



THE USE OF FORCE AND CONTEMPORARY  
SECURITY THREATS:  
OLD MEDICINE FOR NEW ILLS?

Allen S. Weiner

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*International terrorism carried out by nonstate actors and the spread of weapons of mass destruction (WMD) to dangerous states have emerged in recent years as the most significant security threats to the international order. Although the nature of the threats has changed dramatically, the legal regime governing the international use of force has not undergone a comparable transformation. Many commentators and strategists see a growing disconnect between states' security needs and the international law security architecture. Contending that the international law rules and international institutions established by the U.N. Charter are ill-suited to meeting contemporary security threats, these commentators and policymakers advance new doctrines to expand the entitlement of states to use force unilaterally in self-defense.*

*This Article rejects this perspective and the associated prescriptions for new legal rules to regulate the international use of force. It demonstrates that the U.N. Charter created a two-tiered system of rules and standards to govern the use of force. With respect to unilateral uses of force by states, the Charter employs a bright-line rule: to guard against erroneous and bad-faith invocations of the right of self-defense, force may be used unilaterally only in the event of an armed attack. The Charter employs a more flexible standards-based approach, subject to the procedural safeguards of collective decision-making by the Security Council, to authorize force to confront threats to international peace and security.*

*The Article challenges the widely held assumption that the competing interests of the Permanent Members will inevitably produce gridlock in the Security Council with respect to collective action against the new security threats. To the contrary, there is an underlying affinity of interests among the Permanent Members with respect to these threats. The Permanent Members all face major international terrorist threats, and they all seek to preserve their near-monopoly*

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over WMD. Accordingly, the Permanent Members share an interest in confronting international terrorism and preventing the proliferation of weapons of mass destruction. Because these contemporary security threats—unlike the rivalries of the Cold War era—do not implicate competing interests of the Permanent Members, the Security Council’s security architecture is actually better suited to addressing today’s threats than it was to countering the state-versus-state conflicts for which it was designed. The recent behavior of the Permanent Members reflects their increasing cooperation on the basis of this affinity of interests.

The Article further argues that the use of force pursuant to the Charter’s collective security provisions carries with it greater legitimacy, greater prospect for success, and less danger of destabilizing error or abuse than would force exercised pursuant to doctrines that expand the right of states to use force unilaterally. The Article also identifies pragmatic policy and diplomatic steps the Permanent Members should take to build upon their underlying affinity of interests regarding international terrorism and WMD proliferation so as to strengthen the capacity of the collective security architecture to confront these threats.

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#### INTRODUCTION: NEW THREATS AND THE CALL FOR NEW LAW

We live in dangerous times. The September 11, 2001 terrorist attacks against the World Trade Center and the Pentagon inflicted casualties and devastation not sustained on American soil since the Civil War. Exploiting the world's growing interdependence, global terror networks lurk in the shadows, plotting attacks that could strike anywhere against population centers without notice. The world's most dangerous states—illiberal regimes with little regard for international stability—threaten to develop weapons of mass destruction (WMD) and use the specter of nuclear, chemical, or biological weapons attacks to intimidate and dominate others. Fanatical terrorist groups and authoritarian regimes more committed to their own survival than the well-being of their populations exhibit disdain for the lives of both their adversaries and their own forces, undermining the utility of the traditional security policy of deterrence. Changing technologies, which allow countries or terrorist groups with virtually

no conventional military capabilities to inflict great devastation on their adversaries, have undermined the traditional security policy of containment. As a result, although it may be difficult to imagine for those of us raised in the age of the strategic doctrine of “mutually assured destruction,” the current security climate is perhaps even more unsettled and dangerous than the one that prevailed during the Cold War, when nuclear superpowers maintained a balance of terror by aiming thousands of nuclear warheads at one another’s cities.

There is no doubt that international terrorism and the proliferation of weapons of mass destruction—which I refer to as the “new security threats”—present the international community with major challenges. National security strategists and academic commentators alike agree that the new security environment is one in which states may increasingly need to confront threats to international peace with the use of force. Strong evidence supporting this assessment comes in the form of the initiation by the United States of two major military campaigns since October 2001 to counter the new security threats—one in Afghanistan to combat terrorism and the other in Iraq to combat the emergence of WMD capabilities in a dangerous state.

But if the international security environment has undergone a dramatic shift, the prevailing legal regime has not. The international law rules and institutional arrangements that today govern the international use of force are based on the norms and structures established in the U.N. Charter at the end of the Second World War. For many observers, the failure of the international security architecture to change to keep pace with the evolving security climate is disturbing. Some states, in particular the United States, through their declared policies as well as their actions, have begun to question the viability of the existing international legal regime for countering the new security threats. They have begun to articulate new doctrines that deviate from the existing international security architecture so as to provide new legal justifications for using force.

Academic commentators have also addressed what they see as a growing gap between the international legal regime governing the use of force and the nature of today’s international security threats. Anne-Marie Slaughter and William Burke-White, for example, argue that in order “[t]o respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules.”<sup>1</sup> Robert Turner, too, contends that the increased threats presented by international terrorism and the proliferation of weapons of mass destruction “demand a new paradigm” for assessing the legality of resort to force.<sup>2</sup> Ruth Wedgwood has suggested that the law of self-

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1. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 2 (2002).

2. Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 HARV. J.L. & PUB. POL’Y 765, 793 (2004).

defense, which requires a state to “wait until an attack is launched before responding,” is “ill-suited” to the new security threats.<sup>3</sup> Richard Gardner agrees that the “new strategic environment, marked by suicidal terrorists and the spread of weapons of mass destruction, requires a different approach.”<sup>4</sup> Jane Stromseth also argues that “the rules and the system [governing the use of force] need refining and reform”<sup>5</sup> and urges adjustments to our understanding of the right of self-defense and the role of regional arrangements in addressing today’s urgent threats.<sup>6</sup> John Yoo and Will Trachman declare more categorically that “[t]oday . . . the United Nations’ rules on the use of force have become obsolete”<sup>7</sup> and that “[m]odern warfare demands that states enjoy more flexibility in the use of force than that permitted under a strict reading of the UN Charter’s rules.”<sup>8</sup>

In this Article, I argue that—contrary to widely held claims and assumptions—the structure of the existing international security architecture is not ill-suited to addressing the new security threats. Under its collective security powers, the U.N. Security Council may authorize force to respond to an act of aggression, a breach of the peace, or a *threat* to international peace and security. Because the new security threats—terrorism and WMD proliferation—undoubtedly qualify as threats to international peace and security, the Security Council possesses the authority under the current legal regime to authorize force to confront them.

Few, of course, would quarrel with the notion that the Security Council is *empowered* to use force to counter the new security threats. However, what commentators seem generally to believe—or at least to assume—is that the Council is in practice unlikely to respond to such threats. In this view, the capacity of any one of the five Permanent Members to block the use of force through the exercise of its veto power destroys the potential effectiveness of the collective security apparatus. This is particularly true given the perceived disunity, even rivalry, among the Council’s Permanent Members.

I disagree. I contend that the nature of the new security threats and the common challenge they present to the Permanent Members should cause us to reconsider this prognosis for inevitable Security Council gridlock. Security

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3. Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT’L L. 576, 583 (2003); see also Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH. Q., Spring 2003, at 89, 99 (2003) (arguing that “international law dealing with recourse to force in self-defense does not adequately address the problem of WMD and terrorism”).

4. Richard N. Gardner, *Neither Bush nor the “Jurisprudes,”* 97 AM. J. INT’L L. 585, 586 (2003).

5. Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT’L L. 628, 629 (2003).

6. *Id.* at 635, 638.

7. John C. Yoo & Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT’L L. 379, 381 (2005).

8. *Id.* at 394.

Council inaction was to be expected under the international balance of power that prevailed during the Cold War era, when the Permanent Members either had competing interests over or were largely indifferent to most of the major international security threats that arose. The situation with the new security threats is quite different. International terrorism and the spread of weapons of mass destruction implicate and threaten the interests of all of the Council's Permanent Members. These threats are not a cause or result of great power conflict or rivalry; instead, the interests of the major powers in seeking to counter the new security threats are essentially in alignment. The Permanent Members accordingly have considerable incentive to reach shared understandings in both assessing the severity of terrorist and WMD-related threats and developing strategies—including potentially the use of force—to address them.

Under the circumstances, the widely held belief that the Charter's collective security apparatus is incompatible with today's geopolitical realities is too blunt. Undoubtedly, the prevailing rules governing the use of force were not designed with the new security threats in mind. Nevertheless, because the interests of the Permanent Members do not clash with respect to the goals of countering terrorism and WMD proliferation, the international security architecture is actually *better* suited to addressing these threats than it was to countering the conventional state-versus-state conflicts for which it was created. The underlying affinity of interests of the Permanent Members with respect to the new security threats creates at least an opportunity to enhance the effectiveness of the collective security machinery of the U.N. Charter and to promote increased global security.

I begin in Part I by outlining the legal regime governing the use of force; I note that this regime is a two-tiered structure that employs both rules and standards to regulate the use of force. Part II then summarizes the challenges that the new security threats of terrorism and weapons of mass destruction proliferation pose to that regime; it identifies specific impediments under existing international law to the unilateral use of force<sup>9</sup> to counter those threats. Part III then examines a number of the doctrinal developments or adjustments that national strategists or academic commentators have proposed to address this gap and to provide broader legal authority for the unilateral use of force to respond to the new security threats.

In Part IV, I turn to the possible role of collective security in countering the new security threats. Here I focus on the viability of relying on the collective

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9. In describing uses of force, I use the term "unilateral" throughout to refer to the *source* of legal authority upon which states act. A use of force is unilateral if a state has made its own determination that it is permitted to use force. Coalitions of states may join together to use force if each of them perceives it has an inherent lawful basis for using force, including through participation in collective self-defense. The unilateral use of force, as I use the phrase in this Article, stands in juxtaposition to the use of force authorized through the collective security mechanisms of the U.N. Charter.

security machinery. In that Part, I review the policies and positions of the Permanent Members of the Security Council to demonstrate the growing convergence of their interests in seeking to combat the new security threats; I note that these shared interests have already led to important new forms of collective cooperation among the Permanent Members. Part V considers why collective security not only offers a promising underlying basis for addressing the dangers of terrorism and WMD proliferation, but also is strongly preferable to expanding the legal bases for the unilateral use of force. I conclude in Part VI by identifying specific adjustments to the traditional foreign policy perspectives of the Permanent Members, as well as other practical steps they can take, that would enhance the viability of the collective security apparatus in countering the new security threats.

### I. THE USE OF FORCE: THE LAW

Evaluating the claim that the current international security apparatus is inadequate to address the new security threats requires a brief review of the existing regime. The law and institutions governing the use of force are found in the U.N. Charter.

#### A. *The Prohibition on the Use of Force*

The international law rules and institutional arrangements governing the use of force are on their face quite straightforward. Today's security structure was erected after the catastrophic suffering of the Second World War. Against that backdrop, the architects of the post-war regime sought to ban the use of force to the greatest extent possible. Thus, Article 2(4) of the U.N. Charter declares: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>10</sup> International law commentators have generally understood this prohibition on force to be comprehensive. As Louis Henkin has observed: "Article 2(4) clearly intended to outlaw resort to traditional war, but the framers obviously excluded also other uses of force[], whether or not in declared war, whether or not in all-out hostilities."<sup>11</sup>

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10. U.N. Charter art. 2, para. 4.

11. LOUIS HENKIN, *HOW NATIONS BEHAVE* 139-40 (1979) (footnote omitted); *see also* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 *HARV. INT'L L.J.* 41, 42 (2002) (noting that "[t]he broad term 'use of force' . . . reflected a desire to prohibit transnational armed conflicts generally, not just conflicts arising from a formal state of war" and that "Article 2(4) is generally viewed as outlawing *any* transboundary use of military force, including . . . protection of nationals, and humanitarian intervention") (emphasis added).



B. *Exceptions to the Prohibition on the Use of Force*

Fresh from their bitter experience during the Second World War, however, the drafters of the U.N. Charter were not starry-eyed idealists. The League of Nations and the 1928 Kellogg-Briand Pact outlawing war had failed to prevent aggression and global war. As such, the Charter's founders well understood that states might opt to use force despite formal legal prohibitions on their doing so. Accordingly, the U.N. Charter provided two permissible exceptions to Article 2(4)'s prohibition on the use of force: self-defense and collective security measures taken under the authority of the Security Council.

1. *Self-defense*

Article 51 of the U.N. Charter embodies the right to use force in self-defense:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>12</sup>

There are several key features to the Article 51 right of self-defense.<sup>13</sup> First, it is a *unilateral* right. A state requires no approval from any external body before it may avail itself of its sovereign right to defend itself.<sup>14</sup> Second, Article 51 allows a state not only to defend itself but also to join others, such as partners in security alliances, in collectively repelling an armed attack launched by another state. Third, the drafters of the Charter contemplated that the right of self-defense would be an interim response; states would be entitled to use force only until such time as the collective security machinery had responded satisfactorily to the initiation of hostilities.

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12. U.N. Charter art. 51.

13. The prohibition on the use of force among states, subject to the right of individual or collective self-defense after an armed attack, flows not only from U.N. Charter treaty obligations, but also reflects customary international law. *See* *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99 (June 27); *see also* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279-80 (1963).

14. *But see* Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM J. INT'L L. 835, 836 (2001) (contending—erroneously, in my view—that a state seeking to use force in self-defense should be required to present “the international community with credible evidence that it has suffered an armed attack,” that a specific entity is guilty of the attack, “and that the use of force is necessary to protect the state from further injury”).

Fourth, and most important, the right of self-defense recognized in the Charter is limited to situations in which an “armed attack” has occurred. In this regard, Article 51, read together with Article 2(4), represents a limitation on the pre-existing customary international law right to use force. Prior to the adoption of the Charter, the existence of an “armed attack” was not a threshold requirement for the use of force. Rather, the right to use force was deemed an inherent element of state sovereignty, and states could resort to force in response to any breach of their legal rights, at least where efforts to resolve the dispute through diplomatic means had failed.<sup>15</sup> Moreover, the concept of self-defense was broadly understood to cover situations in which a state perceived that its “‘security’ [was] threatened”;<sup>16</sup> at the dawn of the Second World War, customary international law was generally considered to permit the exercise of anticipatory self-defense in the face of imminent danger.<sup>17</sup> However, the prohibition on the use of force in Article 2(4) of the Charter, combined with the limitation on the right of self-defense under Article 51 to cases of armed attacks, served—at least at the time of the Charter’s adoption in 1945—to prohibit anticipatory self-defense.<sup>18</sup>

## 2. *Collective security*

The second exception to Article 2(4)’s prohibition on the use of force arises when the United Nations authorizes armed collective security measures. Under the Charter, the United Nations Security Council is assigned “primary

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15. BROWNLIE, *supra* note 13, at 49-50; *see also* 2 L. OPPENHEIM, INTERNATIONAL LAW § 52I, at 196 (H. Lauterpacht ed., 7th ed. 1963) (noting that under traditional international law, “war could . . . legally . . . be resorted to either as a legal remedy or as an instrument for changing the law” and describing war as a “discretionary prerogative right of [s]tates”); Albrecht Randelzhofer, *Article 51*, in 1 THE CHARTER OF THE UNITED NATIONS 788, 805-06 (Bruno Simma et al. eds., 2d ed. 2002) (“At the time when the UN Charter entered into force the traditional right of self-defence covered not only the case of an armed attack, but also many areas of self-help.”).

16. BROWNLIE, *supra* note 13, at 48.

17. *See* PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1956) (noting that self-defense could be exercised under “traditional law where the injury was threatened but no attack had yet taken place”); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 463 (1952) (identifying the “threat of infringement of the rights” of the defending state as one of the requirements for the unilateral use of force in self-defense). Customary international law also imposed fewer limitations on the use of force than does the contemporary legal regime because the principles regulating resort to force generally applied only where the parties deemed a formal state of war to exist; states frequently employed force in circumstances in which no state of war was declared or deemed to exist. BROWNLIE, *supra* note 13, at 26-28; *see also* Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624 (1984) (“[I]t had become evident in the 1930’s that states often engaged in hostilities without declaring war or calling it war.”).

18. BROWNLIE, *supra* note 13, at 278; *see also* Randelzhofer, *supra* note 15, at 803 (stating that a right of anticipatory “self-defence would be contrary to the wording of Art. 51 . . . as well as to its object and purpose”); *infra* note 84.

responsibility for the maintenance of international peace and security.”<sup>19</sup> The Security Council is comprised of fifteen states: the five Great Powers that prevailed in the Second World War—the United States, the United Kingdom, France, Russia, and China—as well as ten other states elected to serve on the Council for two-year terms.<sup>20</sup> Decisions of the Security Council on non-procedural matters require the affirmative vote of at least nine of its fifteen members, “including the concurring votes of the five permanent members.”<sup>21</sup>

Acting pursuant to its authority under Chapter VII of the Charter, the Security Council is empowered to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>22</sup> In such circumstances, the Security Council “shall . . . decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>23</sup> Measures available under Article 41 are those “not involving the use of armed force” to give effect to the Security Council’s decisions.<sup>24</sup> In addition to nonforcible measures, Article 42 of the Charter empowers the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>25</sup>

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19. U.N. Charter art. 24, para. 1.

20. *Id.* art. 23, paras. 1-2.

21. *Id.* art. 27, para. 3.

22. *Id.* art. 39.

23. *Id.*

24. *Id.* art. 41. The Charter specifies such measures as “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” *Id.* The Security Council has demonstrated considerable creativity in devising measures beyond those specifically listed in Article 41. It has used its authority under Article 41 to make arrangements to demarcate contested boundaries, *e.g.*, S.C. Res. 687, ¶¶ 2-4, U.N. Doc. S/RES/687 (Apr. 3, 1991), to establish international claims commissions, *e.g.*, S.C. Res. 692, ¶ 3, U.N. Doc. S/RES/692 (May 20, 1991), to create international criminal tribunals, *e.g.*, S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (for Rwanda); S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993) (for the former Yugoslavia), and to establish aggressive inspection regimes and organs to ensure compliance with weapons of mass destruction disarmament obligations, *e.g.*, S.C. Res. 687, ¶ 9, U.N. Doc. S/RES/687 (Apr. 3, 1991). On the breadth of the Security Council’s powers under Chapter VII of the Charter, see generally MOHAMMED BEDJAOUI, *THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS* 1-8 (1994); Bernhard Graefrath, *Leave to the Court What Belongs to the Court: The Libyan Case*, 4 EUR. J. INT’L L. 184, 185 (1993); Matthias J. Herdegen, *The “Constitutionalization” of the UN Security System*, 27 VAND. J. TRANSNAT’L L. 135 (1994); Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal’s Development of Limits on the Security Council’s Powers Under Chapter VII of the Charter*, 10 EMORY INT’L L. REV. 509 (1996); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83, 83-85 (1993).

25. U.N. Charter art. 42.

All members of the United Nations have “agree[d] to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>26</sup> Accordingly, Chapter VII determinations of the Council are legally binding on all U.N. member states. Moreover, the Charter provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>27</sup>

The use of force under the collective security regime differs from the exercise of the right of self-defense in several critical ways. First, it is not a unilateral right. Rather, “[r]ecourse to such measures is to be the exclusive prerogative of the United Nations, acting in concert.”<sup>28</sup> In view of the capacity of any of the five Permanent Members of the Security Council to veto a proposed resolution authorizing the use of force, this means that collective security measures are available only when there is unanimity among the Permanent Members in favor of such measures. Second, in contrast to the right of self-defense, the prior commission of an armed attack is not a prerequisite to the exercise of force under Security Council authority. Rather, the Security Council may authorize measures, including the use of force, merely in the face of “threats” to international peace and security,<sup>29</sup> including threats that may not yet be imminent.<sup>30</sup> The Security Council, moreover, has largely unfettered power to determine what events and developments constitute such a threat.<sup>31</sup>

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26. *Id.* art. 25.

27. *Id.* art. 103.

28. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 2* (2002).

29. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 250 (3d ed. 2001) (noting that the Security Council “may wield force to counter any type of aggression, not necessarily amounting to an armed attack, and it may even respond to a mere threat to the peace”) (footnote omitted); *see also* Michael D. Ramsey, *Reinventing the Security Council: The U.N. as a Lockean System*, 79 *NOTRE DAME L. REV.* 1529, 1548 (2004) (“[T]he [U.N.] Charter envisions a Security Council with substantial military force responding to international security threats.”); A. Mark Weisburd, *The War in Iraq and the Dilemma of Controlling the International Use of Force*, 39 *TEX. INT’L L.J.* 521, 541 (2004) (“[T]he authority of the Security Council is extremely broad; its competence extends to addressing even threats to the peace—that is, situations which have not yet amounted to breaches of the peace—and the tools at its disposal include the use of force”).

30. Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 *SAN DIEGO INT’L L.J.* 7, 19 (2003); *see also* Ramsey, *supra* note 29, at 1555-56 (arguing that the design of the Security Council was to enable the international community to deal with “emerging threats,” not only imminent threats).

31. Jochen A. Frowein & Nico Krisch, *Introduction to Chapter VII*, in 1 *THE CHARTER OF THE UNITED NATIONS*, *supra* note 15, at 710-11; *see also* DINSTEIN, *supra* note 29, at 250 (noting that the U.N. Charter “seems to give [the Security Council] *carte blanche* in evaluating any given situation” and that “the degree of latitude bestowed upon [the Council] by the Charter is well-nigh unlimited”); Reisman, *supra* note 24, at 93 (noting that the term “‘threat to peace’ . . . has proven to be quite elastic in the hands of the [Security] Council”).

C. *Use of Force: A Regime of Rules and Standards*

In choosing the conditions under which force could lawfully be used, the Charter's founders were faced with a choice between rules and standards,<sup>32</sup> a choice that presents a familiar set of issues to lawyers.<sup>33</sup> By specifying in advance what conduct is permissible, rules are clear and easy to apply, and thus provide a high degree of predictability both for those who implement them and those regulated by them.<sup>34</sup> Standards, in comparison, allow a broader range of factors to be taken into account by the decisionmaker at the point of application, but make implementation more burdensome.<sup>35</sup> The choice between rules and standards also, and perhaps most importantly, involves the allocation of decision-making authority between different institutions or actors in a legal system,<sup>36</sup> and thus implicates potential principal-agent issues.<sup>37</sup>

For the law governing the use of force, the Charter established a two-tiered system employing both rules and standards.<sup>38</sup> With respect to the *unilateral* use

32. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 758 (2004).

33. See, e.g., Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

34. Because of these features, rules reduce decision costs. See Vermeule, *supra* note 33, at 91. But because rules do not allow decisionmakers at the moment the rule is applied to take into account all relevant factors apart from those specified in the rule, they may result in decisions that fail to give full effect to the normative goals or social policies of those who promulgated them. Rules may thus raise error costs relative to the normative goals for which they were adopted. *Id.* at 91-92.

35. Standards tend to “collapse decision-making back into the direct application of the background principle or policy to a fact situation.” Sullivan, *supra* note 33, at 58. In this way, standards reduce error costs but increase decision costs.

36. Rules and standards, for Sullivan, “vary in the relative discretion they afford the decisionmaker.” *Id.* at 57. In adopting a rule, the lawmaker retains authority over the content of law, leaving to those who will apply it only limited issues of factual determination. *Id.* at 58. In adopting a standard, in contrast, the lawmaker delegates authority to a “decisionmaker at the point of application.” Vermeule, *supra* note 33, at 92.

37. Rules reduce the risk that the agent will erroneously or fraudulently implement the principal's background “principle or policy.” Sullivan, *supra* note 33, at 58. With standards, in contrast, the lawmaker delegates considerable discretion to the agent, an arrangement which brings with it the associated danger of a divergence of interests between the principal and agent. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (addressing the issue of agency costs in the context of the theory of the firm); see also Mark A. Pollack, *Delegation, Agency, and Agenda Setting in the European Community*, 51 INT'L ORG. 99, 108 (1997) (identifying the danger of “agency losses” in the context of delegation of authority by states to a supranational organization). Thus, the effort to reduce error costs associated with rules by adopting standards brings with it not only additional decision costs, but also agency costs.

38. Kaplow notes that legal commands “mix” rules and standards in varying degrees. Kaplow, *supra* note 33, at 561.

of force, the Charter adopts a rule. Force is generally prohibited and may be used by a state only in self-defense in the event of an armed attack. As Michael Glennon notes, “Drawing the line [at which force could be used] at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainty.”<sup>39</sup> In terms of decision-making authority, the lawmakers who promulgated the law, i.e., the states parties to the Charter, retained authority to determine when force may be used unilaterally; the only question to be resolved by the affected state at the time the rule is applied is the factual question of whether an armed attack has occurred.

As lawmakers, the founders of the Charter recognized, however, that this regime might be underinclusive, in that it might prohibit the use of force in circumstances in which it might be appropriate. They recognized, in short, the potential “error costs” of the right of self-defense as formulated in Article 51 in light of the underlying norms of international peace and security they sought to advance. But the pre-Charter regime governing the use of force, in which states were entitled to use force unilaterally either to vindicate their legal rights or to counter perceived threats to their security, had shown itself to be susceptible to erroneous and bad-faith implementation. Because this standards-based approach had led to the overinclusive and excessive use of force, the Charter’s founders were unwilling to delegate substantial discretion to individual states to act as agents to determine the conditions under which they might on their own authority use force.

Instead, the Charter supplemented the potentially underinclusive rule in Article 51 by permitting the use of force to counter *threats* to international peace and security through the Charter’s collective security apparatus. Because the assessment of what kind of threat justifies the use of force requires an open-ended and highly contextualized determination that can be made only at the time of application, the Charter’s collective security regime employs a standards-based criterion.<sup>40</sup>

Since the Charter’s founders did not specify in advance what threats to international peace and security justify the use of force, they needed to select an agent, other than the state considering the use of force, to apply the law. Chapter VII empowers the Security Council to serve as the international community’s agent in applying its background policy of allowing force to be used to address threats to international peace and security. In doing so, the

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39. 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, 546 (2002).

40. In this way, the collective security authorities of Chapter VII serve to overcome the error costs of a potentially underinclusive rule limiting the right of unilateral self-defense to cases of armed attacks. Reliance on this standard as a basis for using force will, as John Yoo notes, increase decision costs because it requires significant expenditure of intelligence, diplomatic, and other resources to assess accurately the intentions and capabilities of states that present a threat to international peace and security. Yoo, *supra* note 32, at 760-61.

Charter employs procedural safeguards to reduce the dangers of erroneous or bad-faith implementation of this standard.<sup>41</sup> With respect to erroneous assessments, the requirements of Security Council deliberations and approval regarding the use of force to address a particular threat are likely to produce a better-informed decision, since all Security Council states, and not just the state that perceives itself to be threatened, will contribute to the assessment of the threat based on data in their possession.<sup>42</sup> The procedural requirements of collective deliberation and information sharing among Council members thus can serve “to correct false beliefs.”<sup>43</sup>

The role of a collective representative body is even more significant in reducing the risk that agents will use force for inappropriate motives. The open-ended and subjective nature of the “threat to international peace and security” standard is sufficiently flexible to be invoked by states that seek to use force for reasons other than the normative goals for which the law was promulgated, including as a pretext for aggression.<sup>44</sup> There is accordingly a significant risk of agency costs in delegating the authority to use force in response to threats to individual states. The problem is particularly acute where the actor is applying

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41. See Pollack, *supra* note 37, at 108 (arguing that administrative procedures serve *ex ante* to limit the risks of agency loss). The key point is that the Security Council’s structure and procedures provide greater protection against uses of force that are inconsistent with the underlying purposes and policies of the Charter—or put another way, of the interests or preferences of the collective membership of the United Nations as principals—than does delegation of authority to individual states to use force in circumstances other than armed attacks. A structure in which discretion to use force in cases not involving armed attacks is vested in individual states would leave U.N. member states collectively with virtually no capacity to limit agency losses that will arise when individual agent states “pursue [their] own preferences at the expense of the preferences of the principals.” *Id.*

42. The information advantages of Council deliberations may be limited. First, it would be possible—though not required—for states to share threat assessment information with one another even under a regime permitting unilateral force against threats that had not yet materialized as armed attacks. Second, Security Council deliberations do not mandate that states share information with one another. Even where the use of force is considered by the Security Council, states are likely to be highly circumspect in sharing sensitive national intelligence information. Thus, although consideration by the Security Council of whether to authorize the use of force will bring into the decision-making process states that presumably possess information beyond that held by the state contemplating the use of force, the quantum of information available to any individual member of the Council may not increase. Nevertheless, critical discussions among states, even if they do not share the information that underlies their assessments of a threat, may contribute to a more informed collective decision. See Sullivan, *supra* note 33, at 119 (noting that a collective body such as the Supreme Court has “deliberative advantages” over a single actor).

43. Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 *ETHICS & INT’L AFF.* 1, 12 (2004).

44. See *infra* Part V.C.

the standard to its own conduct.<sup>45</sup> Designating the Security Council as the collective agent to implement the normative goals of the lawmaking states that adopted the Charter reduces the dangers that such a broad standard will be abused by individual states. The requirement that at least nine of the fifteen members of the Security Council, and all five of its Permanent Members, must agree before force may be used to respond to security dangers that have not yet produced armed attacks serves to align the interests of the parties to the Charter as principals and the Security Council as the agent that applies it. The selection of a collective body like the Council—as opposed to individual states—as the agent thus provides an important safeguard to “reduce opportunistic use of force,”<sup>46</sup> and to ensure that the use of force under that standard is exercised only “in the common interest.”<sup>47</sup>

## II. LEGAL IMPEDIMENTS TO USING FORCE IN SELF-DEFENSE IN RESPONSE TO THE NEW SECURITY THREATS

The new security threats present a significant challenge to the legal regime governing the use of force, particularly to the unilateral use of force by states to counter these threats. The international criticism generated by such uses of force illustrates the difficulty of reconciling the prevailing legal regime with the new security environment. This Part reviews the legal impediments to using force in self-defense against terrorist or WMD threats under the current legal regime.

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45. The danger of conflict between the interests of the principal and the interests of the agent is particularly acute where the agent applying the standard is not a neutral institution, but the very actor whose behavior the standard is meant to regulate. See Yoo, *supra* note 32, at 788 (stating that an “anarchical international system only compounds the problems of abuse of delegated powers, because those who use force will often also be the interpreter and applier of the norm”). Although John Yoo carefully evaluates the decision and error cost implications of moving from a rule-based to a standard-based approach to self-defense, *id.* at 758-61, he fails to consider the risk of agency costs associated with vesting individual states with authority to apply standards. For example, he does not address the danger that individual states entitled to give content to the self-defense standard will have interests different from those of the collection of states that are parties to the Charter. Moreover, he ignores the possibility that states will not give content to the standard in an unbiased manner. This failure is conspicuous, especially since Yoo specifically adverts to the agency loss problem in the context of his discussion of a regime that would permit force to be used unilaterally to promote international stability. *Id.* at 787-88.

46. Buchanan & Keohane, *supra* note 43, at 12.

47. U.N. Charter pmbl. The failure of the Council in many instances to address threats to international peace and security or actual breaches of the peace because of the veto powers of individual members suggests that the use of force standards in Chapter VII are being applied by the Council in an underinclusive fashion. Here, the problem is with the *practice* of the Security Council, not the availability of legal authority to authorize the use of force. For a discussion of the implications for the Council’s legitimacy, see *infra* Part V.A.5.



*A. Terrorism**1. The absence of an “armed attack”*

Uses of force by terrorist actors may not necessarily constitute “armed attacks” that justify the use of self-defense under Article 51. According to the International Court of Justice (ICJ) in the *Nicaragua* case, not all measures that “involve a use of force” are sufficiently “grave” to qualify as an armed attack.<sup>48</sup> In evaluating violence by insurgents in a civil war, the court stated that the key factor was whether their action, “because of its scale and effects, would [be] classified as an armed attack, rather than as a mere frontier incident had it been carried out by regular armed forces.”<sup>49</sup> Although the considered view is that the events of September 11, in view of the devastation they wrought, qualified as “armed attacks,”<sup>50</sup> not all violent acts committed by terrorists—such as assassinations, hijackings of airplanes, or bombings or shootings taking few lives or causing relatively modest property damage—will be of sufficient scale and effect to constitute armed attacks.

*2. Territorial integrity of the state where force is used*

Using force against terrorists highlights a significant tension in the current international legal regime between a state’s right to use force against nonstate actors that have attacked it and the territorial integrity of the state where those terrorists are located. The fact that a terrorist attack is perpetrated by a nonstate actor, rather than by a state, does not necessarily bar the victim state from invoking its right of self-defense. Article 51 refers to the right of “self-defence if an armed attack occurs against a Member of the United Nations.” It is not limited to circumstances in which an armed attack is launched by another state.<sup>51</sup>

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48. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101, 110 (June 27).

49. *Id.* at 103.

50. *See* Murphy, *supra* note 11, at 51.

51. U.N. Charter art. 51. In addition to the text of Article 51, Sean Murphy finds support for the view that self-defense may be exercised in response to armed attacks by nonstate actors in the exchange of letters between Secretary of State Daniel Webster and British Minister Ashburton concerning the 1837 *Caroline* incident that has long been seen as articulating standards for the right of self-defense under customary international law. Murphy, *supra* note 11, at 50. That case involved the use of force by the British military against nonstate actors on United States territory. *See* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 409-10 (1906). There is not, however, complete agreement on the notion that the right of self-defense may be exercised in response to armed attacks committed by nonstate actors. *See, e.g.*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 165 (1991) (noting “substantial doubts” about whether the right of self-defense applies in response to armed attacks by terrorists when no state has been “guilty of an armed attack” or has “directed or controlled the terrorists in question”). Moreover, in its recent Advisory Opinion regarding the Israeli security barrier built largely in occupied

Nevertheless, a state's use of force against terrorist groups abroad also amounts to a use of force against the state where the terrorists are located when they are attacked. The prohibition in Article 2(4) on the use of force is not limited to uses of force directed against institutions of the state, but to force "against the territorial integrity or political independence of any state." As Schachter writes, "any coercive incursion of armed troops into a foreign state without its consent impairs that State's territorial integrity,"<sup>52</sup> and thus violates Article 2(4). In short, the U.N. Charter embodies a tension between the right of a state that is the victim of an armed attack by nonstate terrorists, on the one hand, to exercise the unilateral right of self-defense, and the right of the state where those terrorists reside, on the other, not to be subject to the use of force as long as that state does not *itself* launch an armed attack.

### 3. *Problematic justifications: State responsibility and harboring*

#### a. State responsibility

In some cases, the difficulty of using force against a state that has not itself launched an armed attack may be surmounted if the acts of terrorists are attributable to the state itself. According to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles on State Responsibility") produced by the International Law Commission of the United Nations, the conduct of a nonstate actor "shall be considered an act of a State under international law" if the actor "is in fact acting on the instructions of, or under the direction or control of, that State."<sup>53</sup>

The precise degree of control a state must exercise over nonstate actors to establish such *de facto* responsibility is not entirely settled under international law. In the *Nicaragua* case, the International Court of Justice rejected Nicaragua's assertion that the United States was legally responsible for the conduct of the so-called *contra* groups engaged in armed insurrection against

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Palestinian territory to prevent terrorist attacks, the International Court of Justice suggested in passing that the right of self-defense is not available in response to armed attacks by non-state actors. The court interpreted Article 51 of the U.N. Charter as recognizing "an inherent right of self-defence in the case of armed attack *by one State against another State*." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (emphasis added). Because Palestinian terrorist attacks in Israel were not attacks by a state, the court concluded that Israel could not justify construction of the security barrier on the basis of self-defense. This view was strongly criticized in separate opinions by Judges Buergenthal, *id.* at 241-42 (declaration of Judge Buergenthal), Higgins, *id.* at 215 (separate opinion of Judge Higgins), and Kooijmans, *id.* at 229 (separate opinion of Judge Kooijmans). It remains to be seen whether the court's narrow view of self-defense in the recent advisory opinion will attain the widespread acceptance that the Court's judgment in the *Nicaragua* case has.

52. SCHACHTER, *supra* note 51, at 112.

53. See *Report of the International Law Commission*, U.N. GAOR, Supp. No. 10, at 103, U.N. Doc A/56/10 (2001).

the Nicaraguan government, even though the United States had “largely financed, trained, equipped, armed and organized” the *contras*,<sup>54</sup> and exercised “general control” over them.<sup>55</sup> The court formulated what has become known as the “effective control” standard for de facto responsibility, requiring the sponsoring state to have “effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>56</sup>

More recently, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia adopted a lower standard of control for attribution of the acts of nonstate actors to a sponsoring government. “Overall control,” the Appeals Chamber held, was sufficient to make a state responsible for the acts of nongovernment actors, at least in the context of armed conflict.<sup>57</sup> Such overall control exists when a state “*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.”<sup>58</sup> It is not additionally necessary, the Appeals Chamber held, for the sponsoring state to “issue instructions . . . for the commission of specific acts contrary to international law.”<sup>59</sup>

Under either the “effective control” or “overall control” standard, however, it will typically be difficult to attribute terrorist acts to a sponsoring state. In many instances, the governments of states from which terrorists operate may be affirmatively antithetical to, or at least not share, the ideological goals of terrorist groups present in their territory.<sup>60</sup> In other cases, such as those in which the terrorist group is engaged in an armed insurgency against the government, or the government’s security forces otherwise lack the capacity to suppress the terrorist group, there is little the host-state government can do to prevent actions of the terrorist group.<sup>61</sup> Even in the case of Afghanistan, it is

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54. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 62 (June 27).

55. *Id.* at 64.

56. *Id.* at 65.

57. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 131 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.

58. *Id.* ¶ 137.

59. *Id.* ¶ 131.

60. Examples include the Abu Sayyaf terrorist group in the Philippines, see U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2004, at 93-94 (2005), available at <http://www.state.gov/documents/organization/45313.pdf> (describing Abu Sayyaf as a terrorist group whose “stated goal is to promote an independent Islamic state in western Mindanao and the Sulu Archipelago (areas in the southern Philippines . . . )”), and the Jemaah Islamiyah organization operating in a number of states in Southeast Asia, see Council on Foreign Relations, Jemaah Islamiyah (Oct. 3, 2005), <http://cfrterrorism.org/groups/jemaah.html> (describing Jemaah Islamiyah as a “militant Islamist group” that has engaged in terrorist activities in pursuit of its goal of “establish[ing] a pan-Islamic state across much of [Southeast Asia]”).

61. A *New York Times* report on the lethal United States missile attack against Al Qaeda targets in Yemen in November 2002 stated the United States had acted in part because of “Yemen’s apparent inability to exert much control over its remote and largely

difficult to attribute responsibility for the September 11 attacks by Al Qaeda to the Taliban or the state of Afghanistan under either the effective or overall control standards. The Taliban did not seem to have exercised a high degree of control over Al Qaeda, and Al Qaeda was not highly dependent on the Taliban for financing or supplies. Rather, the Taliban essentially made Afghanistan's territory available for Al Qaeda—with which it shared strong ideological ties—to pursue its activities independently.<sup>62</sup>

b. Harboring terrorists as a basis for the use of force

Even where terrorist acts are not attributable to a state, the use of force against terrorist actors in other states could be defended on alternative legal theories, particularly where the state is harboring or supporting the terrorists. Even though a state with limited control over an armed group operating from its territory may not be deemed responsible for that group's attacks against another state, this does not mean that the harboring state is blameless. The General Assembly has declared that every state has a duty to refrain from "acquiescing in organized activities within its territory directed towards the commission" of forcible "acts of civil strife or terrorist acts in another State."<sup>63</sup> Lillich and Paxman, in their seminal 1977 review of the duties of states to control terrorist groups, concluded that states must "prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions,"<sup>64</sup> and that international law obligates states to exercise "due diligence" to prevent injuries to aliens caused by terrorists.<sup>65</sup>

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lawless border region with Saudi Arabia, which the Americans say serves as the country's main sanctuary for Al Qaeda." James Risen & Judith Miller, *C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen*, N.Y. TIMES, Nov. 5, 2002, at A14; see also Walter Pincus, *U.S. Strike Kills Six in Al Qaeda*, WASH. POST, Nov. 5, 2002, at A1 (quoting a senior intelligence analyst as stating that "[t]he inability of the government to control large areas of Yemen has provided the opportunity for terrorist groups to reorganize there").

62. A staff report of the National Commission on Terrorist Attacks upon the United States noted that although Al Qaeda and the Taliban "forged a close alliance," the unstable situation and lack of centralized government control in Afghanistan gave Osama bin Laden "greater latitude to promote his own agenda." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., STAFF STATEMENT NO. 15, OVERVIEW OF THE ENEMY 7 (2004), available at [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_15.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_15.pdf). The principal benefit the Taliban provided to Al Qaeda was "a sanctuary in which to train and indoctrinate recruits, import weapons, forge ties with other jihad groups and leaders, and plan terrorist operations." *Id.*

63. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law].

64. Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 221 (1977).

65. *Id.* at 245-46.

The difficulty with this analysis is not the proposition that governments violate customary international law by harboring terrorists. They do. But unless the state exercises the required degree of control over a terrorist group, a violation of the duty not to harbor terrorist groups is legally distinct from the violent acts carried out by the terrorists themselves. The significance of this distinction, of course, is that only a violation of a state's Article 2(4) duty not to engage in a use of force amounting to an armed attack gives rise to the target state's right to use force in self-defense. Since the adoption of the Charter, states may no longer use force by way of reprisal in response to breaches of other legal obligations owed to them, including the duty of states not to allow their territories to be used in a manner injurious to the interests of other states.<sup>66</sup> A state's breach of its obligations not to harbor terrorists would entitle the victim state to demand cessation, to claim reparation, or to seek other remedies available under international law. Under current law, however, a breach of that duty would not entitle the victim state to use force against the harboring government.<sup>67</sup>

#### 4. *International assessment of claims of self-defense against terrorism*

Although the U.S. invocation of the right of self-defense in response to the September 11 attacks has not provoked much critical commentary, this is an exceptional case. The international community has generally been critical of the use of force in self-defense against nonstate terrorists. Such criticism suggests that the international community favors the territorial inviolability of the states charged with harboring terrorists over the self-defense rights of victims of terrorist attacks.

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66. See Declaration on Principles of International Law, *supra* note 63, at 122 ("States have a duty to refrain from acts of reprisal involving the use of force."); S.C. Res. 188, ¶ 1, U.N. Doc S/5650 (Apr. 9, 1964) (Security Council "[c]ondemns reprisals as incompatible with the purposes and principles of the United Nations"); see also ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 38-39 (1984) (arguing that Article 2(4) of the U.N. Charter, "by outlawing the threat or use of force, made resort to armed reprisals legally impossible").

67. In a 1974 letter, Acting Secretary of State Rush addressed the distinction between a situation in which "armed force originat[es] from [a State's] territory, whether that force be direct and overt or indirect and covert," on the one hand, and one where "a State cannot or will not fulfill its international legal obligation to prevent the use of its territory for the unlawful exercise of force," on the other. Letter from Kenneth Rush, Acting U.S. Secretary of State, to Professor Eugene Rostow (May 29, 1974), *reprinted in* Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 720, 736 (1974). Rush characterized the use of force in the first instance as self-defense, but in the second circumstance as an impermissible forcible reprisal. *Id.* The key point is that, at least as of 1974, the United States held the view that: (1) "vicarious" responsibility for harboring terrorists or failing to prevent terrorist acts amounted to breach of a legal duty distinct from the use of force amounting to an armed attack; and (2) the use of force against a state for failing to prevent its territory from being used for terrorist acts was not lawful.

Before September 11, 2001, the international community sharply criticized Israeli attacks motivated by the presence of nonstate terrorists in other states on three separate occasions. In the first such case, Israel in 1968 attacked the Beirut airport in response to a violent attack two days earlier by a terrorist organization against an Israeli El Al airliner at the Athens airport. Israel's attack was unanimously condemned as a violation of the U.N. Charter.<sup>68</sup> The Security Council effectively rejected Israel's claim that Lebanon "had assumed responsibility for the activities of terror organisations."<sup>69</sup>

Similarly, Israel's invasion of Lebanon in 1982, following attacks against Israeli territory by terrorists operating from southern Lebanon,<sup>70</sup> met with strong international criticism. Although the Security Council did not expressly condemn Israel's use of force, the General Assembly left no doubt that it considered Israel's action unlawful.<sup>71</sup> A General Assembly resolution adopted by a vote of 127-2 characterized Israel's use of force as "acts of aggression."<sup>72</sup>

In 1985, after the Palestine Liberation Organization (PLO) attacked Israelis in third-party countries, Israel responded with air strikes against the PLO headquarters in Tunisia. The Security Council "[c]ondemn[ed] vigorously the act of armed aggression perpetrated by Israel *against Tunisian territory* in flagrant violation of the Charter of the United Nations, international law and norms of conduct . . . ."<sup>73</sup> The Council's reference to aggression "against Tunisian territory" appears to reflect the view that even though Israel's attack was directed at the PLO, and not at Tunisian state institutions, it was nevertheless a violation of Tunisia's inviolability and Tunisia's right not to be subject to the use of force.<sup>74</sup>

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68. S.C. Res. 262, U.N. Doc. S/RES/262 (Dec. 31, 1968).

69. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 161 (2d ed. 2004).

70. In a letter to the Security Council, Israel specifically invoked Lebanon's "duty to prevent its territory from being used for terrorist attacks against other States." FRANCK, *supra* note 28, at 57 (quoting Letter from the Permanent Representative of Israel to the Secretary-General of the United Nations, U.N. Doc. S/15132, A/37/257 (May 28, 1982)).

71. S.C. Res. 509, ¶ 1, U.N. Doc. S/RES/509 (June 6, 1982).

72. G.A. Res. ES-7/5, U.N. Doc. A/RES/ES-7/5 (June 28, 1982). Israel and the United States were the only two states to oppose the resolution.

73. S.C. Res. 573, ¶ 1, U.N. Doc. S/RES/573 (Oct. 4, 1985) (emphasis added). The resolution was adopted by a vote of fourteen in favor, zero against, and one (the United States) abstaining. In explaining the abstention, the U.S. Permanent Representative to the United Nations expressed support for the principle that self-defense may be invoked in response to attacks by nonstate actors: "[W]e recognize and strongly support the principle that a State subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. This is an aspect of the inherent right of self-defence recognized in the Charter of the United Nations." U.N. SCOR, 40th Sess., 2615th mtg. at 22, U.N. Doc. S/PV.2615 (Oct. 4, 1985).

74. See S.C. Res. 1234, ¶ 2, U.N. Doc. S/RES/1234 (Apr. 9, 1999); S.C. Res. 1304, U.N. Doc. S/RES/1304 (June 16, 2000) (deploring the presence of foreign forces in the Democratic Republic of Congo, including Rwandan forces that attacked refugee camps from which terrorist attacks against Rwanda were launched, and demanding the withdrawal of those forces).

Prior U.S. assertions of the right to use force in self-defense against terrorist attacks have also met with skepticism in the United Nations. In 1986, following the bombing of a night club in West Berlin that resulted in the death of an American soldier and the wounding of a large number of other U.S. servicemen, the United States attacked “terrorist-related targets” in Libya.<sup>75</sup> Nine Security Council members voted in favor of a proposed resolution that would have condemned the U.S. attack as a violation of the U.N. Charter, but it was defeated by the negative votes of three Permanent Members.<sup>76</sup>

Even after September 11, 2001, the international community has continued to express considerable doubt about claims that the right of self-defense entitles states to use force against terrorists in another state’s territory. In October 2003, following a terrorist suicide bombing at a beachfront restaurant in Haifa, Israel attacked an alleged terrorist training camp at Ein Saheb, Syria, with guided missiles. During the Security Council discussion, ten of the fifteen Council members condemned or characterized Israel’s attack as a violation of international law, of Syria’s sovereignty, or of acceptable standards of behavior.<sup>77</sup>

The Security Council took a more neutral stance regarding the recent Israeli use of force against Hezbollah forces in Lebanon following Hezbollah’s July 12, 2006 attack on Israel. The Council did not expressly affirm or condemn Israel’s action. Instead, the Council called for an “immediate cessation” to both attacks by Hezbollah and military operations by Israel.<sup>78</sup>

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75. Letter from Herbert S. Okun, Acting Permanent Representative of the United States of America to the United Nations, to the President of the Security Council (Apr. 14, 1986), *quoted in* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT’L L. 612, 632-33 (1986). In contrast to many of the other cases involving the use of force in response to terrorism, the terrorist acts to which the United States responded in the Libya case were, according to the United States, carried out by agents of, and directed by, the Libyan government. As such, Libya was targeted not merely for harboring nonstate terrorists, but for engaging in violence directly attributable to the government of Libya.

76. The vote on the draft resolution, U.N. Doc. S/18016/Rev.1 (1986), was nine in favor, five against (the United States, the United Kingdom, France, Australia, and Denmark), and one abstaining. U.N. Doc. S/PV.2682 (Apr. 21, 1986).

77. U.N. SCOR, 58th Sess., 4836th mtg. at 3-4, 8-13, U.N. Doc S/PV.4836 (Oct. 5, 2003) (statements of representatives of Syria, Pakistan, Spain, China, Germany, France, Bulgaria, Chile, Mexico, and Guinea). Another two states condemned both the Haifa bombing and Israel’s attacks, without independently addressing the legality of Israel’s behavior. *Id.* at 12-13 (statements of representatives of Angola, Cameroon). Russia urged restraint by all parties to the conflict. *Id.* at 10 (statement of representative of the Russian Federation). The United Kingdom criticized Israel’s attack as an unacceptable “escalation” of violence, but also recognized that “terrorists are continuing to attack Israel and that they are being permitted to do so.” *Id.* at 9 (statement of representative of the United Kingdom). Only the United States appeared to endorse the lawfulness of Israel’s missile attack, stating that “Syria is on the wrong side of the war on terrorism” and noting that “[w]e have been clear of [sic] the need for Syria to cease harbouring terrorist groups.” *Id.* at 14 (statement of representative of the United States).

78. S.C. Res. 1701, ¶ 1, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

In short, although the Security Council referred to the right of self-defense in a preambular clause<sup>79</sup> in Resolution 1368, which condemned the September 11 attacks, the Charter does not clearly authorize the use of force in self-defense in response to terrorist acts by nonstate actors located on the territory of other states. Where force has been used against the territory of states from which terrorists operate, but to which the terrorists' conduct is not legally attributable, the international community has generally been skeptical of claims that the use of force was a justifiable exercise of the right of self-defense.<sup>80</sup>

### B. *The WMD Threat*

The unilateral use of force in self-defense against a state seeking to acquire weapons of mass destruction also is likely to be highly problematic under the current legal regime governing the use of force.

#### 1. *A problematic justification: Anticipatory self-defense*

The most plausible rationale for the unilateral use of force against a state perceived to present a WMD threat under the prevailing use of force regime is the doctrine of anticipatory self-defense.<sup>81</sup> Despite the language in Article 51 recognizing the right of self-defense "if an armed attack occurs," many states and commentators assert that a state need not await its adversary's "first, perhaps decisive, military strike" before it may use force to protect itself.<sup>82</sup>

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79. S.C. Res. 1368, pmb. para. 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

80. This is not to say that the international community's record in condemning uses of force against terrorist groups located on another state's territory has been uniform. As Thomas Franck notes, although Iraq complained in 1995 and 1996 of Turkish military incursions into Iraqi territory in pursuit of Kurdish-secessionist insurgents, "these complaints did not lead to a meeting of, let alone action by, the [Security] Council or the [General] Assembly." FRANCK, *supra* note 28, at 63. Similarly, the missile attacks launched by the United States against Al Qaeda training camps in Afghanistan and a suspected chemical weapons plant in Sudan, in response to the terrorist bombing attacks against American embassies in Tanzania and Kenya, met with only limited condemnation by, and some expressions of support from, other members of the international community. Sudan's formal complaint "was not [even] inscribed on the agenda of the Security Council." *Id.* at 95. For the suggestion that there is an emerging tolerance for cross-border uses of force directed at terrorist groups, at least where the territorial state is harboring the terrorist actors, see *infra* note 99.

81. This doctrine has been invoked—primarily by commentators—as a justification for the U.S. use of force against Iraq in 2003. Although some statements by U.S. officials made "brief and cryptic" references to other legal theories, the claim that the use of force against Iraq was legally permissible under a series of Security Council resolutions was the "explicit and principal legal justification advanced by the United States." Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 176 n.12 (2004).

82. FRANCK, *supra* note 28, at 98; see also D.W. BOWETT, SELF DEFENCE IN INTERNATIONAL LAW 191-92 (1958) ("No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further



Currently, there is reasonably widespread support for the notion that states may use force when a threatened armed attack is imminent and no other means would thwart it.<sup>83</sup> Could the use of force against states that present a WMD threat be justified under this doctrine of anticipatory self-defense?

Advocates of a right of anticipatory self-defense differ on the theory underlying the asserted right.<sup>84</sup> Whether they affirm the existence of the right

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resistance and so jeopardize its very existence.”); Waldock, *supra* note 17, at 500 (interpreting decision of the International Court of Justice in the *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (Dec. 15), so as to permit self-defense “if there is a strong probability of armed attack—an imminent threat of armed attack”).

83. U.N. High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004); *see also* The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 124, report delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) (“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. [This] covers an imminent attack as well as one that has already happened.”); BOWETT, *supra* note 82, at 191 (rejecting the notion that Article 51 of the Charter “restricts the traditional right of self-defence so as to exclude action taken against an imminent danger but before an armed attack occurs”) (internal quotation omitted); David B. Rivkin, Jr., *Commentary on Aggression and Self-Defense*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 54, 56 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (describing the right of anticipatory self-defense as one of the “heretofore well-accepted principles of international law”); S.M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 *RECUEIL DES COURS* 413, 478-482 (1972) (noting that many states and scholars interpret Article 51 to allow anticipatory self-defense and outlining arguments in favor of such an interpretation).

84. One view is that since Article 51 of the Charter refers to the “inherent right” of self-defense, the Charter did not modify the right of anticipatory self-defense that predated the Charter. *See, e.g.*, MYRES MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 232-41 (1961); David B. Rivkin et al., *Preemption and Law in the Twenty-First Century*, 5 *CHI. J. INT’L L.* 467, 476 (2005); Abraham Sofaer, *International Law and Kosovo*, 36 *STAN. J. INT’L L.* 1, 16 (2000); John Yoo, *International Law and the War in Iraq*, 97 *AM. J. INT’L L.* 563, 571 (2003). This position seems difficult to reconcile with the text of the Charter, which preserves the inherent right of self-defense, but only in a particular set of circumstances (“if an armed attack occurs”). *See* SCHACHTER, *supra* note 51, at 150 (stating that “[m]ost international lawyers and most governments have therefore rejected the contention that self-defense is permitted in the absence of armed attack”); *see also* BROWNIE, *supra* note 13, at 278 (“It can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that the arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence.”); DINSTEIN, *supra* note 29, at 168 & n.54 (listing authorities); HENKIN, *supra* note 11, at 141; 2 OPPENHEIM, *supra* note 15, at 156 (noting that “the Charter confines the right of armed self-defence to the case of an armed attack as distinguished from anticipated attack or from various forms of unfriendly conduct falling short of armed attack”). A more persuasive theory rests on the view that the Charter, as a “quasi-constitutional” treaty that is “capable of organic growth,” has itself evolved since its adoption through a process of interpretation by states. Adherents to the evolutionary view contend—largely on the basis of the response of the international community to Israel’s initiation of hostilities against Egypt, Jordan, and Syria at the start of the 1967 Six-Day War—that the Charter, whatever it may have meant in 1945, is now read to permit the use of force in self-defense even prior to an armed attack, but only in narrow circumstances. *See* FRANCK, *supra* note 28, at 5-6. Franck argues that anticipatory self-defense has become legal through this process of “state practice and *opinio juris*.” *Id.* at 191;

as a reserved inherent right, or as a manifestation of an evolving interpretation of the Charter, however, proponents of the right have traditionally subjected it to requirements comparable to those derived from *The Caroline Case*.<sup>85</sup> This means that if force may be used in anticipatory self-defense, it may be used only where force is *necessary* to prevent an adversary's attack ("leaving no choice of means"), and where the attack to be prevented is *imminent* (the need to use force is "instant" and leaves "no moment for deliberation").<sup>86</sup>

The recent use of force by the United States against Iraq demonstrates the difficulty of satisfying this traditional standard for anticipatory self-defense in confronting WMD threats. Controversy continues to swirl around the strength of the evidence regarding the severity and imminence of the threat presented by Iraq which the United States relied on, in 2003, in deciding to use force. Even so, it is difficult to imagine any but the most partisan observers concluding that the U.S. use of force against Iraq satisfied the requirement of imminence or immediacy associated with the traditional doctrine of anticipatory self-defense. George J. Tenet, while still Director of Central Intelligence, emphasized that the intelligence community's October 2002 National Intelligence Estimate, a key basis for the assessment by U.S. policymakers of the dangers posed by Iraq's WMD programs,

never said there was an "imminent" threat. Rather, [U.S. intelligence analysts] painted an objective assessment for our policymakers of a brutal dictator who was continuing his efforts to deceive and build programs that might constantly surprise us and threaten our interests.<sup>87</sup>

Similarly, President Bush, in his January 2003 State of the Union address detailing the threat posed by Iraq's WMD programs, did not assert that the

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*see also* A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II*, at 21 (1997) (noting that "practice under a treaty," including the provisions governing the use of force in the U.N. Charter, "can have the effect of substantially modifying the treaty's requirements").

85. *See supra* note 51.

86. *See* International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 205 (1947) (noting, in rejecting defense raised by Nazi defendants to charges of "Crimes against Peace," that "preventive [military] action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self defense, leaving no choice of means, and no moment of deliberation'" (quoting *The Caroline Case*)); FRANCK, *supra* note 28, at 107 (concluding that states will accept claims of anticipatory self-defense where there is "strong evidence of the imminence of an overpowering attack"); SCHACHTER, *supra* note 51, at 152 (noting that the right of anticipatory self-defense prior to an armed attack exists only where "such an attack is imminent 'leaving no moment for deliberation', 'no choice of means'"); *see also* Waldock, *supra* note 17, at 500 (1952) (interpreting jurisprudence of the International Court of Justice to allow, under Article 2(4) of the Charter, the use of force provided there is "an imminent threat of armed attack"); Yoo, *supra* note 84, at 572 (describing the "classic formulation of the right of anticipatory self-defense," which Yoo argues survived adoption of the Charter).

87. George J. Tenet, Dir. of Cent. Intelligence, Iraq and Weapons of Mass Destruction, Remarks at Georgetown University (Feb. 5, 2004) (transcript available at [https://www.cia.gov/cia/public\\_affairs/speeches/2004/tenet\\_georgetown\\_speech\\_02052004.html](https://www.cia.gov/cia/public_affairs/speeches/2004/tenet_georgetown_speech_02052004.html)).

United States faced an imminent attack by Iraq. To the contrary, he took issue with the notion that the United States was forbidden from acting “until the threat is imminent.”<sup>88</sup> The President’s speech serves as a clear indication that the attack the United States would unleash two months later against Iraq could not be justified as necessary to counter an imminent attack. As such, the Iraq case highlights the difficulty of justifying the unilateral use of force against WMD threats on the doctrine of anticipatory self-defense under its traditional formulation.

## 2. *International assessment of claims of self-defense against WMD threats*

The legality of the U.S. invasion of Iraq has been widely challenged both in the international community<sup>89</sup> and by legal scholars.<sup>90</sup> Because the United States justified the use of force principally on the basis of its interpretation of the relevant Security Council resolutions, and not on the doctrine of

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88. President’s Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109, 115 (Jan. 28, 2003).

89. In an interview with a BBC reporter, U.N. Secretary General Kofi Annan stated that the U.S.-led use of force against Iraq “is not in conformity with the UN Charter . . . and from the Charter point of view it was illegal.” *Excerpts: Annan Interview*, BBC NEWS, Sept. 16, 2004, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/3661640.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3661640.stm). Other significant international figures are also on record as characterizing the U.S. use of force against Iraq as illegal. France’s Foreign Minister declared that “le désaccord de notre pays avec la manière dont a été engagée cette guerre, c’était clairement qu’elle ne se situait pas à cette époque dans le cadre du droit international et qu’il n’y avait pas de mandat clair des Nations unies pour engager cette action.” Michel Barnier, French Foreign Minister, Press Conference in Paris (Sept. 17, 2004) (“[T]he explanation behind our country’s disagreement with the manner in which this war [in Iraq] was begun, was clearly that at the time it was not in accordance with international law and there was no clear mandate from the United Nations to begin this action.”) (Anouck Giovanola trans.), available at <http://www.doc.diplomatie.gouv.fr> (search for “Barnier” in autuer field, “17.09.2004” in date field, and “international” in title field). In a debate before the Security Council, Russia’s representative characterized the invasion of Iraq as “[a]n unprovoked military action” taken “in violation of international law and in circumvention of the Charter.” U.N. SCOR, 58th Sess., 4726th mtg. at 26, U.N. Doc. S/PV.4726 (Resumption 1) (Mar. 27, 2003).

90. See, e.g., Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT’L L. 804, 806 & n.10 (2003) (listing authorities); Turner, *supra* note 2, at 791 (“[M]ost international lawyers—even those within the United States—believe Operation Iraqi Freedom to have been an unlawful use of force.”); Yoo, *supra* note 32, at 791 (“[A]lmost the entire international legal academy” views the invasion of Iraq as illegal.); see also Murphy, *supra* note 81, at 177 (2004) (“[T]he United States and its allies did not have Security Council authorization in March 2003 to invade Iraq.”); Weisburd, *supra* note 29, at 540 (“[N]one of the resolutions of the Security Council can fairly be interpreted as authorizing the conquest of Iraq by the United States and the United Kingdom [and] analyses supporting the legality of that conquest by analogy to lawful responses to breaches of cease-fire agreements are inapposite . . .”). *But see* Greenwood, *supra* note 30, at 36 (concluding that states that resorted to the use of force against Iraq “were right to conclude that they could rely on the authorization of military action in resolution 678, read together with resolutions 687 and 1441”); Wedgwood, *supra* note 3, at 582 (arguing that the “mandates of Resolutions 678 and 687 . . . suffice to ground the allied action against Saddam’s regime”).

anticipatory self-defense, it may be difficult to draw generalizations about the lawfulness of using force to confront states, like Iraq, that present a threat to others because they possess—or seek to acquire—WMD. The reaction of the international community in a comparable case, however, suggests that the existence of a WMD threat is not by itself viewed as sufficient to justify the use of force in self-defense by those states that perceive themselves to be endangered by it.

In 1981 Israeli forces attacked a nuclear reactor near Baghdad that Israel feared was part of an Iraqi nuclear weapons program aimed at destroying Israel.<sup>91</sup> In doing so, Israel invoked its right of self-defense “within the meaning of this term in international law and as preserved also under the [United Nations] Charter.”<sup>92</sup> Despite the fact that a formal state of war existed between Israel and Iraq, and notwithstanding Israel’s assertion that Iraq was “coldly planning [Israel’s] nuclear obliteration,”<sup>93</sup> the Security Council “strongly condemn[ed]” Israel’s actions as a clear violation of the U.N. Charter.<sup>94</sup> Israel’s self-defense claim failed, according to Thomas Franck, because it was “not able to demonstrate convincingly that there was a strong likelihood of an *imminent* nuclear attack by Iraq.”<sup>95</sup> The lesson is that under the law of self-defense—even assuming the Charter has developed to recognize a right of anticipatory self-defense—the gravity of a WMD-related threat does not obviate the requirement that a threatened state face an imminent attack before it is entitled to use force.

### III. NEW DOCTRINES FOR NEW SECURITY THREATS

If, as the preceding Part suggested, contemporary international law prohibits or significantly limits the capacity of states to use of force to confront the new security threats, the question for many is whether it is the use of force or the law that is to be condemned. The conclusion for many commentators and some states is that existing international law cannot adequately address today’s security threats.<sup>96</sup> From this perspective, new international law norms must be developed to enable states to respond adequately to these threats.<sup>97</sup>

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91. See U.N. SCOR, 36th Sess., 2288th mtg. ¶ 44, U.N. Doc S/PV.2288 (June 19, 1981) (statement of the representative of Israel before the Security Council).

92. *Id.* ¶ 190 (statement of the Israeli representative). Israel’s representative before the Security Council specifically cited scholarly authority upholding the right of anticipatory self-defense. *Id.*

93. *Id.* ¶ 194 (statement of the Israeli representative); see also WEISBURD, *supra* note 84, at 288 (noting that “Iraqi official sources had repeatedly stressed Iraq’s intention to acquire nuclear weapons for use against Israel”).

94. S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981) (emphasis omitted).

95. FRANCK, *supra* note 28, at 106 (emphasis added).

96. See *supra* text accompanying notes 1-8; see also Arend, *supra* note 3, at 102 (referring to the “deficiency in the current legal structure” governing the use of force).

97. See Arend, *supra* note 3, at 101 (explaining that U.S. government statements

*A. New Use of Force Doctrines: Terrorism*

Terrorism presents substantially different challenges than the traditional state-to-state security threats that have been the principal focus of the rules governing the use of force. Terrorists operate in secrecy, often blending in with the civilian population, and typically attack using means other than large formations of conventionally armed troops. It is accordingly more difficult to detect in advance terrorist preparations to attack. In addition, terrorists typically do not control territory, and they have no population to defend, making terrorist attacks more difficult to deter through the threat of counterattack. These features of terrorism have led both strategists and commentators to propose, either explicitly or implicitly, a number of modifications to the law governing the use of force to adapt it to the threat of terrorism.

*1. Permitting the use of force on the territory of states where terrorists are found*

Since September 11, the United States has used substantial military force against terrorist actors in Afghanistan, as well as in an isolated case in Yemen.<sup>98</sup> In doing so, it has rejected the view that a state's right of self-defense must give way to the territorial integrity of the state where terrorists are located.<sup>99</sup> This assertion of an unqualified right of self-defense against non-

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reflect the view that because "WMD and terrorism pose a threat that was completely unanticipated in traditional international law, the law must be reinterpreted").

98. U.S. forces have also participated in military operations against terrorist organizations in a number of other countries, including the Philippines and the Republic of Georgia. See DAVID OCHMANEK, RAND, MILITARY OPERATIONS AGAINST TERRORIST GROUPS ABROAD: IMPLICATIONS FOR THE UNITED STATES AIR FORCE iii (2003); see also Seth Mydans, *Threats and Responses: Asian Front; Filipinos Awaiting U.S. Troops with Skepticism*, N.Y. TIMES, Feb. 28, 2003, at A11 (reporting that for the first time since the Second World War, the United States adopted a combat role in the Philippines). U.S. forces are also reportedly engaged in military operations in Pakistan, although this has not been officially acknowledged by the governments concerned because "[t]he presence and activities of U.S. military personnel in Pakistan is a subject of great sensitivity." K. ALAN KRONSTADT, CONG. RESEARCH SERV., PAKISTAN-U.S. ANTI-TERRORISM COOPERATION 13 (2003); see also Michael Clarke, *Growing Arc of Crisis*, WORLD TODAY, Nov. 1, 2004, at 1 (stating that U.S. special forces are "believed to operate at least in Pakistan," as well as in Jordan, Israel, and Yemen).

99. Franck suggests that "there may be emerging in the political organs a greater tolerance for states that carry their wars with terrorists and insurgents across borders to strike at safe havens." FRANCK, *supra* note 28, at 65; see also Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87, 123-24 (2004) (arguing that when a state "is harboring or otherwise supporting a terrorist organization planning [unlawful] attacks," the potentially affected state may lawfully "exercise preemptive force against such terrorist organizations"); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 565 (1999) (arguing that the United States had the right to attack Al Qaeda facilities in Sudan and

state actors, even if it is not an entirely novel principle, resolves the tension between the right of self-defense and the territorial integrity of states where terrorists are found differently than it has traditionally been resolved by the international community.<sup>100</sup> As such, the claimed right of self-defense against terrorist groups reflects an attempt to favor the interests of states that have suffered terrorist violence over the interests of the states where those terrorists are based.

## 2. *Use of force in the absence of an armed attack*

U.S. officials have also claimed, at least rhetorically, the right to use force against even terrorists who have not engaged in an armed attack against the United States. In a speech shortly after the September 11 attacks, President Bush stated that the “war on terror begins with Al Qaeda, but it does not end there.”<sup>101</sup> Rather, the President indicated that the war “will not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>102</sup> Insofar as the United States has asserted the right to use force against international terrorists wherever they may be found, in furtherance of a policy of seeking “to disrupt and destroy terrorist organizations of global reach,”<sup>103</sup> the United States does not appear to recognize that a terrorist group must commit an “armed attack” against the United States before it may be targeted.<sup>104</sup>

The position articulated by Executive Branch officials could represent two proposed modifications to the law governing the unilateral use of force. First, it

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Afghanistan following the 1998 East Africa Embassy bombings; where a country “permits the use of its territory as a staging area for terrorist attacks,” the territorial state “cannot expect to insulate its territory against measures of self-defense”).

100. As noted, the prevailing response of international institutions to states’ uses of force against nonstate terrorist facilities located abroad has been to object to the violation of the territorial integrity of the states where those uses of force took place. *See supra* Part II.A.4.

101. President’s Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) [hereinafter Bush September 20th Address], available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

102. *Id.*; see also THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002) [hereinafter NATIONAL SECURITY STRATEGY 2002], available at <http://www.whitehouse.gov/nsc/nss.pdf> (“The United States of America is fighting a war against terrorists of global reach.”); THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 8 (2006) [hereinafter NATIONAL SECURITY STRATEGY 2006], available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf> (“We are fighting a new enemy of global reach.”). The 2006 National Security Strategy largely reaffirms, and nowhere limits or repudiates, the strategic security doctrines to counter terrorism and WMD proliferation threats articulated in the 2002 National Security Strategy.

103. NATIONAL SECURITY STRATEGY 2002, *supra* note 102, at 5.

104. NATIONAL SECURITY STRATEGY 2006, *supra* note 102, at 12 (noting U.S. policy to “[p]revent acts by terrorist networks before they occur”).

is possible that the United States is identifying terrorist organizations as legitimate targets for attack, even if they have neither engaged in an armed attack nor present a threat of launching attacks. In this light, at least one commentator apparently takes the view that the inherent insecurity generated by groups committed to terrorist means, regardless of their specific intentions or capabilities, provides a justification for states to use force against them. Under this view, states should be permitted to use force “to destroy terrorist groups operating in countries that do not carry out their legal obligations to suppress them,”<sup>105</sup> with no requirement of a link to an actual or threatened armed attack.

Second, the U.S. assertion of its right to use force against terrorist groups other than Al Qaeda might be read as a claim to use force against terrorists who are engaged in or threaten violence that is not of such “scale and effect” as to constitute an armed attack in the sense described by the ICJ in *Nicaragua*. Even “less grave” uses of force by terrorist actors could, in the view advanced by the United States, trigger a right to use force in self-defense.<sup>106</sup> It seems plausible to assume that the United States would assert a right to use force in self-defense against even relatively low-intensity acts of violence by terrorist groups. This would reflect a departure from the traditional right of self-defense, at least as articulated in the *Nicaragua* case.<sup>107</sup>

### 3. Use of force against states that harbor or support terrorists

In addition to claiming a right to use force against terrorist groups found on the territory of states abroad, the United States has asserted, and exercised against the Taliban regime in Afghanistan, the right to use force against states whose governments harbor or support terrorists, even where the terrorists’ conduct may not be legally attributable to the state. The 2002 National Security

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105. Gardner, *supra* note 4, at 589.

106. The divergence of views about the severity or intensity of violence that was required to trigger a right of self-defense against acts of terrorism had emerged well before the events of September 11. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 159-62 (1993).

107. A third possibility is that the assertion of a right to use force against terrorist groups that have not yet launched an armed attack is merely another formulation of the doctrine of preemptive self-defense that has been advanced by the United States. See *infra* Part III.C.1. To the extent the Executive Branch is claiming a right to use force against terrorist organizations regardless of whether they pose a serious threat—imminent or otherwise—of using force against the United States, however, the claim is conceptually distinct. Finally, it may be that the assertion by Administration officials of a right to use force against *any* terrorist organization is solely rhetorical. The United States has not used force against nonstate terrorists not alleged to be affiliated with Al Qaeda and the September 11 attacks, at least not overtly. In this regard, it is notable that the target of the November 2002 U.S. missile strike in Yemen was a suspected Al Qaeda operative in Yemen. See James Risen & Judith Miller, *C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen*, N.Y. TIMES, Nov. 5, 2002, at A6.

Strategy declares that the United States will disrupt and destroy terrorist organizations in part by denying “sponsorship, support, and sanctuary to terrorists by convincing *or compelling* states to accept their sovereign responsibilities.”<sup>108</sup> In a major post-September 11 speech, President Bush announced:

[W]e will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.<sup>109</sup>

To similar effect, in a 2003 speech, the then-Director of the State Department Policy Planning Staff argued that force could be used against states that “abet, support, or harbor international terrorists, or are incapable of controlling terrorists”<sup>110</sup> operating from their territories:

[S]overeign status is contingent on the fulfillment by each state of certain fundamental obligations, both to its own citizens and the international community. When a regime fails to live up to these responsibilities or abuses its prerogatives, it risks forfeiting its sovereign privileges—including, in extreme cases, its immunity from armed intervention.<sup>111</sup>

This doctrine claims an entitlement to do more than use force incidentally on a state’s territory in the course of operations against nonstate terrorists. It contemplates targeting the harboring state and its governmental organs directly.<sup>112</sup> Providing a legal basis for this doctrine requires one of three modifications to the law governing the use of force. First, the threshold for imputing responsibility to a state for the acts of nonstate actors could be lowered, a proposition some legal commentators have endorsed.<sup>113</sup> Second, expansive doctrines of vicarious liability independent of traditional state responsibility doctrines could be adopted to allow force to be used against

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108. NATIONAL SECURITY STRATEGY 2002, *supra* note 102, at 6 (emphasis added).

109. Bush September 20th Address, *supra* note 101, at 1142; *see also* NATIONAL SECURITY STRATEGY 2006, *supra* note 102, at 12 (“The United States and its allies in the War on Terror make no distinction between those who commit acts of terror and those who support and harbor them . . .”).

110. Richard N. Haass, Dir., Policy Planning Staff, U.S. Dep’t of State, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks at Georgetown University (Jan. 14, 2003) (transcript available at <http://www.state.gov/s/p/rem/2003/16648.htm>).

111. *Id.*

112. It is important to stress that assertion of a right to use force against states that harbor terrorists is quite distinct from the incidental violation of a harboring state’s territorial integrity in the course of an attack on terrorist actors.

113. *See, e.g.,* Jack M. Beard, *America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL’Y 559, 581-82 (2001) (“While a state may have once argued that the actions of terrorist organizations did not impose responsibility on that state under Article 2(4) of the U.N. Charter and did not subject them to forcible measures in response under Article 51, those conditions no longer appear to pertain . . .”).



governments of territories from which terrorist groups initiate attacks.<sup>114</sup> Third, forcible reprisals could be accepted as lawful in the case of breaches by a state of its legal obligation not to acquiesce in organized activities within its territory directed towards, or to harbor groups dedicated to, the commission of terrorist acts against other states.<sup>115</sup>

*B. New Use of Force Doctrines: Weapons of Mass Destruction in the Hands of Dangerous States and the “Duty to Prevent”*

As with terrorism, the possession of weapons of mass destruction by dangerous states, particularly authoritarian regimes that show little regard for the well-being of their populations, presents major challenges for the traditional deterrence-based security policies that inform the law on the use of force. States that have manifested disregard for the prohibition on aggression pose especially serious dangers if they acquire weapons of mass destruction. At least one significant proposed doctrinal development—the call for a legal duty to prevent certain states from acquiring the capacity to produce weapons of mass destruction—has emerged in recent years to respond specifically to these dangers.

A network of widely embraced arms control and nonproliferation agreements bars state parties from acquiring weapons of mass destruction. For instance, all parties to the 1968 Nuclear Non-Proliferation Treaty (NPT), other than the five declared nuclear powers, pledge not to acquire nuclear weapons. The 1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (CWC) prohibit the possession of biological and chemical weapons and require those states that already possess such weapons to destroy their stocks. Each of these agreements, however, permits states to pursue the acquisition and development of materials and technologies that are capable of being used to produce weapons of mass destruction, provided that they are used for peaceful and not military purposes. Under these treaties, the traditional sovereign right of states to develop industries that could be used to produce weapons of mass destruction is not impeded; it is only the actual production and acquisition of such weapons that is prohibited.

Governments, international organizations, and commentators have all expressed concern about the adequacy of this legal regime. They note that it allows states to acquire materials and technology that could bring them to the brink of WMD production. States that have reached this stage are then free to

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114. See, e.g., Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 13-17 (2003); Kastenber, *supra* note 99, at 123 (arguing that states guilty of “aiding and abetting” terrorist organizations forfeit their international law protection against the use of force).

115. See, e.g., Kastenber, *supra* note 99, at 125 (arguing that a state that grants terrorist groups safe haven or offers other support “may be subject to military attack”).

withdraw from the relevant treaties and to pursue WMD production. In addition, even states that remain within the nonproliferation regime may cheat and attempt to develop clandestine WMD programs.

To counter this shortfall in the nonproliferation regime and the concomitant risk to international security, two influential commentators have proposed the recognition of a customary law duty to prevent states of special concern from acquiring WMD-related goods and technologies. Lee Feinstein and Anne-Marie Slaughter argue for the acceptance of a duty that would entail “the responsibility of states to work in concert to prevent governments that lack internal checks on their power from acquiring WMD or the means to deliver them.”<sup>116</sup> Under this norm, states would be bound to prevent the export of materials and technologies that members of the nonproliferation regime would otherwise be entitled to receive, such as technology related to civilian nuclear programs.<sup>117</sup>

The proposed duty to prevent the spread of WMD to states whose governments lack internal controls goes well beyond the coordinated implementation of export and financial control measures. It also potentially entails the use of force to confront “the most serious proliferation dangers.”<sup>118</sup> Where force is to be used, the proponents of this doctrine argue that the Security Council is the “preferred enforcer.”<sup>119</sup> Nevertheless, if the Security Council fails to act, the “duty to prevent” ultimately serves as an independent legal basis for the exercise of force through “unilateral action or coalitions of the willing.”<sup>120</sup> To the extent it is not linked to traditional requirements for self-defense or collective security, the duty to prevent would substantially alter the conditions under which force may be used to counter security threats related to WMD proliferation.

### C. *New Cross-Cutting Use of Force Doctrines*

#### 1. *Preemption and prevention*

Perhaps the most significant proposed modification to the legal regime governing the use of force prompted by the new security threats is to liberalize the conditions under which a state would be allowed to use of force in self-defense *before* it has sustained an armed attack. To counter the threats of WMD proliferation and terrorism, the U.S. government has espoused a right to use *preemptive* force in self-defense. The proposed doctrine of “preemptive” or

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116. Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFF., Jan.-Feb. 2004, at 136, 142.

117. *Id.* at 145.

118. *Id.* at 148.

119. *Id.*

120. *Id.* at 149.

“preventive” use of force would alter the concept of “imminence” under the principle of anticipatory self-defense.<sup>121</sup>

In the context of weapons of mass destruction, the potentially devastating consequences of a WMD attack make unacceptable to most governments the prospect of waiting to use force until an armed attack occurs. In addition, the use of missile technology to deliver WMDs makes it difficult to assess when an attack is “imminent.”

These features of the WMD threat have prompted U.S. strategists to call for adaptations to the doctrine of anticipatory self-defense. The 2002 National Security Strategy starts from the premise that under settled international law, “nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”<sup>122</sup> In view of new technological and security threats, the document declares, “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”<sup>123</sup> Gravity, in addition to temporal proximity, should determine whether self-defense may be used prior to an actual attack:

The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>124</sup>

The right to use force in advance of an attack espoused in the National Security Strategy entails an entitlement by states to use force not only to *preempt* the possible use of weapons of mass destruction, but also to *prevent* dangerous states from even acquiring WMD capability.<sup>125</sup> The 2002 National

121. The use of the term “preemption” in the U.S. National Security Strategy creates some conceptual difficulties. As noted below, the doctrine articulated in the National Security Strategy document would more appropriately be termed “prevention.” See *infra* note 125 and accompanying text.

122. NATIONAL SECURITY STRATEGY 2002, *supra* note 102, at 15. The National Security Strategy describes this right to use force to forestall an imminent attack as “preemption.” *Id.* At least as used in this traditional formulation, however, international lawyers conventionally refer to the concept of preemption as “anticipatory self-defense.”

123. *Id.*

124. *Id.*; see also NATIONAL SECURITY STRATEGY 2006, *supra* note 102, at 18 (“[T]he United States will, if necessary, act preemptively in exercising our inherent right of self-defense.”); *id.* at 23 (“[U]nder long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack.”).

125. Security strategists typically define a “preemptive” military attack as the use of force “to quell or mitigate an *impending* strike by an adversary.” Charles W. Kegley, Jr. & Gregory A. Raymond, *Preventive War and Permissive Normative Order*, 4 INT’L STUD. PERSP. 385, 388 (2003) (emphasis added). In this sense, preemptive force is comparable to anticipatory self-defense, which is available in the face of an *imminent* threat. A preventive attack, in contrast, “entails the use of force to eliminate any possible future strike, even when there is no reason to believe that aggression is planned or the capability to launch such an attack is operational.” *Id.* Preemptive force is taken in response to “a credible, imminent

Security Strategy states that the United States will use not only international cooperation to “deny, contain, and curtail our enemies’ efforts to acquire dangerous technologies,” but that “as a matter of common sense and self-defense, America will act against such *emerging threats* before they are fully formed.”<sup>126</sup>

Terrorist threats also have stimulated calls for changes in prevailing legal norms so as to allow the use of either preemptive or preventive force. The U.S. National Security Strategy asserts that in confronting international terrorism, the United States will exercise its right of self-defense “by acting preemptively” against terrorists “to prevent them from doing harm against our people and our country.”<sup>127</sup> To like effect, the proposed legislative language the Executive Branch provided to Congress following the September 11 attacks would have authorized force not only against those implicated in the events of September 11, but also “to deter and pre-empt any future acts of terrorism or aggression against the United States.”<sup>128</sup>

A number of academic commentators have endorsed the view that the traditional temporal character of the “imminence” requirement for anticipatory

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threat,” but preventive force “rests on the suspicion of an incipient, contingent threat.” *Id.* Although the National Security Strategy frames the claim to use force in self-defense before an armed attack occurs in the language of preemption, the document in fact articulates a right to what strategists would describe as preventive military action. *Id.* at 389. It is notable that Russia, according to an article by its Permanent Representative to the United Nations, understands the 2002 National Security Strategy as articulating a right of preventive self-defense. See L. Skotnikov, *The Right of Self-Defense and the New Security Imperatives*, 6 INT’L AFF.: A RUSS. J. WORLD POL., DIPL. & INT’L REL., Dec. 31, 2004, at 13, 13 (“Although the term used in the [National Security] Strategy is ‘preemptive’ self-defense, in actual fact it envisages preventive measures.”).

126. President George W. Bush, *Introduction to NATIONAL SECURITY STRATEGY 2002*, *supra* note 102 (emphasis added); see also NATIONAL SECURITY STRATEGY 2006, *supra* note 102, at 23 (“When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize.”); NATIONAL SECURITY STRATEGY 2002, *supra* note 102, at 15 (noting the availability of using force to preempt “emerging threats”). The preemption standard articulated in the 2002 National Security Strategy document, according to Thomas Franck, “seeks to forestall a danger before it materializes—rather than just to anticipate or prevent it after it has risen to the level of an actual threat.” Thomas M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INT’L & COMP. L. REV. 425, 428 (2004). As a result, the doctrine, in his estimation, “push[es] back the moment for a military response from when a threat becomes imminent to some undefined earlier time when it becomes conceivable.” *Id.* at 428-29.

127. NATIONAL SECURITY STRATEGY 2002, *supra* note 102, at 6; see also NATIONAL SECURITY STRATEGY 2006, *supra* note 102, at 8 (“The United States can no longer simply rely on deterrence to keep terrorists at bay or defensive measures to thwart them at the last moment. The fight must be taken to the enemy . . . .”); *id.* at 12 (noting, as part of U.S. policy to “[p]revent attacks by terrorist networks,” that the “hard core of the terrorists cannot be deterred or reformed; they must be tracked down, killed, or captured”).

128. David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73 (2002).

self-defense is no longer viable in view of the new security threats.<sup>129</sup> Scholars like John Yoo argue that “the concept of imminence must [instead] encompass an analysis that goes beyond the temporal proximity of a threat to include the probability that the threat will occur.”<sup>130</sup> In addition, “the threatened magnitude of harm must be relevant.”<sup>131</sup> If a state was obligated “to wait until the threat were truly imminent in the temporal sense envisioned [under the *Caroline* standard], there is a substantial danger of missing a limited window of opportunity to prevent widespread harm to civilians.”<sup>132</sup> Abraham Sofaer also argues that in appropriate circumstances, preemption should “properly be regarded as part of the ‘inherent right’ of self-defence.”<sup>133</sup> Similarly, the proposed right to use force to confront the most serious proliferation dangers, a right that is ancillary to Feinstein and Slaughter’s duty to prevent, would also allow force to be used preemptively or preventively in ways that would not be lawful under the existing law of anticipatory self-defense.

## 2. *Necessity and stability*

The doctrines of preemption and prevention, though they would allow force to be used to counter an incipient rather than an imminent attack, nevertheless maintain a connection to the principle that force may be used only in self-defense, i.e., to forestall attacks by an adversary. In comparison, a number of other proposed use of force doctrines entirely eliminate the requirement of a connection to an attack against the state contemplating the use of force.

Abraham Sofaer, for example, suggests that the “proper standard” for evaluating whether a state’s use of force is lawful is “necessity.”<sup>134</sup> Whether

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129. See, e.g., Yoo, *supra* note 32, at 751 (arguing for a reconceptualization of the imminence requirement for self-defense “to take into account the magnitude of the harm of a possible attack and the probability that it will occur, rather than focusing myopically on temporal imminence”). Other scholars, however, argue that the conditions governing anticipatory self-defense under customary international law were “far broader” than reflected in the temporal imminence test set out in *The Caroline Case*, and that the right to use force in a broadly anticipatory manner survived the adoption of the Charter. See Rivkin et al., *supra* note 84, at 469, 471. Under this view, the right to use preventive force is not a new legal standard, but a continuing one.

130. Yoo, *supra* note 84, at 572; see also Yoo, *supra* note 32, at 753 (arguing that a state’s flexibility to use force in anticipation of an attack should increase as “the likelihood of an attack increases”). Abraham Sofaer also identifies the “[l]ikelihood of [a] [t]hreat being [r]ealized”—even where that threat is not imminent—as one of the factors to consider in evaluating the lawfulness of a preventive use of force. Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 221-22 (2003).

131. Yoo, *supra* note 84, at 572; see also Sofaer, *supra* note 130, at 221 (considering the “potentially horrendous” nature of possible Iraqi attacks in evaluating whether the threat of such attacks justified preemptive force); Yoo, *supra* note 32, at 755 (international law of anticipatory self-defense “should take into account the potential magnitude of harm”).

132. Yoo, *supra* note 84, at 574.

133. Sofaer, *supra* note 130, at 226.

134. *Id.* at 212.

force is necessary must be determined, employing the methods of a “common lawyer,”<sup>135</sup> on the basis of “all the relevant circumstances, in light of the purposes of the UN Charter.”<sup>136</sup> John Yoo advances a similar proposed framework to evaluate the lawfulness of the use of force that eschews a specific connection to self-defense. Drawing from economics scholarship, Yoo contends that the use of force should be permitted to promote “international stability or security,” a “public good” that is potentially underproduced in international affairs.<sup>137</sup> He argues that the test for the lawfulness of the use of unilateral force should turn on “a cost-benefit analysis that takes into account the benefits of maintaining international stability, and of preserving lives, balanced against the predicted costs of a war to both the attacked nation and the attacker.”<sup>138</sup>

Both Sofaer and Yoo consider the use of force to counter the threat of terrorism in a case like Afghanistan and to prevent dangerous states such as Iraq from acquiring WMD programs to be permissible under the frameworks they advance.<sup>139</sup>

#### IV. COLLECTIVE SECURITY AND THE NEW SECURITY THREATS

The focus of commentators and some states on the need for new doctrinal bases to expand the right to use force unilaterally to address today’s security environment ignores or discounts the role of collective security in meeting the new threats. This Part examines the suitability and availability of the collective security mechanism for addressing the new security threats, taking into account the relationship between collective action and the interests of the Permanent Members of the Security Council.

##### A. *Collective Security and the Balance of Power*

On its face, the standards-based entitlement to use force for collective security allows the international community to address a much broader range of threats than does the right of self-defense under Article 51. The new security threats that bedevil the international community—the presence of terrorists in

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135. *Id.* (citing Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396 (1965)).

136. *Id.* Robert Turner advances an argument similar to Sofaer’s, suggesting that the best approach to determining the legality of the use of force in the face of threats of international terrorism and the proliferation of WMD is to “evaluate the threats in terms of the totality of the circumstances.” Turner, *supra* note 2, at 793.

137. Yoo, *supra* note 32, at 785.

138. *Id.* at 787; *see also id.* at 794 (comparing “the costs of military intervention and its secondary destabilizing effects” with the benefits of stabilizing the international order is “the better way to judge the legality of use of force”).

139. Sofaer, *supra* note 130, at 220-26; Yoo, *supra* note 32, at 789-91.

countries that harbor or fail to suppress them and the potential acquisition of weapons of mass destruction by dangerous states—fall much more cleanly within the category of “threats to international peace and security” than the category of “armed attacks.” Nevertheless, the use of force under the collective security umbrella has been extremely limited since the Charter was adopted.<sup>140</sup> The Security Council’s paralysis arose from the fact that most security challenges confronting the international community since the adoption of the Charter have involved competing interests of the five Permanent Members of the Security Council, each of which was empowered to block the Council from acting.

The international security system in place during the adoption of, and memorialized in, the U.N. Charter was a balance of power system, a system predicated on the formation of alliances by states to prevent other states from dominating them. The Second World War was fought by such an alliance of five states (the United States, the Soviet Union, the United Kingdom, France, and China) against three increasingly assertive allied adversaries (Germany, Japan, and Italy). The U.N. Charter formalized this particular alliance by making the five victorious powers Permanent Members of the Council. The structure was intended to ensure that the members of the alliance that prevailed during the Second World War would be on permanent call to confront the emergence of threats to their collective interests by the vanquished or by other emerging powers.

Where the interests of the Permanent Five are at variance, however, the authority in the Charter to use force to respond to threats short of armed attack is as a practical matter unavailable. As Joseph Nye has written, the Security Council “was specifically designed to be a concert of large powers that would not work when they disagreed.”<sup>141</sup> Thomas Franck notes that during the negotiations leading to the Charter, a “largely un contemplated” issue was “what would happen if a palpable threat to peace were to arise but the Security

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140. The authorization to use force to expel Iraqi forces from Kuwait in 1990 was only the second time in its history that the Security Council authorized the use of force under its collective security powers. (The first case was the 1950 authorization to use force following North Korea’s invasion of South Korea. *See* S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950); S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).) The 1990s witnessed a number of additional instances in which the Security Council authorized the use of force to compel compliance with its previous decisions in the absence of the territorial state’s consent. *See* TREVOR FINDLAY, *THE USE OF FORCE IN UN PEACE OPERATIONS* (2002).

141. Joseph S. Nye, Jr., *U.S. Power and Strategy After Iraq*, *FOREIGN AFF.*, July-Aug. 2003, at 60, 68. Similarly, Ian Hurd describes the Security Council as representing a political compromise to manage the competing interests of the great powers. The UN Charter clearly grants the council power to intervene in the domestic affairs of states, but its five permanent members can each block any such intervention using their veto. There was no expectation at San Francisco that the council’s contribution to world order would be to regulate the foreign adventures of the permanent members. The veto meant that these states were deliberately shielded from all accountability to the council; and without such protection, they would never have agreed to the UN in the first place.

Ian Hurd, *Too Legit to Quit*, *FOREIGN AFF.*, July-Aug. 2003, at 204, 204-05.

Council (either for lack of a majority or by exercise of the veto) were unable to act?"<sup>142</sup> Based on "the strength of wartime cooperation among allied powers," it was assumed that the Council would be able to "make speedy and objective decisions as to when collective measures were necessary."<sup>143</sup>

This assumption, of course, proved gravely mistaken. As one might expect in any balance-of-power regime, as the relative power of the various states in the system changed, relations among one-time allies and among one-time adversaries shifted.<sup>144</sup> The common interests that united the United States and the Soviet Union during the Second World War gave way to a tense rivalry, with communist China frequently allying with the Soviets. The three defeated major powers—Germany, Japan, and Italy—joined the bloc led by the United States.<sup>145</sup> Most of the security threats that emerged after the Second World War were either regional conflicts or internal conflicts in which the competing factions were proxies for, or were at least supported by, members of the competing Cold War blocs.<sup>146</sup> Because the interests of the Permanent Members were at variance during these conflicts, and because the veto power ensured that each of the Permanent Members could prevent Security Council action, the collective security mechanism was stymied during the post-war era.<sup>147</sup>

After the collapse of the Soviet Union, there was great hope that the paralysis that had gripped the Security Council throughout the Cold War could be overcome. The Council's authorization to use force in Iraq, Somalia, and Haiti reinforced this hope. Since then, however, the international balance of power has become more fragmented. Europe increasingly pursues interests that

142. FRANCK, *supra* note 28, at 31.

143. Thomas Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 52 (2001).

144. Balance-of-power theory starts from the premise that "states form alliances in order to prevent stronger powers from dominating them." STEPHEN M. WALT, *THE ORIGINS OF ALLIANCES* 18 (1987); *see also* KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 116-28 (1979) (developing a neo-realist theory of international politics based on balance of power principles). At the same time, the competition between states in an anarchic world order generates an "unrelenting pursuit of power [which] means that great powers are inclined to look for opportunities to alter the distribution of world power in their favor." JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 3 (2001).

145. WALT, *supra* note 144, at 3 ("More than anything else, the Cold War between the United States and the Soviet Union has been a competition for allies."); *see also* Weisburd, *supra* note 29, at 555 (indicating it has become clear since 1945 that "cooperation among [the then-]dominant states is not a given").

146. *See* FRANCK, *supra* note 28, at 69 (Although the phenomenon "of encouragement given by communist states to peoples' liberation movements and by Western states to democratic resistance groups behind the Iron Curtain . . . rarely implicated outright military subversion of a government, it had important geopolitical ramifications during the Cold War, when any overturning of a government aligned with either the USSR or the US was seen to have direct strategic consequences for the balance of power.").

147. Weisburd, *supra* note 29, at 556 (arguing that because "states' relative power can change over time," any system that "institutionaliz[es] the dominance particular states enjoy at a particular time will almost surely become obsolete").



do not align with those of the United States. Russia and China each also have strategic interests that clash with those of the other members of the Security Council. Although they are unable to match the economic or military power of the United States, the other Permanent Members of the Security Council stand on equal footing with the United States in terms of the procedures of the Charter. Through the veto, they are able to preclude the Council from authorizing the use of force under Chapter VII.

The refusal of the Council to authorize the use of force against the Federal Republic of Yugoslavia during the Kosovo crisis in 1999 and against Iraq in 2003 seems, to many observers, to demonstrate that a new and more complex set of rivalries has once again gridlocked the Council. In this vein, Michael Glennon has argued that the refusal of the Council to authorize the use of force against Iraq reflected a

shift in world power toward a configuration that was simply incompatible with the way the UN was meant to function. It was the rise in American unipolarity—not the Iraq crisis—that, along with cultural clashes and different attitudes toward the use of force, gradually eroded the council’s credibility. . . . The fault for this failure did not lie with any one country; rather, it was the largely inexorable upshot of the development and evolution of the international system.<sup>148</sup>

“[A]lthough the UN’s rules purport to represent a single global view—indeed, universal law—on when and whether force can be justified,” Glennon contends, “the UN’s members . . . are clearly not in agreement.”<sup>149</sup>

Commentators who call for the development of new legal doctrines or new institutional arrangements for the unilateral use of force either believe or assume that the political gridlock witnessed in the Security Council since the Kosovo campaign will persist.<sup>150</sup> They appear to accept Glennon’s premise that the structure of the Council, requiring unanimity among the Permanent Members before force may be used, does not reflect the “underlying geopolitical dynamics.”<sup>151</sup>

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148. Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May-June 2003, at 16, 18.

149. *Id.* at 21.

150. See, e.g., Rivkin et al., *supra* note 84, at 477 (criticizing reliance on the Security Council, where “five often mutually competitive if not outright hostile powers enjoy veto authority” to address emerging security threats).

151. Glennon, *supra* note 148, at 30; see also Michael J. Glennon, *Seventeenth Waldemar A. Solf Lecture in International Law*, 181 MIL. L. REV. 138, 146 (2004) (arguing the rules governing the use of force in the U.N. Charter “have fought a losing battle with geopolitical reality”); Weisburd, *supra* note 29, at 555-57 (arguing that the U.N. Charter’s collective security system does not function in light of geopolitical developments since 1945, including the emergence of only one state with global military capabilities); Yoo & Trachman, *supra* note 7, at 386 (arguing that the Permanent Members of the Security Council are “likely to have differing interests in different regions of the world, based on economic and political ties”).

### B. *New Security Threats and Converging Permanent Five Interests*

What the recent move to identify alternative bases for the use of force overlooks is the possibility that the collective security mechanism in the U.N. Charter is actually well-suited to confronting today's new security threats. The security threats that characterized the second half of the twentieth century were conflicts *between* the Permanent Members after shifts in the balance of power caused their war-time alliance to fracture, often carried out indirectly via proxy states or groups.<sup>152</sup> For a great many other international conflicts, Security Council inaction stemmed not from the fact that those conflicts implicated the competing interests of the Permanent Members, but because they did not implicate their vital interests at all.<sup>153</sup>

Today's threats of terrorism and the proliferation of weapons of mass destruction, in contrast, are matters that increasingly present common challenges to the interests of the Permanent Members of the Security Council. As this Subpart demonstrates, each of the Permanent Members, as a matter of self-interest, is increasingly committed to national policies aimed at actively countering the new security threats. This growing convergence of interests has produced enhanced counterterrorism and nonproliferation cooperation among the Permanent Members. This, in turn, has increased the prospects for greater reliance on the collective security apparatus of the U.N. Charter.

#### 1. *Terrorism*

Each of the Permanent Five members of the Security Council has come increasingly to see international terrorism and state sponsors of terrorism as serious threats to their national interests. Moreover, Islamist terrorism in particular threatens to unleash turmoil in other regions, especially the Middle East, where most if not all of the Permanent Members have a strong interest in stability because of their dependence on oil exports from the region.<sup>154</sup> Terrorism more fundamentally undermines a stable global order favored by the Permanent Members in which issues of power and security are determined by

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152. Examples of conflicts implicating competing great power interests include the 1956 Suez Canal crisis, when the Soviet Union and the United States strongly opposed, but British and French troops participated in, Israel's attack against Egypt, WEISBURD, *supra* note 84, at 29-33, and the Soviet invasion of Afghanistan, which the United States, United Kingdom, and France staunchly opposed, *id.* at 44-46. The civil wars in El Salvador and Nicaragua during the 1980s represent examples of conflicts between the interests of the Soviet Union and the United States carried out largely through proxy forces.

153. Examples include Indonesia's 1960 incursions into the Dutch colony of West Irian and Tanzania's 1979 invasion of Uganda. As Mark Weisburd notes, "states have shown a great reluctance to involve themselves actively in wars, the effects of which were unlikely to be felt other than by the participants." Weisburd, *supra* note 29, at 552.

154. Yoo & Trachman, *supra* note 7, at 390 (noting the sensitive balance of power in the "oil-rich and strategically important Middle East").

sovereign states. As a result, the Permanent Members view international cooperation in suppressing transnational terrorism as a prominent foreign policy priority, and they all accept in principle that there may be circumstances in which the use of force is an appropriate response to a terrorist threat.

The United Kingdom has long experience with terrorism, both terrorism connected with Northern Ireland and international terrorism.<sup>155</sup> Since September 11, however, the British government's assessment of the gravity of the threat of terrorism has changed: "The nature of the challenge was revealed in a new light—international terrorism could be more than a heinous crime: it could represent a threat to international security."<sup>156</sup> International terrorism now has been characterized as "the principal threat to the UK's national security."<sup>157</sup> Islamist groups linked to Al Qaeda are at the center of the terrorist threat faced by the United Kingdom; the Director-General of the internal British Security Service has said that Osama Bin Laden "has specifically mentioned the UK as a potential target" for terrorist attacks.<sup>158</sup> In July 2005, the United Kingdom suffered a devastating terrorist attack—a series of nearly simultaneous bomb attacks against the London public transportation system that killed fifty-six people and injured more than 700. A previously unknown organization calling itself the "Secret Organization of Al Qaeda in Europe" claimed responsibility for the attacks, the worst in British memory since the Second World War.<sup>159</sup> The Al Qaeda organization itself has since claimed responsibility for the London bombings,<sup>160</sup> although it remains unclear whether Al Qaeda, or an independent group inspired by it, carried out the attacks.

The official strategy paper of the Foreign and Commonwealth Office (FCO) reflects the growing importance of countering international terrorism to British foreign policy. It identifies terrorism, along with WMD proliferation, as the top strategic threat facing the United Kingdom.<sup>161</sup> As a consequence, the

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155. Bradley W.C. Bamford, *The United Kingdom's "War Against Terrorism,"* 16 *TERRORISM & POL. VIOLENCE* 737, 738 (2004).

156. U.K. CABINET OFF., *THE UNITED KINGDOM AND THE CAMPAIGN AGAINST INTERNATIONAL TERRORISM: PROGRESS REPORT 2-3* (2002), available at <http://www.cabinetoffice.gov.uk/publications/reports/sept11/coi-0809.pdf>; see also U.K. Foreign & Commonwealth Off., *International Terrorism*, <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394239> (highlighting the changing nature of the terrorist threat, including the increasingly "fluid, global, and relatively unpredictable" nature of transnational terrorism).

157. Bamford, *supra* note 155, at 738.

158. Eliza Manningham-Buller, Dir. Gen. of the British Sec. Serv., *Global Terrorism: Are We Meeting the Challenge?*, Lecture at the City of London Police Headquarters (Oct. 16, 2003) (transcript available at <http://www.mi5.gov.uk/output/Page172.html>).

159. Alan Cowell, *Subway and Bus Blasts in London Kill at Least 37*, *N.Y. TIMES*, July 8, 2005, at A1.

160. Sarah Lyall, *London Bombers Visited Earlier, Apparently on Practice Run*, *N.Y. TIMES*, Sept. 20, 2005, at A6.

161. U.K. FOREIGN & COMMONWEALTH OFFICE, *UK INTERNATIONAL PRIORITIES: A STRATEGY FOR THE FCO* 30 (Dec. 2003) [hereinafter *UK INTERNATIONAL PRIORITIES*],

FCO identifies making the world “safer from global terrorism” as one of its “highest strategic policy priorities.” British policy, like American policy, also declares that a counterterrorism policy cannot be limited to terrorist groups themselves, but must also address “the problem of states that offer support to terrorists, or failed states that provide them refuge.”<sup>162</sup>

The United Kingdom’s conduct since September 11 reflects not only its view that international terrorism presents a grave security threat, but also that there are circumstances in which military force is an appropriate counterterrorism tool. Thus, Britain joined other North Atlantic Treaty Organization (NATO) states in invoking Article 5 of NATO’s constitutive treaty, the Treaty of Washington, in the aftermath of the September 11 attacks. Article 5 is the central collective self-defense provision of the Treaty of Washington, which requires NATO member states to treat an armed attack against any of them as an attack against all. In addition, the United Kingdom made substantial contributions to U.S.-led military operations in Afghanistan, including launching cruise missiles from its submarines, permitting American aircraft to operate from its Diego Garcia airbase in the Indian Ocean, and deploying ground troops (including an elite counterterrorist unit) to participate in operations against Al Qaeda and the Taliban.<sup>163</sup> British Prime Minister Tony Blair also engaged in active diplomatic efforts to “build support for U.S. military action in Afghanistan with Arab and Muslim countries and other nations.”<sup>164</sup> These actions reflect British endorsement of the view that the use of force can be an appropriate response to international terrorism and state sponsorship of it.

France, too, has suffered domestic terrorist attacks and has identified suppressing international terrorism as a central foreign policy goal. Indeed, as one commentator notes, “Few states have the history or breadth of engagement with terrorism that has been experienced by France.”<sup>165</sup> Like the other Permanent Members of the Security Council, France now faces a transnational Islamist terrorist threat emanating from Al Qaeda and actors affiliated with it.<sup>166</sup> France’s strong interest in suppressing international terrorism is reflected in statements of French leaders and policy statements. After the bombings of

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available at <http://www.fco.gov.uk/Files/kfile/FCOStrategyFullFinal,0.pdf>. The United Kingdom is also a member of the European Union, which has adopted its own European Security Strategy. The EU’s Security Strategy also identifies terrorism “linked to violent religious extremism” as one of the key threats facing Europe. See A SECURE EUROPE IN A BETTER WORLD: EUROPEAN SECURITY STRATEGY (2003), available at <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>.

162. See also UK INTERNATIONAL PRIORITIES, *supra* note 161, at 31.

163. Bamford, *supra* note 155, at 751.

164. Louis R. Golino, *Europe, the War on Terrorism, and the EU’s International Role*, 8 BROWN J. WORLD AFF. 61, 65 (2002).

165. Shaun Gregory, *France and the War on Terrorism*, 15 TERRORISM & POL. VIOLENCE 124, 124 (2003).

166. *Id.* at 133.

the U.S. embassies in Kenya and Tanzania, for example, then French Prime Minister Jospin declared, "Wherever terrorism is launched from, we must respond with a decisive and firm answer."<sup>167</sup> A statement of French policy on terrorism declares that France "has long shown its determination to fight all forms of terrorism, no matter who is behind it."<sup>168</sup>

Before September 11, French counterterrorism policy was largely limited to police and judicial activities. Since then, however, it has also taken on a military dimension. France has reflected its willingness to both support and employ force to counter terrorism. Following the September 11 attacks, France was "at the forefront in offering military support to the United States including through NATO which activated its Article V defense clause for the first time in its history . . . ."<sup>169</sup> France also pledged "important military contributions" to the U.S.-led campaign in Afghanistan,<sup>170</sup> including the deployment of intelligence forces and personnel to support conventional military operations.<sup>171</sup> French aircraft flew bombing missions in Afghanistan, and French special forces troops continue to fight against the remnants of the Taliban.<sup>172</sup>

Even though the interests of Russia and China regarding traditional security challenges regularly clashed with those of the United States during the Cold War, the assumption that Russian and Chinese interests necessarily diverge from those of the West with respect to terrorism does not withstand scrutiny. Both Russia and China increasingly see their interests as comporting with those of the United States and its traditional allies in responding to terrorism.

As for Russia, its traditional and reflexive tendency to view the United States as a rival is giving way to a more pragmatic approach that recognizes the possibility, and even the importance, of cooperation with the United States and other leading industrialized nations.<sup>173</sup> With respect to terrorism, for instance, Russia faces severe internal security threats related to the separatist insurgency

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167. Edmund L. Andrews, *Backing from Europe*, N.Y. TIMES, Aug. 22, 1998, at A6.

168. Ministry of Foreign Affairs of Fr., France and the Fight Against Terrorism, [http://www.diplomatie.gouv.fr/en/france\\_159/discovering-france\\_2005/france-from-to-z\\_1978/france-and-the-world\\_1989/france-and-the-fight-against-terrorism\\_1475.html](http://www.diplomatie.gouv.fr/en/france_159/discovering-france_2005/france-from-to-z_1978/france-and-the-world_1989/france-and-the-fight-against-terrorism_1475.html).

169. Gregory, *supra* note 165, at 139.

170. Golino, *supra* note 164, at 65.

171. Gregory, *supra* note 165, at 139.

172. U.S. Cent. Command, France: Support to the Global War on Terror, <http://www.centcom.mil/sites/uscentcom1/CoalitionPages/France/France.htm>.

173. See RUSSIAN FEDERATION, THE FOREIGN POLICY CONCEPT OF THE RUSSIAN FEDERATION (2000), available at <http://www.fas.org/nuke/guide/russia/doctrine/econcept.htm> ("Russia attaches great importance to its participation in the Group of 8 of the most industrially developed states. Regarding the mechanism of consultations and coordinating positions on the most important problems of the day as one of the important means of upholding and advancing its foreign political interests, the Russian Federation intends to build up its cooperation with partners in this forum.").

in Chechnya, which has more recently spread to other areas in the North Caucasus region. Since 1994, Russia has been one of the countries most painfully affected by terrorism;<sup>174</sup> it “has been the target of far more terrorist attacks than the United States has.”<sup>175</sup> In 1999, a series of bombings of apartment buildings in Moscow attributed to Chechen separatists killed nearly 300 people.<sup>176</sup> In October 2002, Chechen rebels seized more than 800 people at a theater in Moscow; more than 120 hostages were killed during the subsequent rescue attempt.<sup>177</sup> In 2004, Chechen separatists seized a school in Beslan, in northern Ossetia, an assault resulting in the deaths of 331 hostages.<sup>178</sup> Seventy Russian law enforcement officials were killed during Chechen attacks in Nazran in June 2004,<sup>179</sup> and a similar assault by Islamic militants in the city of Nalchik in October 2005 left 128 dead, including thirty-six civilians and Russian law enforcement personnel.<sup>180</sup> The restive regions where most of these attacks have occurred are predominantly Muslim, and the Russian government has consistently maintained that Al Qaeda and other external Islamist forces are active participants fueling the terrorist violence.<sup>181</sup>

In view of the security threat terrorism poses to Russia, it has identified countering international terrorism as one of its principal foreign policy

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174. Pavel K. Baev, *Instrumentalizing Counterterrorism for Regime Consolidation in Putin's Russia*, 27 *STUD. CONFLICT & TERRORISM* 337, 337 (2004).

175. Council on Foreign Relations, *Terrorism: Questions and Answers: Russia* (2004) [hereinafter Council on Foreign Relations, *Russia*] (copy on file with author).

176. *Id.*

177. Masha Lipman, *Putin's Spreading War*, *WASH. POST*, Oct. 17, 2005, at A15.

178. Kevin O'Flynn & Anna Nemtsova, *A Spreading War*, *NEWSWEEK*, Oct. 24, 2005, at 42.

179. *Id.*

180. *Id.*

181. Council on Foreign Relations, *Terrorism: Questions and Answers: Chechnya-based Terrorists* (2004) [hereinafter, Council on Foreign Relations, *Chechnya-based Terrorists*] (copy on file with author) (“Russian authorities . . . have repeatedly stressed the involvement of international terrorist and bin Laden associates in Chechnya.”). Admittedly, the role of external Islamist groups in the terror attacks against Russian targets is contested. Some argue that Russia exaggerates the role of international terrorism in the political unrest in the Caucasus as a political ploy to enable Russian President Vladimir Putin to consolidate the “semi-authoritarian quasi-market regime that has taken shape in Russia” in recent years. Baev, *supra* note 174, at 338. Even critics of Russia’s policies towards the Caucasus region concede, however, that separatists in Russia have employed terrorist methods “aimed to detach Chechnya and Dagestan from Russia and set up a Muslim state . . . .” Stephen J. Blank, *An Ambivalent War: Russia's War on Terrorism*, 14 *SMALL WARS & INSURGENCIES* 127, 129 & n.21 (2003); *see also* Baev, *supra* note 174, at 338 (“There is no intention here to question the fact that terrorism has emerged as the major threat to Russia’s security . . . .”). Outside experts accept the claim that Al Qaeda developed ties with Chechen separatists, and there is evidence both that members of the “bin Laden network” have fought “alongside the Chechen separatists,” and that Chechen militants fought in conjunction with Al Qaeda and Taliban forces in Afghanistan in 2001. Council on Foreign Relations, *Russia*, *supra* note 175.

objectives.<sup>182</sup> The governing document on Russian foreign policy, the “Foreign Policy Concept of the Russian Federation,” declares: “Russia regards as its most important foreign policy task to combat international terrorism which is capable of destabilizing the situation not only in individual states, but in entire regions.”<sup>183</sup> As evidence of its willingness to engage cooperatively in the fight against terrorism, shortly after September 11, Russia reached an agreement with the United States to increase intelligence-sharing about Afghanistan and Al Qaeda.<sup>184</sup> Russia also acquiesced in the establishment of temporary U.S. military bases that have supported U.S. forces and combat operations in Afghanistan in central Asian nations, which used to form part of the Soviet Union and which Russia regards as falling within its sphere of influence.<sup>185</sup> Russia has, moreover, accepted the notion that force may be used internationally to confront terrorist threats; it has endorsed the interpretation that Security Council Resolution 1368, adopted in the immediate aftermath of the September 11 attacks, permits forcible responses to terrorism, a view Russia sees “as a useful precedent in its fight against Chechen rebels.”<sup>186</sup>

Indeed, Russian President Putin, echoing U.S. assertions of a right to use force preventively against terrorist forces abroad, has claimed that international law would permit Russia to take “necessary measures” to “avert[] the terrorist threat” posed by Chechen militant groups based in Georgia.<sup>187</sup> Subsequent statements by the Russian defense minister that no Security Council approval was needed for Russia to attack Georgia, and the publication in a Russian newspaper of military plans to occupy that country, make clear that the “measures” to which Russia claimed an entitlement included the use of military force.<sup>188</sup> Commentators have observed that Russia’s “notably supportive”<sup>189</sup>

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182. Sergey V. Lavrov, Russian Minister of Foreign Affairs, Statement at the 59th Session of the United Nations General Assembly 2 (Sept. 23, 2004) (“Russia regards the strengthening of the anti-terrorist coalition as one of the most important tasks.”), available at [http://www.un.org/webcast/ga/59/statements/russia\\_eng.pdf](http://www.un.org/webcast/ga/59/statements/russia_eng.pdf).

183. RUSSIAN FEDERATION, *supra* note 173.

184. Council on Foreign Relations, *Russia*, *supra* note 175.

185. *Id.*

186. Chantal de Jonge Oudraat, *Combating Terrorism*, WASH. Q., Autumn 2003, at 163, 168.

187. *Putin Ups Georgia Strike Warnings*, BBC NEWS, Sept. 12, 2002, available at <http://news.bbc.co.uk/2/hi/europe/2253349.stm>; see also Valentinas Mite, *Russia: Moscow Joins Countries Advocating Preemptive Stance on Terror*, RADIO FREE EUROPE / RADIO LIBERTY, Sept. 9, 2004, <http://www.rferl.org/featuresarticle/2004/09/475F521B-0DB7-4884-80F1-9714579E62AD.html> (reporting statement by chief of Russian General Staff that Russia “will take any action to eliminate terrorist bases in any region at the earliest stage”); James P. Pinkerton, *Russia Is a Problematic Anti-Terror Ally*, NEWSDAY, Sept. 9, 2004, at A47. For a more recent Russian assertion of the doctrine, see Pavel Aptekar & Ivan Yegorov, *Russia Is Ready to Bomb Terrorists’ Bases Abroad*, RUSSIAN PRESS DIG., June 27, 2005 (quoting a Russian Air Force Commander as stating, “As for terrorists and our jetfighters, if we have high-precision weapons and know the whereabouts of a terrorist gang, why not smash it, even if it’s outside Russia?”).

188. Stephen Sestanovich, *The World: Putin Has His Own Candidate for Pre-*

overall response to the events of September 11 reflects President Putin's decision to "line up with the United States in the 'war' against terrorism[,], putting his country squarely on the side of the West."<sup>190</sup>

China's foreign policy is undergoing important changes that also bring its global security interests increasingly into alignment with those of the other Permanent Members of the Security Council. As a general matter, China has become a more active participant in the international system. "In contrast to a decade ago, [China] now largely works within the international system. It has embraced much of the current constellation of international institutions, rules, and norms as a means to promote its national interests."<sup>191</sup> Notwithstanding its traditional ideological sympathy for developing countries and its strong opposition to international interference in the internal affairs of sovereign states, China has moved increasingly in the direction of supporting collective security action by the Security Council.<sup>192</sup> As its "stake in the international community expands and it associates itself with great-power interests, China is gradually becoming more involved in efforts to combat global security threats, both traditional and nontraditional."<sup>193</sup>

China now also perceives itself as being threatened by international terrorism and recognizes its responsibilities in seeking to combat it. A Chinese government "White Paper" entitled "China's National Defense in 2002" observes that China is threatened by an internal Islamic terrorist movement and declares that China "has always resolutely opposed and condemned all forms of terrorism, and has actively adopted effective measures to fight against terrorist

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*Emption*, N.Y. TIMES, Oct. 6, 2002, § 4, at 14; see also Sergey V. Lavrov, Russian Minister of Foreign Affairs, Statement at the 60th Session of the U.N. General Assembly 4 (Sept. 18, 2005), available at <http://www.un.org/webcast/ga/60/statements/rus050918eng.pdf> (asserting the right of states to self-defense "in case of an external terrorist attack or imminent threat of such attack"); Lavrov, *supra* note 182, at 2 (international law cannot be "an inalterable dogma" that would interfere with the right of states victimized by international terrorism to use their right of self-defense).

189. Council on Foreign Relations, *Russia*, *supra* note 175.

190. Jusuf Wanandi, *A Global Coalition Against International Terrorism*, 26 INT'L SECURITY 184, 186 (2002).

191. Evan S. Medeiros & M. Taylor Fravel, *China's New Diplomacy*, FOREIGN AFF., Nov.-Dec. 2003, at 22, 22; see also John Pomfret, *A New Direction for Chinese Diplomacy: Nuclear Threat in North Korea Prompts More Ambitious Moves Toward Multilateralism*, WASH. POST, Aug. 15, 2003, at A17.

192. Medeiros & Fravel, *supra* note 191, at 24, 27 (citing China's vote on Security Council Resolution 1441 (Iraq inspections), as well as peacekeeping operations in East Timor, Congo, and elsewhere).

193. *Id.* at 34; see also Brendan Taylor, *US-China Relations After 11 September: A Long Engagement or Marriage of Convenience?*, 59 AUSTL. J. INT'L AFF. 179, 191 (2005) (arguing the Chinese leaders "have gauged that deepening political, institutional and economic involvement in the international system offers the best chance both for insuring China's continued economic growth and for minimising suspicions that Beijing harbours revisionist intentions").



activities.”<sup>194</sup> Shortly after September 11, China’s representative to the Security Council told the Council that “it is not only the United States which is threatened by terrorism,” but that “China, too, has been threatened by terrorism.”<sup>195</sup> China faces Muslim separatists in its western Xinjiang-Uighur Autonomous Region, including forces of the East Turkestan Islamic Movement, which Chinese officials claim are “purely and simply, part of international terrorism, and should be resolutely fought against.”<sup>196</sup>

China’s opposition to international terrorism has generated demonstrable forms of cooperation with the United States’s war on terror. In September 2003, then-U.S. Assistant Secretary of State for East Asian and Pacific Affairs James Kelly noted that the United States and China were pursuing “complementary—and sometimes common—policies” in the war on terror.<sup>197</sup> China offered the United States important forms of political support for its counterterrorism goals; it supported resolutions passed by the Security Council

194. INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., CHINA’S NATIONAL DEFENSE IN 2002 (2002), available at <http://www.china.org.cn/e-white/20021209/index.htm>. In an updated White Paper, China indicated that it “continued to strengthen its international counterterrorism cooperation.” INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., CHINA’S NATIONAL DEFENSE IN 2004 (2004) [hereinafter CHINA’S NATIONAL DEFENSE IN 2004], available at <http://www.china.org.cn/e-white/20041227/index.htm>.

195. U.N. SCOR, 56th Sess., 4413th mtg. at 5, U.N. Doc. S/PV.4413 (Nov. 12, 2001) (statement of Chinese representative); see also KERRY DUMBAUGH, CONG. RESEARCH SERV., CHINA-U.S. RELATIONS: CURRENT ISSUES FOR THE 108TH CONGRESS 13 (updated June 12, 2003), available at <http://fpc.state.gov/documents/organization/22165.pdf> (quoting Chinese Foreign Ministry spokesman as stating, “We hope that our fight against the East Turkestan [Xinjiang] forces will become a part of the international effort against terrorism.”); Leif-Eric Easley, *Interview with Thomas Christensen: The Chinese Military and Post 9/11 Sino-US Relations*, 6 HARV. ASIA Q. 15, 15 (2002) [hereinafter Easley, *Interview with Thomas Christensen*] (stating that China “has a terrorist threat of its own,” some element of which “has been linked to Al Qaeda through Afghanistan so there is a common interest between the two countries in addressing that issue”); cf. Gaye Christoffersen, *Constituting the Uyghur in U.S.-China-Relation: The Geopolitics of Identity Formation in the War on Terrorism*, 1 STRATEGIC INSIGHTS 2 (2002), available at <http://www.ccc.nps.navy.mil/si/sept02/eastAsia.pdf> (noting that the Al Qaeda network “has trained Uyghurs in Afghanistan for terrorist activities in Xinjiang,” but suggesting that China’s estimates of the extent of Al Qaeda influence were “overstated”); Council on Foreign Relations, *Terrorism: Questions and Answers: China* (2004) [hereinafter Council on Foreign Relations, *China*] (copy on file with author) (noting Chinese assertions that the East Turkestan Islamic Movement has close ties to Al Qaeda, but commenting that there is “little evidence” of such ties).

196. U.N. SCOR, 56th Sess., 4413th mtg. at 5, U.N. Doc. S/PV.4413 (Nov. 12, 2001) (statement of Chinese representative); see also Taylor, *supra* note 193, at 182 (noting Chinese assessment that support for the war on terror “would afford Beijing greater leeway in clamping down on Uighur separatists in Xinjiang”); Wanandi, *supra* note 190, at 186 (noting Chinese willingness to cooperate with the war on terror “because of worries about its own domestic terrorists, some of whom are linked to al-Qaeda”).

197. *U.S.-China Relations: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 2-3 (2003) [hereinafter Kelly Testimony I] (statement of James A. Kelly, Assistant Sec’y of State for E. Asian and Pac. Affairs).

and General Assembly,<sup>198</sup> as well as the U.S. assertion that states may use force in self-defense against terrorist actors abroad.<sup>199</sup> Perhaps more critically, China “played an instrumental role in encouraging its close ally Pakistan to support American efforts in Afghanistan.”<sup>200</sup> Additional specific forms of Sino-American cooperation include a Chinese pledge of \$150 million—a significant amount in light of historical Chinese foreign aid commitments—to reconstruction efforts in Afghanistan and participation in the Container Security Initiative to prescreen cargo shipped from China to the United States.<sup>201</sup> China has also reportedly engaged in intelligence sharing with the United States on the Al Qaeda network<sup>202</sup> and has expanded cooperation with American law enforcement officials on antiterrorist financing efforts.<sup>203</sup>

Although some view the Chinese steps in support of the U.S. response to terrorism after September 11 as relatively modest,<sup>204</sup> the evolution in China’s thinking on terrorism is striking. International cooperation on combating terrorism is one of only four topics discussed in China’s 2002 National Defense document. In contrast, the prior version of its National Defense White Paper, issued in 2000, makes only a few passing references to terrorism.<sup>205</sup> With respect to the question of the use of force to counter terrorism, China’s support of the American intervention in Afghanistan is particularly notable in light of China’s past aversion to foreign military intervention; the Afghanistan campaign “was the first such action that China had endorsed since the ending of the Cold War” and stands in sharp contrast to Beijing’s “vitriolic reaction” to the U.S.-led intervention in Kosovo in 1999.<sup>206</sup> One commentator has observed that counterterrorism cooperation between the United States and China has opened a “new era of bilateral relations” between the two countries.<sup>207</sup> These

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198. Taylor, *supra* note 193, at 181.

199. Oudraat, *supra* note 186, at 168.

200. Taylor, *supra* note 193, at 181; *see also* Easley, *Interview with Thomas Christensen*, *supra* note 195, at 15 (Christensen characterizing China’s backing of Pakistani President Musharraf’s decision to support the U.S. war effort in Afghanistan as “very important”).

201. Kelly Testimony I, *supra* note 197.

202. Taylor, *supra* note 193, at 181 (noting that prior to this, Sino-American intelligence-sharing “had remained dormant since the end of the cold war”); *see also* Easley, *Interview with Thomas Christensen*, *supra* note 195, at 15; Bonnie S. Glaser, *Sino-American Relations: A Work in Progress*, 25 AM. FOREIGN POL’Y INTS. 417, 418 (2003); Council on Foreign Relations, *China*, *supra* note 195.

203. *See* Glaser, *supra* note 202, at 418; Taylor, *supra* note 193, at 181.

204. Easley, *Interview with Thomas Christensen*, *supra* note 195, at 15 (“China is not an incredibly important player in the war on terrorism but . . . it has been relatively cooperative with the United States since [September 11].”).

205. INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., CHINA’S NATIONAL DEFENSE IN 2000 (2000), available at <http://www.china.org.cn/e-white/2000/index.htm>.

206. Taylor, *supra* note 193, at 182.

207. Anne Wu, *What China Whispers to North Korea*, WASH. Q., Spring 2005, at 35, 35. *But see* Bonnie S. Glaser, *Sino-American Relations Beyond September 11*, 24 AM.

factors, combined with China's growing willingness to support multilateral security efforts through the Security Council, suggest that it is prepared to act in concert with the other Permanent Members to promote more coercive approaches to counterterrorism.

## 2. WMD proliferation and dangerous states

The Permanent Members also have a common interest in preventing the proliferation of weapons of mass destruction. The geopolitical influence of the Permanent Members stems in part from their military power, including their near-monopoly on nuclear weapons. States that could never threaten the Permanent Members through conventional military means can do so—or can at least resist Great Power intimidation—if they acquire weapons of mass destruction. Even Russia and China, which have in the past engaged in the proliferation of WMD-related technologies to their allies, are increasingly realizing the dangers presented by such an approach. For one, the states seeking to acquire WMD technologies are often unstable.<sup>208</sup> There are no guarantees that a friendly regime that acquires weapons of mass destruction today will not be replaced by a hostile regime tomorrow. Second, recent revelations about the proliferation network organized by the head of Pakistan's nuclear weapons program, A.Q. Khan, demonstrate that it is impossible to set limits on the proliferation of weapons of mass destruction. The acquisition of weapons of mass destruction by states that previously did not possess them is thus dangerous because of the threats presented by unknown states that may benefit from onward proliferation. Finally, WMD proliferation creates risks of counterproliferation. As such, the Permanent Members have come increasingly to realize that even an ally's WMD programs can be detrimental to their interests because they may encourage regional adversaries to pursue competing WMD programs.

Like the United States, the United Kingdom and France have identified the proliferation of WMD as a major security threat. The United Kingdom, as a

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FOREIGN POL'Y INTS. 223 (2002) (suggesting that China may feel threatened by growing cooperation between the United States and Russia on counterterrorism).

208. Pakistan, which recently declared its nuclear weapons capability and which has long been a recipient of military assistance from China, has been described as “economically vulnerable [and] politically unstable” and as “a precarious, decaying, and increasingly Islamist state.” ASHLEY J. TELLIS ET AL., RAND, LIMITED CONFLICTS UNDER THE NUCLEAR UMBRELLA: INDIAN AND PAKISTANI LESSONS FROM THE KARGIL CRISIS xi (2001). Iran, which has received important civilian nuclear cooperation from Russia in recent years and which the United States believes is pursuing nuclear weapons, is another country for which “the possibility of serious political unrest . . . over the next few years cannot easily be discounted.” Roger Howard, *Meeting the Iranian Nuclear Challenge*, 149 ROYAL UNITED SERVICE INST. J. 66, 68 (2004). In North Korea, the world's leading contemporary nuclear weapons proliferation danger, even the government itself is “paranoi[d] about its own stability.” Michael Horowitz, *Who's Behind That Curtain? Unveiling Potential Leverage over Pyongyang*, WASH. Q., Winter 2004-2005, at 21, 23.

matter of national policy, identifies making the world safer from weapons of mass destruction, along with countering terrorism, as the first of its international policy priorities.<sup>209</sup> Along with terrorism, senior British officials have described WMD proliferation as one of the “main security threats for the twenty-first century,” an issue that is “at the very top” of the U.K. government’s international security agenda.<sup>210</sup> In addition, the United Kingdom was one of the initial eleven participants in the U.S.-led Proliferation Security Initiative (PSI), a cooperative arrangement aimed at halting the spread of WMD-related materials to “states and nonstate actors of proliferation concern” through, among other things, the interdiction of shipments of suspected WMD-related materials.<sup>211</sup> Perhaps most visibly, the United Kingdom participated in the U.S. invasion of Iraq and justified its decision to do so almost exclusively on the basis of the WMD threat presented by Saddam Hussein’s regime.<sup>212</sup>

French national policy, too, stresses the dangers posed by weapons of mass destruction. France views WMD proliferation as “one of the most serious threats of our time.”<sup>213</sup> Such proliferation, in France’s view, “endangers the security equilibrium at regional, and at global, level.” In view of the potential for weapons of mass destruction to be used in terrorist attacks, France considers it “essential” to halt WMD proliferation before the “global security architecture is undermined.”<sup>214</sup> France was also one of the founding participants in the Proliferation Security Initiative.<sup>215</sup>

The determination of France and the United Kingdom to prevent WMD proliferation is further manifested by their behavior in the context of both European institutions and ad hoc coalitions. Both states have endorsed the European Union’s Security Strategy, which notes that WMD proliferation “is potentially the greatest threat to [Europe’s] security.”<sup>216</sup> Other EU statements

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209. UK INTERNATIONAL PRIORITIES, *supra* note 161, at 30.

210. U.K. Foreign & Commonwealth Office, Counter-Proliferation, <http://www.fco.gov.uk/servlet/ServletFront?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1030522523536>.

211. John Bolton, Under Sec’y for Arms Control and Int’l Sec. Affairs, Proliferation Security Initiative: Statement of Interdiction Principles, Remarks at Proliferation Security Meeting (Sept. 4, 2003) (transcript available at <http://www.state.gov/t/us/rm/23801.htm>).

212. Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, U.N. Doc. S/2003/350 (Mar. 20, 2003) (stating that the U.K. undertook military action “only when it became apparent that there was no other way of achieving compliance by Iraq” with its “disarmament obligations” under Security Council resolutions).

213. REPUBLIC OF FRANCE, FIGHTING PROLIFERATION, PROMOTING ARMS CONTROL AND DISARMAMENT: FRANCE’S CONTRIBUTION 10 (2005), *available at* [http://www.diplomatie.gouv.fr/actual/pdf/maitrise\\_armement\\_gb.pdf](http://www.diplomatie.gouv.fr/actual/pdf/maitrise_armement_gb.pdf).

214. *Id.* at 6.

215. U.S. Dep’t of State, Proliferation Security Initiative—Paris Meeting of Core Participants, September 3-4, 2003, <http://www.state.gov/r/pa/prs/ps/2003/23673.htm>.

216. A SECURE EUROPE IN A BETTER WORLD, *supra* note 161.

not only reiterate that WMD proliferation constitutes a “threat to international peace and security”<sup>217</sup> that “puts at risk the security of our states, our peoples and our interests around the world,”<sup>218</sup> but also envision that coercive measures, including in appropriate cases the use of force, could be used to address proliferation threats.<sup>219</sup> Commentators have stressed the significance of the change in European thinking about the WMD security challenge, observing that European concern about the problem is growing<sup>220</sup> and that the new European WMD strategy documents mark a “dramatic departure” from previous European thinking about the potential role of military force in confronting proliferation challenges.<sup>221</sup> The greatest difference between the United States and its European allies now appears to turn not so much on whether there are circumstances in which force should be used to address WMD proliferation threats, but whether force may be pursued unilaterally, as U.S. strategy contemplates, or only under the collective security authorities of the U.N. Charter, as the Europeans maintain.<sup>222</sup>

The record of the United States’s traditional Security Council rivals, Russia and China, on WMD nonproliferation has historically been more problematic. It is true that in terms of formal policy statements, Russia declares that it “reaffirms its unswerving course toward participating jointly with other states in averting the proliferation of nuclear weapons, other weapons of mass destruction and means of their delivery, as well as relevant materials and technologies.”<sup>223</sup> Moreover, Russia’s recent decision to join the Proliferation

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217. Presidency Conclusions, Thessaloniki European Council (June 19-20, 2003), Annex II, ¶ 1, available at <http://register.consilium.europa.eu/pdf/en/03/st11/st11638en03.pdf>; *Basic Principles for an EU Strategy Against Proliferation of Weapons of Mass Destruction*, ¶ 1, EUR. COUNCIL DOC. 10352/03 (June 10, 2003), available at <http://register.consilium.europa.eu/pdf/en/03/st10/st10352en03.pdf>; *EU Strategy Against Proliferation of Weapons of Mass Destruction*, ¶ 1, EUR. COUNCIL DOC. 15708/03 (Dec. 10, 2003), available at <http://ue.eu.int/uedocs/cmsUpload/st15708.en03.pdf>.

218. *EU Strategy Against Proliferation of Weapons of Mass Destruction*, *supra* note 217, ¶ 2.

219. *Basic Principles for an EU Strategy Against Proliferation of Weapons of Mass Destruction*, *supra* note 217, ¶ 4; *EU Strategy Against Proliferation of Weapons of Mass Destruction*, *supra* note 217, ¶ 15.

220. Dalia Dassa Kaye, *Bound to Cooperate? Transatlantic Policy in the Middle East*, WASH. Q., Winter 2003-2004, at 179, 180; *see also* Tom Sauer, *The “Americanization” of EU Nuclear Non-Proliferation Policy*, 20 DEF. & SECURITY ANAL. 113, 113 (2004) (noting that although European assessment of the WMD threat for a long time differed from that of the United States, attitudes in Europe are changing).

221. Kaye, *supra* note 220, at 181; *see also* Sauer, *supra* note 220, at 114 (describing the recent “dramatic change” in European WMD security strategy). Sauer suggests that the change in European thinking reflects a “tacit acknowledgement on the part of most EU member states that their existing ‘soft’ policies did not work.” *Id.* at 129.

222. Sauer, *supra* note 220, at 127.

223. RUSSIAN FEDERATION, *supra* note 173; *see also* Lavrov, *supra* note 188, at 3 (stressing the importance of “solving the issues of disarmament and WMD non-proliferation on the basis of strict compliance with the relevant international agreements”).

Security Initiative is a tangible reflection of its expanding commitment to international nonproliferation efforts.<sup>224</sup> Nevertheless, skepticism about whether Russia shares the United States's determination to prevent the spread of WMD to potentially dangerous states remains. As one commentator recently observed, "Russia still has yet to shirk off its Soviet-era policy of external arms and technology transfers and aid to rogue states."<sup>225</sup> Russia's record of cooperation with Iran's nuclear program is frequently identified as evidence that Russia's interests do not align with those of other Permanent Members of the Security Council with respect to nonproliferation. Despite the widely shared Western assessment about Iranian ambitions to acquire nuclear weapons production capability, Russia has continued to work on the construction of a civilian nuclear power plant at Bushehr. As Part IV.C.2 shows, however, even in the case of Iran, the record reveals more common ground than conflict between Russia and the West with respect to the goal of preventing Iran from developing a nuclear weapons capability. This reflects Russia's own assessment that the proliferation of WMD in general, and the acquisition of nuclear weapons by Iran in particular, undermines its security interests.

Like Russia, China's past exports of missile and WMD-related technologies have been a source of considerable concern to the international community. China is reported to have exported nuclear and missile technology to Pakistan<sup>226</sup> and chemical weapons<sup>227</sup> and missile technology to Iran.<sup>228</sup> China's lax control of exports by its munitions industry and its insistence on "nondiscriminatory" nonproliferation regimes, which rejects the notion of disparate treatment of different states based on the proliferation dangers they present, have made China's WMD proliferation a persistent and troubling concern in United States-China relations.

Here, too, however, there is evidence of significant change in Chinese attitudes that creates a strong basis for Permanent Five cooperation on nonproliferation. China's 2003 White Paper on nonproliferation begins with the central premise that preventing WMD proliferation "is conducive to the preservation of international and regional peace and security, and compatible

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224. Press Release, Ministry of Foreign Affairs of the Russian Federation, On Russia's Participation in Proliferation Security Initiative (PSI) (May 31, 2004), <http://www.in.mid.ru/B1.nsf/arh/2E1470910BE746B6C3256EA600359AEF>.

225. Victor Mizin, *The Russia-Iran Nuclear Connection and U.S. Policy Options*, 8 MIDDLE E. REV. INT'L AFF. 71, 72 (2004); see also *id.* at 74 (indicating that many experts believe Russia remains the world's leading source of WMD-related items and expertise proliferation).

226. Ctr. for Nonproliferation Studies, *China's Missile Exports and Assistance to Pakistan* (July 2000), <http://cns.miis.edu/research/india/china/mpakpos.htm>.

227. Rose Gordon, *Chinese Companies Sanctioned for Proliferation*, ARMS CONTROL TODAY, Sept. 2002, at 22.

228. Ctr. for Nonproliferation Studies, *China's Missile Exports and Assistance to Iran* (Sept. 25, 2003), <http://www.nti.org/db/china/miranpos.htm>.

with the common interests of the international community.”<sup>229</sup> Perhaps more importantly, it also recognizes that WMD proliferation “benefits neither world peace and stability nor China’s own security.”<sup>230</sup> Reflecting this emerging view, China has only since the early 1990s begun to join or participate in the major international nonproliferation treaties and regimes.<sup>231</sup> In 1997, it agreed with the United States to cancel existing nuclear assistance activities with Iran and not to embark on any new projects.<sup>232</sup> In 2002, China also enacted new WMD-related export control regulations.<sup>233</sup> Observers note that the “scope, content, and frequency of [China’s] export of sensitive weapons-related items has declined and diminished. In the latter half of the 1990s, the Chinese government began to institutionalize its nonproliferation commitments by issuing export controls, a trend that has continued in recent years.”<sup>234</sup> Even with respect to the potential use of force against WMD threats in dangerous states, it is notable that China voted for U.N. Security Council Resolution 1441, warning that Iraq would face serious consequences if it failed to comply with its disarmament obligations, and it did not express a clear intention to veto a follow-on resolution that would have expressly authorized the use of force against Iraq to enforce those obligations.<sup>235</sup> China’s changing attitude towards the dangers of WMD proliferation is perhaps best exemplified by its increasingly assertive and constructive role in encouraging North Korea to abandon its nuclear weapons program, as Part IV.C.3 demonstrates.

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229. INFO. OFF. OF THE STATE COUNCIL OF THE P.R.C., CHINA’S NON-PROLIFERATION POLICY AND MEASURES (2003) [hereinafter CHINA’S NON-PROLIFERATION POLICY], available at <http://www.china.org.cn/e-white/20031202/index.htm>. Similarly, China’s 2004 National Defense White Paper reiterated: “China attaches great importance to non-proliferation. It pursues a policy of not supporting, not encouraging and not assisting other countries to develop WMD.” CHINA’S NATIONAL DEFENSE IN 2004, *supra* note 194.

230. CHINA’S NON-PROLIFERATION POLICY, *supra* note 229.

231. Daniel A. Pinkston, Testimony Before the U.S.-China Economic and Security Review Commission 1-2 (Mar. 10, 2005) [hereinafter Pinkston Testimony] (transcript available at <http://cns.miis.edu/research/congress/testim/pinkston.pdf>) (noting that China, beginning in 1992, acceded to the Treaty on the Non-Proliferation of Nuclear Weapons, the Chemical Weapons Convention, the Comprehensive Test Ban Treaty, and joined the Zangger Committee and the Nuclear Supplier Group).

232. Wyn Q. Bowen & Joanna Kidd, *The Iranian Nuclear Challenge*, 80 INT’L AFF. 257, 262 (2004).

233. Glaser, *supra* note 202, at 420.

234. Medeiros & Fravel, *supra* note 191, at 27. To date, however, China has not decided to participate in the Proliferation Security Initiative, and U.S. officials have observed that “full implementation and effective enforcement” of China’s export control regulations “are still lacking.” Kelly Testimony I, *supra* note 197, at 12; *see also* B. M. Jain, *India-China Relations: Issues and Emerging Trends*, 93 ROUND TABLE 253, 261-62 (2004) (noting that, according to Indian officials, China’s long-standing support for Pakistan’s missile and nuclear programs has not diminished).

235. Taylor, *supra* note 193, at 183.

*C. Permanent Member Cooperation to Counter the New Security Threats**1. General measures*

The growing convergence of the interests of the Permanent Members of the Security Council has given rise to significant cooperative developments to respond to the new security threats. Some steps, such as the Proliferation Security Initiative and the promulgation of the E.U. Strategy Against the Proliferation of Weapons of Mass Destruction, have been achieved through multilateral diplomacy outside the framework of the United Nations. But substantial achievements have also been made under the collective security authorities of the Security Council. With respect to terrorism, for instance, the Security Council expressly determined in a Chapter VII resolution adopted shortly after the September 11 attacks that “any act of international terrorism” constitutes a “threat to international peace and security.”<sup>236</sup> More significantly, the Security Council has gone beyond declarations and has mandated important new substantive legal requirements to meet the threat of terrorism. Resolving ambiguity about the scope of the customary international law duty not to support or harbor terrorists, the Council in Resolution 1373 decided under Chapter VII that states are legally obligated, among other things, to “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts,” to take “necessary steps to prevent the commission of terrorist acts,” and to “deny safe haven” to persons involved in terrorism.<sup>237</sup> The Council also imposed a duty on states to freeze the financial assets of all persons involved in terrorism.<sup>238</sup>

Resolution 1373 represents a dramatic departure from past Security Council practice in addressing threats to international peace and security. Rather than adopting ad hoc measures to deal with a particular situation, the Council used its Chapter VII powers “to establish new binding rules of international law” of general application.<sup>239</sup> The Council also established the Counterterrorism Committee (CTC), comprised of all members of the Council, to collect and review reports from states on implementation of their obligations

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236. S.C. Res. 1373, pmb. para. 3, U.N. Doc S/RES/1373 (Sept. 28, 2001); *see also* U.N. S.C. Res. 1377, U.N. Doc. S/RES/1377 (Nov. 12, 2001) (adopting a declaration on international terrorism declaring that “acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century”). The Security Council, at a meeting of heads of government, first declared terrorism to be a danger for international security in 1992, U.N. Security Council, Presidential Statement 3, U.N. Doc S/23500 (Jan. 31, 1992), but that policy statement was not made in the context of a Council Resolution and imposed no legal obligations on states.

237. S.C. Res. 1373, *supra* note 236, ¶ 2.

238. *Id.* ¶ 1(c).

239. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901, 902 (2002).



under Resolution 1373.<sup>240</sup> In so doing, the Council has responded to the threat of terrorism by establishing a “rare phenomenon in international law: legally binding regulation, backed by the possibility of real enforcement action, imposed on all states by a global international organ engaged in a continuous legislative enterprise by virtue of a delegated power and subject to no geographic or temporal limitation.”<sup>241</sup>

The converging interests of the Permanent Members of the Security Council have led to significant new developments in the sphere of collective action to counter the threat of WMD proliferation as well. In Resolution 1540, the Council in April 2004 for the first time declared, in broad terms, that the proliferation of weapons of mass destruction “constitutes a threat to international peace and security” and affirmed its resolve to “take appropriate and effective actions against any threat to international peace and security caused by” WMD proliferation.<sup>242</sup> It noted in particular its grave concern over “the threat of terrorism and the risk that non-State actors . . . may acquire” weapons of mass destruction.<sup>243</sup> Acting in a quasi-legislative capacity as it had in Resolution 1373, the Council imposed Chapter VII obligations on all states to refrain from providing any form of support to nonstate actors seeking to develop, acquire, or use weapons of mass destruction and to adopt and enforce laws to prohibit such activities by nonstate actors, “in particular for terrorist purposes.”<sup>244</sup> To enhance compliance, the Council established a new committee to collect and review reports from states on their implementation of the resolution.<sup>245</sup>

## 2. *The Iran case*

Perhaps more telling than such general responses by the Permanent Members to the WMD proliferation threat is their conduct in connection with the North Korean and Iranian proliferation crises. In both cases, the Permanent

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240. On the Counterterrorism Committee generally, see Eric Rosand, *Security Council Resolution 1373, the Counterterrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 334-41 (2003). The Security Council has since expanded the CTC's mandate, see S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004), and modified its organizational structure with a view towards enhancing its effectiveness, S.C. Res. 1535, U.N. Doc S/RES/1535 (Mar. 26, 2004).

241. José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874 (2003); see also Nicholas Rostow, *Commentary—The Road Ahead*, in INTERNATIONAL LAW AND THE WAR ON TERROR 461, 463 (Fred L. Borch & Paul S. Wilson eds., 2003) (describing Resolution 1373 as “one of the most far-reaching Security Council resolutions ever adopted”).

242. S.C. Res. 1540, pmb. paras. 1, 4, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

243. *Id.* pmb. para. 8.

244. *Id.* ¶¶ 1, 2.

245. *Id.* ¶ 4.

Members have cooperated in fairly substantial ways in an effort to prevent or roll back WMD acquisition efforts in those countries.

With respect to Iran, the intensive diplomatic efforts of France and the United Kingdom, working in conjunction with Germany, to address the Iranian nuclear proliferation challenge demonstrate the extent to which those countries' strategic interests regarding contemporary security threats increasingly mirror those of the United States.<sup>246</sup> The "EU-3" have sought commitments from Iran to suspend its uranium enrichment and reprocessing activities and to sign and bring into force an Additional Protocol to its Nuclear Non-Proliferation Treaty Safeguards Agreement with the International Atomic Energy Agency (IAEA). The EU-3 pressure on Iran stems from the European assessment, a view shared by the United States, that: (1) Iran seeks to acquire the capability to produce nuclear weapons; (2) it is operating a clandestine nuclear weapons acquisition program;<sup>247</sup> and (3) "Iran's acquisition of nuclear weapons would be disastrous for the stability of the Middle East and for the future of the global nonproliferation regime."<sup>248</sup>

The Permanent Members' path in dealing with Iran's nuclear program has admittedly been tortuous. In October 2003, Iran agreed with the EU-3 to halt uranium enrichment and reprocessing and to sign an Additional Protocol, which required Iran to provide an expanded declaration of its nuclear activities and to grant the IAEA greater access rights to Iran's nuclear programs.<sup>249</sup> Iran has not ratified the Additional Protocol, although for a period of time it pursued a policy of acting in accordance with it, including its May 2004 submission of a declaration on its nuclear programs required by the Protocol. Although Iran gave IAEA inspectors access to locations they sought to inspect, the IAEA Board of Governors concluded in June 2004 that Iran's cooperation was not as "full, timely and proactive as it should have been."<sup>250</sup> Later in the summer of 2004, Iran announced that it would resume uranium enrichment activities, but agreed in November 2004 to further suspend uranium enrichment to pursue negotiations with the EU-3. Those negotiations foundered, and in April 2005

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246. Kaye, *supra* note 220, at 181-82 (noting that although the United States and Europe have traditionally taken "very different approaches" towards the Iranian proliferation issue, Europe's position is now closer to Washington's).

247. Robert J. Einhorn, *A Transatlantic Strategy on Iran's Nuclear Program*, WASH. Q., Autumn 2004, at 21, 24; *see also* Bowen & Kidd, *supra* note 232, at 261.

248. Einhorn, *supra* note 247, at 24; *see also* Bowen & Kidd, *supra* note 232, at 271 ("America and Europe share the same concerns about Iran's ambitions and both want to prevent Tehran from acquiring nuclear weapons.").

249. Elaine Sciolino, *Iran Will Allow U.N. Inspections of Nuclear Sites*, N.Y. TIMES, Oct. 22, 2003, at A1. Iran signed the Additional Protocol with the IAEA on December 18, 2003. *See* IAEA, *Iran Signs Additional Protocol on Nuclear Safeguards* (Dec. 18, 2003), available at <http://www.iaea.org/NewsCenter/News/2003/iranap20031218.html>.

250. IAEA Board of Governors Resolution, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 2, IAEA Doc. GOV/2004/49 (June 18, 2004), available at <http://www.iaea.org/Publications/Documents/Board/2004/gov2004-49.pdf>.

Iran threatened to resume uranium conversion activities, which it did in August 2005.

Despite the tactical preference they manifested during the nuclear talks for avoiding confrontation with Iran, the EU-3, with U.S. support, responded to Iran's resumption of uranium conversion by halting talks and by successfully pressing for the adoption in September 2005 by the IAEA Board of Governors of a resolution that found Iran to be in breach of its obligations under its Safeguards Agreement with the IAEA.<sup>251</sup> Significantly, the resolution found that doubts about the peaceful purposes of Iran's nuclear program "have given rise to questions that are within the competence of the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security."<sup>252</sup> In an article published simultaneously in *The Wall Street Journal* and *Le Monde*, the Foreign Ministers of the EU-3 and the E.U.'s High Representative for Common European Foreign and Security Policy emphasized the proliferation risks posed by Iran's course of action. Calling on the IAEA Board of Governors to respond to Iran's intransigence, they declared: "Collectively, we are responsible for meeting the challenge."<sup>253</sup>

Russia and China, too, have played a constructive role in attempting to prevent Iran from developing a nuclear weapons capability. Russia has consistently insisted that its nuclear cooperation with Iran is solely for the purpose of civilian nuclear energy production. Because of the threats to regional stability that would flow from the acquisition of nuclear weapons by Iran—including concerns about onward proliferation, the risk of counterproliferation by other regional players, the danger of preemptive attacks by states, such as Israel, that would be threatened by a nuclear Iran, and the weakening of the global nuclear nonproliferation regime that the nuclearization of Iran would trigger—Russia's strategic interests do not favor the acquisition by Tehran of nuclear weapons. As Orlov and Vinnikov write, "Any rational analysis would posit that Russia's interests are better served by ensuring that its southern neighbor remains free of nuclear weapons . . ."<sup>254</sup> Russia was accordingly "shocked, perhaps even more so than the West, at Iran's admission [in 2002] that it had been conducting clandestine . . . nuclear research activities for 18 years."<sup>255</sup> In the words of the then-American ambassador to Russia,

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251. IAEA Board of Governors Resolution, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 1, IAEA Doc. GOV/2005/77 (Sept. 24, 2005), available at <http://www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf>.

252. *Id.* ¶ 2.

253. Philippe Douste-Blazy, Joschka Fischer, Javier Solana & Jack Straw, *Iran Must Work to Rebuild Confidence*, WALL ST. J., Sept. 22, 2005, at A16.

254. Vladimir A. Orlov & Alexander Vinnikov, *The Great Guessing Game: Russia and the Iranian Nuclear Issue*, WASH. Q., Spring 2005, at 49, 60. But see Mizin, *supra* note 225, at 74 (arguing that despite the statements of its experts and politicians, Russia "has never been seriously concerned with the military threat emanating from WMD development in the Third World").

255. Orlov & Vinnikov, *supra* note 254, at 54; see also Mizin, *supra* note 225, at 72,

although the “Russians showed some ambivalence in the past about the threat posed by . . . the current regime in Tehran . . . they are increasingly clear-eyed about the danger, and our cooperation is improving.”<sup>256</sup>

Although Russia continues to resist American demands that it halt its civilian nuclear cooperation with Iran, it has sought to limit the extent to which its assistance could contribute to a nuclear weapons program.<sup>257</sup> Russia does not wish to see Iran develop a complete nuclear fuel cycle that could enable it to produce nuclear weapons,<sup>258</sup> and consequently seeks to put in place arrangements to “effectively control Iran’s nuclear ambitions.”<sup>259</sup> Russia has accordingly taken steps to guard against the export of some of the most sensitive nuclear technologies to Iran,<sup>260</sup> and has more recently insisted on the conclusion of an agreement with Iran that would provide for the return to Russia of spent nuclear fuel once the Bushehr reactor is operative.<sup>261</sup> In an attempt to pressure Iran to abandon any nuclear ambitions it may harbor, Russia has announced that its support for Iran’s nuclear programs will in turn depend on Iran’s cooperation with the IAEA,<sup>262</sup> and Russian diplomacy has

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74 (noting that Russian experts have begun to “worry about Iran’s facilities and end goals”).

256. U.S. Dep’t of State, Bureau of Int’l Info. Programs, *Vershbow Sees “Strong, Positive” U.S. Relationship with Russia* (Nov. 17, 2004), available at <http://usinfo.state.gov/eur/Archive/2004/Nov/17-312250.html>; see also *Hearing on Iran’s Weapons Proliferation Before the H. International Relations Subcomm. on the Middle East and Central Asia*, 108th Cong. (2004), available at <http://www.state.gov/t/us/rm/33909.htm> (statement of John R. Bolton, Under Sec’y of State for Arms Control and Int’l Sec.) (noting that as a result of “sustained high-level exchanges,” the United States believes that “Russia now shares our concern about Iran’s nuclear activities”).

257. To the extent Iran’s nuclear weapons program has been externally supported, actors other than Russia have made a more significant contribution. The success of Iran’s nuclear program has been made possible by assistance from the nuclear proliferation network led by Pakistani nuclear scientist A.Q. Khan. See Orlov & Vinnikov, *supra* note 254, at 60.

258. Gareth Smyth, *EU3 Look to Russia to Influence Iran on Nuclear Talks*, FT.COM, Oct. 11, 2005, <http://www.ft.com/cms/s/1d74f250-3a74-11da-b0d3-00000e2511c8.html> (quoting European diplomat as saying, “Russia’s red line is the same as ours, they do not want Iran to have the full nuclear fuel cycle”).

259. Orlov & Vinnikov, *supra* note 254, at 63. This strategy apparently reflects Russia’s assessment that Iran has not yet “made a political decision to pursue nuclear weapons.” *Id.* at 64.

260. See Bowen & Kidd, *supra* note 232, at 267 (Russia dropped plans to supply Iran with a uranium enrichment facility); see also Mizin, *supra* note 225, at 79 (describing the thwarting, under U.S. pressure, of “potentially dangerous transfers”); Interview with Senior Third-Country Gov’t Official, in Stanford, Cal. (May 2004) (stating that Russia has not transferred to Iran items or technology that would be especially sensitive for nuclear weapons production purposes).

261. Bowen & Kidd, *supra* note 232, at 267.

262. Sergey Lavrov, Russian Foreign Minister, Remarks Following Meeting with U.S. Secretary of State Condoleezza Rice, Moscow (Oct. 15, 2005) (transcript available at [http://moscow.usembassy.gov/embassy/transcript.php?record\\_id=138](http://moscow.usembassy.gov/embassy/transcript.php?record_id=138)) (stressing the need for Iran to cooperate with the IAEA in goodwill and cautioning that “under no circumstances [will there] be permitted any violation by Iran of the nonproliferation regime”); see also

been “tirelessly engaged in persuading Iran” to cooperate with the IAEA and to comply fully with the Nuclear Non-Proliferation Treaty.<sup>263</sup> In June 2004, Russia voted for the IAEA Board of Governors resolution that deplored Iran’s failure to provide full, timely, and proactive cooperation with the IAEA inspectors.<sup>264</sup>

Subsequent events have suggested continuing convergence between Russia and China, on one side, and the United States and the EU-3, on the other, with respect to the Iranian nuclear threat. Russia and China did not vote for the IAEA’s September 2005 resolution on Iran, but merely abstained, allowing the resolution to pass without their active endorsement. In February 2006, the IAEA’s Board of Governors adopted a new resolution regarding Iran’s nuclear program; it noted the IAEA’s “absence of confidence that Iran’s nuclear program is exclusively for peaceful purposes” and directed the IAEA’s Director General to “report to the Security Council” all previous IAEA reports and resolutions related to Iran and the specific steps the IAEA Board deemed necessary for Iran to take to resolve the crisis.<sup>265</sup> Significantly, Russia and China joined the United States and the EU-3 in casting affirmative votes for the February 2006 resolution.<sup>266</sup>

The IAEA’s Director General reported in April 2006 that significant gaps existed in the Agency’s information regarding Iran’s nuclear activities, resulting from a lack of transparency on the part of the Iranian government;<sup>267</sup> a June 2006 IAEA report noted no further progress in clarifying the outstanding issues.<sup>268</sup> In the face of Iran’s refusal to cooperate with the IAEA, the Security

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*Russia Says Nuclear Cooperation with Iran Depends on IAEA*, PRIME-TASS.COM, June 28, 2004, <http://www.prime-tass.com/news/show.asp?topicid=68&id=353047>.

263. Mizin, *supra* note 225, at 81; *see also* Orlov & Vinnikov, *supra* note 254, at 61-62. In 2003, Russia joined a declaration of the G-8 countries urging Iran to sign and implement an IAEA additional protocol, which would permit the IAEA to engage in more intrusive inspections of suspected nuclear facilities in Iran. As Orlov and Vinnikov note, “Russia’s signature on such a document would have been unimaginable a few months earlier.” *Id.* at 55.

264. IAEA Board of Governors Resolution, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 2, IAEA Doc. GOV/2004/49 (June 18, 2004), available at <http://www.iaea.org/Publications/Documents/Board/2004/gov2004-49.pdf>.

265. IAEA Board of Governors Resolution, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶¶ (g) & 2, IAEA Doc. GOV/2006/14 (Feb. 4, 2006), available at <http://www.iaea.org/Publications/Documents/Board/2006/gov2006-14.pdf>.

266. IAEA, In Focus: IAEA & Iran, IAEA Board Adopts Resolution on Nuclear Safeguards in Iran (Sept. 2006), [http://www.iaea.org/NewsCenter/Focus/IaeaIran/iran\\_timeline3.shtml](http://www.iaea.org/NewsCenter/Focus/IaeaIran/iran_timeline3.shtml).

267. IAEA, Director General Report, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/27 (Apr. 28, 2006), available at <http://www.iaea.org/Publications/Documents/Board/2006/gov2006-27.pdf>.

268. IAEA, Director General Report, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/27 (June 8, 2006), available at <http://www.iaea.org/Publications/Documents/Board/2006/gov2006-38.pdf>.

Council in July 2006 passed Resolution 1696 giving Iran one month to “suspend all enrichment-related and reprocessing activities, including research and development” or else “face the possibility of economic and diplomatic sanctions to give effect to its decision.”<sup>269</sup> All of the Permanent Members voted for the resolution, which passed fourteen to one.

At this writing, the outcome of the WMD proliferation challenge presented by Iran remains unclear. There are reports that not all of the Permanent Members favor a strategy of imposing sanctions on Iran to press it to comply with demands that it consent to the verifiable suspension of its uranium enrichment activities.<sup>270</sup> Nevertheless, it seems beyond dispute that the interests and policies of the Permanent Five have converged to attempt to prevent Iran from developing nuclear weapons; their votes to refer the matter to the Security Council and to enact Resolution 1696 further demonstrate common acceptance of the possible resort to coercive collective measures against Iran to achieve that goal.

### 3. *The North Korea case*

Just as the Iran case has served as a test of Russia’s commitment to WMD nonproliferation, the North Korean nuclear crisis has focused the spotlight on China’s commitment to preventing the spread of nuclear weapons to dangerous states. Prior to 1993, China consistently opposed calls by the United States to bring political pressure to bear on North Korea to abandon its nuclear program.<sup>271</sup> China appears since to have concluded that, despite its longstanding patronage of North Korea, the acquisition of nuclear weapons by Pyongyang threatens its interests;<sup>272</sup> it has accordingly delivered “an explicit message that North Korea must put an end to its nuclear weapons program.”<sup>273</sup>

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269. S.C. Res. 1696, ¶ 1, U.N. Doc S/RES/1696 (July 31, 2006).

270. See SHARON SQUASSONI, CONG. RESEARCH SERV., IRAN’S NUCLEAR PROGRAM: RECENT DEVELOPMENTS 6 (2006), available at <http://fpc.state.gov/documents/organization/72449.pdf> (“Iran’s failure to halt enrichment by August 31 has prompted discussion among UNSC members on sanctions. Reportedly, the United States favors a travel ban and freezing assets of key Iranian leaders. Presently, Russia appears not to favor sanctions.”).

271. See Niklas Swanström & Mikael Weissmann, *Chinese Influence on the DPRK Negotiations*, 16 PEACE REV. 219, 222 (2004); see also Wu, *supra* note 207, at 36 (observing that during the first North Korean nuclear crisis, China emphasized that the dispute was a matter to be addressed by North Korea, the United States, South Korea, and the IAEA).

272. See Swanström & Weissmann, *supra* note 271, at 219 (describing “strong concern in Beijing over Pyongyang’s interest in developing nuclear weapons”); see also Pinkston Testimony, *supra* note 231, at 9 (stating that China recognizes “the serious threat that WMD proliferation [on the Korean peninsula] could pose to its security interests”); WANG JISI, CHINA’S CHANGING ROLE IN ASIA 10 (2004), available at [http://www.acus.org/docs/0401-China\\_Changing\\_Role\\_Asia.pdf](http://www.acus.org/docs/0401-China_Changing_Role_Asia.pdf) (“[I]t is definitely in China’s best long-term best interest to maintain a nuclear-free Korea.”); Taylor, *supra* note 193, at 184 (“China and America share a strong interest in keeping the Korean peninsula free from nuclear weapons.”).

273. Wu, *supra* note 207, at 36. China also “reportedly blocked a rail shipment [to

There are a number of reasons for this. First, uncertainty about the stability of North Korea's political system means that China cannot be certain North Korea's nuclear weapons will continue to be controlled by a friendly leadership.<sup>274</sup> Second, given North Korea's own predilection for weapons proliferation, China must be concerned about the spread of nuclear weapons technologies to other states or regions where the introduction of such technology would threaten China's interests.<sup>275</sup> Third, North Korea's nuclear weapons program greatly increases the prospects that Japan, South Korea, or Taiwan—all of which China views either as strategic rivals or as a renegade province—will counter the North Korean threat by developing their own nuclear deterrent capacities.<sup>276</sup>

In light of its growing interest in opposing nuclear proliferation, China has engaged productively in negotiations aimed at persuading North Korea to abandon its nuclear weapons program. In February 2003, China increased pressure on North Korea by voting in favor of an IAEA Board of Governors resolution that declared North Korea to be in noncompliance with its Nuclear Non-Proliferation Treaty Safeguards Agreement and referred the matter to the Security Council.<sup>277</sup> China also adopted a "significantly more proactive posture" towards Pyongyang by engaging directly in efforts to negotiate a resolution of the Korean nuclear crisis.<sup>278</sup> Former State Department Assistant Secretary Kelly described the Chinese role in persuading the North Koreans to participate in the six-party talks that began in August 2003 aimed at terminating the DPRK's nuclear weapons program as "critical."<sup>279</sup> In one of the most

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North Korea] of tributyl phosphate, a solvent that can be used in the extraction of weapons grade plutonium from spent fuel rods, after receiving a tip from U.S. intelligence." Pinkston Testimony, *supra* note 231, at 9.

274. See Robert D. Kaplan, *When North Korea Falls*, ATLANTIC MONTHLY, Oct. 2006, at 64 (noting that Korean leader Kim Jong Il "may be losing his edge" and describing the dangers of a collapse of the North Korean regime).

275. See Pinkston Testimony, *supra* note 231, at 9 (observing that the A. Q. Kahn "network of international nuclear smuggling drive[s] home [for China] the importance of strengthened international coordination in meeting the proliferation challenge").

276. Wu, *supra* note 207, at 38; see also Pinkston Testimony, *supra* note 231, at 9 (highlighting the "potential East Asian nuclear chain reactions as a result of Pyongyang's nuclear weapons program"); Jisi, *supra* note 272, at 10 ("An additional nuclear power so close to the very center of China's territory not only would generate a lasting problem for China's national security, but also could provide the rationale and pretense for other regional players to develop nuclear arms, notably Japan and Taiwan."); Swanström & Weissmann, *supra* note 271, at 2.

277. See Wu, *supra* note 207, at 41-42. For the resolution itself, see IAEA, Director General Report, *Implementation of the NPT Safeguards Agreement Between the Agency and the Democratic People's Republic of Korea*, IAEA Doc. GOV/2003/14 (Feb. 12, 2003), available at <http://www.securitycouncilreport.org> (search Gov/2003/14).

278. See Jisi, *supra* note 272, at 10-11.

279. See Kelly Testimony I, *supra* note 197, at 3; see also Swanström & Weissmann, *supra* note 271, at 223; Wu, *supra* note 207, at 39. See generally Medeiros & Fravel, *supra* note 191, at 34 (noting "Beijing's lead role in addressing the Korean nuclear crisis").

visible displays of the Chinese role, China in spring 2003 signaled its displeasure with North Korea's intransigence in the six-party talks by temporarily suspending oil shipments to North Korea, upon which Pyongyang is highly dependent.<sup>280</sup> Once the talks recommenced, China made, in the words of the lead American negotiator, "extensive efforts" that contributed significantly to progress made during the negotiations.<sup>281</sup>

The growing Chinese concern about WMD proliferation and the resulting evolution in China's policy are particularly striking in light of its traditional, post-Second World War era relationship with North Korea, a relationship that has been described as "closer than lips and teeth."<sup>282</sup> Indeed, during the Korean War, China's strategic commitment to North Korea brought United States and Chinese forces into a dangerous direct military confrontation. Today, however, the two countries today "share a common goal in preventing North Korea's further development of weapons of mass destruction."<sup>283</sup> Commentators note that the Korean peninsula nuclear crisis has "created a new synergy between" Beijing and Washington.<sup>284</sup>

In September 2005, the emerging synergy between the United States and China contributed to a significant breakthrough in the effort to resolve the Korean nuclear crisis: an agreement between the United States, China, North Korea, and other participants in the six-party talks to the terms of a Chinese-drafted Joint Statement in which "[t]he DPRK committed to abandoning all nuclear weapons and existing nuclear programs and returning at an early date" to the Nuclear Non-Proliferation Treaty.<sup>285</sup> Cooperation based on shared Chinese and American interests in preventing the emergence of North Korea as a nuclear-weapons state generated significant and tangible progress in countering a major WMD proliferation security threat. However, this progress was frustrated by North Korea's decision in November 2005 to boycott the six-party talks, and by the escalation of regional tensions triggered by North Korean ballistic missile tests in July 2006.<sup>286</sup> Most recently, North Korea's

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280. See Swanström & Weissmann, *supra* note 271, at 223.

281. *The North Korean Nuclear Calculus: Beyond Six-Power Talks: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 4 (2004) [hereinafter Kelly Testimony II] (statement of James A. Kelly, Assistant Sec'y of State for E. Asian and Pac. Affairs).

282. Timothy Hildebrandt, *Introduction: Uneasy Allies: Fifty Years of China-North Korea Relations* (Woodrow Wilson Int'l Ctr. For Scholars, Asia Program Special Rep. No. 115, Sept. 2003), available at [http://wwics.si.edu/topics/pubs/asia\\_rpt115b.pdf](http://wwics.si.edu/topics/pubs/asia_rpt115b.pdf).

283. Kelly Testimony I, *supra* note 197, at 4.

284. *E.g.*, Wu, *supra* note 207, at 39.

285. See Sean McCormack, Spokesman, Joint Statement of the Fourth Round of the Six-Party Talks Beijing (Sept. 19, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/53490.htm>. At the time, the adoption of the Joint Statement signified, in the words of one commentator, that "we have turned an important nuclear corner on the Korean Peninsula." Joseph Cirincione, *Victory on the Peninsula*, PROLIFERATION BRIEF (Carnegie Endowment for Int'l Peace, Washington, D.C.), Sept. 19, 2005, <http://www.carnegieendowment.org/npp/publications/index.cfm?fa=view&id=17477>.

286. LARRY A. NIKSCH, CONG. RESEARCH SERV., NORTH KOREA'S NUCLEAR WEAPONS



decision to test a nuclear device has provided an alarming reminder of the dangers of nuclear proliferation on the Korean peninsula. Within days, the Security Council, acting under its Chapter VII powers, adopted Resolution 1718, which condemned North Korea's nuclear test and decided unequivocally that North Korea must "abandon all nuclear weapons in a complete, verifiable and irreversible manner," subject to verification by the IAEA.<sup>287</sup> The resolution imposed a series of binding sanctions, including an embargo on heavy conventional weapons to North Korea, the freezing of North Korean assets related to WMD programs, a travel ban on persons involved in North Korea's WMD programs, and a requirement for states to take cooperative action to prevent trafficking in WMD, including through the inspection of cargo to and from North Korea.<sup>288</sup> Press reports indicate that China, in response to the resolution, has "stepped up inspections of trucks crossing into North Korea."<sup>289</sup> The apparent consensus on the need for coercive action against North Korea is important evidence that traditional balance-of-power rivalries have given way to increasingly common interests of the Permanent Members of preventing WMD proliferation.

#### D. *The Iraq Counterhypothetical?*

Those who insist the international legal order must be modernized by expanding the authority of states to use force unilaterally to meet the new security threats, as well as those skeptics who view the current international security architecture as embodying nothing more than "paper rules,"<sup>290</sup> ground their positions at least in part on the failure of the collective security mechanism in 2003 with respect to the threat posed by Iraq.

The Iraq case does not, however, stand for the proposition that there is a necessary or fundamental divergence of interests or principles between the United States and the other Permanent Members that would preclude the Council from authorizing coercive measures, including force, to address the

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PROGRAM 1 (2006) ("The six party talks remained stalemated since November 2005 when North Korea announced its second boycott of the talks . . ."). In a resolution condemning North Korea's missile tests, the Security Council strongly urged North Korea "to return immediately to the Six-Party talks without precondition, to work towards the expeditious implementation of the 19 September 2005 Joint Statement, in particular to abandon all nuclear weapons and existing nuclear programmes." S.C. Res. 1695, ¶ 6, U.N. Doc S/RES/1695 (July 15, 2006).

287. S.C. Res. 1718, ¶¶ 1, 6, U.N. Doc S/RES/1718 (Oct. 14, 2006).

288. *Id.* ¶ 8.

289. Burt Herman, *Report: N. Korea 'Sorry' for Nuke Test*, BRIETBART.COM, Oct. 20, 2006, <http://www.breitbart.com/news/2006/10/20/D8KSCOOO0.html>.

290. *E.g.*, Glennon, *supra* note 148, at 30-31; *see also* Sofaer, *supra* note 130, at 225 (contending that "artificial rules cannot bear the burden of the real world pressures that underlie use-of-force issues"); *id.* at 224 (referring to "Parchment Barriers" to the use of force).

new security threats. The split between the United States and the others on the Security Council in the Iraq case turned not on a disagreement about the basic question of whether force should be employed under the collective security umbrella where necessary to neutralize the threat posed by a dangerous state possessing both the intention and capability of using potentially devastating weapons of mass destruction, as the United States charged. Rather, the split arose from three separate disagreements, namely, a *factual* disagreement about whether the evidence supported the U.S. assertion that Iraq in 2003 actually presented such a case, a *tactical* disagreement about whether the Iraqi threat could be controlled through means short of the use of force, and a *strategic* disagreement about whether the potentially destabilizing consequences of using force outweighed the advantages of forcibly confronting the Iraqi WMD threat.

With respect to the evidence of the Iraqi threat, Richard Falk has argued that the disagreement between the United States and other Security Council members turned on differing views about the “*factual plausibility*”<sup>291</sup> of the threat:

The diplomatic repudiation of the United States in the Security Council resulted mainly from the factual unpersuasiveness of the U.S. arguments about the threats associated with Iraqi retention of weaponry of mass destruction and the claims of linkage between the Baghdad regime and the Qaeda network, and the alleged failures of deterrence and containment.<sup>292</sup>

Sean Murphy, too, has noted that international inspectors deployed to Iraq following the adoption of U.N. Security Council Resolution 1441 “uncovered no ‘smoking gun’ evidence that Iraq had resumed secret WMD programs,” which in turn undermined U.S. efforts to secure consensus in favor of the use of force against Iraq.<sup>293</sup>

Beyond these doubts about the factual basis for claims regarding the WMD threat presented by Iraq, the case for the use of force was further weakened by the perception on the part of other states that Iraqi WMD programs could be contained or controlled through international inspections. In this view, the Iraq crisis did not present a choice between confronting Iraq’s WMD threat with armed force and doing nothing to address that threat. As Thomas Franck explains:

In the run-up to the Iraq invasion, it became clear that the overwhelming majority of nations . . . believed either that Iraq did not have a significant number of weapons of mass destruction or, if such weapons and the necessary

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291. Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L L. 590, 595 (2003).

292. *Id.* But see Ramsey, *supra* note 29, at 1547 (arguing that opposition of France, Russia, and Germany to the use of force against Iraq in 2003 was based on a “fundamental division in modern international security law” regarding the role of the Security Council in “aggressive policing” of the international order); Weisburd, *supra* note 29, at 529 (noting statements by France’s Foreign Minister that there was evidence of Iraqi chemical and biological weapon production capacity and stockpiles).

293. Murphy, *supra* note 81, at 223.

delivery systems existed, that they could be found by the instituted system of inspections.<sup>294</sup>

Finally, disagreements among states about the use of force may go beyond divergent assessments of the gravity of terrorism- or WMD-related threats and the availability of alternative means, such as inspections or sanctions, to address those threats. Given the highly unpredictable and often destabilizing consequences of using force, states may also believe that the dangers to regional or even global security presented by a proposed use of force outweigh the potential benefits of forcibly countering a growing WMD-related threat. Such concerns about broader geopolitical effects—and not a categorical aversion to the use of force—plainly informed the views of a number of states that opposed employing force to address the Iraqi WMD threat during Security Council debates in early 2003 on the question.<sup>295</sup>

The doubts about the evidentiary strength of the U.S. claims regarding the threat posed by Iraqi WMD and about the capacity of an inspection regime to control that threat have, of course, since been borne out by the acknowledgement that Iraq did not in fact possess weapons of mass destruction stockpiles prior to the U.S.-led invasion.<sup>296</sup> In terms of the possible future use of the collective security mechanism to confront new security threats, though, the key is that the Permanent Members did not in the context of Iraq differ on the principle that the Security Council could authorize the use of force to

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294. Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 616 (2003).

295. During Security Council debates, a number of states stressed the serious and unpredictable consequences of using force against Iraq as a basis for opposing it. *See, e.g.*, U.N. SCOR, 58th Sess., 4707th mtg. at 12, U.N. Doc. S/PV.4707 (Feb. 14, 2003) (French representative's warning that it will be a "long and difficult" struggle to build peace and "to preserve Iraq's unity and to restore stability in a lasting way in a country and a region harshly affected by the intrusion of force"); *id.* at 10 (Syrian representative's prediction that "this war will have grave consequences . . . [and] will spill over to the entire region"); *id.* at 29-30 (German concerns that "military action against Iraq would, in addition to the terrible humanitarian consequences, above all endanger the stability of a tense and troubled region" and "could be catastrophic" for the Middle East); U.N. SCOR, 58th Sess., 4717th mtg. at 7, U.N. Doc. S/PV.4717 (Mar. 11, 2003) (concern by Malaysia's representative, speaking on behalf of the Non-Aligned Movement, that "war against Iraq will be a destabilizing factor for the region and for the whole world, as it will have far-reaching political, economic and humanitarian consequences for all"); *id.* at 8 (South Africa's statement that "a war against Iraq will be deadly and destabilizing and will have far-reaching political, socio-economic and humanitarian consequences for all the countries of the world").

296. In a speech delivered on July 12, 2004, President Bush acknowledged that "we have not found stockpiles of weapons of mass destruction" in Iraq. President's Remarks at the Oak Ridge National Laboratory in Oak Ridge, Tennessee, 40 WEEKLY COMP. PRES. DOC. 1254, 1257 (July 12, 2004), available at <http://www.whitehouse.gov/news/releases/2004/07/20040712-5.html>. Two days later, British Prime Minister Tony Blair acknowledged in Parliament that "it seems increasingly clear that at the time of invasion, Saddam did not have stockpiles of chemical or biological weapons ready to deploy." Alan Cowell, *British Report Faults Prewar Intelligence but Clears Blair*, N.Y. TIMES, July 15, 2004, at A6 (originally published July 14, 2004; July 15, 2004 includes an appended correction).

confront a serious WMD threat in a dangerous state. “Saddam Hussein had no do-or-die defenders in the Council Chamber.”<sup>297</sup>

V. DEFENDING THE INTERNATIONAL SECURITY ARCHITECTURE:  
NOSTALGIC OR NORMATIVE?

I have so far advanced two basic claims. First, I have argued that unilateral uses of force to counter the new security threats of terrorism and weapons of mass destruction programs in dangerous states are difficult to reconcile with international law rules governing the use of force. Second, I have suggested that because the five Permanent Members of the Security Council share essentially common interests in countering these threats, it should be possible to ground forcible responses to terrorism and WMD proliferation threats on much sounder collective security grounds, at least in cases where there is a shared assessment of the severity of a threat and force is seen as a response that will not unleash greater dangers than it prevents. I have accordingly taken issue with both those who call for the development of new doctrines to expand the circumstances under which states may unilaterally use force and those who argue that current international security architecture cannot be expected to regulate the use of force because it does not reflect today’s geopolitical realities.

But even if the Charter’s collective security mechanism is a viable option for meeting the new security threats, this tells us only that the oft-made contention that the existing international security architecture is obsolete is wrong. It does not tell us why invoking the collective security machinery is preferable to the alternative of seeking to revise the law to expand and regulate the conditions under which unilateral force may be used. Are there sound principled grounds for seeking to limit forcible responses to new security threats to those available under a traditional—some might say conservative—reading of the Charter? Or does this merely reflect a slavish devotion to rules laid down, if not quite in the time of Henry IV, in an era almost as remote, at least in terms of changes in the international security environment?<sup>298</sup>

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297. Franck, *supra* note 294, at 616. Indeed, notwithstanding the skepticism about the evidentiary soundness of U.S. claims about the Iraqi threat, it is far from clear that the Security Council would have withheld authority to use force had the United States engaged more strenuously in an effort to persuade others in the Council of its view.

A number of close observers—such as British Ambassador to the UN Sir Jeremy Greenstock—believe that with a little more patience and diplomacy, the administration could have obtained another resolution that would have focused on the sins of Saddam Hussein rather than allowing France and Russia to turn the problem into one of American power.

Nye, *supra* note 141, at 63.

298. According to Holmes’s famous aphorism: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

### A. Legitimacy

There are in fact powerful normative and prudential reasons for confining forcible responses to the new security threats to the legal bases set forth in the Charter. The most important normative consideration is the *legitimacy* that flows from using force in a manner that comports with accepted existing legal rules and the international lawmaking process.

I have argued that the rules authorizing the use of force to confront new security threats under the collective security mechanisms of the Charter, unlike unilateral uses of force, are *legal* under prevailing international law norms. Although it is of course possible to identify legality with legitimacy, commentators generally agree that the concepts are distinct; legal rules may be illegitimate, and illegal acts may be legitimate.<sup>299</sup> Accordingly, assessing the legitimacy of competing bases for the use of force to counter the new security threats requires us to consider a question analytically distinct from that of the legality of those alternative bases.

For these purposes, I use the term “legitimacy” in the sense advanced by Thomas Franck<sup>300</sup> as “a property of a rule . . . which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>301</sup> Franck identifies four “indicators” of rule-legitimacy in international relations: “determinacy, symbolic validation, coherence, and adherence.”<sup>302</sup> A rule permitting the use of force to counter new security threats on the basis of collective security exhibits a higher degree of legitimacy than does one allowing unilateral use of force on each of these indicators.

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299. See Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 381 (1999) (“[A]n actor’s belief in the legitimacy of a norm, and thus its following of that norm, need not correlate to the actor being ‘law abiding’ . . . . Often, precisely the opposite is true: a normative conviction about legitimacy might lead to *noncompliance* with laws when laws are considered in conflict with the conviction.”); see also Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1123 (1997) (“[E]ven highly legitimate legal systems . . . often generate legal rules that one can only describe as illegitimate.”).

300. See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). The concept of “legitimacy” and its relationship to legality is frequently invoked in legal and political discourse. I rely here on Franck’s analysis of this relationship because he is perhaps the most thoughtful scholar to examine these issues systematically.

301. *Id.* at 24. Hurd employs a more general formulation, describing legitimacy as “the normative belief by an actor that a rule or institution ought to be obeyed,” without necessarily identifying the sources of or causes for such belief. Hurd, *supra* note 299, at 381.

302. FRANCK, *supra* note 300, at 49.

### 1. *Determinacy*

With respect to *determinacy*, the clear rules-based prohibition on the unilateral use of force, except in cases of armed attack, provides greater clarity than does a rule allowing a state to use force whenever it perceives that another state (or actors present in that state's territory) poses a sufficient threat to it. Clarity, however, is not a conclusive measure of legitimacy. Indeed, Franck recognizes that a rule may through its very clarity lack the "texture[]" necessary to induce states to comply with it; he cites in this regard the Charter's prohibition on the use of force at issue here.<sup>303</sup> The more textured alternative basis for the use of force, under which states may use force when the Security Council determines that a sufficient threat to international peace and security exists, lacks the clarity of the bright-line rule prohibiting force in the absence of an armed attack.

Franck notes, however, that a rule with "low textual determinacy may overcome that deficit if it is open to a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed."<sup>304</sup> The standards-based Charter regime offers greater legitimacy because of the role of the Security Council in interpreting the circumstances under which a threat to international peace and security warrants a forcible response. I will return to this issue below,<sup>305</sup> in discussing the legitimacy of the Security Council as an institution.

### 2. *Symbolic validation*

Symbolic validation, in Franck's legitimacy model, denotes a cultural and anthropological quality of a rule that communicates the acknowledged authenticity of a rule or rule-maker.<sup>306</sup> An important source of symbolic international legitimation arises from vesting authority over matters of international concern in international institutions. "Their very status as international agencies is partially symbolic, transforming them from a diplomatic conference of sovereign states into entities different from, and to some extent independent of, member nations."<sup>307</sup> Thus, a rule requiring Security Council approval as a prerequisite to the use of force to counter new security threats exhibits a greater deal of symbolic validation than does a rule allowing states to act unilaterally.

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303. *Id.* at 75-76.

304. *Id.* at 61.

305. *See infra* Part V.A.5.

306. FRANCK, *supra* note 300, at 91.

307. *Id.* at 101.

### 3. Coherence

Coherence is a third indicator of an international law rule's legitimacy. A rule boasts greater coherence if it is consistent with other rules and the underlying principles or policies for which the rule was adopted. As Franck argues: "Rules, to be perceived as legitimate, must emanate from principles of general application. State behavior is judged in terms of its effect in reinforcing, undermining, or amending the generalized norms of the system."<sup>308</sup>

One of the central goals of the international legal order is to promote a peaceful international world order by limiting the use of force to circumstances in which it advances common interests.<sup>309</sup> The proposed rules aimed at liberalizing the freedom of states unilaterally to decide to use force do not accord with this underlying purpose. First, such doctrines run the risk of increasing the incidence of destructive interstate violence. Second, these doctrines reduce collective control over the process of determining when force should be used, which in turn weakens the link between the use of force and the promotion of the "common interest" of states.

A key measure of the coherence of action under a purported rule, Franck explains, is for all states to judge it "in terms of its projected effect" on the international system "if *all* were to act" in accordance with the rule.<sup>310</sup> Instructive in this regard is the reaction of the United States in cases in which other states faced threats that would have entitled them to use force unilaterally under the new WMD- and terrorism-related doctrines espoused by the United States. One such case arose during the post-September 11th escalation of tensions between India and Pakistan. Following a series of grave attacks in 2001 and 2002 in India by Pakistan-based terrorists,<sup>311</sup> the Indian military

308. *Id.* at 152; *see also id.* at 153 (noting that a rule must be rational in the sense of exhibiting "an intrinsic, usually logical, relationship . . . between the particular rule, its underlying principle, and the principles underlying other rules of society").

309. The first preambular clause of the U.N. Charter declares that the member states created the United Nations "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." U.N. Charter pmb. Three of the four stated functions of the United Nations are "to practice tolerance and to live together in peace with one another as good neighbors," "to unite our strength to maintain international peace and security," and "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest." *Id.* The first stated purpose of the United Nations is to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . ." *Id.* art. 1, para. 1.

310. FRANCK, *supra* note 300, at 152.

311. *See* Celia W. Dugger, *Suicide Raid in New Delhi; Attackers Among 12 Dead*, N.Y. TIMES, Dec. 14, 2001, at A1 (describing suicide attack on Indian Parliament in New Delhi that killed seven people and injured eighteen); Lee Feinstein, *Avoiding Another Close Call in South Asia*, ARMS CONTROL TODAY, July-Aug. 2002, at 3, 4 (describing May 2002 attack by militants in Jammu, India, that killed thirty-two people).

greatly expanded its presence near Pakistan, so that by Spring 2002, one million Indian and Pakistani troops confronted one another along their shared border. The Prime Minister of India delivered a speech to Indian soldiers along the frontier urging them “to prepare for a ‘decisive battle’ against terrorism.”<sup>312</sup>

Under the proposed rules advocated to liberalize the circumstances under which states may use force to counter new security threats like terrorism, the use of force by India against Pakistan would have been permissible. But despite initial U.S. statements that seemed tacitly to accept India’s entitlement to respond forcibly,<sup>313</sup> the United States discouraged a military response. The White House spokesman declared that the terrorism against India “is not a reason for India and Pakistan to take action against each other. This is a time for India and Pakistan to take action against the terrorists.”<sup>314</sup> As tensions escalated, Deputy Secretary of State Armitage and Defense Secretary Rumsfeld made separate trips to South Asia to encourage restraint, and President Bush called the Prime Minister of India and the President of Pakistan to deliver the same message.<sup>315</sup>

Recognizing the risks of military confrontation, the U.S. response to the India-Pakistan crisis suggests that it did not view a unilateral use of force by India to counter the threat of terrorism as the favored response. The United States admittedly brought considerable pressure to bear on Pakistani President Musharraf to halt cross-border incursions by Pakistani militants into India to reduce the terrorist threat.<sup>316</sup> The point, however, is that the United States advanced a nonforcible solution.

In the context of Russia’s dealings with terrorist groups operating from the territory of Georgia, the United States has similarly discouraged unilateral resort to force that would have been consistent with the rights the United States has claimed in the struggle against terrorism. Following Russia’s threats in September 2002 to invade neighboring Georgia to attack Chechen terrorist groups based on Georgian territory,<sup>317</sup> U.S. officials expressed support for the

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312. Barry Bearak, *Indian Leader’s Threat of War Rattles Pakistan and the U.S.*, N.Y. TIMES, May 23, 2002, at A3.

313. Celia W. Dugger, *Group in Pakistan Is Blamed for India Suicide Raid*, N.Y. TIMES, Dec. 15, 2001, at A1 (quoting statement of the American Ambassador to India that the New Delhi attack “was no different in its objective from the [September 11] terror attacks in the U.S.”); Richard Boucher, Spokesman, U.S. Dep’t of State, Daily Press Briefing (Dec. 14, 2001), available at <http://www.state.gov/r/pa/prs/dpb/2001/6860.htm> (stating that the appropriate response for India was “to find out who was responsible for these horrible acts, and take appropriate action”).

314. Ari Fleisher, White House Press Secretary Press Briefing (Dec. 18, 2001), available at <http://www.whitehouse.gov/news/releases/2001/12/20011218-3.html>.

315. See Feinstein, *supra* note 311, at 4.

316. See Walter Andersen, *India and Pakistan Challenge American Diplomacy*, 2003 SAISPHERE 36, 38, available at <http://www.sais-jhu.edu/pubaffairs/publications/saisphere/winter03/andersen.html>.

317. See *supra* notes 187-88 and accompanying text.



Georgian government and “publicly warned [Russia] off any thought of using ‘brute force’ against Georgia.”<sup>318</sup>

U.S. calls for restraint in the context of the India-Pakistan and Russia-Georgia cases appear to reflect a recognition on the part of the United States of the dangers to the international security order presented by generalization of a purported right for states to respond unilaterally to new security threats. Despite the robustness of the justifications advanced by U.S. officials for the claimed new grounds for using force, it is in fact “very unlikely that Washington is eager to have its new doctrine adopted by New Delhi and Beijing, let alone Tehran and Pyongyang.”<sup>319</sup>

The collective security apparatus admittedly is also susceptible to claims of a lack of coherence with the underlying purposes for which the international security architecture was erected, particularly when the veto is used to prevent the use of force against aggression, breaches of the peace, or genuine threats to international peace and security. Where the interests of the Permanent Five are not in conflict, however, the collective security regime can function much more coherently in light of underlying norms than does a regime allowing unilateral uses of force on the basis of perceived threats.

#### 4. *Adherence*

Franck’s fourth indicator of a rule’s legitimacy is “adherence,” or the “vertical nexus” between a substantive rule “and a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted, and applied.”<sup>320</sup> Rules exhibit a higher degree of legitimacy if they are “reinforced by a hierarchy of secondary rules which define the rule-system’s ‘right process.’”<sup>321</sup>

It is on this indicator of legitimacy that proposed rules to expand the conditions under which force may be used unilaterally to confront new security threats face the greatest difficulty. Rulemaking under international law remains fundamentally a process of the consent of states, either through the conclusion of international agreements or through the formation of customary international law, which is based on the widespread practice of states. Similarly, even under an evolutionary view of the U.N. Charter, claims for new interpretations of the law governing the use of force require acceptance by substantial portions of the international community. Unlike the norms embodied in the Charter, none of the new doctrines reviewed in Part III that have been proposed to counter the new security threats can claim to have secured widespread international

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318. Sestanovich, *supra* note 188, at 14.

319. Franck, *supra* note 126, at 429.

320. FRANCK, *supra* note 300, at 184.

321. *Id.*

consensus or to have been adopted in accordance with the “primary” rules for lawmaking in the international system.<sup>322</sup>

There has been no serious attempt, for instance, to negotiate amendments to the U.N. Charter, to negotiate separate international agreements, or to enact interpretative resolutions in either the Security Council or the General Assembly, that would embody the proposed new rules.<sup>323</sup> Instead, only a small number of states have advocated these changes; the prevailing international response to them has been skepticism or outright hostility.

##### 5. *The legitimacy of the Security Council as an institution*

As noted in the discussion of determinacy,<sup>324</sup> the evaluation of the legitimacy of the *rules* allowing the use of force as a matter of collective security necessarily implicates the legitimacy of the *institution* authorized to interpret and apply those rules, the Security Council. There is an active discussion, both among academic commentators and among states in the international system, on the issue. Participants in this debate have advanced arguments both for and against the legitimacy of Security Council decision-making on use of force issues. On the one hand, virtually all member states of the international community have freely consented to the Charter’s legal regime and have delegated decision-making authority over collective security to the Security Council. Membership in the Council, and consequently the entitlement to participate in its decision-making processes, exhibits important features of representativeness. Apart from the Permanent Members, the other members of the Council are elected by the General Assembly, with due regard paid to “equitable geographical distribution.”<sup>325</sup> The fact that Chapter VII-based uses of force are grounded in state consent, which continues to form the bedrock of

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322. See Arend, *supra* note 3, at 99 (noting that although scholars have suggested various standards for the unilateral use of force to confront the problems of WMD and terrorism, neither “treaty law [n]or custom has yet come to endorse one”).

323. A number of independent or quasi-independent international commissions have, in contrast, attempted to define circumstances under which humanitarian intervention—the unilateral use of force to stop widespread atrocities taking place within a country—might be permissible. See INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000); INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>. The efforts of these commissions, however, have not generally led to the adoption of agreed international standards on humanitarian intervention in the political bodies of the United Nations. One striking exception is the shared recognition by the members of the African Union of “the right of the [African] Union to intervene in a Member State pursuant to a decision of the Assembly [of States] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.” Constitutive Act of the African Union, art. 4(h), July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001).

324. See *supra* Part V.A.1.

325. U.N. Charter, art. 23, para. 1.

the process through which international obligations are created, and the requirement that the Security Council enact formal resolutions pursuant to procedures regulated by the Charter, comport with principles of right process.<sup>326</sup>

On the other hand, the legitimacy of the Council is undoubtedly subject to challenge. First, despite the election of nonpermanent members by the General Assembly, the Security Council cannot be said to uphold the principle of equality of states, which would ordinarily be a key requirement for right process in international decision-making.<sup>327</sup> A frequent complaint about the legitimacy of the Council is that “it is dominated by several of the permanent members.”<sup>328</sup> A closely related critique concerns the unfairness of the veto, both as an abstract matter<sup>329</sup> and because of questions about “whether the correct states hold the veto.”<sup>330</sup> The existence of the veto, permitting any of the

326. Some commentators have suggested that where the Security Council unreasonably withholds authorization to use force to confront a threat to international peace and security, it should be permissible for either “the regional organization most likely to be affected by the emerging threat,” *see, e.g.*, Feinstein & Slaughter, *supra* note 116, at 148, or alternatively “a coalition of reasonably democratic states” to decide to use force, *see, e.g.*, Buchanan & Keohane, *supra* note 43, at 18-20. Although the requirement of a collective decision to use force among such a group of states would diminish the dangers of error and abuse inherent in unilateral uses of force, *see infra* Part V.C, the use of force by either a regional organization or a group of democracies would suffer from a critical lack of legitimacy because the states that are the targets of such military interventions have not consented *ex ante* to the use of force authorized by such groups. Through their adherence to the U.N. Charter, in contrast, all states have consented to the use of force authorized by the Security Council to respond to a threat to international peace and security.

327. *See* FRANCK, *supra* note 300, at 176 (observing that the veto “seems to undermine coherence of the general principle of ‘sovereign equality’ established in article 2” of the Charter).

328. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 562 (1993); *see also* Nico Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 879, 905 (Christian Walter et al. eds., 2003) (noting that the Council’s “composition is criticised for being too limited” and that “the Council is often perceived as merely a tool of its Western members and in particular of the United States”).

329. Buchanan & Keohane, *supra* note 43, at 9 (arguing that “[f]rom a cosmopolitan standpoint . . . [t]he veto seriously impugns the legitimacy of the legal status quo”).

330. Caron, *supra* note 328, at 555. As an abstract matter, the existence of the veto means that veto-holders are able to shield themselves and their allies from the international community’s attempts to govern international affairs. The veto also distorts the voices of different participants in Security Council decision-making. *Id.* at 556-66. In terms of distribution of veto powers, the device was originally adopted as a geopolitical matter because China, the Soviet Union, the United Kingdom, and the United States “made clear that the veto was an essential condition for their participation” in the United Nations. Weisburd, *supra* note 29, at 545. The principled justification for the veto was the notion that the Permanent Members “were expected to assume most of the military, as well as fiscal, responsibilities for carrying out the Charter’s mandate. . . . [Thus, i]t made sense that they should have a greater say in key decisions.” FRANCK, *supra* note 300, at 176; *see also* Weisburd, *supra* note 29, at 546. It is highly problematic from a legitimacy standpoint that

Permanent Members to block collective security action even if the other fourteen members of the Council support it, has of course long been a feature undermining the determinacy, and the coherence, of the Charter system. Moreover, the historical inconsistency in the Council's exercise of its collective security functions and its lack of reasoned justifications for authorizing, or failing to authorize, force undermine the Council's claim to legitimacy on the basis of both determinacy and coherence.<sup>331</sup>

I argue below that the Council can begin to address at least the difficulty of inconsistency regarding the exercise of its Chapter VII powers by agreeing on, and beginning to implement, situation-specific benchmarks on when to pursue force on a collective security basis.<sup>332</sup> In any event, however, the relevant question is not whether the Security Council and its Chapter VII decision-making procedures represent the ideal institutional design in terms of legitimacy. In the absence of agreement on a new international security architecture,<sup>333</sup> the issue is comparative: does Security Council control over

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the allocation of veto power is arguably no longer rational in light of its original link to the heavier financial and military burdens expected to be borne by states engaged in maintaining international peace and security. It is no longer the case that those members of the Security Council entitled to exercise the veto are the most powerful members of the international community. Nor do they necessarily make the most significant financial or military contributions to collective security, as manifested through funding or participation in peacekeeping missions. See FRANCK, *supra* note 300, at 177; see also Krisch, *supra* note 328, at 905 (“[T]he veto power of the permanent members is attacked as an outdated prerogative.”).

331. As Caron notes, when an ineffective Security Council fails to act in the face of objectionable behavior by offending states, “community objectives and tools are lost.” Caron, *supra* note 328, at 558 n.26; see also Weisburd, *supra* note 29, at 542-43 (arguing the Council's discretion whether or not to authorize the use of force is so great that it gives rise to no “predictable and generalizable principle,” a situation inconsistent with the rule of law).

332. See *infra* Part VI.B.3.

333. The United Nations has long considered reforms that would change the structure and composition of the Security Council to increase its representativeness, and such discussions continue today. Most recently, the U.N.'s High Level Panel on Threats, Challenges, and Change recommended enlargement of the Security Council, *A More Secure World*, *supra* note 83, ¶¶ 249-56, although it recognized that the debate about reform of the Council “has made little progress in the last 12 years,” *id.* ¶ 250. Similarly, U.N. Secretary-General Annan, in his 2005 report to the General Assembly, urged reform and enlargement of the Security Council. See *In Larger Freedom: Towards Development, Security and Human Rights for All*, *supra* note 83, ¶¶ 167-70. Nevertheless, no agreement on Security Council enlargement was reached at the U.N. “World Summit” of heads of state and government in September 2005; U.N. member states were able to agree only that they support “early reform of the Security Council . . . in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions.” 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 153, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). The assembled national leaders committed their countries to “continuing [their] efforts to achieve a decision to this end and request the General Assembly to review progress on the reform set out above by the end of the 2005.” *Id.* As difficult as agreement on enlargement of the Council has proven, proposals to eliminate the veto of the current Permanent Members seem even less attainable. “Practically speaking, it is quite unlikely that the veto can be eliminated or even significantly

uses of force in situations not involving actual or imminent armed attacks exhibit greater legitimacy than rules not grounded in *ex ante* consent under which states would be permitted to use force unilaterally on the basis of perceived threats? For all the challenges to the Security Council, the rules allowing it to authorize force in response to new security threats exhibit the properties of adherence, symbolic validation, and coherence with the principle of permitting the use of force only in the common interest. Further, the procedural safeguards of Security Council approval for collective security action mean that the indeterminacy of the Council's entitlement to authorize force to counter threats to international peace and security is less subject to the risk of error or abuse than are indeterminate rules permitting unilateral uses of force.<sup>334</sup> Consequently, collective security measures authorized by the Council, including the use of force, carry a much higher degree of legitimacy and international political acceptance than unilateral measures or measures taken by other multilateral bodies that lack the Security Council's explicit mandate to authorize coercive measures.

### B. *Effectiveness*

The legitimacy flowing from basing the use of force on sound legal grounds can have the practical consequence of generating broader international support for the use of force. This in turn enhances the *effectiveness* of military operations and the ability to achieve the political objectives that motivated the use of force.<sup>335</sup> The contrast between the 1991 and the 2003 U.S.-led uses of force against Iraq demonstrates the pragmatic benefits flowing from legitimacy.

During the 1991 Persian Gulf War, which the Security Council authorized, twenty-six countries, including Arab countries from the region, contributed ground or naval military forces to the U.S.-led coalition. Many of the contributions were significant; foreign countries contributed 160,000<sup>336</sup> of the 540,000 troops deployed to liberate Kuwait;<sup>337</sup> according to the Department of Defense, the contribution of these forces was "essential to the success of the [Desert Storm] ground operation."<sup>338</sup> A number of countries, including Egypt, France, Kuwait, Syria, Saudi Arabia, and the United Kingdom, supplied ground

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limited." Caron, *supra* note 328, at 567.

334. *See infra* Part V.C.

335. Joseph Nye has written:

When countries make their power legitimate in the eyes of others, they encounter less resistance to their wishes. . . . If [a country] uses institutions and follows rules that encourage other countries to channel or limit their activities in ways it prefers, it will not need as many costly carrots and sticks.

JOSEPH S. NYE, JR., *SOFT POWER* 10-11 (2004).

336. DEP'T OF DEFENSE, *CONDUCT OF THE PERSIAN GULF WAR* 500 (1992).

337. *Id.* at 86.

338. *Id.* at 500.

troops and armored units that participated in major military actions.<sup>339</sup> In addition, Bahrain, Canada, France, Italy, Kuwait, Oman, Qatar, Saudi Arabia, the United Arab Emirates, and the United Kingdom made substantial contributions of air assets.<sup>340</sup> Important U.S. allies that did not make major troop contributions, such as Germany and Japan, instead made substantial financial contributions to defray the costs of military operations incurred by the United States.<sup>341</sup> Regional states provided the United States with military bases from which to launch and support attacks.<sup>342</sup> After the conflict, the United Nations participated actively in efforts to demarcate the boundary between Iraq and Kuwait, to oversee the destruction of Iraq's weapons of mass destruction program, and to secure payment for those who suffered losses as a result of Iraq's invasion of Kuwait.

In comparison, the United States found itself much more isolated during the 2003 invasion of Iraq, which the Security Council did not authorize. Apart from the United Kingdom, no other country contributed operationally significant military forces during the initial invasion of Iraq. Turkey refused the American request to deploy a substantial U.S. force on Turkish soil to allow for a two-front attack against Iraq.<sup>343</sup> Although thirty-four countries had, as of March 2004, nominally contributed troops to assist in providing security in Iraq, the scale and operational significance of the contributions was modest. The total number of troops from countries apart from the United States and the United Kingdom appears to be no more than 12,000.<sup>344</sup> In terms of the cost of

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339. *Id.*

340. GlobalSecurity.org, Allied Troop Contributions (Apr. 7, 2005), [http://www.globalsecurity.org/military/ops/desert\\_storm-allied.htm](http://www.globalsecurity.org/military/ops/desert_storm-allied.htm).

341. HOUSE BUDGET COMM. DEMOCRATIC CAUCUS, ASSESSING THE COST OF MILITARY ACTION AGAINST IRAQ: USING DESERT SHIELD/DESERT STORM AS A BASIS FOR ESTIMATES 7 (2002) (citing Defense Department budget figures), available at [http://www.house.gov/budget\\_democrats/analyses/spending/iraqi\\_cost\\_report.pdf](http://www.house.gov/budget_democrats/analyses/spending/iraqi_cost_report.pdf). The total cost to the United States of the first Persian Gulf War, in equipment and funds, was \$61.1 billion, but the United States received cash and in-kind contributions from allies totaling \$48.4 billion, or roughly 80%.

342. According to a history prepared by the Naval Historical Center of the United States Navy, the cooperation of Bahrain, Qatar, Oman, the United Arab Emirates, and Saudi Arabia enabled the United States to "quickly base over 500,000 troops and 2000 aircraft in Saudi Arabia and the other Gulf States." DEP'T OF THE NAVY, THE UNITED STATES NAVY IN "DESERT SHIELD"/"DESERT STORM" 52 (1991), available at [http://www.gulflink.osd.mil/histories/db/navy/usnavy\\_001.html](http://www.gulflink.osd.mil/histories/db/navy/usnavy_001.html); see also DILIP HIRO, DESERT SHIELD TO DESERT STORM: THE SECOND GULF WAR 161 (1992) ("By late August [1990] there were foreign forces in all of the Gulf monarchies.").

343. Dexter Filkins, *Turkish Deputies Refuse to Accept American Troops*, N.Y. TIMES, Mar. 2, 2003, at A1.

344. The precise number of non-American troops participating in the invasion and subsequent occupation of Iraq has been difficult to ascertain. As of August 2006, "27 other countries [including the United Kingdom] are contributing about 18,000 forces, but the total is expected to fall." KENNETH KATZMAN, CONG. RESEARCH SERV., IRAQ: POST-SADDAM GOVERNANCE AND SECURITY 37-38 (2006). A number of countries have withdrawn, or are expected to withdraw by the end of 2006, including Japan, Italy and Poland. *Id.*; see also

the military deployment in Iraq, no country has made financial contributions to help defray the enormous cost of U.S. military expenses;<sup>345</sup> to the contrary, it appears that the United States is assuming the costs of many of the foreign troops that have been deployed to Iraq.<sup>346</sup>

Within Iraq itself, the U.S. presence was met with great skepticism even by Iraqis who had suffered for decades under the brutal regime deposed by U.S. forces. American efforts to establish transitional political institutions met with significant resistance, and by Spring 2004, the United States turned to the United Nations for help with the transition.<sup>347</sup> As a strictly military matter, the United States may not need to depend on international cooperation to enable it to confront new security threats. Nevertheless, the recent invasion of Iraq demonstrates that successful uses of force depend on more than military superiority.<sup>348</sup> International cooperation is vital in providing an overarching

JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., POST-WAR IRAQ: FOREIGN CONTRIBUTIONS TO TRAINING, PEACEKEEPING, AND RECONSTRUCTION 2 (2006). As of December 2005, no country, apart from the United Kingdom, had provided more than 2900 troops. See STEVE BOWMAN, CONG. RESEARCH SERV., IRAQ: U.S. MILITARY OPERATIONS 12 (2005). Moreover, the presence of the non-U.K. foreign troops is not operationally vital to the U.S. military's mission in Iraq, but is rather primarily symbolic. Lionel Beehner, Council on Foreign Relations, *Update: The 'Coalition of the Willing' in Iraq*, Dec. 5, 2005, <http://cfr.org/publication/9340/update.html> (quoting Richard Betts, Director, War and Peace Studies Institute, Columbia University).

345. The Congressional Research Service estimated that as of Fiscal Year 2006, Congress has budgeted about \$437 billion for military operations in Iraq and Afghanistan and for operations related to the war on terror since the 9/11 attacks. AMY BELASCO, CONG. RESEARCH SERV., THE COST OF IRAQ, AFGHANISTAN AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, summary (updated Oct. 7, 2005), available at <http://www.fas.org/sgp/crs/natsec/RL33110.pdf>. Since then, the Bush Administration has announced that it will seek an additional \$120 billion in funding for military operations in Iraq and Afghanistan through 2006. David S. Cloud, *\$120 Billion More Is Sought for Military in War Zones*, N.Y. TIMES, Feb. 3, 2006, at A14. In September 2006, the Congress "sent a \$447.6 billion bill for the Defense Department to the president [for Fiscal Year 2007]. It included \$70 billion for operations in Iraq and Afghanistan, a sum that will bring the total spent on those wars and other military antiterrorism operations to more than \$500 billion." Carl Hulse & Rachel S. Swarns, *Senate Passes Bill on Building Border Fence*, N.Y. TIMES, Sept. 30, 2006, at A29.

346. STEVE BOWMAN, CONG. RESEARCH SERV., IRAQ: U.S. MILITARY OPERATIONS 11 (May 18, 2005), available at <http://italy.usembassy.gov/pdf/other/RL31701.pdf>.

347. Warren Hoge, *U.N. Is Wary of Dangers in Taking Lead Role in Iraq*, N.Y. TIMES, Apr. 18, 2004, at A11 (noting that the United States, faced with a June 30, 2004 deadline for the formation of a transitional Iraqi government, had turned to the United Nations "as the only institution that can confer immediate global legitimacy on the American goal of bringing representative government to Iraq"); see also Murphy, *supra* note 81, at 250 ("[B]y early 2004, the United States found that only through the United Nations was there any chance of negotiating with the major Iraqi factions so as to create a popular and legitimate interim Iraqi authority, one that could oversee the drafting of a constitution that would win broad Iraqi support."); William W. Burke-White, *Human Rights and National Security*, 17 HARV. HUM. RTS. J. 249, 274 (2004) (noting, during creation of Iraqi governing institutions, that "the United States needs the U.N. more than ever to help transition to Iraqi rule").

348. See generally NYE, *supra* note 335 (arguing that in the contemporary international system, states cannot rely only on "hard power"—military and economic might—to achieve

umbrella of political support. This can induce states to contribute forces or to allow their territories to be used to support military operations and can dramatically affect the perception and reception by the population of the target country of the state or states using force. Financial contributions and technical assistance are vital in spreading the costs of military operations, reconstruction efforts, and the establishment of transitional institutions. All these forms of cooperation are more likely to be forthcoming where military action carries the legitimacy associated with Security Council authorization.

In short, the use of force is more likely to succeed—in terms of achieving the political goals for which force was employed—when rooted in collective security mechanisms than if founded on doctrines that expand the right to use force unilaterally. This is particularly true in confronting the new security threats, where the political objective goes beyond destroying an adversary's conventional military capability on a fixed bit of territory.<sup>349</sup> In attacking an international terrorist group, for instance, success depends on more than destroying training facilities and weapons caches in a particular country. It requires cutting off the supply and international transit of both funds and concealable munitions. Success depends on robust intelligence sharing and collective efforts to politically isolate the terrorist organization's ideological leaders. It requires assistance in ensuring the capture of key operatives, including the cooperation of regional states across whose borders adversaries might slip.

The U.S.-led military operation in Afghanistan swiftly achieved success according to traditional military criteria, but the record in terms of countering the terrorist threat emanating from Afghanistan has been more mixed. As Joseph Nye has written, “the partial nature of the success in Afghanistan illustrates the continuing need for cooperation. The best response to transnational terrorist networks is networks of cooperating government agencies.”<sup>350</sup> In comparison, many of the most successful responses to terrorist threats have resulted from “broad multilateral cooperation on . . . fronts such as

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desired outcomes, but must also exercise “soft power”—the ability of a state to shape the preferences of others through attraction to its culture, political values, and foreign policies).

349. See Gu Guliang, *Redefine Cooperative Security, Not Preemption*, WASH. Q., Spring 2003, at 135, 140 (arguing that “[i]nternational terrorism and WMD proliferation are global problems” and that international cooperation among nations, rather than unilateral military preemption, is the best way to address them); Bruce W. Jentleson, *Tough Love Multilateralism*, WASH. Q., Winter 2003, at 7, 9 (“Given the global scope of so many of the threats and challenges in today’s world, one nation acting alone simply cannot solve or even manage them.”).

350. Nye, *supra* note 141, at 65; see also NYE, *supra* note 335, at 129 (arguing that “the United States cannot meet the new threat [of transnational terrorism] without the cooperation of other countries”); Lord Peter Goldsmith, QC, *Terrorism and the Rule of Law*, 35 N.M. L. REV. 215, 226 (2005) (arguing that international cooperation is required to “address the threat posed by international terrorism”).



intelligence sharing, border security, economic sanctions, and law enforcement.”<sup>351</sup>

Similarly, collective efforts are more likely to succeed in countering the threat of WMD acquisition by dangerous states. A state acting unilaterally may be able to destroy identified WMD-related programs in a hostile state, as was the case with Israel’s destruction of an Iraqi nuclear reactor in 1981. States committed to developing WMD capabilities, however, can pursue their WMD programs clandestinely, even after they have sustained attack. An effective program to prevent a dangerous state from developing weapons of mass destruction minimally depends on strong international cooperation in cutting off the supply of external sources of WMD-related technologies.<sup>352</sup> A truly effective response is one that induces a government pursuing WMD capabilities to make a strategic decision to forgo weapons of mass destruction, as South Africa and more recently Libya have. States will require strong incentives, usually in the form of enhanced integration into international economic, political, and security structures, to make such a strategic choice attractive. A broad international coalition can more effectively provide the carrots necessary to induce such a choice than a single state. Such broad international coalitions are more likely to exist when force is used under a collective security mandate than when it is employed unilaterally.

### C. *Limiting Error and Abuse*

Relying on collective security as the basis for using force against the new threats is also preferable to developing new unilateralist doctrines because of the danger that such doctrines will substantially increase international insecurity by creating legal bases for erroneous or bad-faith uses of force. By vesting broad discretion in states to determine unilaterally whether the conditions for using force have been met, the new doctrines greatly increase the dangers that force will be used in circumstances unrelated to the policy or principles that purportedly justify the doctrines, i.e., permitting states to counter genuine terrorism- or WMD-related threats of sufficient gravity or imminence.

First, there is a danger that states will make decisions to use force based on mistaken assessments of the prevailing facts, as appears to be the case with respect to the U.S. assessment in 2003 of the WMD threat posed by Iraq. Unilateral assessments of external threats lack the safeguards associated with collective deliberation and information sharing.<sup>353</sup>

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351. Jentleson, *supra* note 349, at 9.

352. NYE, *supra* note 335, at 61 (noting that the United States must influence “distant governments and organizations” to succeed in realizing its policy goals on issues such as the proliferation of weapons of mass destruction).

353. See *supra* text accompanying notes 42-43.

Second, and of even greater concern, is the possibility of abuse. By changing the test for the lawfulness of the unilateral use of force from a clear rule (“armed attack”) to vague standards (“threat of terrorist attack,” “state support for international terrorism,” “WMD-related threat”), the proposed new legal doctrines would greatly increase the opportunity for states to find legal pretexts for attacking their adversaries. A highly subjective and difficult-to-falsify standard that permits states to use force on the basis of perceived threats, reasonableness, or perceived contributions to international stability can easily be invoked by states seeking to use force to engage in aggression or to pursue other national interests.<sup>354</sup> This “fear of misuse,” Michael Ramsey has written, explains why the Charter did not vest the right to use force to address emerging threats in individual nations.<sup>355</sup> The absence from the international system of any assured *ex post facto* mechanism for reviewing uses of force that states might claim to be justified—the lack of what Allen Buchanan and Robert O. Keohane refer to as “accountability”<sup>356</sup>—exacerbates this danger.

Expanding the conditions under which unilateral force may be used, and linking those conditions to subjective assessments of threats, accordingly increases the risks of dangerous regional conflicts. It leads increasingly to a regime in which states, as they did in the nineteenth century, ask themselves not whether the use of force is lawful, but simply “whether it [is] wise.”<sup>357</sup> But because of the unpredictable nature of war, the tremendous human suffering it generates, and the dangers of escalation, those who created the existing international security architecture deliberately forbade states from electing to use force merely because they deemed it to be a good idea.

## VI. PRESCRIPTIONS

If the convergent interests of the Permanent Members of the Security Council provide a viable potential basis for relying on collective security mechanisms to meet the new security threats, they provide only that—a *potential* basis. The split among the Permanent Members over the Iraq case is a

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354. “Quite conceivably, such a rule [permitting states unilaterally to exercise self-defense even before an armed attack had occurred] would merely encourage every malevolent government to take advantage of the holes in the net. A wise cautionary note has been struck by World Court jurist Manfred Lachs, who reminds us that the plea of anticipatory self-defense has been used by aggressors in ‘countless instances . . . alleging the need to forestall attack. Pleas of this kind may amount to severe distortions of reality.’” FRANCK, *supra* note 300, at 76-77 (citing Manfred Lachs, *The Development of General Trends of International Law in Our Time*, 169 RECUEIL DES COURS 9, 163 (1980)).

355. Ramsey, *supra* note 29, at 1556; *see also* Buchanan & Keohane, *supra* note 43, at 3 (“Allowing states to use force on the basis of their own estimate that they may be attacked in the future, without provision for checks on the reliability and sincerity of that judgment, would make the use of force too subject to abuse and error.”).

356. Buchanan & Keohane, *supra* note 43, at 11.

357. Glennon, *supra* note 148, at 16.

telling reminder that we can hardly expect agreement on whether to use force in any given situation to be automatic. Hard policy and diplomatic work will be necessary to convert this potential for agreement into an operationally effective security regime to counter the new security threats. Washington, London, Paris, Moscow, and Beijing must update their thinking about the role of collective security in today's international security environment. Recent developments suggest that all five Permanent Members are in fact doing just this, and that all increasingly favor a strengthening of the collective security machinery to counter new international security threats. The central point is this: the adjustments to traditional foreign policy perspectives of the Permanent Members needed to enhance the collective security machinery do not require the key players to act contrary to their own national interests.

#### A. *Adjusting Traditional Foreign Policy Perspectives*

For Russia and China, new thinking about collective security will require a move away from the zero-sum game attitudes of the Cold War, when any military, diplomatic, or economic success for the United States or Europe was viewed as a setback to Russian or Chinese interests. China, with its growing assumption of responsibilities for global security, is clearly moving in this direction. In Russia, too, dogmatism has increasingly given way to pragmatism. Both Russia and China also must retreat from their past policy of providing allies with WMD-related technologies. This change will not come overnight, as both see significant economic and diplomatic advantages in such exports. China's emerging commitment to export controls and Russia's recent insistence that Iran agree to enhanced cooperation with the IAEA as a condition for continued cooperation on the Bushehr nuclear power facility suggest that both countries increasingly see the dangers of WMD proliferation as outweighing the benefits of the sale of WMD-related technologies.<sup>358</sup>

For France and its European allies, making collective security a robust tool for meeting today's security threats requires overcoming what is often seen as a European aversion to the use of force as an instrument of foreign policy.<sup>359</sup> In

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358. Remarks in early 2006 by Russian Foreign Minister Lavrov over the Iranian nuclear crisis manifest an express recognition by Russia that its interest in preventing the spread of nuclear weapons to Iran outweighs its commercial interests in civilian nuclear cooperation with Iran. "What is most important for us in this situation is not our bilateral relations, our investments in the Iranian economy or our economic profit from cooperation with Iran. . . . The highest priority for us in this situation is the prevention of the violation of the nuclear nonproliferation program." Sergey Lavrov, Russian Foreign Minister, *quoted in* Richard Bernstein, "The Time Has Come" on Iran, 3 in *EU Say*, INT'L HERALD TRIB., Jan. 13, 2006, at 1.

359. Robert Kagan, *America's Crisis of Legitimacy*, FOREIGN AFF., Mar.-Apr. 2004, at 65, 65 ("Opinion polls taken before, during, and after the [Iraq] war show two peoples living on separate strategic and ideological planets. Whereas more than 80 percent of Americans believe that war can sometimes achieve justice, less than half of Europeans agree."); *see also*

reality, claims about pacifism in European foreign policy may be overstated. European powers have not in fact been particularly squeamish about projecting military force abroad.<sup>360</sup> The United Kingdom, for its part, has participated actively with the United States in its military campaigns in Afghanistan and Iraq and deployed peacekeeping forces to Sierra Leone in 2000 during the midst of active hostilities. France, the United Kingdom, and the remaining European members of NATO unanimously agreed to use force in 1999— notwithstanding the absence of a sound legal rationale—to halt abuses of Kosovo’s Albanian population by Federal Republic of Yugoslavia security forces. During 1994’s Operation Turquoise, France deployed its military forces to Rwanda in a declared peacekeeping role in the midst of the Rwandan genocide. More recently, French forces led a peace enforcement mission deployed to the Democratic Republic of the Congo following a deterioration of security conditions there,<sup>361</sup> and France deployed its military to intervene in Côte d’Ivoire’s civil war in 2002. French forces remain in Côte d’Ivoire pursuant to a Security Council peacekeeping mandate.<sup>362</sup>

Moreover, in view of the military supremacy of the United States, the other Permanent Members each recognize that if they reflexively refuse to authorize the use of force through the Council’s collective security apparatus—even where genuine security threats present themselves—the United States can be expected to act unilaterally. When the Security Council functions as designed, the presence of the Permanent Members on the Council and the power of the veto give them a significant degree of influence over global security issues. A

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Kaye, *supra* note 220, at 185-86 (arguing that Europe’s “strategic culture” is generally more averse to the use of force than is that of the United States).

360. The Human Security Report published by the Human Security Centre at the University of British Columbia, which reviewed trends in international security since the Second World War, noted that the two states that have participated in the highest number of international armed conflicts between 1946 and 2003 were the United Kingdom (twenty-one wars) and France (nineteen wars), the two Western European Permanent Members of the Security Council. HUMAN SEC. CTR., UNIV. OF B.C., HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY 26 (2005).

361. See Felicity Barringer, *Security Council Votes to Dispatch Peacekeepers to the Congo*, N.Y. TIMES, May 31, 2003, at A3. See generally S.C. Res. 1484, U.N. Doc. S/RES/1484 (May 30, 2003) (authorizing the deployment of the French-led Interim Emergency Multinational Force to the Democratic Republic of Congo).

362. After civil war broke out in Côte d’Ivoire in September of 2002, France sent troops to protect French citizens. Craig S. Smith, *French Risking Prestige as Talks Open in Ivory Coast Civil War*, N.Y. TIMES, Jan. 16, 2003, at A6. France expanded the mandate of its forces after clashes with rebel groups. The French mission was endorsed as an international peacekeeping operation by the Security Council in 2003 under Chapter VII. See S.C. Res. 1464, ¶ 9, U.N. Doc. S/RES/1464 (Feb. 4, 2003); see also S.C. Res. 1528, ¶ 1, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (replacing the prior United Nations mission in Côte d’Ivoire with a peacekeeping operation known as UNOCI). The French remain heavily involved in UNOCI despite escalating resistance to the U.N. presence. See Lydia Polgreen, *Growing Violence in Ivory Coast Pushes Leaders Toward Crisis Talks*, N.Y. TIMES, Jan. 19, 2006, at A10 (detailing altercations between United Nations peacekeepers and protesters demanding that the United Nations and French peacekeepers leave Côte d’Ivoire).

policy of categorical rejection of the use of force, however, will result in the routine circumvention and ultimate demise of an institution through which the United Kingdom, France, Russia, and China wield power. Accordingly, London, Paris, Moscow, and Beijing have strong incentives to insist on channeling decisions to use force through the Security Council. For this to happen, they have to demonstrate that the Council will, in appropriate circumstances, decide to use force.

And what of the United States? What changes to current American foreign policy perspectives are needed to ensure that forcible responses to the new security threats are conducted under the auspices of the Security Council? The United States must exhibit a willingness to engage seriously with its counterparts to assess particular security risks and the range of suitable responses. It must recognize that opposition by members of the Council to a proposal to use force in a case like Iraq does not necessarily mean that those states oppose, reflexively and in principle, the use of force in response to WMD- or terrorist-related threats. Opposition to the use of force may reflect genuine disagreement about the evidentiary support for the existence of the claimed threat, about assessments of the most effective techniques to counter the threat in a given case, or about estimates of whether the destabilizing results of a proposed use of force will outweigh the benefits of eliminating the threat. The United States must be prepared to engage in a discussion of these questions, rather than merely assuming that the Council's refusal to authorize force reflects a lack of "will" or "courage."<sup>363</sup> Engaging seriously with its partners in the United Nations also means that the United States must not declare in advance, as it did prior to the Iraq invasion, that although it might be prepared to seek Security Council authorization to use force to confront a particular threat, it will act independently if the Council elects not to provide such authorization.

Is there any prospect that the United States, with its extraordinary power and its tradition of exceptionalism, is prepared to make such adjustments to its foreign policy? If such a policy "would require the United States to act against its own interests," as Michael Glennon suggests, he is right to contend that calling for such an approach "simply is not realistic."<sup>364</sup> The experience of the use of force against Iraq, however, has reminded the United States that despite the extraordinary power of its armed forces, it is manifestly not in America's interest to undertake vast overseas military operations in isolation from, or even over the opposition of, substantial portions of the international community, including many of its traditional allies. A force of over 140,000 American troops is currently deployed in Iraq<sup>365</sup> and may have to remain there for years.

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363. President's Remarks in Denver, Colo., 38 WEEKLY COMP. PRES. DOC. 1880, 1884 (Oct. 28, 2002).

364. Glennon, *supra* note 148, at 28-29.

365. David S. Cloud, *No Cutback Likely in U.S. Troop Levels for Iraq Before Spring*, *Top Regional Commander Says*, N.Y. TIMES, Sept. 20, 2006, at A8.

This has substantially strained the capacity of the United States to project force in other theaters.<sup>366</sup> Polling data suggests that there has been a sharp decline in favorable views of the United States around the world,<sup>367</sup> making it more difficult for democratic governments to cooperate with the United States. Accordingly, America's "soft power" has declined.<sup>368</sup> In short, instead of advancing U.S. interests, the invasion of Iraq has left the United States "in a far worse position militarily and diplomatically than it was before the war."<sup>369</sup> Polling data suggests that the American public shares the view that the war in Iraq has made the United States weaker in the world.<sup>370</sup>

The lesson about the dangers of overly exuberant unilateralism is especially instructive because the very reasons most of America's partners opposed the use of force against Iraq—doubts about whether Iraq possessed WMD stockpiles and the belief that the strategy of sanctions and containment was sufficient to counter the Iraqi threat—have been vindicated by subsequent discoveries and events. The United States might have felt free to dispense with international consultation and cooperation had the Bush Administration's claims about Iraq's WMD capability been borne out, and had the invasion resulted in a swift military victory and a seamless transition to a stable democracy. That, however, is not the world in which the United States now finds itself. Current developments confirm Joseph Nye's contention that, despite America's global supremacy, "the world's only superpower can't go it alone after all."<sup>371</sup> In other words, even in the realm of the use of force, multilateralism—which sometimes entails forgoing short-term objectives in the

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366. John Mueller, *The Iraq Syndrome*, FOREIGN AFF., Nov.-Dec. 2005, at 44, 54 ("In part because of the military and financial overextension in Iraq (and Afghanistan), the likelihood of any coherent application of military power or even of a focused military threat against the remaining entities on the Bush Administration's once-extensive hit list has substantially diminished.").

367. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, A YEAR AFTER IRAQ WAR: MISTRUST OF AMERICA IN EUROPE EVER HIGHER, MUSLIM ANGER PERSISTS (2004), available at <http://people-press.org/reports/pdf/206.pdf>.

368. See Joseph S. Nye, Jr., *The Decline of America's Soft Power*, FOREIGN AFF., May-June 2004, at 16.

369. Daniel Byman, *Should Hezbollah Be Next?*, FOREIGN AFF., Nov.-Dec. 2003, at 54, 56; see also Carolyn Lochhead, *News Analysis: Iraq War Has Bush Doctrine in Tatters*, S.F. CHRON., Aug. 27, 2006, at A1 ("By many measures, the United States is weaker and its enemies stronger than before the 2003 Iraq invasion, the experts say."); see also *id.* (noting that after the Iraq invasion the United States is "weaker because we have fewer with us, and we cannot do everything alone" (quoting former National Security Council official Rand Beers)).

370. *Poll: Americans Conflicted About Iraq War: Two Years After War's Start, Deeper Doubts About Costs and Benefits*, ABC NEWS, Mar. 15, 2005, <http://abcnews.go.com/Politics/PollVault/story?id=582744> (showing, in response to question "has the [Iraq] war made the U.S. stronger or weaker in the world," that 41% felt the United States was weaker, compared to 28% that felt the United States was stronger).

371. Nye, *supra* note 141, at 72.

interests of preserving broader political consensus—is in the United States's interests.

### *B. Next Steps*

Although the inherent interests of the Great Powers favor renewed reliance on collective security mechanisms to respond to new security threats, the goal of enhancing the Security Council as an effective global security institution cannot succeed without a conscious and concerted diplomatic strategy. The Permanent Members will need to take a number of difficult steps if they are to succeed in deepening the Council's involvement in countering terrorism and WMD-related threats.

#### *1. Narrowing the agenda*

If the threats of terrorism and the acquisition of WMD by dangerous states reflect the greatest security dangers to the United States and the other Permanent Members of the Security Council, the first step those states must be prepared to take is to narrow the diplomatic agenda in their relations with one another so as to reflect the priority status to be accorded to cooperation in countering these threats. For the United States in particular, this may require downgrading the importance of other issues in our bilateral relations with the other Permanent Members, especially Russia and China. For instance, the importance of securing Chinese cooperation in the effort to prevent North Korea from developing a nuclear weapons arsenal would seem to outweigh the American interest in confronting China over its domestic human rights record, or in pressing China on the valuation of its currency. Similarly, obtaining Russian partnership in pressing Iran to abandon its goal of developing a complete domestic nuclear fuel cycle would seem more central to American interests than does promoting the independence of civil society groups in Russia. Nevertheless, the United States seeks to promote changes in Chinese and Russian behavior on these and other issues, which can increase bilateral tensions and undermine American efforts to secure cooperation on the most pressing security challenges.

The breadth and complexity of U.S. relationships with other global powers can undermine the effectiveness of our efforts to secure cooperation with respect to the new security threats. If the United States wishes to build upon the convergent interests of the Permanent Members of the Security Council in preventing terrorism and WMD proliferation, it must be prepared to prioritize its foreign policy goals in its relations with those states to reflect the central importance of cooperating to counter the new security threats.

## 2. Naming names

A second specific step the Permanent Members should take is to expand existing efforts to identify, in advance, threats to international peace and security. At a general level, important progress has already been made in this regard. The Council has declared that both international terrorism and the acquisition of WMD by nonstate actors constitute threats to international peace and security. In addition, through the operation of the Sanctions Committee established under Security Council Resolution 1267,<sup>372</sup> the Council is working to identify specific individuals and institutions associated with the Al Qaeda terrorist network in order to bring them within the scope of a financial and travel sanctions regime imposed by the Council. The Council's members should continue and extend their efforts to agree on which particular situations, states, organizations, or individuals endanger international peace and security. Such efforts should be directed towards both terrorist-related threats and WMD proliferation threats.

Although the Resolution 1267 Committee has identified individuals and entities involved in terrorism, the Council has in the past been reluctant to designate *states* that pose threats to international peace and security until after a crisis has emerged. This reluctance to single out states before their behavior has generated a full-blown crisis grows out of the notion of the juridical equality of states upon which the international legal system is founded. Notwithstanding their formal legal equality, however, the threats that different states pose are not equal. The degree to which the behavior of states promotes or threatens the maintenance of international peace and security may also vary.<sup>373</sup> On this front, the Security Council needs to move forward. It should begin by explicitly identifying developing threats—situations and states that endanger international peace and security either because of their announced or suspected WMD programs (e.g., North Korea and Iran) or because of their role in supporting international terrorism (e.g., Syria and Iran). Ideally, the identification of states

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372. S.C. Res. 1267, ¶ 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999). The functions of the Committee were expanded in S.C. Res. 1390, ¶ 5, U.N. Doc. S/RES/1390 (Jan. 16, 2002).

373. In the context of peacekeeping, a high-level U.N. panel recognized the potentially counterproductive implications of applying a principle of impartiality where different factions present different threats to peace:

Impartiality [in peacekeeping operations] must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement. In some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so.

*Report of the Panel on U.N. Peace Operations*, ¶ 50, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000). Philip Zelikow also criticizes the notion of insisting on equal treatment of states, regardless of their behavior. He notes that the current U.S. Executive branch “prefers international institutions that judge performance and stress accountability rather than those that maintain a detached neutrality in order to preserve a friendly consensus.” Philip Zelikow, *The Transformation of National Security*, 71 NAT’L INTEREST 17, 25 (2003).



and situations that present serious terrorist and WMD threats would be done formally, through Security Council action. Failing this, though, the Permanent Members should enhance their multilateral efforts to reach informal agreement, among themselves, about the most pressing emerging security challenges.

### 3. *Setting a threshold for force*

Designating a particular situation or course of state conduct as a threat to international peace and security would not by itself constitute an authorization to use force. Consequently, as an additional key step in enhancing the global security capacity of the Security Council, its members—and the Permanent Members in particular—must be prepared to discuss in advance and to identify the point at which the escalation of a particular threat would justify a decision to use force for collective security. The Permanent Members should seek to develop “predictable and generalizable principle[s]”<sup>374</sup> reflecting shared ex ante understandings of what kinds and degree of threats—and what forms of noncooperation by states resisting compliance with Security Council demands—will justify moving to a decision to authorize the use of force.

Even when acting under its Chapter VII authority, the Security Council will ordinarily begin its response to a threat to international peace and security with nonmilitary measures. The decision to resort to force follows only when the crisis escalates, or when nonforcible sanctions fail to bring about compliance with the Council’s demands. In the midst of such a crisis, Council members have confronted difficulty in agreeing on the criteria or conditions upon which to move to a decision to take forcible measures. On a number of occasions, the Council has issued threats warning of future Security Council action if the target state does not comply with its demands.<sup>375</sup> In those instances, however, the threat has been vague, and there was not in fact agreement among the Security Council members about the point, if any, at which they would be prepared to authorize the use of force. Efforts to agree on a threshold or trigger point need not be formally embodied in the Council’s resolutions. Nevertheless, in addition to agreeing on what states or situations

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374. The phrase is from Mark Weisburd, who argues that Permanent Members of the Security Council have historically failed to apply such predictable and generalizable principles in deciding whether to authorize the use of force. Weisburd, *supra* note 29, at 542. As a consequence, Weisburd concludes that the Security Council’s treatment of use of force issues has been “arbitrary” and does not reflect the rule of law. *Id.* at 543.

375. *See, e.g.*, S.C. Res. 1160, ¶ 19, U.N. Doc. S/RES/1160 (Mar. 31, 1998) (emphasizing “that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo [would] lead to the consideration of additional measures . . .”); S.C. Res. 1154, ¶ 3, U.N. Doc. S/RES/1154 (Mar. 2, 1998) (stressing that violations by Iraq of its agreement to permit unrestricted access to U.N. inspectors “would have severest consequences for Iraq”); S.C. Res. 1441, ¶ 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (recalling that it has “repeatedly warned Iraq that it will face serious consequences as a result of its continued violation of its [WMD-disarmament] obligations”).

present a threat to international peace and security, key Council members need to reach understandings with one another on the point at which a risk or threat will have escalated to such a degree that they are prepared to authorize the use of force.<sup>376</sup> Such trigger point discussions will require not only assessments of the gravity of an emerging threat, but also honest exchanges about the anticipated outcomes of using force, and whether force will do more good than harm. Taking the risks of using force into account will mean that two cases involving identical security threats might not result in identical prescriptions regarding whether to use force.

#### 4. *Improved intelligence sharing*

The standards-based entitlement to use force to counter *threats* to international peace and security, as noted above,<sup>377</sup> permits the Security Council to base its decision on a broad range of factors, rather than the relatively objective factual trigger for the right of self-defense against an armed attack.

To reduce the danger of erroneous or bad-faith implementation associated with such a standards-based entitlement, the Permanent Members of the Security Council should expand their intelligence sharing arrangements concerning WMD- or terrorism-related security threats. Where solid evidence of the emergence of a grave security threat exists, the exchange of intelligence can help persuade states that do not possess such intelligence of the genuine nature of the threat. In contrast, if members of the Security Council have evidence that undermines or contradicts another state's assessment of an emerging threat, the practice of sharing intelligence could dissuade states from pressing for the use of force on the basis of dubious information. Enhanced intelligence sharing would build confidence among the Permanent Members that states proposing coercive measures to address terrorist or WMD security threats are acting in good faith in the common interest rather than self-interest. Finally, the development of a standard practice of sharing intelligence regarding emerging threats would serve as a significant deterrent for a state to press for collective security authorization for the use of force on pretextual grounds, since such a state would have difficulty providing the other Permanent Members with persuasive evidence that the proposed target presents a serious threat to peace and security.

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376. See Buchanan & Keohane, *supra* note 43, at 20-21 (urging the adoption by the international community of "prior agreement on a threshold criterion for predicated harm to be prevented" through the use of force).

377. See *supra* Part I.C.

## CONCLUSION

The new security threats of terrorism and weapons of mass destruction differ significantly from the traditional state-to-state threats the international security architecture was designed to address. Over the first forty-five years of its existence, the international security system proved incapable of confronting, or indifferent to, those traditional threats. In geopolitical terms, once the balance of power that emerged at the end of the Second World War began to shift, the Permanent Members of the Security Council found themselves divided over most of the threats that arose after 1945, leading to Security Council gridlock. The new security threats, however, endanger the common interests of all of the Permanent Members of the Security Council to a much greater extent than the traditional threats of the post-war era. The shared vulnerability of the Permanent Members to these threats, combined with their incentives to attempt to preserve a decisive role for the Security Council in regulating the use of force, challenges the conventional view that the existing international security architecture is ill-suited to meeting the new security threats. To the contrary, because the new security threats do not involve balance-of-power rivalries among the Permanent Members, the international security architecture is better suited to addressing these threats than it was to meeting the traditional interstate security challenges for which it was designed. If the Permanent Members build on their underlying affinity of interests and direct their policy and diplomatic efforts towards enhancing the effectiveness of the Security Council as a security institution, it would obviate the calls emanating from many quarters for new doctrines that would broaden the rights of states to use force unilaterally to address the new security threats.

If they choose to pursue efforts to build on their common interests through policy modernization and diplomacy, the Permanent Members of the Security Council can revitalize the collective security machinery of the U.N. Charter. The Council and its key members would play a much more active and anticipatory role in responding to the new security threats by promulgating norms, identifying threats, devising diplomatic strategies to diffuse them, and, when necessary, determining the conditions under which to resort to force. Such a Council would operate as a robust security institution, as originally contemplated.

Because the Security Council operates on the basis of established legal norms and participatory processes, its decisions—including its decisions to use force—will continue to carry far greater legitimacy than unilateral exercises of force. Unlike the development of doctrines that would expand unilateral rights to use force, the multilateral nature of collective security also provides an important safeguard against a descent into an unstable and dangerous security environment in which the use of force is essentially governed only by considerations of policy, and not by law.