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Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law

Michael Skopets

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Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law

Keywords

International law, Self-defense, Battered Woman Syndrome, Anticipatory Self-defense

COMMENTS

BATTERED NATION SYNDROME: RELAXING THE IMMINENCE REQUIREMENT OF SELF-DEFENSE IN INTERNATIONAL LAW

MICHAEL SKOPETS*

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* Staff Member, *American University Law Review*, Volume 55; J.D. Candidate, May 2007, *American University, Washington College of Law*; M.A. Candidate, *American University, School of International Service*, B.S., 2000, *University of Illinois at Chicago*. I must first thank my parents, Ilia and Eleonora, and my grandmothers Esther and Bronislava, for their support and encouragement in this and all my other endeavors. I am grateful to my editor Sima Bhakta for her help and advice; Professors Ken Anderson and Amy Dillard for their suggestions dealing with international law and criminal law, respectively; Robert Zwissler for his perceptive insight into the philosophical nuances of anticipatory self-defense; the staff of *American University Law Review* for their editorial assistance; and § 4 for making me proud to be a member of it.

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“International law is not a suicide pact.”

— Luis René Beres¹

“Today it is more likely to be foolish, if not suicidal, for a state . . . to wait until the first attack.”

— Miriam Sapiro²

INTRODUCTION

On March 19, 2003, the United States and a coalition of its allies attacked Iraq,³ a sovereign nation and a member of the United Nations.⁴ It is undisputed that the United States was not responding to an Iraqi attack on the United States or any other coalition member.⁵ One of its justifications for invading Iraq was the Bush Administration's insistence that Iraq posed a military threat to other countries, including the United States, and that the United States was acting preemptively to prevent Iraq from using non-conventional weapons against these nations.⁶ In recent history, there have been

1. Luis René Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 31 (1994).

2. Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 602 (2003).

3. See President George W. Bush, Presidential Address to the Nation (Mar. 19, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> (announcing the beginning of military operations in Iraq by a coalition of over thirty-five countries led by the United States).

4. See Ulrich Fastenrath, *Article 3*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 155, 157-58 (Bruno Simma et al. eds., 1995) (listing Iraq as one of the fifty-one founding members of the United Nations and noting that it signed the Declaration of the United Nations on January 16, 1943).

5. See Bush, *supra* note 3 (stating that the purpose of the attack on Iraq was to remove the threat posed by Iraq's "outlaw regime" having "weapons of mass murder" before that threat could manifest itself on American soil, and stating that the goal of the military campaign against Iraq was "to disarm Iraq, to free its people and to defend the world from grave danger").

6. See Letter from John D. Negroponte, Permanent Representative of the

other instances of countries relying on their right to self-defense to justify acts of war,⁷ but the United States' intervention in Iraq has brought renewed controversy to the question of whether it is ever proper for one sovereign nation to attack another prior to an act of aggression, rather than in response to one.⁸

Recently published legal literature has noted the connection between the United States' legal rationale for preemptive war and the imminence requirement of self-defense in criminal law.⁹ The imminence requirement, further discussed *infra* Part I.A, posits that one may only act in self-defense if, at the time of the act, he or she reasonably believes that there is a present or imminent danger of

United States of America to the United Nations, to the President of the United Nations Security Council (Mar. 20, 2003), *available at* http://www.un.int/usa/s2003_351.pdf (asserting that Iraq continued to breach the obligations that various Security Council resolutions imposed on it, and that military action against Iraq was necessary "to defend the United States and the international community from the threat posed by Iraq"); *see also* President George W. Bush, State of the Union Address (Jan. 28, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> (referring to the existence of Iraq's illegal weapons programs and its ties to international terrorism, and stating that if Iraq failed to disarm, then the United States would forcibly disarm it "for the safety of our people and for the peace of the world").

7. *See* J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 406 (Humphrey Waldock ed., 6th ed. 1963) (asserting that since aggressive war had been declared a violation of international law, "nearly every aggressive act is sought to be portrayed as an act of self-defence," including German and Japanese action during World War II); Sapiro, *supra* note 2, at 601 (observing that Israel argued in 1981 that it was justified in destroying the Iraqi nuclear reactor at Osiraq on the basis of anticipatory self-defense because it was a threat to Israel's national security); *Binding the Colossus*, *ECONOMIST*, Nov. 22, 2003, at 25, 26 (noting that Israel used preemptive self-defense as justification for attacking Egypt and its Arab allies in the war of 1967); *infra* notes 66-67 and accompanying text (discussing Germany's justification of its attack of Norway during World War II as an act of preemptive self-defense from future Allied aggression).

8. *See* Joseph S. Nye, *Before War*, *WASH. POST*, Mar. 14, 2003, at A27 (asserting that, because the "Bush doctrine of preventive war . . . represents a dramatic departure in American history, it is crucial that we set the right precedent"); Sapiro, *supra* note 2, at 599 (explaining the author's aim to analyze the compatibility of the preemptive war doctrine with existing international law, for while the principles of anticipatory self-defense were already relatively controversial, the use of these principles by the United States in the war in Iraq made it a "critical question with implications far beyond Iraq").

9. *See* RICHARD G. SINGER & JOHN Q. LA FOND, *CRIMINAL LAW: EXAMPLES AND EXPLANATIONS* 406 (3d ed. 2004) (questioning whether the U.S. government's justifications for preemptively striking Iraq would stand up to the scrutiny accorded to self-defense claims in criminal law); *see also* Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 *ARIZ. L. REV.* 213, 215 (2004) (contending that the Bush Administration's "attack" on the imminence requirement of self-defense in international law is evocative of arguments generally made in the debate about the relaxation of the imminence requirement in criminal self-defense law); Shana Wallace, Comment, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 *U. CHI. L. REV.* 1749, 1751 (2004) (suggesting that the factors the Bush Administration adopted to justify preemptive strikes are related to the requirements of individual self-defense).

physical harm.¹⁰ One line of thought is that the Bush Administration's claim that the war was necessary to prevent Iraq from attacking the United States or its allies with non-conventional weapons would not satisfy a strict self-defense analysis.¹¹ Other authors have postulated that the Bush Administration's justification for the war in Iraq could lead to more challenges to, or a possible relaxation of, the imminence requirement of self-defense in criminal proceedings.¹² This Comment argues that the traditional legal requirements of self-defense should not be imposed on self-defense in international law. Focusing on the doctrine of anticipatory self-defense,¹³ this Comment asserts that its imminence requirement should be broadened to reflect the destructive capacity of modern weapons, the increasing number of non-state actors involved in international conflicts, and other related factors.

The parallels between preemptive war and the doctrine of self-defense are especially relevant in the context of Battered Woman Syndrome ("BWS"),¹⁴ a psychological condition sometimes used to support a battered woman's justification for the use of preemptive force against her attacker.¹⁵ BWS reshaped the traditional doctrine of self-defense to reflect conditions faced by battered women in their abusive relationships and their unfavorable treatment by the criminal

10. See *infra* notes 28-29 and accompanying text (demonstrating some variations in how different jurisdictions codify and apply the imminence requirement).

11. See, e.g., Ferzan, *supra* note 9, at 260-62 (noting the distinction between claims of necessity and imminence in self-defense, and asserting that while self-defense laws require a showing of imminence, the United States relied on necessity, thereby invalidating the United States' claim).

12. See SINGER & LA FOND, *supra* note 9, at 412 (noting that a preemptive strike based on a "reasonable belief" of future aggression is usually rejected by the courts when a battered woman kills her sleeping spouse, but that defendants seeking to justify the use of force in self-defense outside a confrontation may challenge the majority view by invoking the Bush Administration's asserted right to preemptive strikes); cf. Wallace, *supra* note 9, at 1751 (recommending that the Bush Administration's broadened definition of imminence be incorporated into the criminal law definition of self-defense).

13. The term "anticipatory self-defense," as used throughout this Comment, refers to a nation's use of force to prevent an attack rather than in response to one. Although there is no precise legal definition for this term, it is commonly used by scholars and commentators; *infra* Part I.C further discusses the development of anticipatory self-defense in the context of self-defense in international law.

14. See BLACK'S LAW DICTIONARY 162 (8th ed. 2004) (defining battered-woman syndrome as "[a] constellation of medical and psychological conditions of a woman who has suffered physical, sexual, or emotional abuse at the hands of a spouse or lover"); see also *infra* Part I.B (describing BWS and discussing its use in criminal self-defense claims).

15. See, e.g., Ferzan, *supra* note 9, at 215-16 (comparing the relaxation of the imminence requirement in anticipatory self-defense and self-defense involving BWS, and drawing further parallels between the claims in each of these settings justifying defensive action because harm was otherwise inevitable).

justice system.¹⁶ Notwithstanding the criticisms of BWS, its use and acceptance by the judicial system¹⁷ has effectively broadened the temporal aspect of imminence in self-defense claims and demonstrates that the traditional requirements of self-defense, although rigid, can indeed evolve over time.¹⁸ Anticipatory self-defense in international law should similarly wean itself from strict traditional self-defense requirements and assume the characteristics of a related but distinct legal doctrine flexible enough to address issues specific to international conflicts and relations.

Part I of this Comment introduces the elements of self-defense in criminal law and describes BWS and its use in legal proceedings. It also discusses the history of anticipatory self-defense and its ties to self-defense in criminal law. Part II explores the shortcomings of customary international law and the ambiguities raised by Article 51 of the Charter of the United Nations in relation to anticipatory self-defense. Part II then examines the legal similarities between States that initiate preemptive strikes and battered women who attack their abusers. Based on this analogy, Part II argues that international law should not adhere to strict traditional self-defense requirements because of the evolving nature of international conflicts. In conclusion, this Comment contends that the legal requirements of anticipatory self-defense in the context of a national defense policy must follow the lead of BWS and utilize a more flexible view of imminence than the traditional doctrine of self-defense.

Even before American troops entered Iraq, legal scholars, politicians, and the media were debating the legality of preemptive war and the legitimacy of the United States' military action against Iraq under the existing legal framework.¹⁹ Since then, information

16. See *infra* notes 18 & 34 and accompanying text for a discussion of how expert testimony describing the effects of battering on its victims has changed courts' approach to battered women's self-defense claims.

17. See *infra* note 48 (describing the acceptance of BWS by the American legal system, while giving nod to the critics of BWS). Although the use of BWS in criminal law has come under criticism, its frequent use in self-defense claims has made it a valid point of reference in discussing the legal requirements of self-defense.

18. See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 753 (2004) (proposing that another way of viewing the use of BWS in self-defense law is as an attempt to redefine or relax the strict imminence requirement of self-defense by assessing the probability of future harm through an analysis of the abuser's past history of aggression); Martin E. Veinsreideris, Comment, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, 149 U. PA. L. REV. 613, 613-14 (2000) (suggesting that BWS cases result in the "dilution of the imminence requirement in self-defense law").

19. Compare Nye, *supra* note 8, at A27 (arguing that while the concept of preventive war has not been accepted in international law, the Bush Administration's rationale for war should be justified as long as a broad coalition supports the United States' actions and the war is limited to Iraq and its present regime), and Press

has surfaced which suggests that the United States used faulty or altered intelligence in order to justify its preemptive war against Saddam Hussein's regime.²⁰ The author of this Comment has strived to remain apolitical and has avoided commenting on the legality of the United States' actions in order to focus on the underlying legal principles.²¹ The purpose of this Comment is to analyze critically the doctrine of anticipatory self-defense; the question of whether the United States was justified in attacking Iraq is left for the reader to decide.²²

I. THE ORIGINS AND DEVELOPMENT OF SELF-DEFENSE, BATTERED WOMAN SYNDROME, AND ANTICIPATORY SELF-DEFENSE

A. *The History and Evolution of Self-Defense Laws and Principles*

The legal concept of self-defense has its roots in early philosophical works dealing with the relationship between individuals and the law,

Release, Senator Rick Santorum, U.S. Senator Rick Santorum Issues Statement Regarding the War with Iraq (Mar. 20, 2003), *available at* <http://santorum.senate.gov/public/> (select "Press Office—Press Releases" from drop-down menu; then select "browse by" "March 2003"; then follow "03/20/03" hyperlink) (expressing support for President Bush's actions as well as the opinion that all options outside of military action had been exhausted), *with* George E. Bisharat, *Facing Tyranny With Justice: Alternatives to War in the Confrontation with Iraq*, 7 J. GENDER RACE & JUST. 1, 45-46, 61-73 (2003) (criticizing the United States' given reasons for invading Iraq and providing policy alternatives to war), *and* Press Release, Senator Edward Kennedy, Statement of Senator Edward M. Kennedy on American Values and War with Iraq (Mar. 13, 2003), *available at* <http://kennedy.senate.gov/~kennedy/statements/03/03/2003317746.html> (citing Saint Thomas Aquinas' requirements for a "just war" and questioning the legitimacy of the United States' invasion of Iraq).

20. See Ari Fleischer, White House Press Secretary, Press Gaggle (July 7, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/07/20030707-5.html> (admitting that information about Iraq attempting to buy yellow cake uranium from Niger, which was incorporated into President Bush's State of the Union address as part of the justification for war with Iraq, "turn[ed] out to be a forgery"); *see also* *Baghdad's Bombs, and London's*, ECONOMIST, July 23, 2005, at 13, 14 (characterizing the coalition's case for war as having been "sex[ed] up" by the United States' and its allies' exaggeration of intelligence concerning Iraq's program of weapons of mass destruction); *cf.* Christopher Hitchens, *A War to Be Proud Of*, WKLY. STANDARD, Sept. 5, 2005, at 24, 26 (suggesting that the war in Iraq was justified for reasons other than those originally proposed by the United States and Britain, and remarking that "it must be admitted that Bush and Blair made a hash of a good case, largely because they preferred to scare people rather than enlighten them or reason with them").

21. To this end, the assertions made by commentators and parties to various international conflicts, which may at times be biased, are taken at face value so as to focus on the underlying legal principles.

22. A proper determination of the legitimacy, under international law, of the United States' invasion of Iraq is a topic that requires much information that is not publicly available. Basing this determination on the official statements of the United States and other governments involved, which may have been manipulated for political purposes, or on other unverified conjectures, would be a political statement inconsistent with the goals of this Comment.

which recognized that the immediacy of a threat sometimes made it impractical for the victim to seek help from legal authorities.²³ By the eighteenth century, self-defense was an established part of English law.²⁴ English common law recognized two types of self-defense, one being a justification defense, and one an excuse.²⁵ Both of these

23. As early as the thirteenth century, Saint Thomas Aquinas proposed that the use of force in self-defense was justified in the case of a risk so immediate that it “does not allow enough time to be able to have recourse to a superior.” THOMAS AQUINAS, *TREATISE ON LAW* 61 (Richard J. Regan ed. & trans., Hackett Publ’g Co. 2000) (1272). Aquinas asserted that only “rulers,” i.e. those who make laws, could legitimately interpret laws. *Id.* at 60. But if an act was against the letter of the law (e.g. murder), then in the absence of laws allowing for self-defense, the very necessity of defending oneself in face of a sudden attack “include[d] an implicit dispensation, since necessity is not subject to the law.” *Id.* at 60-61. Four centuries later, John Locke reiterated Aquinas’ theory in the *Second Treatise of Government*, by asserting that the law permitted self-defense, including the right to kill the aggressor, if the would-be victim’s life was in danger and the aggressor’s force did not leave enough time to seek a legal remedy. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 124 (Mark Goldie ed., Everyman 2000) (1683). However, Locke went a step further in two regards. He justified the use of deadly force even when the would-be victim faced no deadly force (e.g. killing a thief in defense of one’s property), because the aggressor, by violating the victim’s rights, shows complete disregard for the law and there is “no reason to suppose, that he, who would take away my liberty, would not when he had me in his power, take away everything else.” *Id.* at 123. Locke also maintained that his self-defense principles applied not only in response to actual force, but also in response to “a declared design of force upon the person of another,” or in other words—preemptively. *Id.* at 124.

24. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* *3-4 (characterizing self-defense as “the primary law of nature,” which, even if not codified, could be resorted to in repelling an attack on oneself, one’s family, or one’s property, and which was a valid excuse for killing the attacker as long as the force used in self-defense did not exceed its strictly defensive purpose). In cases of assault and battery, Blackstone explained that one had the right to “strike in [one’s] own defence” in response to an actual strike or assault by another, and that the law would acknowledge the fault of the party which had initiated the confrontation. *Id.* *120-21. In cases of attempted robbery, attempted murder, attempted common law burglary (i.e. the burglary of a dwelling at night-time), attempted arson, and attempted rape, both common law and statutory law justified the killing of the perpetrator. 4 *id.* *180-81. The underlying principle that justified killing the attacker was that “where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting.” *Id.* at *181. It is important to take note that Blackstone criticized Locke’s formulation of self-defense as too permissive and noted that it was contrary to the laws of “well-regulated communit[ies]” such as England. *Id.* at *181-82; see *supra* note 23 (explaining Locke’s argument that the law allowed a victim to kill the aggressor in certain circumstances).

25. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *183-84 (noting that the first kind of self-defense was “calculated to hinder the perpetration of a capital crime,” as described *supra* note 24). This defense justified the homicide of the attacker and led to a total acquittal of the defendant “with commendation rather than blame.” *Id.* at *182. The second type of self-defense was the so-called “chance-medley,” in which a person killed his attacker “in the course of a sudden brawl or quarrel.” *Id.* at *184. This was an excusable homicide, more akin to manslaughter, because the killing resulted from violent conduct in which both parties participated. *Id.* at *184-85. What distinguished chance-medley from manslaughter was that in the former, the defendant had to retreat as far as practically possible before using force toward his assailant if the assailant had pressed on with the assault. *Id.*

formulations recognized the right to defend oneself when facing a violent assault, using as much force as necessary to repel the attack.²⁶

Early American law generally followed the established English common law requirements of self-defense.²⁷ Some aberrations did occur,²⁸ but by the end of the nineteenth century, the principles of self-defense law in the United States were well settled and the same principles remain in place today.²⁹ Although the statutory requirements of using force in self-defense vary between jurisdictions, the main common elements are: (1) the actor must reasonably believe that there is a present or *imminent* danger of physical harm; (2) the use of force must be necessary to prevent the harm; and (3) no more force can be used than is reasonably necessary to defend against the threat of harm.³⁰

26. See *supra* note 25 and accompanying text (establishing the legality of using force in self-defense and the principles governing such use of force).

27. See, e.g., *State v. Kennedy*, 20 Iowa 569 (1866) (observing that a threat must be actual and imminent to justify the force used in self-defense); *State v. Sloan*, 47 Mo. 604 (1871) (requiring a reasonable belief of imminent harm to justify the use of reasonable force used to repel that harm). See generally Craig Evan Klafter, *The Americanization of Blackstone's Commentaries*, in *ESSAYS ON ENGLISH LAW AND AMERICAN EXPERIENCE* 42, 42 (Elizabeth A. Cawthon & David E. Narrett eds., 1994) (noting that "[i]n the first century of American independence, [Blackstone's] *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law" (quoting DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3 (Harvard Univ. Press 1941))).

28. See, e.g., *Philips v. Commonwealth*, 63 Ky. (2 Duv.) 328, 331-32 (1865) (ruling that the defendant was justified in fatally striking the deceased, because the defendant had been a victim of a previous attack by the deceased and was attempting to avoid future harm), *overruled by* *Bohannon v. Commonwealth*, 71 Ky. (8 Bush) 481 (1871); *Carico v. Commonwealth*, 70 Ky. (7 Bush) 124, 128-29 (1870) (deriding the trial court's jury instructions on self-defense as "conservative" because they had required an element of imminent danger, and upholding the defendant's right to strike preventively against the deceased, who had previously assaulted the defendant with deadly weapons and had threatened to kill him on the day of the incident).

29. See David McCord & Sandra K. Lyons, *Moral Reasoning and the Criminal Law: The Example of Self-Defense*, 30 AM. CRIM. L. REV. 97, 144 (1992) (noting that when the Kentucky Supreme Court renounced the principle of permitting preemptive strikes, see *supra* note 28, it "br[ought] Kentucky law into line with the traditional law," suggesting that most, if not all, other jurisdictions were already in agreement on this subject); see, e.g., GA. CODE ANN. § 16-3-21(a) (2005) (requiring that a person only resort to deadly force if he or she reasonably believes that the force is necessary to prevent death, serious bodily injury, or a forcible felony); *Robbins v. State*, 891 So. 2d 1102, 1108 (Fla. 2004) (requiring that the defendant had to have thought that death was imminent in order to resort to deadly force in self-defense (quoting *Curington v. State*, 704 So. 2d 1137, 1139-40 (Fla. 1998))).

30. MODEL PENAL CODE § 3.04 (Proposed Official Draft 1962); BLACK'S LAW DICTIONARY 1390 (8th ed. 2004); WAYNE R. LAFAVE, *CRIMINAL LAW* 491 (3d ed. 2000); see Veinsreideris, *supra* note 18, at 615 (surveying self-defense statutes from multiple jurisdictions and concluding that the basic principles of self-defense are the same, albeit with "seemingly infinite linguistic variations"). Veinsreideris noted that the Codes of some states (e.g., ALA. CODE § 13A-3-23(a) (1975), COLO. REV. STAT. § 18-1-704(1) (1999), GA. CODE ANN. § 16-3-21(a) (1999)) require that the threatened force be "imminent," while others (e.g., ARIZ. REV. STAT. ANN. § 13-404(A) (1989), DEL.

B. *Battered Women Who Kill Their Abusers and the Role of Battered Woman Syndrome in Their Self-Defense Claims*

In the early 1980s, courts in many states started accepting expert testimony about the effects of BWS in battered women's self-defense claims.³¹ However, as it was gaining legitimacy, BWS was still widely misunderstood in the legal community.³² Contrary to popular misconceptions, BWS is not a defense in and of itself.³³ Rather, BWS

CODE ANN. tit. 11, § 464(a) (1975), 18 PA. CONS. STAT. ANN. § 505(a) (West 1998)) use the term "immediately necessary." Veinsreideris, *supra* note 18, at 616 & nn.10-11. Although Veinsreideris suggested that there is an inherent distinction between the two terms, he acknowledged that at least some courts and commentators see them as interchangeable. *Id.* at 616 & n.12; *see also* LAFAVE, *supra*, at 495 & n.41 (observing that "[m]ost of the modern codes require that the defendant reasonably perceive an 'imminent' use of force," but some utilize other terminology to describe this requirement).

31. *See* Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 322 (1992) (noting that between the late 1970s and the early 1980s, BWS gained "acceptance within the case law of numerous states," which in turn hastened its acceptance and acknowledgement by legal and mental health professionals); *see, e.g.*, State v. Gallegos, 719 P.2d 1268, 1273-75 (N.M. Ct. App. 1986) (reversing the lower court, which had denied the defendant's self-defense instruction, and acknowledging that BWS was a valid basis for self-defense). The Gallegos court found reversible error where: (1) the trial court's objective interpretation of the evidence contradicted the defendant's perception of the immediacy of the threat to her life; (2) the trial court had excluded the term "battered wife syndrome" from expert testimony because of its novelty; and (3) the trial court did not admit evidence of the deceased's violent acts toward his ex-wife. *Id.*

32. *See* Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 82-83 (1996) (noting that, at the time of the study examined in this article, there existed a perception of BWS as a mental disease or defect). As examples, Parrish mentioned two cases, one from the United States Court of Appeals for the Sixth Circuit, Ware v. Yukins, No. 93-1468, 1994 WL 59004 (6th Cir. Feb. 25, 1994), and one from the Ohio Court of Appeals, State v. Daws, 662 N.E.2d 805 (Ohio Ct. App. 1994), *aff'd*, State v. Daws, No. 18686, 2001 WL 814968 (Ohio App. July 20, 2001), in which the courts referred to BWS as an abnormal mental condition. Parrish, *supra*, at 82-83. Parrish also observed that the National Clearinghouse for the Defense of Battered Women received a number of phone calls exhibiting misunderstanding by many attorneys of the relevance of expert testimony regarding the psychological effects of abuse on battered women's perceptions to the self-defense claims of battered women. *Id.* at 80. Furthermore, some women were not able to present such testimony at trial, or when they did, courts sometimes limited the admissibility or scope of such testimony. *Id.*; *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 177 (1987) (noting that although expert testimony on BWS had a positive effect on people's understanding of the mentality of battered women, the term "syndrome" had skewed the image of battered women as suffering from some impairment in the eyes of, among others, judges and jurors).

33. *See* Parrish, *supra* note 32, at 78 (noting that many people misunderstand the role of BWS in trials of battered women, and while BWS is not a separate defense nor a type of self-defense, expert testimony of the effects of BWS on battered women is used to *support* a battered woman's self-defense claim rather than to *replace* it); *see also* State v. Meyers, 570 A.2d 1260, 1266 (N.J. Super. Ct. App. Div. 1990) ("The Battered Woman's Syndrome does not involve insanity, mental disability or diminished capacity. Rather, it bears on the self-defense issue of the honesty and reasonability of defendant's belief that she was in imminent danger of serious injury."), *cert. denied*,

is employed within the framework of self-defense and expert testimony describing the effects of battering on a woman's mental state helps the jury understand the defendant's perception that she was in imminent danger of death or bodily harm.³⁴

BWS gained prominence against a background in which self-defense laws were generally unresponsive to situations faced by female victims of domestic violence.³⁵ Traditional common law allowed men to physically discipline their wives and denied women the right to defend themselves,³⁶ but the practice of wife beating was not upheld in later jurisprudence.³⁷ However, while the law had evolved beyond encouraging men to abuse their spouses, it still did

604 A.2d 598 (N.J. 1990).

34. See Parrish, *supra* note 32, at 78-79 (explaining how the role of expert testimony in self-defense claims involving BWS helps judges and juries "understand the defendant's experiences and actions, not excuse them"). Parrish clarified that expert testimony is meant to assist the fact-finder in understanding the "social context" of the killing, and its ultimate purpose is to "promote[] fair trials." *Id.* at 79. Parrish compared a battered woman's self-defense claim to any other self-defense claim in which the defendant should be able to and should want to introduce evidence of why "the defendant reasonably believed that she was in imminent danger of death or great bodily harm." *Id.* at 79. This evidence should include the deceased's history of violence toward the defendant as well as an explanation of the general psychological effects of battering on the victim, so that the jury may "fairly evaluate the situation at the time of the incident." *Id.* at 79-80.

35. See Walker, *supra* note 31, at 321 (noting that before BWS was accepted by the legal community, most women who admitted to killing their abusers were advised by their attorneys to plead guilty to murder, and that usually the only defense that these women would be allowed to present was some variation of the insanity defense).

36. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123-24 (1996) (observing that antebellum common law allowed a husband to subject his wife to corporal punishment if she disobeyed him). Siegel qualified her point by observing that in his *Commentaries* Blackstone noted this legal tradition's entrenchment with the British lower classes but was otherwise seemingly critical of it, and that early American legal treatises, such as Kent's *Commentaries* of 1827 and Wharton's criminal law treatise of 1846, "recognized th[is] prerogative in qualified terms." *Id.* at 2124. At the same time, however, the case law of many states recognized the husband's right to use physical force to chastise his wife. See *id.* at 2125 n.25 (surveying a number of cases from early and mid-nineteenth century affirming this right, albeit with various limitations on the amount of force used and the reasons behind it). One such case is *Bradley v. State*, 1 Miss. (1 Walker) 156 (1824), in which the court referred to the infamous guideline, commonly known as the "rule of thumb," which allowed a husband legally to chastise his wife with a rod, so long as its diameter was no greater than that of his thumb. *Id.* at 157.

37. See Siegel, *supra* note 36, at 2129 (observing that "[b]y the 1870s, there was no judge or treatise writer in the United States who recognized a husband's prerogative to chastise his wife"); see, e.g., *Fulgham v. State*, 46 Ala. 143, 147 (1871) (repudiating a husband's authority to physically chastise his wife by holding that a wife is entitled to the same protection of the law as the husband). The Court in *Fulgham* observed that Blackstone's *Commentaries* referred to the practice of "wife-whipping" as an "ancient privilege," but because Blackstone's claims lacked supporting case law and because "learning, with its humanizing influences, ha[d] made great progress [since the publication of the *Commentaries*]," "the exercise of a rude privilege [in England was] no excuse for a like privilege [in the United States]." *Id.* at 146 (citations omitted).

not offer enough legal protection to women in abusive relationships.³⁸ While many battered women were killed by their abusive partners, some fought back and killed their abusers.³⁹ Courts in these cases often refused to admit evidence of past abuse.⁴⁰ Thus, it was more difficult for a battered woman to meet the requirements of self-defense as the jury necessarily evaluated the imminence requirement from an objective viewpoint since it was not privy to the woman's perceptions as a victim in an abusive relationship.⁴¹

The admissibility of expert testimony of BWS was first reviewed by an appellate court in *Ibn-Tamas v. United States*⁴² in 1979.⁴³ The trial court had ruled that expert testimony of BWS was prejudicial and interfered with the jury's fact-finding function, thus refusing to admit it.⁴⁴ The appellate court, however, reasoned that expert psychological testimony about battered women could educate the jury about the defendant's possible state of mind as a victim of spousal abuse.⁴⁵ The

38. See Parrish, *supra* note 32, at 80 (noting that in 1996, when Parrish's article was written, many attorneys and courts lacked familiarity with battered women's cases, meaning battered women "continue[d] to face monumental hurdles" as criminal defendants claiming self-defense); Walker, *supra* note 31, at 321 (describing some problems that battered women faced in the legal system); *cf.* Ferzan, *supra* note 9, at 231 (stating that battered women who kill in confrontational settings are "paying the price for our failure to delineate the defense [of self-defense] properly" and are usually sentenced to relatively lengthy prison terms).

39. See LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 4-7 (1989) (noting that as an expert witness in over 150 murder trials involving BWS, the author encountered women who had killed their partners in order to save their own lives or those of their children "after enduring incredible physical, sexual, psychological, and emotional abuse and torture").

40. See Walker, *supra* note 31, at 325-26 (explaining battered women's difficulties in presenting evidence of their abusers' past behaviors, which could justify their use of deadly force in self-defense).

41. See, *e.g.*, State v. Norman, 378 S.E.2d 8, 9-14 (N.C. 1989) (finding that the imminence requirement needed for a successful self-defense claim was not satisfied because there was no "reasonable fear of imminent death or great bodily harm," even though a psychologist and psychiatrist who presented expert testimony on the defendant's behalf stated that "killing her husband 'appeared reasonably necessary' to the defendant at the time of the homicide") (emphasis added); *see also* Walker, *supra* note 31, at 323-24 (noting that the effect of using an objective "reasonable person" requirement meant that the jury would evaluate the woman's claim through the eyes of an average person rather than a victim of spousal abuse, and that without expert testimony on the effect of abuse on the defendant's thoughts, feelings and actions, the jury would likely find the defendant's perceptions unreasonable).

42. 407 A.2d 626 (D.C. 1979).

43. DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 78 (1996) (noting the significance of *Ibn-Tamas* as the first appellate decision in BWS jurisprudence).

44. *Ibn-Tamas*, 407 A.2d at 632.

45. *Id.* at 634-35. The court reasoned that the expert witness could explain the effects that a history of being subjected to battering and abuse may have on a battered woman's mental state, and "would have supplied an interpretation of the facts which differed from the ordinary lay perception [that a battered woman can freely get out of the relationship with her batterer]." *Id.*

defendant would then gain credibility in the eyes of the jury, making her claim that she believed her husband would kill her and she had no alternative but to act in self-defense more plausible.⁴⁶ The *Ibn-Tamas* trial court retained the discretion to decide whether expert BWS testimony would be admitted,⁴⁷ but generally, by the mid-1990s most American jurisdictions accepted evidence of BWS in battered women's self-defense claims.⁴⁸

C. *Defensive Needs of Nations and the Evolution of Anticipatory Self-Defense Principles in International Law*

The principles of self-defense in international law are similar to the requirements of individual self-defense, but rules governing national self-defense⁴⁹ are more closely associated with *jus ad bellum* (sometimes referred to as the "Just War theory").⁵⁰ *Jus ad bellum* refers to a set of moral and legal principles developed over centuries to address the question of whether a nation's initiation of a war is

46. *Id.* at 632. At trial, the prosecution had alleged that the defendant could not have plausibly perceived herself to be in imminent danger and that a rational woman in her situation would have contacted the police or left her abusive husband. *Id.* at 633-34. On appeal, however, the court noted that expert testimony would provide background information that the jury could use to determine whether the defendant indeed perceived that there was a threat to her life. *Id.* The court also accepted the suggestion that expert testimony might give weight to the defendant's claim of being unable to escape the relationship, on grounds attributable to her state of mind. *Id.* at 634-35.

47. *Id.* at 632, 640 (remanding the case to the trial court and explaining that the question of admissibility of expert testimony, whether about BWS or otherwise, was governed by case law focusing on the witness' expertise and was at the discretion of the trial court).

48. See Parrish, *supra* note 32, at 83 (summarizing the results of a 1995 study, which showed that "[e]xpert testimony on battering and its effects [was] admissible, at least to some degree" in all fifty states, the District of Columbia, and in most of the federal courts that had considered this issue). It must be acknowledged, however, that BWS has many skeptics, ranging from those who believe that it has no scientific basis to those who do not approve of its use in self-defense cases. See, e.g., David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 70 (1997) (criticizing BWS as "pseudoscientific" and asserting that it "has no basis in science and has received its main support from the politics it was believed to advance").

49. In this Comment, the term "national self-defense" refers to defensive actions of states against other nations or non-state actors that project force, usually in the form of a military attack. This term does not refer to the legal doctrine of self-defense under international law, but rather to states' actual practices.

50. See Frédéric Mégret, *Justice in Times of Violence*, 14 EUR. J. INT'L L. 327, 339 n.25 (2003) (explaining that while the primary intent of *jus ad bellum* was to define when the use of force by a state is legitimate, the issues of national self-defense and collective security are byproducts of this theory); cf. BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE 87 (McGill-Queen's Univ. Press 2000) (noting that many of the concepts derived from the Just War theory, including *jus ad bellum* principles, have since been incorporated into international laws governing armed conflict).

justified.⁵¹ One of the elements of *jus ad bellum* is that a nation must have a “just cause” for launching a war; otherwise it is an unjust aggressor.⁵² Commonly mentioned just causes include self-defense from an external attack, recovery of property, and punishment for an unjust act.⁵³

While *jus ad bellum* influenced the formulation of national self-defense principles,⁵⁴ nations’ actual behavior was unchecked due to an absence of laws regulating state conduct both before and during war.⁵⁵ Similar to the actions of a criminal defendant, the use of force

51. See Mégret, *supra* note 50, at 339 (observing that *jus ad bellum* was a “device for order,” which came out of attempts, over many centuries, to control the use of violence by one state against another). Although *jus ad bellum* has its origins in canonic law and draws from religious sources, including biblical texts and the writings of Saint Thomas Aquinas, the scholars most often associated with it are Francisco de Vitoria (1486-1546), Hugo Grotius (1583-1645), and Emmerich de Vattel (1714-1767). OREND, *supra* note 50, at 86-87.

52. See OREND, *supra* note 50, at 87 (listing “just cause” as one of several requirements that a state must fulfill in order for its decision to launch a war to be justified); cf. MICHAEL WALZER, *The Triumph of Just War Theory (and the Dangers of Success)*, in ARGUING ABOUT WAR 3, 18 (2004) (positioning a “war of aggression” as the opposite of a just war meaning that the aggressor state violates the status quo between nations and should be responsible for restoring the status quo when it is justly defeated).

53. See OREND, *supra* note 50, at 87 (explaining that various classic writings on the Just War tradition usually cited the following causes as legitimate justifications for going to war: “self-defence from external attack; the protection of innocents; and punishment for wrongdoing”); see also HUGO GROTIUS, *THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS)* 72 (Louise R. Loomis trans., Walter J. Black 1949) (1625) (summarizing the three most common just causes of war as “defense, recovery of property, and punishment”). Grotius, generally viewed as one of the most prominent contributors to the Just War theory, recognized that self-defense is a just cause for war by stating “it is lawful to kill a person preparing to kill another,” and by further clarifying that the principles regarding the “right of defending one’s person . . . should likewise be applied to public war.” *Id.* at 74-76. Vattel likewise declared that “[a] nation has a right to resist an injurious attempt” and to use force against the aggressor. EMMERICH DE VATTEL, *THE LAW OF NATIONS* 241 (Luke White 1792). A nation may even “anticipate its [enemy’s] machinations,” but it must be careful “not to attack [the enemy] upon vague and uncertain suspicions, in order to avoid exposing itself to become an unjust aggressor.” *Id.*

54. See *supra* note 50 and accompanying text.

55. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 160 (3d ed. 2001).

[W]hen the freedom to wage war was countenanced without reservation (in the nineteenth and early twentieth centuries), concern with the issue of self-defence was largely a metajudicial exercise. As long as recourse to war was considered free for all, against all, for any reason on earth—including territorial expansion or even motives of prestige and grandeur—States did not need a legal justification to commence hostilities.

The author further noted that through the nineteenth century, a state’s right to initiate war at will was considered legitimate under international law and even an attribute of national sovereignty. *Id.* at 71. Ian Brownlie, another eminent legal scholar, commented that “[t]he [nineteenth] century was still dominated by an unrestricted right of war and the recognition of conquests, qualified by the political system of the European Concert.” IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 19 (1963).

by a State claiming self-defense can be best analyzed after the incident in question.⁵⁶ However, until the middle of the twentieth century, there was no legal body that could realistically claim to have jurisdiction over such actions.⁵⁷ The consequent dearth of legal precedent and the lack of codified standards for self-defense in international law (especially before the emergence of the United Nations) mean that the exact bounds of states' rights to self-defense have to be deduced from various treaties and international conflicts.

The modern right of anticipatory self-defense has its roots in the so-called *Caroline* incident.⁵⁸ In 1837, in response to the use of the steamship *Caroline* by Canadian rebels, a British-led paramilitary force crossed into the United States, set the *Caroline* on fire, and forced it down Niagara Falls.⁵⁹ British officials claimed they were acting in self-defense, but U.S. Secretary of State Daniel Webster rejected their position by enunciating limits on a nation's right to self-defense.⁶⁰ The reason that the *Caroline* case is seminal in the development of a legal framework for anticipatory self-defense⁶¹ is that it suggested that the use of force in self-defense was limited to only those actions where: (1) the use of force was necessary due to lack of alternatives; and (2) the magnitude of force used was proportionate to the force that provoked it.⁶² This was a novel

56. See *The Nurnberg Trial*, 6 F.R.D. 69, 100 (1947) (“[W]hether 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 Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493, 505 (1990).

57. See DINSTEIN, *supra* note 55, at 106-07 (noting that several non-binding international instruments articulated the criminality of aggressive war, but the Nuremberg International Military Tribunal created in the aftermath of World War II was the first body with the power and ability to judge claims of aggressive war).

58. See D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 58 (1958) (referring to the *Caroline* incident as the “*locus classicus* of the right of self-defence”, quoted in Yoo, *supra* note 18, at 741 n.41); Yoo, *supra* note 18, at 740 (“The classic formulation of the right of anticipatory self-defense arose from the *Caroline* incident.”).

59. Rogoff & Collins, *supra* note 56, at 493-95. *Caroline* was a privately owned American steamboat that ferried supplies to Upper Canada (now Ontario) to support a small band of Canadian rebels after their bid for independence from British rule had failed. *Id.* at 493-95. A sortie of Canadian loyalist militia and the Royal Navy seized the ship while it was in United States territory, set it on fire and cast it adrift over Niagara Falls, killing two Americans. *Id.* at 495.

60. See *infra* note 62 (explaining Webster’s assertions).

61. See Rogoff & Collins, *supra* note 56, at 498 (stating that the *Caroline* doctrine “effectively defined the limits of self-defense, and in so doing enabled later statesmen and scholars to distinguish that concept [from] self-preservation”); see also *Binding the Colossus*, *supra* note 7, at 25 (noting that the *Caroline* incident was the “classic formulation of the right of pre-emptive attack”).

62. Rogoff & Collins, *supra* note 56, at 498. In an exchange of diplomatic correspondence with the British government, which had claimed that its subjects in Canada were acting in self-defense, U.S. Secretary of State Daniel Webster countered that the self-defense claim would stand only if the British could show a “necessity of

proposition at a time when a nation's right to wage war was unchallenged in the system of international relations.⁶³

Although the *Caroline* criteria were never codified, they have been generally respected as customary international law.⁶⁴ For instance, the Nuremberg Tribunal, which prosecuted German officials for war crimes after World War II,⁶⁵ utilized the *Caroline* formulation of self-defense in rejecting Germany's claim that it invaded Norway in order to prevent an imminent Allied attack.⁶⁶ In holding that Germany invaded Norway for strategic reasons and that the invasion thus failed to meet the *Caroline* requirements of necessity and proportionality of force, the Tribunal implicitly affirmed the legal validity of the *Caroline* doctrine.⁶⁷

By the early twentieth century there was no question that nations had a basic right to self-defense,⁶⁸ but even in light of the *Caroline* doctrine, laws governing national self-defense were vague.⁶⁹

self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation." *Id.* at 497-98 (quoting British government documents). Webster further noted that "the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." *Id.* at 498.

63. See *supra* note 55 and accompanying text (commenting on the historical absence of laws governing the initiation of war).

64. See BROWNLIE, *supra* note 55, at 257 (mentioning the *Caroline* doctrine in the context of the right of anticipatory self-defense in customary international law).

65. See The Nurnberg Trial, 6 F.R.D. 69, 76 (1947) (establishing the Nuremberg Tribunal's jurisdiction over individuals charged with crimes against peace, including planning and waging of wars of aggression; war crimes; and crimes against humanity).

66. See *id.* at 99 (citing the *Caroline* case and quoting Webster's own words, as described *supra* note 62, in the analysis of Germany's claim of having acted in self-defense).

67. See *id.* at 99-100 (reviewing German military memoranda that presented various grounds for invading Norway and concluding that "[f]rom all this it is clear that when the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing," but rather to set up military bases for a future attack on England and France).

68. National self-defense was such an intrinsically understood part of statehood, that:

[D]uring the negotiation of the Kellogg-Briand Peace Pact of 1928 [renouncing war as an instrument of foreign policy], [U.S.] Secretary of State Kellogg observed that there was no need to state it expressly in the terms of the Pact; even the adoption of texts that seem inconsistent with exercise of the right, he said, do not preclude reliance upon it.

Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 558 n.62 (2001) (citing Telegram from Frank B. Kellogg, Secretary of State, to the Ambassador in France (Apr. 23, 1928), 1 FOREIGN REL. U.S. 34, 36-37 (1928)).

69. Because international self-defense laws were not codified, the principles governing self-defense could be interpreted differently by various countries and in divergent legal traditions. See Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 877 (1947) (observing that it is common "that all states, determined to go to war, plead self-defense," and that nations have used self-defense to justify such diverse causes as the

Governments hesitated to formally define the bounds of national self-defense because an overly narrow definition would possibly preclude nations from relying on this right, while a broader definition would make it easier for a nation to claim self-defense as a justification for an unwarranted attack.⁷⁰

In 1945, the United Nations was formed with the aim of preventing future wars and promoting the use of international law.⁷¹ The Charter of the United Nations (“U.N. Charter”) prohibited the “threat or use of force” against any other State,⁷² and idealistically directed all United Nations members to “settle their international disputes by peaceful means.”⁷³ Article 51 of the U.N. Charter attempted to provide definitive guidance for member States’ right to self-defense by declaring: “[n]othing in the present Charter shall impair the *inherent right of individual or collective self-defense* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”⁷⁴ However, due to its vagueness and political and practical considerations, Article 51 has had a destabilizing effect on the viability of customary international law of self-defense, as further explored in the following section.

Monroe Doctrine, the “vital interests” doctrine, the lend-lease program, and others) (citations omitted).

70. As the American side noted in its draft of the Kellogg-Briand Peace Pact, “it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense, since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.” M.A. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1095, 1106 n.32 (1951). The British also objected to codifying the limits on national self-defense, noting that the circumstances of a given case may warrant self-defense actions that would have been improper under other circumstances. *Id.*

71. See U.N. Charter pmbl. (recognizing the devastation brought on by World Wars I and II and stating that the United Nations aimed to “establish conditions” under which nations will respect and adhere to international law, and asserting as one of its goals the elimination of use of force except to further the “common interest[s]” of member states).

72. *Id.* art. 2, para. 4.

73. *Id.* art. 2, para. 3.

74. *Id.* art. 51 (emphasis added). Article 51 goes on to define the Security Council’s role when a member state acts in self-defense under this Article:

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

II. AN ANALYSIS OF ANTICIPATORY SELF-DEFENSE CLAIMS
UNDER INTERNATIONAL LAW THROUGH THE PRISM OF
BATTERED WOMAN SYNDROME

Many commentaries that have attempted to analyze the legitimacy of the United States' invasion of Iraq have done so within the framework of the U.N. Charter or the *Caroline* criteria.⁷⁵ This Part of the Comment attempts to show why existing international law, as exemplified by the *Caroline* Doctrine and Article 51, cannot adequately address various factors inherent to contemporary international conflicts. A subsequent examination of the parallels between States that initiate preemptive strikes and battered women who attack their abusers suggests that the question of imminence in both scenarios should address other factors in addition to the temporal proximity of harm.

A. *The Limitations of Existing International Law for Addressing States' Rights to Anticipatory Self-Defense*

As a result of rapid advances in military technology and the changing nature of international conflicts, the existing legal framework based on the *Caroline* criteria and the U.N. Charter is no longer viable for nations under threat.⁷⁶ In the past, warfare was

75. *E.g.*, David B. Rivkin, Jr. et al., *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 467-70 (2005) (arguing that the United States' attack on Iraq and ouster of Saddam Hussein were a legitimate exercise of anticipatory self-defense supported by the U.N. Charter and the *Caroline* principles, which are enshrined in customary international law); *see, e.g.*, Glennon, *supra* note 68, at 540-41, 546-47 (analyzing the legality of anticipatory self-defense under Article 51 and conceding that it would probably not be permitted under a plain language interpretation of the Article, but asserting that this only brings to light the U.N. Charter's shortcomings); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 571-74 (2003) (asserting that a number of U.N. Security Council resolutions, laws governing armistices, Article 51, and principles of customary international law established sufficient legal authority for the American attack on Iraq). *But see* Ferzan, *supra* note 9, at 215-19 (distinguishing the moral foundations of the right to self-defense from the related concept of necessity of action and asserting that the United States' attack on Iraq did not meet the imminence requirements of self-defense, regardless of the underlying legal framework); Yoo, *supra* note 18, at 730 (rejecting the use of the U.N. Charter to assess the United States' justification of its use of force in Iraq and proposing a cost-benefit analysis to address similar concerns in the future).

76. *See* Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24, 26 (detailing several reasons why "[t]wenty-first century security needs are different from those imagined in San Francisco [during the drafting of the U.N. Charter] in 1945"). Glennon's examples include the proliferation of weapons of mass destruction, which make it possible for the initial attack to be decisive, and the existence of "terrorist organizations 'of global reach,'" that often enjoy state support. *Id.* *See also* Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 202-03 (1984) (asserting that developments in military technology have rendered the U.N. Charter's restrictive view of nations' defensive needs

typically exemplified by the physical movement of military forces and by a clear knowledge of the parties to a conflict.⁷⁷ However, the proliferation of international terrorism, combined with greater accessibility to weapons of mass destruction, drastically changes the dynamic of international conflicts.⁷⁸ These types of threats require new types of responses, and States must have the ability to resort to a wider variety of options—not only diplomatic and military, but also legal.⁷⁹

The *Caroline* criteria cannot be effective in light of the destructive capacity of modern weapons and methods of war.⁸⁰ Nuclear weapons are capable of sudden destruction on a scale unlike that of any conventional weapons, which may prevent the attacked nation from mounting an effective response, especially if a nuclear attack is followed by one with conventional military means.⁸¹ In 1981, during a

obsolete).

77. See WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) [hereinafter NSS], available at <http://www.whitehouse.gov/nsc/nss.pdf> (noting that in the past, imminent threats usually took the form of “visible mobilization of armies, navies, and air forces preparing to attack”); see also Geneva Convention Relative to the Treatment of Prisoners of War arts. 2-3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (recognizing only two types of armed conflict: a “declared war or . . . any other armed conflict” between two or more signatories to the Convention, and an “armed conflict not of an international character” in the territory of one of the signatories).

78. See Condoleezza Rice, U.S. Nat’l Sec. Advisor, Remarks as the Wriston Lecturer at the Manhattan Institute (Oct. 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html> (explaining the rationale behind the National Security Strategy (NSS) by noting that the threats of terrorist networks and rogue regimes “magnif[y] the danger of the other,” because they can pass weapons, technology, and other assets or abilities to each other, and thus increase the scope and scale of potential destruction); see also Nye, *supra* note 8, at A27 (explaining that a major recent shift in world politics is the “privatization of war,” whereby regimes such as those under Hitler or Stalin could only kill millions of people using the full resources of government, but in the twenty-first century, terrorists need little more than access to weapons of mass destruction to cause death and destruction on a similar scale).

79. See Rice, *supra* note 78 (explaining that the catastrophic potential of some threats, namely those related to weapons of mass destruction, “requires new thinking about when a threat actually becomes ‘imminent’” as a matter of common sense, but that this new thinking, as embodied in the NSS, “does not overturn five decades of doctrine and jettison either containment or deterrence”).

80. See Yoo, *supra* note 18, at 750 (noting that the *Caroline* approach came about “in the age of sailing ships and the Concert of Europe,” thus in light of weapons of mass destruction, the reduced response time to potential threats, and the reduced effectiveness of nonviolent measures, *Caroline* is not likely to be heeded by actors that eschew international controls, and would in turn likely be ignored by states facing a potential threat); see also *infra* note 125 (describing the potential destructive capabilities of modern weaponry and terrorist methods of attack).

81. See Polebaum, *supra* note 76, at 228 (noting that in a case involving a nuclear threat, there may be a “swift progression from threat to deployment to annihilation,” which would make the traditional legal standards of self-defense outdated); see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 243 (July 8) (analyzing the characteristics of nuclear weapons and noting that their

United Nations debate in which Israel articulated its justification for destroying the Iraqi nuclear reactor at Osiraq,⁸² the Israeli Ambassador explained some of the shortcomings of the *Caroline* principles:

To try and apply [the *Caroline* doctrine] to a nuclear situation in the post-Hiroshima era makes clear the absurdity of the position of those who base themselves upon it. To assert the applicability of the *Caroline* principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence.⁸³

The United Nations' lack of assertive action in response to the Israeli attack suggested that the international community was willing to tolerate Israel's rationalization of the attack, thereby undermining the significance of *Caroline* in evaluating self-defense claims.⁸⁴

Applying a strict reading of Article 51 to an anticipatory self-defense claim would also be a mistake. The effect of the language of Article 51 on principles governing self-defense has been exactly what

potential for radiation and destructive power, which "cannot be contained in either space or time," make these weapons "potentially catastrophic"). For example, approximately 100,000 people died as a result of the American fire-bombing of Tokyo in March, 1945 and over 100,000 civilians died as a result of a nuclear strike on Hiroshima in August 1945: "One plane, one bomb . . . Atomic war was death indeed, indiscriminate and total[.]" MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 266, 269 (1977); *see also* UNITED STATES STRATEGIC BOMBING SURVEY: SUMMARY REPORT (PACIFIC WAR) 22 (1946) *id.* at 24 (calculating that "the damage and casualties caused at Hiroshima by the one atomic bomb dropped from a single plane would have required 220 B-29s carrying 1,200 tons of incendiary bombs, 400 tons of high-explosive bombs, and 500 tons of anti-personnel fragmentation bombs, if conventional weapons, rather than an atomic bomb, had been used"). On September 11, 2001, almost three thousand people were killed at the World Trade Center alone, in an attack which did not utilize non-conventional weapons, but rather non-conventional military methods. *See* JOHN KEEGAN, *THE IRAQ WAR* 89-90 (Alfred A. Knopf 2004). These examples illustrate the scope of death and destruction likely to occur as a result of a single strategically calculated attack.

82. *See infra* note 113 for a factual background of the Israeli attack.

83. Rogoff & Collins, *supra* note 56, at 509.

84. *See* Anthony D'Amato, *Israel's Air Strike against the Osiraq Reactor: A Retrospective*, 10 *TEMPLE INT'L & COMP. L.J.* 259, 262 (1996) (noting that the Security Council unanimously voted to condemn the Israeli action, but significantly, the resulting resolution was completely ineffective in that it did not propose any punishment and basically amounted to "a gentle pat on the wrist"); *Double Standards*, *ECONOMIST*, Oct. 12, 2002, at 22, 24 (explaining that Security Council Resolution 487, passed under Chapter Six in response to the Israeli attack on Osiraq, was a "non-binding recommendation[]" that did no more than "scold[] Israel" by merely *calling upon* it to refrain from such acts in the future); Rivkin, *supra* note 75, at 480 (asserting that "international inaction strongly suggest[ed] a fundamental recognition that Israel acted in accordance with her rights under international law"); D'Amato, *supra*, at 259 ("These . . . speculations make it clear that Israel did the world a great service on June 7, 1981, in its air strike against the Osiraq nuclear reactor.").

the drafters of early international treaties concerning the use of force feared: confusion.⁸⁵ Article 51 does not specify any criteria for the use of force in self-defense other than in response to an armed attack.⁸⁶ However, even in the case of an armed attack, some defensive actions, such as a nuclear response to a conventional military attack, would likely be judged as unjustified.⁸⁷ By preserving States' "inherent right" of self-defense, Article 51 effectively incorporates the necessity and proportionality principles of the *Caroline* doctrine, seeing that they formed the basis of customary international self-defense law prior to the adoption of the U.N. Charter.⁸⁸ But because the *Caroline* doctrine was not a well-delineated formulation, it provided a certain amount of latitude for acting preemptively, so long as the use of force met *Caroline's* main

85. See *supra* note 70 and accompanying text (explaining why British and American governments did not want to codify limits on the use of force in self-defense); see also Albrecht Randelzhofer, *Article 51, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 4, at 661, 678 (noting the inconsistency between the broader customary right to self-defense and the self-defense rights envisaged in Article 51, and concluding that this inconsistency has "prevented the narrow reading of the right of self-defence laid down in Art. 51 from becoming established in customary international law"). The author further claims that Article 51 "supercedes and replaces the traditional right to self-defence" of U.N. member-states. Randelzhofer, *supra* note 4, at 661, 678.

86. See *supra* note 74 and accompanying text (quoting the full text of Article 51, which neither defines "armed attack," nor provides guidance or limitations on the "right of self defence").

87. See WALZER, *supra* note 81, at 274-83 (analyzing a number of arguments for and against the use of nuclear weapons in various circumstances and concluding that the use of nuclear weapons is never legitimate under "just war" principles). In a 1996 advisory opinion on the legality of the use of nuclear weapons under international law, the International Court of Justice concluded that: "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8). The Court did add, however that:

[I]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Id.

88. See Glennon, *supra* note 68, at 553 (interpreting the words "nothing . . . shall impair [the inherent right of self-defense]" in Article 51 as an indication that such a right was acceptable prior to the U.N. Charter and "continues to exist . . . after [its] ratification"); cf. Rogoff & Collins, *supra* note 56, at 509 (discussing a United Nations Security Council debate in 1981 where several delegates relied on the *Caroline* doctrine's requirements of necessity and proportionality to condemn Israel's military actions); *supra* note 66 and accompanying text (describing the Nuremberg Tribunal's use of the *Caroline* doctrine to determine the invalidity of Germany's self-defense claims). But see *supra* note 85 (arguing that restrictions on independent state actions incorporated into Article 51 supercede customary international law of self-defense).

conditions of necessity and proportionality.⁸⁹ Hence, the Article's requirement that an armed attack take place for self-defense to be warranted contravenes a State's inherent right—also incorporated into the Article—to preempt such an attack under *Caroline*.⁹⁰

Article 51 gives rise to another ambiguity by recognizing a nation's self-defense actions as legitimate only until the Security Council steps in.⁹¹ This provision of Article 51 interferes with nations' customary self-defense rights (which do not provide for deference to any international bodies), thereby further infringing on the same "inherent right" of self-defense that Article 51 purports not to impair.⁹²

As a result of these inconsistencies, the U.N. Security Council's role in self-defense actions has been "almost devoid of practical significance,"⁹³ and nations have at times invoked Article 51 to rationalize actions unrelated to self-defense.⁹⁴ In addition to the

89. See *The Nurnberg Trial*, 6 F.R.D. 69, 99 (1947) (stating explicitly that "preventive action in foreign territory is justified" if the *Caroline* criteria are satisfied). The facts of the *Caroline* incident support this view, since Webster's objections to British claims of preemptive self-defense did not call into question the validity of their assertions, but rather only defined the limits of legitimate self-defense. *Supra* note 62; cf. Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1476-77 (asserting that force employed in self-defense is always preemptive, whether in a personal confrontation or in a military one, "[b]ecause no one can ever be absolutely certain what will happen if he does not employ preemptive defensive force [and] must [thus] act on an assessment of probabilities").

90. See Glennon, *supra* note 68, at 553 (asserting that, by adding the explicit requirement that an armed attack occur, Article 51 effectively removes "a state's inherent right to preempt that attack"); *supra* note 89 and accompanying text (showing that a state has a right to act preemptively in self-defense under *Caroline*).

91. See U.N. Charter art. 51 (permitting a nation to act in self-defense "until the Security Council has taken measures necessary to maintain international peace and security," indicating that the Security Council's authority takes precedence over a member state's right to self-defense).

92. See Glennon, *supra* note 68, at 553-54 (explaining that the text of Article 51 impairs a state's right to self-defense by giving the Security Council primary and superceding authority to act); see also Randelzhofer, *supra* note 85, at 676-77 (explaining that this restriction on a nation's right to self-defense, together with a nation's obligation under Article 51 to report to the Security Council any measures taken in self-defense, "are evidence of the fact that the right of self-defense embodied in Art. 51 is only meant to be of a subsidiary nature").

93. See Randelzhofer, *supra* note 85, at 676-77 (analyzing Article 51's limits on the customary right to self-defense and observing that, because the Security Council has long "been far from performing its intended function" of taking "the measures necessary" to maintain "peace and security," the restrictions on the actions of states embodied in Article 51 have lost any practical meaning); cf. Ruth Lapidoth, *The Security Council in the May 1967 Crisis: A Study in Frustration*, 4 ISR. L. REV. 534, 548-49 (1969) (providing a detailed recount of the on-the-ground events and diplomatic maneuvers leading up to the Six Day War and concluding that the Security Council's failure to act effectively to prevent war was "but a symptom of its decline and inability" resulting from political bias and lack of cooperation between members).

94. See *Binding the Colossus*, *supra* note 7, at 25-26 (referring to various states' use

deficiencies of Article 51, using the *Caroline* doctrine could potentially be a problem in its own right, because, as explained above, its principles are not well suited to contemporary military and political realities.⁹⁵ The various shortcomings of the *Caroline* principles, of Article 51, and of the amalgamation of the two make it clear that existing international law of self-defense is neither flexible nor lucid enough for nations to be able to rely on it in moments of crisis.

B. Parallels Between Battered Women Claiming Self-Defense After Killing Their Abusers and Nations Relying on Their Anticipatory Self-Defense Rights to Justify a Preemptive Attack

This Comment proposes that it is appropriate to evaluate a nation's anticipatory self-defense claim by accepting a broad view of the imminence requirement, analogous to how courts treat battered women's self-defense claims. There are relative similarities between women who rely on BWS in their self-defense claims and nations that claim a right to anticipatory self-defense in justifying preemptive strikes.⁹⁶ Consequently, one must give careful consideration to any germane evidence that could possibly justify a preemptive action which would otherwise be illegal under an application of traditional self-defense principles.

of Article 51 as "creative re-interpretation," because it has been used to justify actions as wide ranging as humanitarian missions, actions to retrieve citizens from danger spots, and retaliatory actions against terrorist groups); *see also* Randelzhofer, *supra* note 85, at 677 (noting that in the face of the Security Council's inaction in most incidents involving self-defense, "self-defence has become the regular course of action"); *id.* at 678 ("Since 1945, various states, occasionally with the approval of others, have invoked a wide concept of self-defence under customary law allegedly not restricted by Art. 51, and have carried out actions involving the use of force which were not directed against armed attacks.").

95. *See supra* notes 80 & 83 and accompanying text (highlighting the deficiencies of the *Caroline* principles in light of the changes that have taken place in the realm of international conflicts since 1837). *But see* note 89 and accompanying text (arguing that the *Caroline* principles create enough latitude to permit the use of preemptive self-defense).

96. *See* Ferzan, *supra* note 9, at 216 (observing that the common rationale underlying the Bush Administration's arguments and the claims of battered women is that harm was inevitable and "the imminence requirement is ill-equipped to mediate the[] situation[]," leading one to ask "why . . . wait until it is imminent?"); Yoo, *supra* note 18, at 753-54 (illustrating that both battered women and nations claiming self-defense may seek to use evidence of past violence to buttress their claims that it was necessary to act preemptively).

1. *Perception of imminence*

A defensive action, whether by a battered woman or by a nation, results from a perception of the imminence of coming harm.⁹⁷ In the time leading up to the killing of her abusive spouse, a battered woman has a heightened sense of danger but she does not necessarily wish to murder her spouse.⁹⁸ Accordingly, the catalyst that impels a battered woman to confront her aggressor is usually an abusive episode or a threat of abuse.⁹⁹ In *Ibn-Tamas*, for example, the defendant's husband tried to kick her out of the house by repeatedly hitting and threatening her with a handgun.¹⁰⁰ When he later resumed attacking her, she thought he was reaching for the gun so she picked it up and fired it.¹⁰¹ Although the defendant had tried to avoid her husband after being physically assaulted, she shot him when he came back because she thought he was about to shoot her.¹⁰²

Similarly, a nation acting in anticipatory self-defense is likely responding to an act that establishes a military threat.¹⁰³ Similar to a

97. See Walker, *supra* note 31, at 324 (observing that a battered woman's reasonable perception of imminent danger drives her to take preemptive action before the abuser has an opportunity to inflict significant physical harm, and is thus a critical component of her self-defense claim); Glennon, *supra* note 68, at 552-53 (suggesting that both common sense and responsibility for the well-being of a nation's citizens would force policymakers to take preemptive action in response to another state's posturing that indicated that aggression was imminent).

98. Lenore E.A. Walker, *Battered Women as Defendants*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 233, 237, 244 (N. Zoe Hilton ed., 1993) (asserting that "[f]ew battered women actually premeditate their assaulter's death" even though "battered women live their life always having an underlying fear of the man's violent potential"); see BROWNE, *supra* note 32, at 135 (observing that battered women's killing of their abusers are usually unplanned).

99. See BROWNE, *supra* note 32, at 135 (claiming that battered women kill their husbands as a result of frequent and severe violence as well as a perception of the inevitability of death based on specific, escalating threats by the abuser); Walker, *supra* note 98, at 242-43 (providing an example of a woman shooting her abuser after he initiated an argument with her, got angrier, and pushed her, because the battered woman could perceive certain cues in the man's behavior, especially if this situation was similar to one she had already experienced and conveyed to her a reasonable perception of danger); see also *Moran v. Ohio*, 469 U.S. 948, 950 (1984) (Brennan, J., dissenting) (summarizing the basic premise of using BWS to support a battered woman's self-defense claim and noting that battered women "may be driven to take the lives of their mates as the only possible method of escaping the threat"), *denying cert. to State v. Moran*, 1983 WL 2712 (Ohio Ct. App. Oct. 27, 1983); see, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626, 634-35 (D.C. 1979) (observing that the expert witness' testimony could support defendant's claim that she perceived herself to be in imminent danger, as characterized by her words "I just knew he was going to kill me," and no less importantly could explain to the jury why the prosecution's position that the defendant "could have gotten out" of the relationship by leaving her husband or by calling the police was not a feasible option for a woman in her situation).

100. *Ibn-Tamas*, 407 A.2d at 630.

101. *Id.*

102. *Id.*

103. See, e.g., DINSTEIN, *supra* note 55, at 173 (describing that Israel's assessment

battered woman, a nation that claims anticipatory self-defense has foreknowledge of a threat facing it, which may be unavoidable unless the nation takes action.¹⁰⁴ A nation therefore uses this knowledge as the basis for its decision to strike first.¹⁰⁵ As an example of this, in 1967, Israel attacked Egypt in response to a perceived threat of attack, thus initiating the Six Day War. Egypt had ordered the withdrawal of the United Nations Emergency Forces from the Egyptian-Israeli border, it had closed the Straits of Tiran, massed its troops along Israeli borders, and its President had made incendiary declarations calling for the destruction of Israel.¹⁰⁶ Israel held off after initial Egyptian provocations, but was compelled to attack after Egypt publicly reasserted that it wanted to destroy Israel and signed military treaties to that effect with Jordan, Syria, and Iraq.¹⁰⁷ Believing Egypt posed an imminent threat, Israel responded with a preemptive defensive action.¹⁰⁸

Admittedly, there is a clear facial difference in how a battered woman and a threatened nation perceive the imminence of harm—the former bases it on her experiences and knowledge of the attacker,¹⁰⁹ whereas the latter relies on its intelligence capabilities and on the history of the attacking nation's past actions.¹¹⁰ However, this

"in the aggregate" of Egypt's provocative actions created a perception that Egypt was about to deliver a "shattering blow" and led to Israel's decision to preemptively attack).

104. See, e.g., Bush, *supra* note 6 (basing the case for military action against Iraq on multiple examples of evidence showing that Iraq had the capacity to produce large amounts of chemical, biological, and nuclear weapons, and claiming that Iraq's links to Al Qaeda made Iraq a threat to the United States and to international security); Glennon, *supra* note 76, at 26 (claiming that the United States' attack on Afghanistan was aimed to prevent a concrete threat of future attacks).

105. See *supra* note 104 (suggesting that the United States acted preemptively in Iraq and Afghanistan, based on intelligence of future threats emanating from those countries).

106. See DINSTEIN, *supra* note 55, at 173 (describing the events that lead up to Israel's preemptive attack on Egyptian forces in 1967 and concluding that the combination of these factors "qualified as an armed attack" to justify self-defense).

107. See WALZER, *supra* note 81, at 83-84 (describing Israel's efforts to defuse the crisis through diplomatic means and its consequent decision to strike).

108. See DINSTEIN, *supra* note 55, at 173 (observing that, because of Egypt's actions, "it seemed to be crystal clear that Egypt was bent on an armed attack," and noting that this perception was shared by other nations "based on sound judgment of events") (emphasis added).

109. See Walker, *supra* note 31, at 326 (suggesting that most battered women know their abusers well enough to be able to perceive a forthcoming threat from a "certain look in his eyes, a certain litany of words, [or] a certain pattern of pushes, shoves, and slaps"); Walker, *supra* note 98, at 242 (claiming that most women who are victims of repeated assault "recognize danger more quickly and accurately than do others").

110. See, e.g., *supra* note 104 (describing the intelligence that convinced the U.S. government to decide to attack Iraq and Afghanistan); Bush, *supra* note 6 (citing Saddam Hussein's regime's "history of reckless aggression" and past violations of Security Council resolutions as evidence of Iraq's threat to the United States and

is not a fundamental incongruence but one predicated on the difference between international and family relations. A nation's intelligence service is like a battered woman's experiential knowledge in that it analyzes data about a subject and produces a prediction based on its subsequent intimate familiarity with that subject.¹¹¹ A battered woman does not kill her attacker purely in response to a threat; she evaluates the threat through the lens of the battering relationship and concludes that she is facing imminent harm.¹¹² Likewise, a nation does not attack preemptively solely in response to a provocation; the preemptive response is based on a multitude of intelligence indicating an overwhelming likelihood of future harm.¹¹³

other countries); WALZER, *supra* note 81, at 82-84 (analyzing Egyptian actions in the 1950s and 60s that contributed to the Israeli perception of the inevitability of an Egyptian attack in 1967). In the case of the Israeli attack, first, Egypt maintained its 1948 posture that Israel did not have a right to exist as a state. *Id.* at 82. Second, the Suez War of 1956, brought on by Egypt's nationalization of the Suez Canal, led to an international recognition of the Straits of Tiran as an international waterway, so Israel could construe Egyptian declarations prohibiting Israel from using the Straits as a declaration of war. *Id.* at 83. Third, in May of 1967, Egypt continued to make anti-Israeli proclamations. *Id.* at 83-84. All this contributed to the Israeli belief that a preemptive strike was necessary in order not to fall victim to Egyptian aggression. *Id.* at 83-84.

111. See RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 99-100 (2005) (describing an intelligence organization as consisting of "collection, analysis, and action" components, which first gather both publicly available and secret information about the target, and then analyze and interpret this information, leading to some action based on what the intelligence reveals); see also NSS, *supra* note 77, at 30 (stating that "integrated threat assessments for national and homeland security" are based on American intelligence warning and analysis capabilities); Glennon, *supra* note 76, at 26 (stating that the U.S. government gleaned evidence of the threat of future attacks from "multiple intelligence sources"); *supra* notes 109 & 110 (containing examples of other factors upon which battered women and nations base predictions of their aggressors' future behavior).

112. See *supra* notes 99 & 109 and accompanying text (discussing how battered women develop their perceptions of imminent harm through past experiences with the abuser, and how based on that knowledge and a litany of cues, they interpret abusers' behavior differently than would others).

113. See, e.g., Glennon, *supra* note 76, at 26 (suggesting that the United States' invasion of Afghanistan was not initiated as a reprisal for the events of September 11, 2001, but rather as a response to additional intelligence that Taliban and Al Qaida posed a further threat to the United States). Another example is Israel's attack on the Iraqi nuclear reactor at Osiraq in 1981, where Iraq claimed that it wanted the reactor for "peaceful" purposes, but Israeli intelligence indicated that Iraq planned to use the nuclear facility to produce weapons-grade plutonium to develop nuclear weapons. William C. Bradford, "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1410-11 (2004). Hence, the Israeli decision to destroy the reactor was not a reaction to a vague threat but to the high probability of Iraq using nuclear force against Israel in the near future. *Id.* at 1411. In retrospect, Israel's act is usually recognized as a justified preventive attack against the Iraqi threat. MICHAEL WALZER, *Five on Iraq: Inspectors Yes, War No*, in ARGUING ABOUT WAR, *supra* note 52, at 143, 147.

2. *Repercussions of aggressor's action*

The role of a belligerent nation in an international conflict is akin to that of the batterer in an abusive relationship. In general, when one person purposely attacks another and succeeds in the deed, whether because the victim does not put up resistance or the resistance is ineffectual, the aggressor's action is either a battery or a homicide.¹¹⁴ The physical effects of the aggressor's action are isolated to the specific incident.¹¹⁵ This is not the case in the context of an abusive relationship, where in addition to physically harming the woman, the aggressor causes her long-term harm by perpetuating the battered woman's status as a victim within the relationship¹¹⁶ and undermining her psychological stability.¹¹⁷ Likewise, when a nation is allowed to threaten and attack another without impediment, it gains in some tangible aspects, but its intangible gains may be even greater. The victor nation may obtain tangible benefits like territory¹¹⁸ or resources,¹¹⁹ and it may also acquire greater political clout.¹²⁰

114. See BLACK'S LAW DICTIONARY 162 (8th ed. 2004) (providing the criminal law definition of *battery* as "[t]he use of force against another, resulting in harmful or offensive contact"); *id.* at 751 (defining *criminal homicide* as "[t]he act of purposely, knowingly, recklessly, or negligently causing the death of another human being") (citing MODEL PENAL CODE § 210.1).

115. Although a battery or homicide of an individual may affect others, the victim is the only one who suffers physical harm as a result of the act.

116. See WALKER, *supra* note 39, at 50-51 (explaining "learned helplessness" as the process through which, as a result of repetitive instances of abuse, a woman resorts to coping mechanisms which lead to results she can foresee (including further abuse), rather than trying to escape the relationship or the specific situation, because this act may have unpredictable consequences); CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 66-67 (1987) ("[Learned] helplessness' is a psychological state which develops when, as a result of being repeatedly exposed to outcomes beyond one's control, one 'learns' that nothing one does will affect or alter any outcome.").

117. See EWING, *supra* note 116, at 67 (summarizing Lenore Walker's studies of battered women and explaining that battered women are psychologically unable to escape the abusive relationship because learned helplessness "diminishes [the battered woman's] motivation" and leads her to think that she has no ability to prevent being abused, "ultimately [causing her] to believe that nothing she does will be of any avail").

118. See, e.g., WALZER, *supra* note 81, at 52 (citing Germany's seizures of Czechoslovakia and Poland in 1939 as prime examples of territorial conquests by a nation whose aggression was not resisted by the victim states); Eritrea v. Ethiopia: *Oh No, Not Again*, ECONOMIST, Apr. 5, 2003, at 44 (describing the war between Ethiopia and Eritrea over the village of Badme, population five thousand, fought because neither side was willing to accede to the other's territorial claims); cf. Yoo, *supra* note 18, at 748 (observing that World Wars I and II were fought for territorial gain, but this is no longer the primary objective of warfare in the post-World War II period).

119. See, e.g., KEEGAN, *supra* note 81, at 74-76 (describing Iraq's occupation of Kuwait in 1990 as ostensibly targeting "only the disputed Rumeila oil field and the oil-bearing islands of Warba and Bubiyan," but noting that as a result of the Iraqi army's prompt advance to Kuwait's border with Saudi Arabia, "[n]early half the world's oil reserves had fallen under the shadow of Saddam's power").

120. See VICTOR DAVIS HANSON, CARNAGE AND CULTURE: LANDMARK BATTLES IN THE

Conversely, the victim nation that is complacent in the face of threats or aggression usually suffers long-term harm, such as loss of political or territorial integrity.¹²¹ The results of unchecked aggression are thus comparable with the effects of battering in an abusive relationship: unlike an isolated act of battery or homicide, unchecked aggression has a tremendous effect far outside the bounds of the incident itself. Consequently, in order to defend its citizens and its political, economic, and military interests, a threatened nation must have at least as much flexibility to deal with a potential threat as does a battered woman.

3. *Magnitude of harm*

In addition to the similarities between battered women and threatened nations, it is critical to note that the magnitude of harm facing a threatened nation is relatively greater than that facing a battered woman. A battered woman who kills her aggressor does so because she believes her life to be in danger.¹²² In an international conflict, a nation acts in self-defense because it may be facing a threat to its existence.¹²³ A nation, as a political entity, is responsible for the

RISE OF WESTERN POWER 22 (2001) (“Western warring is often an extension of the idea of state politics, rather than a mere effort to obtain territory, personal status, wealth, or revenge.”); *see, e.g.*, MICHAEL WALZER, *Justice and Injustice in the Gulf War, in ARGUING ABOUT WAR*, *supra* note 52, at 86-87 (suggesting that Iraq’s invasion of Kuwait would have given it leverage in subsequent negotiations which could have resulted in a “settlement involving small or large concessions to the aggressor,” had the United Nations not sanctioned an economic and military blockade of Iraq). Another example is the 1982 British-Argentine war over the inconsequential Falkland Islands in the South Atlantic. Fought by the British Navy thousands of miles away from home, this conflict was compared by one contemporary to “two bald men fighting over a comb.” HANSON, *supra*, at 446-47, 449. Success in this war, nevertheless, assured Prime Minister Thatcher’s continuity at the forefront of British, and hence international, politics. *The SNP in Trouble: Fortunes of War*, ECONOMIST, Apr. 22, 1999, at 41, available at <http://www.economist.com> (search “The SNP in trouble,” restrict search to “April, 1999”).

121. *See, e.g.*, *supra* note 118 (citing Poland and Czechoslovakia as two countries that lost their territorial and political integrity because of lack of resistance to German aggression at the outset of World War II); POSNER, *supra* note 111, at 82-85 (explaining that the Israeli intelligence ignored warnings of an impending attack by Syrian and Egyptian forces in 1973, almost leading to the destruction of Israel when the surprise attack did take place); *id.* at 83 (citing Stalin’s “notorious failure” to act in the face of “hundreds of warnings” of an impending German attack on the Soviet Union, leading to immense territorial losses and deaths in the weeks following the German invasion).

122. *See supra* notes 98-99 (explaining a battered woman’s perception of the imminence of harm); *see, e.g.*, *Ibn-Tamas v. United States*, 407 A.2d 626, 633 (D.C. 1979) (noting the defendant’s claim that she believed her husband was going to kill her).

123. *See Rice*, *supra* note 78 (observing that the events of 9/11 made it apparent that “America faces an existential threat to [its] security,” and comparing the effects of this threat to the possible alternative consequences of the Civil War or the Cold War); *cf. OREND*, *supra* note 50, at 98 (suggesting that a small country like Israel has

well-being of its citizens, and while death is arguably the most drastic harm that can befall a person,¹²⁴ an individual's death is less significant than the deaths and destruction that ensue when a nation is attacked, especially with non-conventional weapons.¹²⁵

Conforming to this balance of individual and national interests, it is not unreasonable to suggest that in a situation where a nation legitimately perceives itself to be under threat, it is acceptable for that nation to err on the side of using its right to anticipatory self-defense rather than to "patiently . . . await slaughter."¹²⁶ When this decision to act is evaluated *post factum*, it must be considered from the viewpoint of a nation in this situation if the principles of self-defense are to be applied fairly to the potential victim of aggression.¹²⁷

C. The Current Approach for Evaluating Nations' Claims of Self-Defense Harms the Viability of the International Legal System

It is precisely because of a general lack of insight concerning battered women's perceptions of harm that courts allow admission of expert witness testimony on BWS.¹²⁸ This testimony allows a jury to evaluate the defendant's perception of the threat facing her using a

different needs than a larger country in response to aggression, because "all [may be] lost" if it does not respond effectively).

124. For the sake of argument, this Comment considers death to be a more serious harm than physical or mental torture, enslavement, rape, etc., even though some will probably disagree for reasons that may well be valid.

125. See Bush, *supra* note 6 (expressing the fear of "a day of horror like none we have ever known," which could have occurred if Saddam Hussein's regime had cooperated with a terrorist network to unleash chemical or biological weapons in the United States); see also *supra* note 81 (discussing the destructive capabilities of a nuclear strike).

126. See Glennon, *supra* note 68, at 553 (arguing that if a nation with adequate military capacity has expressed willingness to inflict harm upon another nation, the latter would be justified in striking preemptively, and even if a mistake is made, the price of such a mistake should rightfully be borne "by states that so posture themselves than by innocent states"). The Model Penal Code's self-defense provisions propose a similarly lenient treatment of mistake in criminal law. See MODEL PENAL CODE §§ 3.04(1), 3.09(2) (Proposed Official Draft 1962) (providing that the use of force in self-defense is justifiable even if the actor is mistaken about the necessity of using force, unless the actor's mistake was due to recklessness or negligence).

127. See DINSTEIN, *supra* note 55, at 173 (stating that in evaluating national self-defense claims, hindsight knowledge is immaterial and that "[t]he invocation of the right of self-defence must be weighed on the ground of the information available (and reasonably interpreted) at the moment of action, without the benefit of *post factum* wisdom").

128. See *Ibn-Tamas v. United States*, 407 A.2d 626, 633 (D.C. 1979) (explaining that the psychologist's expertise is "beyond the ken of the average layman" and helps the jury understand the situation from the defendant's position). Expert testimony provides the jury with insight about the effect of the battering on the defendant, which the jury would otherwise not be able to deduce from the evidence, and which can help the jury evaluate the credibility of the defendant's testimony. *Id.*

“reasonable battered woman” standard, rather than a purely objective “reasonable person” standard.¹²⁹ Similar concepts can and should be applied to a nation claiming anticipatory self-defense. Thus, a nation’s claim of anticipatory self-defense should be evaluated using a “reasonable nation under threat” standard rather than a “reasonable nation” standard.¹³⁰

An objective standard is not always applicable to national self-defense claims in the modern political structure—when faced with a threat, a nation will act as it feels it must, especially when its survival is at stake.¹³¹ Yet many scholars assert that a nation should not be its own arbiter in determining whether its self-defense justification is legitimate.¹³² To this end, military experts and experts in

129. See Walker, *supra* note 31, at 322-23 (describing that expert testimony explaining a battered woman’s, and specifically the defendant’s, view of the situation she was in, allows a jury to better understand the defendant’s perception of the risk). The “reasonable battered woman” standard is a hybrid one because it asks the jury to consider what a reasonable person would do in the actor’s situation under the circumstance as the actor believes them to be. See Hisham M. Ramadan, *Reconstructing Reasonableness in Criminal Law: Moderate Jury Instructions Proposal*, 29 J. LEGIS. 233, 235 & n.14, 236 (2003) (explaining the “hybrid subjective/objective standard of reasonableness” as the “reasonable person” standard with some subjective elements infused into it, and providing examples from several criminal cases).

130. Cf. Yoo, *supra* note 75, at 567 (asserting that when evaluating a nation’s claim of self-defense, the focus must be on that nation’s “reasonabl[e] underst[anding of] the facts . . . at the start of hostilities,” rather than any additional evidence that may have come to light afterwards); Polebaum, *supra* note 76, at 208-09 (suggesting that the actions of a nation that strikes preemptively to prevent a nuclear attack should be analyzed under a “two-tiered analysis,” which would determine the reasonableness of the threatened nation’s perceptions and whether a “reasonable nation” with the same perceptions would have acted in the same way); *infra* note 131 (citing Glennon for the proposition that states must evaluate threats subjectively); see, e.g., *supra* note 123 (explaining why Israel needs to use different standards than a larger country in calculating a response to a potential threat).

131. See Glennon, *supra* note 68, at 558 (claiming that “states will continue to judge for themselves what measure of force is required for their self-defense . . . because defense is necessary for survival and survival is intrinsic in the very fact of statehood”); Yoo, *supra* note 18, at 749-50 (asserting that nations that feel threatened may not adhere to the restrictions posed by the U.N. Charter, and furthermore, that many scholars believe that the “rules on the use of force have been widely flouted” in the last century); Polebaum, *supra* note 76, at 196 (suggesting that international legal standards of self-defense “cannot be expected to control the initial decision of a nation to strike defensively,” especially in the event of a nuclear crisis); Glennon, *supra* note 68, at 552 (“Waiting for an aggressor to fire the first shot may be a fitting code for television westerns but it is unrealistic for policy-makers entrusted with . . . the well-being of their citizenry.”); cf. Bush, *supra* note 6 (announcing that the United States does not have to wait for a threat to develop because “[s]ince when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?”).

132. See J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 319 (5th ed. 1955) (“[Self-defense] is not a question on which a state is entitled, in any special sense, to be a judge in its own cause.”). Briery also explains that while a state will necessarily make the initial decision of whether defensive force is necessary, that decision should “afterwards be reviewed by the law

international relations and diplomacy can play the same role as expert witnesses in a BWS trial by providing subjective insight into the motives and perceptions of threatened nations.

Furthermore, the determination of whether a nation acted within the law is just as important for the well-being of the international legal order as it is in the determination of the legal consequences facing that nation.¹³³ International law “derives from state behavior and it affects state behavior”¹³⁴—customary international law is based on generally accepted state practices.¹³⁵ In domestic law, the long-standing concept of desuetude posits that a law becomes obsolete through a history of non-enforcement in the face of its violation.¹³⁶ Desuetude is just as applicable in international law, whereby a doctrine based on customary international law or a treaty can become obsolete if nations consistently violate it with no repercussions.¹³⁷ If nations disregard anticipatory self-defense laws because of the impractical strictness of the imminence requirement, the international legal system will suffer whether a nation in a particular incident is justified or not. There is a need, therefore, to clarify and modify existing laws and treaties that govern the use of force in self-

in the light of all the circumstances.” BRIERLY, *supra* note 7, at 407-08; *see also* The Nurnberg Trial, 6 F.R.D. 69, 100 (1947) (rejecting Germany’s proposition that it alone could decide whether circumstances warranted preventive actions, and directing that such claims be independently investigated); Kunz, *supra* note 69, at 879 (commenting that the nations involved in a conflict should leave the determination of who the initial aggressor was and whether a self-defense claim was legitimate to the United Nations Security Council).

133. *See supra* note 56 (quoting the International Military Tribunal at Nuremberg to this effect).

134. Mark A. Drumbl, *Self-Defense, Preemption, Fear: Iraq, and Beyond* 9 (Washington & Lee Univ. Sch. of Law, Public Law Research Paper No. 03-04, 2003), available at <http://ssrn.com/abstract=382863> (observing that international law has a normative function and influences politics and state behavior just as it draws from politics and state behavior).

135. *See* Statute of the International Court of Justice art. 38, § 2, June 26, 1945, 59 Stat. 1031, U.N.T.S. 993 (listing “international custom, as evidence of a general practice accepted as law” as one of the four sources of international law used by the Court); *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (6th ed. 2003) (emphasizing that Article 38 of the ICJ Statute “is generally regarded as a complete statement of the sources of international law”).

136. *See* Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 725 & n.3 (W. Va. 1992) (tracing the history of desuetude to Roman law, which provided that statutes could be repealed “by the silent agreement of everyone expressed through desuetude”). The Supreme Court reaffirmed the concept of desuetude in *Poe v. Ullman*, where it stated that a single prosecution of a state statute over the previous eighty-two years constituted a “nullification by Connecticut of [this] law[] throughout all the long years that [it has] been on the statute books.” 367 U.S. 497, 502 (1961), *quoted in* Printz, 416 S.E.2d at 726.

137. *See* Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 942 (2005) (maintaining that desuetude applies to international law and occurs when “a sufficient number of states join in breaching a rule, causing a new custom to emerge”).

defense so they can be more reflective of the subtleties of international conflicts and will less likely be flouted by the members of the international community.

CONCLUSION

National defense policies must have more flexibility than traditional self-defense laws in the criminal context allow for and should rely on a broader interpretation of the strict imminence requirement. As in battered women's self-defense cases, the evaluation of a claim of anticipatory self-defense must allow for the consideration of additional information, such as the probability and certainty of attack, and the potential consequences of refraining from preemptive defensive action.

This Comment does not propose a new methodology for evaluating states' self-defense claims but points to a new direction for existing laws. Legal principles addressing questions of national self-defense should be modified, and it is important that they incorporate a more relaxed imminence requirement, thus allowing nations to act legally in accord with the ever-changing nature of international conflicts. The body of international law must not only be reasonable but also applicable to political and military realities. Then, when scholars or politicians use it to condemn a nation's behavior, they will not be undermining the integrity of the international legal system.