

THE PAST AND FUTURE OF THE CLAIM OF PREEMPTIVE SELF-DEFENSE

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The claim by the United States to a right of what has come to be known as “preemptive self-defense” has provoked deep anxiety and soul-searching among the members of the college of international lawyers. Some have feared that the claim signaled a demand for the prospective legitimization of “Pearl Harbor” types of actions, that is, sudden, massive, and destructive military actions “out of the blue,” by one state against another in the absence of a state of war, with the objective of militarily neutralizing or even eliminating a latent or potential adversary. Since some public intellectuals within the American political system had recommended such a strategy with respect to the People’s Republic of China in the midst of the Cold War,¹ the anxiety could not be dismissed as entirely unfounded or even hysterical. Nor could it be ignored as if it were some sort of exclusively American aberration that could be tolerated as the idiosyncrasy of one state. From the earliest unilateral claims to a continental shelf, a copycat or mimetic dynamic in modern international law has taken shape whenever an enhancement of state power has become available, so that the possibility of similar claims to an expanded notion of preemptive self-defense by many other states could not be excluded. Indeed, while the United States may now have retreated somewhat from its 2002 broad claim to preemption, various other states (including some with nuclear weapons) have adopted the preemptive self-defense claim as their own. If the U.S. claim posed potentially destabilizing consequences for world order, how much more so would proliferation of the claim?

The United Nations Charter’s prescription with respect to the use of force is essentially binary: either a use of military force is in self-defense, as that concept is conceived in the Charter, in which case it is lawful, or it is not, in which case it is unlawful. As for the right to resort to military measures in self-defense, it materializes only when the state invoking it has suffered an “armed attack,” a stricture that does not even extend to the *Caroline* doctrine of anticipatory self-defense.²

During the Cold War, the practice of low-level protracted conflicts placed considerable stress on the Charter regime, and those charged with its application were obliged to ignore the overt and explicit nuclear threats between the superpowers that had come to constitute the system of strategic deterrence. But despite these problems, the International Court of Justice³ and most international lawyers have steadfastly insisted on the strict application of the Charter

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¹ William Buckley, *A Noted Liberal Agrees: Let’s Destroy Peking’s A-Threat Now*, L.A. TIMES, Dec. 16, 1964, at A6, available in ProQuest Historical Newspapers.

² See R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82 (1938); see also W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3 (1999) (discussing possible current applications).

³ See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Nov. 26); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (June 27); *Oil Platforms* (Iran v. U.S.), Preliminary Objections, 1996 ICJ REP. 803 (Dec. 12); *Oil Platforms* (Iran v. U.S.), Merits, 2003 ICJ REP. 161 (Nov. 6).

regime, most recently in the *Congo v. Uganda* decision,⁴ which is discussed below. Yet if customary international law is in the process of accommodating the U.S. claim to a right of preemptive action—a distinct possibility given the adoption (both full and partial) of the U.S. claim by other significant states—the possibility of future invocations is increased.

I.

The claim to preemptive self-defense is a claim to entitlement to use unilaterally, without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational or directly threatening, but that, if permitted to mature, could be seen by the potential preemptor as susceptible to neutralization only at a higher and possibly unacceptable cost to itself.⁵ Preemptive self-defense differs from anticipatory self-defense in that those contemplating the latter can point to a palpable and imminent threat. Thus, anticipatory self-defense (which was, in our view, not in the contemplation of the drafters of the Charter, though claimed by many to have been grafted thereon by subsequent practice) is at least akin to the armed attack requirement of Charter Article 51, because there may be palpable evidence of an imminent attack. A claim for preemptive self-defense can point only to a possibility among a range of other possibilities, a contingency. As one moves from an actual armed attack as the requisite threshold of reactive self-defense, to the palpable and imminent threat of attack, which is the threshold of anticipatory self-defense, and from there to the conjectural and contingent threat of the mere possibility of an attack at some future time, which is the threshold of preemptive self-defense, the self-assigned interpretive latitude of the unilateralist becomes wider, yet the nature and quantum of evidence that can satisfy the burden of proof resting on the unilateralist becomes less and less defined and is often, by the very nature of the exercise, extrapolative and speculative.⁶ The evolution of weapons systems that are ever more rapid and destructive and that may be initiated without warning or with very narrow warning windows has been invoked as a justification for preemption. But ultimately the central issue is assessment by the risk-averse security specialists of one international actor of the intentions of another actor who has or may acquire the weapons. In an international system marked by radically different cultures, values, and, as a consequence, factual perceptions and their strategic assessments, an act of preemptive self-defense, based upon one actor's self-perceived good faith conviction, will often look like serious or hysterical misjudgment to some actors and like either cynical or self-deluded, naked aggression to others.

When a major international actor claims a new right or its adjustment or termination, the implications for changing customary international law loom especially large, for, at every level of social organization, the making of law, much more than its institutional applications, is in great part political; doctrines of sovereign equality notwithstanding, the actions of a great power may be more generative of law than those of smaller states. The question that is posed in this article is whether, in the period since 2002 when the United States began elaborating its broadest claim, the international legal system has begun to incorporate it, in whole or in part, even as the United States may have

⁴ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Int'l Ct. Justice Dec. 19, 2005) [hereinafter *Congo v. Uganda*].

⁵ The discourse has used different terms to describe this claim throughout the debate on the legality of the use of force. For an interesting discussion, see YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* (4th ed. 2005).

⁶ The inherent difficulty of such exercises is apparent in Taft and Buchwald's contention that the U.S. invasion of Iraq in 2003 was a lawful use of preemptive military self-defense. William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AJIL 557 (2003).

retreated from it. If its incorporation has in fact begun, a pertinent question for the jurist is whether the change has significantly affected world public order.

II.

Over the course of the twentieth century, a fair number of U.S. actions that might be characterized as preemptive self-defense—such as military actions in Haiti and the Dominican Republic before World War I, the military strikes against Tripoli in 1975, and the shelling of Lebanon after the destruction of the U.S. marine barracks—are better characterized as responses to ongoing military conflicts. Recent decades have also seen an increase in resort to military actions to prevent or end crimes against humanity, but these actions were invoked under the rubric of humanitarian intervention, not preemptive self-defense. One possible forerunner of the U.S. unilateral claim to preemptive self-defense would be the Cuban missile crisis, but that was marked by preventive nonmilitary action that shifted the option of an overt military response to the other party.⁷

In the modern era, explicit claims to preemptive uses of military force have been associated preeminently with the administration of George W. Bush, but they were actually pressed by previous administrations, as well as by other states. In the United States, one can trace a series of indicators of a shift in official thinking toward preemptive military strategies well prior to the attacks of September 11, 2001. In 1984 President Ronald Reagan issued a classified national security decision directive outlining his administration's response to terrorism. An unclassified extract explains:

State-sponsored terrorist activity or directed threats of such action are considered to be hostile acts and the U.S. will hold sponsors accountable. Whenever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have a responsibility to take measure [*sic*] to protect our citizens, property, and interests.⁸

Two years later, against the continuing backdrop of suspected Libyan governmental support for terrorist attacks, a classified directive raised the prospect of unilateral military action to prevent terrorist attacks. National Security Decision Directive 207 stated:

The U.S. Government considers the practice of terrorism by any person or group a potential threat to our national security and will resist the use of terrorism by all legal means available. The United States is opposed to domestic and international terrorism and is prepared to act in concert with other nations or unilaterally when necessary to prevent or respond to terrorist acts.

States that practice terrorism or actively support it, will not be allowed to do so without consequence. Whenever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have a responsibility to take measures to protect our citizens, property, and interests.⁹

⁷ The authors disagree with some scholarly characterizations of the U.S. blockade of Cuba during the 1962 Cuban missile crisis as preemptive self-defense. The claim to preemptive self-defense, at its core, is an asserted legal right to use offensive military force against a target that does not yet, but may in the future, pose a threat. Although the blockade could be characterized as preemptive action or as a measure of self-defense, it is not preemptive self-defense. See Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AJIL 576, 584–85 (2003).

⁸ Extract of National Security Decision Directive 138 (signed Apr. 3, 1984), *available at* <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/nsdd138.pdf>> (the full directive is still classified).

⁹ National Security Decision Directive 207, *The National Program for Combatting Terrorism* (Jan. 20, 1986) (formerly top secret), *available at* <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/nsdd207.pdf>>.

Although initially confined to classified documents, the new policy was explicitly discussed in newspaper articles and in speeches by high administration officials,¹⁰ a widely used and internationally legally noted method for establishing national positions—indeed, even for assuming international obligations.¹¹ In what later became known as the “Shultz doctrine,” Secretary of State George Shultz argued for the right to take limited military action to address terrorist threats while they are still “manageable.”

In the wake of the recent attacks at the Rome and Vienna airports, we have heard it asserted that military action to retaliate or preempt terrorism is contrary to international law. Some have suggested that even to contemplate using force against terrorism is to lower ourselves to the barbaric level of the terrorists. I want to take this issue head on.

Unlike terrorists and communist guerrillas, we do not believe the end justifies the means. We believe in the rule of law. This nation has long been a champion of international law, the peaceful settlement of disputes, and the UN Charter as a code of conduct for the world community.¹²

Noting the specific exception to the Charter’s restrictions on the use or threat of force for the right of self-defense, Secretary Shultz called it

absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas. International law requires no such result. A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks, to seize terrorists, or to rescue its citizens when no other means is available. The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the right of states to use force in exercise of their right of individual or collective self-defense.¹³

Shultz strongly foreshadowed the position espoused by the Bush administration in 2002 by arguing that

[a]llies and friends may object to our action—or say they object. But this cannot be decisive. Striking against terrorism in the Middle East, for example, is bound to be controversial. But the worst thing we could do to our moderate friends in the region is to demonstrate that extremist policies succeed and that the United States is impotent to deal with such challenges.¹⁴

Well over a year earlier, in October 1984, Secretary Shultz had already advocated the development of a domestic consensus on the right to use force preemptively in terrorist “gray areas” of fact and law:

The heart of the challenge lies in those cases where international rules and traditional practices do not apply. Terrorists will strike from areas where no governmental authority

¹⁰ See, e.g., Robert C. Toth, *Preemptive Anti-Terrorist Raids Allowed*, WASH. POST, Apr. 16, 1984, at A19.

¹¹ *Nuclear Tests (Austl. v. Fr.)*, 1974 ICJ REP. 253, 267–68 (Dec. 20); see also W. Michael Reisman & Mahnough H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID REV. 328 (2004).

¹² George P. Shultz, Secretary of State, *Low-Intensity Warfare: The Challenge of Ambiguity*, Address at National Defense University (Jan. 15, 1986), BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, CURRENT POL’Y NO. 783, reprinted in 25 ILM 204, 206 (1986).

¹³ *Id.*, 25 ILM at 206.

¹⁴ *Id.*, 25 ILM at 205.

exists, or they will base themselves behind what they expect will be the sanctuary of an international border. And they will design their attacks to take place in precisely those "gray areas" where the full facts cannot be known, where the challenge will not bring with it an obvious or clear-cut choice of response.

In such cases we . . . will have to examine the full range of measures available to us to take. The outcome may be that we will face a choice between doing nothing or employing military force. . . . [T]errorism is being used by our adversaries as a modern tool of warfare. . . . We can expect more terrorism directed at our strategic interests around the world in the years ahead. To combat it, we must be willing to use military force.¹⁵

Claims of a right to unilateral preemption were more muted in the administration of George H. W. Bush from 1988 to 1992. Indeed, directly after Shultz's speech in October 1984, then-vice president Bush (perhaps not coincidentally one of the few leaders in the administration to have had battle experience) publicly disagreed with the policy. Vice President Bush argued, "I think you've got to pinpoint [the response to terrorism], and we're not going to go out and bomb innocent civilians or something of that nature."¹⁶

The claim to a right of preemptive self-defense was not limited to Republican administrations. In the *National Security Strategy for a New Century*, published by the Clinton administration in October 1998, the possibility of a claim to a right of preemption was indicated, but more by implication:

Adversaries will be tempted to disrupt our critical infrastructures, impede continuity of government operations, use weapons of mass destruction against civilians in our cities, attack us when we gather at special events and prey on our citizens overseas. The United States must act to deter or prevent such attacks and, if attacks occurs [*sic*] despite those efforts, must be prepared to limit the damage they cause and respond decisively against the perpetrators.¹⁷

In 2000, however, the Clinton administration issued a new security document, *A National Security Strategy for a Global Age*, in which more explicit attention was given to terrorism. With respect to possible nuclear attacks from a symmetrical adversary, the policy continued to be reactive: "Our military planning for the possible employment of U.S. strategic nuclear weapons is focused on deterring a nuclear war and it emphasizes the survivability of our nuclear systems, infrastructure, and command, control, and communications systems necessary to endure a preemptive attack yet still deliver an overwhelming response."¹⁸

A strategic posture of reaction rather than proaction would be consistent with Article 51. But in the same document, preemptive action is raised as a means of combating asymmetrical foes who are using the techniques of terrorism. The U.S. "aggressive response to terrorism" is described as follows:

Our strategy pressures terrorists, deters attacks, and responds forcefully to terrorist acts. It combines enhanced law enforcement and intelligence efforts; vigorous diplomacy and

¹⁵ George P. Shultz, Secretary of State, Terrorism and the Modern World, Address at Park Avenue Synagogue (Oct. 25, 1984), BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 629.

¹⁶ Don Oberdorfer & Juan Williams, *Officials Split on Shultz's Antiterrorism Speech*, WASH. POST, Oct. 27, 1984, at A1.

¹⁷ A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 7 (Oct. 1998), available at <<http://www.fas.org/man/docs/nssr-98.pdf>>.

¹⁸ A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE 17 (Dec. 2000), available at <<http://www.globalsecurity.org/military/library/policy/national/nss-0012.pdf>>.

economic sanctions; and, when necessary, military force. Domestically, we seek to stop terrorists before they act, and eliminate their support networks and financing. Overseas, we seek to eliminate terrorist sanctuaries; counter state and non-governmental support for terrorism; help other governments improve their physical and political counterterrorism, antiterrorism, and consequence management efforts; tighten embassy and military facility security; and protect U.S. citizens living and traveling abroad. Whether at home or abroad, we will respond to terrorism through defensive readiness of our facilities and personnel, and the ability of our terrorism consequence management efforts to mitigate injury and damage.

Our strategy requires us to both prevent and, if necessary, respond to terrorism.¹⁹

The Clinton administration's 2000 document on security strategy proceeded to an even more explicit formulation: "Whenever possible, we use law enforcement, diplomatic, and economic tools to wage the fight against terrorism." Observing that those tools would not always be adequate, the document asserted that "[a]s long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist, or actively support them, as we have done over the years in different countries."²⁰

Thus, the attack on September 11, 2001, rather than occasioning a radical change in strategy, only reinforced incipient trends. On June 1, 2002, President Bush stated: "We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."²¹ On September 17, 2002, he made explicit and expanded a claim to preemptive action in a new *National Security Strategy*:

We will disrupt and destroy terrorist organizations by:

- direct and continuous action using all the elements of national and international power. Our immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors;
- defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country; and
- denying further sponsorship, support, and sanctuary to terrorists by convincing or compelling states to accept their sovereign responsibilities.²²

Even more explicitly, the president's *National Strategy to Combat Weapons of Mass Destruction*, issued in December 2002, stated: "Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend

¹⁹ *Id.* at 23–24.

²⁰ *Id.* at 24.

²¹ George W. Bush, Commencement Address at the United States Military Academy in West Point, New York (June 1, 2002), 38 WEEKLY COMP. PRES. DOC. 944, 946 (June 10, 2002).

²² NATIONAL SECURITY STRATEGY OF THE UNITED STATES 6 (Sept. 2002), available at <<http://www.whitehouse.gov/nsc/nss/2002/index.html>>.

against WMD-armed adversaries, including in appropriate cases through preemptive measures.”²³ This is a claim of preemption in the broadest sense.²⁴

The Bush administration is currently debating the military content of these preemptive measures. A Pentagon draft “Doctrine for Joint Nuclear Operations” suggested that the United States could deploy nuclear weapons in self-defense to preempt a WMD attack.²⁵ Congressional leaders and arms control experts quickly criticized the draft document, however, and an administration official emphasized that the doctrine had not yet been made final.²⁶

Since the release of the 2002 *National Strategy*, members of the Bush administration have indicated that the “Bush doctrine” of preemption may be more limited. One limiting factor appears to be the presumed rationality of the state regime supporting terrorism. In distinguishing the U.S. claim from potential claims to preemption in the contexts of the China/Taiwan and India/Pakistan situations, a White House official explained:

I think what’s different is the unique history of Iraq and the irrationality of Iraq. Different policies work in different regions of the world, and different doctrines work at different times and in different regions because of the local circumstances. Policies of containment work more with a rational figure than with an irrational one. That’s why the policy of containment worked vis a vis the Soviet Union.

. . . Given the fact that an irrational leader [Saddam Hussein] who has a history of military force and military use and military aggression and domination may acquire a nuclear weapon, the question is, should it be the policy of the United States to do nothing, and allow such a leader to acquire a weapon that he could then use to blackmail the world and blackmail the region, and even use it to harm us.²⁷

Then—national security adviser, Dr. Condoleezza Rice, similarly limited the policy, noting:

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.²⁸

In the newly released 2006 *National Security Strategy of the United States*, the Bush administration indeed appears to have moderated its initial expansive claims, while still retaining its

²³ NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 3 (Dec. 2002), available at <<http://www.state.gov/documents/organization/16092.pdf>>.

²⁴ John Yoo, deputy assistant attorney general in the Office of Legal Counsel from 2001 to 2003, attempted in this *Journal* to position the 2002 claim to preemptive self-defense within the *Caroline* doctrine by arguing that the definition of imminence “should” include the probability and the dangerousness of the threat and whether diplomacy is “practical.” John Yoo, *International Law and the War in Iraq*, 97 AJIL 563, 571–74 (2003). But note that any balancing test can be made to support a preferred position by adding or subtracting variables from one side of the equation.

²⁵ U.S. DEP’T OF DEFENSE, DOCTRINE FOR JOINT NUCLEAR OPERATIONS, FINAL COORDINATION (2), at I–6 (Joint Publication 3–12, Mar. 15, 2005), available at <http://www.globalsecurity.org/wmd/library/policy/dod/jp3_12fc2.pdf>.

²⁶ Walter Pincus, *Pentagon May Have Doubts on Preemptive Nuclear Moves*, WASH. POST, Sept. 19, 2005, at A5. Pincus also notes that the unclassified draft document was removed from the Defense Department’s Web site after details were published in the newspapers.

²⁷ White House Spokesman Ari Fleischer, Press Briefing (Oct. 15, 2002), available at <<http://www.whitehouse.gov/news/releases/2002/10/20021015-5.html>>.

²⁸ Dr. Condoleezza Rice Discusses President’s National Security Strategy, Wriston Lecture, Waldorf Astoria Hotel (Oct. 1, 2002), available at <<http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html>>.

claim to a right to use force preemptively. Although the new strategy proclaims that “[t]he place of preemption in our national security strategy remains the same,”²⁹ the 2006 version also places much more emphasis on alternatives to military preemption and reliance on multilateral solutions. The administration argues that “[t]aking action [to prevent proliferation of weapons of mass destruction] need not involve military force. Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners.”³⁰ Preemptive military action also appears to be limited to being used against a “hard core of terrorists,” who cannot be deterred and therefore must be “tracked down, killed, or captured.”³¹ However, the strategy for confronting underlying networks supporting terrorists is deterrence through “a broad range of tools.”³²

The 2006 *National Security Strategy* provides further support to observers, who, in the aftermath of the war in Iraq, speculated that the Bush administration had already softened its claim to a right of preemption in practice, if not in policy—particularly with respect to Iran and North Korea.³³ Large-scale attacks on states appear to be less favored than strategic preemptive strikes against weapons of mass destruction or terrorist training camps. This may be a tactical change more than an international legal correction.

III.

In the period under review, the United Nations High-Level Panel on Threats, Challenges and Change, appointed by the secretary-general, appears to have sided with those favoring a certain loosening of the strict requirement of an “armed attack” for self-defense by resort to unilateral military action. The panel stated:

The language of this article is restrictive: “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 to maintain international peace and security”. However, a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.³⁴

The Red Queen may assign whatever meaning she wishes to words, but it is plain to us that the language of Article 51, whether wise or not, was not designed to accommodate the *Caroline* principle. The panel’s interpretation appears to be an attempt at adjustment of the Charter to

²⁹ NATIONAL SECURITY STRATEGY OF THE UNITED STATES 23 (Mar. 2006), available at <<http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>>.

³⁰ *Id.*

³¹ *Id.* at 12.

³² *Id.*

³³ See, e.g., Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES, Feb. 19, 2006, §6 (Magazine), at 62; James Sterngold, *Bush Tempers Argument for Preemptive Strikes*, S.F. CHRON., Oct. 2, 2004, at A10.

³⁴ A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 54, para. 188 (2004), available at <<http://www.un.org/secureworld/report.pdf>>. This formulation, while broader than the Article 51 requirement, is narrower than the standard proposed in this *Journal* by Richard Gardner, who argued for a reinterpretation of the UN Charter to allow for armed force to counter transfers of WMD to terrorist groups and terrorists when the host state fails to suppress them. Richard N. Gardner, *Neither Bush Nor the “Jurisprudes,”* 97 AJIL 585, 590 (2003).

meet part of the U.S. claim.³⁵ But only part of it! The high-level panel proceeded to make clear that if imminent armed attack were now brought within the meaning of armed attack and unilateral military action to head it off could now be potentially lawful, preemptive self-defense could not be. Rejecting, in explicit terms, the possibility that acting “preventively (against a non-imminent or non-proximate [threat])” could fall within the confines of lawful self-defense, the panel explained:

For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.³⁶

Curiously, this part of the panel’s report, with its subliminal emendation of the Charter, has excited relatively little comment despite its radical character, for it would significantly change the purport of Article 51 by moving it toward the U.S. position— unless, of course, the change had already been accomplished by practices long since incorporated into customary international law.³⁷

IV.

In a series of judgments and advisory opinions, the International Court of Justice has hewed to a rather strict reading of Article 51 of the United Nations Charter. Assessing the legal content of the right to self-defense in the *Nicaragua v. United States* case of 1986, the Court surveyed treaty law and customary international law and concluded: “In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack.” Noting the apparent “general agreement on the nature of the acts which can be treated as constituting armed attacks,” the Court pointed in particular to the agreement

that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular forces, “or its substantial involvement therein.” . . . It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.³⁸

³⁵ W. Michael Reisman, *Expanding the UN Security Council: Much Ado*, JURIST, Aug. 7, 2005, available at <<http://jurist.law.pitt.edu/forumy/2005/08/expanding-un-security-council-much-ado.php>>.

³⁶ A More Secure World, *supra* note 34, at 54–55, paras. 189, 191.

³⁷ Thomas Franck argued in this *Journal* as early as 1970 that Article 51 was of little use in distinguishing between claims of self-defense and aggression. Thomas M. Franck, *Who Killed Article 2(4)?* 64 AJIL 809, 818 (1970).

³⁸ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 103–04, para. 195 (June 27) (citation omitted (quoting Definition of Aggression, GA Res. 3314 (XXIX), annex)) [hereinafter *Nicaragua*].

Seventeen years later, the International Court of Justice applied its interpretation of Article 51 in the *Nicaragua* Judgment to U.S. claims of self-defense in attacking Iranian oil installations. In the Court's view, the United States had to prove, as a factual matter, not only that Iran was responsible for the attacks—a requirement that the United States was ultimately unable to meet to the Court's satisfaction—but that “those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.”³⁹ As to this legal requirement, the Court harked back to *Nicaragua*:

As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it is necessary to distinguish “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”, since “In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack”. The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.⁴⁰

The Court similarly employed a strict reading of Article 51 in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, finding that Israel's claim of self-defense in constructing a military barrier in the Occupied Palestinian Territory was not relevant to the case:

Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.⁴¹

In its most recent holding in *Armed Activities on the Territory of the Congo*, which was brought under its contentious jurisdiction by the Democratic Republic of the Congo (DRC) against Uganda, the Court was required to address the issue of preemptive self-defense. On September 11, 1998, the Ugandan High Command had issued a document known as “Safe Haven.” The document asserted as purported fact a series of propositions: first, that the “enemies” of Uganda had used the DRC as a base for attacks against it for a long time in the absence of effective control by the Congo of all its territory; second, that in May 1997 the two states had agreed on joint operations by the Uganda People's Defense Force (UPDF) and the Congolese army against the forces of Uganda's enemies in the Congo; and third, that when the anti-Kabila rebellion began in the DRC in 1998, the forces of the two sides were still operating against enemies of Uganda who had returned to the DRC. Having thus set the scene, and “in order to secure Uganda's legitimate security interests,” “Safe Haven” assigned the Ugandan army the following tasks:

³⁹ Oil Platforms (Iran v. U.S.), Merits, 2003 ICJ REP. 161, paras. 57, 61, 64, 71–72 (Nov. 6).

⁴⁰ *Id.*, para. 51 (citations omitted (quoting *Nicaragua* at 101, para. 191, & 103, para. 195)).

⁴¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para. 139 (Int'l Ct. Justice July 9, 2004), 43 ILM 1009 (2004) [hereinafter Wall Opinion].

1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2. To enable UPDF [to] neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR [Former Armed Forces of Rwanda], which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in position to safeguard the territor[ial] integrity of Uganda against irresponsible threats of invasion from certain forces.⁴²

None of the “legitimate security interests” in the five points in “Safe Haven” involves a response to an armed attack. Each is either an action in anticipatory self-defense, in the sense of the *Caroline* doctrine, or, insofar as the event for which military action is proposed is not imminent, an action purportedly in preemptive self-defense, in the sense in which United States administrations have used the term. Only item 2, to the extent that the facts supported it, could clearly be characterized as anticipatory self-defense in the *Caroline* sense.

The Court remarked that “the objectives of operation ‘Safe Haven’, as stated in the Ugandan High Command document, were not consonant with the concept of self-defence as understood in international law.”⁴³ After reciting Article 51 of the Charter, the Court continued:

The Court recalls that Uganda has insisted in this case that operation “Safe Haven” was not a use of force against an anticipated attack. As was the case also in the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) case, “reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised”. The Court there found that “[a]ccordingly [it] expresses no view on that issue”. So it is in the present case. The Court feels constrained, however, to observe that the wording of the Ugandan High Command document on the position regarding the presence of the UPDF in the DRC makes no reference whatever to armed attacks that have already occurred against Uganda at the hands of the DRC (or indeed by persons for whose action the DRC is claimed to be responsible). Rather, the position of the High Command is that it is necessary “to secure Uganda’s legitimate security interests”. The specified security needs are essentially preventative Only one of the five listed objectives refers to a response to acts that had already taken place—the neutralization of “Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan”.⁴⁴

The Court also observed that Uganda had not reported the events purporting to justify self-defense to the Security Council. Reverting to the strict contingency of Article 51, the Court said, “[W]hile Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC.”⁴⁵

As to whether a state is entitled to take actions in self-defense when it has suffered an armed attack from a military force not affiliated with a state, the Court observed as a factual matter

⁴² Congo v. Uganda, *supra* note 4, para. 109.

⁴³ *Id.*, para. 119 (citation omitted).

⁴⁴ *Id.*, para. 143 (citation omitted (quoting *Nicaragua* at 103, para. 194)).

⁴⁵ *Id.*, para. 146.

that “on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.”⁴⁶ As regards self-defense against such irregular forces, the Court stated:

[T]he Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.⁴⁷

The question of self-defense with respect to armed bands or private armies⁴⁸ not affiliated with a state stands, of course, at the very center of the current expanded claim to preemptive self-defense, for it has been assumed from the time of the Reagan administration that, by their nature, they are unsusceptible to deterrence. As we have seen, the International Court had rejected a right of self-defense to such armed attacks in the *Nicaragua* Judgment and the *Wall* opinion;⁴⁹ *Congo v. Uganda* might have provided an opportunity for the Court to revisit the issue, as Judge Pieter Kooijmans observed in a separate opinion. As to the questions of whether a state from which irregular forces sally forth is or is not responsible and whether such actions entitle the target state to undertake actions in self-defense, Judge Kooijmans suggested an analytical distinction:

The Court only deals with the question whether Uganda was entitled to act in self-defence *against the DRC* and replies in the negative since the activities of the rebel movements could not be attributed to the DRC. By doing so, the Court does not answer the question as to the kind of action a victim State is entitled to take if the armed operation by irregulars, “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 no involvement of the “host government” can be proved.⁵⁰

In the *Wall* opinion, Judge Kooijmans wrote that Article 51 “conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.”⁵¹ In *Congo/Uganda*, he observed that the Court’s interpretation is no longer shared by the Security Council.⁵² Moreover, he was not the only member of the Court to hold this view. After agreeing with Judge Kooijmans that the Court should have addressed the right to self-defense with respect to nonstate groups, Judge Bruno Simma elaborated the point in his separate opinion:

⁴⁶ *Id.*

⁴⁷ *Id.*, para. 147.

⁴⁸ See generally W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AJIL 82 (2003); W. Michael Reisman, *Private Armies in a Global War System*, 14 VA. J. INT’L L. 1 (1973).

⁴⁹ *Nicaragua* at 103–04, paras. 194–95; *Wall* Opinion, *supra* note 41, para. 139.

⁵⁰ *Congo v. Uganda*, *supra* note 4, Separate Opinion of Judge Kooijmans, para. 26 (citation omitted (quoting *Nicaragua* at 103, para. 195)).

⁵¹ *Wall* Opinion, *supra* note 41, para. 35.

⁵² *Congo v. Uganda*, *supra* note 4, Separate Opinion of Judge Kooijmans, para. 28.

Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.⁵³

V.

The Security Council has been skeptical about explicit unilateral claims of preemptive self-defense. In 1981 the Council condemned Israel’s preemptive strike against Iraq,⁵⁴ in part as follows:

Deeply concerned about the danger to international peace and security created by the pre-meditated Israeli air attack on Iraqi nuclear installations on 7 June 1981, which could at any time explode the situation in the area, with grave consequences for the vital interests of all States,

Considering that, under the terms of Article 2, paragraph 4, of the Charter of the United Nations, “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”,

[the Security Council]

1. *Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct;

2. *Calls upon* Israel to refrain in the future from any such acts or threats thereof.⁵⁵

In terms of explicit collective claims to preemptive self-defense, the Security Council has remained silent. It has expressed neither support for nor disapproval of U.S. preemptive action in Iraq, perhaps because, as a permanent member, the United States could veto any such resolution, rather than because the Council believed all of its other members shared the U.S. position on this question of international law.⁵⁶ One need only recall that the Bush administration tried, but failed, to win Security Council authorization for the U.S. invasion of Iraq of March 2003.⁵⁷

Nevertheless, the Security Council has not accepted the International Court’s interpretation of Article 51, which, as will be recalled, requires *state* responsibility for the attack that provokes

⁵³ Congo v. Uganda, *supra* note 4, Separate Opinion of Judge Simma, para. 11.

⁵⁴ See *infra* pt. VI, “Non-U.S. Coalition Partners.”

⁵⁵ SC Res. 487 (June 19, 1981), 20 ILM 993 (1981).

⁵⁶ The Security Council did, however, approve a resolution implicitly endorsing the U.S. occupation by authorizing a “multinational force under unified command” to provide security in Iraq. SC Res. 1511 (Oct. 16, 2003), 43 ILM 254 (2004).

⁵⁷ See, e.g., Elizabeth Neuffer, *After Discord, UN’s Effectiveness Called into Question*, BOSTON GLOBE, Mar. 18, 2003, at A29, available in Westlaw, All News Combined. But as Ruth Wedgwood notes, the Security Council later passed Resolution 1483 (May 22, 2003), providing political cover for states to engage in the reconstruction of Iraq. Wedgwood, *supra* note 7, at 582.

a claim of a right to self-defense. Following the terrorist attacks of September 11, 2001, in the United States, the Security Council was plainly operating on the understanding that both non-state actors and the states that aid, support, or harbor them would be held accountable. In Resolution 1368, cited by the Court in the *Wall* case and by Judges Kooijmans and Simma in their separate opinions in *Congo/Uganda*, the Council,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

...

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.⁵⁸

Given the nature of the modus operandi of Al Qaeda and its cognate organizations, merely stating that international law's right of self-defense applies to them may amount to a tacit acknowledgment that sometimes self-defense may be lawfully used anticipatorily and even preemptively.⁵⁹

VI.

In the period since the United States lodged its broader claim, several governments have openly debated the possibility of a right of preemptive self-defense. Classified memorandums and contingency plans may be based on other legal theories, but public documents are almost always phrased as proposing actions that are internationally lawful. The following discussion examines two groups of states: those participating in the U.S. coalition effort in Iraq, part of whose rationale was preemptive self-defense, and those that refused to take part and have been critical of the U.S. action there.⁶⁰ While any grouping is somewhat arbitrary, an initial examination reveals, rather surprisingly, that the position of a state on the lawfulness of the military action in Iraq is not necessarily determinative of its adoption of—or position on—a policy of preemption.

U.S. Partners in Iraq

Australia. The Australian government defends its adoption of a preemptive strike policy against terrorists as a liberal interpretation of Article 51. Defense Minister Robert Hill has argued,

[W]hen an armed attack against a State is imminent, that State is not compelled to wait until the first blow has been struck. But what action can a State legitimately take when that attack is to be launched by a non-State actor, in a non-conventional manner, operating from a variety of bases in disparate parts of the world? There are no tell-tale warning indicators such as the mobilisation and pre-deployment of conventional forces.

⁵⁸ SC Res. 1368 (Sept. 12, 2001), 40 ILM 1277 (2001).

⁵⁹ The Security Council may yet moderate extended claims to preemptive self-defense, according to one scholar. José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873, 888 (2003).

⁶⁰ While the authors focus on government statements of policy, a question worth noting (but beyond the scope of this essay) is whether states have realigned their actual military policies to adhere more closely to their policies, or whether the government statements examined here are more aspirational in nature.

Whilst the Charter of the U.N. adopted not dissimilar language (Article 51 permits the use of self-defence "if criminal attack occurs"), it has not settled the debate between those who adopt a literal interpretation and those who argue that contemporary reality demands a more liberal interpretation.

Again the jurisprudence of the International Court of Justice does not include a definitive statement on the scope of the law of anticipatory self-defence under the Charter. States act according to their interpretation, no doubt informed by the interpretations of others.⁶¹

This liberal interpretation is also embodied in Australian military policy documents. *National Security: A Defence Update 2003* explains that "diplomacy and international cooperation will not always succeed: the Australian Government may need to consider future requests to support coalition military operations to prevent the proliferation of WMD, including to rogue states or terrorists, where peaceful efforts have failed."⁶²

Similarly, a report by the Australian Air Force offers the following rationale for a preemptive policy:

Strike may also take the form of a pre-emptive strike, aimed at deterring an aggressor before major conflict erupts. While there would always be significant political and diplomatic consideration of any pre-emptive strike, confronted by irrefutable intelligence of impending hostilities, the Government may exercise a pre-emptive strike option to remove the immediate threat and demonstrate national resolve.⁶³

Australia was an early supporter of the U.S. preemption claim. In June 2002, following a press conference on the ratification of the Statute of the International Criminal Court, Prime Minister John Howard stated:

[T]he principle that a country which believes it is likely to be attacked is entitled to take preemptive action is a self-evidently defensible and valid principle . . . [L]et me make it very clear [that] if I were presented with evidence that Australia was about to be attacked and I was told by our military people that by launching a preemptive hit we could prevent that attack occurring I would authorise that preemptive hit and expect the Opposition to support me in the process.⁶⁴

This comment, made well before the terrorist attacks of October 2002 in Bali, received little public attention. In December 2002, however, Prime Minister Howard repeated his claim of preemptive self-defence but within a different context. Asked whether Australia would act preemptively on the basis of knowledge that terrorists *in a neighboring country* were planning an attack, he replied:

Oh, yes, I think any Australian prime minister would. I mean, it stands to reason that if you believed that somebody was going to launch an attack against your country, either of

⁶¹ Robert Hill, minister for defence, John Bray Memorial Oration, University of Adelaide (Nov. 28, 2002), *available at* <<http://www.minister.defence.gov.au/HillSpeechtrpl.cfm?CurrentId=2121>>.

⁶² AUSTRALIA, MINISTRY OF DEFENCE, NATIONAL SECURITY: A DEFENCE UPDATE 2003, at 16, *available at* <<http://www.defence.gov.au/ans2003/Report.pdf>>.

⁶³ Royal Australian Air Force, Military Operations Index: Strike (n.d.), *available at* <http://www.defence.gov.au/raaf/organisation/info_on/operations/strike.htm>.

⁶⁴ John Howard, Australian prime minister, Press Conference, Parliament House (June 20, 2002), *available at* <<http://www.pm.gov.au/News/interviews/2002/interview1709.htm>>.

a conventional kind or of a terrorist kind, and you had a capacity to stop it and there was no alternative other than to use that capacity then of course you would have to use it.⁶⁵

Less than a week after those comments, Prime Minister Howard met with high-level diplomats from ten Southeast Asian nations in response to a widespread regional outcry.⁶⁶ More recently, he cast preemptive action as a theoretical, not a concrete, possibility.

I was not really stating that in relation to any country and I have the very strong view that countries like Indonesia, with whom we have very close relationships, if action were needed to be taken against groups that might threaten Australia then that action would be taken by the Indonesian forces. I was simply stating a principle, . . . that if . . . in the future . . . a country were unable or unwilling and the only way to protect Australia was to take action, that that action would be taken. . . . I don't think Australia would be alone in holding that view but I certainly don't regard that . . . statement of a last resort principle as something that should be seen as being in any way antagonistic to any of our friends in the region and, most particularly, Indonesia.⁶⁷

Japan. The Japanese government, while not engaged in combat in Iraq, has maintained elements of its Self-Defense Forces in Iraq since December 2003 to assist in humanitarian and reconstruction efforts.⁶⁸

Under Article 9 of the Japanese Constitution, the Japanese people "forever renounce war as a sovereign right of the nation and renounce the use of force as means of settling international disputes." There is some movement within Japan to amend the Constitution to make the right to self-defense explicit under Article 9.⁶⁹ Despite these possible constitutional impediments, in 2003 the Japanese parliament passed the Law Concerning Measures to Ensure National Independence and Security in a Situation of Armed Attack. The law addresses situations of armed attack and defines such a situation as one "where an Armed Attack against Japan from the outside (including a case where an Armed Attack is imminent) has occurred [or one] where an Armed Attack is anticipated as tensions arise."⁷⁰ Thus, the 2003 law contemplates two potential situations, one involving actual military attacks, and the other the expectation of attacks.⁷¹ Unlike positions advanced by other coalition partners, the Japanese law requires "imminent and illegal invasion of Japanese territory" to trigger the right to self-defense.⁷² The condition that an invasion must be "illegal" seems cosmetic. More recently (and not coincidentally following North Korea's missile tests), a senior Japanese

⁶⁵ Bob Burton, *Australia: Premier Stands Firm on 'Anti-Terror' Strikes*, IPS-INTER PRESS SERV., Dec. 2, 2002 (quoting Prime Minister John Howard, TV interview, Dec. 1, 2002), available in LEXIS, Wire Service Stories; transcript of interview with Laurie Oaks available at <<http://www.pm.gov.au/news/interviews/2002/interview2015.htm>>.

⁶⁶ Teresa Cerojano, *Philippine VP Defends Outcry over Australia*, AAP NEWSFEED, Dec. 5, 2002, available in LEXIS, AAP Newsfeed.

⁶⁷ John Howard, Australian prime minister, Interview with Metro TV (Indonesia) (Oct. 19, 2004), available at <<http://www.pm.gov.au/news/interviews/Interview1130.html>>.

⁶⁸ JAPAN DEFENSE AGENCY, OVERVIEW OF JAPAN'S DEFENSE POLICY (May 2005), available at <<http://www.jda.go.jp/e/publications/overview/english.pdf>>.

⁶⁹ Tetsushi Kajimoto, *Constitution Faces Long Road to Amendment*, JAPAN TIMES, May 3, 2005, available in LEXIS, Major World Newspapers.

⁷⁰ Japan Defense Agency, Defense of Japan White Paper (summary), §4 (2002), available at <<http://www.jda.go.jp/e/pab/wp2002/0304.htm>>.

⁷¹ *Upper House Begins Debating Military Contingency Bills*, JAPAN ECON. NEWSWIRE, May 19, 2003, available in LEXIS, Wire Service Stories.

⁷² *Government Outlines New View on Self-Defense*, DAILY YOMIURI (Tokyo), Jan. 26, 2004, at 1, available in LEXIS, Major World Newspapers.

official argued that attacking North Korea's missile bases should legally be considered as self-defense.⁷³ Both China and North Korea have criticized the Japanese position as destabilizing to the region.⁷⁴

United Kingdom. The United Kingdom has not explicitly adopted the preemptive self-defense doctrine described in the U.S. *National Security Strategy* of 2002. But various remarks by the prime minister, the foreign minister, the defense minister, and the minister of veterans affairs come close to it. In March 2004, Prime Minister Tony Blair stated:

Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically I am not saying that every situation leads to military action. But we surely have a duty and a right to prevent the threat materialising⁷⁵

In reaction, a select committee of the House of Commons concluded, "The Prime Minister's words appear to support the doctrine of anticipatory self-defence."⁷⁶ This statement buttressed an earlier finding by the Commons in 2002 that

[t]he Foreign Secretary appears to accept the principle of pre-emption, as set out in the National Security Strategy of the United States. He told us on 25 September that "If any nation feels that it is threatened in a direct way then under Article 51 it has an inherent right to take action preemptively." The Prime Minister has also asserted that "The one thing we have learned post-11 September is that to take action in respect of a threat that is coming may be more sensible than to wait for the threat to materialise and then to take action."⁷⁷

The primary impetus for the United Kingdom's implicit, though inconsistent, support for the U.S. preemption strategy is the need for an effective and timely response to the new type of threats posed by terrorism. After the attacks on September 11, 2001, the British government commissioned a new chapter for its *Strategic Defence Review*, which had been compiled in 1998.

Experience shows that it is better where possible, to engage an enemy at longer range, before they [*sic*] get the opportunity to mount an assault on the UK. Not only is this more effective than waiting to be attacked at a point and timing of an enemy's choosing, but it can have a deterrent effect. We must therefore continue to be ready and willing to deploy significant forces overseas and, when legally justified, to act against terrorists and those who harbour them.⁷⁸

⁷³ Martin Fackler, *Japan Finds Still Sterner Words for North Korea's Missile Tests*, N.Y. TIMES, July 11, 2006, at A4.

⁷⁴ See, e.g., *Japan's Security Bills Dangerous for Region*, CHINA DAILY, June 9, 2003, available in LEXIS, Major World Newspapers; *North Korea Denounces Japan's Moves for "Overseas Expansion"*, BBC INT'L REP., June 5, 2003, available in LEXIS, Individual Publications.

⁷⁵ Tony Blair, Prime Minister Warns of Continuing Global Terror Threat, Mar. 5, 2004, available at <<http://www.pm.gov.uk/output/Page5461.asp>>.

⁷⁶ SELECT COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF COMMONS, INTERNATIONAL LAW AND THE WAR AGAINST TERRORISM, SEVENTH REPORT, para. 420 (July 21, 2004), available at <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmaff/441/44120.htm>>.

⁷⁷ SELECT COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF COMMONS, DISARMING IRAQ, SECOND REPORT, para. 159 (Dec. 17, 2002), available at <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmaff/196/19609.htm#n210>> (footnotes omitted).

⁷⁸ UK MINISTRY OF DEFENCE, THE STRATEGIC DEFENCE REVIEW: A NEW CHAPTER, para. 9 (July 2002), at <<http://www.mod.uk/defenceinternet/home>> [hereinafter NEW CHAPTER]. In a progress report on the new chapter, Minister of Defence Geoffrey Hoon stated: "all our analysis shows that tackling the problem at distance—whether through prevention or, where justified, pre-emption, or through use of other effects in the framework we

The point was pithily repeated later in the new chapter: “[A]ll our analysis shows that tackling the problem where possible at a distance is preferable to waiting for problems to come to us: in that sense operations overseas are often the best form of home defence.”⁷⁹

At the same time, many elements in the United Kingdom government have approached the U.S. position with caution. The Ministry of Defence has noted the importance of a case-by-case approach for preemptive action.⁸⁰ In addition, the United Kingdom does not appear necessarily to support *unilateral* preemptive action.⁸¹ The Defence Military Academy, which publishes papers

have developed—is much preferable to waiting for problems to come to us.” Geoffrey Hoon, *The New Chapter to the Strategic Defence Review: A Progress Report*, Speech to City Forum Roundtable (May 23, 2002) (on file with authors).

⁷⁹ NEW CHAPTER, *supra* note 78, para. 77. A strategy of attacking problems abroad before they manifest themselves on British soil is also a prominent theme in discussions on restructuring the military. In April 2002, the veterans minister stated:

The Ministry of Defence is therefore currently conducting work to re-examine our own defence posture to ensure that we have the right defence concepts, forces and capabilities to defeat the threat from international terrorism. . . . But the initial findings are that we need to put more emphasis on taking the initiative and, where possible and justifiable, to pre-empt problems rather than simply wait for problems to come to us.

Opening Address by Dr. Lewis Moonie MP, minister for veterans affairs, to Veteran Plenary Forum (Apr. 17, 2002) (on file with authors).

⁸⁰ In a letter to the House of Commons, the Defence Ministry summarized key discussion points of a 2002 seminar, stating: “Pre-emptive action—and particularly a series of pre-emptive actions—is likely to create serious difficulties for coalition cohesion. We cannot be dogmatic in pursuing pre-emptive action: a case by case analysis will be required before any action is undertaken.” Select Committee on Defence, House of Commons, Appendices to the Minutes of Evidence, App. 10, Letter from Ministry of Defence to Committee Specialist Summarising Key Points of Birmingham Seminar 28 February 2002 (May 7, 2003), *available at* <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/93ap11.htm>> (seminar discussed new chapter).

⁸¹ *Id.*, App. 1, Letter to the Committee Specialist from the Ministry of Defence (May 17, 2002), *available at* <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/93ap02.htm>>.

[House of Commons] The New Chapter consultation paper uses terms such as prevent, deter, coerce, disrupt and destroy—does this mean that a pre-emptive role [of] the UK forces is at the heart of the New Chapter in the war on terrorism? Can the UK actually do any of these things alone and if not how far is our understanding of this problem shared by likely allies or collaborators?

[Administration Response] . . . We will set out more developed thinking when we publish some conclusions. But the UN, NATO, the EU and other organisations have all played key roles in recent months, and we see them all playing key roles in future. We continue to regard it as vital for the US and its European Allies to be able to operate together (as many Allies are doing now in Afghanistan), and for the Europeans to make improvements in their capabilities to facilitate that. We fully recognise that, in the future as in the past, effective coalition operations will normally be the key to success, and that we therefore needed a shared approach, shared doctrine and interoperable capabilities. We have been continuing to work to those ends.

We have already indicated that we need to put more emphasis on being proactive and, where possible and justifiable, pre-empting problems, rather than simply waiting for problems to come to us. In that, we should use the whole range of responses that the Government has at its disposal—not just military means.

See also INTERNATIONAL LAW AND THE WAR AGAINST TERRORISM, *supra* note 76, para. 404. The report relates that the foreign secretary appeared before the committee on March 30, 2004, and “underlined the Government’s advocacy of reform of the system of international law.” The committee asked “how the Government might respond to evidence of an imminent threat by terrorists with access to WMD, but when there was little certainty as to the target.” The minister responded as follows:

If it was that imminent and country X perceived that the threat could apply to them, then I think that they would be justified in acting in self-defence and there is nothing in Article 51 which could prevent that. If it was a wider, more general threat, then although there might not be the time nor might it be desirable to have a public debate, there would almost certainly be time secretly to consult [the five permanent members of the Security Council] partners who are crucial to any decision and if they were on board, in practice the Security Council would be.

produced by the Conflict Research and Security Centre, takes a skeptical view of preemptive strikes, although for practical, not legal, reasons.⁸²

The new chapter specifically notes that preemption is allowed only when “legally” justified:

We have made clear that our responses will be proportionate and in accordance with our international legal obligations. But we will not let the less scrupulous think we do not mean business, or simplify an aggressor’s calculations by announcing how we would respond in particular circumstances. The only certainty we should offer is that we shall respond appropriately if we need to, using any of the wide range of options open to us. It should be clear that legally the right to self defence includes the possibility of action in the face of an imminent attack.⁸³

That position, of course, assumes that preemptive military action may sometimes be lawful. Note also that the term “imminent” appears to have undergone a certain longitudinal extension in the new chapter. Indeed, the UK Ministry of Defence does not appear to believe that international law imposes severe limits. One exchange in the House of Commons suggests that the UK military takes a rather broad view of international law in this regard.⁸⁴

In contrast to the public documents indicating some degree of support for the implicit acceptance of the U.S. strategy, Attorney General Goldsmith, in a recently leaked document, explicitly stated in 2003:

[I]n my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger

⁸² C. J. DICK, *THE FUTURE OF CONFLICT—LOOKING OUT TO 2020*, at 22, 36 (Conflict Studies Research Centre, Defense Academy, No. M30, Apr. 2003), available at <http://www.da.mod.uk/CSRC/documents/Special/M30-CJD.pdf/file_view>. The report notes:

Detering intra-state conflict, including by pre-emptive deployments, is theoretically attractive and may become fashionable but will be fraught with problems. . . .

. . . Despite the lessons of the wars of Yugoslav succession and, arguably, the long-term threat posed by Saddam’s missiles and WMD, it will be very difficult to convince many electorates that such action will be cheaper in the long run. Pre-emptive actions may also be morally and legally dubious and therefore politically divisive, both domestically and internationally (including between allies). President Bush’s strident demands for war to disarm Iraq and more controversially, to effect regime change is a case in point.

. . . .

. . . One way or another, the USA will leave itself open to charges of hypocrisy, selectivity and bully-boy behaviour, not to mention the deliberate flouting of international law through mounting dubious pre-emptive attacks.

⁸³ NEW CHAPTER, *supra* note 78, para. 22.

⁸⁴ The Select Committee on Defence asked the secretary of state for defence the following question:

[House of Commons] Are you saying then that if there were a second Resolution of the United Nations which was not carried, but in fact was defeated and the outcome was that it was not right for a war to be engaged in at this time against Iraq, would you then say that if the United Kingdom and the United States were to act unilaterally and go ahead and engage in a war with Iraq, basically they would be working within the realms of the law?

(*Mr Hoon*) I indicated earlier that there are different sources of international law. There is the common law of international nations which provides basic principles like self-defence, for example. There is also the law made by the Security Council of the United Nations and indeed by the General Assembly, so there is a range of ways in which action would be justified, but I assure you that whatever decision is taken by the British Government would be in conformity with international law.

Select Committee on Defence, House of Commons, Minutes of Evidence, Examination of Witnesses, para. 691 (Mar. 5, 2003), available at <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/3030505.htm>>.

in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law.⁸⁵

Non-U.S. Coalition Partners

China. The Chinese government has criticized the U.S. preemptive policy because it “mainly relies on subjective judgments, and is very easily abused and used as a pretext for war. So, the US’ ‘pre-emptive’ strategy is in fact a logic of the powerful.”⁸⁶ Notwithstanding this criticism, such action appears to be contemplated as permissible in the context of China’s claims to Taiwan, with respect to which the Chinese government seems to support a limited version of a right to preemptive action. In March 2005, the People’s Congress of China adopted an antiseccession law that authorizes “non-peaceful means” in the event of overt Taiwanese secessionist actions, or even once “possibilities for a peaceful reunification” are exhausted.⁸⁷ Although the latter conclusion, of course, would rely mainly on subjective judgments, would be susceptible to abuse, and could be used as a pretext for war, the People’s Congress seemed oblivious to the irony.

France. Despite France’s vocal opposition to the war in Iraq, it, too, has announced a defense policy that would allow for preemptive action. In a policy statement for 2003–2008, the French government noted:

Outside our borders, within the framework of prevention and projection-action, we must be able to identify and prevent threats as soon as possible. Within this framework, possible preemptive action is not out of the question, where an explicit and confirmed threat has been recognized. This determination and the improvement of long range strike capabilities should constitute a deterrent threat for our potential aggressors, especially as transnational terrorist networks develop and organise outside our territory, in areas not governed by states, and even at times with the help of enemy states.

....

Prevention is the first step in the implementation of our defence strategy, whose choices have been confirmed by the appearance of the asymmetric threat phenomenon.⁸⁸

This statement, like many of the other examples, focuses on the asymmetrical threat presented by terrorists. As an additional deterrent to terrorist attacks, President Jacques Chirac recently stated that retaliations for large state-backed terrorist attacks against France could involve the use of nuclear weapons. In a speech delivered at a military base, President Chirac asserted that

⁸⁵ Attorney General Goldsmith, Iraq: Resolution 1441 (Mar. 7, 2003), *available at* <<http://www.number-10.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf>> (secret memo to UK prime minister, leaked Apr. 2005). This section was not included in the first publicly released version of the opinion in March 2003. Attorney General Goldsmith, Iraq: Legality of Armed Force, HANSARD, House of Lords, vol. 646, col. WA3 (Mar. 17, 2003), *available at* <<http://www.publications.parliament.uk/pa/ld/ldvol646.htm>> (summary). Indeed, in initial discussions about the legality of military action, the British government refused to base its actions on the U.S. preemptive doctrine. Instead, in accordance with Attorney General Goldsmith’s opinion, the purported basis was the breach of Security Council resolutions.

⁸⁶ *Quoted in China, Taiwan Press, BBC INT’L REP.*, Feb. 8, 2006 (citing CHINA DEFENSE DAILY), *available in* LEXIS Academic.

⁸⁷ *Full Text of Newly Passed Anti-Secession Law*, CHINA DAILY, Mar. 15, 2005, *available in* LEXIS, Major World Newspapers, *also available in* People’s Republic of China, Order of the President No. 34, Mar. 14, 2005 (promulgating the law), *at* <<http://taiwansecurity.org/News/2005/CD-140305.htm>> (English trans.).

⁸⁸ FRANCE, MINISTRY OF DEFENSE, 2003–2008 MILITARY PROGRAMME, BILL OF LAW, *available at* <<http://www.ambafrance-us.org/atoz/mindefa.pdf>>.

nuclear deterrence is not intended to deter fanatical terrorists. Yet, the leaders of States who would use terrorist means against us, as well as those who would consider using, in one way or another, weapons of mass destruction, must understand that they would lay themselves open to a firm and adapted response on our part. And this response could be a conventional one. It could also be of a different kind.⁸⁹

India. Federal finance minister Jaswant Singh has said that every country has a right to conduct preemptive strikes as an inherent part of its right of self-defense and that it is not the prerogative of any one nation. "Pre-emption or prevention is inherent in deterrence. Where there is deterrence there is pre-emption. The same thing is there in Article 51 of the UN Charter which calls it 'the right of self-defence'"⁹⁰

Iran. Iran has adopted a dual strategy in light of the U.S. claims of a right to preemptive self-defense. First, it has explicitly raised the costs of a potential preemptive attack against it by declaring that an attack on its nuclear facilities would amount to an attack on the entire country. Moreover, the Iranian government noted that it would not distinguish between the United States and Israel in the event of an attack by Israeli forces.⁹¹ Second, Defense Minister Ali Shamkhani has signaled that the Iranian government may also invoke a right to preemptive self-defense against targets on U.S. soil or against U.S. forces in the Middle East.

ALI SHAMKHANI: The presence of the US military doesn't empower the US at our expense. The opposite is true. We can hold their troops hostage.

ANCHOR: You say that Iran has a presence in the Gulf, in Iraq, and in Afghanistan, which means that if the US attacks you, you can respond.

Is that a correct interpretation?

ALI SHAMKHANI: We won't stay silent and wait for others to act against us. Some among Iran's military leadership are confident that the preventive operations being discussed by the Americans aren't limited to them.⁹²

Israel. The Israeli raid on the Osirak reactor in Iraq in 1981 remains the clearest example of a preemptive use of force in the period following World War II.⁹³ Israel has also practiced targeted assassinations, which might be characterized as a form of preemptive self-defense.⁹⁴ In the period covered in this essay, Israel has made an explicit claim of a right to preemptive self-defense in the context of the withdrawal from Gaza in 2005. The Amended Disengagement Plan of 2004 indicated that "[t]he State of Israel reserves its fundamental right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip."⁹⁵

⁸⁹ Jacques Chirac, Speech to Strategic Air and Maritime Forces at Landivisiau (Jan. 19, 2006), *available at* <http://www.elysee.fr/elysee/elysee.fr/anglais/speeches_and_documents/2006/speech_by_jacques_chirac_president_of_the_french_republic_during_his_visit_to_the_strategic_forces.38447.html>.

⁹⁰ *Every Country Has Right to Pre-emption: Jaswant*, PRESS TRUST OF INDIA, Sept. 30, 2002, *available in* LEXIS, Wire Service Stories.

⁹¹ Interview with Iranian Defense Minister Ali Shamkhani (Aug. 18, 2004), FED. NEWS SERV., Aug. 19, 2004, *available in* LEXIS, Individual Publications.

⁹² *Id.*

⁹³ Reisman, *supra* note 48.

⁹⁴ See generally Orna Ben-Naftali & Keren R. Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT'L L.J. 233 (2003).

⁹⁵ Disengagement Plan of Prime Minister Ariel Sharon—Revised, §3(1) (3), May 28, 2004, *available at* <http://www.knesset.gov.il/process/docs/DisengageSharon_eng_revised.htm>.

North Korea. In February 2003, in the context of continuing discussions on North Korea's alleged nuclear program, the Foreign Ministry declared that North Korea was entitled to launch a preemptive strike against U.S. forces rather than wait until the American military was finished with Iraq. The deputy director stated, "The United States says that after Iraq, we are next, . . . but we have our own counter-measures. Pre-emptive attacks are not the exclusive right of the US."⁹⁶ Similarly, in September 2004, Yang Hyong-sop, vice president of the Presidium of the Supreme People's Assembly, stated that "[a] pre-emptive attack is not a monopoly of the US."⁹⁷

Russia. Following the seizure of a school in Beslan by Chechen militants, the Russian government indicated its willingness to strike at terrorists preemptively. President Vladimir Putin declared on September 17, 2004, that "[t]oday in Russia, we are seriously preparing to act preventively against terrorists This will be in strict respect with the law and constitution and on the basis of international law."⁹⁸ The defense minister has proclaimed that Russia claims a right of preemptive strikes against terrorists anywhere in the world.⁹⁹ At the same time, Russian officials have noted that their preemptive strikes will not include the use of nuclear weapons.¹⁰⁰

This policy stands in marked contrast to numerous public statements prior to the U.S.-led attacks against Iraq, which the Russian government loudly denounced.¹⁰¹ President Putin even lamented the "replacement of international law with the law of the jungle."¹⁰² One former high-level Russian official believes the recent statements endorsing preemptive strikes are more likely a diplomatic overture to the United States and NATO than a concrete statement on military policy.¹⁰³ In any event, both the United States and the United Kingdom have publicly supported the change in Russian policy.¹⁰⁴

Taiwan. Well before the passage of the Chinese Anti-Secession Law, Taiwan had invoked the right to preemptive action against China. In 2003 Taiwan's defense minister refused to rule out "preemptive attacks" against military targets in China in circumstances involving clear Chinese intent and military mobilization.¹⁰⁵ In fact, the minister's contingency seems more on the order of anticipatory than preemptive self-defense.

⁹⁶ Yong Tiam Kui, *Australia, N. Korea Join 'Preemptive' Bandwagon*, NEW STRAITS TIMES, Oct. 26, 2003, at 4, available in LEXIS, Major World Newspapers.

⁹⁷ *North Korean Official Says Pre-emptive Attack "Not a Monopoly of the US,"* GLOBAL NEWSWIRE, Sept. 10, 2004, available in LEXIS, Individual Publications.

⁹⁸ *Putin Says Russia 'Seriously' Preparing Preventive Strikes, Rejects Talks*, AGENCE FRANCE-PRESSE, Sept. 17, 2004, available in Westlaw, Allnewsplus.

⁹⁹ Ivanov: Military Force Remains a Political and Anti-Terrorist Instrument, News from Russia (compiled by Russian Foreign Ministry) (Dec. 17, 2004), available at <<http://www.india.mid.ru/nfr2004/nf51.html>>.

¹⁰⁰ *Russia's "Preventive Strike" Rhetoric Seen as Olive Branch to NATO and USA*, BBC INT'L REP., Sept. 12, 2004, available in LEXIS, Individual Publications.

¹⁰¹ See, e.g., Christian Caryl, *Balancing Act*, NEWSWEEK, Mar. 20, 2003, available in LEXIS, Magazine Stories, Combined.

¹⁰² Veronika Voskoboinikova, *Putin-Iraq Statement*, ITAR-TASS, Mar. 20, 2003, available in LEXIS, Wire Service Stories.

¹⁰³ BBC INT'L REP., *supra* note 100.

¹⁰⁴ See, e.g., Nicholas Kralev, *Russia Vows Pre-emptive Terror Hits*, WASH. TIMES, Sept. 9, 2004, at A1, available in LEXIS, News, Most Recent Two Years; Cam Simpson, *U.S. Voices Support, Caution on Russia's Terrorism War*, CHI. TRIB., Sept. 10, 2004, at 4, available in LEXIS, News, Most Recent Two Years.

¹⁰⁵ *Taiwan Cannot Rule out Pre-emptive Attacks on Mainland—Defence Minister*, BBC INT'L REP., Oct. 9, 2003, available in LEXIS, Individual Publications.

VII.

The initial assertions of a right of preemptive self-defense by the Bush administration in 2002 were cast more broadly than those of its predecessors. Even though the broader claim was provoked and conditioned by the attacks of September 11, 2001, its open-textured formulation could be interpreted to include surprise attacks on other states. As we have seen, this is how some members of the British government, which was hardly unfriendly to the United States and its military program, read it. The British reading may not have been off the mark. Significant statements of national military doctrine are not made hastily. The *National Security Strategy* of 2002 may have already been in the works and designed to prepare the world for direct action against Iraq, one of whose justifications was preemptive self-defense.

Significantly, not all states' claims of rights of preemptive self-defense that we have been able to find appear to contemplate a right to attack *another state* preemptively. Rather, the more common formulation appears to be a right to use force in a preemptive fashion against nonstate entities employing what have come to be called "terrorist" methods. One variation on this leit-motif, in statements by the United States, France, and Australia, appears to be the right to strike preemptively against states only in the face of a risk that terrorists will acquire weapons of mass destruction from a "rogue state." (These particular conclusions are perforce speculative, for we do not have access to secret "contingency plans," which may be based on much broader conceptions of preemptive self-defense.) Hence, the policy of preemptive strikes of many of the states reviewed here appears more narrowly confined to cases of (1) nonstate entities, such as terrorists, who may or may not possess weapons of mass destruction; and (2) states in which there is a risk that terrorists will acquire weapons of mass destruction.¹⁰⁶

We have thus far focused on affirmative claims. Many governments have explicitly refused to recognize the 2002 claim of the United States as indicative of, or consistent with, international law. Then-chancellor Gerhard Schröder explicitly stated his disagreement with the U.S. claims to the right to preemption.¹⁰⁷ The Spanish prime minister, citing Iraq as an example of failure, averred, "[P]re-emptive wars, never again; violations of international law, never again."¹⁰⁸ The Islamic Conference of Foreign Ministers similarly condemned "the principle of preemptive military strikes against any country under any pretext whatsoever."¹⁰⁹

Thus, insofar as the college of jurists may have considered the claim to use military force preemptively as a serious erosion of international restraints on the use of force and, in the worst sense, simply as a euphemism for aggression, the examination of statements of political leaders made in the last five years in the contexts of national political debates may provide a modest degree, if not of comfort, then at least of relief for being able to conclude that it could have been worse. Very few of the more recent statements seem to contemplate or claim a right to direct

¹⁰⁶ The statements presented here demonstrate the dynamic nature of customary law. Just two years ago, Michael Byers assessed claims to preemptive self-defense in his broader examination of the Proliferation Security Initiative and found the initial claims by a few states outweighed by increasing criticism of the war in Iraq. Since 2004, however, some states have adroitly asserted a claim to preemptive self-defense while maintaining their critical stance on U.S. actions in Iraq. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AJIL 526, 541–43 (2004).

¹⁰⁷ Interview with Chancellor Gerhard Schröder, *Tagesthemen* (ARD television broadcast Jan. 29, 2003) (on file with authors).

¹⁰⁸ *Iraq Proves Pre-emptive Wars Fail: Spanish PM*, AP, May 3, 2004, available in LEXIS Academic.

¹⁰⁹ Final Communiqué of the Thirty-first Session of the Islamic Conference of Foreign Ministers, Istanbul, para. 41 (June 16, 2004), reprinted in Report of the Secretary-General on the Work of the Organization, UN Doc. A/58/856–S/2004/582, at 6, 13.

preemptive attacks against other states. Only Iran and North Korea appear to sanction and to claim the privilege of such action and, in fairness to them, it must be acknowledged that each may have been impelled to that position by its perception of preemptive threats from significant political adversaries. Almost all of the remaining states seem to be focused on actions against nonstate entities and, in virtually all the statements, the assumed context appears to be serial conflicts; that is, continuing conflicts marked by intermittent explosions of violence, followed by relatively long periods of quiescence without formal termination of the hostilities, succeeded by renewed explosions of violence. In this respect, one wonders if the claimed right of preemptive self-defense may be subsiding into a right to initiate the use of force in ongoing overt conflicts, without awaiting a specific provocation. But even under these more limited circumstances, claims of preemptive self-defense would involve uses of force in an ever-widening arena, and any possible gain in the restoration of minimum order will have been secured at the cost of a geographical extension of the conflict. On the other hand, a preemptive attack on Iranian nuclear installations would depart from the narrowing and qualifying trend we have described and could signal a claim to initiate a major change in the *jus ad bellum*.

Even if claims to preemptive self-defense are henceforth limited to military actions in protracted low-level conflicts and not permitted for Pearl Harbor-type initiations of interstate war, all such claims are clearly incompatible with conceptions of the legal use of force in self-defense as understood by the International Court of Justice in its recent decisions. A discrepancy between practice and formal law—between myth system and operational code¹¹⁰—is hardly unique to the international legal system. But uncertainty about precisely what the law prohibits is always an invitation to adventurism; and adventurism with highly destructive and nondiscriminating weapons is a particularly frightening prospect. In any event, if one were to hazard a prediction in this fluid situation, it would be that a conception of lawful self-defense incorporating only the *Caroline* doctrine will continue for most matters; beyond that, the right of self-defense will have been relaxed only for the so-called war against terrorism.

But just as this broad, but necessarily incomplete, survey may have provided some comfort, so increasing legal mimesis may accelerate the drift away from the binary formulation of Article 51 (which presents its own problems) toward a vaguer, and possibly less stable, definition of the right to use force.¹¹¹ Imitation is said to be the highest compliment. And in this instance, the United States has developed some unlikely—and from its perspective, undesired—admirers. Two of the three remaining “axis of evil” members, North Korea and Iran, quickly adopted the U.S. claim in potential defense of their own fragile international positions.¹¹² Perhaps more significant for international lawmaking purposes, Russia specifically noted that it was not the

¹¹⁰ W. MICHAEL REISMAN, *FOLDED LIES* (1979).

¹¹¹ Although the authors disagree with Thomas Franck’s argument that the U.S. invasion of Iraq signaled an abrogation, rather than a possible transformation, of the international legal order pertaining to the use of force and self-defense, his broader points regarding who decides when force is justified as preemptive self-defense and who then reviews the lawfulness of that military action is particularly relevant here. This essay has focused on the shifting definitions attached to “attack,” “imminence,” and “self-defense,” but even once the content of these definitions is certain, the question of who decides and who then reviews when these definitions will be applied (the Security Council, a jury of states, or just the state asserting the right to preemptive action) remains. Under Article 51 of the UN Charter, of course, it is the threatened state that decides. Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AJIL 607, 616 (2003).

¹¹² George W. Bush, State of the Union Address (Jan. 29, 2002), 38 WEEKLY COMP. PRES. DOC. 125, 135 (Feb. 4, 2002), available at <<http://www.gpoaccess.gov/wcomp/2002.html>> (noting that Iraq, North Korea, and Iran constituted an axis of evil).

first government to announce a policy of preemptive self-defense. According to Defense Minister Ivanov, "Whether we like it or not, the pre-emptive use of force in the modern world is a reality. While this principle exists, we are not going to relinquish it voluntarily."¹¹³ The House of Commons noted this very danger in requesting the Blair government to assist in developing a clear international consensus on the right to use force in self-defense. Otherwise, "there is a serious risk that [justifying action against Iraq on an "expanded doctrine of 'pre-emptive self-defence'"] will be taken as legitimising the aggressive use of force by other, less law-abiding states."¹¹⁴ Prime Minister Howard has rejected the substance of these warnings, arguing that there has been "too great a tendency to impute a generalised intention on the part of the United States to adopt what you call a pre-emptive strike policy."¹¹⁵

In the grip of mimetic effects, however, the actual policy of the United States becomes less important than the policy that continues to be imputed to it. In its inferences with respect to evolving custom, international law will take account of the policies and practices of all nations. Although the U.S. policy may now be more limited than initially claimed, other states may not have received that message. Some may reactively adopt exaggerated preemption policies with respect to their own latent adversaries, thus skewing assessments of international consensus and practice back toward a position that ironically may no longer be claimed by those major powers that had brought the claim to the fore. Hence, what appears to be a growing adoption of claims to preemptive self-defense in limited circumstances may mistake political posturing for international consensus, with grave consequences for both the expectation and eventuation of violence.

There are other hidden costs to broad claims of preemptive self-defense. Although the doctrine of the United States not unreasonably aims at enhancing its own security against an adversary apparently impervious to deterrence, wider adoption of a legal policy of preemptive self-defense may actually undermine international security. States may simply appropriate the language of preemption to fit their individual security concerns and the strategies they craft to maintain their security—essentially becoming "free riders" in the international legal system. For example, North Korea has justified its further development of nuclear weapons as essential to its self-defense against U.S. claims of a right to preemptive self-defense.¹¹⁶ Such invocations of U.S. policies to justify domestic measures in other states is apparent in other areas influenced by the "war on terror." The UN special rapporteur on independence and the judiciary notes a downward spiral as states refashion U.S. policy for their particular local circumstances:

Based on the doctrine of counter-terrorism and sometimes even taking inspiration from the status of "enemy combatant", the governments of many States have adopted or

¹¹³ *Russia Not Planning to Give up Right of Pre-emptive Strikes—Defence Minister*, BBC INT'L REP., Oct. 20, 2003, available in LEXIS, Individual Publications.

¹¹⁴ SELECT COMMITTEE ON FOREIGN AFFAIRS, *supra* note 77, CONCLUSIONS AND RECOMMENDATIONS, para. 154(r), available at <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/19603.htm>> (citation omitted).

¹¹⁵ Australian Prime Minister John Howard, Interview with Leon Delaney, Radio 2SM (Oct. 10, 2003), available at <<http://www.pm.gov.au/news/interviews/Interviews517.html>>; see also *Where's the Red Line?* NEWSWEEK, Feb. 17, 2003, at 36, available in LEXIS, Magazine Stories, Combined.

¹¹⁶ *North Korea Not Bound by Missile Test Moratorium—Text*, BBC INT'L REP., Mar. 3, 2005 (quoting Foreign Ministry of North Korea, Memorandum of DPRK Foreign Ministry (Mar. 2, 2005)), available in LEXIS, Individual Publications (stating, "Therefore, it is quite natural that the DPRK has manufactured nukes for self-defence and continues to do so to cope with the policy of the Bush administration aimed at mounting a pre-emptive nuclear attack on it.").

strengthened legal instruments giving them powers of detention beyond all judicial control which, depending on the context, they use to detain terrorist suspects, political opponents, refugees or asylum seekers.¹¹⁷

These mimetic and free-riding effects remained somewhat muted during the initial iteration of claims to a right of preemptive self-defense under the Reagan administration. Perhaps this restraint resulted from the controls the superpowers in a then-bipolar system exercised over the various states within their zones of influence and, ironically, the sense of security derived from the relative military parity of the two superpowers.¹¹⁸ The point is not to be nostalgic about the Cold War but simply to note that because the controls exercised by the formal institutions of international law are not yet comparably effective in the sphere of international security, these implications should be borne in mind when contemplating the expansion of the *legal* boundaries of unilateral military action.

The dangers of legal mimesis and free riding are further amplified by the international community's failure thus far to formulate a consensus definition of "terrorism." Definitions establish a focus. Definitions of terrorism are especially outcome sensitive because they tend to delimit the range of lawful responses to them.¹¹⁹ As a result, international politics, in proving itself unable to adopt a comprehensive definition of the terrorist actions that have provoked many of the claims to preemptive self-defense, may, in turn, be provoking even broader claims to it.

¹¹⁷ Comm'n on Human Rights, Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. E/CN.4/2005/60, para. 36.

¹¹⁸ Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AJIL 259, 266–69 (1989). The world has changed significantly since Schachter noted the potentially destabilizing effect of uncertainty and indeterminacy of evaluating unilateral claims to preemptive self-defense, restrained at that time through power politics and the widely accepted norm against using force to achieve objectives previously thought legitimate, such as economic gain or fulfillment of a "manifest destiny."

¹¹⁹ For further discussion of terrorism and international law, see Reisman, *supra* note 2.