Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense

Rex J. Zedalis
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As articulated in 1842 by U.S. Secretary of State Webster in diplomatic correspondence to representatives of the British government, in connection with the now famous Caroline incident, traditional international law permitted the use of armed force in anticipation of an attack whenever there existed a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."1 There is no universal agreement on whether the traditional right, paraphrased by commentators as requiring a threat of imminent attack,2 survived the

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1 Letter from Mr. Webster to Mr. Fox, (Apr. 24, 1841) 29 BRI. AND FOREIGN ST. PAPERS 1129, 1138 (1840-41).

2 See e.g., M. McDougall and F. Feliciano, Law and Minimum World Public Order 231 (1961); Waldock, The Regulation of the Use of Force by Individual States in International Law, II Rec. des Cours 455, 498 (1952); W. Friedmann, The Changing Structure of International Law 259 (1964); D. Bowett, Self-Defense in International Law 191-192 (1958); Fawcett, Intervention in International Law: Some Recent Cases, II Rec. des Cours 347, 361 (1961); J. Stone, Legal Controls of International Conflict 244 (1954); Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1634-1635 (1984); Schachter, In Defense of Rules on the Use of Force, 53 U. Chi. L. Rev. 113, 135 (1986). The idea of "imminence" would appear designed to capture both of the conditions on "necessity" established by Webster's formulation of the traditional standard found in the Caroline case. Imminence allows for the recourse to peaceful means contemplated by the condition "no choice of means." It also allows for the urgency or immediacy contemplated by the language "no moment for deliberation." This article deals with these two aspects of imminence in the context of the language of Webster's formulation. Thus, temporal proximity is discussed in Section II and recourse to peaceful means is discussed in Section V. Since the idea of imminence undoubtedly reflects both topics, their discussion in separate portions of the article should not be taken to imply that imminence reflects only temporal proximity.

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adoption in 1945 of the U.N. Charter. But even among those who contend that the traditional law still obtains, there has been precious little discussion of three points which recent events suggest are of distinct relevance to the law of anticipatory self-defense.

The first is raised by the Israeli aerial attack of June 7, 1981, against the Tamuz I nuclear reactor in Baghdad, Iraq. That point involves whether a state faced with developments in another state which are said to pose a threat of actual attack at some distant future time may properly invoke anticipatory self-defense to justify immediate recourse to armed force, if deferring invocation until the threat matures would result in the force then required to be used, producing much greater destruction than would otherwise occur. In defense of the aerial attack, which was carried out by F15 and F16 aircraft supplied by the United States, the Israeli government reported that “[s]ources of unquestioned reliability told us that the [reactor] was intended . . . for the production of atomic bombs. The goal for these bombs was Israel.” Additionally, Yehuda Blum, Israel’s permanent representative to the United Nations, indicated in the Security Council that had his country waited until the reactor had become capable of producing weapons-grade nuclear fuel, “any attack would have blanketed the city of Baghdad with mass radioactive fallout,” killing “tens of thousands.” As it stood, the attack killed only three Iraqi civilians and one French technician. Notwithstanding the attractiveness of Israel’s argument, a threat of actual attack at some distant future time would seem unable to be considered “imminent,” a threat leaving “no moment for deliberation.”

The second point, which is closely related to, yet clearly distinct from that just mentioned, involves whether a distant future threat faced

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5 See text accompanying infra notes 119, 120 on need for a proportionate response preceded by peaceful resolution.


by a state invoking anticipatory self-defense may be met with armed force when the threat is not a threat of actual attack, but a threat to the security of a nation deriving from immediate efforts to shift the military balance of power. This point, suggested today by the problems associated with the so-called “window of vulnerability,” was originally presented by the Cuban missile crisis of 1962. In the context of that earlier crisis, President Kennedy’s quarantine of Cuba was defended by some on the basis that any further steps in the direction of the deployment of offensive nuclear weapons in the Western hemisphere would have created an irreversible situation causing serious disruption to the balance of power, thereby advancing the Soviet objective of undermining the security of the United States. Any difficulty in attempting to justify immediate use of anticipatory force against a distant future threat of actual attack is compounded when the threat takes the less distinct form of jeopardizing the security of a nation by disrupting the military equilibrium. By definition, no threat of imminent “attack” exists.

9 See Frye, Strategic Build-Down: A Context for Restraint, 62 FOREIGN AFF. 293, 296-98 (1983-84) describing this as metaphor capturing the fact of a comparatively larger Soviet ICBM force possibly being able to conduct a first strike against U.S. ICBMs, thereby crippling that force to the point that it could not respond.


11 McDougal, id., at 601-02. See also Mallison, id., at 393-94, and Seligman, id., at 142-45. The official United States position was based on the collective self-defense under Chapter VIII of the Charter. See Meeker, id., at 523-24; Chayes, Law and the Quarantine of Cuba, 41 FOREIGN AFF. 550, 554 (1963); and Wright, The Cuban Quarantine, 57 AM. J. INT’L L. 546, 557 (1963). Justifications based on individual claims to anticipatory self-defense have been criticized. See e.g., L. Henkin, supra note 3, at 295-296. One suggestion offered to explain why the United States did not officially invoke Article 51 is because it would have opened the door to similar Soviet claims regarding U.S. missiles then stationed in Turkey. Schachter, In Defense of Rules on the Use of Force, supra note 2, at 134. On the Turkish missiles see Hafner, Bureaucratic Politics and “Those Frigging Missiles”: JFK, Cuba and U.S. Missiles in Turkey, 20 ORBIS 307 (1977). The suggestion has also been made that the U.S. may not have invoked anticipatory self-defense because of a fear that such would have distended the principle beyond recognition and thus served to weaken the general prohibition on the use of force. Preserving Order and Security, PROC. OF AM. SOC’Y INT’L L. 55, 57 (1981) (remarks by E. Lauterpacht).

12 See Farer, Law and War in III THE FUTURE OF THE INTERNATIONAL LEGAL ORDER:
The third and final point regarding anticipatory self-defense raised by recent events concerns the acceptability of invoking the right as a justification for the use of force against a threat posed by a defensive military system, as distinguished from one posed by armed offensive weapons. Now that military technology has progressed to the stage that increasing attention is being focused on the development and deployment of both tactical defensive weapons (e.g., precision guided anti-tank weapons, sophisticated anti-aircraft weapons with high single shot kill probability or fire-and-forget capability, advanced anti-submarine submarines) and their strategic cousins (high-powered microwave devices, electromagnetic and nuclear pumped x-ray pulse weapons, impenetrable energy shields), the importance of this point seems clear. To the extent that one nation is able to harness the defensive technology needed to insulate itself from the weaponry of an opponent, it presents the possibility that many of the objectives underlying the possession and use of offensive weapons can be accomplished by the possessor of defensive technology without a single shot—so to speak—being fired. To maintain that such technology may be subject to preemptive strike runs squarely up against the need for a threat which is imminent since it would seem that only offensive systems can pose a threat of such a nature. Additionally, it runs up against both the fact that the Caroline incident itself involved a claimed threat of an offensive nature, and the fact that the thrust of the literature concerning anticipatory self-defense has concentrated on threats of that sort. Given the notion of anticipatory

CONFICT MANAGEMENT 5 at 62-63 (1971) (noting this problem in context of Cuban Missile Crisis).


15 A state with the kind of offensive superiority which would permit it to strike another state with a blow destroying that state's ability to retaliate could, at least in theory, exact concessions by threatening the use of force. If instead of such an offensive capability, the state possessed a defensive technology able to neutralize retaliation, then when joined together with a considerably more modest offensive capability, similar concessions could be obtained by merely threatening force.

16 The threat in that case involved the ferrying of reinforcements and military supplies to Canadian rebels on Navy Island in the Niagara River and then on the Canadian mainland. See Jennings, The Caroline and McLeod Cases, 32 AM. J. INT'L L. 82-4 (1938).

17 Some literature actually speaks of a threat of imminent offensive attack. See Note, National
self-defense against a threat of imminent "attack," the latter phenomenon seems quite explicable.

Before examining each of the three foregoing points in detail, this article opens, in Part I, with some comments on the fundamental question of ascertaining the meaning of words. It is suggested that the words of legal rules seldom have a "plain" meaning. They are most accurately seen as instruments for presentation to officials who make decisions about lawfulness of conduct and the full range of policies and values which may be implicated. With this theme in mind, Part II then proceeds to address the matter of anticipatory self-defense against distant future threats of actual attack. It is suggested that the Caroline standard's reference to "no moment for deliberation" need not necessarily be read as requiring a threat of actual attack sufficiently impending to be considered "imminent." Since the standard has the effect of minimizing the chances that defensive force will be used when there is no threat it serves to preempt, perhaps there is room to argue that defensive force can appropriately be used against any distant future threat of actual attack, when the existence of such attack is reasonably certain. Part III focuses on whether preemptive self-defense may be exercised not against distant future threats of actual attack, but against distant future threats to the security of a nation stemming from present efforts to disrupt the military equilibrium. The reference to imminent "attack" is acknowledged as troublesome. Nevertheless, the fact that attention should really be focused on the existence of "necessity," rather than on the idea of "attack," is said to raise the possibility that the traditional standard might be broad enough to include anticipatory action against efforts to change the military balance of power. In Part IV the point of anticipatory self-defense against a defensive military system is addressed. It is

Self-Defense in International Law: An Emerging Standard for a Nuclear Age, supra note 4, at 201 [hereinafter Note National Self-Defense]. Most, however, simply discusses anticipatory self-defense in the context of an imminent offensive attack. See e.g., McDougal, supra note 10, at 600-01; W. Friedmann, supra note 2, at 259-260; J. STONE, OF LAW AND NATIONS 8-9 (1974); Waldock, supra note, at 497-98; L. Henkin, supra note 3, at 141-45.

18 This is one of several fundamental or basic questions relative to international law and the use of force which merits consideration. Others include: whether expansion of existing exceptions to the rule against the use of force is likely to result in abuse eventually eroding the rule itself. Whether resisting expansion of exceptions to accommodate behavior states are likely to engage in may eventually reduce respect for other priciples of international law; whether international law is based on consent, which may be reavled expressly in things like international conventions, tacitly through international practice, and if so, Law such a conception of international law accommodates value changes not yet captured by express or tacit consent; whether a value-oriented approach to law ranks the value against the use of force as preminent; whether rules restricting force are designed to promote pluralism at the expenses of other values; whether answers to any of these preceding questions are motivated by implications in areas of international law other than that concerning use of force, e.g., resource allocation, state responsibility.

19 See Letter supra, note 1.
argued that, even though the paraphrasing of the *Caroline* standard as referring to "imminent attack" has been conceptualized by commentators in the context of a threat presented by offensive weapons, there may exist no reason to exclude the possibility that preemptive force can justifiably be used against some defensive military systems, since "necessity," again, is the issue of importance. Part V, the last substantive section of this essay, examines the effect on anticipatory self-defense of a nation's ability to undertake actions to neutralize a threat before it matures. This matter is of importance irrespective of whether developments in another state present a distant future threat of actual attack, a similar threat to security by upsetting the balance of power, or a threat resulting from the eventual completion of a defensive weapons system susceptible to appropriate invocation of anticipatory self-defense. The contention advanced is that measures of neutralization need not be developed as an alternative to the use of force unless they are absolutely certain to be effective. Even then, the possibility should perhaps not be foreclosed of there being no need to develop measures of neutralization, with the immediate use of defensive force being the appropriate course of action.

I. THE WORDS OF RULES

A quarter of a century ago, one distinguished authority, when discussing whether the traditional right of anticipatory self-defense had survived the adoption of the U.N. Charter and its reference in Article 51 to "armed attack," observed as follows:

If, in scholarly interpretation of authoritative myth, any operational reference is seriously intended to be made to realistically expected practice and decision, an attempt to limit permissible defense to that against an actual "armed attack," when increases in the capacity of modern weapons systems for velocity and destruction are reported almost daily in the front pages of newspapers, reflects an unsurpassing optimism.

The importance of this observation is not only in its approval of the continuation of the traditional right, but is also in its suggestion that perhaps words mean more than they appear to mean. Unfortunately,

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20 The thoughts expressed in this Part are tentative and will be explored in detail in future articles.

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

22 M. McDougal and F. Feliciano, supra note 2, at 238.

23 This sort of relative or contextualist, as opposed to absolute or essentialist, approach is also reflected in L. Wittgenstein, Philosophical Investigations § 43 (G.E.M. Anscombe trans. 1968) (in "a large class of cases - though not for all . . . the meaning of a word is its use in the language."
the notion of rules as commands or directives is not explicitly rejected in favor of using rules as rhetorical devices for generating discussion of the central question—what kind of international community should we have, with what kind of values given preeminence?\textsuperscript{24} We are not told that rules of international law are to be understood as vehicles for presentation to officials who make decisions about the lawfulness of relevant conduct, the full range of policies and values that, in differing contexts, may be implicated.\textsuperscript{25} The most we are treated to is a hypothesis which leaves a question. "If, in scholarly interpretation..., any operational reference is seriously intended to be made to realistically expected practice and decision," then a certain conclusion is said to follow.\textsuperscript{26} But is the hypothesis itself correct? More precisely, do the rules of international law open conduct they govern to examination of the policies and values which guide the practices and decisions of states?\textsuperscript{27} Or, alternatively, do the rules have a certain, precise, concrete or objective meaning which, once discovered, need simply be applied to the factual situation at hand in order to produce some ineluctable conclusion?

\textbf{A. Essential Meaning, or Instruments of Policy and Value Choice?}

A certain sense of surprise may be evoked by the notion of legal standards proving to be facilitators for consideration by decisionmakers of the values touched by particular conduct and ultimate judgment thereon.\textsuperscript{28} The objective of international "law" is to cage power, to con-


\textsuperscript{25} But see M. McDougal and F. Feliciano, \textit{supra} note 2, at 151 where it is indicated that in drafting rules of law such an approach should be used.

\textsuperscript{26} But see id.

\textsuperscript{27} This question naturally raises the issue of whether the use of a policy and value oriented approach to the interpretation of existing legal standards involves basing the obligation of the standard on something like natural law rather than on consent. See \textit{supra} note 18 (characterizing this as a fundamental question). See also \textit{supra} notes 72 and 86 and accompanying text. In this respect, however, it should be recalled that the United Nations General Assembly has no authority to take binding decisions, U.N. \textsc{Charter} art. 25 vests that power in the Security Council. Nevertheless, it has been recognized that Assembly Resolutions and Declarations purporting to flesh-out the broad standards of the Charter are declaratory of international law. \textit{Compare} L. Henkin, R. Pugh, O. Schachter and H. Smit, \textbf{International Law: Cases and Materials} 104 (1980) (declaratory) \textit{with} G. Fitzmaurice, \textit{Special Report to the Institute de Droit International in Livre du Centenaire 1873-1973}, at 269 (1973) (influences the formative content of the law but does not make law). See also \textit{Western Sahara} 1975 I.C.J. 12 (ascribing a developmental role to Assembly Resolutions and Declarations). Perhaps the same approach can be taken with respect to community interpretations of antecedent rules when the interpretations reflect a changing assessment of relevant policies and values.

\textsuperscript{28} Yet there would seem to be no reason for surprise. If evolving conceptions of policies and values did not enter into legal decision, there would never be talk of a Warren Court or a Burger Court, cases like \textit{MacPherson v. Buick Motor Co.}, 217 N.Y. 382, 111 N.E. 1050 (1916) (eliminating
strain efforts to advance parochial national interest, whether those of the acting state or of the states called upon to pass judgment. This is best accomplished when the essential, plain, or objectified meaning of relevant neutral legal rules or standards is revealed through impartial and reasoned analysis. To permit rules or standards to open the door for consideration of policies and values involved in various situations could make a travesty of the entire international legal process. Law would become the handmaiden of those who seek to justify why a particular application of power should be considered permissible. Equally alarming, it would be subject to abusive interpretation by decisionmakers who seek to characterize as illegal even the most time-honored forms of conduct, because of some disapprobation towards the state which has had recourse to such. Conventional wisdom dictates that nothing could be more foreign to any system of order based on law. We are all familiar with the idea that the principal attribute of law is that it prevents society from being governed by the whim and caprice of men.

Conventional wisdom, however, may not comport with reality. Law is simply an instrument of policy, a way of expressing how those who participate in its creation prefer to have their lives ordered. Of necessity, then, to talk of what the words of a rule or standard mean requires talk of policies and values, not talk of some discoverable understanding of how one configuration of various characters of the alphabet produce an essential difference in meaning from another configuration. Perhaps it was an appreciation of this fact which led to the observation that those charged with the responsibility of writing law have as their task, not the development of a precise and final verbal formula, but rather that of

29 Without "law," it would not be difficult to imagine the abuses to which disfavored states would be subjected. Instances of this sort are already too familiar, even though international rules presently exist for guiding and assessing conduct. Take for instance the Arab-Israeli conflict. In the estimation of the states involved, the other side seldom complies with its international obligations.

30 On this already being the situation, see Kennedy, *International Legal Education*, 26 Harv. Int'l L.J. 361, 37 (1985) (since the normative moorings of international law are infirm, legal doctrines "dissolve . . . into thin disguises for assertion of national interests.")


32 Recognizing the extreme animosity between various members of the world community, e.g., Israel and the Arab states; the United States and Libya; Nicaragua and its Central American neighbors, suggests this as a distinct possibility.

33 See *Marbury v. Madison*, 137 U.S. (1 Chanch) where Justice Marshall captures this idea in his reference to the fact that in the United States we have a "government of laws, and not of men."

34 See L. HENKIN, supra note 3, at 92.

35 See White, supra note 24, at 698.
presenting, in broad outline, "to the attention of officials who must reach a decision about . . . lawfulness or unlawfulness . . ., the different variable factors and policies that, in differing contexts and under community perspectives, rationally bear upon their decision . . ." The point made here is not complex. Both in reading law and in writing it, the struggle is with policies and values, not with words. Words merely represent a way of permitting the inquiry into policies and values to begin and to allow that inquiry to be carried to its ultimate conclusion.

B. Treatment of Words in International Practice

No matter how "scientific" the analytical methodology applied by those who believe words have an essential meaning is claimed to be, the diametrically opposed conclusions arrived at by governments and scholars regarding the lawfulness of particular international events belies that the words of legal rules or standards are not so treated in actual practice. If every international legal standard had a plain meaning, there would seem to be little possibility, short of a misunderstanding about what legal standard applied or what factual events actually occurred, for divergent conclusions regarding the status under the law of particular conduct.

36 M. McDougal and F. Feliciano, supra note 2, at 151.

37 Without attempting to determine the relative persuasiveness of the approach that legal decisionmaking can be impartial, even though its task is to choose between various policies, cf. G. Christie, Jurisprudence: Text and Readings on the Philosophy of Law 1014 (1973) (acknowledging the entry of policies, at least to the extent that they have been "filtered through the facts of . . . previously decided cases"), or, alternatively, that it can never be anything more than politics in a more structured and sophisticated garb, see Hutchison and Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 STAN. L. REV. 199, 206 (1984), Kairys, Law and Politics, 52 GA L. REV. 243, 248 (1984), and on the international front, Boyle, Ideals and Things: International Legal Scholarship and the Prison-house of Language, 26 HARV. INT'L L.J. 327, 351-52, it would seem clear that the notion - or myth, if you so please - of legal standards having essential, plain, or neutral meanings has endured for several reasons. First, viewing an international standard or rule as neutral suggests that results produced through the application of the standard or rule will be fair, thereby enhancing the likelihood of states submitting to the regime of international law. Second, by promoting the image of fairness, the idea of an essential meaning helps minimize the possibility that a state may feel it has not been impartially treated, thus leading it to raise a question of obligation: Is international law "law"? And finally, by avoiding the relationship between law and values, the notion of neutrality has prevented attention from being deflected from the shared goal of "peaceful change," change wrought through international systems, rather than through military power, see M. McDougal and F. Feliciano, supra note 2, at 129-30; G. Tunkin, Theory of International Law 251-52 (1974); and Tunkin, International Law in the International System, 147 Rec. des Cour 1 (1975) (international law to play peacekeeping role while transition is made from capitalism to socialism).

38 This is, perhaps the distinguishing attribute of science: its immutable principles produce results which time, place, nor person seem to affect. Law, on the other hand, is not science. See O. Holmes, The Common Law I (1881) stating:

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency
Scientific analysis should result in parallel conclusions among those who consider the particular problems being addressed. Yet all one need do to appreciate the degree to which law is seen as an instrument for policy or value choice is to recall the irreconcilable assessments of the Axis powers and the International Military Tribunal (IMT) concerning specific events in the Second World War, of East and West Soviet action in Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979), of commentators regarding the ongoing Arab-Israeli conflict in the Middle-East, and of scholars reflecting on recent events in Grenada (1983) and Nicara-

of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

See also Holmes, The Path of the Law, 10 HARV. L. REV. 457, reprinted in G. Christie, supra note 37, at 648, 656, stating that behind the logical form of legal reasoning: "lies judgment as to the relative worth and importance of competing legislative grounds, often on inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form."

39 On Nazi claims to have legitimately invoked anticipatory self-defense in attacking various nations, claims rejected by the IMT for Nuremberg, see I. Brownlie, supra note 3, at 258 (attack on Soviet Union); M. McDougal and F. Feliciano, supra note 2, at 232 (attack on Norway). On Nazi claim to make the decisive and unreviewable decision regarding whether invocation of anticipatory self-defense legitimate, claim rejected by the IMT for Nuremberg, see I. BROWNLIE, supra note 3, at 237-39. On a Netherlands claim that a declaration of war against Japan was taken in contemplation of an imminent attack against the Netherlands East Indies, claim accepted by the IMT for Far East, see I. BROWNIE, id.


The variety in the conclusions arrived at may well suggest the existence of undisclosed motivations, motivations which have their generative source in the central matter of choice between competing policies and values.

C. Can It Be Any Other Way?

As much as we would undoubtedly relish avoiding the agony associated with recognizing that the words of rules dictate assessment and reassessment of policies and values and choices among them, the agony may be something with which we must learn to live. Words, the instruments of human expression, may well be incapable of conveying ideas with the same precision and completeness as when they were formulated in the mind of the originator. If this is so, the search for an essential, plain, or objective meaning may always prove frustrating. Much of language is ambiguous or vague. And even when that which is selected to express

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43 The use of force is not the only area where such motivations may exist. In the area of the "sources and evidence" of international law similar motivation may also appear. For example, perhaps the inclination to use the disparities between lesser developed nations and socialist states, on the one hand, and Western market economy states, on the other, for the purpose of reforming existing international legal standards is what has motivated Soviet scholars to urge a more flexible approach to law-making by international organs. Compare G. Tunkin, Theory of International Law 165, 170, 172 (W. Butler trans. 1974) (Resolutions of the General Assembly viewed as authoritative whenever "generally accepted" with the Western Sahara, 1975 I.C.J. 12, ¶ 54-9 (giving authoritative force to Resolutions of the General Assembly when adopted by consensus)). Similarly, it may be Soviet apprehension over the impact of liberal democratic theory which has led to it arguing that the reference in Article 38(1) of the Statute of the International Court of Justice, 54 Stat. 1055, T.S. No. 933, 3 Bevans 1179, to "general principles of law" does not include general principles of municipal law. See G. Tunkin, Dag Volkerrecht Der Gegenwart 125-27 (Wolf trans. 1963), reprinted in L. Henkin, P. Pugh, O. Schachter, H. Smith, International Law: Cases and Materials 77-8 (1980). See M. Virally, The Sources of International Law § 3.21 (Sorensen ed. 1968).

44 See G. Christie, supra note 37, at 824, n. 96, for an excellent illustration of ambiguity in a notice posted for hunters. The notice read: "Please do not ask permission to hunt." Obviously this could be, and was, read to have two distinct meanings.

45 U.S. Const., art. I, § 8, cl. 5 provides Congress with the power: "To coin Money . . . ." In Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, the Supreme Court struck down Congressional reliance on this power as the basis for attempting to make paper money legal tender. II M. Howe, Justice Oliver Wendell Holmes: The Proving Years 52 (1963), attributes to Justice Holmes a letter in 4 Amer. U.L. Rev. 768 (1870), in which the Hepburn decision is praised on the following basis:

It is hard to understand when a power is expressly given, which does not come up to a required height, how this express power can be enlarged as an incident to some other express power. The power to "coin money" means, I take it . . . (1) to strike off metallics medals (coin), and (2) to make those medals legal tender (money). I cannot therefore, see how the right to make paper legal tender can be claimed for Congress . . .
an idea is so clear as to leave no question about the meaning of the words selected, holding that meaning to be the one emanating from the words can lead to absurd results, simply because that meaning may fail to capture the full range of values considered by those engaged in the constitutive process of law-making. One primitive example from everyday life appears to suggest this conclusion.

As might well be imagined, it is not uncommon for parents raising a child to give a rather simple instruction the first time the child displays both the will and capability to repair from the house without the parent. The instruction is clear, direct, and emphatic and usually is something like: "Never go out of the house without your mother or father." The use of the word "never" prevents the instruction from being ambiguous and thus able to be understood as meaning contradictory things. Similarly, it also prevents the instruction from having the open-textured nature of standards which are vague and thus susceptible to being understood as dealing with only a limited universe of situations. To proponents of plain meaning, "never" means never. However, the policies or values which served to impel the articulation of the standard—in particular the policy or value of promoting the child's bodily safety—suggests something much less inclusive. Surely no parent would insist that their child contravened the instruction if the house were on fire and the child fled outdoors to avoid injury. As plain as the word appears, "never" does not always mean never. The full sense of any word requires references to policies, values, and context.

D. Problems Associated With Essential Meaning

Apart from the peculiar results which plain meaning can produce, it also has the effect of rigidifying ideas. When one views words as having an essential meaning, a meaning that does not depend on the policies or values the words implicate, the words obtain a certain inflexibility, a lack

This is a classic example of an instance where vague terms were viewed as having certainty. See Knox v. Lee and Parker v. Davis, 79 U.S. (12 Wall.) 457, overruling Hepburn. See also Thayer, Legal Tender 1. HARV. L. REV. 73 (1887) (pointing out Holmes' error).

46 See supra note 44, at 822-24.
47 Id. at 823.
48 While some may claim the example of the parental instruction is inapposite when concerned with the meaning of "legal" standards, recall the First Amendment, U.S. CONST. AMEND. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." (emphasis added). On its face, this legal standard seems just as clear. Yet it, too, has been read as not meaning what it says. See Schenck v. United States, 249 U.S. 47 (1919) (J. Holmes' fire in a crowded theatre example); B. SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK 251 (1972). Expressing the view that the First Amendment means what it says, see Konigsberg v. State Bar of California, 366 U.S. 36 (1961) (J. Black's dissenting opinion). On Black's approach, see Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. REV. 549 (1962).
of capacity to be receptive to changing conditions.\textsuperscript{49} As a consequence, the passage of time may mean they will give rise with increasing frequency to disputes; disputes which indicate that law is becoming or has become inconsistent with the way in which the regulated community prefers to arrange its affairs. Of itself, the inconsistency may be the result of law's effort to restrain conduct argued by some to be undesirable or unacceptable. While such arguments may have merit, it would seem wise to guard against inconsistency which leads to questions about the fairness of the legal system.\textsuperscript{50} It may well be that at some point such questions might result in reduced respect for legal standards that would otherwise be observed.\textsuperscript{51} Wondering about fairness, a state may find it easier to violate rather than to respect principles which seem inconvenient or out-of-line with perceived interests.\textsuperscript{52}

The fact that international law lacks a system of certain, swift, and externally imposed sanctions makes the problem of whether the absence of perceived fairness can lead to law violation, one of tremendous importance.\textsuperscript{53} To be sure, the international legal system is not completely without a set of direct and formal sanctions. At least in theory, the United Nations is empowered to punish transgressions of international law.\textsuperscript{54} However, the most common form of sanction the international system imposes for law violation is informal, slow to occur, and indirect.\textsuperscript{55} It is found in the reprisal actions of individual states.\textsuperscript{56} Endeav-


\textsuperscript{50} See G. Christie, \textit{supra} note 37, at 1007-08 (expressing idea that perception of fairness is important).

\textsuperscript{51} The relationship between some rules perceived as unfair and respect for other rules is explored in H. Packer, \textit{The Limits of the Criminal Sanction} 305 (1968) and A. Sinclair, \textit{Prohibition: The Era of Excess} 214 (1962).

\textsuperscript{52} For an indication that states will violate unrealistic legal standards which are inconsistent with perceived interests, see \textit{Nonproliferation Treaty: Hearings Before the Senate Comm. on Foreign Relations}, 90th Cong., 2d Sess., CONG. REC. 129, 139-40 (1960) (statement to R. Strausz-Hupe to the effect that the United States would have to violate a nonproliferation treaty if "a matter of life and death for the United States" arose). \textit{See also} MacChesney, \textit{supra} note 10, at 597 (indicating the need to make the law of self-defense compact with reality since "states whose survival is threatened will nonetheless react to such threats" making the response "either outside or above the law.")


\textsuperscript{54} Schachter, \textit{The Right of States to Use Armed Force}, \textit{supra} note 2, at 1621-22. \textit{See also} Fitzmaurice, \textit{The Foundations of the Authority of International Law and the Problem of Enforcement}, 19 MOD. L. REV. 1, 5-6 (1956) (noting the United Nations' enforcement powers do not extend to all "law-breaking as such").

\textsuperscript{55} J. Brierly, \textit{supra} note 53, at 101 (sanctions are "precarious in their operation"). \textit{See also}
or making deter violation in the future, individual states suffering the effects of earlier actions inconsistent with international law may take responsive action. Various types of retaliation such as refusal to honor legitimate claims submitted by the violating state or pursuit of conduct inconsistent with obligations owed to the violating state may be invoked. Even if such informal, slow, and indirect sanctions were sure to occur, and there clearly can be certainty on this score, the manner in which they come about may mean that the state which had violated international law will make no connection with its earlier conduct. If the deterrent capacity of sanctions is absent, what is left to induce states which view the international legal system as unfair to observe principles that are inconsistent or out-of-line with perceived interests? The sanctioning process of international law makes the extent to which the rules or standards of the system reflect ever changing preferences toward differing policies or values a matter of critical significance.

E. Identification and Balancing of Relevant Policies and Values

Acknowledging that the words of rules are merely vehicles for presentation to officials who make decisions the full range of policies and values that may be implicated, and that this is the way it must be, should be, and is, directs attention to the matters of central importance: What policies and values are involved in various situations, and which should prevail when several conflict. Obviously, the policies and values implicated by anticipatory self-defense include the policy against the use of force (both with regard to frequency and intensity) and the policy in favor of defense of self. There may be dispute about what others should be referenced, but since the use or non-use of force in self-defense has


56 See O. Lissitzyn, The International Court of Justice 5 (1951) (“disadvantages incurred by [the] breach [of international law],” in the form of reactions from other states); Schachter, The Right of States to Use Armed Force, supra note 2, at 1623-24 (responses of other states and the public affect what states do).

57 On what may increase the chance of certainty, see J. Brierly, supra note 53, at 102 (relative power vis-a-vis the violator state); H. Morgenthau, supra note 55, at 282 (suggesting same position).

58 To overcome the problem of “connection” associated with the indirectness and lack of certainty in the sanctioning process, every nation taking a sanction should make it absolutely clear exactly what unfortunate act generated the sanction.

59 Scandinavian “legal realists” might suggest the principles will be obeyed out of a sense or feeling that it is right to obey. See generally A. Ross, Tu-Tu, 70 Harv. L. Rev. 812 (1957); A. Hagerstrom, Inquiries into the Nature of Law and Morals (C. Broad trans. 1953) (discussing a cognitive impulse to obedience which is engendered simply by a command or directive).

60 The list could be endless, but surely would include economic security, intellectual freedom, basic health, political and cultural diversity, etc.
impact on the quality of life generally, other values are clearly involved.\textsuperscript{61}

When any of the values involved conflict, decisionmakers who pass upon lawfulness must make a choice, and choice is the basic element of the process of making (in its initial articulation) or remaking (by way of interpretation) all rules of law.\textsuperscript{62}

Certainly, there is no way to empirically verify that an ethically “correct” choice has been made between one value or group of values and another. Even assuming a process in which every official or body fixed with the responsibility of choosing between various policies and values performed conscientiously and without predilections towards those whom their decisions would affect,\textsuperscript{63} the choice takes place with nothing but the fallible power of human reason to suggest that the choice which is made is right.\textsuperscript{64} Unlike some aspects of science, there is no litmus test by which to judge the correctness of the selection between values.\textsuperscript{5} If there is reason to avoid complete despair, it could well be that by struggling intellectually and emotionally with the problem of resolving conflicts between various policies and values, a greater sensitivity or humaneness is acquired.\textsuperscript{65} Presumably that attribute, fashioned in the context of passing upon the lawfulness of conduct of others, will guide the decisions of

\textsuperscript{61} It should be noted that any attempt to enumerate the values involved in instances where force is used in self-defense necessarily reflects the political, moral, and cultural biases of the one constructing the list. Additionally, as suggested, the values involved may be affected directly by the use of defense force (e.g., force and in self-defense touch the values against the use of force and in defense of self) or affected only indirectly (e.g., in using defensive force a state may allow for the promotion of economic or wealth values that would otherwise be disadvantaged if the state had to forego the use of force for the development of countermeasures able to neutralize the threat it faced; see infra Part V).

\textsuperscript{62} See text accompanying supra notes 33-37. It should be noted that this article does not attempt to thoroughly identify and balance all the values implicated by the various circumstances in which anticipatory action may be involved. Witness the “preliminary” nature of the thoughts expressed. Though various values are referred to in the context of the specific problems examined in Sections II-V, and some attempt is made to balance the values referenced, the conclusions suggested should be taken as tentative.

\textsuperscript{63} In view of the fact that international decisionmakers have a dual role to play, one which is national and narrow, and another which is international and broad, there will be many instances when international judgment is affected by the narrow, national interest. On the dual role of decisionmakers, see M. McDOUGAL AND F. FELICIANO, supra note 2, at 39-40.

\textsuperscript{64} This, however, should not be permitted to serve as a justification for a cavalier approach toward policy and value choice.

\textsuperscript{65} One should not be misled into thinking that science always has available a way of verifying postulated theories. In the area of high energy physics, for example, the “unification theories” seeking to bring together discovered physical phenomena, e.g., time, space, gravity, are frequently regarded as not susceptible to verification in the classic sense. Some have therefore been led to think that Keats’ idea of “Beauty is truth; truth is beauty” has applicability. Verification is thus said to perhaps rest on the internal elegance of a proposed unification theory.

\textsuperscript{66} See G. TINDER, POLITICAL THINKING: THE PERSISTENT QUESTIONS, 16-18, 189-200 (2d. ed. 1974). The change in the public’s perception of ethnic and sexual groups witnessed in the last thirty years seems as much the result of widespread discussion of the subject of equality as of any
the states who choose between various conflicting policies and values when they give consideration to acting in a manner affected by international law. To the extent that this occurs, it would seem a gross mischaracterization to conclude that policy and value choices made without the benefit of certainty regarding their correctness are nothing but wasteful expenditures of time. Perhaps it seems trite to say, but every moment spent on improving the sensitivity and humanity of mankind may well be a moment well spent.

II. DISTANT FUTURE THREAT OF ACTUAL ATTACK

With these skeletal observations on whether the words of rules mean what they appear to mean, let us proceed to address the problem of defensive action against distant future threats of actual attack. With regard to that matter, there is no denying that the fashion in which the traditional standard of anticipatory self-defense is cast presents a substantial problem. To say that there must exist a necessity which leaves "no moment for deliberation" implies the need for a high degree of urgency, an immediate proximity in time. Thus it is understandable that commentators have characterized this exacting formulation as one which requires an imminent threat. Yet unless one is prepared to view the words used in the formulation of the standard as more determinative than the values the standard implicates, one cannot help but conclude that such characterization may not precisely describe the instances when anticipatory self-defense may be properly invoked. In order for that right to be so invoked, there is no need to do as some have suggested and change the law. As presently formulated, anticipatory self-defense might well be viewed as including permission to act against some distant future threats of actual attack.

demonstrable evidence on that score. Simply by talking about and struggling with the problem, perceptions of equality have been changed.

Because of the dual role of international decisionmakers, see M. McDougal and F. Feliciano supra note 63, those who have struggled with policy and value choices in the context of assessing the lawfulness of the conduct of others may see an increased sensitivity to important values affect their own decisions regarding their own behavior in specific situations. This may also come about because states function from time to time as both decisionmakers and claimants. Consequently, they appreciate that the values they suggest should be preferred when they assess a claim are the same values which may be applied whenever they make a claim. The reciprocal nature of this process results in the more widely shared values being preferred.

See authorities cited supra note 2. See also Note, National Self-Defense, supra note 4, at 207 (suggesting McDougal's Cuban quarantine approach leaves the reference to imminent meaning "the moment of last opportunity to eliminate [a] threat"). Recall that "imminence" also captures the idea of recourse to peaceful means. See supra note 2, second paragraph.

See Note, id. at 200-17 (viewing the "imminency" requirement as one of temporal proximity, then arguing that in certain instances it should be relaxed and the U.N. Charter should be amended to reflect this fact).
A. Imminence: A Method of Minimizing Mistake

The right of a state to defend itself against an existing attack or an anticipated threat of actual attack is surely entitled to be highly ranked among the litany of rights held by members of the international community. This proceeds from the fact that the absence of an international body capable of effectively protecting every member of the community of nations from threats highlights the importance of the value of defense of self. What would seem to assure that the right to act to protect one’s self is recognized as the most fundamental of rights is that without it, territorial integrity and political independence could be impaired. The result is that other rights inuring with sovereignty might prove short-lived.

The rule of the Caroline incident recognizes the position of primacy of anticipatory self-defense by crystalizing the notion that force may be used before the effect of an external danger is felt. A word formula might then be fashioned to commit the right to the corpus of general international law. Nothing, not even the fact that the authoritative statement of the right is expressed in restrictive terms, should be allowed to deflect attention from this essential point. The principal contribution of the Caroline incident is to be found in its recognition of the right to act in advance, not in its restriction of the instances when that right may be exercised.

Bearing this in mind, it must nevertheless be acknowledged that the restrictive terms used in the traditional standard have undoubted effect on the overall configuration of the law of anticipatory self-defense. The requirement that there exist a necessity “leaving no moment for deliberation” cannot simply be read out of the traditional formulation. Conceivably it was inserted for some reason and therefore its effect on anticipatory self-defense must be taken into account. The inclination may be to view the reason for the requirement’s insertion as evidenced by the meaning of the restrictive language itself. Thus can be explained the assessment that anticipatory self-defense requires the existence of an “imminent” threat in order to justify its invocation. The evident intent of the Caroline standard, and the restatement of that standard by commentators, stresses the immediacy of an attack. An additional assessment, however, would be obtained by recognizing that acceptance of the notion that a state may preempt the use of force raises the risk that such force may be used mistakenly—where there is no actual attack it serves to pre-

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71 See Jennings, supra note 16, at 82 (“It was in the Caroline case that self-defense was changed from a political excuse to a legal doctrine.”). Limitations on self-defense had been suggested considerably before the Caroline case. See e.g., H. Grotius, De Jure Belli de Pacis (1625), reprinted in 2 Classics of International Law 172-75 (J. Scott ed. 1925) (immediate and certain danger from an identified aggressor).
empt—and militates in favor of limitations designed to promote the value against the use of force by minimizing the occasions for mistake. Unless the latter approach is seen as totally without merit, it may strike the appropriate balance between the values of defense of self and that against the use of force.

The very fact that language limiting anticipatory self-defense exists in the traditional formulation of the right indicates an appreciation for the value against the use of force and recognizes the possibility that force might be used by mistake whenever its use, before the consequences of an external danger are felt, is permitted. At the same time, it certainly appears that the very words selected to reflect the limitation convey the thought that temporal proximity is an absolute imperative. The words could not be more plain. For defensive force to be justified, there must be a threat “leaving no moment for deliberation.” But the notion that resort to anticipatory force must await the existence of a threat of actual attack considered imminent has the effect of reducing the number of occasions when force is used mistakenly. In doing so, the value against the use of force is advanced, since force is not used when there is no threat it serves to anticipate. Given this, it would seem fair to view proximity in time as nothing more than a way through which the risk that naturally accompanies a right to act in advance is to be dealt with and the value against the use of force promoted. Requiring an external threat which is imminent yields clarity to those factual circumstances which will support a claim that anticipatory action was justified. However, as long as the risk of mistake is minimized there may be no reason why the external threat need be imminent in time. To require that it be so in all cases may elevate the meaning of the words used to express the limitation on the right of anticipatory self-defense above the values against the use of force and in defense of self which the right implicates. In all candor, however, with the exception of Israel’s attack on the Tamuz I nuclear reactor, it is difficult to identify other instances where state practice indicates a willingness to back away from so elevating those words of limitation.\footnote{\textsuperscript{72} This raises one of the fundamental or basic questions alluded to \textit{supra} note 18. The question concerns whether an interpretation of a legal principle, when the interpretation is based on a value assessment, can reflect an obligation whenever the interpretation is not borne out by state practice or state pronouncements. Without so much as intimating an answer to so complex and important a question, any effort to develop an answer would seem required to explore the matter of whether practice necessarily alters a principle that allows more than states willingly claim. Those familiar with the development of customary international law will recall that many insist a practice does not reflect law unless the practice is followed because of a sense of obligation, as distinguished from political expediency. See \textit{e.g.}, C. De Visscher, \textit{Theory and Reality in Public International Law} 148-49 (Corbett trans. 1957). In line with this idea, if a principle admits of an interpretation permitting more than state practice indicates states are anxious to claim, is the principle nevertheless narrowed, though the practice is meant to suggest a political choice rather than a sense of the limitations on legal choice?}
B. The Humanitarian Consideration

The humanitarian attraction of Israel's claim which relates to the attack on the Tamuz I nuclear reactor would appear to indicate the propriety of giving the restrictive language contained in the traditional formulation the reading suggested. Without intending to pass on the merits of the factual assertion involved in the Israeli aerial strike, there would seem every reason to support the view that it is more preferable to have defensive force produce minimal damage than it is to have it produce extensive damage. Whenever the accomplishment of that objective requires action before an external danger proves imminent, the focus of attention should be on whether the existence of the danger is certain rather than whether the danger is in the form of an immediate or impending attack. To require a threatened state to refrain from acting until an external danger becomes imminent seems justifiable in humanitarian terms only if the very existence of the danger were not certain. But if one state has embarked on a pursuit designed to culminate in the use of force against another, a defensive attack taken before the threat matures enough to satisfy the standard of imminence would seem supported if that attack would result in much less destruction than an attack put off until a future point in time. An approach of this sort promotes both the value of defense of self and that aspect of the value against the use of force limiting the intensity of coercion.

This is not to say, however, that a state may properly invoke anticipatory self-defense simply because the defensive force used will produce less destruction than that used later. In the absence of some certainty that the use of defensive force would not be mistaken, the mere fact that an early use of force would produce less destruction would seem to supply insufficient justification. The restrictive language of the Caroline standard favors minimizing the chances of mistake. Thus, it is only when the objective of damage limitation is joined with the minimization of mistake that anticipatory self-defense in advance of temporal imminence is justified.

73 Recall the observation of Ambassador Blum that postponing the strike until the reactor had become "hot" would have killed "tens of thousands." Mallison and Mallison supra note 7.
74 Those who have reflected on the merits of the claim of self-defense have arrived at differing conclusions. See Mallison and Mallison, supra note 4 (claim of self-defense unpersuasive); Note, National Self-Defense, supra note 4 (claim persuasive); Note, The Sun Sets on Tamuz I, supra note 4 (claim unpersuasive).
75 This is because refraining from the use of defensive force until the danger becomes certain promotes the value against the use of force without jeopardizing the value of defense of self.
76 See discussion supra note 62 on the tentative nature of any value assessment suggested in this article.
77 Clearly, any assessment of this sort would seem to require some reference to the perceived intentions of the threatening state. This necessarily raises the question of what must be the nature of the responding state's view that an attack is certain?
C. Required State of Mind Reflects Required Level of Certainty

A level of certainty required under international law to minimize the chances that anticipatory self-defense may be used by mistake would seem to be reflected in the state of mind of a nation invoking that right. That the element of state of mind is crucial seems evident. Even the movement of troops towards a border following their massing nearby, or the making of final preparations necessary for launching a portion of one's ballistic missiles, or the existence of any other factual situation one might conclude satisfies the requirements of imminence, temporal proximity, immediacy of attack, would not entitle a state to use anticipatory force without some evidence that the indicia of an actual attack were perceived or apprehended. Though the concept of an "imminent" attack is admittedly more certain than a state's subjective assessment that it faces a threat of attack in the distant future, the problem of state of mind cannot be escaped.

The Caroline offers little help regarding the state of mind required by international law when invoking anticipatory self-defense. Interestingly enough, once the sources for the proposition that no nation may be the final judge of the lawfulness of its own actions have been identified, few authorities can be found who have sought to go further and deal with the kind of apprehension needed in order to legitimize resort to force of self-defense. Is it sufficient that a nation honestly believes it faces a threat of attack? Must the relief be supported by facts subsequently re-

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78 As will be recalled, the Kellogg-Briand Treaty of 1928, 46 Stat. 2343, 94 L.N.T.S. 52, basically outlawed resort to war for the resolution of international controversies. The United States indicated to several countries that in its estimation the treaty did not prevent resort to war in self-defense and that every nation "alone is competent to decide whether circumstances require recourse to war in self-defense." The same view was expressed by the U.S. Senate Committee on Foreign Relations. See I. Brownlie, supra note 3, at 236-37. In defending some of its actions in World War II, Nazi Germany advanced a theory of decisive unilateral determination, drawing apparently on the language just quoted. L. Henkin, R. Pugh, O. Schachter, H. Smit, International Law: Cases and Materials 908, n. 1 (1980). That theory was rejected, with the IMT at Nuremberg stating: "But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." Quoted in I. Brownlie, supra note 3, at 239. For the same approach taken by the earlier constituted Lytton Commission investigating the September 18, 1921, Japanese attack on Manchuria, see I. Brownlie, id., at 242 ("the Commission does not exclude the hypothesis that the officers on the spot may have thought they were acting in self-defense. . . .") [Emphasis added]). This same aversion to decisive unilateral characterization has evidenced itself in other contexts as well. See e.g., Fisheries Case (U.K. v. Norway) [1951] I.C.J. 116, 132 (indicating that municipal law delimitation of offshore areas are permitted, but validity "depends upon international law.

79 But see Note, National Self-Defense, supra note 4, at 208-10 ("reasonable nation"); I J. Westlake, International Law 299 (1904) ("attack reasonably . . . apprehended"); M. McDougal and F. Feliciano, supra note 2, at 230 (observation made that what must be investigated is "the degree of necessity—as that necessity is perceived and evaluated by the target claimant. . . .") [Emphasis added]).
vealed as indicating an actual armed attack was intended by another state? Will a subsequent factual assessment which indicates that an attack was not intended preclude reliance on anticipatory self-defense, if at the time it was invoked a reasonable belief existed that an attack would occur?

As with many areas, those who have at least given passing consideration to such questions appear to be in some disagreement. In discussing the matter, some have used language which can be understood to suggest that the appropriate standard is purely subjective. Whenever a state which invokes self-defense honestly believes an attack is certain to occur, the requisite state of mind exists. Small wonder the very right of anticipatory self-defense has received less than universal acceptance. Others who have reflected on the necessary state of mind take the posi-

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80 M. McDougal and F. Feliciano, supra note 2, at 230.
81 Id. and id at n. 241. But see McDougal, supra note 10, at 597 (stating the standard as that of a state which "reasonably decides" activities of another state require self-defense). It's unclear what the McDougal position, stated here and in supra note 79, should be read as meaning. Presumably the standard is to be that of reasonable apprehension of an attack. The language referred to in supra note 79, especially at 230, n. 241, seems to confuse the matter.
tion that the standard has, or should have, an objective as well as a subjective component.\textsuperscript{83} Legitimate reliance on self-defense requires that the state invoking the right actually perceive itself as threatened and that this perception be based on circumstances which would suggest its reasonableness.

In common law countries, the municipal law test concerning the state of mind of an individual invoking self-defense has both a subjective and an objective component.\textsuperscript{84} No person may properly invoke the right as a justification for the use of force unless that person believes a threat which warrants defensive measures exists. Furthermore, the belief that a threat of such a nature exists is insufficient to provide justification unless a reasonable third party would arrive at the same conclusion. Surely the basic rationale for such an approach is twofold. First, it curbs resort to force by eliminating the possibility of advancing \textit{post hoc} rationalizations based on after-discovered facts. And second, it curbs resort to force by eliminating the possibility that the use of force can be justified on the pretext that action is needed for defensive or protective reasons when no reasonable person would include such to be the case. The same rationale is relevant in relations between members of the international community as well. Indeed, it seems captured by the previously mentioned proposition that no nation may be the final judge of its own actions.\textsuperscript{85}

Arguably one might see the idea that no nation is the final judge of its own actions as not ruling out the possibility that international review focuses only on determining whether the state claiming to use force in self-defense perceived or apprehended a threat which warranted defensive action. From this it might be suggested that the requisite state of mind under international law is purely subjective. To take such an approach, however, would leave open the chance of force being used on the pretext that defensive action is needed. The result would be a situation in which the legitimate value of defense of self is perverted in order to circumvent the value against the use of force. To avoid this, the more appropriate reading of international review would be that it indicates that the required state of mind has both a subjective as well as an objective

\textsuperscript{83} See I. Westlake, supra note 79 (stating a standard which indicates the traditional law sets forth on objective and a subjective component); I. Brownlie, supra note 3, at 260, 367 (notes the law should set forth such, but that the traditional standard fails to do so in any clear fashion).

\textsuperscript{84} On the two-pronged component in United States municipal law, see R. Perkins, Criminal Law 1113-16. For an interesting comparison from an entirely distinct legal system, see Otley and Zorn, Criminal Law in Papua New Guinea, 31 Am. J. Comp. L. 251, 266-67 (1983) (noting that the defense of provocation has an objective and subjective component), and 276 (noting section 274 of the Criminal Code allows self-defense, which is written so as to reflect an objective and subjective component).

\textsuperscript{85} See supra note 78 and accompanying text.
component. The effect of defensive action against a distant future threat suggests the level of certainty required to justify such can be stated as that of reasonable certainty.

Reasonable certainty is preferable to any purely subjective standard (eg., "honest belief" of attack), since it guards against instances in which states may wish to act just because they feel threatened. The objective component of the state of mind requirement limits the ability of states to abuse the subjective component. It is not enough that a state apprehends an attack. In order for the use of preemptive force to be justified as legitimate anticipatory self-defense, subjective apprehension must be confirmed by objective factors reflective of an attack reasonably certain to occur. An assessment of such factors would seem to require that the validity of any claim to use force in anticipatory self-defense be evaluated in light of the extent of the ideological gulf between the states involved; the nature of past and current international relations between those states; the character of the military development causing the claim to resort to force in self-defense; a comparative examination of the involved states’ existing military strength; an appraisal of the likelihood that other states might assist either the state claiming self-defense or the state allegedly planning an attack, as well as an evaluation of the military strength of the assisting states; and, the internal political situation within the state presumed to be disposed to attack.

The chances seem somewhat minimal that states not holding antithetical ideological beliefs would attack each other. Nevertheless, the Falkland-Malvinas Islands conflict of 1982 between Great Britain and Argentina reminds us that it can happen. When, on the other hand, the ideological gulf is great, the chances of military confrontation increase substantially. Witness events over the last few years concerning Libya and the United States. For all that can be said about ideological differences, however, they alone would seldom prove determinative. Of equal importance would be whether current relations are marked by serious tensions, like those now apparent between Nicaragua and its neighboring nations, El Salvador and Honduras, or a formal state of war, like that which existed between Iraq and Israel at the time the Tamuz I nuclear reactor was bombed. This is not to say that an attack can never be reasonably certain to occur in the absence of serious tensions or a state of war. Some have suggested that the optimum time to catch an opponent by surprise is when relations are excellent and an attack seems distinctly improbable.\textsuperscript{86} Going beyond current relations between the states con-

\textsuperscript{86} The same question referred to supra note 72 occurs here whenever one examines the possibility of giving the Caroline standard a reading that would allow the use of force to redress a military imbalance. If imbalance is an accepted fact of life, and practice suggests that states do not use imbalance as justification for a claim of self-defense, how can an interpretation of the Caroline inconsistent with practice be viewed as reflecting the state of the law?
cerned, the nature of past relations, the character of the military development leading to the claim of self-defense, and the general military situation in the involved states would also reflect on the reasonableness of a judgment that an attack is certain to occur. Apprehensions conceived in the context of a history of repeated invasions from particular sources may be more reasonable than those burdening a nation which historically has been insulated by geography. Similarly, whether the state benefiting from the military development which justifies anticipatory action is militarily superior, equivalent, or inferior to the other state, and whether the development itself is of such a nature as to alter that relation, seems to bear upon reasonable certainty. Many militarily superior states enjoying the benefits of new developments, however, live in harmony with weaker neighbors. This emphasizes once again that any effort to assess the reasonableness of a determination that an attack is certain to occur requires consideration of more than a single factor.

There are two other factors which would seem to complicate any effort to assess the reasonableness of such a determination. The first concerns the likelihood that other nations might assist either the state claiming self-defense or the state allegedly planning an attack. The second concerns the internal political situation within the state presumed to be disposed to attack some other state. While both factors deal with matters which are highly conjectural, their relevance seems evident. Is it not difficult to imagine one concluding that an attack is reasonably certain to occur, when the presumed attacking nation, though ideologically and historically hostile, as well as militarily superior, is in the throes of a revolution about to displace the entire political structure with one which is much more accommodating and pacific? Clearly we can all think of recent examples where the attitude of a nation towards using force has changed markedly almost overnight. The most familiar example of a change resulting in a more liberal attitude towards using force would have to be the ouster of Shah Reza Pahlavi and the accession of the Ayatollah Khomeini. This change in an internal political system led to the recrudescence and accentuation of long-standing problems between Iran and Iraq, ultimately culminating in the ongoing Iran-Iraq war. Is not the reasonableness of a determination that an attack is certain to occur somewhat suspect when the state to be attacked is one which has many close and powerful allies likely to come to her assistance and inflict unbearable misery upon the aggressor? While there may well be instances when the likelihood of the infliction of such misery may not prevent the attack, to deny that this affects the reasonableness of a determination that the attack is certain to occur would seem to deny the very notion of deterrence.
III. THREAT TO SECURITY THROUGH DISRUPTION OF MILITARY BALANCE OF POWER

From what has preceded, it would seem that the traditional standard applicable to anticipatory self-defense is susceptible to the reading that a state may take immediate action against threats of actual attack that will mature only in the distant future. The language of the standard indicating that the right obtains whenever a threat is imminent can be viewed as stressing an interest in reducing the chances that force will be used when there is nothing it really serves to preempt. Ultimately reduction of the chances of mistake is accomplished by faithful attention to whether a state which has invoked self-defense actually perceived itself as subject to a threat and whether the international community will conclude that that perception was based on reasonable certainty. But quite apart from arguments relative to countering threats of actual attack in the distant future, what about the availability of preemptive self-defense against threats to a nation's security deriving from disruption of the military balance of power? Can a state justify the use of anticipatory force when it confronts not a threat of actual attack, but a threat of immediate efforts to reconfigure the military equilibrium to the disadvantage of its security? The usual translation of the Caroline standard would seem to suggest a negative response. States have seen military disequilibrium as an accepted fact of international life.

For a threat which jeopardizes the military equilibrium to warrant resort to force in self-defense with the prospect of an imminent "attack," an actual application of coercion must be present.

A. Situations Raising Concern

Disruptions in the balance of power which might threaten a state's security would seem to fall into three categories. The first category would involve threats to security which have their origin in third country political developments that may be said to inure to the benefit of one superpower and the detriment of another. Typical cases might include the rise to power of Fidel Castro in Cuba in 1959 and of the Sandinistas in Nicaragua in 1979. The second category involves indirect threats to a nation's security resulting from determined efforts to shift the military balance of power through developments in weaponry. The distinguishing characteristic of threats of this sort is that a military development aimed at third states is used to produce a threat to the political security of a

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87 See e.g., Kaiser and Pincus, 'Shall We Attack America?', Wash. Post., Aug. 12, 1979, at B1, col. 3, and id. at B4, col. 1 (suggesting an attack "when the Bolshoi Ballet or the Moscow Circus go touring the United States.")

88 See Farer, supra note 12, at 62-3 ("disequilibrating consequences" are not alone enough since a state must show threat of imminent attack).
disadvantaged superpower. An excellent illustration concerns the Warsaw Pact/NATO tank disparities surrounding the “neutron bomb” controversy of the late-1970s. The third category also involves developments in weaponry designed to disrupt the military balance of power. But what separates this third sort of disruption from the immediately preceding one is that here the weapons developed are actually aimed at the disadvantaged superpower, thus creating a direct threat to military as well as political security. One need look no further than the 1962 Cuban Missile Crisis and the claimed “window of vulnerability” faced by the United States during the latter-half of the 1980s for familiar examples.

Each of these categories of disruption to the balance of power is important in its own right. The only sorts of disruption commented on here, however, involve the latter two: indirect threats to political security, and direct threats to military and political security.89

The indirect threat to the United States' political security of interest in the neutron bomb controversy of the late 1970s90 was the product of a four-to-one superiority in the number of tanks held by Warsaw Pact forces in the European theatre.91 It was argued that unless neutron bombs—capable of killing troops while limiting collateral heat and blast damage to property—92 were made available to field commanders, credible deterrence to a Soviet directed invasion would be lost. The argument was based on the fact that NATO would have to select between the obviously unacceptable choice of employing highly destructive standard tactical nuclear weapons (TNWs) on its own soil in order to repel a tank assault uncontained by conventional forces, or using neutron bombs if Warsaw Pact forces advanced into Western Europe. The latter was viewed as equally unacceptable since it would result in a quick crossing of the nuclear threshold, thus risking very early escalation to general nuclear war.93 With such choices suggesting capitulation or defeat as distinct possibilities,94 some saw the Warsaw Pact advantage as nothing but

89 The third category, threat to security deriving from third country political developments, is not examined here because it often involves the topic of intervention in civil war in addition to the law of self-defense.


93 Id.

94 Defeat could come about because NATO might refuse to use standard tactical nuclear weapons on its own soil and yet try unsuccessfully to contain Warsaw Pact troops with conventional forces. Capitulation might come about if it becomes obvious to NATO that its conventional forces
are not holding and it desires to seek peace on the most favorable terms available. Both possibilities enhanced the attractiveness of neutron bombs since they can be used at any stage of a conflict and, presumably, with great success.


96 McDougal, supra note 10, at 601.


98 See, Lehman & Hughes, “Equivalence” and SALT II, 20 ORBIS 1045 (1977); Reflections on the Quarter: Judging SALT II, 23 ORBIS 251 (1979). The Soviet capability derives from the fact that a Soviet first-strike would deprive the United States of enough ICBMs to threaten those landbased missiles held in reserve by the Soviets, thus confronting the United States with the phenomenon of “self-deterrence,” since its only course of action would be to launch an SLBM strike against Soviet urban and industrial centers — an action sure to bring a similar retaliatory strike from the Soviet Union.

99 On the shift in world forces, see Deane, The Soviet Assessment of the “Correlation of World Forces”: Implications for American Foreign Policy, 20 ORBIS 625 (1976).

100 See Nitze, Strategy in the Decade of the 1980s, 59 FOREIGN AFF. 82, 85-6, 90-1, 94-7 (1980). Those occasionally described as “functionalist” might, however, take the position that the Soviets would never really do anything to the West which might be inimical to Moscow’s own economic objectives. For a flavor of “functionalist” underpinnings, see opinion of J. Alvarez, Corfu Channel Case, [1949] I.C.J. 39, 43 (stressing social interdependence).
B. Need for Threat of "Attack"

As was suggested earlier with the Israeli aerial attack on the Tamuz I nuclear reactor, put aside the merits of the claims in the neutron bomb, Cuban Missile Crisis, and window of vulnerability cases. The significance of whether one can show that a military advantage produces a situation which erodes the security of the disadvantaged state loses its importance if nothing short of a threat of actual attack warrants invocation of anticipatory self-defense. Judged by the usual recasting of the Caroline standard offered by commentators, how can the conclusion be escaped that a disruption to the military balance of power can never present a threat of imminent "attack"? Attack implies the use of military force by one state against another. The only conceivable instance in which a shift in the military balance of power might be said to present a threat of attack would have to involve a military development accompanied by adequate evidence that the development is a step in the direction of actual application of military force against the disadvantaged state.

Notwithstanding the logic of this approach, sight should not be lost of what is called for under the traditional standard. No reference is made in the Caroline to the idea of an attack. For a threat to justify the use of preemptive force as a defensive, the traditional standard speaks of the need for a "necessity" leaving no choice of means and no moment for deliberation. The determinative consideration is the presence of such a necessity, not the presence of an imminent attack.

But what does it take to make a threat one concerning which it can be said that a necessity exists to use preemptive force in self-defense? Clearly, necessity is affected by the requirement that there be no choice of means (a requirement to be examined in Part V) and the requirement of no moment for deliberation (a requirement examined in Part II, and suggested as capable of being read as directed to reduce mistaken uses of defensive force). Apart from these requirements, however, must there be something present in the very nature of an external threat in order to permit the conclusion that the threat is one which creates a necessity to use force in self-defense? Is it conceivable that that which must be present exists only when the external threat is one of actual attack?

Some might argue that the kind of threat which creates a necessity justifying the use of armed force in anticipatory self-defense is a threat

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101 See L. Henkin, supra note 3, at 295-96 (Cuban quarantine indefensible on self-defense grounds); Farer, supra note 12, at 62-3 (basically agreeing with Henkin). But see Farer, id., at 64 (indicating that possibly a threat to balance of power deriving from violation of an arms control agreement would support use of anticipatory self-defense, notwithstanding idea of imminent "attack"). See Zedalis, On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and Other Glimpses at the Future, 18 N.Y.U. J. Int'l L. & Pol. 73 (1985).

102 See supra Part II.
which raises a reasonably certain risk\textsuperscript{103} of territorial diminution or physical injury to a state or its inhabitants, or perhaps even a similar risk of explicit or subtle imposition of political judgment regarding the manner in which a state disadvantaged by a shift in the military balance of power is expected to behave on matters of vital importance.\textsuperscript{104} If such an approach were acceptable, action designed to stop efforts to disrupt a military balance of power would be viewed as lawful. Clearly, however, legitimization of preemptive action poses a problem since it is the acting state which, in the first instance, determines whether a matter is of vital importance, thereby opening the possibility of preemption simply to keep neighbors weak in order to maintain the benefits deriving from international hegemony. Is the desire to avoid an abuse of the right to anticipate so intense and deeply rooted that it elevates the value against the use of force to a position of preeminence?\textsuperscript{105} Are there no instances in which it would be appropriate to accept the risk of abuse in order to promote the value of defense of self? Should the fact that to allow the use of force to prevent military disruption of the balance of power serves to protect the security of a state committed to political, economic, and social objectives which are widely and independently viewed as preferable to those sought by the state against which the force is used? These are immensely important questions; questions which are never even approached under the view that “necessity” is wedded with the idea of imminent attack, and questions which may very well go the heart of what the law in this area is all about. Beyond these questions, however, there may be other questions which suggest that a standard like that referred to above—a standard which invites a wide-ranging value assessment—may be so slippery and amorphous as to be unacceptable. Take for instance the question of whether law should strive to create a certain amount of predictability.\textsuperscript{106} To the extent that a legal standard calls for the weighing of innumerable values in seeking to determine the validity of a claim to reliance on anticipatory self-defense, no state can be sanguine as to the outcome of an effort by the other members of the world community to judge its actions.\textsuperscript{107} Yet how important should the goal of predictability be if a legal assessment argues for a principle that is inconsistent with realistically expected state behavior?\textsuperscript{108} Another question affecting acceptability is

\textsuperscript{103} On the state of mind requirement in general, see text accompanying \textit{supra} notes 77-85.

\textsuperscript{104} See M. McDougal and F. Feliciano, \textit{supra} note 2, at 177 (indicating that “political independence,” protected by Article 2(4) of the U.N. Charter, would be violated by “substantial curtailment of the freedom of decisionmaking through the effective and drastic reduction of the number of alternative policies open at tolerable costs . . .”).\textsuperscript{105} Again, see \textit{supra} note 62 on the tentative nature of any value assessment suggested in this article.


\textsuperscript{107} Further compounding the process is the fact that political biases may also affect decisions.

\textsuperscript{108} See M. Akehurst, A Modern Introduction to International Law 15 (3d ed.
whether systems of law should endeavor to optimize efficiency in decisionmaking.\textsuperscript{109} Surely it strains reason to expect the entire universe of values—values which defy any knowably “correct” prioritization—to be weighed and reflected upon every time an international dispute arises. But unless such an impossible task is attempted, what hope remains of forging a world designed to promote the chance for humankind to realize its fullest potential?\textsuperscript{110}

C. \textit{Necessity in Context of Balance of Power}

Assuming acceptance of the notion that “necessity” for defensive uses of force can exist in the context of weaponry developments which shift the military balance of power, there is still a further question to complete inquiry. Specifically, the question involves whether developments which produce an indirect threat to a state’s political security (e.g., Warsaw Pact tank superiority and neutron bomb controversy) or a direct threat to a state’s military and political security (e.g., the Cuban Missile Crisis and the “window of vulnerability” case), can factually create a necessity sufficient to warrant resort to preemptive self-defense? Put another way, if one accepts the idea that the doctrine of anticipatory self-defense is broad enough to include action against developments which threaten to disrupt the military balance of power, can indirect threats to military security or direct threats to military and political security create the kind of factual situation needed to satisfy the legal standard?

There are some unsettling problems with the idea that military developments producing an \textit{indirect} threat to a state’s political security entitle that state to invoke anticipatory self-defense as a justification for the use of force designed to stop those developments from reaching fruition. Admittedly, pressure deriving from weaponry developments may serve

\textsuperscript{109} In doing this, legal systems might attempt to minimize the number of occasions when thorough examination of a legal principle’s underlying policies and values will take place. Stated another, to reassess the social, economic, political, and moral underpinnings of every legal principle in dispute in every case would be extravagantly wasteful. \textit{See generally} Gjerdingen, \textit{Legal Consciousness and the Modern Theory of Law}, 35 \textit{Buffalo L. Rev.} (forthcoming 1986), on idea that legal systems endeavor to optimize efficiency. As best as can be determined, no one seems to argue that in fact efficiency should be optimized.

\textsuperscript{110} This query is not meant to suggest an answer, since it is possible that all efforts should be directed towards a world free of the use of force, even though such is at the expense of the human condition, individual creativity and initiative. Reference should be made, however, to Solzhenitsyn, \textit{Misconceptions About Russia Are a Threat to America}, 58 \textit{Foreign Aff.} 797 832 (1980), where he recounts instances in which Soviet soldiers felt so strongly about values other than self-preservation that they refused to obey commands in the face of known summary execution. \textit{See also} Tucker, \textit{The Nuclear Debate}, 63 \textit{Foreign Aff.} 1, 18-22 (1984), noting that Vatican II (1965) and the recent American Catholic Bishops Pastoral Letter on nuclear weapons do not condemn all uses of such, even though it is clear that any use might completely destroy most of civilization.
to complicate relations between the state incurring the indirect threat and the third state subjected to the pressure. Burdened by the clear or unspoken expectations that international policy choices will be in the interest of the state which uses the weaponry developments to its advantage, the state subjected to the pressure can often be counted on to perform as expected. Nevertheless, if relations between the superpowers involved happen to reach the point of serious crisis, the distinct likelihood is that the state or states facing the military threat will side with a power with whom cultural, economic, and political affinity is most widely shared. Given this, gains indirectly threatening another state's political security may prove quite ephemeral and make it difficult for the threatened state to advance a satisfactory explanation to justify preemptive force.

Beyond this, however, there is at least one additional problem. Pressure from developments in the field of weaponry can undoubtedly produce indirect threats to political security. But the fact that the exertion of the pressure is separated from the resultant threat to political security by one or more states, necessarily opens the door for the entry of influences that will act upon the ability of the pressure to actually produce a threat. This not only makes the certainty that political security will be jeopardized less apparent, but also increases the chances that motives independent of those generated by weaponry developments serve to drive the wedges of discontent between the states concerned. Under such circumstances, there may be real difficulties in identifying a threat sufficient to warrant anticipatory action.

If the focus of attention is narrowed to direct threats to military and political security, the problems associated with indirect threats are less pronounced. Since the state benefiting from the military developments is aiming the newly obtained weapons at targeted locations within the state from which it desires concessions, the likelihood that a crisis will reveal the military advantage as ephemeral is somewhat reduced. A direct threat to military and political security does not depend upon the behavior of third states conforming to the expectations generated by pressure exerted by a state with a military advantage. Whether a targeted superpower finds itself with or without allies during a period of crisis is immaterial. Facing a direct threat, the chances are increased that the targeted state will feel a distinct need to make concessions on matters which, from time to time, may be of vital importance.

The problem with the entry of influences that could affect whether a military advantage actually produces a threat to security can be seen in a similar light. The absence of the intermediate link of third states minimizes the chances that various influences will serve to neutralize the impact of the weaponry developments on the targeted state's military and political security. This is not to say, however, that such influence cannot
exist. It only serves to emphasize that since the threat arises directly rather than indirectly, the chances of that influence existing are that much more reduced. As a consequence, there is a greater likelihood that a necessity sufficient to justify the use of preemptive force will be present. This would occur if a shift in the military balance of power would result from technological innovations which offered few opportunities for human ineptitude to spoil their impact, and if the shift could produce a situation where the advantaged state would have military superiority that neutralized the threatened state's capability to credibly invoke the use of superiority. In the face of such dominance, is it not likely that concessions on matters of grave consequence would be forthcoming?

IV. DEFENSIVE MILITARY SYSTEMS

A. Initial Obstacles

While there may be instances where anticipatory measures of self-defense would seem appropriate against a distant future threat to a nation's security deriving from efforts to shift the military balance of power there is also another view. For instance, what if a threat faced by a nation is not manifested through efforts designed to result in production of an offensive, but rather through production of a defensive military system? There appear to be two reasons for suggesting this question. First, as already indicated, the Caroline standard speaks of permitting the use of preemptive self-defense whenever the threat responded to is one which leaves "no moment for deliberation." In view of the very nature of a defensive military system, which is designed to be insulative and protective rather than external and aggressive, it is difficult to imagine a system presenting a threat of the requisite character—that is, an imminent threat. Second, the Caroline incident involved nothing more than a claimed threat of an offensive nature. Moreover, discussion about the concept of imminent attack has naturally led to attention being focused on threats presented by offensive military systems.111 Defensive systems, therefore, might be seen as beyond the scope of legitimate anticipatory measures.

As stated earlier, the traditional standard's reference to a threat "leaving no moment for deliberation" could be read to mean that it is directed at minimizing the risk of anticipatory action being taken when there is no threat it really serves to preempt.112 This shifts attention away from the notion of immediate proximity of time. In the instant context, the net result is to make clear that no difference exists between offensive and defensive systems which present a threat otherwise subject

111 See e.g., L. Henkin, supra note 3, at 142-45; J. Stone, Of Law and Nations 9 (1974); M. McDougal and F. Feliciano, supra note 2, at 238-40.
112 See supra Part II.
to preemptive measures. If imminence is understood to mean a high degree of urgency, one might be inclined to such a differentiation. But there is nothing unique in an offensive as opposed to a defensive military system which makes the latter inherently incapable of presenting a threat of sufficient clarity to justify preemptive action. If the existence of a threat is sufficiently clear to minimize the chance that anticipatory force may be used mistakenly, why should it matter that the threat derives from a defensive system? Preemptive action would seem appropriate unless some other reason exists for its disqualification.

With respect to both the nature of the claimed threat that led to the articulation of the traditional standard, and the preoccupation of commentators with the use of anticipatory self-defense against offensive systems, it need merely be reiterated that the basic emphasis of the traditional standard is on the existence of "necessity." That commentators have dealt with the right in the context of a threatened attack from offensive weapons, and that the dispute in the mid-19th Century between Great Britain and the United States which gave rise to the verbal configuration of the right happened to have involved a threat of an offensive nature should not obscure this basic point. Proper analysis is concerned only with determining the existence or nonexistence of necessity. If necessity is found to exist, it would not seem to matter that it is produced by a defensive threat. Acceptance of any other view would impinge on the value of defense of self without producing equivalent benefits for the value against the use of force. Accordingly, the most important consideration when examining the availability of a right to anticipatory action against defensive systems is the factual matter of whether such systems can ever create a threat sufficient to warrant forceful action directed at their removal.

**B. Can Defensive Systems Produce Sufficient "Necessity"?**

The nub of the inquiry concerning anticipatory self-defense against defensive military systems is indeed whether such systems can ever produce a threat sufficient to warrant action directed at their removal. Without a sufficient threat, "necessity" would not exist. And without necessity, even the most accurate perception regarding the existence of

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113 As a general proposition, imminence and offensive threats often go together. It does not follow from this, however, that defensive weapons systems cannot produce threats which are imminent in nature.

114 If anticipatory self-defense were not to be permitted against defensive weapons systems, we could well have a situation where the same effects produced by offensive weapons systems—against which preemption can be exercised—could not be prevented whenever the military instrumentality used to produce such is defensive. The advantages of using offensive force are gained at the expense of the value of defense of self. Again, however, any assessment of conflicting values suggested herein should be regarded as tentative. See supra note 62.
the threat would not justify the invocation of self-defense. In examining the nature of the threat presented by defensive military systems, it must be recognized that technological innovation in the upcoming decades may provide the capability to fashion systems which can give not only piece meal tactical protection against external offensive threats (e.g., sophisticated and advanced anti-tank weapons, anti-aircraft weapons, anti-submarine submarines), but also systems which can give enveloping strategic protection that insulates the possessor from threats posed by all principal offensive military systems (e.g., high power microwave devices, electromagnetic pulse weapons, impenetrable energy shields). Without yet indicating whether systems on either end of the spectrum create the requisite necessity, it is obvious that whatever necessity they do create varies according to which end of the spectrum attention is directed.

Defensive systems offering tactical protection undoubtedly reduce the effectiveness of another state's offensive military systems. By frustrating or complicating the success of the offensive systems' objectives, the defensive systems produce a certain vulnerability that would not otherwise exist. Whenever offensive systems cannot, or cannot as easily, accomplish their prescribed mission, the ability of the directing state to protect itself is distinctly affected. Because it is caused by the defensive system, the effect suggests that the very existence of that system presents a threat.

Defensive systems capable of providing enveloping strategic protection from all principal offensive military systems of another state would pose a qualitatively distinct threat. Systems able to provide such protection may never be developed. The fast pace of technological innovation, however, would suggest that development is not beyond the realm of possibility. If put in place, such systems would be capable of neutralizing the most significant offensive weapons systems of an opponent. When coupled with weaponry able to place the opponent under the peril of an attack which could inflict a level of destruction considered unacceptable, the defensive systems could bring about capitulation without an even near launch of an offensive attack.

In the immediate future, the closest that military technologists may bring us to a defensive system capable of insulating its possessor from the principal offensive weapons of an opponent will probably be found in the Reagan administration’s Strategic Defense Initiative—or “Star Wars”—proposal. Star Wars falls short of a completely insulative defensive system in that any success it will have will be primarily to prevent strategic missiles of an opponent from reaching targeted locations. Air and sea-launched cruise missiles (ALCMs and SLCMs) with nuclear warheads, as well as other delivery platforms or methods of introducing nuclear charges into the United States will be much more difficult to deal with. Focusing just on strategic missiles, estimates of the overall effectiveness
of the Star Wars system vary. The most optimistic assessments have not gone further than to suggest that a system with components able to destroy strategic missiles in the boost, mid-course, and terminal phases could have a success rate in the vicinity of ninety-nine percent. Depending on the number of strategic warheads in one's nuclear arsenal, this could result in a large or small number of warheads penetrating to reach preassigned destinations.

The kind of threat which may be said to create a necessity which justifies the use of force in self-defense could be like the one referred to before in the context of threats to the military balance of power. That threat is one which raises a reasonably certain risk of imposed political judgment regarding the manner in which a state is expected to behave on matters of vital importance. The Caroline teaches that a state can preserve its territorial integrity or political independence by anticipatory action. The fact that the principle of anticipatory action grew out of a situation involving a threat of offensive force is more reflective of the state of technology then extant than of any notion that the principle is limited to responses to threats of an offensive nature. Is there no merit at all to the suggestion that anticipatory action otherwise justified is permitted, irrespective of whether directed at an offensive or defensive threat? Such action promotes the value of defense of self, a value which the principle of the Caroline incident holds to be of great importance. It does so, moreover, without contravening the value against the use of force, since to be justified the anticipatory action must only be taken when the existence of the threat to which it responds is sufficiently clear.

Against this background, it may be argued that military systems on the tactical end of the defensive spectrum cannot present a threat sufficient to create a necessity to take preemptive measures directed at preventing completion of their deployment. Such systems are designed to do nothing more than to provide some degree of operational protection for offensive weaponry which can then be used to jeopardize the territorial integrity or political independence of another state. The protection provided is less than complete.

Defensive systems which envelop their protection from all principal offensive weapons of an opponent, however, may well create a necessity to take measures designed to prevent the completion of their deployment. These systems do more than offer some protection; they insulate the possessor from all external military threats and therefore have the effect of neutralizing the weaponry of an opponent. In doing so, the defensive system has accomplished what would have otherwise required an incomprehensibly substantial offensive attack. It has eliminated the opponent's

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ability to protect itself by depriving the opponent of the power to threaten effective use of its own offensive weapons. The end product is an opponent subject to the political dictates of the state possessing the defensive system. The mere deployment of the system has created a situation in which an opponent can be told how to act on matters of vital importance. Deployment would also violate that direction of the risk of a military strike capable of being made with impunity.

Defensive systems which fall short of providing complete insulation, but which have the capability of preventing a large portion of an opponent's principal offensive weapons from reaching targeted destinations, pose a difficult problem. To the extent that they can destroy enough offensive weapons to affect an opponent's ability to protect its territorial integrity or political independence, it might be inappropriate to consider such systems as analogous to run-of-the-mill tactical defensive systems. A defensive system offering complete insulation presents a threat sufficient to create a necessity which justifies actions directed at removal because the system will neutralize an opponent's offensive weaponry. Neutralization, however, does not necessarily depend upon a one-hundred percent effective defensive system. All that would seem to be needed is the ability to destroy a sufficient number of principal offensive weapons so to leave the opponent without enough fire-power to inflict a high enough level of damage which would deter the possessor of the defensive system from ever credibly threatening to use its own offensive weapons. Any system capable of accomplishing that task may give the deploying state the leverage to exact significant international political control on matters of great consequence. Such a threat to independence of judgment may well be argued as being susceptible to preemptive measures of self-defense since a threat of that sort is precisely what the Caroline standard sought to address. From this perspective, Star Wars would appear to fail to present itself as subject to justifiable anticipatory action.\textsuperscript{116}

V. Of Countermeasures and Necessity

It has been shown above that it is possible to make reasonable arguments in favor of anticipatory self-defense being invoked against developments which present a distant future threat of actual attack, threats to security proceeding from efforts to create military disequilibrium, and developments which might result in the eventual completion of a defensive weapons system. With respect to these matters, however, inquiry cannot be limited to the points already examined. As stated early in this essay, the traditional standard governing the use of preemptive action

requires not only a necessity of self-defense which leaves no moment for
deliberation, but one which leaves "no choice of means" as well. And
beyond even that directive, the actual diplomatic correspondence in the
Caroline incident requires that "nothing unreasonable or excessive [be
done] since the act [of preemption], justified by the necessity of self-de-
fense, must be limited by that necessity, and kept clearly within it."117
These additional components round out the law of anticipatory self-de-
fense by focusing on the idea that force should be used only after it has
been determined that no other responsive countermeasures (e.g., peaceful
means or countermilitary developments) exist,118 and that the degree of
force which ultimately is used is proportionate to the threat against
which it is directed.

A. Need for Effective Countermeasures

Much has been written about the concept of proportionality.119 The
absence of comparable literature on countermeasures suggests that some
consideration of that matter might be appropriate. An important start-
ing point would appear to be acknowledgment of the fact that counter-
measures may take many forms. In that respect, it should be noted that
the use of diplomatic interchange and negotiation would almost always
be required.120 Aside from these, countermeasures would seem to fall
into either the category of defensive protection or that of offensive build-
up, both of which are, in the first instance, designed to drive home the
futility of trying to capitalize on threatening innovations.121 It would
appear, however, that resort to one of these categories of countermea-
sures, rather than to the use of force, must be had only if it can be said
that the countermeasure which happens to be available would prove
effective.122

117 See supra note 1.
118 See supra notes 2 (second paragraph) and 68, on idea that recourse to non-forceful counter-
measures derives from the Caroline's requirement of "no choice of means." Further, commentators
have captured that requirement in the reference to "imminence." Imminence, however, also cap-
tures the Caroline's other notion, that of temporal proximity or immediacy in time.
119 See e.g., M. McDougal and F. Feliciano, supra note 2, at 241-44; I. Brownlie, supra
note 3, at 261-64; Schachter, The Right of States to Use Armed Force, supra note 2, at 1637-38.
120 See Schachter, id., at 1635 ("force should not be considered necessary until peaceful meas-
ures have been found wanting"). If resort to peaceful measures may prevent self-defense from being
effective or result in greater destruction, then it would seem that recourse to such measures would
not be a precondition to the use of force.
121 An offensive build-up may be directed either at outstripping or neutralizing an offensive
build-up of an opponent, or at overwhelming or neutralizing an opponent's defensive capability.
122 Though emphasizing the idea of “necessity,” and not limiting the countermeasures of con-
cern to defensive protection or offensive buildup, Schachter, The Right of States to the Armed Forces,
supra note 2, at 1635 notes: "It would be hard to deny the necessity of forcible action in...[a case
of imminent threat involving danger to lives coupled with a demand for concessions] on the ground
that a peaceful means might succeed." (Emphasis added).
Currently there exists no explicit principle of international law which directs effectiveness. Nevertheless, the need for effectiveness would seem to proceed from the fact that any other approach would either jeopardize the survival of members of the international community, or result in their successful protection at the expense of substantial damage being suffered before forceful measures of self-defense can restore parity between the contending states. After all, to conclude that a state must use even ineffective alternatives before it resorts to force, could place the state in a position where it could only draw upon force against aggression aimed at the state's extinction well after the likelihood that force proving able of impeding such action has vanished or through time has reached the point that extinction can be prevented by nothing short of great loss to life and property. As long as self-defense is to retain international recognition, and although the destructive properties of the use of force result in its general condemnation, perhaps the best approach regarding countermeasures is one which preserves the value of defense of self, while seeking an overall lower level of destruction. Effectiveness satisfies this objective. It permits a state to do what is needed to protect its survival by not compelling it to pursue countermeasures which may prove their worthlessness too late for force to work or to work in a time frame that results in greater destruction than might otherwise occur.\(^{123}\)

In dealing with the idea of effectiveness, it would seem important to observe that it is an idea shaped by the interplay of a variety of factors. The most important factors appear to be the scientific, industrial, and technological capability of the state concerned, as well as the amount of time available to permit those three phenomena to yield tangible results. The existence of objective evidence indicating that a state in fact possesses the scientific, industrial, and technological capability to develop countermeasures is critically indicative of the presence of a countermeasure's effectiveness. That evidence may be affected, however, if deployment of the external threat itself. For example, a countermeasure, though objectively capable of neutralizing an external threat, may require more time to develop, test, and deploy than is available. By the time the countermeasure can be made fully operational, a threat of actual attack from offensive weaponry, or a threat to the balance of power from offensive or defensive military systems, may already be in motion. Similarly, a state faced with an external threat might be able to expedite its research and development and deploy an operational system in a timely fashion. But timely deployment can be nullified if the system lacks the sophistication needed to deter or neutralize the external threat. Clearly,\(^{123}\)

\(^{123}\) Any course which results in greater destruction than might otherwise occur contravenes the value against the use of force. See supra note 62 on tentative nature of the value assessment suggested here.
science, industry, technology, and time work together to determine whether a state is able to develop effective countermeasures.

B. Degree of Effectiveness

Related to the need for effectiveness is the question of what the degree of likelihood of effectiveness should be. It must be emphasized again that, at present, there is no explicit principle of international law which enjoins a standard. Some obvious standards, however, might include any possibility of effectiveness, reasonable likelihood of effectiveness, high probability of effectiveness, or absolute certainty of effectiveness. Given the fact that the rationale—upon which the need for effectiveness itself rests—seeks to avoid jeopardizing the survival of members of the international community, or placing them in a position where successful defense of self comes at the expense of substantial devastation, might it not be that the most appropriate of the suggested standards is that of absolute certainty? Obviously, the big problem with this standard is that absolute certitude in political affairs is virtually unattainable. As for high probability of effectiveness, it would tend to promote quite adequately the value of defense of self and that aspect of the value against the use of force designed to limit or minimize destruction when force is used.\textsuperscript{124} But even so stringent a standard as high probability, let alone one satisfied by a lesser showing (such as reasonable likelihood of effectiveness or any possibility of effectiveness) would certainly admit of occasions where defense of self could be accomplished only after much damage has already been inflicted in an effort to restore some sense of equilibrium between the threatening and the defending state. Unless one is prepared to argue that the value against the use of force is always preeminent, what, other than the difficulty of showing absolute certainty, exists to suggest a lesser standard? Absolute certainty, which is intended here to refer to nothing other than a degree of effectiveness identifiable through empirical inquiry and prediction, would assure more thorough promotion of the value against the use of force, while striking a balance with the value in favor of defense of self. Only in situations where an objective observer would conclude that there exists an absolutely certain and effective countermeasure must the threatened state refrain from having immediate recourse to armed force to protect itself. Doubt regarding effectiveness would permit force to be used to assure that vital interests remained protected. It goes without saying, of course, that the amount and character

\textsuperscript{124} The value of defense of self would be promoted by the fact that “high probability” would allow a threatened state to use defensive force whenever countermeasures could not satisfy that standard. The value against the use of force would be promoted by requiring countermeasures satisfying the “high probability” standard to be developed and prohibiting the use of force where the opportunity to satisfy the standard exists.
of defensive force used in such a situation is governed by the principle of proportionality.

The fact that absolute certainty meshes with the rationale underpinning the notion of effectiveness is not the sole reason why that standard suggests itself. Absolute certainty also appears to establish an internal consistency with the idea of reasonable certainty, discussed earlier in the context of one state's perception regarding the existence of a threat posed by another. Under that idea, a state which perceives itself as facing a reasonably certain threat may undertake measures of self-defense whenever measures of that nature are otherwise permitted by international law even if it may later be determined that the state was in fact mistaken in its assessment of the circumstances indicating a threat. This permits a margin of error on the side of the state claiming self-defense. A margin of error of similar character would result from application of the standard of absolute certainty in connection with the degree of a countermeasure's effectiveness. By authorizing the use of preemptive force whenever an objective observer would conclude that nonforceful countermeasures absolutely certain to be effective do not exist, any error regarding that assessment would prove to the benefit of the state invoking self-defense. If the standard of a countermeasure's effectiveness were the less strict test of high probability, the margin of error would not fall on the side of the state acting to protect itself against an external threat. The result would be a standard inconsistent with the standard used to measure another important constituent of the law of anticipatory self-defense—that governing the state of mind of the nation invoking self-defense.

C. What If Countermeasures Absolutely Certain to be Effective Exist?

Should what has been said regarding the existence or nonexistence

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125 As will be recalled, see supra notes 119-127 and accompanying text, the notion of "effectiveness" derives from the accommodation of the value of defense of self and the value against the use of force. The accommodation suggests that, without a need for a countermeasure to be effective before a threatened state can be said to have an obligation to develop such, the survival of members of the world community would be jeopardized or could be successfully protected only at the expense of having first suffered substantial damage. By suggesting that the degree of effectiveness be that of "absolute certainty," the accommodation between the two values is strengthened. Unless a threatened state has access to a countermeasure, the effectiveness of which is absolutely certain, it is permitted to resort to force in self-defense. In doing so, the state assures its survival as a member of the world community, and minimizes the amount of damage that would have to be suffered to determine whether or not a countermeasure less certain to be effective actually works.

126 Reference here is to the ideas of proportionality and countermeasures, in particular.

127 If it was determined that a state had the capability to develop in a timely fashion countermeasures holding out a high probability of being able to neutralize an external threat before that threat matured, immediate resort to defensive force would not be permissible, even though the countermeasures might later prove ineffective.
PRELIMINARY THOUGHTS

of countermeasures absolutely certain to be effective be viewed as indicating the unlawfulness of preemptive force designed to deal with an external threat when countermeasures absolutely certain to be effective do in fact exist? The Caroline standard's reference to a necessity of self-defense "leaving no choice of means" can be read to suggest that resort to preemptive force is never necessary when a state has access to effective nonforceful countermeasures. To have countermeasures of that sort means they must be used. On the other hand might it not be suggested that if the words used to express international legal standards are understood as devices for presenting the entire spectrum of implicated policies and values to the decisionmakers, necessity which justifies the use of preemptive force can exist, notwithstanding the availability of effective countermeasures? That a state has access to effective countermeasures does not in every instance preclude that state from having to resort to force in self-defense.\textsuperscript{128} The existence of nonforceful countermeasures is extraordinarily important, but it is only one of the many considerations which determine the lawfulness of anticipatory action.

At least one distinguished authority seems to have left open the latter suggestion by writing that the existence of necessity is determined by reference to, among other things, "[t]he nature and consequentiality of [the threatening state's] objectives, the character of its internal institutional structures [and] the kind of world public order it demands."\textsuperscript{129} The fact that that statement was probably made without considering countermeasures may well be reflected by the absence of any effort to set forth real life illustrations where the defensive use of force might be permissible, notwithstanding the existence of nonforceful measures for addressing the threat involved.\textsuperscript{130} Nevertheless, is the suggestion of the effect of the mentioned considerations on the existence of necessity totally without merit when placed in the context of a Nazi Germany? Had there been reasonable certainty in the mid-1930s that Hitler posed a threat of future attack to European countries (a matter of which the evidence may be equivocal),\textsuperscript{131} and had the Allies been willing and capable

\textsuperscript{128} Cf. Schachter, The Right of States to Use Armed Force, supra note 2, at 1635, taking the approach that where an invasion or attack is already in progress, the state in peril need not resort to peaceful means of resolution, "irrespective of probabilities as to the effectiveness of peaceful settlement." This suggests that there is at least one instance where values more important than that against the use of force may exist.

\textsuperscript{129} M. McDoogal and F. Feliciano, supra note 2, at 230.

\textsuperscript{130} Id.

\textsuperscript{131} See A. Taylor, The Origins of the Second World War 17 (2d ed. 1961) (indicating some governmental officials felt from the very beginning that they knew Hitler's plans); 97-110 (suggesting that the reoccupation of the Rhineland on March 7, 1936, marked a turning point); 128 (stating that the Anschluss - annexation of Austria — fixed the beginning of the pre-war). See also R. Albrecht-Carrie, A Diplomatic History of Europe Since the Congress of Vienna 497-528 (1973).
of embarking on a military build-up absolutely certain of deterring Nazi aggression (a matter of which the evidence seems to reveal a lack of resolve),\textsuperscript{132} would the law have not supported a preemptive strike designed to remove the Nazi regime? If the \textit{Caroline} standard's reference to "necessity of self-defense . . . leaving no choice of means" indicates that necessity is absent when countermeasures are present, then the answer is obvious. Under no circumstances would the use of defensive force have been justified. But is this the approach international law should take? By compelling a course of action that would lead to the development of countermeasures, the law may force the diversion of huge sums of money, labor, and intellectual power from more humane, productive, and creative pursuits. Is the value against the use of force, notwithstanding that the force may be purely defensive, so weighty that it will invariably tip the scales in the direction of countermeasures? Does it not matter that compelling the development of such means that many social, economic, medical, educational, and other problems go unredressed and thus worsen? And beyond this, does it not matter that by disapproving the use of preemptive force a tyrannical, repressive, and predatory regime may be allowed to remain in power? Think of the untold number of political, racial, and religious atrocities which could have been averted in Germany had the Allies been ready and had the law been willing to permit them to topple the Nazi regime. Is the value against the use of force unapproachable by any value or combination of values with which it conflicts?\textsuperscript{133}

\subsection*{D. Balancing of Values}

In a situation where the existence of an external threat is reasonably certain, and countermeasures absolutely certain to be effective can be developed before the threat matures, there may be a value in favor of human dignity.\textsuperscript{134} This value would be in addition to the more involved values against the use of force and in defense of self which together should be considered in determining the appropriateness of immediate


\textsuperscript{133} The advent of thermonuclear weapons, perhaps capable of eliminating civilization, is an extraordinarily weighty consideration. See Sagan, \textit{Nuclear War and Climatic Catastrophe: Some Policy Implications}, 62 \textit{Foreign Aff.} 257 (1983-84). It should not, however, overshadow the fact that there may be situations where the military force appropriate is significantly less destructive. At present, the author is in the process of preparing a substantial study identifying and balancing the conflict values involved in situations involving self-defense.

\textsuperscript{134} See M. McDougal and F. Feliciano, \textit{supra} note 2, at 2, 4 and 11 (expressing view that the promotion of this value is the objective of international law). \textit{Contra supra} note 62.
resort to defensive force rather than to the development of neutralizing countermeasures. Could it be that the value of human dignity places a premium on the dedication of economic and intellectual resources to the resolution of day to day human problems? If it does, might it not be possible that a state which has immediate resort to defensive force in order to assure the availability of resources for addressing the problems of its own or another state’s people, should have its choice of defensive force, rather than countermeasures, embraced?\textsuperscript{135} Should the possibility be foreclosed if there ever exists a situation in which the plight of those living in object misery not be unredressed in order to promote the value against the use of force, when force used in derogation thereof is purely defensive?\textsuperscript{136} Might it not be possible that the value in favor of human dignity would result in the approval of defensive force which not only protects the state having recourse thereto but liberates the indigenous population of the state attacked from the oppression of despotic rule?\textsuperscript{137}

To be sure, the nature and extent of the resources made available for dealing with pressing human problems as a result of accepting the right to use defensive force immediately (though effective countermeasures are available) will shape any conclusion regarding the lawfulness of the force used in any particular situation. How could it be suggested otherwise, if relatively little expense would be involved in developing neutralizing countermeasures?\textsuperscript{138} By turning in the direction of immediate use of defensive force, perhaps not enough resources would be freed up to make the slightest dent in the eradication of social, medical, economic, or educational problems, or political repression and inhumane abuse. Yet even in instances where the drain on money, labor, and intellectual power which the development of countermeasures might cause could be staggering, there may still be no assurance that the appropriate course is to approve the immediate use of defensive force. Are there no problems with which humankind must endure to avoid the number of occasions

\textsuperscript{135} This type of situation might involve immediate resort to defensive force which has the effect of freeing-up economic, medical, and intellectual resources for use in addressing problems faced by the peoples of the state using such force or peoples of other states. Compelling the state using defensive force to develop neutralizing countermeasures may prevent these problems from being addressed.

\textsuperscript{136} It bears emphasis that no views are expressed in this Article about the use of offensive force, irrespective of the arguments advanced in claimed justification. See text accompanying infra note 141.

\textsuperscript{137} It is not difficult to imagine that both of these objectives may be accomplished in some cases. However, it may be sufficient that the defensive objective is promoted, with the concommitant result being the ability to devote resources that would otherwise have been committed to countermeasures to more constructive forms of activity.

\textsuperscript{138} If the development of neutralizing countermeasures will be a relatively inexpensive and simple task, the use of defensive force will free up little that can have applicability elsewhere. Thus, the value of defense of self may not be joined with sufficient promotion of other values to warrant a lower ordering of the value against the use of force.
where the value against the use of force is violated? And, are the problems with which different peoples suffer of greater or lesser magnitude according the cultural environment in which they appear, though the problems may not actually differ at all in degree between one societal grouping and another?

By no stretch of the imagination is the suggestion being advanced that the use of force is appropriate when it promotes noble objectives or higher ends. Distinct from some recent soundings in favor of the use of force in such situations, the point made here is simply that it is not completely unreasonable to suggest that there may well be instances where defensive force may appropriately be used, though absolutely effective neutralizing countermeasures could be developed, if the use of the defensive force promotes values considered of essential importance. No view at all is expressed herein on whether offensive force may be used to promote such values, and this cannot be stressed strongly enough. With regard to either offensive or defensive force, however, we should be wary of principles characterized as law which serve to paralyze our ability to make moral choices. Law provides the benefit of predictability, but predictability never has, nor perhaps should it ever be permitted to, stop growth and change in the law. Rules or standards of law are nothing other than word formulae designed to serve as vehicles for discussion about the values which those formulae implicate. To acknowledge this is to not only understand why the law changes, but to assure that every legal question pushes to the bright center of the mind the matter of essential concern—which values should prevail and why.

139 How does one weigh such things as infant mortality rates, standards of living, levels of education, psychological problems of citizens, cultural development, etc. against the absence of inter-state violence? Is it not possible that while some of these can be weighed against such, the weighing of others against the absence of inter-state violence would be entirely inappropriate?


142 In the Corfu Channel Case 1949 I.C.J. 4, 35 (Judgment), the court stated, in response to a claim by the United Kingdom regarding the use of force:

The Court cannot accept such a line of defense. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.

Clearly the potential for abuse is always present. Without assuming that risk in order to advance values other than that against the use of force, law may become the instrument of wrong doing.

143 See H. Hart, supra note 106 and accompanying text.

144 See supra note 28, indicating that from time to time long-standing legal principles are radically altered to reflect new assessments of the values involved. This is accomplished in spite of the recognized importance of the value of predictability.
Conclusion

From what has preceded, three general points seem to emerge. First, the language of both the Caroline standard and the usual rephrasing of that standard suggested by commentators raise what seem to be insurmountable difficulties when evaluating whether anticipatory self-defense may be invoked against (1) distant future threats of actual attack, (2) threats to the military balance of power, (3) threats presented by defensive military systems, or (4) threats sufficiently distant in time to permit the development of effective countermeasures. A distant future threat of attack cannot be said to present a threat which is “imminent,” or which leaves “no moment for deliberation.” A threat to the military balance of power is neither a threat which is “imminent” nor a threat of “attack.” A threat presented by a defensive military system is neither a threat of “attack” nor an offensive threat like that which justified the use of anticipatory force in the Caroline incident itself. A threat which can be met with neutralizing countermeasures before the threat matures enough to become operational cannot be said to be a threat leaving “no choice of means.”

Second, to view the words of the traditional standard governing anticipatory self-defense as having some essential, objective, and plain meaning is to misunderstand the very nature of the words of legal rules. In the final analysis, the words of rules act as instruments for presentation to officials who make decisions about the lawfulness of relevant conduct and the full range of policies and values that, in different contexts, may be implicated. Of necessity, then, discussion should focus on the policies and values which happen to find themselves in conflict, not on whether the relevant conduct is within the ambit of particular language. An approach of this sort breaks away from the conventional method of analysis. What is deeply troubling, however, is the uncertainty about whether the suggested approach lacks sensitivity to that which “goes without saying” after the death and destruction of two World Wars. Could it be that those who have managed to keep vivid the impression of the horror produced by such cataclysms better appreciate the true weight of the value against the use of force? Or, alternatively, could it be that that which so many have assumed goes without saying actually fails to rest on solid ground?145 The complexities implicit in these questions seem to merit full exploration.

The third and final general point which emerges is that when one moves away from the determination imposed by the language of the

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145 In addition to the fear of nuclear annihilation, it has recently been suggested that the value of pluralism (i.e., economic and political diversity) is extremely important in assessing questions regarding the use of force. See Schachter, In Defense of Rules on the Use of Force, supra note 2, at 144.
traditional formulation of the standard governing anticipatory self-defense, and moves towards an approach that elevates the significance of relevant policies and values, arguments in favor of a broader view of permissible preemptive action do not seem to be completely lacking in merit. While no attempt is made to identify and weigh each and every policy and value implicated in the factual situations discussed, there would seem to be every reason to believe that an exhaustive survey and assessment may not completely foreclose anticipatory action in instances where a language-oriented essential meaning approach would indicate unlawfulness. Since the references to "imminent" and to "no moment for deliberation" serve to minimize the chances of mistake, the value of defense of self might be preferred whenever the existence of an actual attack at some future point is sufficiently clear. The reference to an imminent "attack" may not always elevate the value against the use of force to a position of preeminence; if the totality of circumstances suggest that a threatened shift in the military balance of power, or in the scheduled deployment of a defensive military system, creates a "necessity" for preferring the value of defense of self and other values which support of defense of self might advance. The fact that the capability to develop neutralizing countermeasures before a future threat matures means that a state cannot claim "no choice of means," and may not prevent immediate resort to anticipatory force whenever allowance of such would promote values deemed more important than that against the use of force.

If there is a litmus test for assessing the ultimate wisdom of the approach suggested in the foregoing pages, it may be one which asks whether the approach comports with the expected behavior of states; to put it another way, with international political reality.\textsuperscript{146} Judged by such a standard, it is difficult to know whether there is wisdom in taking a broader view of anticipatory self-defense in each of the instances to which attention has been devoted. The Israeli aerial attack on the Tamuz I nuclear reactor indicates that states may act to preempt a distant future threat of actual attack. Even if the stakes involve nuclear annihilation, it is unlikely that one nation which knows of a nuclear strike planned by another will sit by and resign itself to simply suffer the first blow.\textsuperscript{147} With regard to threats to the military balance of power, the Cuban Missile Crisis suggests that nations may be willing to use more than mere diplomatic pressure to prevent threats which directly jeopardize military and political security from reaching fruition. While it is unclear whether the measures employed will involve the use of force, there

\textsuperscript{146} Cf. L. Henkin, supra note 3, at 97-8 (indicating that the most successful part of law is that part which reflects existing mores of how those governed do and ought to behave).

\textsuperscript{147} See L. Henkin, id. at 142-44 (stating, however, that this should not result in approval of anticipatory self-defense as a legal principle); McDougal, supra note 10, at 600-01; J. Stone, Of Law and Nations 9 (1974).
should be no doubt about the inclination to advise that force be used.  

Defensive military systems threatening a state's ability to make independent judgments on matters of vital importance might be handled in a similar fashion. If negotiations to prevent deployment or efforts to develop offensive weapons able to overwhelm the system are found wanting, force may be viewed as a realistic option.

The only instance in which the practice of states may suggest a preference for the value against the use of force is in the development of neutralizing countermeasures. Surely it would not stretch credulity too far to imagine that there may very well have been some in the United States who advocated limited nuclear strikes against the Soviet Union after its detonation of an atomic weapon in September 1949. Conceivably, the argument of a preventive war as justification may have been supplemented with the idea that it would free-up economic, intellectual, and scientific resources that would otherwise be dedicated to an offensive build-up to deter the Soviets from using their newly acquired capability; resources that otherwise could be used to promote more human and productive pursuits. That is to say, from the standpoint of balancing conflicting values, values other than those against the use of force may have been argued as preferable. As time has demonstrated, if such a suggestion were ever advanced, it proved unattractive. Nuclear strikes were never taken. Instead, an offensive build-up to deter undesirable Soviet conduct was preferred. Nevertheless, one should not be too quick to draw any definite conclusion from this, for what actually occurred may have been as much the result of a general American disinclination to use force when unprovoked. Or it might be concluded that no other values surfaced as preeminent, this being the result of a considered judgment that as long as neutralizing countermeasures are available, force will never be used since use can never be justified.

148 It has been reported that during the Cuban Missile crisis, for instance, Secretary of State Dean Acheson, a lawyer, urged a bombing strike on the missile sites with which the administration was concerned. R. Kennedy, Thirteen Days: A Memoir of the Cuban Missile Crisis 37-8 (1969).
