The Legality of Coercive Arms Control

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I. INTRODUCTION

On June 7, 1981 the Israeli air force bombed the Iraqi nuclear complex at Tuwaitha.¹ The attack was strongly condemned by the U.N. Security Council as a “clear violation of the Charter of the United Nations and the norms of international conduct.”² Nearly ten years after voting to condemn

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the Israeli raid, the United States struck at the same target. Unlike the Israeli raid, the American action was not denounced by a Security Council resolution.

The absence of any Security Council action denouncing the American raid is particularly striking in light of the language of Resolution 678, which authorized military action against Iraq. While the United States made Iraq's nuclear ambitions, as much as Iraq's annexation of Kuwait, a justification for the use of military force during the fall of 1990, the Security Council made no mention of Iraq's nuclear weapons program in its resolution sanctioning military action against Iraq. Resolution 678 only authorized member nations to "use all necessary means" to force Iraq to withdraw from Kuwait and to "restore international peace and security."5

Not only did the Security Council never condemn the American raid on Tuwaitha, but subsequently, it actually endorsed the strike through actions that made the raid itself seem insignificant. As part of its terms to end the war, the Security Council ordered Iraq to destroy all manufacturing capabilities for the production of nuclear, chemical, and biological weapons, as well as those for ballistic missiles. While Iraq's nuclear and biological weapon programs may have violated its treaty obligations, its possession of chemical weapons and ballistic weapons was not prohibited by international law. The Security

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4. In trying to rally public support for its stand against Iraq, the Bush administration initially stressed the economic consequences of Iraq's control over Kuwait's oil, but did not mention Iraq's unconventional weapons capability. See James Baker, America's Stake in the Persian Gulf, 1 DEP'T ST. DISPATCH 69 (1990). However, finding strong public support for a tough non-proliferation approach toward Iraq, the Bush administration altered its strategy and identified Iraq's unconventional weapons capability as the preeminent danger. See James Baker, Why America Is in the Gulf, 1 DEP'T ST. DISPATCH 235 (1990); McGeorge Bundy, Nuclear Weapons and the Gulf, FOREIGN AFF., Fall 1991, at 83, 89.


8. When Resolution 678 was adopted, only the use of chemical weapons was prohibited by international law. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 25 U.S.T. 571, 94 L.N.T.S. 65. The Chemical Weapons Convention was only opened for signature on January 13, 1993, and as of this writing, Iraq has not yet become party to it. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800
Council's blanket demand that Iraq be prohibited from manufacturing weapons of mass destruction, regardless of Iraq's actual international legal obligations, provided an ex post facto stamp of approval of the American raid on Tuwaitha.

In the aftermath of the Gulf War, scholars and diplomats are left with a critical question: has the Security Council, by omission and commission, ushered in a new world order, an order where "coercive arms control" is both a legal and legitimate instrument of statecraft? By "coercive arms control," I mean the use or threatened use of military force (as opposed to other types of diplomatic measures or economic sanctions) to either eliminate or restrict the production or deployment of certain classes of weapon systems.9

The starting point in finding an answer to this question is Article 2(4) of the U.N. Charter, which requires all members of the United Nations to "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."10 Its drafters

In regard to ballistic missiles, the only relevant international law is the Missile Technology Control Regime (MTCR), which merely seeks to control the export of long-range (more than 300 kilometers) ballistic missile equipment and technology. See Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles, Exchange of Letters Between Canada, France, Federal Republic of Germany, Italy, Japan, United Kingdom, and the United States, Apr. 7, 1987, 26 I.L.M. 599. The seven original members of the MTCR have been joined by Australia, Austria, Denmark, Finland, Greece, Luxembourg, the Netherlands, Norway, New Zealand, Portugal, Sweden, and Spain. Argentina, the People's Republic of China, Israel, and Russia have agreed to apply MTCR standards in the export of missile technology.


Coercive arms control can be distinguished from "preemptive war" and "preventive war." Preemptive war is initiated in response to the threat of an attack that is perceived to be imminent. As one political scientist puts it, "the choice is between war right now and war in the immediate future, between a war one's own state starts and a war the other side initiates." ROBERT JERVIS, THE MEANING OF THE NUCLEAR REVOLUTION 137 (1989). A classic example of a preemptive war is the 1967 Arab-Israeli War. See infra part III.B.2.a. Preventive war is a strategic response to a perceived long-range threat. Historian Michael Howard has observed that the causes of preventive war are "rooted . . . in perceptions by statesmen of the growth of hostile power and the fears for the restriction, if not extinction, of their own." MICHAEL HOWARD, THE CAUSES OF WARS AND OTHER ESSAYS 18 (1983). The preeminent example of a preventive war is the Peloponnesian War, which broke out because Sparta feared the rising power of Athens. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 49 (Rex Warner trans., 1954) ("What made war inevitable was the growth of Athenian power and the fear which this caused in Sparta.").

In contrast, coercive arms control is characterized by the use of military force directed solely at the targeted state's deployed forces or production capabilities. Needless to say, an act of coercive arms control could certainly lead to a wider use of force, including full-scale war, but that is not its political objective. While an act of coercive arms control may share some of the same concerns that lie behind a decision for preventive war, its aims and the means employed are much more limited. Thus, what distinguishes coercive arms control from preventive war is a focused, discrete use of force for a limited set of political objectives.

10. U.N. CHARTER art. 2, ¶ 4. Article 2(4), in its concern with the use or threatened use of force, goes well beyond the 1928 Kellogg-Briand Pact, which only outlawed "war." Treaty for the Renunciation of War (Kellogg-Briand Pact), Aug. 27, 1928, art. 1, 46 Stat. 2343, 94 L.N.T.S. 57. For more on the
permitted only two exceptions to this prohibition on the recourse to military action: use of force authorized by the Security Council, or use of force in self-defense. Article 2(4) sets guidelines for states on the use of force against other states, whether under conditions of war or under other scenarios. Despite the considerable scholarly debate surrounding Article 2(4), this Essay assumes that it is still good law. The principal reason for such an assumption is that Article 2(4) provides the strictest standard for determining the legality of coercive arms control. If coercive arms control is legal under the explicit terms of Article 2(4) and its exceptions, then it will certainly be legal under a more permissive regime regarding the use of force.

This Essay argues that coercive arms control is legal and has been legal since the 1960s under either exception to the U.N. Charter's prohibition on the use of force. Part II addresses the exception allowing the collective exercise of coercive arms control under the U.N. Charter. It examines the theory underlying this exception in Section A, the operation of the exception in practice in Section B, the Gulf War as a legal precedent for coercive arms control under the exception in Section C, and the use of the Gulf War as a meaningful legal precedent for coercive arms control under the exception in Section D. Part II concludes by assessing the potential for future coercive arms control actions. Part III addresses coercive arms control under the self-defense exception to the U.N. Charter. Its organization mirrors that of Part II. This Essay concludes that the significance of Resolution 678 is not that it legitimized the Security Council’s power to find a state’s military capability a threat to international peace and security. The Security Council already had such broad discretionary power under the Charter. Rather, Resolution 678 signifies that states now have the authority to engage in coercive arms control with only the most minimal requirements.


11. Technically, there are two other exceptions. First, Article 106 allowed the current five permanent members of the U.N. Security Council to take joint military action prior to the establishment of the Security Council. U.N. Charter art. 106. Second, under Articles 53 and 107, states are permitted to take actions against "any enemy state" of the Second World War. Id. arts. 53, 107.

12. Id. art. 42.

13. Id. art. 51.


15. See Arend, *Shift in Paradigms*, supra note 14, at 6-37 (arguing that Article 2(4) is no longer authoritative or controlling as international law, and that Article 2(4) has been replaced by more permissive "post-Charter self-help paradigm" on use of force, which permits military action to carry out just reprisals, correct past injustices, or promote self-determination).
II. COERCIVE ARMS CONTROL UNDER THE CHARTER’S EXCEPTION FOR UNITED NATIONS–SANCTIONED ACTIONS

Part II of this Essay examines the theory of collective security embedded in the U.N. Charter and of state practice as it has evolved in the four decades between the Korean War and the Gulf War. The weight of evidence favors the conclusion that Resolution 678 was consistent with procedures established in the Charter and was, therefore, legal as a collective exercise of coercive arms control. However, this Part concludes that Resolution 678 is not a meaningful precedent for future action because of the unique circumstances under which it was adopted and because of the United Nations’ institutional weakness.

A. The U.N. Charter and Collective Security in Theory

It has been asserted that the “U.N. Security Council has both the judicial authority and moral suasion to sanction the elimination of doomsday weapons in the hands of irresponsible members of the international community.”16 Certainly, the expansive language of Article 1 of the Charter implicitly recognizes a legal authority theoretically broad enough to embrace coercive arms control. Article 1 states that the United Nations’ fundamental purpose is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”17

Chapter VII of the Charter specifies how the United Nations is to exercise this broad authority.18 Article 39 provides:

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.”

Article 39 is a grant of wide discretionary power to the Security Council. The drafters of the Charter did not offer precise definitions as to what constitutes a “threat to the peace,” a “breach of the peace,” or an “act of aggression.”20 Although the U.N. General Assembly eventually reached a rather limited definition of aggression,21 the Security Council is not bound by it. Indeed,

16. Lewis & Joyner, supra note 9, at 306.
17. U.N. CHARTER art. 1, ¶ 1; id. art. 24, ¶ 1 (granting the Security Council “primary responsibility for the maintenance of international peace and security”).
18. Id. arts. 39-51.
19. Id. art. 39.
given the history of the Security Council, one strongly suspects that any
definition these terms might have is entirely subjective. To date, the Security
Council has yet to identify a single “act of aggression.”\textsuperscript{22} Even in the case
of Iraq’s invasion of Kuwait, the closest the Council came to identifying an
“act of aggression” was in Resolution 667, which strongly condemned the
“aggressive acts perpetrated by Iraq against diplomatic premises and personnel
in Kuwait.”\textsuperscript{23} The invasion, occupation, and annexation of Kuwait, however,
were not branded “acts of aggression.”

The organizational ethos guiding the Security Council is the peaceful
resolution of disputes. Consequently, once the Security Council has identified
a threat to international peace and security, Article 41 of the Charter places
at its disposal the widest possible array of non-military sanctions to encourage
an end to the crisis.\textsuperscript{24} If the Council deems sanctions available under Article
41 to be insufficient, it may order military sanctions under Article 42.\textsuperscript{25}
Under Article 40, it may also take “provisional measures.”\textsuperscript{26}

In short, the Security Council is granted powers theoretically expansive
enough to identify the development, production, and deployment of certain
weapon systems as a threat to international peace and security, and respond
in whatever manner it deems appropriate.

\textsuperscript{22} Goodrich, supra note 20, at 299 (discussing reluctance of Security Council to find act of
aggression in Korean War). It took the Security Council seven years before it considered the Iran-Iraq War
a breach of the peace sufficient to warrant consideration under Chapter VII of the Charter. Resolution 598
deplored the continuation of the conflict, as well as the use of chemical weapons, and demanded an
immediate ceasefire along with the withdrawal of all forces to internationally recognized borders. S.C.


\textsuperscript{24} 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.

\textsuperscript{25} Article 42 provides:
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 actions may
include demonstrations, blockade, and other operations by air, sea, or land forces of Members
of the United Nations.

Id. art. 42. As with Article 41 sanctions, actions mandated by the Security Council under Article 42 are
binding on member states. See id. art. 48.

\textsuperscript{26} Article 40 provides:
In order to prevent an aggravation of the situation, the Security Council may, before making
the recommendations or deciding upon the measures provided for in Article 39, call upon the
parties concerned to comply with such provisional measures as it deems necessary or
desirable. Such provisional measures shall be without prejudice to the rights, claims, or
position of the parties concerned. The Security Council shall duly take account of failure to
comply with such provisional measures.

Id. art. 40.
Despite its broad mandate for ensuring international security, the Security Council was handicapped almost from its first days by the great power rivalry between the United States and the Soviet Union. Deadlocked by the frequent use of the veto power, the Security Council was frozen into a powerless "adolescence." Even the formal mechanisms by which the Security Council was to impose military sanctions fell victim to the Cold War. The negotiations over implementation of Article 43, under which U.N. members were to conclude special arrangements with the Security Council to furnish military contingents for Council use, broke down in 1947. The Military Staff Committee, which was to coordinate the use of such forces, itself amounted to a hollow shell and met "only as a matter of form." In fact, prior to the Gulf War, the Security Council authorized the use of military force only once, during the early days of the Korean War.

In late June and early July of 1950, the Security Council passed three resolutions that committed the United Nations to war on the Korean peninsula. The most important of these actions was Resolution 83, which recommended that member states render assistance to South Korea in order to repel North Korea's armed attack and to restore peace. Although Resolution 83 was the sole precedent for collective coercive arms control prior to Resolution 678, it was a notable precedent; it confirmed the broad discretion granted to the Security Council or to states acting under Security Council authority.

The language of Resolution 83 prefigured quite closely the language used to authorize military action against Iraq in Resolution 678. Resolution 83 recommended that member states "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." More important, as with Iraq forty years later, the language of the authorizing resolution permitted an extensive air campaign that went well beyond the minimum force necessary to "repel the armed attack." As with the later air campaign against Iraq, a host of economic targets was attacked in North Korea. Bridges, railroad marshalling yards, and tunnels were struck; manufacturing facilities, hydroelectric power plants, oil refineries, and communication centers were also bombed. Virtually anything that could conceivably aid the North
Korean (and later Chinese) war effort was targeted, as sometimes were things that could not.35

In short, when the Security Council has authorized military action to restore international peace and security, it has allowed member states to interpret that authority broadly. Yet, even though Resolution 678 may be consistent in its effects with Resolution 83, two questions remain: (1) did Resolution 678 set a legal precedent for more explicit coercive arms control actions in the future? and (2) if so, did it set a meaningful precedent?

C. The Gulf War: Legal Precedent for Coercive Arms Control?

It has been argued that, at worst, Resolution 678 exceeded the Security Council's powers under Chapter VII of the Charter,36 and at best, Resolution 678 was technically consistent with Chapter VII but legally questionable.37 Criticisms of Resolution 678 center around two central issues: (1) whether the Security Council moved too quickly to authorize military action, and (2) whether the Security Council delegated too much control over the eventual use of military force.38 As it will be seen, neither criticism is a serious challenge to Resolution 678's legality.

1. Resolution 678: Too Much, Too Soon?

The issue of whether the Security Council moved too quickly concerns the connection between Articles 41 and 42 of the Charter. As noted above,39 the Chapter VII formula requires, first, a determination that a breach has occurred under Article 39. Once the Security Council has determined that a breach has

35. One chemical complex in particular was targeted, not because it could aid North Koreans, but because it was believed to be supplying radioactive materials for the Soviet atomic energy program. Id. at 177 (describing General Douglas MacArthur's authorization of "special missions" against Hungnam chemical complex in July 1950).
39. See supra notes 18-26 and accompanying text.
occurred, it must either take non-military measures under Article 41, or it
must determine that such measures would be inadequate and then take any
necessary military measures under Article 42. If the Council proceeds
down the route of non-military measures first, as happened with Iraq, when
can the Council invoke Article 42 and authorize military measures?

By the clear language of Article 42, the Council must "consider" that the
non-military measures "would be inadequate or have proved to be
inadequate" in order to move to military measures. Is this a mere technical
requirement or is something substantive required? Although Resolution 678
did not explicitly state that the Security Council had found the Article 41
measures inadequate, such a finding may reasonably be inferred from the very
purpose of Resolution 678. Consequently, the issue is not whether the
Security Council made a technical "finding." Nor is the issue whether
economic sanctions would have eventually been successful in forcing Iraq
from Kuwait, since the language of Article 42 does not require actual
exhaustion of non-military measures. Rather the issue is whether the Security
Council waited long enough to determine that economic sanctions would be
inadequate.

Article 33 of the Charter calls for the settlement of interstate disputes first
by "negotiation, enquiry, mediation, conciliation, arbitration, judicial
settlement, resort to regional agencies or arrangements, or other peaceful
means of their own choice." The connection between Articles 41 and 42,
read in light of Article 33's admonition to exhaust all peaceful means of dispute resolution, suggests that having started down the Article 41 path, the Security Council was obliged to give sanctions a reasonable chance to work. This obligation for patience was particularly strong in the case of Iraq. First, the sanctions against Iraq were unprecedented in their complexity and comprehensiveness. Second, Iraq was particularly vulnerable to sanctions because of its dependence on oil exports and imports of most industrial goods. Third, such quick action with respect to Iraq stood in stark contrast to the Security Council's prior patience when economic sanctions were applied in other situations that threatened international peace and security, most notably against Rhodesia and South Africa. Finally, given the nature of sanctions, it takes time for even the most vulnerable of target countries to feel the effects. Since only four months had passed between the imposition of sanctions and the passage of Resolution 678, it could be argued that the Security Council violated an implicit, but substantive, requirement of the Charter by authorizing military force too quickly.

Other language in the Charter rebuts this assertion. Resolution 678 may not have been entirely consistent with the spirit of Article 33, which encourages negotiation and mandates an exhaustion of peaceful remedies, but it was entirely consistent with the Charter's fundamental purposes. Article 1 of the Charter calls for the maintenance of international peace and security

46. This very point was brought to the Security Council's attention by the representative from Yemen, who observed that "it is a little surprising that those who used to lecture us on the need to be patient for sanctions to work when they had to do with Rhodesia or South Africa are today in such a hurry to declare that those comprehensive and enforceable sanctions imposed on Iraq are simply not working." Provisional Verbatim Record, U.N. SCOR, 45th Sess., 2933d mtg. at 19, U.N. Doc. S/PV.2933 (1990).


44. Editorial, Choose Peace, 251 NATION 809 (1990) [hereinafter Choose Peace]; see also Gulf Hearings, supra note 5, at 121 ("All the evidence indicates that the world embargo against Kuwait is the most comprehensive in history.") (statement by Joseph Biden, U.S. Senator, quoting former Under Secretary-General for Special Political Affairs Brian E. Urquhart); id. at 124 ("We have 4 months of the best sanctions enforcement that has ever probably existed.") (statement of James Baker, Secretary of State).

45. Choose Peace, supra note 44, at 809. Urquhart's views were prefigured by two former chairmen of the Joint Chiefs of Staff, who, on November 28, 1990, just one day before Resolution 678 was approved, counseled patience to the Bush administration. See Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Armed Services Comm., 101st Cong., 2d Sess. 182-257 (1990) (testimonies of General David C. Jones and Admiral William J. Crowe, Jr.). The views of Jones and Crowe were reportedly shared by then Chairman of the Joint Chiefs, General Colin Powell. BOB WOODWARD, THE COMMANDERS 38-42 (1991).

through "effective collective measures for the prevention and removal of threats to the peace." Moreover, the preamble refers to saving "succeeding generations from the scourge of war," and the need to avoid armed force, "save in the common interest." In short, under the Charter's hierarchy of values, the effective removal of threats to peace takes precedence over the exhaustion of peaceful remedies in dispute resolution. Because threats to peace vary, the Council is empowered to respond at its discretion. Thus, the Security Council is empowered to take effective collective measures to restore international peace without waiting for peaceful resolutions to work. The Security Council was under no explicit or implicit obligation to wait to see if sanctions would force Iraq from Kuwait.

2. Resolution 678: Too Much Delegation?

Another, less ambiguous, legal problem casts a shadow on Resolution 678. Unlike Article 41, which provides that the Council "may call upon the Members" to apply non-military sanctions, Article 42 states that the Council "may take such action . . . as may be necessary." When this language is joined with the provisions under Articles 43 and 47, which allow for national contingents to be assigned to the Security Council and for a Military Staff Committee to be established, the clear implication is that the Security Council, not individual states, should organize and control any military action under Article 42. It is this element of control that separates the Charter from its predecessor, the Covenant of the League of Nations.

Although the provisions of Article 43 remain unfulfilled, in the past, the Security Council at least attempted to conform to Chapter VII provisions regarding the use of military force. In Korea, the Security Council established a U.N. command, although the command was delegated to the United Nations.
States. The Security Council did not retain even this degree of control in Resolution 678. The Resolution ignored the Military Staff Committee, despite a call for its use from Soviet President Mikhail Gorbachev. Such non-compliance with Chapter VII procedures led Secretary-General Pérez de Cuéllar to remark that the Persian Gulf War was not “a classic United Nations war in the sense that there is no United Nations control of the operations, no United Nations flag, [no] blue helmets. . . . The [Security] Council, which has authorised all this, is informed only after the military actions have taken place.”57 According to one observer, the “absence of Security Council control violated the requirements of Chapter VII.”58

Assuming that a violation did occur, does this violation render Resolution 678 illegal, or at least void, for the purposes of establishing a precedent for coercive arms control? Law, logic, and the legislative history of the Charter argue that it does not. The central premise underpinning this challenge to Resolution 678’s legality is that the U.N. Charter is a static, unchanging, and largely unchangeable document.59 This assumption runs contrary to the central tenets of international law. While the Statute of the International Court of Justice gives preference in its hierarchy of sources of international law to “international conventions,”60 none of its provisions restricts any change in the operation or interpretation of a particular treaty to those changes made by formal amendment. Indeed, not only is “international custom” an independent source of international law that may supersede international agreements,61 it may be used in the interpretation of treaties.62 In short, recognition that international law is formed by both the written word and the action of states is an acknowledgement of the inevitability of change.

56. Frank J. Prial, Crisis Breathes Life into a Moribund U.N. Panel, N.Y. TIMES, Sept. 6, 1990, at A20. Gorbachev had once before called for a revival of the Military Staff Committee. Paul Lewis, Soviet Announces Shift on U.N. Staff Demanded by U.S., N.Y. TIMES, June 4, 1988, at A1. The Military Staff Committee did meet shortly after sanctions were imposed. Paul Lewis, Confrontation in the Gulf: Security Council’s Military Panel Reviews Naval Efforts to Enforce Trade Embargo, N.Y. TIMES, Sept. 19, 1990, at A11. However, as with the actual war, the Committee played no role in coordinating the blockade. The failure to revive the Military Staff Committee for the war against Iraq was sharply criticized by a former U.N. senior official. Brian Urquhart, Learning from the Gulf, N.Y. REV., Mar. 7, 1991, at 34.


58. Quigley, supra note 36, at 28.

59. The U.N. Charter, like the U.S. Constitution, can be interpreted as an evolving, ever more revealing document. Of course, considerable scholarly debate exists about whether the U.S. Constitution should in fact be seen as a dynamic document. The “originalist” school of constitutional thought argues that the Supreme Court should not be in the business of constructing new rights, but instead should simply determine the original intent of the framers. See, e.g., ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971); Edwin Meese, III, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. TEx. L. REV. 455 (1986); Edwin Meese, III, Address, Construing the Constitution, 19 U.C. DAVIS L. REV. 22 (1985).

60. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(a).

61. See id. art. 38(1)(b) (listing “international custom” as source of international law).

The organs of the United Nations must adapt to changing circumstances. The Security Council may not always need to make formal determinations that Article 41 sanctions have been proven to be inadequate to invoke Article 42, or to exercise direct control over Article 42 enforcement actions. What may seem like "violations" can easily be seen under a different light as necessary and logical adaptations to a changing environment. At least one observer critical of Resolution 678's legality concedes that the resolution may constitute an entirely new and positive precedent in the United Nations' police action procedures: "[F]rom a perspective that welcomes strengthened UN policing opportunities and capabilities, including a Security Council positioned to act quickly and effectively, [the precedent of Resolution 678] may, if wisely fine tuned, prove salutary over the long run."64

Indeed, such an evolution would bring the Charter closer to the original intent of the drafters. The President of the United Nations Charter Preparatory Commission noted in 1945 that there was "general agreement as to the paramount importance of the Security Council being placed in a position to act quickly and effectively."65 He further added that "on the authority and ability of the Security Council to act with all possible dispatch and forcefulness, may very well depend at some future date, the security, the peace, and the very existence of the freedom- and justice-loving nations of the world."66

Moreover, the mere fact that the United States decided to act on the basis of Article 39, rather than on the self-defense provisions of Article 51, can be seen as an important affirmation of Resolution 678, and more broadly of Article 2(4).67 If Resolution 678 can be seen as an acceptable modification of the Security Council's procedures, why can it also not be seen as an acceptable expansion of the Council's scope of action to include coercive arms control? The notion that the Charter is an organic treaty with expandable

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64. Weston, supra note 37, at 522 (footnote omitted). While Weston questions Resolution 678's legitimacy, he does not conclude that it was illegal. Id. at 533.
67. As Professor Paul Kahn has noted:
From the perspective of creating an effective international legal regime regulating the use of force, the United States' action with respect to Iraq is particularly praiseworthy because a strong argument could be made in support of unilateral action under Article 51 of the Charter. . . . Arguably, the United States could have defended Kuwait and Saudi Arabia merely upon request from their governments. This exception for a unilateral recourse to force in "self-defense" has provided a large loophole through which much of the hope for the prohibition on the use of force in Article 2(4) has fallen over the last few decades. Yet another unilateral use of force, justified by reference to Article 51, would have done little to advance international law from self-serving rhetorical system to an actual restraint on the behavior of states.
functions is embedded in international law. In *Certain Expenses of the United Nations*, the International Court of Justice held that the U.N. General Assembly had the authority to develop and incur costs for peacekeeping forces even though such forces were not explicitly authorized in the Charter. As Judge Spender argued in that case,

> A general rule is that words used in a treaty should be read as having the meaning they bore therein when it came into existence. But this meaning must be consistent with the purposes sought to be achieved. Where, as in the case of the Charter, the purposes are directed to saving succeeding generations in an indefinite future from the scourge of war, . . . the general rule above stated does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers of the Charter.

In logic reminiscent of Justice Marshall’s in *McCulloch v. Maryland*, Judge Spender was articulating a doctrine of implied powers. Through such a doctrine, the United Nations can exercise implied powers in order to implement the purposes and functions of the organization as spelled out in the Charter.

Since the Charter was drafted and signed before Hiroshima, it is, to use John Foster Dulles’ words, “a pre-atomic age charter.” Given the tremendous destructive power of nuclear weapons, no one is likely to argue that the proliferation of such weapons should not fall within the purview of the Security Council simply because nuclear weapons were not known to the Charter’s drafters. This conclusion raises the organizing question of this Essay: are there circumstances under which a state or states can legally use force to respond to the development, production, deployment, or threatened use of unconventional weapons, such as nuclear weapons?

Resolution 678 answers this question affirmatively. If it is accepted that Resolution 678 was a legal exercise of the Security Council’s evolving authority, then it is but a short step to the conclusion that the American strike on Tuwaitha was consistent with Resolution 678. Resolution 678 authorized the United States and its coalition partners to use “all necessary means” to ensure Iraqi withdrawal and to “restore international peace and security in the area.” It requires very little imagination to see how reducing or destroying Iraq’s nuclear weapons infrastructure would contribute to international peace and security in the Gulf region. Unlike the U.S. Air Force’s strikes against retreating Iraqis in the last stages of the war, which were marked by gratuitous damage and loss of life, the strike at Tuwaitha cannot be

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69. *Id.* at 186 (separate opinion of Spender, J.).
70. 17 U.S. (4 Wheat.) 316 (1819).
73. S.C. Res. 678, *supra* note 5.
condemned as inconsistent with Resolution 678.\textsuperscript{74} The strike against Tuwaitha came early in the war, less than a week after the air war began, and was apparently discriminate and proportional in its methods.\textsuperscript{75}

Although a persuasive case can be made that Resolution 678 was a legal exercise of Security Council authority, a nagging question remains. In almost every area of substantive law some decisions, while never overturned, have been so extensively criticized and distinguished by subsequent decisions or are so tied to a particular set of facts that they cannot be said to offer any meaningful precedent. Consequently, it must be asked, how meaningful is Resolution 678 for future efforts at coercive arms control?

D. The Gulf War: Meaningful Legal Precedent for Coercive Arms Control?

By definition, a precedent is meaningful if it can encourage and guide similar action in the future. Under international law, an event can only encourage and guide future action if it possesses two elements: authority and control.\textsuperscript{76} First, it must be perceived by states to be authoritative,\textsuperscript{77} as possessing legitimacy.\textsuperscript{78} Second, the rule must be reflected in state behavior; it must be controlling.\textsuperscript{79} As Professors McDougal and Lasswell explain, "The conjunction of common expectations concerning authority with a high degree of corroboration in actual operation is what we understand by law."\textsuperscript{80} While a persuasive case can be made that Resolution 678 has authority, there are strong reasons to doubt whether it will ever be controlling. Two sets of reasons make it unlikely that Resolution 678 will serve as precedent for coercive arms control in the future. The first set concerns the uniqueness of the Gulf War. The second concerns the weaknesses of the United Nations as an institution.

1. Uniqueness of the Gulf War

The Gulf War was unique in at least five key aspects. The first was the triggering event. In 1990, as in 1950, what triggered a Security Council

\begin{itemize}
\item \textsuperscript{74} Quigley, supra note 36, at 15.
\item \textsuperscript{77} According to McDougal and Lasswell, "Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures." Id. at 9.
\item \textsuperscript{78} See THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (defining legitimacy as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe the rule or institution has come into being and operates in accordance with generally accepted principles of right process").
\item \textsuperscript{79} McDougal and Lasswell explain that "[b]y control we refer to an effective voice in decision, whether authorized or not." McDougal & Lasswell, supra note 76, at 9.
\item \textsuperscript{80} Id.
\end{itemize}
resolution authorizing the use of force was a brutal and utterly transparent act of aggression. Given the possibility of one state dominating the supply of oil from the Persian Gulf, the invasion of Kuwait was a particularly galvanizing act of aggression. Indeed, as four noted analysts observed, “One is hard pressed to recall a more unambiguous act of aggression that was so pregnant with dark possibilities by a large state against a small neighbor.” Such an egregious triggering event is unlikely in the future. Moreover, requiring such a trigger would defeat the implicit purpose of coercive arms control: to prevent an act of aggression. For coercive arms control to be effective, the use of force must be authorized before an act of aggression occurs. Yet such pre-aggression authorization is unlikely given the Security Council’s history of using the reactive, rather than proactive, approach.

Second, in 1990 the Security Council was incredibly lucky in its draw of an opponent: “It is hard to imagine a more clumsy or cynical villain” than Saddam Hussein. By taking hostage French diplomats and citizens from Kuwait, for example, Hussein assured French military participation in the campaign to drive Iraq from Kuwait. France otherwise might not have participated in the military coalition given its large Arab population and tradition of strategic individualism. Since coercive arms control is inherently a preventive action, there will typically not be an aggressive act around which to organize a collective response. There will also be no assurance of a single individual, let alone an inept one, who can be easily vilified to mobilize international and domestic support.

Third, as in 1950, the passage of a Security Council resolution authorizing military force was facilitated by events external to the crisis at hand. In 1950, it was the absence of the Soviet delegate, who was protesting the Security Council’s refusal to seat the delegate from Beijing as the representative of China. In 1990, although the delegates from the Soviet Union and the People’s Republic of China were both present for the debate

81. See Editorial, Is Anyone Really Safe in the Face of Such Aggression?, L.A. TIMES, Aug. 3, 1990, at B6 (“The aggression was undisguised, the greed was naked, the operation was swift, vengeful and effective. In just a few hours, Iraq’s dictator Saddam Hussein wolfed down all of Kuwait and sat back to gloat.”).


83. Id. The same observers remark:

In a bizarre attempt at crisis management just a few days after invading Kuwait, Saddam Hussein . . . poured gasoline on the fire he had ignited by detaining foreign nationals as “guests” of the Iraqi state. Three days after he began to take hostages and four days after he announced the “eternal merger” between Iraq and its long-lost nineteenth province, Saddam Hussein cloaked himself in the mantle of Palestinian nationalism by proclaiming that the resolution of the Kuwait crisis was inextricably linked with the Palestinian cause.

Id.

84. Strobe Talbott, Status Quo Ante: The United States and Its Allies, in AFTER THE STORM, supra note 82, at 3, 9-10.
on Resolution 678, their votes were influenced by other considerations. As one scholar has remarked, "Both the Soviet Union and China were so preoccupied with their own domestic problems, and with their relations with the West, that they were unwilling to exercise their veto power in the U.N. Security Council to defend a former client state." It is unlikely that either Russia or China will be dealing with events as momentous as the death of Communist rule or the massacre at Tiananmen Square when a resolution authorizing coercive arms control next comes before the Council.

Fourth, despite a naked act of aggression with wide-ranging consequences, a clumsy adversary, and distracted members of the Security Council, the coalition against Iraq did not come together of its own accord. The United States had to provide a number of inducements. These inducements took a number of forms but most involved money. To insur the dispatch of Egyptian troops to the Saudi desert, the United States canceled Egypt's foreign military sales debt. To insure the votes of the Latin American and African representatives on the Security Council, the United States reportedly promised long-sought financial assistance and attention. The price for China's abstention was U.S. support for a $114.3 million loan from the World Bank, and the resumption of normal diplomatic ties, which had been suspended since the Tiananmen crackdown. For Yemen, which voted against Resolution 678, the United States cut off $70 million in annual aid. While the use of carrots and sticks by the United States to pull together an international coalition was not unprecedented, the extent of the U.S. campaign was unusual. Few world events are likely to trigger such a commitment from the United States.

The U.S. inducements to gain Soviet support are particularly instructive. In order to secure Soviet support, the United States agreed to keep Estonia, Latvia, and Lithuania out of the November 1990 Paris summit conference on European security. In addition, the United States encouraged Saudi Arabia to provide Moscow with approximately $1 billion of much needed hard currency. While these inducements purchased an affirmative vote on Resolution 678, they did not buy a completely compliant Soviet Union. The

86. Kahn, supra note 67, at 433.
87. Memorandum on the Cancellation of Egyptian Military Debt, 27 WEEKLY COMP. PRES. DOC. 1 (Dec. 27, 1990); see also Lawrence S. Eagleburger, Proposal to Forgive Egypt's Foreign Military Sales Debt, 1 DEPT ST. DISPATCH 107, 107-09 (1990).
92. Friedman, supra note 90, § 1, at 1.
Soviet Union, in fact, refused to endorse the coalition's highly punitive plans for Iraq. Moreover, throughout the war, it offered Saddam Hussein terms much more generous than those offered by the Bush administration. The Soviet Union's independent diplomacy emphasizes an important and timeless adage in international politics: that two countries have reached an agreement says nothing about its content. As a consequence, any resolution authorizing coercive arms control will not materialize spontaneously, but will emerge from a highly political and visible process. The very visibility of this political process will alert the targeted state and jeopardize the success of any subsequent military action.

Finally, one needs to consider the distinctive military factors that ensured the success of the Gulf War, beginning with the fact that Iraq proved to be the most compliant of adversaries. As several experts noted,

Saddam Hussein did not attempt to interfere with the coalition's efforts to marshall and train its forces, to test, adjust, and make fully operational its high-tech weapon systems, and to work out the command and control links for a coordinated multinational campaign. Not only did the coalition have the luxury of months of unfettered preparation, but it was also able to decide when and where the coming battle would be fought. No less rare in the annals of far-flung military expeditions was a readily available infrastructure (ports, air bases, fuel, and pre-positioned equipment) to support the deployment of half a million men and women.

While future acts of coercive arms control would probably not require a military force of the magnitude deployed in the Gulf during Operation Desert Storm, they would probably require participation of more than one state's military forces. At a minimum, the executing state will most likely need passive military cooperation of other states in the form of overflight rights, staging areas, port facilities, and the like. As time goes on, it will most likely require the active cooperation of several states. The proliferation of advanced military capabilities, conventional as well as unconventional, means that the "risks of intervention are escalating substantially." While debate among Security Council members will make strategic surprise impossible, proliferation of surveillance and imaging systems will make tactical surprise less and less likely. The proliferation of precision-guided munitions, particularly cruise missiles, may make successful military interventions the exception and not the rule.

93. See Talbott, supra note 84, at 11-21.
94. Inman, supra note 82, at 267-68.
96. See generally COMMERCIAL OBSERVATION SATELLITES AND INTERNATIONAL SECURITY (Michael Krepon et al. eds., 1990).
97. See W. Seth Carus, Cruise Missile Proliferation in the 1990s (1992). Carus argues that recent breakthroughs in engine design and navigation technology have placed the production of accurate cruise missiles within the reach of many developing countries. Given that these weapons systems are well suited to the delivery of chemical and biological agents, the success of any intervention against a country armed with such weapons will be increasingly problematic.
2. Requirements for the Collective Exercise of Coercive Arms Control

Acknowledging the extraordinary nature of the circumstances surrounding Resolution 678 raises the question of whether a resolution authorizing the collective exercise of coercive arms control would materialize if there were no obvious act of aggression, no villain, no state willing and able to assume the burdens and risks of leadership, and no favorable military situation. Put differently, what does the United Nations need to change in order to ensure that collective coercive arms control will be undertaken when needed?

To guard against the vagaries of changing fortune and shifting international alignments, the United Nations will need to do at least four things, none of which will be easy. First, the United Nations will need to increase the scope of its jurisdiction over domestic matters. Under the Charter, the United Nations is not "to intervene in matters which are essentially within the domestic jurisdiction of any state." However, there is an exception to this prohibition: it "shall not prejudice the application of enforcement measures under Chapter VII [of the Charter]." In short, the United Nations can intervene in domestic affairs of any member state when international peace and security are threatened.

Increasing the United Nations' domestic reach may be the easiest of the four requirements. In recent years, the precedent for intrusive, multilateral monitoring of a state's unconventional and conventional military capacity has become well established. The agreements on intermediate-range nuclear forces (INF), conventional armed forces in Europe (CFE), strategic nuclear arms reductions (START), and the chemical weapons convention all contain elaborate verification provisions, including sustained on-site monitoring and challenge inspections.

Moreover, over the last few years, the Security Council has demonstrated a willingness to expand the boundaries of what constitutes a threat to international peace and security. The most significant expansion of the Council's international jurisdiction came at the expense of Iraq's sovereignty.

99. Id.
104. CWC, supra note 8, art. XXI.
In addition to Resolution 687, with its provisions for the forced disarmament of Iraq, the Security Council adopted Resolution 688, which dealt with Iraq’s repression of its Kurdish and Shiite minorities. Resolution 688 condemned the “repression of the Iraqi civilian population in many parts of Iraq,” demanded that Iraq “immediately end this repression,” and ordered Iraq to “allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operation.” The Security Council justified its intervention on the grounds that Iraq’s repressive acts led to a massive influx of refugees across international frontiers, which threatened international peace and security in the region. Such action by the Security Council was quite remarkable. As one scholar observed, “Even though human rights violations had been condemned before as threats to international peace and security, Resolution 688 marked the first time that the United Nations ordered a state to receive humanitarian assistance from international agencies.”

In the Somalian civil war, the Security Council took another step to enlarge the scope of actions it may undertake. In late November 1992, the United States offered to use military force to ensure the delivery of humanitarian relief to the Somalian people. In early December, the Security Council unanimously accepted the U.S. offer by adopting Resolution 794. It never used the word “force,” but clearly implied its use in language reminiscent of Resolution 678. “[A]cting under Chapter VII of the Charter,” the Security Council in Resolution 794 “authoriz[ed] the Secretary-General and Member States cooperating to implement the offer referred to . . . use all necessary means to establish as soon as possible a secure environment for humanitarian relief efforts in Somalia.” Unlike Resolutions 678 and 688, there was no identifiable act of state-sponsored aggression or repression. The absence of any traditional triggering event bodes well for the collective exercise of coercive arms control.

There is no assurance, however, that the Security Council will always define its authority in such broad terms. Despite widespread opposition to the military coup that overthrew Haitian President Jean-Bertrand Aristide and strong action by the Organization of American States, the Security
Council refused to take any meaningful action, reportedly due to a concern that the Security Council is "becoming increasingly involved in domestic issues that are the private affairs of member states." More recently, the Security Council has persistently refused to authorize military action to stop Serbian aggression in Bosnia or to stop the continued conflict between Armenia and Azerbaijan.

A second, and more difficult, task for the United Nations is to reconcile a tension in the Charter regarding the United Nations' role in conflict management. Under Chapter VI of the Charter, the Security Council performs the role of a neutral party that facilitates the peaceful settlement of disputes. Under Chapter VII, as discussed earlier, the Security Council becomes much more of a partisan player — identifying which party is a threat to international peace and security, and responding with a variety of military and non-military sanctions.

For most of its history, the United Nations has preferred the neutral role of "peacekeeper." However, as evidenced by the actions against Iraq, and more recently, in Somalia, it appears increasingly willing to play the role of "peacemaker." Coercive arms control will require that the United Nations play a partisan role to an even greater degree in the management of international conflicts. If the United Nations chooses the role of peacemaker, its ability to offer its services as a neutral arbiter might be affected. To carry out its role as an "honest broker," the United Nations must be perceived as a "truly disinterested party, rendering decisions based on established legal norms and entering the process without biases toward any of the disputants." Depending on who are the targets of authorized coercive arms control and how it is exercised, the United Nations will run the risk of destroying its reputation of neutrality. If the targets of United Nations—authorized coercive arms control actions tend to be from one region or from one end of the ideological/political spectrum, the United Nations will be seen as the creature of a few powerful states. Yet at the same time, only a few states are powerful enough to carry out coercive arms control actions on the United Nations' behalf. Moreover, they are unlikely to conduct such actions against each other.

The two other obstacles to the U.N. practice of coercive arms control are closely intertwined. For almost its entire history, the United Nations in general, and the Security Council in particular, have approached their mission in a reactive manner. The Gulf crisis illustrates this habit of reaction:

(recommending suspension of all economic and diplomatic ties with military government in Haiti).

114. See supra notes 18-26 and accompanying text.
115. See A. LEROY BENNET, INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES 107-14 (5th ed. 1988) (identifying 172 disputes that were considered by Security Council or General Assembly in 1946-88).
116. Arend, New World Order, supra note 107, at 504.
United Nations did nothing until after Iraq invaded Kuwait. Before August 2, 1990, despite the escalating rhetoric, the provocative military deployments, and the failure of the Arab League to resolve the crisis, the United Nations took no action. This penchant for responding to crises in an ad hoc fashion is anathema to coercive arms control with its ethos of prevention.

One reason that the United Nations has been able to practice only curative, and not preventive, medicine against threats to international peace and security is its institutional weakness. As noted earlier, the principal mechanisms for taking preventive action — the Article 43 military contingents and the Military Staff Committee — have been dormant since the United Nations' founding. According to some observers, this very weakness was responsible for the United Nations' poor performance in the Gulf crisis.

Some have argued that because of this institutional weakness, the United Nations not only forfeited the initiative during the Gulf crisis, it also forfeited its independence and neutrality.

One of the consequences of the Gulf War has been a deluge of proposals to make the United Nations more proactive, while at the same time preserving its independence from the manipulations of dominant states. Central to most of these proposals is the creation of a permanent U.N. military force that could be used preventively. The concept of such a force has found favor beyond the editorial pages and academic journals. At the Security Council's first summit at the level of heads of state and government in January 1992, five states, including two permanent members (France, Russia, Austria,
Belgium, and Hungary), explicitly endorsed the creation of a U.N. force. As a follow-up to the summit, Secretary-General Boutros Boutros-Ghali published a study detailing how the United Nations could more effectively ensure international peace and security. One of the most noteworthy aspects of his *An Agenda for Peace* was its call for the creation of “peace-enforcement units” under the command of the Secretary-General. The mission of these units, which would be more heavily armed than peacekeeping forces, “would be to respond to outright aggression, imminent or actual.” From the Secretary-General’s perspective, such an institutional change is critical to the future role of the United Nations: “[T]he option of taking [military action] is essential to the credibility of the United Nations as a guarantor of international security.”

Like many of the pundits who advocate the creation of an institutionalized military force for the United Nations, the Secretary-General believes that, with the end of the Cold War, the time is ripe for fulfillment of Article 43 and the utilization of the Military Staff Committee. But the past is more complicated than it may first appear. True, Article 43 was a victim of the Cold War, but it was also a victim of its own inherent ambiguities and difficulties. As the record of the Military Staff Committee’s work in 1946-47 shows, a number of serious, and potentially intractable, problems would accompany any attempt to create a peace-enforcement army for the United Nations. The same issues that bedeviled the Military Staff Committee in the late 1940s — command, control, basing, size, and equipment — would haunt the Security Council today. Of particular importance to effective coercive arms control is the size and sophistication of the proposed U.N. force, particularly its naval and air arms. If the force is small and possesses relatively unsophisticated weapon systems, a double standard may emerge because such a force would be able to compel adherence to arms control regimes by small states, but not large ones. If the U.N. force is large and sophisticated, two dangers emerge. The first is the obvious danger to any


123. Id. ¶ 44.

124. Id.

125. Id. ¶ 43.

126. Id. (“Under the political circumstances that now exist for the first time since the Charter was adopted, the long-standing obstacles to the conclusion of such special agreements should no longer prevail.”).

state's sovereignty from such a force. The second is more subtle; if one state makes a disproportionate contribution to the size and sophistication of the U.N. force, it may acquire influence over the use of the force commensurate with its contribution, thereby compromising the United Nations' neutrality.

U.S. and British reaction to the proposals for a permanent force illustrates the enduring problem of trying to create such an international force. Both British Prime Minister John Major and President George Bush refrained from endorsing a permanent force and instead stressed the value of the United Nations' traditional roles in peacekeeping and in acting as an "honest broker." American reluctance to have an active, interventionist United Nations was obvious when President Bill Clinton addressed the U.N. General Assembly in September 1993 and listed a number of institutional changes that the United States supported in order to make the United Nations more effective in safeguarding international security; conspicuous by its absence from that list was any reference to a permanent military force.

Other states share the reluctance of the United States and Britain to expand the mandate of the United Nations. In recent days, the permanent members of the Security Council have voiced support for a cautious, "go-slow" approach to U.N. military involvement in international conflicts.

While it can be argued that Resolution 678 has established a legal precedent for the collective exercise of coercive arms control, it is much more difficult to argue that it is an immediately meaningful legal precedent. On grounds of political and military efficiency, the unilateral or multilateral exercise of coercive arms control without explicit U.N. sanction is far more available to the international community. Its legality is the subject of the discussion in Part III.

III. Coercive Arms Control Under the Charter's Exception for Self-Defense

This Part examines the second exception to the U.N. Charter's prohibition on the use of force that would permit coercive arms control, the exception allowing acts in self-defense. Part III begins with a quick overview of the customary international law on this subject and moves on to determine that the Charter, in theory and in practice, incorporates this law. It then recounts how


129. The U.N. Assembly in Clinton's Words: U.N. Cannot Become Engaged in Every World Conflict, N.Y. TIMES, Sept. 28, 1993, at 16 ("We support the creation of a genuine U.N. peacekeeping headquarters with a planning staff, with access to timely intelligence, with a logistics unit that can be deployed on a moment's notice, and a modern operations center with global communication." (quoting President Clinton's address to United Nations)).

the Security Council, through its actions during the Six Day War of 1967, the 1981 Israeli raid on Tuwaitha, and the Cuban Missile Crisis, has gradually enlarged the law's scope to include efforts at coercive arms control. The discussion then turns to whether the Gulf War can be seen as a legal exercise of self-defense and coercive arms control. This Part argues that the Gulf War both met and expanded the scope of coercive arms control permitted without express U.N. sanction. Moreover, the newly expanded notion of permissible coercive arms control is being slowly institutionalized in the bureaucratic organization and diplomatic practice of the United States. This Part concludes with a cautionary note about the practical obstacles constraining the use of military force for arms control objectives.

A. Customary International Law and Anticipatory Self-Defense

Coercive arms control, with its ethos of prevention, can be best thought of as a form of anticipatory self-defense, defined as self-defense that occurs immediately before the aggressor strikes the first blow.131 Anticipatory self-defense should be distinguished from reprisal. Although both are a form of self-help, they have different purposes. Reprisals, since they come after an attack has been absorbed, are punitive in nature and cannot be undertaken for protection. In contrast, anticipatory self-defense comes before an attack and is designed to mitigate harm.132

Hugo Grotius, writing in 1625, acknowledged not only a natural right to self-defense, but also the need for protection against a present danger and threatening behavior that is "imminent in point of time."133 By recognizing this need, Grotius implied that self-defense is permitted not only after an

131. Coercive arms control most often takes place well before there is any threat of hostilities, but it may also occur after hostilities have begun. What distinguishes acts of coercive arms control from other acts of self-defense are the independent nature of the arms control objectives. In 1991, for example, American decisionmakers knew that Iraq, although it harbored nuclear ambitions, did not possess a nuclear weapons capability and would not gain such a capability before the war ended. The 1991 American raid on Tuwaitha thus had little to do with evicting Iraq from Kuwait and everything to do with limiting Iraqi power in the future. Because the destruction of the research and production facilities was not directly related to the primary war effort, the raid is more usefully characterized as an independent act of coercive arms control than as one act among many related to the prosecution of the war.

132. Anticipatory self-defense is a right that was well recognized under customary international law, with its origins dating back to ancient Athens and Rome. See Beth M. Polebaum, National Self-Defense in International Law: An Emerging Standard for a Nuclear Age, 59 N.Y.U. L. REV. 187, 188-89 (1984) (citing statements by Plato and Cicero recognizing need to forestall imminent or future attack). However, it was not until after the Renaissance that the principles underlying the right to anticipatory self-defense were formally acknowledged. In response to the prolonged brutality of the Thirty Years War, a number of late Enlightenment scholars began to identify the requirements for a just war. See Geoffrey Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflicts 31-74 (1983). At the core of the then-emerging jus ad bellum doctrine was the notion of necessity. It was this notion that eventually came to underlie the legal doctrine of anticipatory self-defense. See Derek Bowett, Reprisals Involving Recourse to Armed Force, in International Law: A Contemporary Perspective 394 (Richard Falk et al. eds., 1985) (discussing distinction between reprisal and self-defense).

attack has already taken been place, but also in advance. For Grotius, "it is permissible to kill him who is making ready to kill."  

Samuel von Pufendorf and Emmerich de Vattel later echoed Grotius' basic points. Pufendorf noted an obligation to exhaust all peaceful avenues to a settlement:

Where it is quite clear that the other is already planning an attack upon me, even though he has not yet revealed his intentions, it will be permitted at once to begin forcible self defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper. . . . For defense it is not required that one receive the first blow, or merely avoid and parry those aimed at him.

Vattel refined Grotius's summary of the law by stressing that the right to anticipatory self-defense is contingent on the truly imminent nature of the attack. According to Vattel,

It is safest to prevent the evil, when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honourable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.

Despite the efforts of Grotius, Pufendorf, and Vattel, the concept of anticipatory self-defense remained more of an ex post facto justification for state action than a legal doctrine. It was not until the Caroline case in 1837 that anticipatory self-defense "was changed from a political excuse to a legal doctrine."  

The Caroline case involved an attack by British soldiers on an American ship in American waters. The attack occurred during the unsuccessful rebellion of 1837 in Upper Canada against British rule. The rebellion had attracted sympathy and support in the United States, and the Caroline was being used to transport supplies to the rebels. On the night of December 29, after the Caroline had returned to American waters, British troops boarded the ship, cut it adrift, set it on fire, and then sent it over the Niagara Falls. Two American citizens were killed in the process. The attack prompted an American demand for redress, against which the British pleaded "the necessity of self-defence and self-preservation."

The ensuing debate over the destruction of the Caroline led to a celebrated correspondence between the American Secretary of State, Daniel  

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134. Id. at 176.
135. SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS LIBRI DUO [TWO BOOKS ON THE DUTY OF MAN AND CITIZENS ACCORDING TO NATURAL LAW] 32 (Frank Gardner Moore trans., 1927) (emphasis added).
138. Id. at 82-84.
139. Id. at 85.
Webster, and the British special minister to Washington, Lord Ashburton, which ultimately set forth two criteria for the permissible use of anticipatory self-defense. The first criterion affirmed the principle of necessity as established by Grotius and his successors, but made it more stringent. As Webster explained to Lord Ashburton, the attacker must show a “necessity of self-defence [that] is instant, overwhelming, and leaving no choice of means and no moment for deliberation.” The second criterion, proportionality, was new. According to Webster, the attacker must also show that it “did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly with in it.”

The Caroline case, combined with the theories of commentators that preceded it, has created under customary international law three distinct elements necessary for the permissible exercise of anticipatory self-defense. First, the threatened nation must exhaust all peaceful means of protection. Second, the danger to the threatened nation must be imminent. Third, the threatened nation’s response must be proportionate to the threatened danger.

B. The U.N. Charter and Anticipatory Self-Defense

1. The U.N. Charter in Theory

Anticipatory self-defense is not mentioned in the U.N. Charter. Instead, the Charter speaks simply of “self-defense.” Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken 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.

140. 30 BRITISH & FOREIGN STATE PAPERS: 1841-1842, at 201 (1858). This definition of permissible self-defense was employed by the International Military Tribunal at Nuremberg in rejecting Nazi Germany’s claim of self-defense in its invasion of Norway in 1940. See BOWETT, supra note 51, at 142.

141. Jennings, supra note 137, at 89.


143. U.N. CHARTER art. 51. The inclusion of Article 51 can be seen as an attempt to rectify a problem with the Kellogg-Briand Pact of Paris. The Pact made no mention of a right to self-defense. This omission led a number of states, including the United States, to present notes prior to ratification of the Pact indicating their understanding that wars launched in self-defense would be lawful. Multilateral Treaty for Renunciation of War: Identic Notes of the Government of the United States, 22 AM. J. INT’L L. 109 (Supp. 1928) (sent to 14 foreign governments); General Pact for the Renunciation of War: Notes Between the United States and Other Powers, 23 AM. J. INT’L L. 1 (Supp. 1929) (replies of foreign governments); see also Yoram Dinstein, War, Aggression and Self-Defence 81-82 (1988); Wright, supra note 10,
The absence of any provision in the Charter dealing with anticipatory self-defense and the ambiguous language of the Article 51 have combined to divide legal scholarship on this issue.

One group of scholars interprets the language of Article 51 narrowly, focusing particular attention on the provision that provides that nothing shall impair the right of self-defense "if an armed attack occurs." These scholars suggest that the plain meaning of the language would rule out any use of force in anticipation of an attack. Moreover, Article 51, read in conjunction with Article 33, confines states to peaceful means for dispute resolution until an actual armed attack occurs.

Other scholars interpret the language of Article 51 in a broader sense. These scholars point to the language that "nothing shall impair" the right to self-defense. Their argument is that Article 51 preserves, not extinguishes, the right to anticipatory self-defense as developed under customary international law. As Professor McDougal notes:

"[N]othing in the "plain and natural meaning" of the words of the Charter requires an interpretation that Article 51 restricts the customary right of self-defense. The proponents of such an interpretation substitute for the words "if an armed attack occurs" the very different words "if, and only if, an armed attack occurs.""

The proponents of this second school bolster their interpretation by pointing to the negotiating history, which reveals that Article 51 was written to incorporate the entire customary law of self-defense. This broader

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144. See, e.g., Louis Henkin, How Nations Behave: Law and Foreign Policy 140-44 (2d ed. 1979) (arguing that only "small and special exception" to Article 51's prohibition against anticipatory self-defense is surprise nuclear attack); Philip C. Jessup, A Modern Law of Nations 166 (1949) ("Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened."); Dinstein, supra note 143, at 173 ("Recourse to self-defence under the Article [51] is not vindicated by any violation of international law short of an armed attack."); see also Goodrich, supra note 20, at 342-53 (supporting restrictive interpretation of Article 51 in which self-defense is justified only as response to armed attack).


146. See supra text accompanying note 43.

147. Quincy Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 546, 560 (1963) (arguing that there is no right of military self-defense in case of mere "threats" under Charter).

148. See, e.g., Bowett, supra note 51, at 191 ("It is not believed, therefore, that Art. 51 restricts the traditional right of self-defense so as to exclude action taken against an imminent danger but before 'an armed attack occurs.'"); Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 236 (1961) ("'Legitimate self-defense,' encompassing anticipatory defense, has long been honored in traditional authoritative myth as one of the fundamental 'rights of sovereign states'... [and] limitations or derogations from sovereign competence are not lightly to be assumed."); Julius Stone, Aggression and World Order: A Critique of United Nations Theories of Aggression 98-101 (1958) (arguing that narrow interpretation of Article 51's "self-defense" provisions and Article 2(4)'s prohibition of "force" does not make "moral, political or even legal sense").


interpretation is not only supported by the Charter's legislative history, but is also necessitated by the changed technologies of war. As noted earlier, the Charter is "pre-atomic."

2. The U.N. Charter in Practice

Although there has been no authoritative decision of an international adjudicatory body on the question of anticipatory self-defense, the Security Council has examined three prominent instances of state action that involve some form of anticipatory self-defense. Taken together, the three instances suggest that coercive arms control, and other forms of anticipatory self-defense, are permitted under the Charter. The following section will briefly examine each use of force in turn.

a. The 1967 Arab-Israeli War

On June 5, 1967, the Israeli Air Force launched a series of deep penetration bombing raids against Egyptian air bases. The raids achieved complete tactical surprise: they destroyed the Egyptian air force on the ground and thereby opened the way for a decisive victory by the Israeli army over its Arab adversaries during the course of the next six days.

In the debate that followed Israel's attack, a central question in the
Security Council was determining the best evidence of aggression: a first shot or threats? While the Security Council never arrived at an explicit answer to this question, it implicitly affirmed that threats can justify the exercise of self-defense. Of the three resolutions adopted by the Security Council during the course of the war, none condemned Israel for its attack. More significantly, a resolution submitted by the Soviet Union calling for a condemnation of Israel was rejected first by the Security Council and then by the General Assembly. While the outcome in the Security Council may be explained by the veto power of Israel’s principal patron, the United States, the same cannot be said for the General Assembly, where each nation’s vote counts equally.

Irrespective of the operative definition of aggression, the initial Israeli attack arguably constituted a lawful exercise of anticipatory self-defense under customary international law. In regard to necessity, Israel can point to provocative actions by Egypt in the month preceding the Israeli attack. On May 18, four days after putting its armed forces into a state of maximum alert, Egypt terminated its consent for the presence on its soil of the U.N. Emergency Force (UNEF), which had served as a buffer between Egyptian and Israeli forces since the 1956 war. Four days later, Egypt closed the Strait of Tiran to Israeli shipping. By early June, the armed forces of Syria, Jordan, and Iraq were placed under a unified Egyptian command that also included military units from Algeria, Kuwait, Libya, and Sudan. Out-manned, out-gunned, and with no ability to trade land for time, Israel was compelled to seize the military advantage.

As for the requirement of prior exhaustion of alternative means of dispute resolution, Israel also conformed to the standard of customary international law. After Egypt closed the Strait of Tiran, Israel sent its foreign minister on a mission to London, Paris, and Washington in search of a diplomatic


162. SAFRAN, supra note 159, at 271, 294.
resolution to the crisis. And as late as May 28, the Israeli prime minister announced that Israel would continue its political efforts to reopen the Strait of Tiran "to obviate the necessity of Israel having to use armed force for its defense." This statement stands in stark contrast to the more bellicose rhetoric coming from Egypt's leadership at the time.

More problematic, however, is the proportionality of Israel's response. While the initial raids by the Israeli Air Force were narrowly tailored to eliminate a military threat, the same cannot be said for Israel's later conduct. The subsequent occupation and annexation of the Gaza Strip, the Sinai peninsula, the West Bank of the Jordan River including the city of Jerusalem, and the Golan Heights does not seem proportionate to the initial threat confronting Israel.

b. The 1981 Israeli Raid on Tuwaitha

On June 7, 1981, eight Israeli fighter-bombers swept in low over Iraq's nuclear research facility outside of Baghdad and, in two minutes, effectively destroyed a nearly operational nuclear reactor. Acting upon information from "[s]ources of unquestioned reliability," Israel had launched the attack out of a perceived need for self-defense. According to the official Israeli statement on the raid, the reactor was intended . . . for the production of bombs. The goal for these bombs was Israel. This was explicitly stated by the Iraqi ruler. After the Iranians slightly damaged the reactor, Saddam Hussein remarked that it was pointless for the Iranians to attack the reactor because it was being built against Israel alone.

Despite its immediate condemnation of the raid, the United States
government confirmed that Israel's fears about Iraq's nuclear capability were justified. Other governments shared this view to some degree. While Arab governments roundly condemned the attack in public, there was confident speculation that a number of those same governments were quietly relieved that, at least for the moment, the danger of Iraqi hegemony over the Arab world had been eliminated.

Despite similar assessments of Iraqi capability by other governments, the Security Council unanimously condemned the Israeli raid. Yet Iran had attacked the very same facility a few months earlier during its war with Iraq and had not been condemned by the international community. While legal scholars have raised serious questions about whether Israel's raid was proportionate and whether it followed an exhaustive search for a peaceful resolution of the dispute, the lack of immediacy was dispositive for the Security Council.

The Israeli argument for immediacy, as presented in the official statement following the attack and by the statements of the Israeli ambassador to the United Nations, unfolded along two lines. Israel argued that Iraq was well advanced in its nuclear weapons program and that as soon as Iraq acquired a nuclear capability, it would attack Israel. Israel then argued that, because the reactor at Tuwaitha would soon be operational, Israel had to strike immediately or risk exposing the citizens of Baghdad to unacceptable levels of radiation.

In contrast to the layered approach to immediacy adopted by Israel, the Security Council focused on the perceived nuclear threat to Israel and ignored the issue of nuclear danger to Iraqi citizens from an Israeli attack. For many of the Council members, the critical fact was that, at the time of the raid, Iraq

170. Judith Miller, U.S. Officials Say Iraq Had Ability to Make Nuclear Weapon in 1981, N.Y. TIMES, June 9, 1981, at A9 (reporting that American diplomats and intelligence officials "believed that Iraq had acquired enough enriched uranium and sensitive technology to make one nuclear weapon by the end of [1981] and several bombs by the mid 1980s").


174. On September 30, 1980, as part of the ongoing Iran-Iraq war, Iranian aircraft attacked the Tuwaitha research complex. See LEONARD S. SPECTOR, NUCLEAR PROLIFERATION TODAY 177 (1984). Iraq suggested that the Iranian attack was really carried out by Israeli aircraft flying Iranian colors. See U.N. SCOR, 36th Sess., 2280th mtg. at 22, U.N. Doc. S/PV.2280 (1981) (statement of Iraqi Foreign Minister Hammadi). This rumor was apparently put to rest when Iranian President Bani Sadr reportedly admitted that Iran was responsible. Roger F. Pajak, Nuclear Status and Policies of the Middle East Countries, 59 INT'L AFF. 587, 598 (1983).

It should also be noted that Iraq attacked Iranian nuclear facilities seven times between 1984 and 1988 without producing a reaction from the international community in any way comparable to that accorded the 1981 Israeli raid. The fact that the two countries were at war may account for the international community's silence. See LEONARD S. SPECTOR, NUCLEAR AMBITIONS 417-20 (1990).

175. See, e.g., Mallison & Mallison, supra note 150, at 431-32.

176. See, e.g., id. at 427-29.


did not possess nuclear weapons capability. Under the *Caroline* rules there was no military necessity for the attack because Israel faced no immediate nuclear danger.\footnote{179}

Moreover, as the representative from Sierra Leone observed, the Israeli attack failed to satisfy another requirement of the rule of necessity, an absence of premeditation.\footnote{183} A precision strike, like Israel's raid, obviously could not be mounted overnight, but required weeks, if not months, of training. Prime Minister Begin's comments on the day after the attack suggest how long Israel contemplated its strike. Begin acknowledged that he had informed the leader of the opposition Labor Party about plans for the attack three months earlier.\footnote{181} Under *Caroline*, anticipatory self-defense requires a necessity for action that leaves "no moment for deliberation";\footnote{182} the Israeli action did not meet such a test.\footnote{183}

A comparison of the Security Council's responses to Israeli actions in 1967 and 1981 indicates that, prior to the Gulf War, coercive arms control was not deemed a lawful exercise of anticipatory self-defense under the Charter. It was not lawful because inherent in the notion of coercive arms control is an understanding that the threat, while real and approaching, is not entirely imminent. The Charter, in contrast, permitted only the absolutely necessary use of force. That Israel, with its powerful allies in the Security Council, launched the anticipatory attack in each instance bolsters this conclusion, because it suggests that the Council's negative ruling was motivated by principle rather than politics.

To stop here, however, and conclude that, prior to Resolution 678, the unilateral exercise of coercive arms control was illegal under the Charter would be premature; arguably, the touchstone event of the nuclear age after Hiroshima and Nagasaki was an act of coercive arms control. Significantly, this act of coercive arms control involved a less than imminent threat. Perhaps most important, this act of coercive arms control was endorsed, at least tacitly, by the Security Council.

\footnote{179. As the British delegate explained:  
It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq. There was no instant or overwhelming necessity for self-defence. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq.  
182. See supra text accompanying note 140.  
183. See, e.g., Koroma Statement, supra note 180, at 148.}
c. The 1962 Cuban Missile Crisis

The executive chairman of the U.N. Special Commission established to implement the forced disarmament of Iraq asserted that the ceasefire terms imposed on Iraq are "the first modern example of arms control through imposition."184 The chairman’s comments reflect the fact that analysts have generally not interpreted the Cuban Missile Crisis as an act of coercive arms control. Instead, political scientists have concentrated on the decisionmaking process during the crisis.185 Specialists in international politics have stressed the importance of the Cuban Missile Crisis in restructuring the conduct of nuclear diplomacy and effectively ending the true Cold War.186 Arms control experts have focused on the impetus the crisis gave to formal arms control agreements.187 International lawyers have concerned themselves with whether legal authorization for the American quarantine of Cuba came from the Organization of American States and the Rio Treaty,188 or from Article 51 as an act of collective self-defense.189 No one has specifically examined the Cuban Missile Crisis as an act of coercive arms control.

The missile crisis began on October 16, 1962, when President Kennedy was informed that U.S. intelligence agencies had hard evidence that the Soviet Union was deploying medium-range ballistic missiles (MRBMs) in Cuba. On October 20, Kennedy decided to impose a naval quarantine on the further delivery of offensive weapons to Cuba and to insist on the prompt withdrawal of all Soviet missiles already delivered. On October 22, the President informed the Soviet Union, the United Nations, the American public, and the rest of the world of his decision. Thirteen days after it began, on October 28, the crisis ended with a public statement by Premier Khrushchev that the Soviet Union would remove all offensive missiles from Cuba.190

Three significant aspects of the crisis are relevant to coercive arms
control. First, the decisive factor in the outcome of the crisis was the threatened use of force by the United States. Despite ongoing debate over whether American nuclear superiority or American conventional superiority in the Caribbean was ultimately decisive in forcing the Soviets to withdraw their missiles, few question that American military strength was in fact decisive. In the judgment of one prominent student of the crisis, "Khrushchev withdrew the Soviet missiles not because of the blockade, not because of the implicit threat of 'further action,' but because of an explicit threat of air strike or invasion on Tuesday — unless he served immediate notice that the missiles would be withdrawn." In recent years, as more and more documents have become declassified, some observers have noted that the outcome may have constituted a negotiated settlement much more than had been previously suspected. Revelations that Kennedy had possibly agreed not to invade Cuba and had offered to remove American medium-range missiles from Turkey in exchange for the withdrawal of Soviet missiles from Cuba have fueled this suspicion. Unaided diplomacy, however, would hardly have succeeded in getting the missiles out of Cuba. The Soviet Union gambled on such a risky deployment in order to redress a highly unfavorable balance of strategic forces. An exchange of Soviet missiles in Cuba for American missiles in Turkey would have left the strategic balance intact and heavily in favor of the United States. In summary, Kennedy's assurances about the missiles in Turkey were far less important than the threat of American military action.

191. The issue of the respective roles played by the nuclear and conventional balance of forces is intimately bound up with an even more enduring and contentious issue: the strategic importance of the Soviet missile deployment to Cuba. For the perspective of four key American decisionmakers, see JAMES G. BLIGHT & DAVID A. WELCH, ON THE BRINK: AMERICANS AND SOVIETS REEXAMINE THE CUBAN MISSILE CRISIS 137-200 (1989).

192. ALLISON, supra note 185, at 65.


195. This is the consensus view of most American commentators on the crisis. See, e.g., ALLISON, supra note 185, at 50-56, 237-44; HERBERT S. DINERSTEIN, THE MAKING OF A MISSILE CRISIS: OCTOBER 1962, at 130-83, 186-87 (1976); ARNOLD L. HORELICK & MYRON RUSH, STRATEGIC POWER AND SOVIET FOREIGN POLICY 126-40 (1966). This is also the view of Khruzhchev himself. While Khruzhchev publicly spoke of a need to defend Cuba from American attack in 1962, in his memoirs he acknowledged the importance of transforming the strategic balance as an additional rationale for the deployment. See NIKITA S. KHURSHCHEV, KHURSHCHEV REMEMBERS 492-94 (Strobe Talbott trans. & ed., 1970).


197. During the crisis Kennedy had mobilized over 200,000 assault troops in Florida for an immediate invasion of Cuba. Moreover, he had increased the alert status of U.S. military forces worldwide. See ALLISON, supra note 185, at 62-66. As one American participant in the deliberations later concluded, "Khruzhchev was in a position of such inferiority . . . that unlike the president he must [sic] fear not only the unpredictable consequences of accident, but the certainty of defeat at every level up to
1962, the United States was able to achieve, with only the threat of force, what Israel and the United States tried to achieve with the actual use of force in 1981 and 1991 respectively.  

Second, the Soviet missile deployments in Cuba did not present a threat of imminent war to the United States. The Soviets did not deploy missiles in Cuba in order to launch a war against the United States. Rather, the Soviets sought long-term geopolitical advantage from the deployment; it was designed to reverse the true "missile gap." Ever since Sputnik's launch in 1957, many American observers thought that the Soviet Union had leap-frogged ahead of the United States in the balance of strategic nuclear forces. This alleged missile gap became a centerpiece of John Kennedy’s campaign for the presidency in 1960. While a missile gap existed in 1960-61, it completely favored the United States. By 1961, satellite reconnaissance revealed the reality of the missile gap to the Kennedy administration, which, in turn, made it known to the Soviets and the rest of the world. In a deliberate attempt to expose Khrushchev’s pretensions to nuclear superiority, Kennedy’s Deputy Secretary of Defense, Roswell Gilpatric, revealed the full extent of American superiority in a public speech:

> The fact is that this nation has a nuclear retaliatory force of such lethal power that an enemy move which brought it into play would be an act of self-destruction on his part. ... The destructive power which the United States could bring to bear even after a Soviet surprise attack upon our forces would be as great as — perhaps greater — than the total undamaged force which the enemy can threaten to launch against the United States in a first strike. In short, we have a second strike capability which is at least as extensive as what the Soviets can deliver by striking first.

While Soviet MRBMs in Cuba would have posed a threat to some of the Strategic Air Command’s bomber bases, they would have affected the strategic balance only at the margins. The central concern for the common catastrophe.” McGeorge Bundy, Danger and Survival: Choices About the Bomb in the First Fifty Years 440 (1988).

198. That the outcome of the Cuban Missile crisis was not negotiated but coerced was plainly evident in the bitter warning given by Vasily Kuznetsov to John McCloy as both men were overseeing the removal of the missiles from Cuba: “You Americans will never be able to do this to us again.” Beschloss, supra note 193, at 563 (1991); see also Garthoff, supra note 193, at 145 (“The American action had been an offensive use of military power — compellance, not deterrence — and [had] spurred Soviet resolve to acquire countervailing strategic military power. And while they would never admit it openly, they deeply nursed resentment that they had been compelled to give up a prerogative of great power status. The outcome of the Cuban missile crisis had been a rankling defeat in the cold war.”).

199. See sources cited supra note 195.

200. See Bundy, supra note 197, at 337-38.


203. The deployment of 72 MRBMs to Cuba would have doubled the Soviet first-strike capability. Still, as Gilpatric made clear in his speech, the Strategic Air Command had a tremendous advantage in strategic bombers over the Soviet Union. Documents on Disarmament, 1961, supra note 202, at 544. However, the Soviet deployment could have affected the strategic balance in a more
American leadership was not the military but rather the political significance of the missiles. As Professor McGeorge Bundy notes, "What was decisive for the president was not the number of missiles in prospect, or their strategic value, but the political damage that the United States and its government would suffer if any nuclear missiles at all that could reach the United States from Cuba were tolerated." Thus, the threat posed by the missiles lay less in their direct military value than in their geopolitical consequences. This lack of immediacy suggests that the Cuban missile crisis more closely resembles the Israeli and American raids on Tuwaitha than the 1967 Arab-Israeli war.

The third significant point about the Cuban Missile Crisis in regard to the legality of coercive arms control is that the United Nations implicitly endorsed the outcome. That the United Nations supported the outcome can be argued on three grounds. First, as with the 1967 Arab-Israeli war, neither the General Assembly nor the Security Council issued a resolution condemning American military action. This argument, however, says very little about the legality of coercive arms control because the American naval quarantine, although approved by the Organization of American States (OAS), was not explicitly approved by the Security Council. Under Article 53 of the Charter, the Security Council must authorize enforcement actions "taken under regional arrangements." The lack of explicit Security Council approval for the quarantine thus might even be interpreted as a condemnation of it. Moreover, the Security Council was split along the ideological and political divides of the Cold War. The United States offered a resolution condemning the Soviet Union, and the Soviet Union offered a resolution condemning the United States. The remaining members of Security Council ignored both and simply encouraged the parties to seek a peaceful resolution to their dispute.

A second, and more intriguing, argument for U.N. endorsement of American coercive arms control tries to bypass the problem posed by Article 53. This argument has been offered by Abram Chayes and Leonard Meeker, the U.S. Department of State's Legal Advisor and his Deputy during the missile crisis. Chayes and Meeker have argued that, by not condemning the quarantine, the Security Council's actions amounted to a formal endorsement of the action. While this "not-unauthorized" line of reasoning has significant way, if the first set of missiles had been followed by more. As two analysts concluded, "The sudden installation of a sizeable number of nuclear bombardment vehicles in Cuba, and the long-term prospects of such a base very near American shores, offered much foundation for sober thought about significant alterations in the military balance." Albert Wohlstetter & Roberta Wohlstetter, Controlling the Risks in Cuba, 17 ADELPHI PAPERS 12 (1965).
received some support, the scholarly literature has generally rejected it. This argument would make a mockery of the Security Council’s primary responsibility for international peace and security.

The third, and most convincing, argument that the United Nations endorsed the outcome of the crisis was its willingness to implement the agreement. On October 27, Kennedy wrote to Khrushchev to communicate his terms for ending the crisis. Kennedy first demanded that the Soviet Union remove its missiles from Cuba under U.N. supervision. Khrushchev responded the next day by agreeing to Kennedy’s terms, and noting that U.N. officials could verify the dismantling of the missiles. Not only did both superpowers turn to the United Nations, but the United Nations eagerly embraced the result. In early November, Secretary-General U Thant went to Cuba to negotiate a U.N. inspection plan with Fidel Castro. Although his initial effort met with a blunt refusal to allow U.N. inspectors on Cuban soil, U Thant tried again. Instead of relying on U.N. inspectors, the Secretary-General “put forward a suggestion that the five Latin American Ambassadors in Havana be named as inspectors and travel throughout Cuba.” Although this suggestion was also rejected, the United Nations did support the quarantine’s outcome.

This line of argument becomes all the more convincing if the U.S./OAS quarantine is seen as an act of collective self-defense under Article 51, and not an enforcement action by a regional organization under Article 53. An act of collective self-defense, unlike a regional enforcement action, does not require formal Security Council approval. Hence, any voluntary action by the United Nations in support of an act of collective self-defense can be seen as an endorsement.

In fact, the U.S./OAS quarantine is most easily and logically interpreted as an act of self-defense. That was certainly how President Kennedy justified

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209. AREND & BECK, supra note 72, at 62.
210. John W. Halderman, Regional Enforcement Measures and the United Nations, 52 GEO. L.J. 89, 110 (1963) (arguing that “the authority conferred upon the United Nations by article 53, enabling it to control such measures [as the quarantine] from the outset, may be considered as a fundamentally important power, abandonment of which would be decisive in admitting that regional organizations might proceed on their own volition to interpose measures of force or other tangible pressures into international situations”).
211. See, e.g., Louis Henkin, Comment, in CHAYES, supra note 188, at 150-51 (arguing that authorization by “failure to disapprove” is sharply at odds with both spirit and letter of Chapter VIII of Charter); JOHN NORTON MOORE, LAW AND THE INDO-CHINA WAR 296, 343-45 (1972) (arguing that Chayes and Meeker’s interpretation would lead to undesirable loosening of Security Council control over regional action).
212. Letter from President Kennedy to Premier Khrushchev (Oct. 27, 1962), in CUBAN MISSILE CRISIS, supra note 190, at 224.
214. State Department Cable on U.N. Secretary General U Thant’s Meetings with Prime Minister Castro (Nov. 1, 1963), reprinted in CUBAN MISSILE CRISIS, supra note 190, at 249.
215. Summary Record of NSC Executive Committee (Nov. 7, 1963), reprinted in CUBAN MISSILE CRISIS, supra note 190, at 267.
his actions to the public on October 22.\textsuperscript{216} Moreover, the Security Council debate itself was couched, explicitly and implicitly, in terms of self-defense and anticipatory self-defense.\textsuperscript{217} Finally, such an interpretation is consistent with state practice under the Charter: when regional groupings want to circumvent the requirements of Article 53, they turn to Article 51 and the right of collective self-defense.\textsuperscript{218} Accordingly, the U.N. action in support of the quarantine implicitly approved it as a legal act of collective self-defense under Article 51.

d. Reconciling State Practice Under the Charter

Considering the Cuban Missile Crisis an act of self-defense makes it easier to reconcile the crisis with the Israeli raid in 1981. In both instances, the United Nations wrestled with the concept of self-defense in the nuclear age. Addressing the concept of self-defense under the threat of nuclear war is as old as the United Nations.\textsuperscript{219} The problem of anticipatory self-defense with regard to nuclear weapons was officially brought to the Security Council's attention as early as December 1946. The U.N. Atomic Energy Commission included in its first report to the Security Council a memorandum from the U.S. representative.\textsuperscript{220} After noting that, under Article 51, states have a right to self-defense after being attacked by atomic weapons,\textsuperscript{221} the memorandum states:

\begin{quote}
It is equally clear that an "armed attack" is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define "armed attack" as [sic] a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.\textsuperscript{222}
\end{quote}

In defining self-defense rights in the nuclear age, the United Nations had to determine which "certain steps" constituted justification for acts of self-

\textsuperscript{216} Radio-TV Address of the President to the Nation from the White House (Oct. 22, 1963), reprinted in CUBAN MISSILE CRISIS, supra note 190, at 150.
\textsuperscript{217} See AREND & BECK, supra note 72, at 74-76.
\textsuperscript{218} INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 94-110 (1st ed. 1964). Scholarly opinion, then and now, has regarded the quarantine as an act of collective self-defense. See C.G. Fenwick, The Quarantine Against Cuba: Legal or Illegal?, 57 AM. J. INT'L L. 588 (1963); Brunson MacChesney, Some Comments on the "Quarantine" of Cuba, 57 AM. J. INT'L L. 592 (1963); McDougal, supra note 149, at 597; Rostow, supra note 189, at 515.
\textsuperscript{219} Coercive arms control directed at the proliferation of nuclear weapons actually predates the United Nations. See DAVID IRVING, THE GERMAN ATOMIC BOMB: THE HISTORY OF NUCLEAR RESEARCH IN NAZI GERMANY 155-71, 201-11 (1967) (describing British commando operations in 1943 against heavy water plant at Vemork in Nazi-occupied Norway, and sinking of Norwegian ferry that was carrying 613 liters of heavy water destined for German nuclear weapon research program).
\textsuperscript{221} Id. at 109.
\textsuperscript{222} Id. at 110 (emphasis added).
defense and what responses to those “certain steps” were permitted.

(1) Defining “Certain Steps”

By endorsing the outcome of the Cuban Missile Crisis, the United Nations implicitly adopted a “technical” theory of how and why wars begin. Technical theories of war stress the configuration of opposing military forces, their war plans, and mobilization schedules. Those who espouse these theories assume that the decision for war is devoid of political content. They believe that when the configuration of forces reaches a certain point, war occurs. Under this theory, war can actually occur by accident. A great and terrible war might arise due to a temptation to preempt, even if there was “no ‘fundamental’ basis for attack by either side.”

The technical theory of war represents a radical departure from the more traditional, or political, theory of war. The traditional theory stresses that wars are political actions taken for political purposes; they are neither accidental nor the result of military phenomena. Wars, under the political theory, “begin with conscious and reasoned decisions based on the calculation made by both parties that they can achieve more by going to war than by remaining at peace.”

At the time of the Cuban Missile crisis, the technical theory was in ascendancy among practitioners, particularly in the United States. Taking their cue from the rigid mobilization schedules that contributed to the onset of World War I, American nuclear strategists sought to devise a configuration of nuclear forces that allowed for “crisis stability.” Crisis stability was defined as a configuration of opposing forces that did not generate pressure for escalation or preemption; it occurred when there was no “reciprocal fear of surprise attack.” During the 1950s, a series of government-sponsored studies argued that the danger of surprise attack was highest when strategic forces were vulnerable to preemption. As Thomas Schelling and Morton Schelling, The Strategy of Conflict 207 (1960). The concern in the 1970s and early 1980s over a “window of vulnerability” — a fear that the vulnerability of American ICBMs would invite Soviet preemption in a crisis — is a recent example of the technical theory of war. One of the many proponents of the “window of vulnerability” school of thought was Paul Nitze. See generally Paul Nitze, Assuring Strategic Stability in the Era of Detente, 54 FOREIGN AFF. 207 (1976); see also STROBE TALBOTT, THE MASTER OF THE GAME: PAUL NITZE AND THE NUCLEAR PEACE 151-61 (1988) (discussing Nitze’s views on “window of vulnerability”).


225. This theory had even found popular expression at the time of the crisis in Barbara Tuchman’s history of origins of World War I. See BARBARA TUCHMAN, THE GUNS OF AUGUST (1962). Kennedy himself had read Tuchman’s book shortly before the crisis and spoke during the crisis on past miscalculations of other nations in stumbling into war. See KENNEDY, supra note 190, at 62.

226. SCHELLING, supra note 223, at 207.

Halperin observed in 1961, the “most mischievous character of today’s strategic weapons is that they provide an enormous advantage in the event that war occurs to the side that starts it.”

The technical school’s emphasis on military force configurations and surprise attacks explains why the United Nations implicitly found that the United States was within its right to self-defense in 1962, but explicitly found that Israel exceeded that same right in 1981. Unlike the United States in 1962, Israel had nothing yet to fear from the configuration of Iraqi strategic forces. In Cuba in 1962, there were not only accurate, nuclear-capable rockets, but also nuclear warheads for those rockets. In contrast, in Iraq in 1981 there were no nuclear rockets capable of striking Israel, let alone nuclear warheads to go atop those rockets.

Through its actions in the Cuban Missile Crisis, the United Nations acknowledged that “certain steps” well short of an armed attack could trigger Article 51’s right to self-defense. Through its condemnation of the 1981 Israeli raid on Tuwaitha, the United Nations established that those “certain steps” did not encompass the mere potential to deploy certain types of weapon systems. At a minimum, provocative weapon systems had to be actually deployed. The United Nations’ emphasis on force configuration also explains its approval of the Israeli attack in 1967. As in 1962, the hostile configuration of forces-in-being, as opposed to potential forces, justified a preventive (or at least preemptive) military action.

(2) How to Respond to “Certain Steps”

In trying to determine what range of action a threatened state can take in response to provocative “certain steps” toward war, the United Nations has given priority to political responses. Regardless of how threatening the deployment of military force might appear, states have an obligation to find a peaceful resolution to the crisis. This emphasis on political action first, and military action permitting a peaceful resolution second, is consistent with the Charter’s dual aim of avoiding war and encouraging the peaceful resolution of disputes. It also explains why American action in 1962 and Israeli action in 1967 were given at least tacit approval, while the Israeli action in 1981 was roundly condemned. In the former instances, there was a commitment to exhausting or at least exploring a peaceful end to the crises. In the latter, there was no attempt by Israel to explore a non-violent remedy to its fears of Iraqi nuclear power.

Moreover, Israel’s decision to act in a completely unilateral fashion in 1981 stands in stark contrast to Israeli action in 1967 and American action in

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1962. In the latter two cases, both states sought to end the crisis by involving other states. Israel sent its foreign minister to the United States, Britain, and France in May of 1967; the United States sought the approval of the OAS as well as the United Nations. Both thus implicitly argued that their situations involved international peace and security, not just their own. The condemnation of Israel in 1981 following its raid on Tuwaitha suggests that the invocation of support from some community of states is an essential prerequisite for the permissible exercise of coercive arms control under the Charter.

To summarize, although neither anticipatory self-defense nor coercive arms control is mentioned in the Charter, both were permitted under the Charter prior to the Gulf War. They were allowed if the three essential conditions for exercising the customary right of anticipatory self-defense were present: an imminent threat actually existing; a legitimate exploration of alternative means to ending the crisis; and proportionate use of military force in response to the threat. A fourth factor — the support of some community of states — may be necessary for the legal exercise of coercive arms control under the self-defense exception to the Charter’s prohibition on the use of force.

C. The Gulf War: New Precedent for the Exercise of Coercive Arms Control Without Express U.N. Sanction?

In order to determine whether the Gulf War set a new precedent for the exercise of coercive arms control as a means of self-defense, it is necessary to consider whether the Gulf War can be categorized as a lawful exercise of self-defense. An inquiry into the Gulf War’s legality as an exercise of self-defense begins with the text of Article 51.

Article 51 states, in part, “[N]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security.”

As one observer has astutely noted, “The statutory language [of Article 51] is not a model of clarity.” In particular, considerable confusion seems to exist over the significance of the word “until.”

In the months before the Gulf War, Abram Chayes and U.N. Secretary-General Javier Pérez de Cuéllar strongly suggested that there was no continuing right to collective self-defense under Article 51. Once the

230. U.N. CHARTER art. 51 (emphasis added).
232. Professor Chayes’ comments were given at the Conference on International Law and the Non-Use of Force, convened jointly by the American Society of International Law and the Soviet Association of International Law, in Washington, D.C., on October 4-6, 1990. See id. at 340. An argument similar
Security Council takes action on an issue, all initiative for resolving the crisis passes to the Council. In the matter of Iraq's invasion of Kuwait, it was argued that since the Security Council had already passed several resolutions on the Iraqi invasion of Kuwait, the United States, absent some further provocation by Iraq or authorization from the Security Council, could not use force to liberate Kuwait under Article 51. A number of legal scholars supported this interpretation after the war.\textsuperscript{233}

Other scholars, however, have presented powerful arguments that the word "until" is of little significance in reaching a judgment about the legality of collective self-defense in the Gulf War. First, such an argument fails to take account of the language of resolutions adopted by the Security Council in the summer and fall of 1990. The very first Security Council resolution to adopt measures to restore international peace and security (economic sanctions) specifically affirmed the "inherent right of individual or collective self-defense."\textsuperscript{234} As Professor Schachter has observed, "The adoption of sanctions and the simultaneous affirmation of self-defense are surely inconsistent with an intention to bring an end to self-defense measures."\textsuperscript{235}

Second, it has been argued that to read the text of Article 51 literally would be "an implausible — indeed, absurd — interpretation."\textsuperscript{236} While such an interpretation calls on an aggressor to withdraw, it would simultaneously deprive a victim state of the right to defend itself if the aggressor ignored the Security Council's call. Subordinating the right of self-defense to prior permission from the Security Council would be seriously detrimental to the ability of states to defend themselves:

What the Charter prescribes is precisely the opposite rule: that the aggrieved state and its friends and allies may decide for themselves when to exercise their rights of individual and collective self-defense until peace is restored or the Security Council, by its own affirmative vote, decides that self-defense has gone too far and become a threat to the peace.\textsuperscript{237} Third, such an interpretation of Article 51 is at odds with the drafters's intent. As the drafting history makes clear, language that would have explicitly terminated the right of continuing self-defense after the Security Council took action was proposed and rejected.\textsuperscript{238} As one discerning analyst of the Charter's travaux préparatoires concludes, "[T]he rejection of the proposed changes supports the argument that defensive rights are ongoing and

\textsuperscript{233} See, e.g., Dallal, supra note 38, at 136-37; Franck & Patel, supra note 63, at 63; Quigley, supra note 36, at 37-42.


\textsuperscript{235} Schachter, supra note 42, at 458.

\textsuperscript{236} Id.

\textsuperscript{237} Rostow, supra note 189, at 510; see also Abraham D. Sofaer, Asking the U.N. Is Asking for Trouble, WALL. ST. J., Nov. 5, 1990, at A14.

\textsuperscript{238} Plofchan, supra note 231, at 351.
do not cease upon simply any action of the Security Council, but only upon those actions of the Security Council that explicitly terminate a State's self-defense rights or several States's collective-security rights." Since the Security Council did exactly the opposite by authorizing the use of necessary means to liberate Kuwait and restore international security to the region via Resolution 678, it is reasonable to conclude that the exercise of self-defense was legal in the Gulf War.

However, the fact that the exercise of the broad and traditional right of self-defense — the right to repel an invader — in the Gulf War may have been legal does not automatically imply that the exercise of the specific act of coercive arms control during the War was legal. Indeed, even if the actual choice of target is excluded from consideration, the American raid on Tuwaitha has far more in common with the Israeli raid of 1981 than with the 1962 missile crisis.

Similarities between the American raid in 1991 and the Israeli raid in 1981 exist on a number of levels. First, there is the issue of immediacy. Unlike 1962, there was no provocative deployment of nuclear weapons in 1991. As in 1981, the concern was with potential forces as opposed to forces-in-being. While Iraq was suspected of having a nuclear weapons program before the onset of Desert Storm, no evidence linked the internationally safeguarded reactors at Tuwaitha with such a program. Instead of trying to develop a plutonium-fueled bomb, which would require nuclear reactors, Iraq was pursuing the enriched uranium route to nuclear weapons capability. Thus, the research reactors posed no significant threat, and the raid on them could not possibly have advanced either Iraq's withdrawal from Kuwait or international peace and stability. Indeed, numerous postwar inspections have failed to turn up any linkage between the research reactors and the massive Iraqi clandestine nuclear weapons program.

Second, there is the related issue of premeditation. As in the 1981 Israeli

239. Id. at 352.


Nothing in this text is meant to suggest that the 1991 raid on Tuwaitha was either poorly planned or without reason. As suggested earlier, see supra note 4 and accompanying text, there was at least one good political reason that the Bush administration targeted Tuwaitha. Late in the fall of 1990, the Bush administration began increasingly to justify its action against Iraq in terms of non-proliferation. Consequently, having justified war on the basis of Iraq's latent nuclear threat, the administration could hardly not strike at the most visible manifestation of that threat. Indeed, given the administration's ignorance of the breadth and depth of the Iraqi nuclear program, there were precious few other targets on which to demonstrate its commitment to non-proliferation.
raid, the U.S. attack in 1991 was deliberate and well-planned. While the United States did not have the luxury of building a mock-up of the Iraqi reactor as Israel did in preparation for its 1981 raid, it had nearly three months to plan the attack. The fact that the U.S. raid came during the first week of the war strongly suggests that Tuwaitha was not a target of opportunity but a priority on a lengthy target list.

The issue of premeditation becomes all the more troubling given the failure to search for alternative means to resolve the crisis. While the United States did engage in a prolonged diplomatic dance with Iraq in search of a peaceful resolution to the crisis, a dance that lasted until just a few days before the war, it devoted almost no effort to resolving the crisis over Iraq's unconventional weapons capability. Indeed, the "crisis" over Iraq's unconventional weapons capability really did not begin until well after the war was over, as U.N. inspection teams began to discover the full extent of Iraq's clandestine nuclear weapons program. Thus, because of the lack of immediacy as well as the high degree of premeditation, the American raid on Tuwaitha seems to be sharply at odds with both the customary law of anticipatory self-defense and the law of anticipatory self-defense/coercive arms control as developed through state practice since 1945.

Because of similarities with the 1981 Israeli raid, the American raid on Tuwaitha may appear at first glance to be an illegal exercise of coercive arms control. A more sustained analysis, however, reveals important similarities to the legal American exercise of coercive arms control in the 1962 missile crisis. First, both received ex post facto U.N. endorsement, thereby rendering the debate over legality largely moot. More important, both the 1991 raid and the 1962 quarantine were supported by a community of states. In 1962, it was the OAS, a formal, standing regional organization committed to international security in the Western Hemisphere. In 1991, it was an ad hoc coalition of states concerned with stability in the Persian Gulf area. This regional support created a presumption of legality in both cases.

The presumption of legality arises because reliance on regional organizations outside the United Nations is consistent with the intent of the

243. This assumes that the decision to use military force to drive Iraq out of Kuwait was taken by the United States in mid-October, following the "Temple Mount" incident on October 8, 1990 in Jerusalem. The chronology of events and the initial reporting on U.S. decisionmaking support this. On October 30, President Bush decided to increase the U.S. military commitment to Saudi Arabia by an additional 150,000 troops, bringing the total U.S. presence to nearly 400,000. President Bush announced this decision on November 8, explaining that the additional forces were meant to give the coalition an "offensive military option." See Woodward, supra note 45, at 297-321; Joao Resende-Santos, The Persian Gulf Crisis: A Chronology of Events, in After the Storm, supra note 82, at 295, 318-25.
Charter’s framers. As one scholar points out, “the sponsoring powers [of the Dumbarton Oaks Proposals] envisioned that regional arrangements would provide the means for dealing with most conflicts and that the Security Council would concern itself only with the most serious.”

This sentiment in favor of regional initiatives found clear expression in Article 52, which provides, in part:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

In a searching examination of the drafting history behind Article 52, one scholar discovered that the drafters did not intend the division of labor between the Security Council and regional arrangements to be hierarchical. The Charter allows regional arrangements considerable initiative and independence. Moreover, the framers of the Charter were very liberal in their definition of what constituted a regional arrangement. The drafting history of the Charter indicates that the framers were willing to consider almost any grouping of states as a bona fide regional arrangement. They rejected a proposal to restrict regional arrangements to organizations of a permanent nature that were geographically and culturally linked. Instead, the definition that was adopted “was completely amorphous and appears to permit any amalgamation of States to qualify as a regional arrangement.” Almost “any agreement between two States could qualify as a regional arrangement justifying participation in a collective defense effort.”

This broad definition of regional arrangements, viewed in the context of the Gulf War, creates a lower legal threshold for the exercise of coercive arms control. Based solely on the Cuban Missile Crisis and the 1981 Israeli raid, one might reasonably conclude that official support from a formal regional or international organization is necessary in order to carry out an act of coercive arms control under the self-defense exception of the U.N. Charter. The ad hoc regional arrangement that was used to prosecute the Gulf War and carry out coercive arms control against Iraq, however, may have broadened the definition of regional arrangements under which coercive arms control can be legally carried out. Perhaps it affirmed the Charter’s broad definition of

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246. Plofchan, supra note 231, at 348.
247. U.N. CHARTER art. 52, ¶ 1.
248. Plofchan, supra note 231, at 355. As one delegate to the drafting conference in 1945 declared, there “can be no double jurisdiction or competence as between that of the Security Council . . . and that of the regional organization. The Council should limit its action to investigating . . . any situation which may threaten peace, and to promoting the regional settlement of the problem.” Doc. 576, supra note 150, at 684.
249. Plofchan, supra note 231, at 361-63.
250. Id. at 363.
251. Id.
regional arrangements allowed to exercise collective self-defense and established a powerful new precedent for the future use of coercive arms control.

D. The Gulf War: A Meaningful New Precedent for Coercive Arms Control?

For the expansive notion of coercive arms control implicit in the 1991 U.S. raid on Tuwaitha to be considered a meaningful precedent under international law, it must, as noted earlier, possess two elements: authority and control. Recent state behavior in the aftermath of the Gulf War suggests that an expansive notion of coercive arms control possesses not only authority, but also control.

It is tempting to immediately dismiss this conclusion by arguing that it overreaches the truth; the Security Council’s endorsement of the American raid on Tuwaitha was but a momentary aberration brought on by the stunning reversal of an act of naked aggression. The problem with this interpretation is that it ignores the Security Council’s decision in January 1992, one year after the war with Iraq, to enforce the Nuclear Non-Proliferation Treaty (NPT) by all “appropriate measures” in the event of a violation by any signatory. It could also be argued that the legitimacy conferred by the international community on expansive coercive arms control measures, while enduring, is confined to measures against Iraq. After all, the final declaration agreed upon in January 1992 by the heads of state of the Security Council, although it stated that “[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security,” was prompted by Iraq’s unrepentant obstruction of the implementation of the cease-fire agreement. But if that were the case, what accounts for the recent

252. See supra notes 76-79 and accompanying text.


255. In the six months preceding the January 1992 summit declaration, the Security Council passed resolutions demanding Iraqi compliance with the disarmament provisions of Resolution 687. The more important of the two resolutions was Resolution 707. See S.C. Res. 707, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/707 (1991); see also Maureen Dowd, France Backs U.S. on Using Force If Iraq Pursues Nuclear Weapons, N.Y. TIMES, July 15, 1991, at A1. In addition, the American cruise missile attack against Iraq’s intelligence headquarters on June 27, 1993 may have been linked to a tense standoff between Iraq and the U.N. Special Commission over weapons inspections. On June 15, 1993, the Security Council adopted a presidential statement that warned Iraq of “serious consequences” if it continued to refuse to cooperate with the Special Commission. Robert L. Gallucci, Nuclear Situation in Iraq, 4 DEP’T ST. DISPATCH 483 (1993). President Clinton’s explanation for the June 27 attack stressed that it was in retaliation for Iraq’s planned assassination attempt against former President Bush during a visit to Kuwait. President William Clinton, U.S. Responds to Attack by Iraqi Government, 4 DEP’T ST. DISPATCH 473 (1993). Subsequent news reports, however, implied that the Clinton administration might be linking the strike to the Iraqi inspection refusal. See, e.g., Elaine Sciolino, Raid on Baghdad, N.Y. TIMES, June 29, 1993, at A6.
American and South Korean threats of military action against North Korea for its suspected nuclear weapons program? Or, more troubling, what accounts for the *Yinhe* incident?

The *Yinhe* incident provides a compelling case study on the Gulf War's legacy in the area of coercive arms control. Beginning in late July 1993, American warships and military aircraft began tracking a Chinese freighter, the *Yinhe*, suspected of transporting chemicals to be used in Iran's chemical warfare program. By a combination of military force and diplomatic pressure, the United States barred the *Yinhe* from entering the Persian Gulf until after it had submitted to a detailed inspection of its cargo.

This incident is distinguishable from previous coercive arms control exercises discussed for three reasons. First, unlike the Israeli and American raids against Tuwaitha, military force was directed not against the suspected proliferating state, but against one of its purported suppliers. Second, unlike the American strike against Tuwaitha, there was not even an ex post facto confirmation that the American action was justified. After the war with Iraq, international inspection revealed a secret multi-billion dollar nuclear weapons program. Consequently, while the United States' aim may have been a little off in attacking Tuwaitha, its intuition was on target. The same cannot be said for the *Yinhe* incident. A detailed search by a Sino-Saudi inspection team, accompanied by an American advisor, found that the *Yinhe* was carrying only metals, stationary, and machine parts. No chemical weapon precursors were listed on the ship's manifest or hidden in its holds.

256. Standing at the "Bridge of No Return" connecting the two Korean states through the Demilitarized Zone, President Clinton stated in July 1993 that it was "pointless for [North Korea] to try to develop nuclear weapons, because if they ever use them, it would mean the end of their country." *UPI White House Reporter*, UPI, July 11, 1993, available in LEXIS, Nexis Library, UPI File. President Clinton's remarks were foreshadowed by John M. Deutch. Shortly before joining the Clinton administration as an undersecretary of defense, Deutch argued in the fall of 1992 that "[t]he United States, preferably in a multilateral context, should state that any use of a nuclear weapon would be considered a casus belli and that violation of the NPT would trigger specific sanctions, including the possibility of multilateral and, in exceptional cases, unilateral military action." John M. Deutch, *The New Nuclear Threat*, FOREIGN AFF., Fall 1992, at 120, 133.


258. This inspection was eventually accomplished at the Saudi port of Damman, and the *Yinhe* was found to be carrying "no trace of the thiodiglycol and thionyl chloride as alleged by Washington." Jeffrey Parker, *U.S.A. "Laughing Stock" Over China Ship Incident*, Reuters, Sept. 9, 1993, available in LEXIS, Nexis Library, Reuters File.


Third, unlike the American raid against Tuwaitha, where the United States had the mantle of Security Council authority, however attenuated, this recent attempt at coercive arms control was dressed in nothing more than a legal fig leaf. Although both China and Iran had signed the Chemical Weapons Convention (CWC), which bans the production, stockpiling, or use of chemical weapons, and prohibits any assistance to a country developing such weapons, the CWC had not yet entered into force. Even if the CWC were in force, the authorized measures to ensure compliance do not include unilateral state action. Instead of bringing the matter to the CWC's Conference of State Parties or to the U.N. General Assembly or Security Council as required by the CWC, the United States acted on its own authority. Despite the absence of any compelling legal authority, the international community, with the exception of China, has expressed little concern over the American role in this incident. Thus, the Yinhe incident is a recent example of coercive arms control that goes beyond the Gulf War precedent. Moreover, it provides an example of what may be the most well-defined feature of the still evolving post–Cold War world. While concern over the proliferation of unconventional weapons is not new, a willingness by the international community in general and the United States in particular to use or threaten the use of military force to counter such proliferation is new. The Clinton administration took an important step in institutionalizing the counterproliferation agenda in late 1993 when then-Defense Secretary Les Aspin announced a new defense program designed to produce specially tailored operational plans and weapon systems to combat the

261. The CWC does not enter into force until it has been ratified by 65 countries and not before January 13, 1995. See CWC, supra note 8, art. XXI(1).
262. Id. art. XII(4).
263. Instead of relying on the CWC, the United States could attempt to justify its action under the Draft Articles on State Responsibility adopted by the International Law Commission (ILC). Documents of the 32nd Session (1980), 2 Y.B. INT'L L. COMM'N 14, 30-34, U.N. Doc. A.CN. 4/SER.A/1980/Add.1. Under the Draft Articles, the United States could either argue that China's action in and of itself was "wrong" because it constituted a breach of an international obligation (Article 3) or alternatively that it was "wrong" because it assisted another state's wrongful act (Article 27). There are two principal problems with this reasoning. First, there are serious doubts as to whether the work of the ILC is a source of international law. See IAN SINCLAIR, THE INTERNATIONAL LAW COMMISSION 121-38 (1987). Second, even if the ILC is seen as the equivalent of international legal scholarship, there is no authority in the Draft Articles for unilateral state action to correct a "wrong." For an interesting attempt to apply the Draft Articles to the military aid provided to Iraq prior to the invasion of Kuwait, see Paul Rubenstein, Comment, State Responsibility for Failure to Control the Export of Weapons of Mass Destruction, 23 CAL. W. INT'L L.J. 319 (1993).
264. In an address before the U.N. General Assembly, Deputy Prime Minister and Foreign Minister Qian Qichen denounced the "hegemonic conduct of a self-styled 'world cop.'" Anthony Goodman, China Lashes U.S. as 'Self-Styled 'World Cop',' Reuters, Sept. 29, 1993, available in LEXIS, Nexis Library, Reuter File.
265. Symbolic of this new order is a change in vocabulary. The term "non-proliferation" has become passé among those inside and outside of the American government. The preferred choice among those walking the corridors of power in Washington seems to be "counter-proliferation," while among the cognoscenti who reside outside the government but inside the Beltway, the favored label may be "anti-proliferation." See Roberts, supra note 95, at 139.
proliferation of unconventional weaponry. The aggressive leadership of recent American presidents on proliferation matters has seemingly found an echo among the American public. A recent poll indicated that many Americans would view nuclear weapons development in North Korea as a serious threat, and more than half of those polled said they would support the use of force to eliminate such capability. In short, whatever the label, the movement away from reactive strategies toward proactive strategies of arms control seems both evident and unlikely to be reversed in the near future.

If a more expansive rule is slowly acquiring both authority and control, this is significant in two ways. First, it represents a major change in direction for international law. The abiding focus of modern international law has been the prevention of war. From the Covenant of the League of Nations to the Kellogg-Briand Pact to Article 2(4) of the U.N. Charter, the central concern has been to restrict a state’s ability to wage war. As Professor O’Brien has noted, “modern international law has sacrificed justice in its attempt to virtually eliminate the competence of the state to engage in war unilaterally.” With a more permissive rule on coercive arms control, the hierarchy of values is the same — peace over justice — but the means available to realize those values is changing. Force may now be used proactively, not just reactively, to prevent the outbreak of war.

Second, a new rule on coercive arms control is significant in that it represents a greater commitment to sustain the international regimes for the non-proliferation of nuclear, chemical, and biological weapons and ballistic missiles. The essence of any international regime is its injunctions, which follow most directly from its norms or its “standards of behavior defined in terms of rights and obligations.” Given that “no single counterfactual occurrence refutes a norm,” the norm remains valid. For instance, the conviction for drunk driving of a person, or for that matter of a thousand people, does not necessarily destroy the normative order against operating an automobile while intoxicated. What is important for normative orders is not just the degree of observance, as has been suggested, but community

268. See Jacqueline R. Smith, Nuclear Non-Proliferation Policy in a New Strategic Environment, In ARMS CONTROL: WHAT NEXT? 58, 61 (Lewis A. Dunn & Sharon A. Squassoni eds., 1993) (identifying new trend in non-proliferation that includes “[t]hreatening to use, or resorting to, force in order to constrain a country’s nuclear program when all other means of inducing compliance appear to have fallen short of the desired objective”).
reaction to deviations from the norm. Thus for the various non-proliferation regimes, validity is assessed not only in the rate of proliferation, but also in how the international community responds to violations. By making coercive arms control more practicable, the new rule will work to reinforce the various non-proliferation norms.

However, as with the future exercise of collective coercive arms control discussed in Part II, serious obstacles make actions similar to the raid on Tuwaitha doubtful under the self-defense exception to the Charter. First, and perhaps most daunting, is the detection of provocative “certain steps.” Respect for the various non-proliferation regimes has not ended proliferation, but in many cases has instead driven it underground. This “silent spread” or “opaque proliferation” makes detection extraordinarily difficult, as the United States discovered after the Gulf War. The experience with Iraq’s clandestine program is not unique. The United States was only able to detect Soviet missiles in Cuba in 1962 because Soviet officers ignored orders to camouflage the missile sites. Despite the sophistication of its overhead reconnaissance, the United States reportedly relied on human sources to help confirm the presence of a chemical weapon facility at Rabta, Libya.

A second obstacle is the difficulty of mobilizing domestic support for an active and sustained coercive arms control campaign. This is an essential ingredient in maintaining the non-proliferation regimes because non-proliferation is an ongoing commitment. Iraq’s ability to regenerate a capacity to dominate the Persian Gulf region not long after its devastating defeat, despite sanctions and intrusive monitoring, illustrates this point. The domestic political problems inherent in an aggressive non-proliferation policy were recognized as far back as 1946. In responding to Bernard Baruch’s proposal for “swift and condign punishment” for any violation of his 1946 plan for the international control of atomic energy, Admiral Chester Nimitz


276. When the U.S. raid on Tuwaitha was announced, General Norman Schwarzkopf asserted that Iraq’s ability to develop nuclear weapons had suffered a “considerable setback if not a total setback.” Atkinson & Devroy, *supra* note 3, at A1.


expressed "grave misgivings."^{280} Nimitz did not believe that the American public was prepared to enter into any plan for "automatic punishment of other nations for acts which do not directly concern the United States. In other words, the people of the United States will in fact insist on the power of their elected representatives to veto the deliberate entry of the United States into war."^{281} Nimitz' forebodings proved to be well founded. In 1968, for example, Secretary of State Dean Rusk had to repeatedly reassure senators that the NPT would not entail any additional U.S. military commitments.^{282} While it may be true that during the Gulf War the President was able to "box" Congress in and transform the latest opinion polls in his favor,^{283} and that the President almost always wins foreign affairs contests with the Congress,^{284} the forced timetable for withdrawal from Somalia shows that the President's foreign affairs powers are limited.^{285}

The limits on the U.S. President's ability to exercise coercive arms control measures will have a direct impact on the stability of the various non-proliferation regimes. As Professor Krasner has noted, there are "makers, breakers, and takers" of international regimes.^{286} The United States has been the principal "maker" of the various non-proliferation regimes. As the one remaining superpower, if it refuses to take aggressive action, it is less likely that other states will.

A third obstacle that is related to both intelligence gathering and domestic mobilization is military success. Even when intelligence is good and domestic support strong, success on the battlefield is not guaranteed. An unsuccessful attempt at coercive arms control is unlikely to generate future attempts.

IV. CONCLUSION

This Essay has sought to make legal and political sense of the Security Council's endorsement of the U.S. strike against the Iraqi reactors at Tuwaitha in 1991. Under the express terms of the U.N. Charter, American military action against Tuwaitha could be justified either as an act authorized by the Security Council or as an act of self-defense. Consequently, the argument of this Essay has moved along two parallel tracks, one dealing with

281. Id.
the raid as a collective exercise of coercive arms control authorized by the United Nations, and the other dealing with the raid as an exercise of coercive arms control for purposes of self-defense.

On the first track, this Essay argued that the Charter gives the Security Council powers broad enough to include the authorization of coercive arms control, that such authorizations have been given prior to the Gulf War, and that the exercise of the Security Council's authority in the Gulf War was legal. This Essay also argued, however, that the authorization did not constitute a meaningful new precedent for the collective exercise of coercive arms control because of the uniqueness of the situation and the prevailing institutional weakness of the United Nations.

On the second track, this Essay argued that although neither anticipatory self-defense nor coercive arms control is explicitly mentioned by the Charter, both have been endorsed by the Security Council. Moreover, the Gulf War may be seen as a permissible exercise of self-defense that broadened the scope of the legal exercise of unilateral or multilateral coercive arms control without U.N. sanction. The second half of this Essay concluded with the observation that a new understanding of the permissible uses of military action, based in part on the 1991 raid against Tuwaitha, is slowly being institutionalized in the United States. This understanding stands at the center of the international regimes designed to prevent the proliferation of unconventional weaponry.

The shift in the way nations think about force, while consistent with the hierarchy of values inherent in the Charter, is strikingly at odds with the central thrust of modern international law. Instead of trying to constrain a state's ability to resort to military force, this new paradigm opens more room for state discretion in using force. Resolution 678 did not by itself inaugurate this change. The change was, in part, inherent in the Charter. But more important, the paradigm has been evolving since 1945 as states wrestled with the dilemmas of living with nuclear weapons. Consequently, it is neither an exception to a rule nor a completely new rule. But it is a rule that will probably not disappear. Given the proliferation of weapons of mass destruction, it is likely that this shift will take roots and grow, as it has already done within the American government. Coercive arms control merits much closer observation by scholars and statesmen, for it is fundamentally a frontal attack on state sovereignty.

Not long after Hiroshima, Albert Einstein issued a challenge to the international community: "The unleashed power of the atom has changed everything save our modes of thinking, and thus we drift toward unparalleled catastrophe. . . . [A] new type of thinking is essential if mankind is to survive."287 The question for future research is a normative one: whether legalizing coercive arms control meets Einstein's challenge.
