H. Kelsen, *THE LAW OF THE UNITED NATIONS* 797-98 (1950) (rejecting anticipatory self-defense); H. Kelsen & R. TUCKER, *PRINCIPLES OF INTERNATIONAL LAW* 64-87 (2d ed. 1966) (rejecting right of intervention to protect nationals); Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 *AM. J. INT'L L.* 872, 878 (1947) (rejecting anticipatory self-defense and intervention to protect nationals); Schwarzenberger, *Report on Some Aspects of the Principle of Self-Defense in the Charter of the United Nations and the Topics Covered by the Dubrovnik Resolution*, 48 *INT'L L.A.* 550, 617-18 (1958) (Reply from Dr. D. Ninčić) (rejecting anticipatory self-defense) [hereinafter cited as Ninčić]; Tucker, *The Interpretation of War Under Present International Law*, 4 *INT'L L.Q.* 11, 29-30 (1951) (rejecting anticipatory self-defense). The view reflected by these commentators has been termed "restrictionist" and is said to be shared by most states. *See* Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 197, 209-13 (R. Lillich ed. 1973). *But see* Kelsen, *Collective Security Under International Law*, 1954 *INT'L L. STUDIES* 162 (U.S. Naval War

limited to the promotion of international peace, nor most accurately construed when the exceptions to Article 2(4) are read narrowly. Holders of this view insist that the Article 2(4) prohibition is less encompassing than those subscribing to the first view would have it.²³ According to the third view,

College 1956) (indicating acceptance of right of intervention to protect nationals).

23. See D. BOWETT, *supra* note 20, at 91-104 (characterizing the use of force to protect nationals and humanitarian intervention as lawful), 188-89 (anticipatory self-defense as lawful); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 232-41 (1961) (anticipatory self-defense lawful); M. McDUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 862-70 (supporting the use of force to protect nationals), 874-79 (1981) (supporting humanitarian intervention to protect non-nationals); I L. OPPENHEIM, *INTERNATIONAL LAW* 309 (H. Lauterpacht 8th ed. 1955) (intervention to protect nationals lawful), 312-13 (humanitarian intervention to protect non-nationals lawful); II L. OPPENHEIM, *INTERNATIONAL LAW* 156 (H. Lauterpacht 7th ed. 1948) (rejecting notion of permissibility of anticipatory self-defense); A. THOMAS & A. THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965*, at 11-18 (1967) (protection of nationals on basis of self-defense lawful), 19-24 (humanitarian intervention to protect non-nationals, and protection of nationals on basis of self-defense lawful); Farer, *Law and War*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: VOL. III, CONFLICT MANAGEMENT* 15, 36-43 (C. Black & R. Falk eds. 1971) (suggesting anticipatory self-defense unlawful), 54-56 (suggesting intervention to protect nationals or non-nationals supported on humanitarian grounds); Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, 103 *RECUEIL DES COURS* 341, 361-67 (anticipatory self-defense lawful), 404-05 (intervention to protect nationals permitted under right of self-defense, but severely restricted); Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 92 *RECUEIL DES COURS* 1, 171-74 (anticipatory self-defense and intervention to protect nationals on basis of self-defense lawful), 207 (acknowledging developments in international law of human rights, the first step in the direction of humanitarian intervention to protect non-nationals); Joyner, *Reflections on the Lawfulness of Invasion*, 78 *AM. J. INT'L L.* 131, 133 (1984) (use of force to protect nationals and humanitarian intervention to protect non-nationals lawful) [hereinafter cited as Joyner, *Reflections*]; Lillich, *Forcible Self-Help to Protect Human Rights*, 53 *IOWA L. REV.* 325 (1967) (humanitarian intervention to protect non-nationals lawful because international machinery to protect human rights ineffective); McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 *AM. J. INT'L L.* 1, 11 (1968) (supporting humanitarian intervention to protect non-nationals); McDougal & Reisman, *Response*, 3 *INT'L LAW.* 438-45 (1968) (supporting humanitarian intervention to protect non-nationals) [hereinafter cited as McDougal & Reisman, *Response*]; Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 *VA. J. INT'L L.* 205, 261-64 (1969) (humanitarian intervention to protect non-nationals lawful);

Article 2(4) has had little if any effect on pre-Charter customary international law regarding the use of force. This view is based in large measure on both the literal meaning of the qualifying language of Article 2(4), which describes when force is prohibited, and the belief that any other reading would result in the adoption of legal principles unacceptable in practice.²⁴

Each of these views focuses on the extent to which the Charter restricts the use of "force."²⁵ But exactly how the

Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 153-54 (1984) (protection of nationals lawful); Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 800 (1976) (intervention to protect nationals lawful); Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177-78 (R. Lillich ed. 1973) (supporting humanitarian intervention to protect non-nationals); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 467 (intervention to protect nationals lawful), 497-98 (anticipatory self-defense lawful); Note, *Use of Force for the Protection of Nationals Abroad: The Entebbe Incident*, 9 CASE W. RES. J. INT'L L. 117, 132 (1977) (protection of nationals and non-nationals lawful on humanitarian grounds). These commentators may be referred to as having a "realist-restrictionist" view. Cf. J. STONE, OF LAW AND NATIONS 2-3 (1974) ("idealist-restrictionist") [hereinafter cited as J. STONE, OF LAW]; Note, *Resort to Force by States to Protect Nationals: The U.S. Reserve Mission to Iran and its Legality Under International Law*, 21 VA. J. INT'L L. 485, 491 (1981) ("realist").

24. See E. COLBERT, RETALIATION IN INTERNATIONAL LAW 203 (1948) (cannot assume that signatories to Charter intended to restrict right of retaliation in any way); J. STONE, OF LAW, *supra* note 23, at 2-10, 19-20 (narrowly interpreting Article 2(4) to permit the use of forceful reprisals); Farer, *supra* note 23, at 69-72 (noting that United States and Israel each have sought to justify use of force in reprisal as legitimate). These commentators share a view that may be termed the "traditionalist" view. Cf. J. STONE, OF LAW, *supra* note 23, at 28 ("realist-traditionalist"). But see J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 286-87 (1954) (appearing to adopt approach to the Charter which precludes legitimacy of reprisals). Stone's view on reprisals and the Charter may have changed between 1954 and 1974. For an indication of his evolving view, see J. STONE, OF LAW, *supra* note 23, at 33.

25. On whether Article 2(4) applies to the use of force in transnational spatial areas, see J. BRIERLY, THE LAW OF NATIONS 316 (H. Waldock 6th ed. 1963) (recognizing self-defense on the high seas and, in doing so, signifying the application of Article 2(4)); G. GÁL, SPACE LAW 130-32 (1969) (noting that U.N. General Assembly resolutions and Article 3 of the Outer Space Treaty of 1967 apply international law, including the United Nations Charter, to outer space); M. MCDUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 437-50 (1963). Compare Meeker, *Defensive*

Charter defines that term is unclear. The reference in the Preamble²⁶ to "armed" force provides the only clue contained in the Charter itself. Yet "force" may encompass more than simply "armed" force.²⁷ Nevertheless, the definitional breadth of the term "force" would seem to extend no further than "coercion," which implies all forms of pressure resisted by a receiving state as well as pressure not resisted (either because of an inability to undertake resistance or a conscious decision to forego resistance). In view of this, it would appear that in situations where military objects deployed in violation of international law have been left unprotected by the deploying state, efforts to remove such objects or to render them inoperative would not violate Article 2(4)'s prohibition. That is, by effecting clandestine removal a targeted state avoids the use of coercion.

The language of Article 2(4), prohibiting the threat or use of force against the "territorial integrity or political independence of any state," would not be helpful when addressing situations in which a state using transnational spatial areas (hereinafter using state) is likely, because of the importance of the military deployment or presence of its personnel, to resist the removal of its military hardware or the termination of its threatening activities. This would also be the case if contrary to what was suggested above, clandestine removal was viewed as involving the use of "force" as that term is understood in the context of Article 2(4).²⁸

Quarantine and the Law, 57 AM. J. INT'L L. 515, 523-24 (1963) (collective nature of the quarantine of Cuba in 1962 did not violate Article 2(4), therefore recognizing that provision's applicability to the high seas) with Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 556-63 (1963) (quarantine not justified under Articles 2(4) and 51).

26. The Preamble to the U.N. Charter includes the following clause: "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."

27. Compare Zedalis, *Some Thoughts on the United Nations Charter and the Use of Military Force Against Economic Coercion*, 17 TULSA L.J. 487, 491-97 (1982) (intense economic coercion violates Article 2(4)) with Joyner, *The Transnational Boycott as Economic Coercion in International Law: Policy, Place, and Practice*, 17 VAND. J. TRANSNAT'L L. 205, 240-42 (1984) (broad interpretation of the term "force" as used in Article 2(4) inconsistent with the language of Articles 39 and 51).

28. When the targeted state is incapable of clandestine removal or termination, the peaceful settlement mechanisms discussed in Part V, will prove essential. See *infra* notes 194-276 and accompanying text.

The right of a targeted state to employ force in such situations may be seen as affecting the freedom of the decision-making of the state whose objects or personnel are attacked, and, therefore, impairing that state's "political independence."²⁹ It may be that the using state's burden of demonstrating that "territorial integrity or political independence" can be violated without an invasion of its geographical limits can be avoided altogether³⁰ by relying on the language extending Article 2(4)'s prohibition to cases ". . . in any other manner inconsistent with the Purposes of the United Nations."³¹ The import of this clause is to make the organization's "Purposes" member-state obligations. The ultimate effect of the clause, it might be argued, is to bring many uses of force, whether or not violative of territorial integrity or political independence, within the prohibition of Article 2(4). Reliance on the language of this latter clause, however, is not without its own problems.

First, does the concluding clause of Article 2(4) leave untouched uses of force "not inconsistent" with a purpose of the United Nations, or does it simply attempt to suggest—perhaps inartfully—that every use of force is prohibited unless justified under exceptional principles (*e.g.*, self-defense)? Second, assuming that the clause does not prohibit uses of force "not inconsistent" with a purpose of the United Nations, does the provision of the Charter which sets forth the organization's "Purposes" state a purpose with which the

29. On defining "political independence," see I. BROWNLIE, *supra* note 22, at 265-68; R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 182-83 (1963); M. McDOUGAL & F. FELICIANO, *supra* note 23, at 176-78.

30. The violative objects or personnel, although physically outside the deploying state's boundaries, might be assimilated to state territory and therefore viewed as covered by Article 2(4). If so, the targeted state's attempts to remove or terminate the objects might impair the deploying state's territorial integrity or political independence. Whether such objects or personnel can be assimilated to deploying state territory, however, is doubtful. See Brownlie, *The Maintenance of International Peace and Security in Outer Space*, 40 *BRIT. Y.B. INT'L L.* 1, 8 (1964). *But see* Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law*, 21 *VA. J. INT'L L.* 485, 512-13 (1980-81) (rejecting theory that U.S. embassy is U.S. territory, and therefore denying that embassy rescue may be justified as protection of territorial integrity).

31. I. BROWNLIE, *supra* note 22, at 382; Brownlie, *supra* note 30, at 8.

use of force to remove threatening military hardware can be said to be not inconsistent? Answers to these important questions clearly affect the extent to which efforts to remove military hardware or terminate military activities in transnational spatial areas can be viewed as justifiable.

A. *Permissibility of Force Not Inconsistent With a Purpose of the United Nations*

A textual reading of the final clause of Article 2(4)³², which prohibits force "in any other manner inconsistent with the Purposes of the United Nations," suggests that force may be permissibly used if it is not inconsistent with a purpose of the United Nations. An examination of the discussions surrounding the adoption of the clause, however, implies the contrary.³³ In this regard, it is noted that when, during the 1945 San Francisco Conference on International Organization, the delegate from Brazil suggested that the clause might have a qualifying effect on the Article 2(4) prohibition, the United States' delegate responded, without dissent, that "the phrase 'or in any other manner' was designed to insure that there should be no loopholes."³⁴ If, indeed, Article 2(4) has no loopholes, then any force, even that which is not inconsistent with a purpose of the United Nations, is prohibited. But the words of the United States' delegate may mean something quite different; specifically, that the Article 2(4) prohibition contains no loophole regarding the *ways* and *forms* in which prohibited force may manifest itself. In other words, Article 2(4) prohibits not only armed force used to imperil a state's territorial integrity or political independence, but also force used "in any other manner" inconsistent with the Organization's purposes.³⁵ If this latter read-

32. See *supra* note 16.

33. See M. McDUGAL & F. FELICIANO, *supra* note 23, at 178-79.

34. Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 334-35 (1945). *But cf.* II L. OPPENHEIM, *supra* note 23, at 154 (stating the provision does not exclude "the use of force in fulfillment of the obligations to give effect to the Charter").

35. Prior to the observation of the United States' delegate, the Brazilian delegate had also raised a question about including in Article 2(4) a provision to prohibit "economic" coercion. The delegate from Belgium suggested that, given the phrase "or in any other manner," the change was unnecessary. See Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 334 (1945). (This

ing is correct, then the American delegate's statement did not rule out the use of force when not inconsistent with a purpose of the United Nations.

The strongest evidence that Article 2(4) was not intended to permit force to be used even when not inconsistent with a purpose of the U.N. grew out of the events surrounding the rejection of a Norwegian submission.³⁶ The Norwegian proposal sought to change Article 2(4), which was then in the form of an Australian amendment to the Dumbarton Oaks proposal, the seminal draft of the United Nations Charter.³⁷ The Norwegian submission would have prohibited "any use of force not approved by the Security Council."³⁸ Although it was rejected because of the ambiguity of the words "not approved," the Norwegian submission was later described in a subcommittee report as "clarifying the Australian amendment."³⁹ Earlier, in the discussion of possible "loopholes" in Article 2(4), the Norwegian delegate had remarked that "it should be made very clear in the [Committee's] Report to the Commission that . . . paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defense."⁴⁰ This clarification was incorporated into the committee's report to the Commission. The report noted that "in view of the [rejected] Norwegian amendment, the unilateral use of force or similar coercive measures is not authorized or admitted" by Article 2(4).⁴¹ The report followed this notation by stating that with the exception of "legitimate self-defense," the "use of force, therefore, remains legitimate only to back up decisions of the organization."⁴²

may suggest that the American delegate's focus on the same phrase was intended to indicate that the Article 2(4) prohibition was against the use of force manifesting itself in a *military* manner or in *any other manner* inconsistent with the purposes of the United Nations.)

36. Doc. 215, I/1/10, 6 U.N.C.I.O. Docs. 564 (1945).

37. L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 665-66 (3rd & rev. ed. 1969), *citing Proposals for the Establishment of a General International Organization, Dumbarton Oaks, Washington, XI DEP'T ST. BULL.* 368 (Oct. 7, 1944).

38. *See* Doc. 215, I/1/10, 6 U.N.C.I.O. Docs. 564 (1945).

39. Doc. 739, I/1/A/19(a), 6 U.N.C.I.O. Docs. 720 (1945).

40. Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 334-35 (1945).

41. Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 400 (1945).

42. *Id.*

The subsequent report to the Plenary Session of the Conference unanimously adopted this approach without dissent,⁴³ leaving little doubt that Article 2(4) does not contain an exception for force even when such force is "not inconsistent" with a purpose of the United Nations.

B. *"Purposes" of the United Nations: Is the Use of Force Ever Not Inconsistent?*

If, however, the better view is that the concluding clause of Article 2(4) does not prohibit the use of force when such force is "not inconsistent" with a purpose of the United Nations, a further question arises. Specifically, does Article 1 of the Charter, which sets forth the Organization's "Purposes," include a purpose with which the use of force in the context of removal or termination can be said to be "not inconsistent"? The use of force will always conflict with the maintenance of peace, a primary purpose stated in Article 1(1).⁴⁴ Thus, to determine whether force used under Article 2(4) to remove military hardware or terminate military activities in transnational spatial areas is permissible, one must not only identify a purpose with which a use of force is not inconsistent, but also reconcile such a use of force with the primary purpose of maintaining peace stated in Article 1(1).

One way to reconcile such a conflict in purposes is through a balancing approach, which considers the relative value, in fact-specific situations, of the "Purposes" in opposition. For example, when a state intervenes in a foreign state to protect its own nationals and others, Article 1(3)'s call for respect for human rights may outweigh Article 1(1)'s call for the maintenance of peace.⁴⁵ Because the final clause of Arti-

43. Doc. 1179, I/9/(1), 6 U.N.C.I.O. Docs. 247 (1945).

44. See *supra* note 18. Article 1(1) enjoins the United Nations to resolve international disputes or situations by "peaceful means."

45. Some argue that Article 2(4) does not preclude intervention to protect the "fundamental" human rights of both nationals and non-nationals. See, e.g., McDougal & Reisman, *Response, supra* note 23, at 442-44 ("humanitarian intervention" remains valid under the Charter); Reisman, *supra* note 23, at 172-78 ("[Humanitarian] intervention . . . for parties to the Charter . . . is mandatory."). Others believe, however, that unilateral intervention by a state is permitted only to protect its nationals and then only to the extent of the state's interest in its own self-defense. See, e.g., D. BOWETT, *supra* note 20, at 91-94; A. THOMAS & A. THOMAS, *supra* note 23,

cle 2(4) specifies the plural "Purposes," however, this balancing approach may be incongruous with the intent of the Charter. The choice of the plural "Purposes" may signify that apart from those uses of force expressly permitted (*e.g.*, self-defense), the only other uses of force left unaffected by the prohibition of Article 2(4) are those not inconsistent with any and all of the Organization's several "Purposes."⁴⁶ A use of force inconsistent with even one purpose would thus be prohibited, no matter how many other purposes that use of force might further.

Certainly, not everyone considers the maintenance of peace a purpose equal in importance to respect for human rights.⁴⁷ Supporters of the fact-specific balancing test, how-

at 19-24; Fawcett, *supra* note 23, at 404-05; Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1628-33 (1984) [hereinafter cited as Schachter, *The Right of States*]; Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis*, 37 J. INT'L AFF. 231, 241-45 (1984) [hereinafter cited as Schachter, *Self-Help*]. *But see infra* note 47.

46. The choice of the plural "Purposes" suggests at least two other interpretations: that the Charter allows the use of force if it is not inconsistent with at least *one* of the Charter's many purposes (*i.e.*, the use must be inconsistent with *all* to be prohibited); or that the Charter allows use of force if it is not inconsistent with at least *one* of the Charter's many purposes and, in the specific context, that purpose outweighs the others. This latter interpretation has already been mentioned, *see supra* text accompanying note 45, and will be addressed again below.

The former interpretation is difficult to accept. Specifically, if the plural "Purposes" means that Article 2(4) does not prohibit a use of force if such is not inconsistent with at least one of the Charter's purposes (since it must be inconsistent with *all* to be prohibited), then the use of the word "other" in the final clause of Article 2(4) must indicate that such a use of force against the territorial integrity or political independence of another state is prohibited, because it is inconsistent with *all* of the purposes (*i.e.*, not even "not inconsistent" with *one*). Yet under Article 1, force against territorial integrity or political independence may not be inconsistent with all of the Organization's purposes, and in particular those set forth in Articles 1(3) (respect for human rights) and 1(4) (United Nations serves as center for harmonizing actions of nations in achieving common ends). Therefore, since the plain terms of Article 2(4) still prohibit a use of force against territorial integrity or political independence, "Purposes" should not be read in this manner.

47. *Cf.* I. BROWNLIE, *supra* note 22, at 268-70 (arguing that the broad language of Article 2(4) rejects customary law of protecting nationals); L. HENKIN, *supra* note 22, at 137-38 ("the Charter's prohibition on unilateral force was to apply [and still applies] universally"); P. JESSUP, *supra* note 22, at 169-70 (arguing that Article 2(4) prohibits unilateral, as opposed to col-

ever, have obviously accepted the view that the term "Purposes" was not meant to prohibit uses of force that promote one U.N. purpose even though its promotion may be inconsistent with another purpose. Any argument in favor of the balancing test, then, must start with the proposition that in specific cases, Article 2(4) may not prohibit the use of force as long as such use promotes *one* of the Organization's purposes.

Various arguments may be advanced to support this proposition.⁴⁸ Its textual plausibility, however, turns on two points: first, whether refraining from force in order to promote peace may at times be inconsistent with other "Purposes" that the use of force may well advance; and second, whether the Charter provides any guidance concerning the permissibility of the unilateral use of force to promote such other purposes. If any of the U.N.'s purposes are inconsistent under some circumstances with refraining from the use of force, then perhaps the conflicting purposes of Article 1 must be balanced.⁴⁹ If, however, the balancing test applies only to acts and not to omissions (such as refraining from the use of force), then whether the Charter addresses the permissibility of unilateral acts of force promoting purposes of the Organization becomes decisive.

lective, intervention); *cf. also* Farer, *supra* note 24, at 27-36 (analyzing various interpretations of Article 2(4) by other scholars); Fonteyne, *supra* note 22, at 216-18 (citing arguments made in various U.N. General Assembly debates about the legality of intervention).

48. *See, e.g.*, Reisman, *supra* note 23, at 168-76 (citing legal and policy arguments in favor of "humanitarian intervention" based on, for example, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and the United Nations Charter Preamble and various Articles).

49. Article 2 appears to be directed at action alone. Its opening sentence ("The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles") provides that members shall "act" in accord with several principles, including that of paragraph 4 to refrain from the "threat" or "use" of force. Nothing is said about the permissibility of a decision *not* to use force. Further, Article 1 has the same thrust. It characterizes the purposes of the United Nations in terms suggesting action. The purposes stated in the opening paragraph are to "take" collective measures to maintain peace; in the second paragraph, to "take" measures to strengthen peace; in the third, to "achieve international cooperation" in solving international problems; and in the fourth, to "be a center" for harmonization.

The precise terms of Articles 55 and 56 provide some guidance on this latter point. Article 55 reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 states: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

While Article 56 authorizes joint as well as separate "action"—"action" is undefined—to achieve the purposes in Article 55, the action must be "in cooperation with the Organization." Thus, even if "action" includes the use of military force, these sections suggest that such force cannot be wholly unilateral.⁵⁰ Still, this analysis does not answer the question of whether there are circumstances under which the failure to act would be inconsistent with a purpose of the United Nations.

The question of whether Article 1 states a purpose with which the use of force to remove military hardware or to terminate military operations in transnational space can be said to be not inconsistent is significant. The language of Article 1(1) calls for the resolution of international disputes in conformity with "justice and international law."⁵¹ Do the quoted words support a targeted state's use of force to re-

50. See L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 371-82. *But see* Reisman, *supra* note 23, at 175 (states may act "singly . . . in humanitarian intervention").

51. See *supra* note 18 (for text of Article 1(1)).

move objects or terminate activities that violate international law?⁵² This argument seems plausible since the force is directed at restoring compliance with those elements of justice and international law reflected in relevant international agreements. Examined in light of controlling legal principles, however, the argument is unpersuasive.

Article 1(1)'s reference to "justice and international law" merely points out the requisite character of the terms of a peaceful resolution to an international dispute. Apparently, the language was not intended to suggest that securing "justice and international law" is, like the promotion of human rights under Article 1(3), one of the United Nations' many "Purposes." The location in the text of the phrase "justice and international law" makes this clear.⁵³ Yet even if "justice and international law" is read as a purpose of the United Nations, it is difficult to argue that this purpose may be balanced against the maintenance of peace. Indeed, the discussions surrounding the adoption of Article 1(1) indicate that attempts at the 1945 San Francisco Conference to draft Article 1(1) so as to permit such a reading failed.⁵⁴

52. See J. STONE, *AGGRESSION AND WORLD ORDER* 100-01 (1958) (arguing that states may still use force as a means of vindicating rights); J. STONE, *OF LAW*, *supra* note 23, at 2-10 (criticizing the restrictive view of Article 2(4) that the use of force is prohibited).

53. Article 1(1) provides that the first purpose of the United Nations is the maintenance of peace. See *supra* note 18. That purpose is to be accomplished through (a) collective measures that prevent and remove threats to the peace or that suppress aggression or other breaches of the peace; and (b) the adjustment or settlement of international disputes by peaceful means "in conformity with the principles of justice and international law." The phrase "justice and international law" is part and parcel of the Article's reference to the adjustment or settlement of international disputes by peaceful means. "Justice and international law" are components of the adjustment or settlement; pursuit of them out of the context of a peaceful resolution to an international dispute is, therefore, not a purpose of the United Nations. See also *infra* text accompanying notes 167-69, which indicates that the phrase "justice and international law" was adopted as part of a textual arrangement involving the reference to "justice" in Article 2(3) ("All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."). Apparently, both phrases were intended to safeguard against the settlement of a dispute by an accommodation, such as the 1938 Munich appeasement, that would result in injury to weak nations.

54. For text of Article 1(1), see *supra* note 18. Neither the proposal to insert the word "justice" between the phrases "peace and security" and

Hence, whether the Charter's reference to "justice and international law" states a purpose of the United Nations, and if so, whether that purpose may be balanced against the maintenance of peace, are questions to which affirmative answers cannot be easily developed.⁵⁵ Complications therefore arise in any attempt to show that the use of force to remove objects or terminate activities that violate international law is permissible because it promotes a purpose of the United Nations. Thus, to justify the use of force against a perceived imminent threat of attack or an action that threatens to create military instability, reference must be had to the doctrines of anticipatory self-defense and self-help reprisal. The only situation in which it would not be necessary to draw on these doctrines might involve a nation undertaking the clandestine removal of military objects. In this case, removal would not involve the use of "force," and therefore would not fall within the prohibition of Article 2(4).

III. ANTICIPATORY SELF-DEFENSE

Customary international law has long recognized the right of a state to use military force in anticipation of an armed attack. In 1841, Secretary of State Daniel Webster wrote to the British Minister to the United States concerning *The Caroline* incident, and stated that the doctrine was applicable whenever the "necessity of self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁵⁶ The doctrine was subsequently invoked

"and to that end" (19 for, 12 against), nor the proposal to insert the language "in conformity with the principles of justice and international law" at that same location (19 for, 15 against) achieved the two-thirds majority needed for adoption. See Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. 446 (1945); Doc. 926, I/1/36, 6 U.N.C.I.O. Docs. 422-23 (1945); Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 393-95 (1945); Doc. 742, I/1/23, 6 U.N.C.I.O. Docs. 318 (1945). For the same reason, Commission 1 of the Conference rejected by a vote of 21 to 21 an Egyptian proposal to insert the language "in conformity with the principles of justice and international law" at that same location. The Commission then unanimously adopted the language of Committee I, language that ultimately became Article 1(1). Doc. 1187, I/13, 6 U.N.C.I.O. Docs. 203 (1945); Doc. 1179, I/9/(1), 6 U.N.C.I.O. Docs. 245-46 (1945).

55. See *supra* text accompanying notes 45-50.

56. Letter from Mr. Webster to Mr. Fox, Apr. 24, 1841, *reprinted in* 29

during border skirmishes after World War I⁵⁷ and again following the Second World War in the judgments of the International Military Tribunal for the Far East⁵⁸ and the Nuremberg Trial of War Criminals.⁵⁹

The adoption of Article 51⁶⁰ of the Charter, however, raised questions about the continued legality of anticipatory self-defense. Article 51 recognizes the right to use force in self-defense, but only "if an armed attack occurs." Some scholars contend that Article 51 thus eliminates the customary right to use force in anticipation of an armed attack.⁶¹ They find support in both the Charter's general call for peaceful resolution of international disputes and specific prohibition of Article 2(4) on the use of force.

Several arguments lend some support to the contention that the doctrine of anticipatory self-defense lacks continued legitimacy in the post-Charter world. Each merits attention, given that a state may well invoke the doctrine if it perceives that another state's deployment of military objects or conduct of military maneuvers in a transnational spatial area is posing an imminent risk to its national security.⁶² Since the invocation of the doctrine and consequent use of force could lead to monstrous levels of destruction, it is important to analyze anticipatory self-defense from both a legal and a policy perspective. After all, of what use is a conclusion that the law requires a certain kind of behavior if actual conduct is likely to be inconsistent with the law?

BRIT. & FOREIGN ST. PAPERS 1129, 1138 (London 1857). See generally Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

57. See I. BROWNLIE, *supra* note 22, at 257.

58. *Judgment of the International Military Tribunal for the Far East* 994 (1948), cited in M. McDUGAL & F. FELICIANO, *supra* note 23, at 231-32 (upholding anticipatory self-defense by the Netherlands against Japan).

59. OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 36-38 (1947), discussed in W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 918 (3d ed. 1971) (rejecting Germany's reliance on anticipatory self-defense as justification for attacking Norway not on the basis of any objection to the notion of justification but on the facts).

60. For the text of Article 51, see *supra* note 13.

61. See *supra* note 22 and accompanying text.

62. Whether such objects or activities in fact pose imminent risks will be explored *infra* text accompanying notes 277-376.

A. *Article 51 and Anticipatory Self-Defense: An Assessment of the Law*

1. *The Text of Article 51*⁶³

Article 51 begins: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs.” Some scholars therefore argue that Article 51 limits the use of self-defense to situations in which an actual armed attack is in progress.⁶⁴ A thorough reading of Article 51 does not support this conclusion.⁶⁵ Article 51’s provision for the right of self-defense in response to an armed attack does not in and of itself mean that no similar right exists in response to something short of an actual attack. Such a limitation can be determined only by reference to other Charter provisions.⁶⁶ Furthermore, other official language texts of Article 51 support a broader reading.⁶⁷ For example, the French text states: “dans un cas où un Membre des Nations Unies est l’objet d’une agression armée,” (“in a case where a United Nations Member is the object of an armed aggression”); the Spanish text, “en caso de ataque armado” (“in a case of armed attack”). While both encompass responses to actual armed attacks, neither is limited thereto.⁶⁸

2. *The Travaux Préparatoires, Negotiating Background, and Relation to Article 2(4)*

The *travaux préparatoires* of Article 51 provide additional reason for concern regarding the continued validity of antici-

63. See *supra* note 13.

64. L. HENKIN, *supra* note 22, at 141 (“The fair reading of Article 51 permits unilateral use of force only in a very narrow and clear circumstance. . .”); see also I. BROWNLIE, *supra* note 22, at 275-76; Ninčić, *supra* note 22, at 69 (relying on the canon *exceptiones sunt strictissimae interpretationes* and arguing that retaliation allowed only when armed attack occurs).

65. See D. BOWETT, *supra* note 20, at 188-89; McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597, 599-600 (1963); Waldock, *supra* note 23, at 497-98.

66. See *infra* text accompanying notes 69-90.

67. See Waldock, *supra* note 23, at 497.

68. On the French text, see Mallison & Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT’L L. 417, 420-21 (1982). See also A. THOMAS & A. THOMAS, *NON-INTERVENTION* 123 (1956).

patory self-defense. Specifically, the *travaux préparatoires* contain little language approving the use of force in response to the imminent threat of attack.⁶⁹ Had Article 51's reference to self-defense "if an armed attack occurs" not been intended to eliminate the preexisting right to act in anticipation, some effort to have the *travaux* capture that fundamental point would have seemed natural. The failure of the *travaux* to do so, therefore, is somewhat suggestive.

Although this reasoning is logical, several pieces of information put the absence of such a reference in the *travaux* in better perspective. Principally, Article 51's inclusion in the Charter was to accommodate the system of international security envisioned by the Charter with that of the inter-American system of mutual defense,⁷⁰ a system based on the Declaration of Lima (1938),⁷¹ the Act of Havana (1940),⁷² the Act of Chapultepec (1945),⁷³ and the then-anticipated Inter-American treaty of reciprocal assistance (1947).⁷⁴ The objective was to ensure that regional defense organizations would be permitted to engage in forceful collective self-defense even where the U.N. Security Council was unable to authorize such action as a result of the exercise of a permanent Council member's veto power.⁷⁵ In adopting Article 51, the framers did not intend to create a right of self-de-

69. L. HENKIN, *supra* note 22, at 141 ("Nothing in the history of [Article 51's] drafting (the *travaux préparatoires*) suggests that the framers of the Charter intended something broader than the language implied.").

70. L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 342-44; McDougal, *supra* note 65, at 599.

71. Declaration of Lima, Dec. 24, 1938, *reprinted in* 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 534 (Bevans 1968).

72. Act of Havana, July 30, 1940, 54 Stat. 2491, E.A.S. No. 199.

73. Act of Chapultepec, Mar. 8, 1945, 60 Stat. 1831, T.I.A.S. No. 1543.

74. Inter-American treaty of reciprocal assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77.

75. The veto of any permanent Security Council member prevents that body from acting. *See* D. BOWETT, *supra* note 20, at 297-99; Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 362 (1962). A veto would have effectively prevented any forceful acts of self-defense, since under Chapter VIII(C)(2) of the Dumbarton Oaks Proposal forceful measures (even in self-defense) could not have been taken "without the authorization of the Security Council." *See* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 669, 672, *citing Proposals for the Establish-*

fense which would not otherwise have existed.⁷⁶ They merely intended to assure that the right could be exercised by regional defense organizations without the prior approval of the Security Council.

Having established that the absence of a reference to anticipatory self-defense in the *travaux* of Article 51 should not be seen as evidence of the elimination of that customary right, Article 2(4)'s effect on the right remains to be examined. Article 2(4) is relevant here as a result of the opening language of Article 51. That language—"[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs"—does not deal with self-defense in response to something short of an actual armed attack. Other Charter provisions, however, may restrict the use of defensive force. The most obvious is Article 2(4).⁷⁷ But there appear to be several reasons why that Article should not be read as affecting the customary right of anticipatory self-defense.

First, the text of Article 2(4) prohibits both the use and threat of force. As a consequence, to avoid the existence of a lacuna between prohibited force under Article 2(4) and explicitly permitted self-defense under Article 51, defensive measures in anticipation of an armed attack should be permissible.⁷⁸

Secondly, Article 2(4) provides, in part, that "Members

ment of a General International Organization, Dumbarton Oaks, Washington, XI DEP'T ST. BULL. 368 (Oct. 7, 1944).

76. Article 51 describes this right as "inherent". See L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 344. On the need to state inherent rights, compare statement by Secretary of State Kellogg to the U.S. Ambassador to France, Mr. Herrick, in connection with the Kellogg-Briand Pact of 1928 (Apr. 23, 1928), *reprinted in U.S. DEP'T OF STATE, I FOREIGN RELATIONS OF THE UNITED STATES 36-37 (1928)*. On the significance of the right's inherent nature and anticipatory self-defense, compare A. THOMAS & A. THOMAS, *supra* note 68, at 123-24.

77. On whether restrictions in the form of pre-conditions exist, see *infra* text accompanying notes 196-97, for a discussion of peaceful settlement of disputes.

78. For support for the conclusion that such anticipatory self-defense should be permissible, see D. BOWETT, *supra* note 20, at 191-92. See also McDougal, *supra* note 65, at 600 ("a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion").

shall refrain . . . from the threat of use of force against the territorial integrity or political independence of any state”⁷⁹ As a result, to the extent that the use of anticipatory force is in fact defensive, such force is not used “against” the other state’s territorial integrity or political independence and is thus not contrary to the letter of Article 2(4).⁸⁰ What cannot be ignored, however, is that such force is inconsistent with the Charter’s purpose of maintaining peace and, thus, prohibited by Article 2(4)’s concluding clause (“in any other manner inconsistent . . .”). But as noted earlier, Article 2(4) was not intended to jeopardize legitimate self-defense.⁸¹ Indeed, the Report of Rapporteur of Committee 1 to Commission I states that under Article 2(4), “self-defense *remains admitted and unimpaired*.”⁸² This language, unanimously adopted in the subsequent report to the Plenary Session,⁸³ suggests that the drafters of Article 2(4) intended to preserve the customary right of self-defense, not restrict it.⁸⁴ How else could self-defense “remain” and be left “unimpaired”?

The final reason for not reading Article 2(4) as impairing the customary right of anticipatory self-defense is that departures from or alterations in customary international law are not lightly to be presumed.⁸⁵ This is particularly wise when the failure of the Charter and accompanying negotiating documents to indicate unequivocally the rejection of the customary right is conjoined with the kind of currently existing political stalemate between East and West.⁸⁶

79. For complete text of Article 2(4), see *supra* note 16.

80. See D. BOWETT, *supra* note 20, at 152; J. STONE, *OF LAW*, *supra* note 23, at 24-26.

81. See *supra* text accompanying notes 36-43.

82. Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 400 (1945) (emphasis added).

83. Doc. 1179, I/9(1), 6 U.N.C.I.O. Docs. 247 (1945).

84. D. BOWETT, *supra* note 20, at 188.

85. *Id.*

86. The East-West stalemate has rendered the United Nations virtually incapable of taking the kind of collective measures required to prevent or remove threats to international peace. To permit casually the elimination of the customary right of anticipatory self-defense under such circumstances would risk unnecessary violence. Some have argued that if it is assumed that Articles 2(4) and 51 eliminate anticipatory self-defense, the United Nations’ inability to take effective collective measures means that

3. *Relation to Article 2(3)*⁸⁷

The relationship among the various Articles of the Charter provides further evidence supporting concern about the continued legitimacy of anticipatory self-defense. When Articles 2(4) and 51 are read in conjunction with Article 2(3), Article 2(3)'s requirement that "[a]ll members shall settle their international disputes by peaceful means" suggests that forceful measures of dispute resolution are always prohibited, unless in response to actual armed attack.⁸⁸ The absence of a rejection of the customary right of anticipatory self-defense in either the text or the *travaux préparatoires* of Article 51 is less persuasive support for the continued validity of anticipatory self-defense in light of Article 2(3)'s express requirement. Indeed, Article 2(3) may be read to contradict any evidence supporting anticipatory self-defense and to enunciate the Charter's principal limitation on the use of force (with Article 51 providing the only exception thereto).

Nevertheless, it is one thing to argue that Article 2(3) dictates peaceful dispute resolution, but quite another to conclude that all uses of force, except those in response to actual armed attack, are prohibited. Article 2(3) is undoubtedly a logical corollary of Article 2(4),⁸⁹ but Article 2(3) focuses on how "disputes" are to be resolved, while Article 2(4) focuses on which uses or threats of "force" are prohibited. The placement of the language of Article 2(4) after Article 2(3) is probative in this regard. Yet, if Article 2(3)'s directive means that all uses of force not expressly permitted by Article 51 are prohibited, it would be difficult to explain why Article 2(4) follows with an arguably less inclusive prohibition specifically relating to "force."⁹⁰ The rational explanation seems to be that Article 2(4) follows Article 2(3) because Article 2(4) alone determines the parameters of permissible "force."

the power to use anticipatory self-defense merely reverts to the member-states. See, e.g., W. FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 259-60 (1964).

87. For text of Article 2(3), see *supra* note 19.

88. J. STONE, *OF LAW*, *supra* note 23, at 2 (noting that others have developed this argument).

89. L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 41.

90. J. STONE, *OF LAW*, *supra* note 23, at 5.

4. *Evidence Outside the Charter*

In addition to indications in the Charter suggesting that doubts about the continued viability of the doctrine of anticipatory self-defense are unpersuasive, several non-Charter sources also provide evidence, though substantially more equivocal, that tends toward the same conclusion. In the *Corfu Channel Case*,⁹¹ the International Court of Justice (hereinafter I.C.J.) rejected the argument that four British warships had violated Albania's sovereignty by moving through Albanian waters with their guns at action station. The I.C.J. explained that British warships lawfully sailing in the same area had earlier been attacked by Albania.⁹² Although the opinion can be read as raising the possibility that the use of force in anticipation of an imminent attack might be permissible,⁹³ the failure of the Court to discuss the matter in the context of Articles 2(4) and 51 suggests that such a reading goes too far. The failure of the British to plead self-defense,⁹⁴ and the fact that the British never actually took preventive action against Albanian shore batteries bolsters thus conclusion.⁹⁵

Similarly, the 1946 report of the United Nations Atomic Energy Commission is also ambiguous on the issue of anticipatory self-defense. That report states that, because of the destructive force of nuclear weapons, "grave" violations of arms control agreements might "give rise to the inherent

91. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Judgment of Apr. 9, 1949).

92. *Id.* at 31.

93. Waldock, *supra* note 23, at 500-01. The Case Concerning United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), 1980 I.C.J. 3, 43 (Judgment of May 24, 1980), is more helpful on the legality of intervention to rescue nationals and, perhaps, reprisals to remedy violations of international law. Judge Morozov, dissenting in *U.S. v. Iran*, 1980 I.C.J. at 56-57, expresses his view on self-defense when he notes that the U.S. rescue mission was an "invasion," legally justifiable only on the basis of "an armed attack" of which "there is no evidence that any . . . had occurred against the United States."

94. Reply of the United Kingdom (*U.K. v. Alb.*), 1950 I.C.J. Pleadings (2 *Corfu Channel*) 241, 293 (Reply dated Mar. 26, 1948). The plea of the British agent, Sir Eric Beckett, was that the passage of the four warships on Oct. 22, 1946, was fully within the right of innocent passage. *Id.* at 301-02.

95. See I. BROWNIE, *supra* note 22, at 277.

right of self-defense recognized in Article 51."⁹⁶ Although the report suggests a possible right of anticipatory self-defense,⁹⁷ it does not clearly state that "grave" violations include actions preliminary to the actual movement of weapons toward a targeted state.⁹⁸ The report's approval of anticipatory self-defense, therefore, is not necessarily incontrovertible.

These ambiguities notwithstanding, state practice since the adoption of the Charter has been consistent with the continued validity of anticipatory self-defense.⁹⁹ Similarly, United Nations General Assembly Resolution 3314, which contains the Consensus Definition of Aggression,¹⁰⁰ leaves open the possibility of the right's existence.¹⁰¹ Article 6 of the Resolution provides that "[n]othing in the Definition shall be construed as in any way enlarging or *diminishing* the scope of the Charter, including provisions concerning *cases in which the use of force is lawful*."¹⁰² But the inferential signifi-

96. U.S. DEP'T OF STATE, PUB. NO. 2737, FIRST REPORT OF THE UNITED NATIONS ATOMIC ENERGY COMMISSION TO THE SECURITY COUNCIL 22 (1946), *cited in* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 980 (1965).

97. *See* Waldock, *supra* note 23, at 498.

98. Nor is this point made any more clearly in U.S. DEP'T OF STATE, PUB. NO. 2702, UNITED STATES MEMORANDUM NO. 3, DEALING WITH THE RELATIONS BETWEEN THE ATOMIC DEVELOPMENT AUTHORITY AND THE ORGANS OF THE UNITED NATIONS, SUBMITTED TO SUB-COMMITTEE NO. 1 OF THE UNITED NATIONS ATOMIC ENERGY, App. No. 16, 160, 164 (1946), *cited in* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 980 (1965). That document states that under modern conditions an "armed attack" is "something entirely different from what it was prior to the discovery of atomic weapons." *Id.* As a result, "attack" should include "not simply the actual dropping of an atomic bomb, but also certain steps in themselves *preliminary* to such action." (Emphasis added.) *Id.* Steps "preliminary" to the dropping could mean starting the weapons in the direction of the targeted state. It does not necessarily mean earlier steps. For additional criticism of using the Atomic Energy Commission report to support anticipatory self-defense, see I. BROWNLIE, *supra* note 22, at 276-77.

99. *See* D. BOWETT, *supra* note 20, at 188-89; *see also* Fonteyne, *supra* note 22, at 212-13 (arguing that Western states have continued to assert the right in United Nations organs).

100. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

101. *See* Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224, 243-46 (1977) ("little or no interest" in dealing with the lawfulness of anticipatory self-defense).

102. G.A. Res. 3314, *supra* note 100, art. VI, at 142 (emphasis added).

cance of both state practice and the Resolution is questionable because the United Nations has never explicitly approved the right of anticipatory self-defense in any of its deliberations.¹⁰³

In sum, then, the clearest legal evidence supporting the right of anticipatory self-defense is found in the Charter itself. Evidence outside the Charter, although instructive, is inconclusive.

B. *Anticipatory Self-Defense: A Policy Assessment*

There is no doubt that inherent in the recognition of a right of anticipatory self-defense lies the possibility of nuclear annihilation precipitated by a mistaken assessment of the imminence of an attack.¹⁰⁴ On the other hand, it is logical to suppose that if the right is not recognized, innocent and law-abiding nations might become "sitting ducks," entitled to respond only after the time for effective action has passed.¹⁰⁵ True, deterrence based on second-strike retaliatory capability militates against this latter possibility.¹⁰⁶ If a nation can absorb a nuclear strike and emerge with sufficient second-strike capability to devastate its opponent's urban and industrial centers, nuclear war will be deterred without need for a right to preempt an imminent attack.¹⁰⁷ Current

103. R. HIGGINS, *supra* note 29, at 200-04 (covering 1945-1961); Fonteyne, *supra* note 22, at 211-12 (covering 1961-1971). For commentary on two relatively recent episodes in which the United Nations refused to approve claims to anticipatory self-defense, see S. MALLISON & W. MALLISON, *ARMED CONFLICT IN LEBANON, 1982: HUMANITARIAN LAW IN A REAL WORLD SETTING* 19-34 (1983) (June 1982 Israeli mission into Lebanon); Mallison & Mallison, *supra* note 68, at 434-41 (Israeli attack on nuclear reactor in Baghdad, Iraq). It is not clear, however, whether the United Nations did not approve the claims because it objected to the notion of anticipatory self-defense, or because the claims failed to meet the customary international law requisites for anticipatory self-defense.

104. See L. HENKIN, *supra* note 22, at 142 ("Surely today's weapons render it even more important that nations should not be allowed to cry 'vital interests' or 'anticipatory self-defense' and unleash the fury.")

105. See McDougal, *supra* note 65, at 601; Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 *RECUEIL DES COURS* 411, 481; Waldock, *supra* note 23, at 498.

106. R. ALDRIDGE, *THE COUNTERFORCE SYNDROME: A GUIDE TO U.S. NUCLEAR WEAPONS AND STRATEGIC DOCTRINE* 1-2 (1979) (second-strike capability deters occurrence of first-strike).

107. L. HENKIN, *supra* note 22, at 142. Henkin characterizes United

thought on nuclear strategy, however, suggests that this approach could be fatally flawed. The following subsections on current nuclear strategy explore this possible flaw.

1. *Second-Strike Capability: Where Do We Stand?*

In the years of increasing East-West tensions immediately following the Second World War, deterrence was based on the theory of "balanced collective forces."¹⁰⁸ According to this theory, the likelihood of conflict diminishes in direct relation to both the size of the standing armies of the Soviet Union and the United States, and the willingness of those nations to use armed force.¹⁰⁹

In the 1950s, the United States achieved nuclear superiority vis-a-vis the Soviet Union through the production of thermonuclear weapons and accompanying long-range delivery systems, primarily in the form of B-47 and B-36 strategic bombers.¹¹⁰ This led to a new theory of deterrence, one based on "massive retaliation," which called for unrestrained nuclear response to threatening Soviet military activity.¹¹¹

The impact of the United States' position of nuclear superiority became evident to the Soviets during the Cuban missile crisis in the fall of 1962.¹¹² The Soviets reacted by embarking on an ambitious strategic build-up to increase the number, accuracy, and destructive capability of their own land-based intercontinental ballistic missile (ICBM) force.¹¹³ By the latter half of the 1960s, the United States was beginning to perceive the effects of this Soviet effort. Realizing that soon it would no longer enjoy strategic nuclear superiority, the United States abandoned the doctrine of massive

States strategic policy: "The argument that 'anticipatory self-defense' is essential to United States defense is fallacious. The United States relies for its security on its retaliatory power, and primarily on its second strike capability." *Id.*

108. Bundy, Kennan, McNamara & Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 *FOREIGN AFF.* 753, 754 (1982) (arguing no "first use").

109. The "Balance of Power" theory is synonymous and is similarly defined. See J. SPANIER, *GAMES NATIONS PLAY* 124-25 (1972).

110. N. POLMAR, *STRATEGIC WEAPONS: AN INTRODUCTION* 27-28 (1975).

111. See S. HUNTINGTON, *THE COMMON DEFENSE: STRATEGIC PROGRAMS IN NATIONAL POLITICS* 74-85 (1961).

112. Nitze, *Assuring Strategic Stability in an Era of Dètente*, 54 *FOREIGN AFF.* 207, 214-16 (1976).

113. 1979 ACIS, *supra* note 4, at 51.

retaliation in favor of that of "mutual assured destruction" (MAD).¹¹⁴ MAD relied on both the United States and the Soviet Union possessing sufficient nuclear firepower to threaten large-scale elimination of cities and industrial centers even after sustaining a first strike. With neither side capable of initiating a nuclear attack without sustaining unacceptable losses, the balance of terror resulted in deterrence.

During the first half of the 1970s, a large number of ICBMs in both the United States and the Soviet Union were scheduled to be fitted with multiple independently targeted reentry vehicles (MIRVs), a move which would increase the number of warheads that could be delivered by each ICBM.¹¹⁵ Technological advances in ICBM navigation systems suggested that over roughly the same time period there would be dramatic improvements in the accuracy of the warheads.¹¹⁶ The increasing number of accurate MIRVed warheads coming on line in the Soviet Union during the 1970s and 1980s caused concern in the United States about whether MAD could continue to provide a basis for deterrence. It was thought possible that if at some point during the 1980s, the Soviet Union were to launch a first-strike against *only* the United States' land-based ICBMs, the Soviet Union would be capable of destroying a substantial number of the U.S. missile force, while using considerably less than all of its own strategic forces.¹¹⁷ If that first-strike were suc-

114. See R. ALDRIDGE, *supra* note 106, at 2.

115. See 1979 ACIS, *supra* note 4, at 55.

116. *Id.* at 58-60.

117. See R. ALDRIDGE, *supra* note 106, at 3 (noting that some strategists have theorized that the Russians might "launch an attack on U.S. missile silos but hold back a sizeable portion of their silo-based missile force to deter the United States from retaliating against Soviet cities"); Lehman & Hughes, "Equivalence" and SALT II, 20 ORBIS: J. WORLD AFF. 1045, 1048 (1977) (commenting on the SALT II accord, the authors hypothesize that if Soviet missile throw-weight is coupled with MIRV technology, the Soviets "could destroy a major portion of our land-based ICBMs in a surprise first-strike and still retain substantial missile forces for post-attack deterrence"); see also *Reflections on the Quarter: Judging SALT II*, 23 ORBIS: J. WORLD AFF. 251, 253 (1979) (during 1982-1985, the Soviets could destroy 90 percent of U.S. ICBMs, the most important component of the U.S. strategic triad, by firing only one-third of its large and increasingly accurate MIRVed ICBMs). On comparable Soviet vulnerability to U.S. attack, see Lehman & Hughes, *supra*, at 1048 ("because of the inferior throw-weight of the U.S. land-based ICBM force, and because much of the U.S. MIRV

cessful enough to deprive the United States of a sufficient number of ICBMs to threaten those land-based missiles held in reserve by the Soviets, the United States would be forced to choose between capitulation and using its much less accurate submarine launched ballistic missiles (SLBMs) to launch a second-strike against Soviet urban and industrial centers.¹¹⁸

The mid-1970s was a period of much debate about the consequences and acceptability of this choice. MAD supporters suggested that the threat of a second-strike against Soviet urban and industrial centers was sufficient to deter a Soviet first-strike against U.S. strategic systems.¹¹⁹ Opponents countered that the second-strike would provide "minimum deterrence" at best.¹²⁰ Other critics noted that U.S. "self-deterrence" would give the Soviets a theoretical war-winning capability,¹²¹ because a second-strike would assure

capability is currently in the less accurate SLBM force, the United States would not have a similar [silo-killing] capability vis-a-vis Soviet land-based missiles."). Regarding when such a U.S. capability might exist, compare Lodal, *Assuring Strategic Stability: An Alternative View*, 54 FOREIGN AFF. 462, 465 (1976) ("the technology is clearly in hand to permit both sides to obtain [silo-killing] accuracies better than 0.1 nautical miles in the late 1980's. . .") with Lodal, *SALT II and American Security*, 57 FOREIGN AFF. 245, 257 (1978-1979) ("By [the mid-1980s,] the U.S. land-based missile force will be able to destroy 80 to 90 percent of the Soviet land-based MIRVed missile force in a preemptive strike. . .") [hereinafter cited as Lodal, *SALT II*]. Some experts dispute whether the U.S. MX (or "Missile Experimental") will have a silo-killing capability. See *Jane's Says MX Missiles May Lack Power to Destroy Soviet Silos*, Tulsa World, Dec. 20, 1984, at B2, col. 1.

118. *Reflections on the Quarter*, *supra* note 117, at 253-54. See *infra* notes 334-35 (while cruise missiles can destroy Soviet ICBM silos and, therefore, might permit the United States to avoid the choice between capitulation and counter-city strikes, significant problems exist in actually delivering the cruise missiles to targets in the Soviet Union).

119. Lehman & Hughes, *supra* note 117, at 1047 (noting that this is the assessment of what constitutes "strategic [or essential] equivalence" under MAD).

120. Nitze, *supra* note 112, at 227 ("the United States is moving toward a posture of minimum deterrence").

121. See Nitze, *supra* note 112, at 227. According to some, however, any victory flowing from such a Soviet capability would be purely theoretical. Sagan, in *Nuclear War and Climatic Catastrophe: Some Policy Implications*, 62 FOREIGN AFF. 257, 292 (1983-1984), observes that the climatic changes produced from a first-strike, such as that mentioned by Nitze, may exterminate all life as we know it. See also *Comment and Correspondence*, 62 FOR-

retaliatory destruction by the Soviets of U.S. urban and industrial centers.¹²² To restore security, it was argued that deterrence should be founded on "flexible" or "limited" response, rather than second-strike capability. The "flexible" response theory meant improving the ability of U.S. strategic systems to survive a Soviet first-strike,¹²³ and enhancing those systems so that U.S. ICBMs that survived such a first-strike would be capable of destroying the land-based missiles held in reserve by the Soviet Union.¹²⁴ With such systems in place, "self-deterrence" would not pose a problem, because the United States would have an option other than one calling for the destruction of Soviet cities.¹²⁵

In the final years of the Carter Administration, controversy swirled around the various weapons programs

FOREIGN AFF. 995-1002 (1984) (reflecting on Sagan's theory). For an assessment of Sagan's conclusions, see *Theory About "Nuclear Winter" Revised*, Tulsa World, Jan. 9, 1985, at A15, col. 2.

122. Lehman & Hughes, *supra* note 117, at 1049; Lodal, *SALT II*, *supra* note 117, at 255-56.

123. See Gray, *The Strategic Force Triad: End of the Road?*, 56 FOREIGN AFF. 771, 785-89 (1978) (listing alternative mobile basing modes for MX); Lodal, *Assuring Strategic Stability*, *supra* note 117, at 474 (agreeing with idea of mobile ICBMs); Nitze, *supra* note 112, at 228-30 (suggesting emphasis on Trident submarines, B-1 bombers, air defense capabilities, and mobile ICBMs). Apart from these substantive improvements, some have advocated that the U.S. adopt some form of a "launch-on-warning" doctrine. See Reed, *USAF in the Forefront of the C3 Revolution*, 59 A.F. MAG. 62, 65 (July 1976); Widder, *Launch-on-Warning: A Counter to the Arms Race*, A.F.U. REV., Jan.-Feb. 1980, at 95. For a critique of launch-on-warning, see Gray, *supra*, 780-81.

124. See Nitze, *supra* note 112, at 227-28; see also Aldridge, *MaRVs in Sheep's Clothing*, NATION, Aug. 17, 1974, at 102-03 (discussing terminal guidance warning navigation system); Downey, *How to Avoid Monad-And Disaster*, 24 FOREIGN POL'Y 172 (1976) (discussing terminal guidance warhead navigation systems).

125. See Schlesinger, *Flexible Strategic Options and Deterrence*, 16 SURVIVAL 86, 89-90 (1974). Many have questioned the feasibility of limited nuclear conflict. See Harold Brown, 1979 DEF. DEP'T ANN. REP. 53 (dated Feb. 2, 1978) (limited strategic nuclear conflict); Bundy, Kennan, McNamara & Smith, *supra* note 108, at 757 (limited tactical nuclear conflict); McNamara, *The Military Role of Nuclear Weapons: Perceptions and Misperceptions*, 62 FOREIGN AFF. 59, 72 (1983) (limited tactical nuclear conflict); see also Sakharov, *The Danger of Thermonuclear War*, 61 FOREIGN AFF. 1001, 1006 (1983). Assuming these questions about limited nuclear conflict are warranted, possessing a flexible response capability is arguably meaningless, since a first-strike will rapidly escalate to full-scale nuclear war.

designed to provide the United States with the "flexible response" capability necessary to reduce the threat U.S. land-based ICBMs were projected to face during the 1980s.¹²⁶ In the midst of this controversy, the Administration adopted Presidential Directive 59,¹²⁷ which, as described by former Secretary of Defense Harold Brown, advocated a "countervailing" or war-fighting capability to frustrate Soviet military ambitions at all levels of engagement. This new strategy entailed a shift from deterrence based on assured retaliatory destruction of Soviet urban and industrial centers, to deterrence based on the ability to match Soviet weapons escalation at every turn.¹²⁸

Both "flexible response" and "countervailing" capability have a counter-silo or counterforce component. Thus, the latter strategic theory is a logical and natural outgrowth of the former.¹²⁹ Full implementation of either doctrine might well improve the security of the United States while at the same time jeopardize that of the Soviet Union, since the weapons able to provide counterforce effect are the same weapons the United States could use to launch a disarming first-strike against the Soviet Union.¹³⁰

126. See Garwin, *The Right 'Basket' for Our MX 'Eggs'*, Wash. Post, June 17, 1980, at A17, col. 1; Woolsey, *Getting the MX Moving*, Wash. Post, May 22, 1980, at A17, col. 2; House Rejects Move to Delay Development of MX Missile, Wash. Post, May 16, 1980, at A8, col. 1; Wilson, *Hatfield Wants Missiles Based at Sea, Not on Land*, Wash. Post, Apr. 7, 1980, at A9, col. 4; Greenberg, *Missiles at Sea*, Wash. Post, Aug. 7, 1979, at A19, col. 2; Pincus, *Pentagon Proposes New Mobile Basing System for MX Missiles*, Wash. Post, July 18, 1979, at A12, col. 1.

127. See Pines, *Rethinking the Unthinkable*, TIME, Aug. 25, 1980, at 30.

128. Tucker, *The Nuclear Debate*, 63 FOREIGN AFF. 1, 10 (1984) (quoting Harold Brown).

129. The "Counterforce" capability developed from the thinking of former Secretary of Defense Robert McNamara. See Commencement Address by Secretary of Defense Robert McNamara at Ann Arbor, Michigan (June 16, 1962), reprinted in 47 DEP'T ST. BULL. 64-69 (July 9, 1962). It languished in the late 1960s, see Sloss, *The Strategist's Perspective*, in BALLISTIC MISSILE DEFENSE, *supra* note 1, at 24, 41-42, but began to reappear in the mid-1970s in the form of a "flexible response" targeting option. See Schlesinger, *supra* note 125, at 136. On Soviet "counterforce" capability, see Payne & Gray, *supra* note 1, at 839 ("it is clear that one reason for the Soviet commitment to large numbers of strategic weapons is to achieve a damage limiting effect through offensive 'counterforce' capabilities").

130. This point was made by the Congressional Budget Office as early as 1978. It stated:

What does the historical development of U.S. strategic deterrence theories tell us about the need for a legal concept permitting anticipatory self-defense? From the late 1960s through the 1970s, when deterrence was based on assured second-strike retaliatory capability, anticipatory self-defense was not an essential right. The superpower nations' awareness that mutual destruction would result if either launched a nuclear attack was sufficient to prevent them from initiating an attack. Any right to self-defense in anticipation of such an attack contributed little, if anything, to security.

Assuming the current vulnerability of United States ICBMs, however, the policy analysis changes considerably. Preemptive or anticipatory self-defense may well be a necessary policy choice, however undesirable, as long as the Soviets are able to launch a disarming first-strike against U.S. land-based missile silos. In extreme cases, preemptive self-defense might involve action against destabilizing Soviet ICBMs before they could be used to threaten the legitimate security interests of the United States. Once the United States closes the so-called "window of vulnerability," its possession of any disarming first-strike weaponry will undoubtedly raise similar claims in Moscow. Moreover, as the technological arms race accelerates, if either or both sides are able to destroy the other's retaliatory capability, the need for decisionmakers to have the option to use military force in anticipation of an imminent, disarming first-strike will be evi-

There may be an inescapable dilemma in the procurement of second-strike counterforce capability; a U.S. arsenal large enough to attack Soviet ICBMs after having absorbed a Soviet first-strike would be large enough to threaten the Soviet ICBM force in a U.S. first strike. Moreover, the Soviet Union, looking at capabilities rather than intentions, might see a U.S. second-strike capability in that light.

CONG. BUDGET OFF., BACKGROUND PAPER 32, COUNTERFORCE ISSUES FOR THE U.S. STRATEGIC NUCLEAR FORCES (1978).

On the destabilizing effect of specific counterforce weapons being developed by the U.S., see 1980 ACIS, *supra* note 4, at 54-55; 1979 ACIS, *supra* note 4, at 64-65 (on new Trident SLBMs); *Fiscal Year 1979 Arms Control Impact Statements: Hearings Before the Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs*, 95th Cong., 2d Sess. 21 (Joint Comm. Print 1978) (on MX missile); Burrows, *supra* note 1, at 844 (on President Reagan's "Star Wars" initiative). On the destabilizing effects of space-based weapons generally, see Andelman, *Space Wars*, 44 FOREIGN POL'Y 94, 103-04 (1981).

dent. Without this option, the space- and ocean-based weapons systems currently under consideration could prove dangerously disruptive of the military balance.

At this point, one might ask whether the continued recognition of the legality of anticipatory self-defense creates a problem as serious as the one it is meant to address. More specifically, does not the preemption of an imminent, disarming first-strike inevitably lead to large-scale destruction and even nuclear annihilation? Not necessarily. A nation faced with an imminent attack may, in some cases, successfully thwart that attack with force insufficient to result in the threatening state's belief that it is justified in further escalation or retaliation. More significantly, if the preemptive attack effectively neutralizes the threatening state's ability to launch a disarming first-strike, then a certain degree of military equilibrium will be restored. This fact alone makes it unlikely that the threatening state, against which the preemptive attack is launched, will retaliate. This conclusion might not obtain, of course, where the state under preemptive attack had adopted a launch-on-warning strategy. But the risks associated with a launch-on-warning strategy make it as undesirable an approach for a state under preemptive attack as it is for a strategically inferior state which might use launch-on-warning to escape first-strike threats.¹³¹ In both cases, launch-on-warning may serve to precipitate full-scale nuclear conflict.

2. *A Flat Prohibition on Anticipatory Self-Defense: No Temptation to Use Force*

There is a second policy argument against anticipatory self-defense: a flat prohibition is preferable to a prohibition which permits exceptions in cases of imminent threat of attack. By providing for no exceptions, this argument asserts, the flat prohibition reduces the temptation to use force. Were exceptions permitted, states might be inclined toward conduct allowed by the exceptions. If Article 51 is interpreted as not authorizing the use of force in anticipation of an armed attack, states will be less likely to use anticipatory force. Conversely, if Article 51 is understood to authorize

131. See 1979 ACIS, *supra* note 4, at 75; see also *supra* note 123 (adopting a launch-on-warning policy when in a position of strategic inferiority).

anticipatory self-defense, states will be less inclined to refrain from using force.

To be sure, an exception to any general rule opens the possibility for abuse. Nevertheless, the potential for abuse will be affected by the self-interest of the state invoking anticipatory self-defense. Thus, if state A perceives state B as engaging in provocative military activities, state A's urge to preempt will be tempered by its awareness that preemption will require military expenditures and a costly engagement in human terms. It is these factors, rather than perceptions about existing legal standards, which will likely determine whether preemption will occur.

3. *A Flat Prohibition on Anticipatory Self-Defense: No Possibility of Mistake*

A flat prohibition might also be argued to be an attractive policy for a related reason. That reason concerns the role law should play in situations of genuine threats to the survival of humankind. When nuclear weapons are aimed at a nation, that nation's leaders will have their perceptions of the imminence of an attack affected and, as a result, may be inclined to act even though no real threat exists. A flat prohibition, therefore, would be desirable to offset the possible effects of such misperceptions.¹³² Unambiguous and absolute, a flat prohibition removes the slightest chance of triggering "the fatal spasm" because of a mistaken assessment of an opponent's intentions.

While investing international law with the capacity to affect conduct may be well-intentioned, it is important to recognize that decisionmakers sometimes must act in situations in which national well-being and even national survival may be at stake.¹³³ Under these circumstances, the only significant restraint on the use of preemptive force is the possibility

132. Farer, *supra* note 23, at 39-40.

133. Followers of John Austin dispute the existence of "law" governing international relations. See Austin, *The Province of Jurisprudence Determined*, in *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 471, 503 (G. Christie ed. 1973). Those who argue that law governing international relations exists because self-interest results in adherence to the standards the "law" purports to establish, acknowledge the strong influence of self-preservation on the shape of the law. See M. McDOUGAL & W. BURKE, *supra* note 5, at 87-88 (on law of the seas); Almond, *Law and Armed Conflict: Some*

that it might not succeed. It is unlikely that any legal principle will be adhered to which runs counter to the instinctual urge to protect through preemption, no matter how the international community views anticipatory force.¹³⁴ Some may deal with the ineluctability of this urge to preempt by arguing that anticipatory self-defense against an imminent nuclear attack is beyond the realm of law.¹³⁵ Nevertheless, given the practice of states of using force to preempt imminent threats of conventional attack,¹³⁶ any such line-drawing may be illusory.

Another equally important reason to reject a flat prohibition on anticipatory self-defense concerns the potential impact of such a prohibition on world stability. It could be argued that by itself a flat prohibition may not affect international stability. Nations which might otherwise need to resort to anticipatory self-defense could simply improve their military position, thereby guaranteeing the ability to deliver the kind of devastating second-strike that would deter a potential aggressor from ever launching a first-strike.¹³⁷ In democratic societies, however, movements periodically surface which seek the reduction of military budgets or extrication from essential positions of international responsibility.¹³⁸ Given this phenomenon, the wisdom of a flat prohibi-

of the Shared Policies, 9 CASE W. RES. J. INT'L L. 175 (1977) (on armed conflict).

134. See W. FRIEDMAN, *supra* note 86, at 260 (statements of President Kennedy during the Cuban missile crisis indicate overwhelming influence of self-preservation).

135. See L. HENKIN, *supra* note 22, at 143-44. Henkin advances two reasons: first, realistically, it makes no sense to view law as covering such instances; second, the Charter, written in a different era, did not contemplate such instances.

136. The most common contemporary instances involve the Middle East conflict and preemptive strikes against Israeli military posts or targets suspected of terrorism.

137. Clearly this ability to deter would not exist unless one had such a second-strike capability.

138. See R. FERRELL, *AMERICAN DIPLOMACY: A HISTORY* 470 (1975) (on Senator Gerald P. Nye's "merchants of death" campaign in the 1930s); H. MORGENTHAU, *POLITICS AMONG NATIONS* 37-38, 196 (5th ed. 1973) (on isolationism in the United States and Great Britain); Ravenal, *Consequences of the End Game in Vietnam*, 53 FOREIGN AFF. 651-67 (1975) (on fall-out of Vietnam experience); Tucker, *supra* note 128, at 1-32; Yankelovich & Doble, *The Public Mood: Nuclear Weapons and the U.S.S.R.*, 63 FOREIGN AFF.

tion is drawn into question. It is possible that a democratic nation believing anticipatory self-defense to be unlawful might find itself forced to choose from among limited policy options after awakening to find that well-intentioned advocates have set in motion programs increasing its military vulnerability to totalitarian adversaries.¹³⁹

IV. REPRISAL AS A SELF-HELP MEASURE TO REMEDY VIOLATIONS OF INTERNATIONAL LAW

When military use of a transnational spatial area violates international law but does not pose an imminent threat to a targeted state, anticipatory self-defense will not justify a use of force designed to end the violation. In such a situation, any effort by the threatened state to justify the use of force must rely on the customary right of reprisal as a self-help measure.

The customary right of reprisal appears to be of rather ancient origins.¹⁴⁰ It permits the use of military force in certain limited circumstances. Most commentators point to the *Naulilaa Incident Arbitration*¹⁴¹ for the specific parameters governing reprisals. That case involved a dispute over the lawfulness of German military coercion against Portuguese authorities in Angola in 1914. The arbitrators imposed three conditions on the use of reprisals: 1) the offending state must have committed an act contrary to international law; 2) the injured state must make a demand on the offending state and that demand goes unsatisfied; and 3) the force used in the reprisal must be proportionate to the offending act.¹⁴²

33-46 (1984) (focusing on current public debate concerning nuclear conflict).

139. Realistically, a state may act before this time. On the need to keep law and practice in line, see *infra* text accompanying note 192.

140. Waldock, *supra* note 23, at 458 (tracing the right of reprisal to the system of private reprisals which operated during the 14th to 18th centuries).

141. Portuguese-German Arbitral Tribunal, 8 Trib. Arb. Mixtes 409, 2 R. Int'l Arb. Awards 1012 (1928), *translated and discussed in* W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 903-04 (3d ed. 1971). In the language of the arbitral decision: "Reprisals are an act of self-help. . . on the part of the injured state, responding *after an unsatisfied demand* to an act contrary to international law on the part of the offending state." *Id.* at 903 (emphasis in original).

142. *Id.* at 904; see *infra* note 278.

Reprisals apparently remained lawful under both the Covenant of the League of Nations¹⁴³ and the Kellogg-Briand Treaty of 1928,¹⁴⁴ since neither instrument went further than to forbid resort to "war."¹⁴⁵ The prohibition in the United Nations Charter against the threat or use of "force" signalled an intent to broaden the range of prohibited coercive acts. Thus, when the Charter's prohibition on "force" is viewed in light of the obligation to resolve disputes peacefully, it seems that the continued validity of the customary right of reprisal is drawn into question.¹⁴⁶

A. *Reprisals: An Assessment of the Law*

1. *Use of Force to Ensure Respect for International Obligations: First Paragraph of the Preamble*

The first paragraph of the Preamble of the Charter¹⁴⁷ may provide legal justification for the continuation of the customary right of reprisal. That paragraph states that the

143. I M. HUDSON, *INTERNATIONAL LEGISLATION* 1 (1931).

144. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 59.

145. I. BROWNLIE, *supra* note 22, at 219-24; M. McDUGAL & F. FELICIANO, *supra* note 23, at 138-43; II L. OPPENHEIM, *supra* note 23, at 151-52, 184-86.

146. This view is accepted by most authorities. See D. BOWETT, *supra* note 20, at 154-55; I. BROWNLIE, *supra* note 22, at 281, 431; M. McDUGAL & F. FELICIANO, *supra* note 23, at 208 n.193 (reprisals against "lesser wrongs" characterized as illegal); A. THOMAS & A. THOMAS, *supra* note 23, at 13-17; Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 4-6 (1956); Fitzmaurice, *supra* note 23, at 119-20; Waldock, *supra* note 23, at 493. *But see* authorities cited *supra* note 24. Compare II L. OPPENHEIM, *supra* note 23, at 151-54 (suggesting reprisals illegal) with 143-44 (suggesting the legality of reprisals is arguable because no effective centralized peacekeeping body exists).

147. U.N. CHARTER Preamble, para. 1 states:

We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom . . .

peoples represented in the United Nations are determined "to establish conditions under which . . . respect for the obligations arising from treaties and other sources of international law can be maintained."¹⁴⁸ When a state undertakes the removal of military objects deployed in, or the termination of military activities conducted in, a transnational spatial area in violation of international obligations, that state might attempt to justify its actions as preserving the "establish[ment] of conditions under which . . . respect for the obligations"¹⁴⁹ would be maintained. Thus, such actions might be defended as lawful and consistent with Charter commitments.

There are several problems with this argument. Most important, the Preamble's first paragraph indicates a preference for collective rather than individual action to accomplish that paragraph's goal. The "Peoples of The United Nations" have stated their determination to establish conditions which ensure respect for international obligations. The third paragraph of the Preamble highlights the collective nature of this determination in stating that the peoples "Have Resolved To Combine [Their] Efforts To Accomplish [That Aim]". Yet even if individual action to implement the first paragraph is consistent with the Preamble, no single paragraph of the Preamble establishes substantive rights or duties. In the words of the 1945 Report of the Rapporteur of Committee I to Commission I, the Preamble "introduces the Charter and sets forth the declared common intentions which brought [the nations] together."¹⁵⁰ These intentions are to be distinguished from the Organization's "common ends," found in the Charter's statement of Purposes, and its "regulating norms" set forth in the Charter's Chapter on Principles.¹⁵¹ The Preamble is an integral part of the Charter, but it does not define the basic responsibilities of member states.¹⁵²

This does not mean that the first paragraph of the Pre-

148. *Id.*

149. *Id.*

150. Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. 446 (1945).

151. *Id.*

152. L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 20.

amble is meaningless. Both United Nations practice¹⁵³ and accepted principles of treaty interpretation¹⁵⁴ indicate that recourse may be had to preambular language when attempting to construe the substantive provisions of a treaty commitment. Also, read in conjunction with the Preamble, Article 14 of the Charter indicates that the U.N. General Assembly is empowered to issue recommendations for the peaceful adjustment of situations affecting international treaty commitments. Specifically, Article 14 authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, likely to impair the general welfare or friendly relations among nations".¹⁵⁵ In light of the first paragraph of the Preamble, Article 14's reference to "regardless of origin" indicates that situations referred to may include those arising from the breach of international treaty commitments. The background of both Article 14 and paragraph 1 of the Preamble supports this interpretation. Both found their way into the Charter as a compromise growing out of the American delegate's proposal to include a substantive provision authorizing General Assembly input on existing international treaty commit-

153. See discussions on the "United Action for Peace" resolution at 5 U.N. GAOR C.1 (362d mtg.), para. 21, U.N. Doc. A/C.1/SR.362 (1950); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, Preamble, paras. 2-3, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) (Preamble of Charter referred to in course of fleshing out substantive Charter provisions) [hereinafter Declaration on Principles]; see also Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. 447 (1945).

154. See Advisory Opinion on the Competence of the International Labour Organization and International Regulation of the Conditions of Labour of Persons Employed in Agriculture, 1922 P.C.I.J., ser. B, No. 2, at 25-27; Vienna Convention on the Law of Treaties, art. 31, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 63 AM. J. INT'L L. 875, 885 (1969).

155. U.N. CHARTER art. 14. Article 14 states:

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

ments.¹⁵⁶ Nevertheless, an examination of the language of Article 14, language which provides substantive content to that of paragraph 1 of the Preamble, reveals little reason for doubt that forceful measures of reprisal taken by individual states to remedy violations of international law are not contemplated.

2. *Use of Force in the Common Interest: Second Paragraph of the Preamble*

The second paragraph of the Preamble declares that "armed force shall not be used, save in the common interest."¹⁵⁷ Does this paragraph permit forceful reprisals "in the common interest"? Focusing on the quoted language alone, it would appear the answer is yes. But again, that answer would relate only to the collective use of armed force as a reprisal. Furthermore, this simple affirmative response does not address the legal status of collective reprisals. As suggested above, the Preamble is merely a declaration of the intentions of the world community in forming a collective and united body. Articles 39 and 42, which grant the power to use military force to maintain peace and security, may, however, provide the necessary substantive authorization for the collective use of armed force in a reprisal.¹⁵⁸

When looking for a similar substantive provision which

156. See L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 141-43. The United States delegate making the proposal was Senator Arthur H. Vandenberg. *Id.*

157. U.N. CHARTER Preamble, para. 2 states:

[We the peoples of the United Nations determined] . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples . . .

158. Under Article 39 the Security Council has the authority to make "recommendations" designed to maintain or restore international peace and security. It is possible that the Council might, therefore, recommend that an individual state take forceful reprisals to remedy violations of international law. Reprisals taken on the basis of such a recommendation would thus have the advance authorization of the collective world community.

might be construed to govern reprisals by individual states, one runs up against Article 2(4). The text and negotiating history of that provision, discussed above, make plain that its prohibition on the use of force is nearly complete;¹⁵⁹ the only use of force by an individual state left indisputably untouched by Article 2(4)'s prohibition is the traditional right of self-defense.¹⁶⁰

3. *Article 2(3)'s Reference to "Justice" as an Exception to Article 2(4): The Text and the Travaux Préparatoires*

Although the first and second paragraphs of the Preamble appear not to support the continued existence of a right of reprisal, it may be reasoned that the obligation of Article 2(3)¹⁶¹ to settle disputes so as not to endanger international peace, security, and justice does support such a right. Article 2(3)'s reference to "justice"¹⁶² is distinguishable from the earlier discussed reference to "justice" in Article 1(1).¹⁶³ In the context of Article 1(1), the word "justice" was examined to determine if it was one of the "Purposes" of the United Nations, thus enabling it to support the view that force used to remove military objects or terminate military activities violative of international law is untouched by the basic prohibition of Article 2(4). In the context of Article 2(3) the word "justice" is examined to determine if what is prohibited by Article 2(4) is nonetheless permitted as an exception under Article 2(3). At least one learned scholar has accepted this approach. In his view, the use of force to accomplish some just end is permissible; any other reading would make Article 2(3)'s reference to "justice" difficult to explain.¹⁶⁴

159. See *supra* text accompanying notes 18-55.

160. See *supra* text accompanying notes 45-50 for analysis of suggestion that intervention to protect nationals and non-nationals is permitted.

161. For the complete text of Article 2(3), see *supra* note 19.

162. ". . . settle . . . disputes . . . such . . . that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, para. 3.

163. See *supra* text accompanying notes 53-54.

164. J. STONE, OF LAW, *supra* note 23, at 5, 8. Stone also suggests that any other approach would make it "impossible to see why [Article 2(3)] should be followed immediately, in Article 2(4), with a ban stated in apparently more limited fashion." *Id.* at 5. As has already been discussed, see *supra* text accompanying notes 18-55, Article 2(4) includes all uses of force, except those taken in self-defense.

This argument notwithstanding, the location of the word "justice" within Article 2(3) suggests it does not authorize individual states to use force to bring about justice by compelling the observance of international obligations. Instead, the context within which the word appears indicates only that whenever an international dispute exists, states must settle it peacefully, with the aim of the settlement being to avoid endangering international peace, security, and justice. "Justice" is merely part of the peaceful resolution of international disputes. Were the call for "justice" meant to enable states to argue that certain uses of force are permissible,¹⁶⁵ the placement of the word within Article 2(3) would have indicated that it qualified the very obligation to settle international disputes "by peaceful means."¹⁶⁶

The *travaux préparatoires* relating to the adoption of Article 2(3) support the conclusion that Article 2(3) was not meant to endorse the customary law right of reprisal. Reference to "justice" was included in Article 2(3) in conjunction with the inclusion of "justice and international law" in Article 1(1).¹⁶⁷ Both references were simply intended to ensure against the possibility of dispute settlements injurious to weaker states.¹⁶⁸ Neither reference was meant to create a loophole that could be used to justify the use of force.¹⁶⁹ Hence, there seems little doubt that the conclusion drawn from the grammatical structure of Article 2(3) is corroborated by the negotiating history of that provision. Like the Preamble, Article 2(3) does not appear to support the continued validity of the right of reprisal.

165. M. McDUGAL & F. FELICIANO, *supra* note 23, at 178 n.140.

166. The drafters had no such intention in mind. See Doc. 885, 1/1/3, 6 U.N.C.I.O. Docs. 399 (1945).

167. See L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 27-28, 41; see also text accompanying notes 53-54.

168. For an example of such a settlement, consider the 1938 Munich agreement among the British, the Italians, the French, and the ruling Nazi faction in Germany. See L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 27-28, 41.

169. Some did express concern that the reference might engender ambiguity. See R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 658 (1958).

4. *Sources Outside the Charter: U.N. Practice and I.C.J. Opinions*

Considering the demonstrated weakness of each of the foregoing arguments in favor of the right of reprisal, it should come as no surprise that arguments supporting the right's existence in the post-Charter world suffer assault from at least two other sources. The first is U.N. practice; the second, opinions of the International Court of Justice.

United Nations practice, as reflected both in the Organization's responses to conflict situations and in normative standards embodied in legislative enactments, has characterized reprisals as contrary to the Charter. Resolutions condemning reprisals as inconsistent with Charter obligations were issued 13 times during the first 25 years of the Organization's existence. Some of the conflict situations which prompted the resolutions include the 1953 Qibya, 1955 Gaza, and 1956 Lake Tiberias incidents, the June 1967 Six Day War, the December 1968 Beirut International Airport raid, the 1964 British attacks against Yemeni forces in Fort Harib, Yemen, and the 1969 Portuguese attack on Zambia.¹⁷⁰

The Organization's legislative enactments leave no doubt about the U.N.'s rejection of a right of reprisal. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations,¹⁷¹ provides a prime example. The first principle of the Declaration recaptures the essence of Article 2(4) of the Charter.¹⁷² The sixth paragraph of the elaborative statements appended to the principle notes that "[s]tates have a duty to refrain from acts of reprisal involving the use of force."¹⁷³

I.C.J. pronouncements also tend to negate the right of

170. See R. HIGGINS, *supra* note 29, at 217-18; 12 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 161-87 (1971); Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 33-36 (1972).

171. See *supra* note 153.

172. Declaration on Principles, *supra* note 153, at 121. The first principle provides: "The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." *Id.*

173. See *supra* note 153.

reprisal, although not definitively. In the *Corfu Channel Case*,¹⁷⁴ the British argued that a minesweeping operation to clear the waters of mines laid by Albania in contravention of international law constituted a justifiable intervention in self-help to remedy the breach of a general international obligation.¹⁷⁵ The Court disagreed, finding the minesweeping to be a violation of Albanian sovereignty, notwithstanding Albania's failure to fulfill its obligation to remove the mines.¹⁷⁶ The Court also noted that the action could not be justified as an effort to collect evidence. Any such effort, the Court explained, could only be regarded as "the manifestation of a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever the present defects in international organization, find a place in international law."¹⁷⁷ Although the Court discussed manifestations of a "policy of force," it made no reference to Charter provisions that affect the use of force. Most likely, the I.C.J. had self-help as a remedy for violations of international law in mind, but as with the portions of its opinion dealing with anticipatory self-defense, no reference was made to Charter provisions that govern the use of force. Thus, the opinion is not conclusive as to whether the customary right of reprisal as a self-help measure continues to be permissible under the Charter.¹⁷⁸

The 1980 I.C.J. opinion in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*,¹⁷⁹ of primary interest on the matter of humanitarian intervention to protect nationals of the intervening state, offers some additional insight into the permissibility of reprisals under contemporary international law.¹⁸⁰ In addressing the ill-fated American

174. U.K. v. Alb., 1949 I.C.J. at 4.

175. Statement by Sir Eric Beckett (U.K. v. Alb.), 1950 I.C.J. Pleadings (3 *Corfu Channel I*) at 294-96; Reply of the United Kingdom (U.K. v. Alb.), 1950 I.C.J. Pleadings (2 *Corfu Channel*) at 282.

176. 1949 I.C.J. (Merits) at 35.

177. *Id.*

178. Cf. Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 650 (1984) (criticizing U.K.'s defense that force is permissible if promoting international justice and generally discussing the use of force against governments unresponsive to popular self-determination). *Contra* Waldock, *supra* note 23, at 502.

179. U.S. v. Iran, 1980 I.C.J. at 3.

180. See generally Schachter, *Self-Help*, *supra* note 45, at 245 (indicating, in

rescue attempt of April 24-25, 1980, the Court indicated that it was not favorably disposed to the use of force in the relations between nation-states. Noting that it "[could not] fail to express its concern in regard to the United States incursion," the Court stated it was "bound to observe that [the incursion], *from whatever motive*, [was] of a kind calculated to undermine respect for the judicial process," which had been initiated on November 29, 1979.¹⁸¹

Backing away from any final legal characterization of the so-called "incursion," the Court pointed out that the legality of the rescue attempt was not before it.¹⁸² In the estimation of Judge Morozov, the Court was not compelled to abstain from expressing its view on that matter.¹⁸³ Judge Morozov's dissenting opinion,¹⁸⁴ as well as Judge Tarazi's,¹⁸⁵ characterized the incursion as violative of the Charter because it did not meet the requirements of Article 51.¹⁸⁶ Although the majority indicated an aversion to the use of force, it is not clear that it shared the view of Morozov and Tarazi that force is lawful only when used under the precise circumstances set forth in Article 51.

B. *Policy Assessment of the Right of Reprisal*

The Charter and its negotiating history, current United Nations practice, and the opinions of the World Court indicate that the right of reprisal is a relic. But is this conclusion supported by sound policy considerations? As before, the fact that the matters of concern here involve nation-state security makes this sort of inquiry of the utmost, if not controlling, importance. The ineffectiveness of the United Nations in maintaining peace, security, and respect for international legal norms bolsters this point. Unless one is prepared to see violations of international law go unredressed, ought not states be permitted to use force to remedy such wrongs?¹⁸⁷

discussing the Iranian hostage crisis, that reprisals are illegal under the Charter).

181. U.S. v. Iran, 1980 I.C.J. at 43 (emphasis added).

182. *Id.*

183. *Id.* at 51, 56-57 (Morozov, J., dissenting).

184. *Id.*

185. *Id.* at 58, 64-65.

186. See the text of Article 51, *supra* note 13.

187. See J. STONE, OF LAW, *supra* note 23, at 24-35; cf. Reisman, *Coercion*

The idea is appealing, but before concluding that policy argues for a contrary result to that permitted by law, further analysis is required. The following subsections examine some of the prevalent policy justifications for the legal position on reprisals.

1. *Reprisals Risk Initiation of Conflict*

It can be argued that permitting reprisals might lead to full-scale conflict between the state taking the reprisal and the one against which the reprisal is directed.¹⁸⁸ Clearly, a full-scale conflict would not result if the state taking the reprisal were much stronger than the one against which it was directed. In such situations, the potential for abuse arises.¹⁸⁹ But potential abuse seems more a problem with respect to how the right, if acknowledged, is exercised, than with whether it should exist. Also, there may be circumstances involving the superpowers in which a violation of an international obligation will create a military disequilibrium which a reprisal might readjust. With the relative balance of military forces restored, the futility of an unbridled military conflict will most likely serve to deter any response which could lead to tit-for-tat escalation.¹⁹⁰ For example, to the extent that a targeted state's reprisals against objects or activities violative of international law restore the rough equivalence of military forces by rendering inoperative or removing threatening military hardware or personnel, the prospect of a nuclear exchange in which neither side could prevail would seem to deter any disproportionately severe military response. Finally, although international public opinion plays a limited role in influencing the behavior of nations, widespread international support for reprisals designed to remove objects or termi-

and Self-Determination: Construing Chapter Article 2(4), 78 AM. J. INT'L L. 642, 643 (1984) (arguing against "automatic indiscriminate denunciations of unilateral resorts to coercion by states as violative of Article 2(4)" and proposing development of criteria for appraising the lawfulness of such actions).

188. See M. McDUGAL & F. FELICIANO, *supra* note 23, at 208 n.193; cf. Schachter, *supra* note 178, at 649 (same proposition in connection with use of force to promote democratic regimes).

189. Schachter, *supra* note 178, at 650.

190. *But see* Waldock, *supra* note 23, at 459 (arguing that reprisals between powerful states will lead to war).

nate activities violative of international law may cause decisionmakers contemplating a response to such reprisals to pause and reflect on how a response would be received by the international community.

2. *Exceptions Erode Fundamental Principles*

A second policy argument supportive of the rule against reprisals rests on the notion that it is important to avoid fashioning derogations from any principle as fundamental as that prohibiting non-defensive uses of force. The argument might be that once scholars set about the task of suggesting an exception to that prohibition, forces capable of slowly, yet inexorably, eroding the esteem in which that prohibition is held will be unleashed. Once unleashed, it would only be a matter of time before these forces would result in the entire prohibition being swallowed by exceptions, thus jeopardizing international peace.¹⁹¹

This argument attributes greater influence to the views of international legal scholars than perhaps they are actually accorded. The argument also fails to consider whether advocating the use of reprisals to remedy violations of international law may actually increase the observance of the violated legal standards. In that event, the beneficial effect of increased observance may well outweigh any deleterious impact resulting from the advocacy of reprisals as an exception to the general prohibition against the use of force. Mere advocacy can create an impression that one has the will to use force. Although force may in fact never be used, the impression alone may be sufficient to deter violations of international commitments.

There is another, more weighty, objection to the argument that derogations from the principle prohibiting non-defensive uses of force should be avoided: any principle disallowing behavior that states are naturally inclined to exhibit when legitimate security interests are threatened, may well be ignored. If there is the slightest risk that this may be true, it would seem important to consider whether preventing the

191. Cf. Schachter, *supra* note 178, at 650 (expressing concern over another scholar's suggestion that Article 2(4) not be read as prohibiting uses of force to overthrow non-democratic regimes).

establishment of such an exception would itself serve to erode respect for other components of the principle.

An essential agreement in the observance of law is the extent to which the law is perceived as being fair. If one state suffers a violation of an international commitment relating to security, fairness would seem to dictate the availability of a remedy. To deny a remedy to the aggrieved state may result in that state questioning the fairness of other standards by which it is bound. Unless self-interest clearly favors adherence to those standards, respect for such may well decline.¹⁹²

3. *Losing Ground*

The third and final policy argument against reprisals is that the mere enshrinement in the Charter of the prohibition on the use of force, however ineffective and hortatory that principle has become, may have served to deter some unacceptable state conduct in the past. To permit reprisals now, because other states have taken and will continue to take reprisals, will merely increase the number of occasions when force is used, and eventually cause the drifting away from the norm of peaceful conduct of those nations that hitherto have demonstrated their commitment to the prohibition on the use of force.

The basic premise upon which this argument rests is difficult, if not impossible, to prove. True, if states have taken and continue to take reprisals, a kind of centripetal force may pull all states towards the use of reprisals. Most importantly, however, it is still not at all clear that the benefit gained from a flat prohibition on reprisals will outweigh the damage done to international political stability. The prohibition may simply provide a spring-board for ideological rhetoric which hardens feelings and poisons the entire international diplomatic environment.¹⁹³

If every time a justifiable reprisal is taken, an opposing

192. On the general idea that laws or rules perceived as unfair affect one's view of other laws or rules, see H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 305 (1968); A. SINCLAIR, *PROHIBITION: THE ERA OF EXCESS* 214 (1962).

193. *Cf.* J. STONE, *supra* note 23, at 36-37 (making this point in response to critics of his approach to interpreting Article 2(4)).

international ideological bloc were to use it as a pretext to raise Article 2(4) and rail against the motives of its adversary, political feelings would become frayed, and the United Nations would become increasingly contentious. Thus, before readily accepting any policy argument based on the extent of unknown observance of the prohibition on reprisals, it would be advisable to assess further whether the extent of observance clearly outweighs the risks involved.

V. PEACEFUL SETTLEMENT OBLIGATION

A targeted state facing an imminent threat of attack as a result of another state's military use of a transnational spatial area may have immediate recourse to necessary and proportionate measures of self-defense whenever all means short of the use of force have proven incapable of eliminating the threat.¹⁹⁴ This is so because the customary right of anticipatory self-defense appears to have survived the Charter's passage, and because under the traditional formulation of that right, anticipatory self-defense may be invoked whenever a threat leaves "no choice of means."¹⁹⁵

The customary right of reprisal, however, included a peaceful settlement requirement as a precondition to its invocation.¹⁹⁶ As stated in the 1928 *Naulilaa Incident Arbitration*, a legitimate reprisal is an act of self-help by an injured state "responding after an unsatisfied demand" to another to cease an act contrary to international law.¹⁹⁷ Therefore, if a state facing an imminent or less than imminent threat of attack is or should be entitled to take measures of reprisal, the appropriate procedures of peaceful settlement become important. In any case, since it is likely that a state apprehensive over another state's violative use of a transnational spatial area will initially attempt to resolve the matter without

194. On the resort to peaceful means once an attack has begun, see Schachter, *Right of States*, *supra* note 45, at 1635 ("to require a state to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defense"). *But cf.* Mallison & Mallison, *supra* note 68, at 419-20, 427-29.

195. *See supra* text accompanying note 56.

196. Waldock, *supra* note 23, at 460.

197. *See supra* note 141.

resort to force, familiarity with the procedures of peaceful settlement commends itself.

A. *Chapter VI of the Charter*

As discussed above, the basic principle of peaceful resolution of international disputes is set forth in Article 2(3) of the Charter. Article 33 of Chapter VI of the Charter elaborates on that principle by obligating the parties to "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security," to seek a solution through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or any similar means.¹⁹⁸ If such efforts prove unsuccessful, the parties are obligated to refer the matter to the Security Council.¹⁹⁹

Article 34 provides that the Security Council "may" conduct an investigation of "any dispute" to determine whether the continuance of the dispute is likely to endanger the maintenance of international peace and security.²⁰⁰ This author-

198. U.N. CHARTER art. 33, para. 1. Article 33 states:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Id. art. 33.

199. *Id.* art. 37, para. 1. Article 37 reads:

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Id. art. 37.

200. Article 34 states:

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

ity is surely broad enough to encompass Article 33 disputes referred to the Council by the parties. If, however, the parties to the dispute fail to refer the matter, any United Nations member can exercise the Article 35 right to call the dispute "to the attention" of the Council, and engage the Security Council's investigative prerogative.²⁰¹ If the Council determines that continuance of the dispute is "in fact" likely to endanger international peace and security, it is obligated to decide whether to recommend appropriate procedures or methods of adjustment under Article 36,²⁰² or appropriate terms of settlement under Article 37.²⁰³ Recommendations in both cases are non-binding.²⁰⁴

The parties to a "situation" (as opposed to a dispute) the continuance of which is likely to endanger the mainte-

Id. art. 34.

201. *Id.* art. 35, para. 1. Article 35 states:

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Id. art. 35. The Security Council may begin an investigation on its own initiative. *See infra* text accompanying note 213.

202. Article 36 states:

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council shall take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

U.N. CHARTER art. 36.

203. *Id.* art. 37, para. 2; *see supra* note 199.

204. L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 284; *see* U.N. CHARTER art. 37, para. 1, *supra* note 199.

nance of international peace and security²⁰⁵ have no Article 33 obligation to seek a negotiated settlement.²⁰⁶ Though neither term is defined, a "situation," unlike a "dispute," does not involve differing positions concerning the continuation of a specific state of affairs, or differing positions based on conflicting claims about the actual facts or attendant legal consequences.

The broad language of Article 34 indicates that a situation of the nature referred to above may serve as a basis for invoking the Security Council's investigative authority.²⁰⁷ Article 35(1)'s reference to "[a]ny member" suggests that the invocation could even come about as a result of the request of a party to the situation bringing the matter to the Council's attention.²⁰⁸

The Security Council need not complete its investigation before exercising its authority under Article 36(1) to "recommend appropriate procedures or methods of adjustment," as this may be done "at any stage."²⁰⁹ Recommendations under Article 37(2) concerning appropriate "terms of settlement," however, may be made only when the Council is faced with a "dispute" the continuance of which is likely to endanger the maintenance of international peace and security.²¹⁰ Furthermore, "situations" the continuance of which are likely to endanger the maintenance of international peace and security are not included under the provisions of Article 37(2).²¹¹ Nevertheless, it is not clear whether Articles

205. U.N. CHARTER art. 36, para. 1 refers to a "situation" of a nature similar to a "dispute" as defined in Article 33 (*i.e.*, "the continuance of which is likely to endanger the maintenance of international peace and security"). *See supra* note 202.

206. Yet there have been instances where such "situations" have led to the use of Article 33 procedures. Whether use of these procedures was required is unclear. *See* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 260-61.

207. U.N. CHARTER art. 34 speaks of "any situation which might lead to international friction or give rise to a dispute." *See supra* note 200.

208. *See supra* note 201.

209. U.N. CHARTER art. 36, para. 1; *see supra* note 202.

210. *But see* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 286-87 (indicating that the Council has used its Article 37 authority with regard to some matters submitted as "situations").

211. Thus, Article 36 "situations," *see supra* note 202, are not included under Article 37(2). U.N. CHARTER art. 37, para. 2; *see supra* note 199.

36(1) and 37(2) preclude the Council from doing more to settle peacefully a situation than simply recommending procedural strategems.

Aside from disputes or situations "likely to endanger the maintenance of international peace and security," Chapter VI also details procedural steps which may be used to address, in the words of Article 34, "any dispute, or any situation which might lead to international friction or give rise to a dispute."²¹² Disputes or situations of this sort are subject to investigation on the Security Council's own motion in order to determine whether they are likely to endanger international peace and security.²¹³ They are not sufficiently grave, however, to impose an obligation on the parties involved to seek resolution through Article 33 methods.²¹⁴

As mentioned in connection with both disputes and situations likely to endanger the maintenance of international peace and security, Article 35 grants to members of the United Nations the authority to bring to the attention of the Security Council a broad range of issues, including "any dispute, or any situation of the nature referred to in Article 34."²¹⁵ If a Council investigation does not find a dispute likely to endanger international peace and security, the Council has no authority to recommend terms of settlement,²¹⁶ nor to recommend procedures or methods of adjustment.²¹⁷ It may make such recommendations, however, if the matter involved constitutes a "dispute" and all the parties to the dispute request Council action.²¹⁸

212. U.N. CHARTER art. 34; *see supra* note 200.

213. *Id.*

214. *Cf.* L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 260 (noting that Article 33 applies only to a "dispute, the continuance of which is likely to endanger the maintenance of international peace and security").

215. For the complete text of Article 35 of the U.N. Charter, *see supra* note 201.

216. U.N. CHARTER art. 37, para. 2; *see supra* note 199.

217. U.N. CHARTER art. 36, para. 1; *see supra* note 202.

218. Article 38 states:

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

U.N. CHARTER art. 38.

A Chapter VI dispute or situation may develop into a "threat to the peace, breach of the peace, or act of aggression."²¹⁹ This might occur if the pace of events outstripped the pace of settlement efforts under Chapter VI, or if the Security Council is unable to act, or, assuming it does act, if its recommendations are ignored or prove insufficient and the dispute or situation continues. In all of these cases, Article 39, the opening provision of Chapter VII,²²⁰ obligates the Council to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42."²²¹ The measures contemplated under Articles 41 and 42 range from diplomatic or economic pressure to armed force.²²²

The seriousness of a Security Council action, especially one taken under Chapter VII,²²³ raises the possibility that a

219. Article 39 states:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Id. art. 39.

220. Chapter VII of the U.N. Charter contains provisions which enable the Security Council to take certain actions in response to threats to the peace, breaches of the peace, and acts of aggression. These include the issuance of recommendations and provisional measures, and the imposition of economic sanctions. The Chapter also establishes the enforcement power of the Council.

221. U.N. CHARTER art. 39; *see supra* note 219.

222. Article 41 reads:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

U.N. CHARTER art. 41. Article 42 reads:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id. art. 42.

223. *See supra* note 220.

permanent member will paralyze the Council by exercising its veto power. A veto would be likely in the event that the superpowers disagreed on the military use of a transnational spatial area. Because a veto would thus render the United Nations unable to end the violation, the question of the continued existence of the customary right to reprisal may be crucial.

B. *Peaceful Settlement Provisions of Arms Control Agreements*

The United Nations Charter is not the only source of peaceful settlement procedures. The international agreements that would be violated by military uses of transnational spatial areas²²⁴ also contain peaceful settlement procedures of their own. Indeed, Article 36(2) of the Charter urges the Security Council not to intervene prematurely, but rather to employ fully the settlement procedures contained in all of these agreements first.²²⁵

The international agreements involved can be divided according to the spatial areas they govern. For problems in outer space, the general rule is to obligate states parties to consult one another whenever one party has engaged in conduct that another claims is of questionable legality.²²⁶ While such a claim would imply the existence of a dispute, under the relevant international agreements there is no obligation parallel to the obligation of Article 33 of the Charter, since the Article 33 obligation is triggered by a dispute which is likely to endanger the maintenance of international peace and security. How consultations tailored for disputes regarding the use of outer space should be conducted is not

224. See *supra* notes 2-15 and accompanying text.

225. See generally L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 37, at 279.

226. SALT II, *supra* note 8, art. XVII, para. 2(a); see ABM Treaty, *supra* note 2, art. XIII, para. 1(a); Moon Treaty, *supra* note 12, art. XV. But see OST, *supra* note 10, art. IX (requiring consultations before a "state party" undertakes activities which may create "harmful interference with activities of other States Parties"). The draft Anti-Satellite Treaty, *supra* note 12, art. IV, para. 3, is not clearly in this category. It refers to consultations "whenever necessary." For discussion of Article 33 obligations, see *supra* notes 198-99 & 205-06 and accompanying text.

clearly defined.²²⁷ The newly-adopted Moon Treaty, however, requires that consultations proceed "without delay" and seek a resolution both "mutually acceptable" and in keeping with the "rights and interests of all States Parties."²²⁸ If consultations cannot produce such a result, the parties must then attempt other means of peaceful resolution.²²⁹ Failure to reach a meeting of the minds entitles any party to seek the assistance of the Secretary-General of the United Nations.²³⁰

A similar obligation to consult exists for disputes in the Antarctic.²³¹ Established by the 1959 Antarctic Treaty, the obligation applies to "any dispute . . . between two or more . . . contracting parties concerning the interpretation or application" of the Convention.²³² It does not, however, bind members of the world community who are not states parties. Reflecting the influence of the Charter's Article 33, the Antarctic Treaty's obligation to consult is aimed at dispute resolution through negotiation, inquiry, mediation, conciliation, arbitration, or judicial settlement.²³³ If a resolution through such means is impossible, the dispute must be referred to the International Court of Justice,²³⁴ provided that all parties to the dispute consent to the referral.²³⁵

An obligation on state parties to consult on matters concerning the oceans was not incorporated into a convention provision until the 1970s.²³⁶ At that time, several members

227. See, e.g., Moon Treaty, *supra* note 12, art. XV; ABM Treaty, *supra* note 2, art. XIII, para. 1(a).

228. Moon Treaty, *supra* note 12, art. XV, para. 2.

229. *Id.* art. XV, para. 3.

230. *Id.*

231. See Antarctic Treaty, *supra* note 11, art. XI.

232. *Id.*

233. *Id.* art. XI, para. 1.

234. *Id.* art. XI, para. 2.

235. *Id.*

236. Neither the 1958 Continental Shelf Convention, *supra* note 5, nor the 1958 High Seas Convention, *supra* note 5, contains any obligation to consult. The same U.N. Conference which prepared those two Conventions, however, also prepared an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. See U.N. Doc. A/CONF.13/L.57, reprinted in 2 First United Nations Conference on the Law of the Sea 145, U.N. Doc. A/CONF.13/38 (1958). But the Protocol only binds the approximately forty nations that have signed it. The United States Senate refused to give its advise and consent to the Protocol and, therefore, the

of the world community agreed that when "reasonable doubts" arose regarding whether a state party was using the ocean floor for prohibited military purposes, the presumed using state would be obligated to consult with the other states parties involved with an eye towards removing their doubts.²³⁷ If consultation did not alleviate the doubts, any party entertaining such doubt would be obligated to notify the other concerned parties, and all parties concerned would then be obligated to cooperate on "such further procedures for verification as may be agreed, including appropriate inspection of objects, structures, installations or other facilities that reasonably may be expected to be of a kind . . . [prohibited]."²³⁸ These verification procedures can also be initiated without prior consultation when the state party responsible for the violation cannot be identified and refuses to step forward.²³⁹ If, after consultation and inspection, a state party is unable to alleviate its doubts, it can, "in accordance with the provisions of the Charter of the United Nations," refer the matter to the Security Council.²⁴⁰

The proposed 1982 United Nations Convention on the Law of the Sea²⁴¹ would extend and elaborate considerably the existing legal regime of mandatory consultation concerning use of the oceans. Part XV of the Convention obligates states parties to consult with one another whenever they have "any dispute . . . concerning the interpretation or application" of the Convention.²⁴² Once a dispute arises, the parties must "proceed expeditiously to an exchange of views regarding its settlement" through negotiation or other peaceful means as set forth in Article 33 of the U.N. Charter.²⁴³ If these means are unsuccessful, any party to the dispute may request that the dispute be submitted to one of the

United States is not bound by its terms. See 12 M. WHITEMAN, *supra* note 170, at 1332-33.

237. See SACT, *supra* note 9, art. III, para. 2.

238. *Id.*

239. *Id.* art. III, para. 3.

240. *Id.* art. III, para. 4.

241. LOS Convention, *supra* note 6.

242. *Id.* art. 279.

243. *Id.* art. 283, para. 1. Article 283(1)'s reference to peaceful means of settlement draws on Article 279. Its language also suggests the peaceful settlement methods of Article 33 of the U.N. Charter.

several entities expressly provided for in the Convention and selected by the parties to the dispute at the time of their signature, ratification or accession, or at any time thereafter.²⁴⁴ Under the proposed Convention, a settlement decree issued either by an appropriate entity selected by the parties or by an arbitral body which the Convention deems to have been selected, is binding on all parties to the dispute.²⁴⁵

Some disputes relating to the exclusive economic zone (hereinafter EEZ) have been exempted implicitly by the terms of the Convention. But of those disputes subject to mandatory settlement, the most important for purposes of this Article concern those dealing with a coastal state's "exercise" of sovereign rights or jurisdiction in the EEZ, when the coastal state or another state is alleged to have violated Convention provisions "in regard to the freedoms and rights of navigation, overflight, or the laying of submarine cables and pipelines, or other internationally lawful uses of the sea" specified in the Convention.²⁴⁶ Such disputes remain subject to compulsory settlement. It should be noted, however, that any dispute involving a military use may be exempted from compulsory settlement if either party to the dispute has exercised the Convention's optional exception for military activities.²⁴⁷

C. *Assessment of Peaceful Settlement Mechanisms in Context of Military Use of Transnational Spatial Areas*

As discussed above, the existence of a right of reprisal as a self-help measure to remedy violations of international law is questionable. Yet, if one argues that policy reasons suggest that such a right should exist, a state wishing to use self-help, in order to avoid further violations of legal standards,

244. *Id.* art. 286 & art. 287, para. 1. When one or both parties have made no selection, or when their selections differ, the dispute must be submitted to arbitration. *Id.* art. 287, paras. 3 & 5. Para. 3 discusses instances when no selection of entities has been made; para. 5 refers to instances of conflicting selections.

245. *Id.* art. 296 & Annex VII, art. 11.

246. *Id.* art. 297, para. 1(a).

247. *Id.* art. 298, paras. 1(b) & 3. See generally Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 OCEAN DEV. & INT'L L. 51 (1977).

must consider the peaceful settlement procedures of both the Charter and the relevant international conventions regulating military uses of transnational spatial areas. How these procedures are likely to operate in the event that any of the four factual situations set forth in the introduction above come into play is worthy of attention.²⁴⁸ To reiterate, these situations involve:

1. military hardware left unprotected by the deploying state and subject to clandestine removal;
2. hardware considered important enough to the deploying state that efforts by the targeted state to remove the state's hardware are likely to encounter resistance;
3. hardware or activities that the targeted state lacks the technological sophistication or military wherewithal to remove or terminate; and
4. ongoing uses which require that the state engaging in the uses employ armed forces or military equipment to achieve complete implementation.

1. *The United Nations Charter*

In each of the hypotheticals presented above, any claim by the targeted state that the military use violates a binding international commitment will likely be met with a categorical denial by the state engaging in the military use based on the facts of the case or applicable law. Under the terms of Chapter VI of the United Nations Charter²⁴⁹, such a denial creates a "dispute." If the dispute is one "the continuance of which is likely to endanger the maintenance of international peace and security," then the mandatory settlement procedures of Article 33 will be triggered.²⁵⁰ In this context, a military use which results in a potentially destabilizing strategic advantage for the using state might be considered to

248. *See supra* text accompanying notes 13-16.

249. Chapter VI of the United Nations Charter sets procedures for the peaceful settlement of disputes between member states. *See supra* note 17.

250. U.N. CHARTER art. 33, para. 1; *see supra* note 198. In addition, many of the provisions of Chapter VI of the Charter are sufficiently broad that a targeted state may use their settlement procedures without first submitting a representation of violation to the using state. *See infra* text accompanying notes 261-64.

create an Article 33 dispute.²⁵¹ Under such a scenario, the targeted state might take rash action to restore the military equilibrium, or the using state itself might grow intolerant of the targeted state's claims of illegality. Since under Article 33 it is the dispute itself, rather than the underlying facts giving rise to it, that must be likely to endanger the maintenance of international peace and security, even a military use which would have the effect of restoring the military balance may trigger Article 33.²⁵² Thus, whether the targeted state seeks to remove the military objects left unprotected by the deploying state,²⁵³ or engages in some other form of retaliatory activity either because it is incapable of removing the violative hardware or because it is unwilling to risk military engagement, Article 33 is relevant.

Should a using state answer challenges to the legality of its use by declaring that the military use will continue, Article 33 again controls.²⁵⁴ Article 33's reference to a "dispute" covers "any" dispute likely to endanger international peace and security.²⁵⁵ That neither state's position may relate to the meaning or effect of legal principles which regulate the use involved is immaterial. Similarly, the absence of conflicting claims over the facts surrounding the use is not significant. As long as the states concerned have opposing views on the continued use, Article 33's requirement of "any" dispute is satisfied. The representation evidences targeted state objection to the use. The admission of the using state, coupled with continued use, thus indicates that a "dispute" exists.

In any case, the targeted state is entitled to exercise its Article 35(1) right to bring the matter to the Security Council for appropriate action²⁵⁶ whenever the states fail to re-

251. *Id.* art. 33; *see supra* note 198.

252. *Id.*

253. If removal in this context is seen as not involving the use of "force," *see supra* text accompanying notes 27-28, reprisal and its corresponding "peaceful settlement" obligation are irrelevant. Moreover, the settlement obligation is not triggered prior to clandestine removal. Only after removal is discovered might a "dispute" arise that obligates the targeted state to settle peacefully.

254. U.N. CHARTER art. 33.

255. *Id.*

256. *See supra* text accompanying notes 201-08.

solve the dispute as required under Article 33.²⁵⁷ The Council is then authorized by Article 34 to investigate the dispute.²⁵⁸ Articles 36(1) and 37(2) authorize the Council to issue non-binding recommendations on the procedures or methods of adjustment the parties should use, or on the terms of settlement considered appropriate.²⁵⁹ If the dispute cannot be resolved, it may then merit consideration under Chapter VII.²⁶⁰

The broad language of Chapter VI permits a targeted state to use the settlement procedures of the Chapter without first having to submit a representation of violation to the using state. The submission of a representation only provides the opportunity for an Article 33 "dispute" to arise. Since the maintenance of international peace and security may be endangered whether or not a state undertaking a violative military use gains a strategic advantage, the absence of a representation of violation may simply mean that the matter is a "situation of like nature"²⁶¹ (*i.e.*, likely to endanger the maintenance of international peace and security), or a "situation which might lead to international friction."²⁶² In either case, the targeted state would thereby be entitled to exercise its Article 35(1) right to bring the matter to the Security Council for appropriate action.²⁶³ Even if there are instances where international friction might not result, the right to bring the matter to the Security Council's attention applies to any "situation which might . . . give rise to a dispute."²⁶⁴ And, unless a targeted state were unconcerned about violations of arms control commitments, a military use of a transnational spatial area would almost always give rise to such a dispute. Invariably, if a targeted state cannot terminate violative activities or remove violative objects, it will submit a representation to the using state. As long as the

257. U.N. CHARTER art. 35.

258. *See supra* text accompanying notes 255-56.

259. *See* text of Article 33, *supra* note 198.

260. Since clandestine removal does not involve a "dispute," peaceful settlement under Article 33 would not be triggered. *See supra* note 250.

261. U.N. CHARTER art. 36, para. 1.

262. *Id.* art. 34.

263. *See supra* text accompanying notes 205-08.

264. U.N. CHARTER art. 34.

using state refuses to accede to a request, a dispute is sure to arise.

A "dispute" likely to endanger international peace invokes all of the Security Council's powers. If the matter is merely a "situation" likely to endanger international peace, the Council's investigative power is augmented by its power to recommend resolution procedures or methods of adjustment.²⁶⁵ Moreover, a "situation which might lead to international friction" or a "situation which might give rise to a dispute" leaves the Council's investigative power standing alone. Even situations of this sort, however, may develop into threats to international peace, and trigger the Security Council's powers under Chapter VII.²⁶⁶

2. *The Arms Control Agreements*

What about the peaceful settlement procedures set forth in the international conventions violated by the military use of a transnational spatial area? These conventions provide for mandatory consultation and settlement procedures that may be triggered merely by concern over whether convention commitments are being observed. A dispute, as such, is not essential. Moreover, for the settlement procedures to be employed, a suspected violation need not be likely to endanger international peace, or to raise the specter of international friction. Thus, the settlement obligation set forth in the relevant conventions is more easily triggered than the corresponding obligation of the Charter. There are two instances, however, in which a dispute is required before the settlement procedures are triggered. Both Article XI of the 1959 Antarctic Treaty and Article 279 of the proposed 1982 United Nations Convention on the Law of the Sea require "any dispute . . . concerning the interpretation or application" of the respective convention.²⁶⁷ But unlike Article 33 of the Charter, neither Article XI nor Article 279 requires a dispute that is likely to endanger international peace.²⁶⁸

265. U.N. CHARTER art. 36, para. 1.

266. *See supra* notes 220-23.

267. United Nations Convention on the Law of the Sea, 5 UNCLoS at 45, U.N. Doc. A/CONF.62/122 (1982); Antarctic Treaty, *supra* note 11, art. XI.

268. *See supra* note 198.

A state using a transnational spatial area for military purposes cannot avoid the Article 33 obligation merely by coupling its refusal to discontinue its military use with an admission of a violation. The refusal creates a dispute, and "any" dispute the continuation of which is likely to endanger international peace triggers the Article 33 obligation.²⁶⁹ Under Article XI and Article 279, however, the same conclusion may not be reached. Although a refusal may create a dispute, an admission by the state engaging in the military use that the targeted state has accurately stated both the relevant facts and the controlling law may prevent the dispute from being one "concerning the interpretation or application" of the relevant convention. Admissions of this sort are unlikely. They may arise, however, if the targeted state is perceived by the using state as either unable to end the use, or is perceived by that state as unwilling to run the risks of attempting to do so.

Such an admission by a using state would raise a basic question: does the phrase "concerning the interpretation or application" refer to a dispute about whether a relevant provision has a particular interpretation or is applicable to the facts at issue, or does it refer to a dispute arising from or having a basis in a particular provision, as interpreted and applied to the specific facts? The former reading would facilitate any effort of a deploying state to avoid the relevant conventions' resolution mechanisms, while the latter reading would prevent such an approach from being successful. Several reasons suggest that the latter reading is more persuasive.

First, the inclusion of dispute resolution mechanisms within an international convention that contains specific proscriptions reflects an intention of the drafters to submit all disputes related to those proscriptions to the enumerated mechanisms. To allow acknowledged violative military activity to continue without requiring the using state to submit to the dispute resolution procedures would circumvent this intent.

Second, the terms of a convention should be given their "ordinary meaning," unless it is clear that the drafters in-

269. See U.N. CHARTER art. 33.

tended a different meaning.²⁷⁰ Thus, to the extent that dictionary definitions reflect ordinary meaning, "concerning" is synonymous with "relating to."²⁷¹ The term "concerning" is arguably broader than "about," and includes disputes arising from or having a basis in a substantive provision of an international convention.

Third, the French version of Article XI of the Antarctic Treaty speaks of a dispute "*concerne* l'interprétation ou l'application."²⁷² Had the French version been intended to convey the narrower concept of a dispute "about" the interpretation or application of a convention, it might have read "*à propos de* l'interprétation ou l'application."

Fourth, the *travaux préparatoires* of Article 279 of the 1982 Law of the Sea Convention indicate that the drafters preferred the term "concerning" to the phrases "relating to" or "arising out of." In almost every provision of Part XV ("Settlement of Disputes") in which "concerning" now appears, the drafts of Part XV of the proposed 1982 Law of the Sea Convention used either "relating to" or "arising out of."²⁷³ Since the *travaux préparatoires* do not include any suggestion that the change to "concerning" had a substantive effect, perhaps none should be implied.

270. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, art. 31 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969); Interpretation of the 1919 Convention Concerning Employment of Women During the Night, 1932 P.C.I.J., ser. A/B, No. 50, at 17 (Judgment of Nov. 15, 1932).

271. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 272 (9th ed. 1983).

272. *Traité sur L'Antarctique*, Dec. 1, 1959, art. XI, No. 5778, 402 U.N.T.S. 72, 81 (emphasis added).

273. See Informal Single Negotiating Text art. 137, U.N. Doc. A/CONF.62/WP.8/Part II, *reprinted in* United Nations Convention on the Law of the Sea, 4 UNCLOS at 171, U.N. Doc. A/CONF.62/122 (1982); Revised Single Negotiating Text art. 131, U.N. Doc. A/CONF.62/WP.8/Rev.1/Part II, *reprinted in* 5 UNCLOS at 172, U.N. Doc. A/CONF.62/122 (1982); Informal Composite Negotiating Text arts. 279-84, 286-88 & 296-97, U.N. Doc. A/CONF.62/WP.10/Add.1, *reprinted in* 8 UNCLOS at 45-48, U.N. Doc. A/CONF.62/122 (1982); Informal Composite Negotiating Text Rev. 1 arts. 279-84, 286-88, 294, 296 & 298, U.N. Doc. A/CONF.62/WP.10/Rev.1, *reprinted in* 18 I.L.M. 686, 778-83 (1979); Draft of the Convention on the Law of the Sea (Informal Text) arts. 279-84, 286-88, 295, 297 & 298, U.N. Doc. A/CONF.62/WP.10/Rev.3, *reprinted in* 19 I.L.M. 1131, 1239-41, 1243-45 (1980).

Finally, if the term "concerning" in the 1982 Law of the Sea Convention is interpreted to include only disputes about a particular provision's interpretation or application to specific facts, disputes of any other sort would not be covered. Yet the fact that Article 298(1)(c) of the Convention permits parties to except from the compulsory settlement provisions of Part XV disputes over which the Security Council exercises its powers under Chapter VI of the Charter certainly suggests that "concerning" must have a broader meaning.²⁷⁴

This stems from the fact that the Security Council's authority under Chapter VI includes disputes of many degrees of intensity as well as disputes arising from many different sources.²⁷⁵ A dispute regarding the continuation of a military use violative of the 1982 Convention would surely be included. If "concerning" were given its narrower technical meaning, Article 298(1)(c)'s optional exception would be unnecessary.²⁷⁶

This discussion does not mean that there is no technical difference between "relating to," "arising out of," and "concerning." In the context of Article XI of the Antarctic Treaty and Article 279 of the proposed 1982 Convention on the Law of the Sea, however, that technical difference appears not to have been closely followed. Nor is the discussion above intended to suggest that only disputes arising from or connected with expectations about state party behavior are within the ambit of "concerning the interpretation or application." Disputes about a particular provision's meaning or its applicability to specific facts are also included under the language. By giving the term "concerning" a broader reading, the intent of the drafters may be better effectuated, and premature intervention by the Security Council under Chapter VI of the Charter may be averted.

274. United Nations Convention on the Law of the Sea, *supra* note 266, at 49. For a discussion of the Security Council's authority over disputes under Chapter VI of the Charter, see *supra* text accompanying notes 249-66.

275. For discussion of peaceful settlement, see text accompanying notes 194-223.

276. This is because the dispute would not be within Part XV settlement provisions.

VI. ASSESSMENT OF CLAIMS THAT USE OF FORCE IS
JUSTIFIED: SPACE-BASED BMD AND CONTINENTAL
SHELF-BASED ASW SYSTEMS

Whether a state's violation of an international obligation to refrain from deploying military objects or engaging in military activities in international spatial areas allows a targeted state under the legal concepts discussed above to use force to remove the objects or terminate the activities is of central importance. If one is favorably disposed to a right of reprisal,²⁷⁷ the factual situation created by the violative use will determine whether a targeted state can justifiably invoke the right, for as formulated under customary international law, the doctrine of reprisal requires that any resort to force be warranted by necessity.²⁷⁸ Similarly, the facts of a specific violative use are also important in assessing the right of anticipatory self-defense. As *The Caroline* incident makes clear, the use of force in anticipation of an armed attack may be justified only if the attack is imminent, "leaving . . . no moment for deliberation."²⁷⁹ The lower degree of necessity re-

277. See, e.g., II L. OPPENHEIM, *supra* note 23, at 136 (non-compliance with treaty obligations may justify a reprisal).

278. For example, the opinion in the *Naulilaa Incident Arbitration*, *supra* note 141, at 904, states: "The use of force is only justified by its character of necessity." The opinion rejected Germany's plea that it had used force as a measure of reprisal, on three grounds: first, Germany was not the victim of an internationally unlawful act; second, even if it had been a victim, Germany had made no request for satisfaction prior to using force; and third, the force Germany employed was out of proportion to the act triggering its use. *Id.* It is difficult to know exactly in what sense the case intended there to be a necessity. The arbitrators may have meant that the necessity to use force exists (a) anytime peaceful settlement fails; (b) only when the situation, after unsuccessful attempts at peaceful settlement, poses a threat to the state invoking the right of retaliation; or (c) only when the threat is so acute that it cannot be removed by other means. In view of the grounds for decision, it seems strained to read the opinion to mean that the international delinquency must have created a threat so acute that no other means existed by which the threat could be avoided. In all likelihood, the arbitrators meant only that Germany was required to exhaust peaceful settlement efforts before it would be justified in using force to remedy the violation it suffered. For present purposes, however, the arbitrators' ruling may be and has been read as falling between these two extremes and as requiring the failure of peaceful settlement coupled with a threat to the invoking state.

279. Jennings, *supra* note 56, at 90; see Letter from Mr. Webster to Mr. Fox, *supra* note 56.

quired to invoke the right of reprisal suggests one reason the right has not been well received in international law. In any case, a targeted state may not justify the use of force under either the right of reprisal or the right of anticipatory self-defense unless the factual situation created by the violative use satisfies the appropriate standard.

The following sections will examine the legal validity of reprisals and anticipatory self-defense measures in the context of two possible future military uses: the deployment by the United States of a ballistic missile defense (BMD) system in outer space, and the placement of anti-submarine warfare (ASW) devices by the Soviet Union on the United States' continental shelf.

A. *"Star Wars": A Difficult Case for the Anticipatory Use of Force by the Soviet Union*

1. *Space-Based BMD Systems*

In a nationally televised address on March 23, 1983, President Ronald Reagan outlined a defensive alternative to the current U.S.-U.S.S.R. offensive arms race.²⁸⁰ The Strategic Defense Initiative, or "Star Wars" program, is intended to examine the technological feasibility of a space-based BMD system capable of providing the United States with a shield against Soviet ballistic missiles.

As presently conceived, the system is composed of three distinct layers.²⁸¹ Each layer would attack Soviet ballistic missiles at different phases—the boost, the mid-course, and the terminal phases—of their flight towards targets in the United States.²⁸² The boost phase includes the 200 to 300 seconds immediately following the lift-off of Soviet ICBMs and SLBMs.²⁸³ During this phase, directed-energy weapons able to strike at the speed of light would be used to destroy

280. N.Y. Times, Mar. 24, 1983, at A20, col. 5.

281. Burrows, *supra* note 1, at 847-48. Changes in the contours of the space-based BMD proposal formulated after the latter half of 1984 are not considered in this Article.

282. *Id.*

283. D. GRAHAM, *supra* note 1, at 115 (240 seconds); Andelman, *supra* note 130, at 96 (250 seconds); Burrows, *supra* note 1, at 848 (300 seconds); Weiner, *supra* note 1, at 91 (200 seconds).

or disable Soviet launchers.²⁸⁴

Soviet launchers not destroyed in the boost phase would release multiple warheads on various trajectories aimed at individual targets. These warheads would be targeted during the mid-course phase by the second layer of U.S. weapons. The difficulty of destroying all of the warheads at this phase would depend upon the number of Soviet launchers able to escape destruction during the boost phase and the number of warheads carried by those launchers.²⁸⁵ The mid-course phase will last approximately 20 minutes for ICBMs²⁸⁶ and 10 minutes for SLBMs.²⁸⁷

The terminal phase begins as the warheads re-enter the earth's atmosphere. During this phase, which may last only a few minutes, warheads which survived the mid-phase defensive weaponry would have to be destroyed at nearly point-blank range by earth-based BMD systems. Possible system components include nuclear-tipped rockets,²⁸⁸ multiple unguided Swarmjet non-nuclear rockets,²⁸⁹ large fragmentation warheads,²⁹⁰ and nuclear charges which are planted around ICBM fields and detonated so as to neutralize incoming warheads with clouds of dust and debris.²⁹¹

The directed-energy weapons used in this three layer BMD system would most likely be either high energy lasers

284. Estimates of the number of space-based directed-energy weapons needed in this phase vary from 24, *see* C. GRAY, *supra* note 1, at 60, to 250, *see* Carter, *supra* note 1, at 175; *see also* Weiner, *supra* note 1, at 94 (at least 200 satellites); Letters to the Editor, *Wall St. J.*, Jan. 17, 1985, at 27, col. 1 (Union of Concerned Scientists suggests 300 satellites).

285. In addition to directed-energy weapons, mid-course phase weaponry may include: a) hypervelocity electromagnetic railguns able to fire dense fusillades of lethal pellets at extraordinary speeds, *see* Burrows, *supra* note 1, at 848; and b) non-nuclear exo-atmospheric multiple warhead interceptor rockets, operating in conjunction with exo-atmospheric infrared optical sensors able to direct each interceptor warhead to an independent incoming ICBM/SLBM warhead, *see* Payne & Gray, *supra* note 1, at 823; Weiner, *supra* note 1, at 75-85.

286. Burrows, *supra* note 1, at 848; Weiner, *supra* note 1, at 51 (Fig. 3-1).

287. Weiner, *supra* note 1, at 51 (Fig. 3-1).

288. The nuclear-tipped rockets might be of the Sprint variety used in the U.S. BMD system in the late 1960s. Burrows, *supra* note 1, at 848.

289. D. GRAHAM, *supra* note 1, at 46.

290. *Id.*

291. Weiner, *supra* note 1, at 89-91.

or particle beam weapons.²⁹² Both require a power-generating source, and beam and fire control subsystems.²⁹³ The beam and fire control subsystems would aim and focus the beam at a vulnerable spot on the target,²⁹⁴ and cease firing once the objective has been accomplished²⁹⁵ in order that the weapon could be immediately resighted. The objective in each case would be to penetrate the target surface and ignite the fuel, destroy or damage a vital component, or cause a warhead to detonate.²⁹⁶ A single high energy laser or particle beam weapon functioning at an optimum level would be capable of destroying only 40 to 60 missiles during boost phase.²⁹⁷

High energy lasers operate by projecting either a continuous beam of light or a series of energy pulses.²⁹⁸ In a "continuous beam" mode, laser-generated heat burns through the target surface,²⁹⁹ while in the pulse mode, shock waves are generated in the target surface.³⁰⁰ A particle beam

292. BURROWS, *supra* note 1, at 847.

293. D. GRAHAM, *supra* note 1, at 115 (lasers), 118 (particle beam weapons).

294. *Id.*

295. *Id.*

296. *Id.* at 116 (lasers), 119 (particle beam weapons).

297. Carter, *supra* note 1, at 175. This estimate is based on the operational range of the BMD system weapons and enough time for the beam to "dwell" on the target. An operational range of 1000 miles has been suggested for high energy lasers, *see* C. GRAY, *supra* note 1, at 60-61, and 10,000 kilometers for particle beam weapons, *see* D. GRAHAM, *supra* note 1, at 119. A satisfactory beam dwell time has been established at approximately 5 seconds per target. Carter, *supra* note 1, at 174. "Laser" is an acronym for Light Amplification by Stimulated Emission of Radiation.

298. Thompson, *supra* note 1, at 698.

299. *Id.*

300. *Id.* High energy lasers take a number of different forms. The most technologically developed high energy laser, *see* C. GRAY, *supra* note 1, at 61, is the hydrogen fluoride laser. It is not considered sufficiently promising for BMD missions in the 1990s. *Id.* The deuterium fluoride chemical laser, the most powerful chemical laser to date, is subject to the same observation. *See* D. GRAHAM, *supra* note 1, at 117-18. Other types of lasers currently under development may, however, prove to produce sufficient power. For example, a free electron laser able to produce moderate power levels is due to be completed in the mid-1980s. D. GRAHAM, *supra* note 1, at 118. Research into the ultraviolet excimer laser is progressing much more slowly. C. GRAY, *supra* note 1, at 61. Nuclear-pumped x-ray lasers, although under research at one laboratory, *see* Burrows, *supra* note

weapon, on the other hand, produces a beam of either charged or neutral subatomic particles and then accelerates those particles and projects them to a target in a form best described as a man-made lightning bolt. As the particles strike the target surface they transfer intense kinetic energy which results in targeted material fracturing from stress.³⁰¹ The major technological hurdle to deploying particle beam weapons in space is decreasing the size of current particle accelerators while increasing the energy they are able to generate and project. Currently, ground-based particle accelerators are a mile or more in length and do not produce sufficient energy to serve as effective defensive weapons.³⁰² Some commentators suggest that the necessary breakthroughs in particle beam weaponry are not likely to occur before the end of this century.³⁰³

2. *Should "Star Wars" Be Deployed?*

Assuming that technological impediments can be overcome, the decision to proceed with deployment of the "Star Wars" system must take into account a number of policy considerations. For instance, to what extent would efforts to deploy a space-based BMD system drive Soviet decisionmakers, unable to keep their own technology abreast of America's, to order a nuclear strike against the United States during a crisis arising prior to the BMD system being made operational? Facing a new generation of American ICBMs, SLBMs, and long-range bombers, it does not seem unrealistic to imagine Soviet decisionmakers viewing a space-based BMD system with great trepidation and wondering whether time will blunt the ability of their retaliatory forces to discourage attacks against their nation. The likelihood of such a Soviet attack might be reduced by deploying the earth-

1, at 848, may not be a critical component in any space-based BMD system in the near future. See Payne & Gray, *supra* note 1, at 837 n.14 (citing G. Keyworth, Presentation at the Forum on the Future of Ballistic Missile Defense, Brookings Institution (Feb. 29, 1984)); see also D. GRAHAM, *supra* note 1, at 118.

301. The particle beam has been an integral part of efforts to replace present-day fission nuclear reactors with fusion ones. D. GRAHAM, *supra* note 1, at 119; Thompson, *supra* note 1, at 698.

302. C. GRAY, *supra* note 1, at 58.

303. *Id.*

based components of the BMD system first. Such a move would make it more difficult for the Soviets to destroy American ICBMs, thereby reducing the likelihood of a Soviet first-strike.

But what if the Soviets match every American technological advancement with an advancement of their own? If the "Star Wars" program simply ignites a weapons race in outer space, will that lead to more widespread confrontation on earth at the conventional forces level? Conventional conflict between the superpowers has been conducted through surrogates, principally out of the fear that more direct or frequent conflict might escalate to nuclear war.³⁰⁴ If the stage for the ultimate battle between the two superpowers is to be outer space, who can say whether the lifting of the threat of widespread devastation on earth might not remove the basic constraint (fear of nuclear war on earth) that has kept more conventional confrontation at a tolerable level.

In assessing the choice between war in outer space with its accompanying possibility of a greater chance of conventional conflict on earth, and the constant and looming threat of nuclear annihilation with its accompanying possibility of a smaller chance of conventional conflict,³⁰⁵ one must not lose sight of the fact that there is no guarantee that conventional conflict will remain conventional. Further, unless space-based defensive systems are in fact fail-proof, the likelihood of full nuclear destruction may thus be dramatically increased by a move to outer space.

3. *Assessment*

The considerations discussed above draw into question the wisdom of proceeding with deployment of a space-based BMD system, but have little to do with the lawfulness of Soviet efforts to remove the components of such a BMD system once deployed. Such an effort by the Soviets would seem to involve the use of force and would therefore require justification under an exceptional principle.

304. The superpowers probably recognize that indirect and infrequent confrontation at the conventional level reduces the chances of escalation to greater levels of conflict between them.

305. See F. DYSON, *WEAPONS AND HOPE* 71-72 (1984) (discussing a particular kind of situation in which he would accept space-based BMD).

A Soviet effort to interrupt the deployment process may involve clashes with American deployment personnel. Where such personnel are not present, either because they are not needed to complete the deployment or because the BMD system is already operating, Soviet efforts are sure to be detected by space surveillance systems. In both cases, it probably will not matter whether the United States attempts to stop the Soviet removal efforts or chooses not to stop them in order to avoid more widespread conflict. As long as force implies pressure not resisted because of a conscious decision by the receiving state,³⁰⁶ only completely undetected removal efforts would not involve the use of force. Since in regard to a space-based BMD system all removal efforts would probably be detected, there is thus little doubt that "force" would be involved. Yet, it is unlikely that the Soviets would ever undertake removal efforts during a period of crisis. With tensions already heightened, removal of a ballistic missile defense system might be seen as the opening thrust of an offensive attack. Unless the Soviets were convinced that the existing crisis was serious enough to push the superpowers to nuclear war, and saw removal efforts as a step towards improving their position at the onset of conflict, removal efforts probably would be undertaken only during times of relatively low tensions. As a result, the Soviet efforts at removal would provide a difficult case in terms of current international law, for they probably would not be clandestine and also probably would not occur at times when Article 51 self-defense principles might be employed.

With regard to the exceptional principle of reprisal, the threat to Soviet ICBMs and SLBMs posed by the three-tier American BMD system would seem to provide sufficient necessity to warrant the use of military force to remove BMD hardware whenever peaceful negotiations fail to result in removal.³⁰⁷ Unless the BMD system is in fact incapable of destroying any Soviet missiles or warheads, it will pose a threat to Soviet nuclear forces. Most analysts assume the BMD system will eventually have an overall strategic warhead de-

306. See *supra* text accompanying notes 25-28.

307. See *supra* note 278 on what the customary law meant by the requirement of necessity in the context of reprisals.

struction rate of between 50 and 99 percent.³⁰⁸ Since even slight fluctuations in retaliatory capability may upset the strategic balance,³⁰⁹ removal might be justified whenever peaceful efforts prove unproductive.

With respect to anticipatory self-defense, Soviet efforts to effect removal would present two important questions. The first concerns whether a state must resort to effective countermeasures in an attempt to ameliorate the threat of attack before it can justify its use of force on grounds of anticipatory self-defense. It is well settled in some jurisdictions that municipal law requires individuals to show that they have "retreated to the wall" before their resort to force in self-defense will be considered justifiable. Is such a requirement part of international law's test of anticipatory self-defense? International legal literature regarding anticipatory self-defense does speak of the concept of "necessity."³¹⁰ Yet there has been little effort to translate this concept into a requirement that effective countermeasures be used prior to being able to rely justifiably on the use of force.

The second question raised by any Soviet removal effort based on anticipatory self-defense concerns whether the doctrine of anticipatory self-defense can even be invoked as a justification for using military force against a defensive system. This is a question of first impression. The traditional international law of anticipatory self-defense was formulated to permit a state facing an imminent threat of offensive attack to react before suffering the first blow. At the time it was formulated, nearly 150 years ago, no one could have envisioned defensive systems with the capabilities of the "Star Wars" system. The failure of traditional formulations of an-

308. See Burrows, *supra* note 1, at 852 (suggesting a penetration figure converting to a 99 percent overall kill rate); Keeny, *Reactions and Perspectives*, in BALLISTIC MISSILE DEFENSE, *supra* note 1, at 411 (90 percent); Payne & Gray, *supra* note 1, at 823 (85 percent at each level of the layered system); Rathjens, *Reactions and Perspectives*, in BALLISTIC MISSILE DEFENSE, *supra* note 1, at 424 (50 to 90 percent).

309. See 1979 ACIS, *supra* note 4, at 119.

310. Cf. S. MALLISON & W. MALLISON, *supra* note 103, at 16-19 (suggesting force in self-defense is justified only if the "circumstances require" it); M. McDUGAL & F. FELICIANO, *supra* note 23, at 218 (suggesting that necessity is an imperative to the use of force and that its existence is to be determined in total context); see also Schachter, *Right of States*, *supra* note 45, at 1635-37.

ticipatory self-defense to address the issue of defensive systems is therefore quite understandable.

Requiring states to use effective countermeasures currently within their capability has a distinct appeal, since it might reduce or eliminate the imminence of an attack without resort to military force. Secretary Webster's statement in *The Caroline* incident that anticipatory self-defense is justified only by an attack so imminent that it leaves "no moment for deliberation,"³¹¹ supports such a requirement. If effective countermeasures exist as an alternative to the use of force, then a "moment for deliberation" is present. Furthermore, in almost every conceivable instance, a state aware of some development which will pose an imminent threat of attack in the future cannot justify immediate recourse to armed force if its technological sophistication enables it to fashion countermeasures which can neutralize the threat when the threat eventually matures. Advance knowledge of a situation surely gives the targeted state more than a "moment for deliberation," and thus seems to require it to develop appropriate responses.³¹²

Since *The Caroline* standard requires peaceful settlement whenever a threat of attack does not leave a "choice of means," it should not be thought unusual that the "no moment for deliberation" standard directs internal or domestic decisions by compelling the pursuit of alternatives to the immediate use of defensive force. The concept of "domestic jurisdiction" reflected in Article 2(7)³¹³ of the Charter is not intended to limit the extent to which principles of interna-

311. Letter from Mr. Webster to Mr. Fox, *supra* note 56.

312. An example where force may in fact have been used far in advance of an external threat being imminent is the Israeli air attack on the Tamuz I nuclear reactor in Baghdad, Iraq. Whether the use of force was appropriate is an entirely distinct question. See generally Mallison & Mallison, *supra* note 68; Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV. 187 (1984).

313. Article 2(7) states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7.

tional law direct a state's internal decisions. Were this not so, most principles of international law would be rendered meaningless, since all are designed to establish parameters on the exercise of state discretion.

To be sure, this is not to suggest that a state caught without effective countermeasures, as a result of a conscious decision to refrain from complying with the countermeasure requirement, is estopped from invoking anticipatory self-defense when a threat becomes imminent. But a state would not decide rationally upon such an imprudent course. Every state wants to avoid the risks of conflict. The point made here, however, is that a state able to choose between immediate resort to armed force and the development of countermeasures able to thwart a threat that time will cause to become imminent, is required to select the latter. This choice is consistent with the policy against breaches of the peace reflected in the Charter of the United Nations.

The important point about anticipatory self-defense against defensive systems is that the basic objective behind the right to preempt is, and has always been, to permit a state to use reasonably proportionate armed force when necessary to forestall any military interference threatened by another state. That the customary international law standard was formulated in a context of an imminent threat of an offensive attack is but reflective of the stage of technological development extant at the time of *The Caroline* incident. The future may be marked by defensive systems with staggering capabilities, and as long as such systems may be used to further military ambitions there seems to be no reason to place them beyond the scope of anticipatory self-defense.

Perhaps the clearest example in the nuclear age of a defensive system that should be considered as subject to justifiable preemption would be one able to envelop the possessor with a shield impenetrable by an opponent's strategic weapons. To conclude otherwise would vest the possessor of such a defensive system with the ability to disarm an opponent while retaining its own offensive forces. If the defensive system does not permit such a completely neutralizing capability, the use of military force against it should be justifiable on the basis of anticipatory self-defense in but one instance: if the system enables the possessor to destroy a sufficient number of strategic weapons so as to leave the opponent

without the strategic power to inflict damage sufficient to deter the possessor of the defensive system from ever credibly threatening the use of its own offensive weapons.

As discussed above, many argue that the United States' current strategic vulnerability stems from the fact that a Soviet first-strike may destroy enough highly accurate American ICBMs to force the United States to capitulate rather than launch a responsive strike against Soviet urban and industrial centers, thereby triggering a retaliatory strike and full-fledged nuclear conflict.³¹⁴ This line of reasoning suggests that defensive systems not able to envelop their possessor with completely impenetrable shields may still prove sufficient to give their possessor the capability to impose its will on an opponent. Since the basic objective of anticipatory self-defense is to permit states to use force to prevent this from ever happening, defensive systems that deny an opponent effective use of enough offensive weapons to inflict the kind of destruction able to deter threats from the possessor of the defensive system would seem as susceptible to claims of anticipatory self-defense as systems that create completely impenetrable shields.

In light of the reasoning above, the Soviet Union would seem hard pressed to make a case justifying the use of force to remove the space-based BMD system currently receiving consideration in the United States. The Soviet military could easily put in place several countermeasures to the BMD system currently envisioned. These include: polishing missile boosters to deflect the beams generated by directed-energy weapons;³¹⁵ adding ablative material to the boosters and warheads to increase their ability to absorb heat;³¹⁶ rotating the boosters to reduce the dwell time of a weapon's beam;³¹⁷ shortening the firing time of missile boosters to minimize the risk span during the boost phase;³¹⁸ depressing the trajectory of missiles so as to fly under the space-based compo-

314. See Nitze, *supra* note 112, at 227.

315. C. GRAY, *supra* note 1, at 64.

316. Payne & Gray, *supra* note 1, at 835.

317. *Id.*

318. See Letters to the Editor, *Wall St. J.*, Jan. 17, 1985, at 27, col. 1; Bienen & Ostriker, 'Star Wars'-Costly, Futile, *N.Y. Times*, Jan. 13, 1985, at 4, col.1.

nents of the BMD system;³¹⁹ using chaff or dummy warheads to increase the number of targets for the mid-course and terminal phases;³²⁰ and deploying space mines³²¹ or earth-based lasers designed to destroy the space-based components of the BMD system in the moments preceding the outbreak of war.³²²

Moreover, even if countermeasures did not exist or could not be developed in time, it seems doubtful that the effectiveness of the American BMD system would be sufficient to justify a Soviet use of military force to effect removal. Analysts do not suggest that the system will be completely impenetrable.³²³ And every one-tenth of one percent results in leakage of ten strategic warheads. Even if the BMD system were completely effective, American military specialists would still have to contend with low-altitude nuclear delivery systems such as air- and sea-launched cruise missiles. The Soviets have thousands of these missiles, which can be launched from every direction and can strike targets with pinpoint accuracy from altitudes of 100 feet to 600 miles.³²⁴ These missiles alone, given their destructive capability, may deter the United States from coercing the Soviets to conform to certain American dictates or suffer an offensive strike.

B. *Advanced ASW: A Possible American Case for Anticipatory Use of Force*

What if the Soviet Union were to emplace anti-submarine warfare (ASW) devices on the U.S. continental shelf? The Soviet Union may have a real interest in clandestinely deploying such devices off the Atlantic, Pacific, and Gulf coasts of the United States³²⁵ in order to jeopardize as many of the United States' strategic forces as possible.³²⁶ Such a deployment might justify the anticipatory use of force by the United States. To understand this, an examination of the

319. See C. GRAY, *supra* note 1, at 65.

320. Andelman, *supra* note 130, at 97.

321. See generally C. GRAY, *supra* note 1, at 64-69.

322. Weiner, *supra* note 1, at 96.

323. See *supra* note 308.

324. Burrows, *supra* note 1, at 850.

325. See R. Zedalis, *Foreign State Military Use*, *supra* note 5.

326. Some argue the Soviets are seeking a war-winning capability. See *Soviets Confident of Nuclear Victory?*, *Tulsa World*, Nov. 4, 1981, at A5, col. 2.

current configuration of strategic nuclear weaponry is important.

1. *The Importance of American SSBNs*

The Soviet and American strategic nuclear arsenals are estimated to hold approximately 10,000 warheads each.³²⁷ The superpowers' basing preferences, however, differ markedly. The United States has deployed slightly more than fifty percent of its strategic warheads on SLBMs.³²⁸ Less than thirty percent of the United States' strategic warheads are carried on long-range bombers, and approximately twenty percent on ICBMs.³²⁹ In contrast, the Soviets have deployed slightly more than seventy percent of their strategic warheads on land-based ICBMs.³³⁰ Less than twenty percent of Soviet warheads are on SLBMs, and less than ten percent on bombers.³³¹

The high percentage of Soviet warheads based on ICBMs has contributed to the vulnerability of the United States' ICBM force.³³² Many strategic theorists suggest that the destructive power and accuracy of the Soviet ICBMs, when combined with the Soviet preference for land-based missiles, could result in the loss of as much as ninety percent of the United States' ICBM force in a Soviet first-strike.³³³ Thus, the critical importance to the United States of its SLBMs and the nuclear powered submarines that carry them is clear. The difficulty the United States' bomber force might encounter in getting airborne³³⁴ and then attempting to penetrate Soviet air space,³³⁵ further heightens the importance

327. Frye, *Strategic Build-Down: A Context for Restraint*, 62 FOREIGN AFF. 293, 296 (1983-1984).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Reflections on the Quarter*, *supra* note 117, at 253.

334. See 1979 ACIS, *supra* note 4, at 69 (suggesting that only about 30% of the United States bomber force would survive a Soviet surprise attack).

335. See Rummel, *Will the Soviet Union Soon Have a First-Strike Capability?*, 20 ORBIS: J. WORLD AFF. 579, 584-86 (1976) (suggesting that United States bombers may not be able to penetrate Soviet airspace). Notwithstanding difficulties in penetration, cruise missiles may give the United States the ability to strike hardened Soviet targets, such as ICBM silos, see

of American SLBMs.

The roughly 5,000³³⁶ strategic nuclear warheads on the United States' SLBM force are carried by a fleet of thirty-three ballistic missile launching nuclear powered submarines (SSBNs).³³⁷ Thirty-one of these are Poseidon SSBNs armed with sixteen missiles apiece,³³⁸ and two are Ohio-class Trident SSBNs³³⁹ able to fire twenty-four missiles apiece.³⁴⁰ The Trident SSBNs carry Trident I (C-4) missiles which have eight warheads each³⁴¹ and a range of approximately 4,000 nautical miles.³⁴² Twelve of the thirty-one Poseidon SSBNs have been retro-fitted to carry Trident I (C-4) missiles.³⁴³ The remaining nineteen Poseidons carry the Poseidon C-3 missile,³⁴⁴ which has ten warheads³⁴⁵ and a range of approximately 2,500 nautical miles.³⁴⁶ Since approximately fifty-five percent of the United States' SSBNs are out of port at any one time,³⁴⁷ roughly 2,400 of the strategic nuclear warheads deliverable by its SLBMs would be exposed to any risks created by a Soviet ASW system deployed on America's continental shelf. Of that number, only those atop Trident I (C-4) missiles would have a chance of hitting from home-port anything more than the northeasternmost tip of Siberia.³⁴⁸ The

Vershbow, *The Cruise Missile: The End of Arms Control?*, 55 FOREIGN AFF. 133, 137 (1976), from locations beyond the range of Soviet air defenses. (Since the bombers which carry cruise missiles may be significantly more vulnerable than long-range ballistic missiles, see 1979 ACIS, *supra* note 4, at 67-69, the United States should not rely too heavily on air-launched cruise missiles to deter a Soviet first-strike threat.)

336. One source lists the precise figure at 4,960. See STOCKHOLM INT'L PEACE RESEARCH INST., 1983 Y.B. WORLD ARMAMENTS & DISARMAMENT 48, table 3.1 [hereinafter cited as SIPRI 1983].

337. *Id.* at 53.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 48, table 3.1.

342. 1980 ACIS, *supra* note 4, at 46.

343. SIPRI 1983, *supra* note 336, at 53.

344. *Id.*

345. *Id.* at 48, table 3.1.

346. See Lindsey, *The Future of Anti-Submarine Warfare and its Impact on Naval Activities in the North Atlantic and Arctic Regions*, in NEW STRATEGIC FACTORS IN THE NORTH ATLANTIC 139, 150 (C. Bertram & J. Holst eds. 1977).

347. 1979 ACIS, *supra* note 4, at 104.

348. See R. Zedalis, *Foreign State Military Use*, *supra* note 5.

heavily populated and industrialized south and southwestern portions of the Soviet Union lie beyond the range of any American SLBMs launched from home-port.³⁴⁹

International law may authorize the use of force to remove a Soviet ASW system emplaced on America's continental shelf without demanding that all or a substantial part of all of the three legs of the United States' strategic triad be subject to destruction as a result. If the right of reprisal exists under contemporary international law, the United States need show only that necessity requires that the threatening system be removed. Although the doctrine of anticipatory self-defense is considerably more stringent than the reprisal standard, the United States would only need to show that the Soviet ASW system posed an imminent threat of attack to justify removal efforts. As a prelude to a discussion of whether ASW deployment would be sufficient to warrant invocation by the United States of the rights of reprisal or anticipatory self-defense, an examination of current ASW detection and weapons technology is set forth below.

2. *Advanced ASW Technology*

The most advanced and modern ASW systems are those possessed by the United States.³⁵⁰ Nevertheless, it would be unrealistic to think that the Soviets will be unable to match the U.S. systems after a reasonable period of intense research and development.³⁵¹ Thus, caution seems to dictate that one should assume that whatever advanced technology now exists is the technology the Soviets would employ in putting their ASW system in place.

Several kinds of detection devices would likely make up an integral part of a Soviet ASW system, including: low-light level television,³⁵² infra-red line scan,³⁵³ radar sensor,³⁵⁴

349. *Id.*

350. *Id.*

351. The Soviets apparently seek major breakthroughs rather than incremental advances in almost all areas of military technology. For discussion on U.S. apprehensions regarding a Soviet ASW system, see 1979 ACIS, *supra* note 4, at 106.

352. *Id.* at 108; SIPRI 1974, *supra* note 4, at 308, 310.

353. 1979 ACIS, *supra* note 4, at 106.

354. SIPRI 1974, *supra* note 4, at 308.

magnetic anomaly detection,³⁵⁵ active and passive sonobuoy,³⁵⁶ and dipping sonar.³⁵⁷ Although a rapidly deployable moored surveillance system is currently being developed, the basic seabed-based listening system at the present time is the acoustic detection array.³⁵⁸ The Soviets could conceivably construct a series of linked self-powered detec-

355. *Id.* at 309, 313.

356. *Id.* at 308-10, 313.

357. Dipping sonar is carried by the Sea King SH-3 series helicopter. *See* K. TSIPIS, *supra* note 4, at 24-25 & app. 1, table 1, A(3).

358. This system functions by means of detectable sound emitted or reflected by submarines. Passive arrays are those which simply detect sound emissions; they have been estimated to pick up sound generated by the cavitation and turbulence of a submarine as far away as 100 miles. *See* Brown, *Military Uses of the Ocean Floor*, in *PACEM IN MARIBUS* 285, 288 (E. Borgesse ed. 1972). Some authorities, however, set the range of detected sound at 100 kilometers. *See* SIPRI 1974, *supra* note 4, at 307. The passive device consists of hyper-sensitive hydrophones or listening instruments which detect sound emissions generated by moving vessels, and then relay the detected emissions to an awaiting computer analysis unit which distinguishes the ambient ocean noise from meaningful signals and attempts to identify the nature of the moving object. *See* SIPRI 1974, *supra* note 4, at 316-17.

Arrays which detect reflected sound are termed active systems. Active arrays are equipped with electromechanical generators, known as transducers, which propagate sound waves, and hydrophones, which listen to detect any reflection of the sound waves, processing all information in a manner similar to that used by the passive system. Active arrays are estimated to have a range of about fifty miles. *See* Brown, *supra*, at 287. Unlike passive systems, active systems can compute the location of detected objects. Processing units accomplish this by triangulation and by measuring the time it takes for sound pulses to return to the hydrophones.

The principal acoustic detection arrays presently employed are the Sonar Surveillance System (SOSUS), *see generally* K. TSIPIS, *supra* note 4, at 29-30; the Azores Fixed Acoustic Range (AFAR), *see id.* at 30 & app. 1, table 1, A(5); and Sea Spider, *see id.* at app. 1, table 1, A(5).

The entire SOSUS system consists of several individual systems, each designed to monitor specific areas of ocean space. "Caesar," the original component of SOSUS, is emplaced on the continental shelf along the eastern seaboard. *See id.* A more advanced version, "Colossus," is located on the Pacific shelf off the west coast. *See* SIPRI 1974, *supra* note 4, at 317. "Barrier" and "Bronco," systems similar to those scanning the two seaboard, are believed to be deployed beyond the coasts of the United States' allies. *See* K. TSIPIS, *supra* note 4, at app. 1, table 1, A(5).

AFAR consists of several sonars mounted on top of three or more 130-meter high towers, each spaced thirty-five kilometers apart and submerged off the southernmost islands of the Azores group in water 300 to

tion arrays, which might permit continual surveillance of conventional and nuclear powered submarines located anywhere on the United States' continental shelf.³⁵⁹

Detection is but one part of an ASW system; a second critical component is a complementary weapons system. The basic weapons systems now in operation include depth charges, antisubmarine rockets, antisubmarine torpedoes, submersible antisubmarine mines, and Captor (encapsulated torpedo).³⁶⁰ While the exact capabilities of these weapons are classified, reports suggest that they may be quite astounding.³⁶¹ Many of the depth charges, rockets, and torpedoes are, or are capable of being, armed with nuclear explosive devices.³⁶² Some have target ranges in the area of 50,000 meters and diving abilities of up to 1,000 meters.³⁶³

The seabed-based weapons now most often in use, submersible antisubmarine mines and encapsulated torpedoes, have less impressive capabilities. The submersible mine has a range limitation of approximately thirty fathoms.³⁶⁴ It is activated by either fluctuations in hydrostatic pressure³⁶⁵ or changes in surrounding magnetic or acoustic energy levels.³⁶⁶ Captor is a new and sophisticated form of mag-

600 meters deep. Its principal task is to keep track of submarines entering and leaving the Mediterranean.

Sea Spider is a much more ambitious system. It is basically a passive acoustic submarine detection unit composed of a single hydrophonic listening device three meters in diameter and anchored by three cables at a depth of approximately 5,000 meters. The entire unit is reported to be powered by a nuclear battery and stationed a few hundred miles north of Hawaii. In 1969 the Navy attempted unsuccessfully to install such a system. Reports that it later succeeded have not been confirmed.

359. See R. Zedalis, *Foreign State Military Use*, *supra* note 5.

360. K. TSIPIS, *supra* note 4, at 48, app. 1, table 2.

361. *Id.*

362. See Zedalis, *Military Uses of Ocean Space*, *supra* note 6, at 590 n. 70-72.

363. See *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings Before the Subcomm. on Research and Development of the Senate Armed Services Comm.*, 96th Cong., 2d Sess. 3102-06 (1980) [hereinafter cited as 1980 DOD Hearings].

364. Brown, *supra* note 358, at 289.

365. Depression mines rest on, or are secured to, the sea floor. Unlike physical contact mines which explode upon impact, depression mines depend on fluctuations in the hydrostatic pressure.

366. Magnetic acoustic mines also rest on, or are secured to, the sea

netic/acoustic submersible antisubmarine mine.³⁶⁷ Various technological innovations have been integrated to give it the ability to detect an enemy submarine, release itself from a mooring capsule, and then propel itself to its targeted destination. It is believed that Captor may be deployed by airplane, surface ship, or submarine.³⁶⁸ Captor's sensor acquisition radius, however, is only about one kilometer.³⁶⁹ Nevertheless, this self-activated antisubmarine weapon does pose a threat to conventional and nuclear powered submarines.

3. *Assessment*

Undoubtedly, the United States would not tolerate the presence on its continental shelf of Soviet detection devices or seabed-based weapons similar to those described above.³⁷⁰ Since these objects would lie defenseless below the opaque cover of the ocean, removal would most likely be undertaken anytime the effort could be assured of escaping detection. If one accepts the idea that such removal does not involve the use of force, the United States would not need to rely on the rights of reprisal or anticipatory self-defense to justify its actions. Even where likely to meet with Soviet resistance, removal may nevertheless be advised if U.S. decisionmakers conclude that U.S.-U.S.S.R. relations could withstand the strains removal might produce.

If, on the other hand, U.S. decisionmakers determine that U.S.-U.S.S.R. relations are already overburdened by other crises, and it is concluded that removal of Soviet ASW devices and weapons may push the superpowers to the breaking point, the decisionmakers would probably advise against removal. The only case of this sort in which removal might be advised would involve the conclusion that the existing crises already held out the possibility of conflict. In

floor. Changes in the surrounding magnetic or acoustic energy levels activate them.

367. See 1979 ACIS, *supra* note 4, at 108.

368. See 1980 DOD Hearings, *supra* note 363, at 311.

369. See K. TSIPIS, *supra* note 4, at 33.

370. M. MCDUGAL & W. BURKE, *supra* note 5, at 724. The United States' involvement in the Bay of Pigs invasion and the quarantine of Cuba also demonstrate U.S. intolerance to threats posed close to national borders.

that case, the rationale for removal would be to assure that the United States entered the inevitable conflict with an improved military position.

Assuming the existence of a right of reprisal, a refusal by the Soviet Union to remove a Soviet ASW system from the United States' continental shelf would probably constitute "necessity" sufficient to permit the use of force in removal efforts by the United States. Many analysts believe that the strategic balance is sensitive to the slightest variations in force levels caused by weapons able to threaten the retaliatory capability of an opponent.³⁷¹ A Soviet ASW system as described above could make some American SSBNs within home-port waters vulnerable to a surprise attack. The fact of Soviet knowledge of the location of a significant number of American SSBNs poses a direct threat in its own right.³⁷² Although the range limitations of the seabed-based weapons would prevent them from destroying SSBNs while in port, Soviet vessels located outside American territorial waters and armed with long-range antisubmarine rockets and torpedoes would not be so constrained. Using the location information supplied by ASW detection devices, such weapons could be targeted to destroy American SSBNs in port. If the American SSBNs attempted to cross the United States' continental shelf to reach launch locations in the Atlantic, Pacific, and Indian Oceans, the seabed-based weapons of the ASW system would pose a direct threat.

Under the law of anticipatory self-defense, the United States would be required to demonstrate that a Soviet ASW system posed an imminent threat of attack, leaving "no moment for deliberation."³⁷³ In the absence of this, the use of force to effect removal would not be justified. A showing of this sort would be difficult to make during periods of relative tranquility. Scholars have suggested that a preemptive strike against Soviet ICBMs might be justified only during the minutes immediately prior to an incontrovertibly demonstrated

371. 1979 ACIS, *supra* note 4, at 108.

372. See R. ALDRIDGE, *supra* note 106, at 51 (quoting the Director of the Defense Department's Advanced Research Projects Agency (DARPA)).

373. See Letter from Mr. Webster to Mr. Fox, *supra* note 56.

launch of those Soviet missiles.³⁷⁴ Thus, how could the United States maintain credibly that a Soviet ASW system poses an imminent threat of attack justifying the use of force to effect removal? The threat of destruction from an ASW system is much more speculative than that from ICBMs. That removal may nonetheless be advised as a matter of military policy in such situations suggests an inconsistency between the current legal standards governing anticipatory self-defense and expected state behavior.

By contrast, anticipatory self-defense may justify removal by force when U.S.-U.S.S.R. relations are marked by tension and animosity. As discussed above, Soviet knowledge of SSBN locations obtained by ASW detection devices may pose an imminent threat of attack to the United States when that knowledge is relayed to armed Soviet vessels. Therefore, unless effective countermeasures are in place, anticipatory self-defense would seem to justify U.S. efforts to remove the ASW devices. From a practical vantage point, however, removal efforts would likely intensify already strained relations between the superpowers, and might, therefore, be unwise.

That a threat of attack is not "imminent" when the superpower relationship is not burdened by other crises should not be seen as paradoxical. The mere deployment of a Soviet ASW system, even if violative of international law, does not necessarily create sufficiently grave concerns to warrant invocation of anticipatory self-defense. Soviet SSBNs armed with nuclear missiles navigate just off the United States' coasts all the time. The presence of these vessels poses a far greater threat to the United States than an ASW system does.³⁷⁵ Were they to unleash their fury, the SSBNs could

374. Cf. L. HENKIN, *supra* note 22, at 142-45; J. STONE, *OF LAW*, *supra* note 23, at 8-9.

375. See R. Zedalis, *Foreign State Military Use*, *supra* note 5. This Article indicates that ballistic missile launching submarines are relatively invulnerable and, because of their less accurate guidance systems, incapable of being used as first-strike weapons. Thus, SSBNs serve to strengthen state security. To the extent that ASW weapons and devices threaten SSBNs, they threaten stability. As a result, it is not incongruous to view ASW activities as a greater threat than SSBN activity. International law of the sea contains prescriptions reflecting the relative desirability of each of these two uses. *Id.*

deliver well over 100 nuclear warheads with pinpoint accuracy, killing millions and inflicting widespread devastation on the U.S. industrial complex.³⁷⁶ Yet few would suggest that the United States would be justified in striking those submarines during a relatively tranquil period. Thus, in the absence of tensions creating a reasonable apprehension of the imminence of an attack guided and controlled by a Soviet ASW system, the violation of international law arising from the deployment of such a system would likely not be redressable by force.

VII. CONCLUSION

This Article has not considered whether the principle of military necessity reflected in the "laws of war," as opposed to the principles of reprisal or anticipatory self-defense, which regulate the use of force during times governed by the "laws of peace," more appropriately fits the current state of relations between the superpowers.³⁷⁷ Continuing ideological hostility, astronomical defense budgets which greatly outstrip those of earlier wartime eras, and occasional military confrontation through surrogates lend a logical appeal to claims of this sort. Similarly, this Article has not discussed the jurisprudential questions connected with prescriptions designed to regulate the behavior of members of the world community. The absence of centralized sanctioning for violations of international rules raises this issue whenever the topic of international "law" is addressed. Any truly comprehensive study of the topic dealt with herein would require equal attention to both of these important items.

The objective of this Article has been to consider the

376. See Weinland, *The State and Future of the Soviet Navy in the North Atlantic*, in *NEW STRATEGIC FACTORS IN THE NORTH ATLANTIC* 55, 62 (C. Betram & J. Holst eds. 1977) (3-5 Delta class SSBNs on patrol in Atlantic at any one time); R. Zedalis, *Foreign State Military Use*, *supra* note 5, at nn.445-59 (number of warheads Delta-class submarines can deliver). Notice that no reference has been made to the destructive capability of Soviet SSBNs in the Pacific.

377. Cf. Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 *AM. J. INT'L L.* 72, 76-79 (1970) (regarding Israel's 1968 raid on the Beirut Airport, the author notes a distinction between the principle of military necessity and those governing reprisal and anticipatory self-defense).

remedies available under international law for violations of arms control agreements. The analysis has focused on the "Star Wars" space-based BMD system and a continental shelf-based advanced ASW network. The Article has argued that, with one possible exception,³⁷⁸ a state can justify its use of force to end military uses violative of various international conventions only by means of the exceptional principles.

The customary right of reprisal could provide justification for the removal of a space-based BMD system or a shelf-based ASW system. Reprisal, however, is no longer recognized as a right under contemporary international law. Nonetheless, the policy reasons supporting this interpretation of the status of the law have not been adequately developed.

Anticipatory self-defense remains as valid an alternative justification now as it was before the adoption of the United Nations Charter. Support for the right can be found in both sound legal and policy bases. The standard of imminent threat of attack, leaving "no moment for deliberation," was formulated during a period when no one could have envisioned defensive systems able to achieve the same objectives as offensive weapons. Moreover, given the language used to express the standard, the standard fixes a considerable burden on a state seeking to demonstrate legitimate reliance on the right. Any Soviet effort to prevent deployment of an American space-based BMD system would raise novel and important questions that would mark the course of future international law.

Ultimately, Soviet efforts to prevent deployment of an American space-based BMD system seem unable to satisfy the rigorous anticipatory self-defense standard. American efforts to remove a Soviet ASW network based on the United States' continental shelf, on the other hand, may meet the current anticipatory self-defense standard, but only during times of intense crisis. Even then, there are probably few instances when military decisionmakers would actually advise removal.

378. This possible exception is the clandestine removal of objects left unprotected by the deploying state.

