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# Assessing Claims to Revise the Laws of War

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# EDITORIAL COMMENT

## ASSESSING CLAIMS TO REVISE THE LAWS OF WAR

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation.
>
> —*Oliver Wendell Holmes*

For better or worse, participants in a civilization of science and technology are locked in a relentless process of research and a frenzied, competitive drive to apply the results wherever they promise enhanced productivity and profit. Each innovation stimulates further innovations and the juggernaut of development roars on. As for the law that would regulate it all, thanks to its characteristic deliberative and measured methods, it often lags behind the innovations, leaving intervals of legal gap in which authority becomes uncertain.

Weapons and their delivery systems are no exception to this dynamic. They, too, evolve inexorably, as do the identity, character, and modus operandi of manifest and latent adversaries. The first imperative of every territorial community—hence the first imperative of the international law that these communities have created—is provision for national defense. That part of the legal regime that establishes the licit means and modes for the maintenance by each community of its national defense is necessarily a response to the common needs and common interests of politically relevant actors in the system. Their felt necessities determine the content of the law and, in its crafting, take account of a wide range of factors, such as the current and projected technology and quanta of weapons; their modes of application; geography and geostrategic implications in specific contexts; and, of course, the characteristics, objectives, and capacities of manifest and latent adversaries. When some of these factors change to the point that communities can no longer assure their defense within the ambit of inherited law, those charged with national defense inevitably demand changes in the law.

### I.

International law is still largely a decentralized process, in which much lawmaking (particularly for the most innovative matters) is initiated by unilateral claim, whether explicit or behavioral. Claims to change inherited security arrangements, or any other part of the law, ignite a process of counterclaims, responses, replies, and rejoinders until stable expectations of right behavior emerge. Since every legal regime perforce benefits some actors more than others, no sooner does a new normative arrangement stabilize than it, too, comes under stress from new claims for change, in an ongoing bargaining process between sometimes rapidly shifting coalitions. Hence the ceaseless dialectic of international law: Whether by diplomatic communication or state behavior, one state claims from others acquiescence in a new practice. Insofar as that new practice is accepted in whole or in part, the practice becomes part of the law. But inherited law, especially in the form of *lex scripta,* manifests no such dynamism. As a consequence, there will often be tensions between formally prescribed law from a previous period and contemporary customary law.

Lawyers sometimes forget that specific arrangements in law are not a value in themselves but, as Rudolf von Jhering put it, are a "means to an end,"[1] the attainment of the fundamental goals of all law—the minimization of violence, the maintenance of minimum order, and as approximate an achievement of the policies of human dignity as each situation allows. Specialists in international law in particular tend to rally behind inherited arrangements; they assume that because the international legal system is weak, a principal duty is to defend existing prescriptions, whatever the consequence. Thus, international lawyers frequently respond to the appearance of a discrepancy between existing and emerging legal arrangements by heatedly rejecting the new "with a fury of virtuous unanimity [against] the evil whose name is Change."[2] Lost in the righteous fury is a dispassionate assessment of the extent to which the old arrangements are likely to work in contexts different from those in which they were originally established or the extent to which the new arrangements may better secure, in possible future contexts, law's fundamental goals.

## II.

The law setting the conditions under which states may resort to military force, the *jus ad bellum,* was shaped in the early part of the twentieth century and largely codified in the United Nations Charter. The unilateral and discretionary use of proactive military force, until then lawful, was henceforth prohibited; reactive military force was to be limited to self-defense and then only insofar as, and until, the international community could come to the assistance of a victim of unlawful military force. All uses of force were to be necessary, proportional, and discriminating.

Among the factors that made such a novel legal regime acceptable to those charged with the maintenance of national security within states was the unprecedented undertaking by the major powers in the Security Council to cooperate to ensure the collective defense of victims of aggression. Even those who assumed that the Security Council would wield the power the Charter assigned it in each appropriate case did not imagine that it would act quickly. But time was less of the essence then than now, given the character and potential of the arsenals of adversaries. Arsenals consisted essentially of kinetic weapons of relatively limited range, often requiring significant time for pre-positioning before activation. Prior to the expanded development and refinement of air warfare, weapons were usually limited in reach to the peripheries of the territorial communities that might come under attack. A surprise attack could thus be costly to its victim but not decisive. Most important, critical weapons were likely to be available in militarily significant quanta only to other states whose elites, however different their cultures and values, generally shared a continuing interest in the maintenance of the state system, of which all were part. Each elite's own territorial base made it at once member and beneficiary of, as well as hostage to, the system, susceptible to the ongoing dynamic of reciprocity and retaliation that generates the effectiveness of international law.

All of these factors shaped a common interest in a legal regime restricting the contingencies for self-defense to an actual armed attack. Indeed, as late as 1986, the International Court of Justice, in the watershed decision in the *Nicaragua* case, purported to limit the right of self-defense even further to an armed attack *of significant scale,* thereby prohibiting unilateral acts of self-defense in response to what came to be called "low-level warfare."[3] One may question the wisdom of the Court's decision, but it indubitably represented a considered policy. At times when the Security Council was frozen by the Cold War, self-defense would become

[1] RUDOLF VON JHERING, LAW AS A MEANS TO AN END (1913).

[2] R. H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 68 (1926).

[3] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP.14, 103–04, para. 195 (June 27).

the only real response to attack. As long as determining the contingency for resort to defensive violence was left to the discretion of a beleaguered state, the Court apparently reasoned, international violence would be minimized if the legal threshold for resort to self-defense were set higher rather than lower.

## III.

The development of weapons roared on, as did their proliferation. Wholly apart from the doubts that had arisen about the effectiveness of the Security Council, the introduction of vastly more destructive and rapidly delivered weapons began to put the efficacy of the legal regime itself into question. The reason was simple: the opportunity for meaningful self-defense could be irretrievably lost if an adversary, armed with much more destructive weapons and poised to attack, had to be allowed to initiate (which could mean, in effect, to accomplish) its attack before the right of self-defense came into operation. This development prompted a claim to expand the right of reactive self-defense to "anticipatory self-defense."

Anticipatory self-defense, the claim to "do unto others *before* they do unto you," promised to vouchsafe the security of the intended victim when he who struck first could deliver an unacceptable measure of damage, if not win outright. But the move from reactive to anticipatory self-defense required replacing the objectively verifiable prerequisite of an "armed attack" with the subjective perception of a "threat" of such an attack that, in the sole judgment of the state believing itself about to become a target, was so palpable, imminent, and prospectively destructive that the only defense was its prevention.

While all these considerations were redolent of the *Caroline* incident[4] and could thus respond to the defensive needs of the putative victim, they did not fit easily into the Charter formula and presented serious systemic challenges. Anticipatory self-defense was, and is, open to abuse by self-serving interpretations in ways that the older right of reactive self-defense was not. Hence, the authority of anticipatory self-defense remained cloudy and much of formal legal doctrine rejected its lawfulness. Nevertheless, security planners could not afford to exclude the possibility of its eventuation.

## IV.

After atomic bombs brought the Second World War to an abrupt halt, the United States and the Soviet Union scrambled to acquire larger and increasingly powerful nuclear weapons, together with more sophisticated, varied, and rapid modes for their delivery. As the strategic specialists on each side gamed the application of these weapons in virtually every imaginable scenario, it became increasingly clear that a claim of anything like anticipatory self-defense would be calamitous as between adversaries with significant arsenals of intercontinental ballistic nuclear missiles. As a result, the latter part of the last century witnessed the development among the major nuclear adversaries of a special operational code for the *jus ad bellum* of strategic weapons: the inaptly called "rules of the game." A common interest in continuous reciprocal deterrence was to be achieved, in a context of intense suspicion and distrust, by the prospect of *mutual* assured destruction if the nuclear weapons of one state were unleashed against the other.

The resulting strategic balance girded each major nuclear power with the assurance that the other could not attack it. (Ironically, the balance also provided a cogent and not merely pious basis for arms reductions, for if the principle on which the system now rested was parity, that parity could be achieved at lower and more economic armaments levels.) At the same time, the balance guaranteed a system of minimum, if imperfect, order for the rest of the world. By virtue of their military and economic power, these same nuclear states had

[4] *See* R. Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AJIL 82 (1938).

perforce become global actors—superpowers—whose positions, relative to each other, now depended on networks of regional alliances. Thus, despite their reciprocal hostility, the superpowers shared urgent interests in ensuring a minimum world order that was sufficiently stable to prevent local, conventional conflicts from reaching a point where they might so change geostrategic values as to provoke a nuclear war.

Although this complex of strategic arrangements and understandings now formed the substructure of minimum world order, the International Court of Justice could not bring itself, in its *Legality of Nuclear Weapons* opinion, to accept it as part of international law.[5] The Court's dictum did not affect the viability of the global security system, but it did show how far the deans of the college of international law could drift from the operative normative arrangements upon which international life had come to depend.

## V.

The realization by security specialists in the United States and the then Soviet Union of the essentiality of the regime of mutually assured destruction to their survival led, logically, if counterintuitively, to another conclusion: an antiballistic missile (ABM) weapon, like the development of more precise weapons, could disturb the parity underlying the international security system they had established. A comprehensive and effective ABM system in one superpower would have defeated the deterrence mechanism by tempting that state to strike first and then hunker down behind its shield, which, in theory, would cause the second striker's nuclear missiles to bounce off harmlessly. The mere deployment of a significant ABM could revive the need for strategic anticipatory self-defense. Hence, a treaty outlawing the development and wide deployment of ABM systems was an inevitable and organic offshoot of the strategic regime.[6]

But all legal arrangements are responses to present and projected contexts. The mechanism of mutually assured destruction and the system of minimum world order that it sustained presupposed the exclusive availability of nuclear weapons to a small number of "like-minded" states. The system could operate as long as the United States, the Soviet Union, and, perhaps, China were the only possessors of nuclear arsenals that were sufficiently large and geographically dispersed to withstand a first strike by an adversary and still riposte with a level of assured destruction so unacceptable to the putative first striker that its very anticipation would lead that state to resist the temptation and abandon its plan.

This necessary strut of the system threatened to crumble as the elites of various other states, who did not share the common perspectives and global responsibilities of the leaders of the nuclear club's charter members, struggled to acquire their own nuclear weapons and intercontinental delivery systems. During the same period, the Soviet Union expired, leaving the United States as the lone superpower and ultimate actor in international politics.

If other states, with territorial ambitions rather than global interests, were to acquire a limited number of nuclear weapons, the major powers would be unable to maintain the minimum order upon which the international system has come to rely. An Iraq that could threaten European or North American cities with one or two nuclear missiles, or a North Korea with a capacity to threaten South Korea or Japan, could then engage in unlawful adventures yet paralyze the key permanent members of the Security Council, upon which regional and international order depends, both legally and factually. The key members of the Council are democracies, which are easily mobilized for urgent self-defense but far less prepared to make altruistic sacrifices. No leader of a democratic government would be able to undertake

[5] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226 (July 8).

[6] Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-USSR, 23 UST 3435, 944 UNTS 13.

elective military action in defense of regional or world order, if a probable cost of victory were the nuclear destruction of one of the country's own major cities.

Concerns arose over the incipient arsenals, political objectives, and command-control systems (such as they were) of the new or soon-to-be nuclear powers. An antiballistic missile system, theretofore rejected by the ABM Treaty as incompatible with strategic defense and world order, reemerged as an urgent priority for many defense specialists in the United States. No serious student of the subject could harbor the illusion that a feasible ABM system might screen the United States against a full nuclear fusillade from Russia's large arsenal, whether in a first or a second strike. As between the United States and Russia, the strategic balance of their respective nuclear arsenals would still sustain a deterrence regime based on mutually assured destruction. But an ABM system, it was thought, might be an effective screen against the two or three missiles that one of the new nuclear states might be able to fire. ABM weapons would thus neutralize the limited nuclear weapons capacity of the small nuclear states and prevent that unpredictable capacity from undermining the continuing superpower provision of stability in critical regions. Hence the obsolescence of the raison d'être of the ABM Treaty, its denunciation by the Bush administration,[7] and the now feverish efforts in states as diverse as the United States, Israel, Japan, and others to develop and deploy various types of operational antiballistic missile systems.

The prospect of the termination of the ABM Treaty provoked such a furious chorus of criticism that one would have thought the sky was about to fall. But, unlike the claim for anticipatory self-defense and wholly apart from the serious question of whether ABMs could work or were cost-effective, the introduction of ABM systems did not threaten to undermine minimum order, for they could not affect the regime of mutual assured destruction of the nuclear club's charter members. ABM systems did, however, promise to enhance the ability of the major nuclear and other potentially targeted states to protect themselves from limited nuclear attack by other states.

## VI.

One of the factors that had made the inherited *jus ad bellum* effective was the concentration of weapons in the hands of territorial elites who were subject to the dynamic of reciprocity and retaliation that underlies international law. That dynamic does not operate for nonstate actors, for they are neither beneficiaries of nor hostages to the territorial system. As long as nonstate actors did not amass significant arsenals, their indifference or even hostility to world public order was inconsequential.

The proliferation of atomic, biological, and chemical weapons, the so-called ABC weapons, and their diffusion into the hands of nonstate actors has changed that. Even if an ABM system could screen the few nuclear weapons likely to be fired intercontinentally from the territory of an adversary, the United States, on the morning of September 11, 2001, awoke to a new reality. There are many other ways that the cluster of nonstate groups referred to as Al Qaeda can deliver highly destructive weapons to what has since come to be called "the homeland." Biological and chemical weapons cannot be screened by an ABM system. Nor can the most effective ABM system prevent the infiltration and detonation of a "dirty bomb." Nor can deterrence operate without an address to deter. As President Bush confessed, "Deterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nations or citizens to defend."[8] These developments have given new impetus to a claim of preemptive, as opposed to anticipatory, self-defense.

[7] Ari Fleischer, ABM Treaty Fact Sheet: Announcement of Withdrawal from the Abm [*sic*] Treaty (Dec. 13, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/12>.

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

"Preemptive self-defense" is broader than anticipatory self-defense. Although different definitions have been proffered, preemptive self-defense is essentially a "nip in the bud" strategy. It is a claim to use unilaterally, and without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational, hence not yet *directly* threatening, but that, if permitted to mature, could then be neutralized only at a higher and possibly unacceptable cost. A credible claim for anticipatory self-defense must point to a palpable and imminent threat. A claim for preemptive self-defense can point only to a possibility, 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 preventive self-defense, and from there to the conjectural and contingent threat of *possible* attack, which is the threshold of preemptive self-defense, the need for interpretive latitude of the would-be unilateralist and his burden of proof become ever greater. In an international system marked by radically different values and factual perceptions, an act of preemptive self-defense will often look like a serious or hysterical misjudgment to some actors and like naked aggression to others.

Analytically, the claim to engage, in certain circumstances, in a "regime change" is a corollary of preemptive self-defense. For if a regime that is animated by unlawful ambitions against its neighbors continues to develop the ABC weapons, and especially if it does so in violation of international commitments, the deprivation of those weapons in a single instance may only reinforce the regime's intentions to try even harder the next time to develop and deploy the weapons so that it can then paralyze subsequent efforts to control it.

## VII.

The United States claim to engage in preemptive self-defense is not new. It was made implicitly by the Clinton administration with respect to aerial military action to "degrade" Iraqi military capacities, actions that continue to the present. There may have been more explicit applications. President Clinton recently stated that "[w]e actually drew up plans to attack North Korea and to destroy their reactors and we told them we would attack unless they ended their nuclear programme."[9] That threat was apparently an effective preemption. But if threats or overt acts aimed at degradation of an adversary's arsenal fail, will further and even more intrusive preemptive acts against the adversary be deemed permissible under the rubric of self-defense?

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."[10] On September 17, 2002, he made explicit and expanded the claim to preemptive action that had been an active part of America's legal arsenal in the previous decade. He said:

> 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

[9] Elaine Monaghan, *Clinton Planned Attack on Korean Nuclear Reactors*, TIMES (London), Dec. 16, 2002, *available in* LEXIS, News Library, Major World Newspapers File; *see also* Toby Sterling, *Clinton: N. Korea Warned About Reactor*, AP, Dec. 15, 2002, *available in* 2002 WL 104356190.

[10] Bush, *supra* note 8, at 946.

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.[11]

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 against WMD-armed adversaries, including in appropriate cases through preemptive measures."[12]

The unilateralism of these claims has been decried by some critics as if it were the major innovation here. In fact, it is not very different from the approach of the previous administration, which had said, famously, "We act in concert with the international community whenever possible, but do not hesitate to act unilaterally when necessary."[13] The issue is not the lawfulness of unilateral action in self-defense, which, after all, is the essential formula of Charter Article 51. The issue is, rather, an explicit claim to preemptive self-defense.

## VIII.

International law has been grappling with the claim of preemptive self-defense for decades. In 1967 the initiation of the Six-Day War by an Israeli air attack on Egyptian airports was not condemned by the institutions of the international community. The relation that prevailed between Egypt and Israel at the time may have already been one of belligerency, so that the air attack could have been seen as anticipatory or even reactive, rather than preemptive, self-defense. If a state of war exists, a belligerent need not wait until its adversary strikes in order to respond militarily, but is entitled, itself, to select the moment of initiation or resumption of overt conflict. Since the relation between Al Qaeda and the United States can generally be characterized as a state of war,[14] it would be inappropriate to characterize unilateral United States actions after September 11 as falling in the area of preemptive self-defense. In contrast, the Israeli destruction of the Osirak reactor near Baghdad in 1981 was a quintessential preemptive action. At the time, it was widely condemned as a violation of international law. Scarcely a decade later, after the lethal and aggressive character of the regime in Baghdad was exposed, opinions about the preemptive action of 1981 underwent revision in many quarters, suggesting that there may be unarticulated, but operative, criteria for assessing the lawfulness of preemptive actions.

By their nature, all acts of self-defense are initiated unilaterally and evaluated for their lawfulness only after the fact. In all claims to self-defense, the international legal review of the action will be based upon a prudential contextual assessment of factors such as the degree of the threat presented, the availability of a meaningful organized international response, the urgency of unilateral action to prevent or deflect the attack, and the proportionality of the means chosen to the necessity presented by the threat. Thus, on a case-by-case basis, the legal danger of an abuse of preemptive self-defense is no greater than for anticipatory self-defense, which also does not require an "armed attack" to justify it. Humanitarian intervention

[11] NATIONAL SECURITY STRATEGY OF THE UNITED STATES 6 (Sept. 2002), *available at* <http://www.whitehouse.gov/response/index.html>.

[12] NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 3 (Dec. 2002), *available at* <http://www.whitehouse.gov/response/index.html>.

[13] A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 19–20 (Dec. 1999), *available at* <http://www.dtic.mil/doctrine/jel/other_pubs/nssr.99.pdf>.

[14] By characterizing as essentially "law enforcement" questions the prior attacks on the Khobar Towers, the embassies in Nairobi and Dar es Salaam, and the USS *Cole* in Aden harbor, one might argue, as some have, that the United States was not at war as of 8 A.M. on September 11, 2001. Only a most technical and arid legalism could deny that it is now.

does not even require a demonstration of a real or conjectural threat against the intervening state or states. The danger presented by the installation of a doctrine of preemptive self-defense is systemic: if writ large and generally available in international law, it is even more likely than anticipatory self-defense to lead to greater resort to international violence by further lowering the threshold for unilaterally determined contingencies that warrant acts of self-defense. This potential could create an imperative for all latent adversaries to strike sooner so as to strike first, raising the general expectation of violence and the likelihood of its eventuation.

Fear of an inexorable slide down that precipitous slope appeared to have been the concern of the International Court of Justice in *Nicaragua,* where, as noted above, the Court set the legal bar for the initiation of actions in self-defense at a rather high notch and, in effect, asked targeted populations simply to endure the consequences of protracted low-level conflict. In transposing the Court's policy prescription from a context of low-level protracted conflict conducted with relatively primitive and inherently focused weapons to a situation in which nonstate actors, armed with weapons of mass destruction, animated by manifestly hostile intentions, and impervious to the controls of reciprocity and retaliation that operate on territorial elites, are preparing the wherewithal for attack or actually readying to attack, international law would now be demanding that target states tolerate a much higher toll of death and destruction without trying to prevent it by prior unilateral action. Such a transposition of the International Court's policy position in *Nicaragua* puts international law on a head-on collision course with democratic politics, for a government in a functioning democracy whose population faces such violence will not last long if, in the circumstances, it tells its electorate that international law prevents it from taking anticipatory or preemptive action.

## IX.

A critical factor in the acceptance and incorporation of a new claim into the corpus of international law is whether it serves the common interests of the aggregate of actors. Thus, the responsibility of the international lawyer here is to assess innovative claims carefully for their contribution, in present and projected contexts, to the essential goals of law.

For all the fury it provoked, the claim to develop an ABM system posed no challenge to the international security system. It does not threaten the effectiveness of the deterrence mechanism operating between the major nuclear powers, while an operational ABM system would provide an entirely passive self-defense mode to states likely to be targets of surprise ABC missile attacks. It is, by its nature, only defensive. Moreover, the denunciation of the ABM Treaty did not undermine the viability of the international treaty regime, for the treaty in question was susceptible, by its terms, to termination, on notice.

"Regime change" is a euphemism for externally provoked and managed coups d'état. A broad and unilateral right of regime change, by itself, can hardly be accommodated within the ensemble of policies of international law. If it became generally lawful, it would lead to more frequent unsupervised meddling in the processes of choice within other states. But regime change may be internationally lawful when it is the contextually appropriate *instrument* of an intrinsically lawful action. Recall that regime change has always figured as one of the strategic objectives of humanitarian intervention, a claim to use force unilaterally, hitherto controversial, that appears to have acquired more legitimacy since NATO bombed Serbia and Kosovo in 1999 and the various commissions established to review the lawfulness of the action essentially concluded that it was illegal but, in the circumstances, the right thing to do.[15] If preemptive self-defense is potentially lawful and the conditions that obtain in a particular

[15] *See* HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE—FOURTH REPORT, Kosovo (May 23, 2000), *available at*<http:// www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm>; INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT (Oct. 2000) (on file with author).

case warrant resort to it, the legality of an instrumental regime change will turn on its necessity, proportionality, and discrimination.

But can a preemptive self-defense action be lawful? It is not hard to imagine circumstances in which such action might appear justified. Yet the claim, if universalized, could increase the expectation of and resort to violence and undermine minimum order. Its challenge to international law, at least with respect to a prospective preemptive strike against Iraq, may be finessed by construing various Security Council resolutions under Chapter VII as fully authorizing the action for the material breach of prior resolutions. Alternatively, the claim to engage in preemptive action may be partially rejected by being confined to the status of an American "doctrine," rather like the Monroe Doctrine in the days of the League of Nations.

In modern international law, a doctrine—such as the Brezhnev, Carter, and Reagan doctrines—consists of a formal and credible statement by a significant international actor of a firm policy and the resolve to implement it upon certain contingencies. Doctrines are positioned at the interface of law and power. They are not based on a general right that is theoretically available to other states. By their nature, they constitute a demand for an exception. Not all doctrines conform with existing international law, but doctrines do contribute to minimum order by stabilizing the expectations of all actors as to the consequences of certain types of action and thus aid in avoiding adventures and mistakes.

If preemptive self-defense is only an American doctrine, reserved to the global superpower for its episodic forays as international policeman, at least the danger of its rampant use by many other states is contained. The danger of its abuse by an uncontrolled superpower is not. But the potential for abuse here does not derive from the power of a single state. Rather, it inheres in a legal system that continues to maintain weak central institutions and accordingly reserves to each state, in the words of the French text of Article 51 of the Charter, a *droit naturel* to engage in unilateral action when necessary for its self-defense, while assigning the residual responsibility for global security to a small group of powerful states.

Until the installation of an effective world constitutive process, which will remove the need to rely upon unilateral action for the achievement of key international goals, it will be for the college of international lawyers to establish criteria for the lawfulness of the initiation and application of unilateral anticipatory and preemptive defensive actions.[16] Their lodestar will be the legitimacy of self-defense insofar as it is implemented in accordance with the venerable policies of necessity, proportionality, and discrimination. But because the context has changed, the legal arrangements to implement these policies of international law must change as well. Legal creativity and factual realism in this area are called for in equally urgent measure, for if the effectiveness and soundness of a future international regime about the unilateral use of force remain clouded in uncertainty, the insufficiency of the inherited regime, which was designed for a context of weapons and adversaries that has changed forever, is certain beyond peradventure.

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[16] They will find considerable assistance in this task in MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 63 (1961).

* The source for the epigraph to this Editorial is Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). James E. Baker and Andrew Willard read earlier drafts and made useful comments and criticisms.