

PREEMPTIVE STRATEGIES IN INTERNATIONAL LAW

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In September 2002, President George Bush released the much anticipated National Security Strategy of the United States of America (NSS). It articulates a robust, aggressive, and highly controversial grand strategy that will serve as the starting point for development of subordinate strategies, such as the National Military Strategy.¹ Of particular note is its embrace of a preemptive approach to maintaining security, one designed to remedy the shortfalls of containment and deterrence in a twenty-first century threat environment characterized by transnational terrorists and weapons of mass destruction (WMD).

Much of the controversy surrounds the advisability of preemption. Some pundits suggest that highlighting the preemptive option actually encourages use of weapons of mass destruction, lest they be lost during a first strike. Others are concerned that U.S. adoption of a preemptive strategy might legitimize preemption by other States in highly unstable situations, for instance during the nuclear saber rattling that periodically infects the Indian subcontinent. Still others worry that preemption threatens the Westphalian order, with its keystone principles of sovereignty and territorial inviolability. After all, effectively preempting transnational terrorists who operate from scores of countries—some cooperative, some not—necessarily implies treading upon previously

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1. A nation's "grand strategy" embraces its economic, military, political, and informational strategies. As of April 1, 2003, the new National Military Strategy had not been released. On national security strategy, see STRATEGY AND FORCE PLANNING (Richmond M. Lloyd et al. eds., 3d ed. 2000); U.S. ARMY WAR COLLEGE GUIDE TO STRATEGY (Joseph R. Cerami & James F. Holcomb, Jr. eds., 2001).

pristine sovereign rights. Similarly, effectively preventing the development and transfer of weapons of mass destruction requires an intrusiveness that arguably jeopardizes a State-centric world order. Particularly interesting is the cast of characters who have urged caution vis-à-vis the probable test case, Iraq. As Republican gray beards like Henry Kissinger and Brent Scowcroft have warned, preemption will prove a complicated option when applied to real world events.²

That said, it is not the intent here to enter the fray.³ Rather, this Article explores the appropriateness of preemptive strategies in international law. Are preemptive actions approved by the international community lawful? Can States act unilaterally or in a coalition of the willing to preempt terrorism, the development and transfer of WMD, or other threats? If so, under what circumstances and based on what quantum and quality of evidence? When can preemptive actions be taken against non-State actors such as terrorists who are based in other States?

Although the new U.S. National Security Strategy makes the issue of preemption timely, it will be used solely for illustrative purposes. Instead, the analysis that follows applies to preemptive actions in general. Likewise, despite the current brouhaha over the arguably preemptive

2. Henry A. Kissinger, Statement of the Honorable Henry A. Kissinger Before the Senate Foreign Relations Committee (Sept. 26, 2002) (on file with author); Henry A. Kissinger, *Our Intervention in Iraq*, WASH. POST, Aug. 12, 2002, at A15; Brent Scowcroft, *Don't Attack Saddam*, WALL ST. J., Aug. 15, 2002, at A12.

3. An interesting analysis of possible preemption in the Iraq case is Briefing Memo No. 25 from Charles Knight, to the Project on Defense Alternatives, First Strike Guidelines: the Case of Iraq (Sept. 16, 2002). Knight applies criteria (and argues they are *not* met) developed by Dr. Barry R. Schneider, Director of the Air Force's Counterproliferation Center. Dr. Schneider's criteria include:

- Is the enemy undeterrable, violent, and a risktaker?
- Is the enemy on the WMD threshold or beyond it?
- Are vital U.S. interests threatened?
- Are key enemy targets precisely located and vulnerable?
- Is surprise achievable?
- Does the United States have a first strike capability?
- Is the United States homeland safe from enemy WMD?
- Would the United States and its allies be safe from retaliation from the WMD of third parties?
- Have all non-military options been exhausted before considering preemption?
- Does the United States have clear objectives achievable by appropriate means?
- Is the United States committing enough resources and is it taking all necessary steps to insure victory?

Barry R. Schneider, *Radical Responses to Radical Regimes: Evaluating Preemptive Counter-Proliferation*, MCNAIR PAPER 41, at vi (1995). As will be seen, the ninth criterion is an essential element of a legal analysis of a preemptive strike.

strike against Iraq, no attempt will be made to comprehensively assess its legality. Absent an in-depth review of the Iraqi WMD programs, Iraqi intentions as to its use and transfer, and Iraqi ties to transnational terrorist groups, it would be rash to render any purportedly definitive opinion.⁴ On the contrary, this Article simply sets forth generic criteria for use in assessing the legality of preemptive military operations on a case-by-case basis.⁵

I. THE U.S. NATIONAL SECURITY STRATEGY

The first inklings of the new strategy began to appear soon after the tragic events of September 11.⁶ In his January 2002 State of the Union

4. Both the U.S. and British governments have released unclassified reports on Iraq's weapons of mass destruction programs. OFFICE OF THE PRIME MINISTER, IRAQ'S WEAPONS OF MASS DESTRUCTION: THE ASSESSMENT OF THE BRITISH GOVERNMENT (2002), *available at* <http://www.pm.gov.uk/files/pdf/iraqdossier.pdf>; DIRECTOR OF CENTRAL INTELLIGENCE, IRAQ'S WEAPONS OF MASS DESTRUCTION PROGRAMS (2002), *available at* http://www.cia.gov/cia/publications/iraq_wmd/Iraq_Oct_2002.htm. The U.S. report concludes that:

Iraq has continued its weapons of mass destruction (WMD) programs in defiance of UN resolutions and restrictions. Baghdad has chemical and biological weapons as well as missiles with ranges in excess of UN restrictions; if left unchecked, it probably will have a nuclear weapon during this decade.

- Baghdad hides large portions of Iraq's WMD efforts
- Since inspections ended in 1998, Iraq has maintained its chemical weapons effort, energized its missile program, and invested more heavily in biological weapons; most analysts assess Iraq is reconstituting its nuclear weapons program
- How quickly Iraq will obtain its first nuclear weapon depends on when it acquires sufficient weapons-grade fissile material
- Baghdad has begun renewed production of chemical warfare agents, probably including mustard, sarin, cyclosarin, and VX
- All key aspects—[research and development], production, and weaponization—of Iraq's offensive BW program are active and most elements are larger and more advanced than they were before the Gulf War
- Iraq maintains a small missile force and several development programs, including for a UAV that most analysts believe probably is intended to deliver biological warfare agents.

5. Guy Roberts has proposed agreement between States on a normative regime that would legitimize self-help in the face of threats from weapons of mass destruction. Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483 (1999).

6. The Clinton administration implicitly considered the possibility of preemption in its Defense Counterproliferation Initiative (DCI). Announced by Secretary of Defense Les Aspin in December 1993, and launched pursuant to Presidential Decision Directive 18, the initiative focused primarily on the acquisition of new technologies. It did not explicitly articulate a new

Address, the president labeled States such as Iran, Iraq, and North Korea an “axis of evil,” and pledged, “I will not wait on events. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.”⁷ Clearly, the president was announcing his intent to strike before a hostile regime could develop WMD that might threaten the United States.

In May, he took this message to Europe. Speaking to the German Bundestag, the president warned that “[t]he authors of terror are seeking nuclear, chemical and biological weapons. Regimes that sponsor terror are developing these weapons and the missiles to deliver them. If these regimes and their terrorist allies were to perfect these capabilities, no inner voice of reason, no hint of conscience would prevent their use.”⁸

The following month, President Bush addressed the graduating class of the United States Military Academy at West Point. It was this speech that captured global attention by unambiguously signaling adoption of a preemptive strategy. As the president explained,

For much of the last century, America’s defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.

We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign nonproliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long Our security will require all Americans to be forward-looking and resolute, *to be ready for preemptive ac-*

strategy. On the DCI, see Thomas G. Mahnken, *A Critical Appraisal of the Defense Counterproliferation Initiative*, NAT’L SECURITY STUD. Q., Summer 1999, at 91.

7. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

8. President George W. Bush, Remarks to a Special Session of the German Bundestag (May 23, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/05/20020523-2.html>.

tion when necessary to defend our liberty and to defend our lives.⁹

Note the president's characterization of deterrence and containment as inadequate in the face of the new threats endangering the United States. For him, the shifting threat environment necessitated a corresponding strategic shift.

That shift occurred formally with the September issuance of the new National Security Strategy. Reflecting concerns expressed throughout the year, the strategic calculations set forth in the document were underpinned by anxiety over the development of weapons of mass destruction by rogue States, the possibility that such weapons might find their way into the hands of terrorists, and the inability to effectively deter or contain such threats, except by preemptive action. In the president's mind, today's security environment is proving far more perilous than the Cold War's:

But new deadly challenges have emerged from rogue states and terrorists. None of these contemporary threats rival the sheer destructive power that was arrayed against us by the Soviet Union. However, the nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world's strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today's security environment more complex and dangerous.¹⁰

As in the West Point address, the National Security Strategy posits the impotence of traditional strategies in averting these threats. In decades past, so the argument goes, the United States faced a "status quo,

9. President George W. Bush, Remarks by the President at 2002 Graduation Exercise of the United States Military Academy at West Point (June 1, 2002) (emphasis added), *available at* <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>. The existing doctrines retain some strategic relevance. As the president's National Security Advisor noted in October 2002,

[t]he National Security Strategy does not overturn five decades of doctrine and jettison either containment or deterrence. These strategic concepts can and will continue to be employed where appropriate. But some threats are so potentially catastrophic—and can arrive with so little warning, by means that are untraceable—that they cannot be contained. Extremists who seem to view suicide as a sacrament are unlikely to ever be deterred.

Condoleezza Rice, Wriston Lecture to the Manhattan Institute for Policy Research (Oct. 1, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/10/20021001-6.htm>.

10. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13 (2002) [hereinafter NSS], *available at* <http://www.whitehouse.gov/nsc/nss.pdf>.

risk-averse adversary.”¹¹ While deterrence proved effective in that environment, a “deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.”¹² An analogous logic applies to terrorists, “whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness.”¹³ The 2002 NSS unequivocally offers a solution to this dilemma: “The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit [relying on a reactive posture]. *We cannot let our enemies strike first.*”¹⁴

II. INTERNATIONAL LAW

Perhaps anticipating criticism, the National Security Strategy explicitly contends that the preemptive option is firmly grounded in international law.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons

11. *Id.* at 15.

12. *Id.*

13. *Id.*

14. *Id.* (emphasis added). The Secretary of Defense’s Annual Report makes the same point in a “lessons learned” section:

[D]efending the United States requires prevention and sometimes preemption. It is not possible to defend against every threat, in every place, at every conceivable time. The only defense against is to take the war to the enemy. The best defense is a good offense.

DONALD H. RUMSFELD, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 30 (2002), available at http://www.defenselink.mil/execsec/adr2002/pdf_files/chap3.pdf.

that can be easily concealed, delivered covertly, and used without warning.¹⁵

In other words, the law of self-defense has long permitted military action in anticipation of an imminent attack. However, the requirement of imminency must evolve as the nature of the threat changes.

After providing the legal justification for preemption, the NSS enunciates the standard by which the United States will act.

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.¹⁶

Does this standard comport with international law? Or is it an example of the global “hyper-power” contorting international legal standards to its own purpose? As will become apparent, the answers to such questions depend on the facts at hand in each individual case.

A. *The Prohibition on the Use of Force*

By the dawn of the twentieth century, the use of military force by States was considered a necessary and appropriate, albeit unfortunate, instrument of international relations. In his classic 1866 work, *The Elements of International Law*, Henry Wheaton provided the justification for this view:

The independent societies of men, called States, acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress.¹⁷

15. NSS, *supra* note 10, at 15.

16. *Id.*

17. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 290 (8th ed. 1866).

Indeed, manuals of law prepared for military officers during the First World War embodied this paradigm.¹⁸ The unprecedented carnage of that war led to attempts to restrict the use of force.¹⁹ In the interwar years, two were particularly noteworthy. The first, the 1919 Covenant of the League of Nations, did not render war illegal, but did set out various restrictions on the right to employ force in disputes between parties to the treaty. Most notably, article 12 required them to submit disputes to arbitration, judicial settlement, or enquiry by the League's Council. Disputants were prohibited from resorting to war until three months after the arbitral award, judicial decision, or report by the Council.²⁰

Much more normatively significant was the 1928 adoption of the Treaty for the Renunciation of War as an Instrument of National Policy (the Kellogg-Briand Pact).²¹ By article I, the parties to the Pact "condemn[ed] recourse to war for the solution of international controversies, and renounc[ed] it as an instrument of national policy in their relations with one another." The prohibition was by no means absolute. Various reservations deposited by States party to the Pact made it plain that self-defense continued to be a legitimate use of force.²² Additionally, as treaty law, the Pact bound neither non-parties nor parties who found themselves involved in a dispute with a non-party. Finally, by restricting the prohibition to the use of force in pursuit of national policy, it remained legitimate to use force pursuant to *international* policy, in particular when authorized by the League of Nations.²³

18. See, e.g., CHARLES H. STOCKTON, A MANUAL OF INTERNATIONAL LAW FOR THE USE OF NAVAL OFFICERS 155 (rev. ed. 1917).

19. It was common for States to conclude bilateral agreements renouncing the right to use force. Several multilateral treaties limited the right of States to go to war. Most notable were the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and of 1907. Article 2 of the Conventions provided, "In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers." Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 1 Bevans 230; Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577.

20. LEAGUE OF NATIONS COVENANT art. 12.

21. Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

22. As an example, when hostilities flared in 1929 between China and the Soviet Union, the United States sent both sides a diplomatic note reminding them of their obligations under the Pact. DOCUMENTS ON INTERNATIONAL AFFAIRS 274 (John W. Wheeler-Bennett ed., 1929). The USSR replied that it was acting pursuant to its right of self-defense and was therefore not in breach. *Id.* at 279.

23. Both Professors Ian Brownlie and Yoram Dinstein have made this point in their seminal works on the *jus ad bellum*. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 89-90 (1963); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 79 (3d ed. 2001).

The Kellogg-Briand Pact did affect State practice in the interwar years. For instance, it provided the legal basis for multiple bilateral and multilateral nonaggression pacts.²⁴ It was also regularly referenced when hostilities flared, such as those between China and the USSR, China and Japan, Peru and Colombia, and Italy and Ethiopia. Indeed, the Pact's prohibition on the use of force formed the legal basis for the offense of crimes against peace contained in the Charters of the International Military Tribunals at Nuremberg and Tokyo.²⁵

What the Kellogg-Briand Pact did not do was supply an enforcement mechanism. That omission would be remedied with the next noteworthy attempt to prohibit resort to military force, the United Nations Charter. Drafted in 1945, the Charter imposed a near absolute prohibition on the use of force. Article 2(4) provides that "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."²⁶ Several aspects of the prohibition merit comment.

Although the obligation to refrain from using force applies only to Members, it extends to acts of force against *any* State, even a non-party. In the twenty-first century, this is a point of *de minimus* import for two reasons. First, although only 51 States were party to the Charter in 1945, today membership stands at 191, virtually the entire world. Second, the prohibition has become, as will be discussed, customary international law, thereby binding all States, present and future.

The language of article 2(4) might also seem to imply that the only prohibited uses of force are those directed against the territorial integrity or political independence of a State. Thus, for example, a preemptive surgical strike against a weapons manufacturing facility in which there

24. Violation of a number of these agreements provided a basis for charges at the Nuremberg Trials: Treaty of Arbitration and Conciliation Between Germany and Luxemburg, Sept. 11, 1929, F.R.G.-Lux., 118 L.N.T.S. 104; Polish-German Declaration, Jan. 26, 1934, Pol.-F.R.G., in *POLAND'S INTERNATIONAL AFFAIRS* 166 (Stephan Horak ed., 1964); Treaty of Non-Aggression Between German Reich and the Kingdom of Denmark, May 31, 1939, F.R.G.-Den., 197 L.N.T.S. 40; Treaty of Non-Aggression Between Germany and U.S.S.R., Aug. 23, 1939, F.R.G.-U.S.S.R., in 1 *DOCUMENTS ON INT'L AFF.* 408 (1939).

25. See, e.g., International Military Tribunal, Indictment, app. C, Charges and Particulars of Violations of International Treaties, Agreements and Assurances Caused by the Defendants in the Course of Planning, Preparing, and Initiating the Wars, Charge XIII, "Violation of Treaty between Germany and other Powers providing for Renunciation of War as an Instrument of National Policy, signed at Paris 27 August 1928, known as the Kellogg-Briand Pact," available at <http://www.yale.edu/lawweb/avalon/imt/proc/countc.htm>. Violations were charged as to German actions against Poland, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the USSR, and the United States.

26. U.N. CHARTER art. 2, para. 4.

was no intent to seize territory or affect political processes would not implicate the prohibition.²⁷

This interpretation neglects the article's prohibition of the use of force "in any other manner inconsistent with the Purposes of the United Nations." Among those purposes is the maintenance of "international peace and security."²⁸ Since 1945, the Security Council, as will be discussed, has freely characterized situations as threatening international peace and security. In light of this liberality, it would be incongruent to narrowly construe the scope of uses of force forbidden by article 2(4). Moreover, the Charter's *travaux préparatoires* reveal that inclusion of the territorial integrity and political independence verbiage occurred during the San Francisco Conference at the behest of several smaller States that merely wanted to stress those conditions; at no time were they intended as limitations on the use of force prohibition.²⁹

Of greater consequence when assessing preemptive strategies is the prohibition on *threats* to use force. The years preceding the Second World War witnessed numerous such threats that contributed to the outbreak of global conflagration.³⁰ Accordingly, the Charter drafters included threats in the article 2(4) proscription.

It is essential to understand that the prohibition only extends to situations where the threatened use of force would itself be illegal. In the context of preemptive strategies, this is of particular importance. Such strategies may well entail threats to use force if the other side does not desist from a particular course of conduct. Their lawfulness depends on whether it would be appropriate to employ force in the extant circumstances at the time the threatened force would be used. As the International Court of Justice stated in its 1996 advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*, "if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter."³¹

Consider the repeated U.S. threats to use military force to put an end to Iraq's weapons of mass destruction program, without Security Council sanction if necessary, made prior to its attack on March 19, 2003. The

27. Professor Anthony D'Amato has asked precisely these questions in the context of the 1981 Israeli air strike against an Iraqi nuclear installation near Baghdad. ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 57-73 (1987); see also Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983).

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

29. See Albrecht Randelzhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 112, paras. 37-39 (Bruno Simma ed., 2d ed. 2002) [hereinafter *CHARTER COMMENTARY*].

30. See, for example, Polish and Hungarian threats against Czechoslovakia in 1938.

31. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 225, para. 47 (July 8).

question is *not* the legality of Iraqi WMD production and possession. True, such actions may be wrongful under international law, thereby constituting a breach of State responsibility. However, the remedies for an international wrong traditionally include restitution, compensation, or satisfaction, not resort to armed force.³² This point is emphasized in article 50 of the International Law Commission's Articles on State Responsibility. There, it is specifically provided that "[c]ountermeasures shall not affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations."³³ The restriction also tracks the International Court of Justice's landmark 1949 judgment in *Corfu Channel*.³⁴

Instead, the appropriate query is whether or not the United States was justified in using force against Iraq pursuant to an exception to the article 2(4) prohibition at the time the threats were made. The Charter allows for three, two of which are relevant: authorization by the Security Council under Chapter VII, and individual or collective self-defense pursuant to article 51.³⁵

32. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 211–34 (2002). Established by the U.N. General Assembly in 1947, the International Law Commission is composed of thirty-four distinguished international lawyers elected by the General Assembly for five year terms. Most of their efforts are devoted to preparing draft documents on international law. Topics can be selected by the Commission itself, or by the General Assembly or the Economic and Social Council. When draft articles are complete, the General Assembly usually convenes an international conference to incorporate the draft articles into a convention. The Commission adopted the Draft Articles on State Responsibility in 2001. Pursuant to those articles, restitution reestablishes "the situation which existed before the wrongful act was committed" (art. 35), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Agenda Item 162, at 8, U.N. Doc. A/RES/56/83 (2002); compensation covers any financially assessable damage not made good by restitution (art. 36), *id.*; satisfaction is "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality" that responds to shortfalls in restitution and compensation when making good the injury caused (art. 37), *id.* at 9. In very limited circumstances, countermeasures involving force can be permissible. Sending agents into a State to apprehend a terrorist that State wrongfully refused to extradite would be one example. Mary Ellen O'Connell, *Lawful Responses to Terrorism*, JURIST (2001), at <http://jurist.law.pitt.edu/forum/forumnew30.htm>.

33. *Draft Articles on Responsibility of States*, *supra* note 32, at 12.

34. *Corfu Channel Case (Merits)*, 1949 I.C.J. 4, 22 (Apr. 9). The Court held that every State has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." *Id.* The case involved an incident in which two British destroyers struck mines in Albanian waters while transiting the Corfu Strait in 1946. Though the evidence was insufficient to demonstrate that the Albanians laid the mines, the Court nevertheless held that they had the obligation to notify shipping of the danger posed by the mines. Albania's failure to do so represented an internationally wrongful act entailing the international responsibility of Albania. But the Court also held that Albania's failure to comply with its responsibility did not justify the British minesweeping of the Strait, an act that therefore constituted a violation of Albanian sovereignty.

35. The Charter also authorized action against former "enemy States" of World War II under certain circumstances. U.N. CHARTER arts. 53, 107.

Before turning to those exceptions, it might finally be asked whether there exists in customary international law an analogous prohibition on the use of force. Customary law is unique in that it binds all States; in that sense, it differs from treaty-based law, which sets forth rights and obligations only for Party-States.³⁶ A practice of States matures into customary law when that practice evidences *opinio juris sive necessitatis*, a belief on the part of States engaging in it that the practice is legally obligatory.³⁷

Although it might be suggested that the scores of armed conflicts since 1945 augur against maturation of the prohibition into customary international law, in its 1986 judgment in the *Nicaragua* case, the International Court of Justice found that it had done exactly that. Referring to State attitudes toward various General Assembly Resolutions referencing the prohibition, the Court stated that they

cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force . . . may thus be regarded as a principle of customary international law.³⁸

36. The Vienna Convention on the Law of Treaties provides that a "treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 331, 341, 8 I.L.M. 679, 694.

37. Article 38 of the Statute of the International Court of Justice is universally accepted as a restatement of the sources of international law. Paragraph 1(b) includes "international custom, as evidence of a general practice accepted by law" in such sources. The duration and extent of the requisite practice is a matter of some controversy. Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1, 59 Stat. 1031, 1043, 1978 Y.B.U.N. 1185, 1197. On customary international law, see also V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 142-78 (1997); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986). On the issue of the customary international law regarding the use of force, see generally MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II (1997).

38. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14, para. 188 (June 27)(merits). In particular, the Court cited the Declaration on Friendly Relations. It provides that,

[e]very State has a duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Agenda Item 85, at 7, U.N. Doc. A/8082 (1970).

The International Law Commission's 1966 Commentary to the Final Draft Articles on the Law of Treaties went further still. In it, the Commission opined, in a statement later referred to in the *Nicaragua* judgment, "that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."³⁹ Such peremptory norms cannot be derogated from, even by treaty, and thus represent the most powerful genre of international law.

Clearly then, the prohibition on the use of force, an obligation based not only in treaty and customary law, but also a peremptory norm, represents a stringent restriction on the preemptive employment of military force. The legality of such use will, therefore, depend on the applicability of exceptions to the prohibition.

B. *Uses of Force Authorized by the Security Council*

The mere fact that a State has violated article 2(4)'s prohibition on the threat or use of force does not allow the State against whom the force is employed to reply in kind. On the contrary, a response must be consistent with either of the two exceptions found within the Charter.

Authorization by the Security Council is the first. The Charter's procedure for granting that authority is relatively straightforward. Pursuant to article 39 of Chapter VII, the Security Council must first "determine the existence of any threat to the peace, breach of the peace, or act of aggression." Once that has occurred, the Council may either make recommendations to those involved or "decide what measures shall be taken . . . to maintain or restore international peace and security."⁴⁰

Under article 41, the Security Council should first consider calling on U.N. Members to apply "measures not involving the use of armed force." Such measures include, *inter alia*, "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."⁴¹ However, if nonforceful measures have been tried unsuccessfully, or if the Council determines that it would be fruitless to attempt them, under article 42 it may then "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." In other words, the Council may authorize the use of force.

39. SIR ARTHUR WATTS, 2 THE INTERNATIONAL LAW COMMISSION: 1949–1998, at 741 (1999). The statement was made in the official ILC Commentary to article 50.

40. U.N. CHARTER art. 39. For an excellent discussion of article 39, see Jochen Frowein, *Article 39*, in CHARTER COMMENTARY, *supra* note 29, at 717.

41. U.N. CHARTER art. 41.

Several aspects of this process merit comment. First, note that there need not have been an actual breach of the peace or act of aggression. The fact that the formula includes threats to the peace makes it indisputable that the Council may authorize preemptive military action. This is equally apparent from the inclusion of *maintenance* of international peace and security in the permissible purposes of the enforcement action. The very fact that there is even a discussion about whether Security Council authorization was required prior to strikes against Iraq presumes the possibility of that body authorizing preemptive military steps.

Moreover, action can be ordered in response to *any* threat to the peace, so long as the intention is to maintain or restore international peace and security. This represents a broad grant of discretion. Between January and November 2002, the Security Council formally found a situation to threaten peace on ten separate occasions.⁴² For instance, in October 2002 the Council labeled the hostage taking at the Moscow theatre such a threat.⁴³ In the case of Iraq, Security Council Resolution 1441, the resolution demanding Iraqi compliance with the weapons inspection program and warning Iraq that “it will face serious consequences as a result of its continued violations of its obligations,” specifically branded “Iraq’s non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles” as a threat to international peace and security.⁴⁴ These express findings of a threat are in addition to the numerous times the Council either reaffirmed pre-2002 resolutions that labeled a state of affairs a threat or addressed the issue peripherally, as it did, for example, by expressing “grave concern” over Israeli reoccupation of Arafat’s headquarters in September 2002.⁴⁵ As an illustration of the Council’s discretionary power in this regard, it has even gone as far as characterizing Libya’s failure to cooperate in the prosecution of the Pan Am Flight 103

42. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002) (Iraq); S.C. Res. 1440, U.N. SCOR, 57th Sess., 4632d mtg., U.N. Doc. S/RES/1440 (2002) (Moscow); S.C. Res. 1438, U.N. SCOR, 57th Sess., 4624th mtg., U.N. Doc. S/RES/1438 (2002) (Bali); S.C. Res. 1417, U.N. SCOR, 57th Sess., 4554th mtg., U.N. Doc. S/RES/1417 (2002) (Congo); S.C. Res. 1413, U.N. SCOR, 57th Sess., 4541st mtg., U.N. Doc. S/RES/1413 (2002) (Afghanistan); S.C. Res. 1408, U.N. SCOR, 57th Sess., 4526th mtg., U.N. Doc. S/RES/1408 (2002) (support by Liberia to rebel groups); S.C. Res. 1404, U.N. SCOR, 57th Sess., 4514th mtg., U.N. Doc. S/RES/1404 (2002) (Angola); S.C. Res. 1400, U.N. SCOR, 57th Sess., 4500th mtg., U.N. Doc. S/RES/1400 (2002) (Sierra Leone); S.C. Res. 1399, U.N. SCOR, 57th Sess., 4495th mtg., U.N. Doc. S/RES/1399 (2002) (Congo); S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452nd mtg., U.N. Doc. S/RES/1390 (2002) (Afghanistan).

43. S.C. Res. 1440, *supra* note 42. It did exactly the same with regard to the October 12, 2002 bombing in Bali. S.C. Res. 1438, *supra* note 42.

44. S.C. Res. 1441, *supra* note 42, at 1, 5.

45. S.C. Res. 1435, U.N. SCOR, 57th Sess., 4614th mtg., at 1, U.N. Doc. S/RES/1435 (2002).

bombers as a threat to peace.⁴⁶ Ultimately, it would seem that a threat to international peace and security is whatever the Council declares it to be.

In light of this leeway, the question of whom the Security Council may empower to take military action arises.⁴⁷ There are three possibilities. First, the Council may grant a mandate to a coalition of the willing. As an example, recall Resolution 1386, which authorized the creation of an Interim Security Assistance Force for Afghanistan in December 2001. In it, the Council welcomed the United Kingdom's offer to organize and command the force and called upon U.N. Member States to "contribute personnel, equipment and other resources."⁴⁸

Alternatively, the Security Council may turn to another international organization to provide forces. For instance, in the aftermath of Operation Allied Force, the NATO air operation against the Federal Republic of Yugoslavia, the Council authorized "Member States and relevant international organizations to establish the international security presence in Kosovo" pursuant to Chapter VII.⁴⁹ The purpose in referring to "international organizations" was to empower NATO to deploy forces and exercise command and control over the operation. However, because the Council did not wish to limit the security presence in Kosovo to NATO troops, it also authorized individual Member States to participate; the most notable example was, of course, Russia.

46. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., at 1, U.N. Doc. S/RES/748 (1992). Until the Cold War ended, the Council, due to the existence of off-setting bloc vetoes, was generally impotent in responding to threats to the peace. Only once did it find a threat to the peace. That occasion involved the authorization of forceful measures in response to the situation in Rhodesia. In Security Council Resolution 221 (April 9, 1966), the Council authorized the United Kingdom to deny, by force if necessary, access to the Port of Beira in Mozambique to ships carrying oil destined for Rhodesia. S.C. Res. 221, U.N. SCOR, 21st Sess., 1276th mtg., U.N. Doc. S/RES/221 (1966). The impotence of the Security Council led the General Assembly to adopt the Uniting for Peace Resolution in 1950. It provides that, "if the Security Council, because of the lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including . . . the use of armed force." *Uniting for Peace*, G.A. Res. 377, 5th Sess., ¶ 1, U.N. Doc. A/1481 (1950).

47. There is an interesting legal debate on the basis for such an authorization. Some scholars suggest that article 42 provides that basis, as it is the provision dealing directly with the use of force. Others suggest it is article 39, because States never executed agreements with the Security Council regarding the provision of troops necessary to implement article 42 measures, as is required by article 43. *See generally* DINSTEIN, *supra* note 23, at 263-73. Regardless of the legal basis, State and Security Council practice demonstrates that Chapter VII writ large is deemed to allow the Security Council to mandate military operations.

48. S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., at 2, U.N. Doc. S/RES/1386 (2001).

49. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., at 2, U.N. Doc. S/RES/1244 (1999).

Finally, under Chapter VII the Security Council may create a "U.N. force." For instance, in 1999 the Security Council authorized the creation of the United Nations Mission in Sierra Leone (UNAMSIL). Initially authorized to field a force of six thousand troops, by 2002 the authorization had grown to nearly twenty thousand.⁵⁰

In summary, the Security Council may clearly sanction preemptive actions pursuant to its Chapter VII powers. Indeed, the Council enjoys broad discretion in both determining what situations constitute a threat to the peace and deciding whom to grant a mandate to in its effort to maintain international peace and security.

C. Self-Defense

The second exception to the general prohibition on the use of force is self-defense. Article 51 of the Charter sets forth the standard. It provides:

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

Self-defense is, as discussed, the legal basis on which President Bush has centered his preemption doctrine. Specifically, the NSS envisages conducting operations anticipatorily, even when "uncertainty remains as to the time and place of the enemy's attack."⁵¹

Tracking this approach, the Congressional Joint Resolution authorizing the president to commit U.S. troops to battle against Iraq relied on self-defense (and enforcement of U.N. Security Council resolutions) as

50. The operation was initially authorized pursuant to S.C. Res. 1270, U.N. SCOR, 54th Sess., 4054th mtg., U.N. Doc. S/RES/1270 (1999). Subsequent revisions of the mandate and operation occurred with S.C. Res. 1289, U.N. SCOR, 55th Sess., 4099th mtg., U.N. Doc. S/RES/1289 (2000); S.C. Res. 1346, U.N. SCOR, 56th Sess., 4306th mtg., U.N. Doc. S/RES/1346 (2001); and S.C. Res. 1436, U.N. SCOR, 57th Sess., 4615th mtg., U.N. Doc. S/RES/1436 (2002). In September 2002, UNAMSIL's mandate was extended to March 2003. For a description of UNAMSIL, see http://www.un.org/Depts/dpko/unamsil/body_unamsil.htm.

51. NSS, *supra* note 10, at 15.

its justification under international law. In preambular language, the resolution described the situation warranting the use of force.

Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the high risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself⁵²

The resolution's actual grant of authority not only cited self-defense, but also noted that the president's authority is based on the existence of a *threat* when it authorized him to "use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq; and . . . enforce all relevant United Nations Security Council resolutions regarding Iraq."⁵³ In other words, Congress authorized President Bush to act *preemptively* in response to the *possibility* that Iraq would attack the United States or U.S. armed forces, or conspire with terrorists to do the same. This authorization was entirely consistent with the 2002 National Security Strategy.

1. The Criteria for Lawful Self-Defense

International law requires that any use of armed force in self-defense, preemptive or otherwise, comply with three basic criteria—necessity, proportionality, and imminency. These requirements derive historically from the *Caroline* case, which involved the nineteenth century Mackenzie Rebellion in Canada against the British Crown. Some of the rebels operated from U.S. soil. Despite diplomatic entreaties by the British, the United States failed to put an end to use of its territory as a rebel sanctuary and base of operations. Therefore, in 1837 British forces mounted a small raid of approximately eighty men across the border into New York state where they seized the *Caroline*, a vessel used by the rebels and their supporters. They then set the ship on fire and sent it over Niagara Falls.⁵⁴

The United States protested the attack on the basis that the British had violated its sovereignty. When the Foreign Office replied that the

52. Authorization for the Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1499 (2002).

53. *Id.* at 1501.

54. The case is described in R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-92 (1938).

action had been an appropriate exercise of self-defense, Secretary of State Daniel Webster argued that for self-defense to be legitimate, the British had to demonstrate a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and the acts could not be "unreasonable or excessive."⁵⁵ Over time, this standard, and its implicit criteria, has become universally accepted as the keystone in the law of self-defense. The Nuremberg Tribunal spoke approvingly of it,⁵⁶ as has the International Court of Justice in both its *Nicaragua* judgment⁵⁷ and the Use of Nuclear Weapons advisory opinion.⁵⁸

The principle of necessity requires that all reasonable alternatives to the use of force be exhausted. In the context of an ongoing attack, the absence of options is generally manifest. However, situations that prompt a preemptive defensive operation are likely to be much less clear-cut. For instance, what degree of certainty is there that the "threat" will mature into an attack? Given that a use of force is the most severe form of sanction available in interstate relations, and in light of the presumption, albeit rebuttable, against its legitimacy, the likelihood of the threat being carried out must be exceptionally high before preemptive

55. Letter from Daniel Webster, Secretary of State of the United States, to Henry S. Fox, Esq., Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (Apr. 24, 1841), reprinted in 29 BRIT. & FOREIGN ST. PAPERS 1129, 1138 (1857).

56. See International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT'L L. 172, 205 (1947). There is significant State practice regarding assertions of anticipatory self-defense. Professor Bowett has noted a number of the earlier examples:

Pakistan justified the entry of her troops into Kashmir in 1948 on this basis before the Security Council, an argument opposed only by India. Israel's invasion of Sinai in October, 1956, and June, 1967, rested on the same argument. The O.A.S. has used the same argument in relation to the blockade of Cuba during the 1962 missile crisis. Several states have expressed the same argument in the Sixth Committee in connection with the definition of aggression and the U.N. itself invoked the principle of anticipatory self-defense to justify action by O.N.U.C. in Katanga in December, 1961, and December, 1963. Following the invasion of Czechoslovakia by the U.S.S.R. in 1968, it is permissible to assume that the U.S.S.R. now shares this view, for there certainly existed no "armed attack."

Derek W. Bowett, *Reprisals Involving Resort to Armed Force*, 66 AM. J. INT'L L. 1, 4 n.8 (1972).

57. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14, para. 176 (June 27).

58. Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 225, para. 41 (July 8); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905. Professor Brownlie labels proportionality "the essence of self-defence." BROWNIE, *supra* note 23, at 279 n.2. It is important to note that the Court found that, "This dual condition applies equally to Article 51 of the Charter," thereby characterizing the proportionality principle as both customary and conventional law. *Use of Nuclear Weapons*, 1996 I.C.J. at para. 41.

action is appropriate. If a situation merely threatens peace, then the correct remedy is referral to the Security Council (or other nonforceful option, such as diplomatic or economic sanctions). It is only when a threatened action is nearly certain to materialize and, as discussed below, sufficiently imminent, that individual or collective defensive action outside the Security Council framework is permissible.

Similarly, and for the same reasons, an extremely high threshold for determining that no viable option to the use of force exists must apply.⁵⁹ Yoram Dinstein has suggested, in a slightly different context, a “beyond reasonable doubt” standard for determining when nonforceful remedies have been exhausted.⁶⁰ Surely, it cannot be otherwise, for any lesser standard would amount to permitting speculative defensive attacks. International law should not be interpreted as countenancing violation of its seminal norm, the prohibition on the use of force, when reasonable doubt as to the facts exists. Thus, if diplomatic, economic, informational, judicial, or other courses of action might deter the threatened action, defensive use of force by the target of the threat would violate article 2(4). It is in this context that Chapter VII action relates to the law of self-defense. If a State wishes to act preemptively, then it must be certain beyond reasonable doubt that either the Security Council will fail to act or that any action it might take will be unsuccessful in deterring the threat.⁶¹

Operation Allied Force, although conducted pursuant to an asserted right of humanitarian intervention, illustrates this principle. It was beyond reasonable doubt, according to supporters of the intervention, that the Russian Federation would have vetoed any Security Council resolution authorizing force against the Federal Republic of Yugoslavia. Since a separate legal basis purportedly existed for action (humanitarian

59. Condoleezza Rice made exactly this point in commenting on the new NSS:

But this approach must be treated with great caution. The number of cases in which it might be justified will always be small. It does not give a green light—to the United States or any other nation—to act first without exhausting other means, including diplomacy. Preemptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action.

Rice, *supra* note 9.

60. DINSTEIN, *supra* note 23, at 220. Professor Dinstein was addressing a situation in which terrorists or an armed band had already conducted an attack and there was fear of follow-up attacks. He notes, “[t]he absence of alternative means for putting an end to the operations of the armed bands or terrorists has to be demonstrated beyond reasonable doubt.” *Id.*

61. When an attack is underway, the mere fact that the Security Council *could* consider the situation does not deprive a State of its right to act in self-defense—recall that by the terms of article 51, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense . . . until the Security Council has *taken* measures necessary to maintain international peace and security.” U.N. CHARTER art. 51 (emphasis added).

ntervention on behalf of the Kosovar Albanians), and because resort to the Council would have merely wasted valuable time, the attack was legal.

Applying this approach by analogy to the Iraq case, if it had been beyond reasonable doubt that the Security Council would be unable to agree on steps (weapons inspections) to resolve the situation *or* that the inspection would be unsuccessful (the argument asserted by many), then taking military action against Iraq would have been permissible despite the fact that the Security Council was seized of the matter. In other words, the mere fact that the Security Council is empowered to consider situations that threaten the peace—indeed, even the fact that it *is* considering the situation—does not deprive a State of its right to self-defense. Of course, any preemptive defensive actions must comport with other facets of the principle of necessity (as well as proportionality and imminency).

The principle of proportionality limits any defensive action to that necessary to defeat an ongoing attack or to deter or preempt a future attack. This simple principle is frequently misstated. The most common error is suggesting that the size and scope of the defensive action may not exceed that of the attack. Such a standard could deprive a State of an ability to effectively defend itself, for it may be necessary to employ much more force than that which is threatened. Consider Operation Enduring Freedom. Although the consequences of the 9/11 attack were horrendous, with thousands of deaths and financial losses measured in the tens of billions of dollars, the U.S. and coalition response resulted in conquest of an entire nation. However, although the operation might be questioned on other grounds,⁶² there is no doubt that to effectively combat al-Qa'ida, it was necessary to deny Afghanistan as a sanctuary for the organization. Similarly, little doubt exists that as long as Saddam Hussein ruled Iraq, the country would continue to threaten international peace and security. Thus, if the country posed a threat severe enough to legally justify taking military action in self-defense, it was arguably necessary to remove Saddam from power to ensure the threat's complete eradication. After all, Iraqi forces were decisively defeated in the 1991 Gulf War. Yet, in the aftermath of that defeat, and despite a robust U.N. weapons inspection program, Saddam Hussein's Iraq continued to surreptitiously develop weapons of mass destruction.

On the other hand, less force than that which a State is facing may be all that is needed. Recall the 1981 Israeli air strikes on the Iraqi nuclear reactor near Baghdad. Although one might question whether the attack met the other criteria of self-defense, it was surely proportional.

62. See Michael Schmitt, *Counter-terrorism and International Law*, in ISR. Y.B. ON H.R. (forthcoming 2002).

The Israeli Air Force skillfully conducted the operation, discriminately targeting the source of a major threat to Israel and violating Iraqi airspace with only a handful of aircraft for a very short period. Although the size and scope of the mission paled beside the threat to Israel from Iraqi nuclear attack, only a limited operation was legally permissible due to Israel's ability to surgically exterminate the threat.

Finally, the response (or preemption) in self-defense need not be targeted against the attacking forces. Rather, it may be more effective to hit assets that will exert greater influence on the attacker's cost-benefit calculations. This may involve striking targets that are not directly involved in the attack, but are of high value to the attacker. Of course, every target chosen must be a legitimate military objective under the law of armed conflict.

The point is that the nature of an action in self-defense is not governed by the nature of the original attack (or in the case of preemptive self-defense, by the forthcoming attack). Considerations such as the scale, scope, consequences, and targets of the first blow are irrelevant when assessing compliance with the principle of proportionality. Instead, compliance is judged solely against the force necessary to defeat or preempt the underlying strike that justifies the right to self-defense.

The third criterion is imminency, sometimes labeled immediacy.⁶³ Recall the "instant" and "leaving no moment for deliberation" verbiage in Webster's formula. Some commentators argue for a high standard for imminence, reading the *Caroline* principle narrowly.⁶⁴ Indeed, on its face, it appears to impose a fairly restrictive test in which the defensive force can only be used just as the attack is about to be launched.

63. This principle was articulated by Hugo Grotius in 1625:

War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed.

The danger, again, must be immediate and imminent in point of time

. . . .

Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambush, or that he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences. . . .

HUGO GROTIUS, 2 DE JURE BELLI AC PACIS LIBRI TRES 173–75 (Carnegie Endowment trans. 1925)(1625).

64. See, e.g., Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634–35 (1984).

While a restrictive construction may have made sense in the nineteenth century, the nature of warfare has evolved dramatically since then. The Bush administration cites this evolution as justifying its preemptive strategy.⁶⁵ In the twenty-first century, the means of warfare are such that defeat, or at least a devastating blow, can occur almost instantaneously; battlespaces have become four-dimensional, with effects measured in fractions of a second. Moreover, with the advent of transnational terrorism, the enemy—including his intentions, location, tactics, and targets—is proving highly elusive. Whereas the conventional battlefield has become ever more transparent to those who possess state-of-the-art surveillance, reconnaissance, and other information warfare technology, paradoxically the Clausewitzian fog of war has thickened dramatically in the context of the new war against terrorism. At the same time, weapons of mass destruction render any miscalculation disastrous.

In such an environment, restrictive approaches to imminency run counter to the purposes animating the right of self-defense. Its primary function is to afford States a self-help mechanism by which they may repel attackers; self-defense recognizes that the international community may not respond quickly enough, if at all, to an armed attack against a State. Yet, the imminency component of the principle simultaneously seeks to stave off violence so as to allow maximum opportunity for peaceful alternatives to work. In other words, a balance between the State's right to exist unharmed and the international community's need to minimize potentially destabilizing uses of force underlies the right of self-defense.

This being so, maturation of the right to self-defense is relative. For instance, as defensive options narrow or become less likely to succeed with the passage of time, the acceptability of preemptive action grows. Weak States may lawfully act sooner than strong ones in the face of identical threats because they are at greater risk as time passes. In the same vein, it may be necessary to conduct defensive operations against a terrorist group long before a planned attack because there is unlikely to be another opportunity to target the terrorists before they strike. Other appropriate considerations include the attacker's timeline *and* the ability of the target State to counter a particular type of attack. In other words, each situation presents a case-specific window of opportunity within which a State can foil an impending attack. Depending on the circum-

65. For instance, Condoleezza Rice has argued that, "new technology requires new thinking about when a threat actually becomes 'imminent.' So as a matter of common sense, the United States must be prepared to take action, when necessary, before threats have fully materialized." Rice, *supra* note 9.

stances, the window may extend for some time, perhaps even to the moment of attack, or be very limited.⁶⁶

To summarize, it would be absurd to suggest that international law requires a State to “take the first hit” when it could effectively defend itself by acting preemptively.⁶⁷ This being so, the correct standard for evaluating a preemptive operation must be whether or not it occurred during the *last possible window of opportunity* in the face of an attack that was almost certainly going to occur. Restated, it is appropriate and legal to employ force preemptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack. This standard combines an exhaustion of remedies component with a requirement for a very high reasonable expectation of future attacks—an expectation that is much more than merely speculative.

As a final note on the issue of imminency, it is important not to confuse a preemptive strike in self-defense with self-defense against an ongoing campaign. Conventional military campaigns seldom occur as either a single blow or an extended period of uninterrupted combat. On the contrary, pauses are the norm, not the exception, in conflict. The same applies to terrorism. For instance, the 9/11 attacks were only the latest attacks in a long-term terrorist campaign against the United States by al-Qa’ida. There is evidence of ties between the group and the 1993 World Trade Center bombing, the 1998 attacks on the U.S. embassies in

66. On the contextual nature of the right to self-defense, see Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885, 930–32 (1999). Three and a half centuries ago, de Vattel took precisely the same approach in his classic work, *The Law of Nations*.

Since it is the lot of men to be guided in most cases by probabilities, these probabilities deserve their attention in proportion to the importance of the subject-matter; and, if I may borrow a geometrical expression, one is justified in forestalling a danger in direct ratio to the degree of probability attending it, and to the seriousness of the evil with which one is threatened. If the evil in question be endurable, if the loss be of small account, prompt action need not be taken; there is no great danger in delaying measures of self-protection until we are certain that there is actual danger of evil. But suppose the safety of the State is endangered; our foresight cannot extend too far. Are we to delay averting our destruction until it has become inevitable?

E. DE VATTEL, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 249 (Carnegie Institution trans. 1916)(1758).

67. Article 2 of the Definition of Aggression Resolution refers to the first use of force as *prima facie* evidence of aggression. In other words, the burden is upon the actor to demonstrate that its use of force was not aggression. But this necessarily means that there are first uses of force that do not amount to aggression and are, therefore, not wrongful. *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR 6th Comm., 29th Sess., 2319th plen. mtg., Annex, Agenda Item 86, art. 2, at 142, U.N. Doc. A/RES/3314 (1974), reprinted in 13 I.L.M. 710, 713 (1974).

East Africa,⁶⁸ and the 2000 attack on the *USS Cole*. More concretely, al-Qa'ida claimed responsibility for the 1993 attack against U.S. special forces in Somalia and multiple bombings in Yemen that were designed to kill U.S. military personnel. Other unexecuted plots which al-Qa'ida has masterminded include an attack on tourists in Jordan for the millennium, blowing up multiple airliners, and assassinating both the Pope and President Clinton.⁶⁹

Once the first attack in an ongoing campaign has been launched, the issue of *preemptive* self-defense becomes moot. Imminence is irrelevant because an armed attack is already underway. Instead, the question becomes whether or not the last attack was the final blow of the campaign; if it was, further defensive operations are unnecessary.

Aside from the strict criteria of self-defense, there are three issues involving self-defense that merit discussion in light of recent events. The first is whether the law of preemptive self-defense applies to operations against non-State actors, especially terrorists. Assuming it does, when can a potential victim State strike into another State's territory to preempt the non-State actor's attack? Finally, since States almost universally claim that their use of force is justified by the right to self-defense, who is competent to evaluate such claims?

2. Armed Attacks by Non-State Actors

A number of commentators have suggested that the law of self-defense presupposes a State-on-State conflict and is therefore inapplicable to terrorist acts.⁷⁰ This does not mean that States cannot respond to terrorism, but rather that the appropriateness of preventive, preemptive, and remedial actions would be determined by the law of domestic and international law enforcement.

In the aftermath of the 9/11 attacks, it is clear that State practice contradicts such an interpretation. The very day after the attacks, the Security Council passed Resolution 1368, which characterized the "hor-

68. Bin Laden has been indicted for involvement in these attacks. *United States v. Bin Laden*, Indictment, S(2) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998), <http://cns.miiis.edu/pubs/reports/pdfs/binladen/indict.pdf>.

69. OFFICE OF COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2000, app. B (Apr. 30, 2001), <http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm> (Al-Qa'ida).

70. See, e.g., Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, in EUR. J. INT'L L. DISCUSSION FORUM, THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, at http://www.ejil.org/forum_WTC/ny-cassese.html (last modified Nov. 26, 2001); see also Giorgio Gaja, *In What Sense Was There an "Armed Attack"?*, in EUR. J. INT'L L. DISCUSSION FORUM, THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, at http://www.ejil.org/forum_WTC/ny-gaja.html (last modified Feb. 4, 2002).

rifying” attacks as a “threat[] to international peace and security,” and reaffirmed the “inherent right of individual or collective self-defence in accordance with the Charter [of the United Nations].”⁷¹ Just over two weeks later, the Council again cited the right to self-defense in Resolution 1373.⁷² It must be recalled that at the time, especially on September 12, no one was seriously suggesting that the attacks had been the work of any State, or even an agent of a State. On the contrary, attention quickly zeroed in on transnational terrorists, especially the al-Qa’ida organization. Thus, from the very beginning, the Security Council acted as if article 51 applied to attacks by terrorists.

So did States. For instance, NATO, which depends on the consensus of nineteen nations when taking action, invoked article V, the collective self-defense provision of the North Atlantic Treaty.⁷³ Absent was any reference against whom the self-defense might be directed. Since the U.S.-U.K. (two NATO countries) air strikes against al-Qa’ida began a mere five days later, NATO obviously viewed the self-defense exception to the prohibition on the use of force as applicable to terrorists.

Other organizations and States followed suit. The Organization of American States invoked the Rio Treaty’s collective self-defense provisions,⁷⁴ while Australia similarly offered to deploy troops in accordance

71. S.C. Res. 1368, *supra* note 48, pmb.

72. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., pmb., U.N. Doc. S/RES/1373 (2001). Contrary to the approach taken by the Security Council, the General Assembly did not refer to self-defense in its resolution on the attacks. G.A. Res. 56/1, U.N. GAOR, 56th Sess., Agenda Item 8, U.N. Doc. A/RES/56/1 (2001).

73. Article V, based on article 51 of the U.N. Charter, provides for collective self-defense if any of the Member States suffers an “armed attack.”

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, Apr. 4, 1949, art. 5, T.I.A.S. No. 1964, at 4, 34 U.N.T.S. 243, 246. On September 12, NATO’s North Atlantic Council stated that the attacks would be “regarded as an action covered by Article 5 of the Washington Treaty” if they originated from outside the United States. Press Release (2001)124, Statement by the North Atlantic Council, North Atlantic Treaty Organization (Sept. 12, 2001), *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>. After the United States provided “clear and compelling” evidence that the attacks were not the work of domestic terrorists, the North Atlantic Council invoked article V. Statement by NATO Secretary General, Lord Robertson, NATO Headquarters (Oct. 2, 2001), *available at* <http://www.nato.int/docu/speech/2001/s011002a.htm>.

74. *Terrorist Threat to the Americas*, Res. 1, 24th Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001). The

with the ANZUS Treaty.⁷⁵ Bilateral offers of support to the United States flowed in from around the globe.⁷⁶

That the 9/11 attacks were nearly universally viewed as implicating the right to self-defense became abundantly clear following the commencement of the campaign against al-Qa'ida and the Taliban on October 7. One week after the attacks began, the Security Council passed Resolution 1378, which accepted the strikes against al-Qa'ida by expressing support for "international efforts to root out terrorism, in keeping with the Charter of the United Nations," and implicitly adopted self-defense as the legal basis for the strikes when it reaffirmed Resolutions 1368 and 1373 (which had cited the right to self-defense).⁷⁷

In terms of State practice, the United Kingdom conducted the first strikes alongside U.S. forces; other countries, including Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan, provided critical airspace and facilities. China, Egypt, and Russia publicly expressed approval of the strikes,⁷⁸ while Australia, Can-

treaty provides that "[t]he High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations." Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, para 1, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95.

75. Prime Minister John Howard, Government Invokes ANZUS Treaty—Prime Minister's Press Conference (Sept. 14, 2001), available at <http://australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml>; see also White House, Fact Sheet, Operation Enduring Freedom Overview (Oct. 1, 2001) [hereinafter Fact Sheet], available at <http://www.state.gov/s/ct/rls/fs/2001/5194.htm>. Article VI of the ANZUS Treaty provides: "Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." Security Treaty Between Australia, New Zealand, and the United States, Sept. 1, 1951, art. IV, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86.

76. Russia, China, and India agreed to share intelligence. Japan and South Korea offered logistics support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan agreed to cooperate fully with the United States. Twenty-seven nations granted overflight and landing rights, and forty-six multilateral declarations of support were obtained. Fact Sheet, *supra* note 75.

77. S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., at 1, U.N. Doc. S/RES/1378 (2001). Later resolutions expressed support for the anti-terrorist operations, even as combat operations in Afghanistan were ongoing. This strengthens arguments for applicability of the law of self-defense to situations involving terrorism. See, e.g., S.C. Res. 1386, U.N. SCOR, 4443d mtg., U.N. Doc. S/RES/1386 (2001); S.C. Res. 1390, *supra* note 42. Specific reference was made to Osama bin Laden and the al-Qa'ida network in the January resolution.

78. 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, 49 (2002); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 248 (2002) [hereinafter Murphy, *Contemporary Practice*]. The Organization for the Islamic Conference simply urged the United States to limit the campaign to Afghanistan, while the Asia-Pacific Economic Cooperation Forum condemned terrorism of all kinds. Neither organization criticized the operations.

ada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.⁷⁹ As the war progressed, many States offered further support, ranging from Kyrgyz airfields, to Spanish, Dutch, Danish, and Norwegian transport aircraft, to a South Korean medical team.⁸⁰

It is incontrovertible that States now treat the law of self-defense as applicable to acts by non-State actors. This interpretation appears consistent with the plain text of the U.N. Charter. Although the prohibition on the use of force in article 2(4) expressly applies to States, article 51 makes no mention of who must commit the armed attack that activates the right to self-defense. By negative implication then, the right applies regardless of the source of the armed attack; had article 51 been intended to be limited to States, it would have so stated, as was done in article 2(4). This makes sense in light of the fact that violent acts committed by non-State actors are already universally criminalized in domestic and international penal law; *prohibition* within the Charter framework would have been duplicative. However, as the events of 9/11 tragically demonstrated, domestic or international law enforcement may prove an insufficient tool in effectively *defending* against non-State actors, such as terrorists.

Of course, not every attack, whether by a State or a non-State actor, implicates the international law right of self-defense, and the derivative right to preempt that attack. Indeed, the International Court of Justice, in the *Nicaragua* case, held that not all uses of force amounted to an “armed attack” justifying the use of force in self-defense. Rather, the act has to be of a particular “scale and effects.”⁸¹ The Court specifically excluded mere frontier incidents from the ambit of the phrase.

79. Murphy, *Contemporary Practice*, *supra* note 78, at 248. The European Council “confirm[ed] its staunchest support for the military operations . . . which are legitimate under the terms of the United Nations Charter and of Resolution 1368.” Declaration by the Heads of State or Government of the European Union and the President of the Commission, Follow-up to the September 11 Attacks and the Fight Against Terrorism, Ghent European Council, Oct. 19, 2002, SN 4296/2/01 Rev. 2.

80. *Americans in a Strange Land*, *ECONOMIST*, May 4, 2002, at 41.

81. Applying customary international law, the International Court of Justice held in the *Nicaragua* case:

[T]he prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, *if* such an operation, because of its *scale and effects*, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a *significant scale* but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.

Such acts by States might amount to an international wrong, but absent an “armed attack,” the State is precluded from responding with the use of force in self-defense, as that term is understood in *international* law. The same applies to terrorist acts. If the attack is of significant scale (e.g., intended to cause multiple deaths) and conducted either by or on behalf of a foreign State or by a transnational or foreign terrorist group operating from abroad, then it implicates the “armed attack” phraseology of article 51 and its customary international law counterpart. Of course, quite apart from the international law issue, any individual who is attacked may defend himself or herself, or even others, under the domestic laws of self-defense, defense of others, or defense of property, and law enforcement entities may use force to prevent crimes or apprehend wrongdoers under domestic laws and regulations governing law enforcement. Nevertheless, such measures are not the type envisaged by preemptive strategies.

3. Crossborder Operations

If a non-State actor can conduct an armed attack, can the potential victim cross into another State without its consent in order to preempt that action? This is an especially apropos question in light of the transnational terrorism besetting the early twenty-first century. As with much of international law, the answer depends on finding an appropriate balance between seemingly contradictory rights and obligations.

All States enjoy the right of territorial integrity, a customary international law right codified in article 2(4)’s prohibition on threats or uses of force against the “territorial integrity . . . of any State.”⁸² At the same time, States have a right to self-defense. Under certain circumstances, the territorial integrity principle obviously must yield to this right. For instance, it is manifestly legal to cross into another State to conduct military operations in self-defense if it is that State which has committed aggression.

Ascertaining the appropriate balance between one State’s right to territorial integrity and another’s right to self-defense depends in part on the extent to which the former has complied with its own international obligations vis-à-vis the latter. It is a long-established principle of international law that “a State is bound to use due diligence to prevent the

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14, para. 195 (June 27) (emphasis added).

82. Noncompliance with this duty may amount to an act of aggression. Aggression is the “use of armed force by a State against the . . . territorial integrity . . . of another State.” *Definition of Aggression*, *supra* note 67, art. 1, at 713. Additionally, pursuant to article 3, aggression includes “[t]he invasion or attack by the armed forces of a State of the territory of another State.” *Id.* art. 3.

commission within its dominions of criminal acts against another nation or its people.⁸³ This principle is reflected in numerous pronouncements on terrorism.⁸⁴

If a State is unable or unwilling to comply with this obligation, the victim State may then cross into the offending State to conduct defensive operations. Over history, there have been numerous examples of States exercising this self-help right of self-defense, the most well known being General John Pershing's 1916 campaign into Mexico after the bandit Pancho Villa.⁸⁵ In the recent past, such incidents include the air strikes against terrorist facilities in Sudan and Afghanistan in response to the 1998 bombings of the U.S. embassies in Nairobi and Dar-es-Salaam and the 1999 pursuit of Hutu guerrillas in the Democratic Republic of Congo by Ugandan forces following a massacre of foreign tourists.⁸⁶ Of course,

83. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 88 (Sept. 7, 1927) (Moore, J., dissenting).

84. The 1970 Declaration on Friendly Relations, for example, urges States to "refrain from . . . acquiescing in organized activities within its territory directed towards the commission of [terrorist acts in another State]." *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, U.N. GAOR, 25th Sess., Annex, Agenda Item 85, at 4, U.N. Doc. A/Res/2625 (1970). The proscription is echoed in the 1994 Declaration on Measures to Eliminate International Terrorism. G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., Annex, U.N. Doc. A/49/743 (1994); see also *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., Annex, U.N. Doc. A/51/631 (1996). With regard to terrorists operating from Afghanistan, note that there were numerous Security Council resolutions condemning the Taliban's willingness to allow territory they controlled to be used by al-Qa'ida prior to 9/11. See, e.g., S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000).

85. Another well-known example involved U.S. air and ground attacks into Cambodia during the Vietnam War. For an analysis of the legal issues therein, see John H.E. Fried, *United States Military Intervention in Cambodia in the Light of International Law*, in 3 *THE VIETNAM WAR AND INTERNATIONAL LAW* 100 (Richard Falk ed., 1972); Captain Timothy Guiden, *Defending America's Cambodian Incursion*, 11 *ARIZ. J. INT'L & COMP. L.* 215 (1994); Note, *International Law and Military Operations Against Insurgents in Neutral Territory*, 68 *COLUM. L. REV.* 1127 (1968).

86. On the events, see Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 *YALE J. INT'L L.* 559 (1999); Leah M. Campbell, Comment, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 *TUL. L. REV.* 1067 (2000); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *HOUS. J. INT'L L.* 3, 53 (1999). Most criticism surrounding the cruise missile strike against the al-Shifa pharmaceutical plant in Sudan (which was allegedly involved in chemical weapons production) focused on the validity of the claimed connection between the plant and international terrorism, not the violation of Sudanese territory; the attacks against al-Qa'ida training bases in Afghanistan evoked little criticism. Nor did the 1999 operations in the Congo, although internationalization of the conflict drew international concern and resulted in dispatch of a peacekeeping force by the Security Council. In S.C. Res. 1291, U.N. SCOR, 54th Sess., 4104th mtg., U.N. Doc. S/RES/1291 (2000), the Council authorized the United Nations

recall that the seminal *Caroline* case itself involved a self-help penetration of U.S. territory without the consent of the United States. And there was virtually no criticism of the 2001 incursions into Afghanistan to strike at al-Qa'ida after the Taliban failed to comply with U.S. and U.N. demands to surrender Osama bin Laden and his lieutenants.⁸⁷

It cannot be otherwise, for the unwillingness or inability of one State to meet its legal obligations cannot deprive other States of the most important right found in international law, the right to defend oneself against an armed attack. Still, the right of the State conducting the defensive operation must have matured by the time of the territorial penetration. With respect to preemption, this requires that an attack be imminent, that no viable alternatives to the prospective military operation exist and that the force finally used be limited to that necessary to accomplish the defensive objectives. In such cases, the exhaustion of remedies component of self-defense translates into a requirement that the potential victim State issue a demand that the sanctuary State comply with its obligation to prevent its territory from being improperly used.

Organization Mission in the Democratic Republic of the Congo. For details and background, see http://www.un.org/Depts/dpko/monuc/monuc_body.htm.

87. The Security Council had repeatedly insisted on Taliban compliance with measures sought by the United States. In Security Council Resolution 1333, for example, it "demanded" that:

[T]he Taliban comply without further delay with the demand of the Security Council in paragraph 2 of Resolution 1267 (1999) that requires the Taliban to turn over Usama bin Laden to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice; . . . [and also that] the Taliban should act swiftly to close all camps where terrorists are trained within the territory under its control. . . .

S.C. Res. 1333, *supra* note 84. In June 2001, the United States warned the Taliban regime that it would be held responsible for any terrorist acts committed by terrorists operating from its territory. Press Release, United Kingdom, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 (Oct. 4, 2001), para. 16, available at <http://www.number-10.gov.uk/news.asp?NewsId=2686>. After the attacks of 9/11, the United States continued to press its demands through the Pakistani government, which maintained diplomatic relations with the Taliban. They were articulated publicly in late September during a presidential address to a joint session of Congress. Specifically, the United States insisted that the Taliban:

Deliver to United States authorities all the leaders of Al-Qa'ida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001).

Once mounted, the operation must immediately be terminated and all forces withdrawn as soon as the defensive objectives are attained. Further, the preemptive strike may not be directed at the “sanctuary” State itself, for it has not committed an armed attack unless it subsequently uses force against the State conducting the defensive operations. In that case, since the initial defensive use of force is lawful, any other State’s countervailing use of force would amount to an “armed attack.”⁸⁸

There are two other circumstances in which it is indisputable that one State’s armed forces can cross into another State to conduct preemptive defensive operations. Since it enjoys sovereignty, the latter may consent to the operation. The second situation is one in which the terrorists in question, or other non-State actors, act on behalf of the State into which the defensive strikes penetrate.⁸⁹ When this occurs, the potential terrorist attack may be attributed as a matter of law to the sanctuary State such that its territorial integrity rights fade away as if it was going to commit the attack itself. The sole question then becomes whether cross-border operations are necessary, proportional, and in response to an imminent armed attack.

4. Assessing Claims of Self-Defense

Dean Acheson’s well-known assertion that “[t]he survival of states is not a matter of law”⁹⁰ implies that the rule of law necessarily yields to the force of international security when the stakes are high enough. Although Secretary Acheson somewhat overstates his case, it is true that the mechanisms for assessing claims of self-defense are weak;⁹¹ hence,

88. Professor Robert Turner has offered a similar analysis. Robert F. Turner, *International Law and the Use Of Force in Response to the World Trade Center and Pentagon Attacks*, JURIST (Oct. 8, 2001), at <http://jurist.law.pitt.edu/forum/forumnew34.htm>. On self-help, see also Franz W. Paasche, *The Use of Force in Combating Terrorism*, 25 COLUM. J. TRANSNAT’L L. 377 (1987); Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT’L L. 243 (1987); Oscar Schachter, *The ExtraTerritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT’L L. 309 (1989).

89. On the evolution of legal standards regarding the extent of support necessary to attribute a terrorist act to a State, see Schmitt, *supra* note 62.

90. Dean Acheson, *Remarks by the Honorable Dean Acheson*, 1963 PROC. OF AM. SOC’Y INT’L L. 13, 14. The remarks were made in the context of the Cuban Missile Crisis during the annual meeting of the American Society of International Law. As might be expected, prominent international lawyers, such as Myres McDougal and Quincy Wright, took him to task. *Id.* at 15–18.

91. Indeed, upon becoming party to the Kellogg-Briand Pact, both the United States and France insisted that only the State itself could determine the need for self-defense. U.S. Note of June 23, 1928, *cited in* Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. 259, 260–61 (1989). Paradoxically, the Nuremberg Tribunal rejected auto-interpretation when it held that claims of self-defense “must ultimately be subject to investigation and

the propensity for States to cite self-defense as a rationale for nearly every use of force not authorized by the Security Council.⁹²

Judicial remedies are scarce. The International Court of Justice can only exercise its contentious jurisdiction (as distinct from advisory jurisdiction) in cases between States that are party to its Statute, and even then consent of the dispute's participants is necessary before the case may be heard. Such consent may be granted specifically for a particular controversy, be provided for in a treaty to which the disputants are both party, or be expressed in a declaration that the State recognizes the Court's jurisdiction as compulsory *ipso facto* with respect to any other State accepting the same obligation.⁹³

The final method, compulsory jurisdiction under the "optional clause," was at the heart of the *Nicaragua* case, which involved a U.S. claim that it was acting in collective self-defense with El Salvador by supporting insurgent activities in Nicaragua. Having executed an optional clause declaration in 1946, the United States sought to amend it in 1984 vis-à-vis Central American States in order to avoid the Court's jurisdiction. When the International Court of Justice rejected the U.S. attempt and proceeded to rule on the merits, the United States withdrew from the litigation.⁹⁴ In other cases, respondents have failed to appear altogether.⁹⁵ But even when the Court does deliver a binding decision in a contentious case, the sole formal enforcement mechanism is the Security Council.⁹⁶ Of course, any possible action it might take may be vetoed by one of the permanent members of the Council, as was done by the United States when Nicaragua sought enforcement of the Court's decision in *Nicaragua*.⁹⁷

No other existing international tribunal has jurisdiction over wrongful uses of force based on claims of self-defense. Eventually, the International Criminal Court (ICC) may have jurisdiction over individu-

adjudication if international law is ever to be enforced." 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 208 (1947).

92. For example, the Soviet Union justified its invasion of Afghanistan on the basis of self-defense, a claim rejected by the General Assembly. See G.A. Res. ES-6/2, U.N. GAOR, 6th Emergency Special Sess., Agenda Item 5, U.N. Doc. A/RES/ES-6/2 (1980).

93. Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. See SHABTAI ROSENNE, *THE WORLD COURT*, ch. 5 (5th rev. ed. 1995), for a discussion of the legal and practical aspects of the Court's jurisdiction.

94. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Jurisdiction and Admissibility)*, 1984 I.C.J. 392 (Nov. 26).

95. *E.g.*, *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (July 25); *Nuclear Tests (Austl. v. Fr.; N.Z. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

96. U.N. CHARTER art. 94, para. 2.

97. Excerpts From Verbatim Records Discussing I.C.J. Judgment in *Nicaragua v. United States*, 25 I.L.M. 1352, 1364 (1986).

als charged with the crime of aggression. However, aggression still needs to be defined in an amendment to the Statute, which will also have to set out the conditions under which the ICC shall exercise jurisdiction over the crime.⁹⁸

The primary structural remedy for abusive claims of preemptive self-defense is, thus, resort to the Security Council. There is little doubt that a use of force which violated the legal requirements of self-defense would be a breach of the peace and/or act of aggression, thereby empowering the Security Council to act to restore or maintain international peace and security pursuant to Chapter VII. Indeed, the right of self-defense under article 51 is itself subject to the condition that it may only be exercised “until the Security Council has taken measures necessary to maintain international peace and security.”⁹⁹

Of course, ultimately, if a State wrongfully claims to be acting in self-defense against another State, the “victim” State may respond in self-defense to the armed attack that it is suffering, either individually or collectively. In fact, this remedy is certainly the most meaningful one available.

III. PREEMPTIVE STRATEGIES—FINAL THOUGHTS

The Cuban Missile Crisis, in which President John Kennedy ordered a naval quarantine in response to Soviet installation of medium range nuclear missile systems in Cuba, is often cited as the precedent for the new U.S. preemptive strategy. However, in 1962 the United States specifically chose not to base its legal justification on the law of self-defense. As Abram Chayes, the Department of State’s Legal Advisor at the time, has explained,

I think the central difficulty with the Article 51 argument was that it seemed to trivialize the whole effort at legal justification. No doubt the phrase “armed attack” must be construed broadly enough to permit some anticipatory response. But it is a very different matter to expand it to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome. To accept that reading is to make the occasion for forceful response essentially a question for unilateral national decision that would not only be formally

98. Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 5, para. 2, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999, 1004.

99. U.N. CHARTER art. 51. No situation has occurred to date in which the right to self-defense was supplanted by Security Council action.

unreviewable, but not subject to intelligent criticism, either Whenever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible.

. . . In this sense, I believe an Article 51 defense would have signalled that the United States did not take the legal issues involved very seriously, that in its view the situation was to be governed by national discretion, not international law.¹⁰⁰

Similarly, when Israel bombed the Iraqi nuclear reactor in 1981, it claimed that Iraq was in a state of war with Israel (having fought Iraq three times—1948, 1967, 1973), asserted that Iraq denied the right of Israel to exist as a State and averred that one purpose of the Iraqi nuclear program was to attack Israel. Therefore, “in removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defence within the meaning of this term in international law and as preserved also under the United Nations Charter.”¹⁰¹ In response to this self-defense justification, the Security Council unanimously “condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”¹⁰²

The world has changed and international law must evolve to remain relevant. A restrictive reading of self-defense made sense in a bipolar State-centric world where the risk of superpower involvement, or even nuclear exchange, served deterrent ends. But as correctly noted in the 2002 National Security Strategy, those most likely to threaten international peace and security today may be undeterrable. Moreover, the consequences of failure to meet these threats, in light of both their strategy of targeting the civilian population and the proliferation of weapons of mass destruction, could be catastrophic. Ultimately, law must be construed in the context in which it is to be applied if it is to remain relevant; and in the twenty-first century security environment, insistence on a passé restrictive application of international legal principles to strategies of preemption would quickly impel States at risk to ignore them.

100. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 65–66 (1974); *see also* Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597 (1963); W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335 (1962).

101. Excerpts from Security Council Provisional Verbatim Record of June 15, 1981, 20 I.L.M. 996 (1981).

102. S.C. Res. 487, U.N. SCOR, 35th Sess., 2288th mtg., U.N. Doc. S/PV.2288 (1981).

The approach set forth above represents an evolution, not revolution, in the two Charter exceptions to the prohibition on the use of force. It provides a basis for allowing the Security Council to authorize preemptive action in response to any situation that might threaten international peace and security. The Charter requirements that such a mandate be approved by nine of the Council's fifteen members and that none of the five permanent members cast a veto serve as effective safeguards against abuse of power by the Council.

Aside from Security Council action, individual States, operating individually or collectively, may act preemptively in self-defense. However, because there is no structural mechanism to prevent abuse of the right, States do not enjoy the freedom of action that the Council does. On the contrary, the right is strictly limited. In particular, there must be near certainty that an armed attack will be launched, peaceful alternatives to resolution of the situation must be exhausted beyond reasonable doubt, defensive action can only be taken during the last available window of opportunity, and the defensive force used cannot exceed that necessary to deter the threat. The defensive operations may be conducted against non-State actors, who can no longer count on the legal principle of territorial inviolability to allow them sanctuary in sympathetic or weak States.

And the future? The continued spread of weapons of mass destruction and transnational terrorism will likely continue to exert pressure on the existing normative boundaries. This trend is already in evidence. For instance, the attack directly against the Taliban on October 7, 2001 challenged then-existing legal understandings of the quality and quantity of support necessary to attribute an armed attack by a non-State actor to its State sponsor. Yet, there was virtually no condemnation of the U.S. and U.K. strikes because the international community deemed them sensible in the context of 9/11. A year later, State sponsors are on notice that although the precise level of support necessary to legally justify defensive operations against State sponsors of terrorism remains unclear, it surely has dropped. Of course, al-Qa'ida was conducting an ongoing campaign of terror against the United States, a fact that made acceptance of the response against the Taliban more palatable. Nevertheless, the community reaction to the situation signals a willingness to tolerate aggressive responses to the new threats that may well be reflected in the realm of preemptive activities.

This is certainly the case with regard to Iraq. Opposition to the strike against the country has far less to do with whether such a strike can be conducted in the first place than with concern that various legal preconditions have not been met. For instance, almost no one argues that the

Security Council would have been unable to authorize strikes against Iraq for its noncompliance with resolutions demanding cooperation with weapons inspections. Indeed, as noted earlier, the dialogue assumed the Council could do exactly that—hence the discussion over whether a follow-up resolution was necessary before strikes could be launched.

Similarly, assertions that the United States could act preemptively in self-defense were met with claims that alternatives, such as resort to the Security Council, had not been exhausted (necessity), that an assault which resulted in regime change was more than necessary to force Iraq into compliance with the inspections regime (proportionality), and that Iraq was years from developing a nuclear weapons capability and unlikely to employ chemical or biological weapons unless attacked (imminency). In other words, the controversy centers on whether the situation was ripe for a U.S. military preemptive operation, not the legality of such an operation in the abstract.

Ultimately, the question regarding evolution of any legal standard is whether its development contributes to a furtherance of world order. In the current environment, with images of the suffering wrought by transnational terrorism still fresh and growing awareness of the very real danger that proliferation of weapons of mass destruction poses, the trend would appear positive. However, in law as in life, one must be careful what one wishes for. There are enormous risks associated with preemptive strategies, for each preemptive act builds a body of State practice that can be relied upon by those who would “claim” the right malevolently.¹⁰³ Thus, it is incumbent on responsible States to pull the preemptive trigger only after every requisite legal condition has been met. Acting precipitously or without due regard to existing norms will almost certainly erode the international legal system that is so central to world order. That reality would favor no State.

103. President Chirac of France has expressed just this concern.

As soon as one nation claims the right to take preventive action, other countries will naturally do the same. . . . What would you say in the entirely hypothetical event that China wanted to take pre-emptive action against Taiwan, saying that Taiwan was a threat to it? How would the Americans, the Europeans and others react? Or what if India decided to take preventive action against Pakistan, or vice versa?

Comments of Jacques Chirac, *quoted in* Elaine Sciolino, *French Leader Offers Formula to Tackle Iraq*, N.Y. TIMES, Sept. 9, 2002, at A1.