

**THE SIXTEENTH WALDEMAR A. SOLF LECTURE IN
INTERNATIONAL LAW¹**

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1. This is an edited transcript of a lecture delivered on 28 February 2003 by Professor Michael N. Schmitt to the members of the staff and faculty, distinguished guests, and officers attending the 51st Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School, United States Army, on 8 October 1982. The chair was named after Colonel Waldemar A. Solf. Colonel Solf (1913-1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later.

Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; as the Staff Judge Advocate of both the Eighth U.S. Army/United States Forces Korea/United Nations Command and the United States Strategic Command; as the Chief Judicial Officer, United States Army Judiciary; and as the Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, Colonel Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross (ICRC) Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as chairman of the U.S. delegation to the International Committee of the Red Cross Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea.

He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, Colonel Solf again retired in August 1979.

In addition to teaching at American University, Colonel Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

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***Bellum Americanum* Revisited: U.S. Security Strategy and the
*Jus ad Bellum***

I. Introduction

Five years ago, I published an article entitled *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*.³ Its premise was quite simple—the law of armed conflict is in a dependency relationship to conflict, one that is usually reactive. Although proactive examples of limiting conflict exist,⁴ normative reactions thereto are far more common.⁵ For instance, the International Committee of the Red Cross is currently campaigning for a new Conventional Weapons Convention protocol on explosive remnants of war.⁶ This effort responds to the fact that in (and after) certain conflicts,

3. Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051 (1998).

4. For example, the bans on blinding lasers and biological weapons. Additional Protocol to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Blinding Laser Weapons, Oct. 13, 1995, 35 I.L.M. 1218; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 164.

5. The U.S. Civil War motivated adoption of Professor Francis Lieber's "set of regulations" (Lieber Code) as General Order No. 100, U.S. Dep't of Army, Instructions for the Government of Armies of the United States in the Field (Government Printing Office 1898) (1863), reprinted in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 3 (Dietrich Schindler & Jiří Toman eds., 1988); the Battle of Solferino during the Italian War of Liberation, and the resulting monograph *Souvenir de Solferino* by Henri Dunant (1862), led to creation of the International Committee of the Red Cross; the Russo-Japanese War of 1904-05 was followed by the Geneva Convention of 1906 and the Hague Conventions of 1907; World War I was followed by the 1925 Gas Protocol and the 1929 Geneva Convention; World War II was followed by the Geneva Conventions of 1949 and the 1954 Cultural Property Convention; and Korea, Vietnam, and the "wars of national liberation" were followed by the Additional Protocols to the 1949 Geneva Conventions, the Environmental Modification Convention, and the Conventional Weapons Convention. Each of the aforementioned conventions is available at the ICRC documents Web site, <http://www.icrc.org/ihl>.

such as that in Kosovo, explosive remnants present a greater danger to civilians than even anti-personnel mines.⁷

If law is typically reactive, by considering future conflict it might be possible to identify: (1) prospective lacuna in the law of armed conflict; (2) facets of that law that might be at risk; and (3) characteristics of future conflict that could potentially enhance the law's effectiveness. Such an

6. See International Committee of the Red Cross Official Statement, *Explosive Remnants of War: Negotiations on a New Instrument in 2003* (Jan. 16, 2003), at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList282/E80618B36E5F5C5E41256CBC002CC444>. The Second Review Conference of the Certain Conventional Weapons Convention established a Group of Governmental Experts to analyze the situation. That group ultimately recommended work on an additional protocol to the Convention. The proposal was accepted by States Parties, and negotiating sessions are to be held during 2003. This effort followed quickly on the heels of the successful effort to draft a convention banning anti-personnel landmines, *The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction*, Sept. 18, 1997, 36 I.L.M. 1507. The United States is not a Party to the Convention.

7. The ICRC estimates that of the 429 people injured in unexploded ordinance incidents in the area, only one-third were injured by anti-personnel mines. Of the remaining injuries, unexploded bomblets (such as those contained in cluster bombs) caused one half, with other forms of unexploded ordinance causing the remainder. Reactive laws of armed conflict adopted since publication of original article include: the Rome Statute of the International Criminal Court, July 17, 1998, art. 85, U.N. Doc. A/CONF.183/9* (1998), 37 I.L.M. 999 (1998), revised by U.N. Doc. PCNICC/1999/INF/3* (1999), <http://www.un.org/law/icc>, which establishes the first permanent international tribunal to address war crimes, crimes against humanity, and genocide (and eventually aggression); the Second Protocol to the Hague Cultural Property Convention of 1954, Mar. 26, 1999, 38 I.L.M. 769 (1999), which enhances protection for cultural property and imposes individual criminal responsibility for certain violations; the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/fc06c04cc5efa0014125693c004a45ab?OpenDocument>, which strengthens the prohibitions on the recruitment of children into armed forces and limits their participation in conflict; and Amended Article 1 to the Conventional Weapons Convention (December 2001), which extends application to non-international armed conflict, Second Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Final Document, U.N. Doc. CCW/CONF.II/2, at 4 (2001). For an excellent analysis of the conference by U.S. participants therein, see David Kaye & Steven A. Solomon, *The Second Review Conference of the 1980 Convention on Certain Conventional Weapons*, 96 AM. J. INT'L L. 922 (2002).

analysis, so the theory went, could in turn suggest options for strengthening the international legal regime.

Cognizant of the difficulties inherent in any predictive analysis, *Bel-lum Americanum*, as the title suggests, narrowed the field of study to one possible alternative future, that posited by the United States in official documents such as President Clinton's 1997 *National Security Strategy for a New Century*⁸ and the Joint Chiefs of Staff's 1996 *Joint Vision 2010*.⁹ The U.S. vision was selected both because of its strategic maturity and due to the determinative influence the United States would likely wield over the course of conflict for the near future.

The inquiry immediately led to the *jus in bello*.¹⁰ This was only logical, for conflict studies at the time were dominated by consideration of a purported revolution in military affairs. We were obsessed with full spectrum dominance, information operations, cyber war, operating inside the enemy's OODA loop,¹¹ precision attack, stealth technologies, nanorobotics, unmanned aerial vehicles, civilianization and privatization, asymmetrical warfare, and so forth. The normative implications of this revolution in methods and means of warfare tended to bear most heavily on *jus in bello* principles such as discrimination.

Much has transpired since 1998. In 1999, the NATO Alliance conducted major combat operations for the first time in its history during Operation Allied Force, the air campaign against the Federal Republic of Yugoslavia. Two years later, al-Qa'ida mounted the single largest terrorist attack in history when it seized four airliners and flew them into the World Trade Center and Pentagon. Over 3000 citizens of nearly ninety nations perished. In response, a U.S.-led "coalition of the willing," after declaring a "Global War on Terrorism" (GWOT), launched a massive military operation, Operation Enduring Freedom, against the organization's bases in Afghanistan. It concurrently struck targets tied to al-Qa'ida and the Taliban, the de facto rulers of the country. Moreover, as this article is being

8. WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1997).

9. JOINT CHIEFS OF STAFF, JOINT VISION 2010 (1996). Other documents considered included JOINT CHIEFS OF STAFF, CONCEPT FOR FUTURE JOINT OPERATIONS: EXPANDING JOINT VISION 2010 (1997); JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY (1997); WILLIAM S. COHEN, THE REPORT OF THE QUADRENNIAL DEFENSE REVIEW (1997).

10. The *jus ad bellum* is that component of international law that governs when a State may resort to the use of force. By contrast, the *jus in bello* addresses how force may be applied in armed conflict, irrespective of the legality of the initial resort to force.

11. Observe, orient, decide, act.

finalized, United States and British forces are responding to Iraq's failure to disarm pursuant to UN Security Council resolutions with a military campaign against Iraq, Operation Iraqi Freedom.

Given the uniqueness of these events, it is a propitious moment to revisit *Bellum Americanum*. Each has presented significant challenges to the *jus in bello*. Consider the controversies over the term "military objective" during Operation Allied Force or the refusal to characterize detainees as "prisoners of war" during Enduring Freedom.¹² However, most normative disquiet during this period has surrounded the *jus ad bellum*; therefore, that body of law shall be the focus of this inquiry.

The methodology applied here tracks that used in *Bellum Americanum*. Since law tends to react to conflict, it is sensible to begin by considering the nature of future conflict and the strategies designed to address it. It might then be possible to identify where such strategies fit existing legal norms, where reinterpretation of those norms might be necessary, and where there is an overt mismatch between law and strategy.

The presumption underlying this effort is that law is both contextual and directional. It is contextual in the sense that it will inevitably adjust to meet the aspirations and expectations of the community in whose behalf it operates—in the case of international law, the global community. Simply put, law is dynamic, not static. At the same time, law tends to be directional. Rather than responding on a case-by-case basis to isolated events, it evidences movement in a general direction. This directional aspect makes predictive endeavors more reliable; by identifying the azimuth of change, it becomes possible to map out normative futures with greater confidence.

Obviously, this is a speculative undertaking. In the twentieth century, for instance, who would have anticipated the use in the twenty-first century

12. The former issue resulted in the Bankovic litigation before the European Court of Human Rights, which involved the April 1999 NATO bombing of the Radio Televizije Srbije (Radio-Television Serbia) headquarters in Belgrade. *Bankovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, Application No. 52207/99 (Eur. Ct. H.R. 1999). The ECHR dismissed the case for lack of jurisdiction. On the issue of the Guantanamo prisoners, see Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 475-83 (2002); George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002).

of commercial airliners as cruise missiles? Five years ago, strategists were concentrating on the possible emergence of a peer-State competitor, most likely China. Today, China as a threat is almost an afterthought in the face of attacks by transnational terrorist groups and the possibility that they may acquire weapons of mass destruction. And who could have imagined Germany, France, and Belgium joining forces to oppose efforts to secure NATO protection for Turkey during a U.S.-led military campaign to disarm Iraq?¹³

Despite this caveat, it remains useful to ask where strategies conflict with law, thereby necessitating a change in one or the other, or at least an acceptance of the costs of being labeled as lawless. The U.S. vision of future conflict, as well as the strategies articulated to deal with such conflict, has again been selected the point of departure. The United States enjoys determinative influence over the use of force in the global community. It has the most powerful military in the world, possesses military capabilities that the armed forces of other States rely on to conduct major operations beyond their borders, occupies a seat on the Security Council, dominates NATO, and, due to its political and economic wherewithal, has the greatest capability for bilateral influence. Like it or not, U.S. vision and U.S. strategies matter most in determining the future of conflict, and with it, international law. That being so, we shall begin with the current U.S. view of twenty-first century conflict.

II. The U.S. Vision of the Twenty-First Century Political-Military Environment

What is striking in the American view of the future political-military environment is the extent to which it is threat-based. This is true both as

13. Because of opposition in the North Atlantic Council, the issue was transferred to the Defence Planning Committee, on which France is not represented. The 10 February 2003 request from Turkey came pursuant to Article IV of the North Atlantic Treaty, which provides that the "Parties will consult whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened." North Atlantic Treaty, Aug. 24, 1959, art. 4, 63 Stat. 2241, 34 U.N.T.S. 243. The decision to provide support was made on 16 February 2003, see text at Decision Sheet of the Defense Planning Committee, at <http://www.nato.int/docu/pr/2003/p030216e.htm>, and resulted in Operation Display Deterrence, Regional Headquarters Allied Forces Southern Europe, *Operation Display Deterrence*, at <http://www.afsouth.nato.int/operations/NATOTurkey/DisplayDeterrence.htm> (last updated Mar. 20, 2003). As an illustration of the changing dynamics in the Alliance, note that Turkey's traditional opponent, Greece, voiced no objection to the Turkish request.

to the diversity of the threats faced and, perhaps more tellingly, with respect to the extent to which particular trends, such as globalization, are now characterized as potential vulnerabilities. The United States sees itself as entering what Richard Holbrooke has branded the “post-post Cold War era.” No longer does bipolar competition frame security, as it did in the Cold War. Likewise, the demise of bipolarity’s regulating effect on potential internal and external conflict has passed its prime as a security determinant. Although the negative consequences of this post-Cold War era still underlie many security concerns, particularly in the Balkans, there is a sense that these are residual in nature, that the dynamics which led to the collapse of Yugoslavia and generated tension between Russia and the West have nearly played themselves out.

Post-post Cold War security anxiety focuses on chaos, disorder, and criminal actions by rogue States and transnational groups. In a sense, a classic battle between good and evil is underway for the United States, one that is far more nefarious than either simple clashes of national interests or conflicts over self-determination within well-defined political space. The Bush *National Security Strategy (NSS)*, issued in September 2002, exemplifies this concern when it argues that “America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few.”¹⁴

Strikingly, President Bush’s *NSS* devotes far less attention to describing the global security condition than his predecessor’s did in 1997. Perhaps this is because the Administration believes that condition to be self-evident in the aftermath of 9/11. Moreover, in contrast to the somewhat vague Clinton version, the 2002 *NSS* sets forth an unambiguous U.S. strategy. Indeed, following the 9/11 attacks, the Administration delayed issuing the *NSS*, presumably to better address the dramatically altered threat environment, only releasing the strategy once the situation vis-à-vis Iraq had crystallized.

More descriptive of the security environment have been two other documents, one issued by the Joint Staff, the other by the Secretary of Defense. *Joint Vision (JV) 2020*, the Joint Staff’s “conceptual template” for guiding transformation of the U.S. armed forces, posits three factors

14. NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA ch. 1 (Sept. 2002) [hereinafter *NSS*], available at <http://www.whitehouse.gov/nsc/nss.pdf>.

most likely to determine the future security environment. First, the United States will remain a global power with global interests. Indeed, globalization, with its ever expanding transportation, communications, and information technology network, will require the United States to remain engaged internationally for both security and economic reasons. Consequently, the U.S. armed forces “must be prepared to ‘win’ across the full range of military operations in any part of the world, to operate with multinational forces, and to coordinate military operations, as necessary, with government agencies and international organizations.”¹⁵ The United States cannot simply withdraw into its borders and assume a defensive stance.

Second, current U.S. military advantages may begin to fade as technological and commercial globalization make militarily useful technology such as commercial satellites, digital communications, and the Internet available and affordable to opponents. This will allow them to be better organized, more elusive, and deadlier than ever before.¹⁶

The third factor cited by the Joint Staff is the adaptability of adversaries to U.S. capabilities. Clearly, the United States is the dominant military power by a great margin. However, its conventional and nuclear dominance drives opponents towards asymmetrical responses designed to circumvent U.S. strengths and exploit its weaknesses. *Joint Vision 2020* was issued over a year before the terrorist strikes of 9/11, one of the most effective asymmetrical attacks in the history of warfare. Yet, it was astonishingly prescient.

The potential of such asymmetric approaches is perhaps the most serious danger the United States faces in the immediate future—and this danger includes long-range ballistic missiles and other *direct threats to U.S. citizens and territory*. The asymmetric methods and objectives of an adversary are often far more important than the relative technological imbalance, and the psychological impact of an attack might far outweigh the actual physical damage inflicted. An adversary may pursue an asymmetric advantage on the tactical, operational, or strategic level

15. JOINT CHIEFS OF STAFF, JOINT VISION 2020, at 5 (2000) [hereinafter JV 2020], available at <http://www.dtic.mil/jv2020/jv2020.doc>. The individual services have also issued vision documents: U.S. DEP’T OF NAVY, FORWARD . . . FROM THE SEA (1994); U.S. DEP’T OF ARMY, THE ARMY VISION (1999); U.S. MARINE CORPS, STRATEGY 21 (2000); U.S. DEP’T OF AIR FORCE, VISION 2020 (n.d.).

16. JV 2020, *supra* note 15, at 5.

by identifying key vulnerabilities and devising asymmetric concepts and capabilities to strike or exploit them. To complicate matters, our adversaries may pursue a combination of asymmetries, or the United States may face a number of adversaries who, in combination, create an asymmetric threat.¹⁷

U.S. concerns regarding asymmetry have grown exponentially since *JV 2020*'s release; they pervade the new *NSS* and the novel strategy it articulates.

Secretary of Defense Donald Rumsfeld issued the *Quadrennial Defense Review (QDR)* the very month of the attacks. Designed to assess military capabilities against the threat environment, it represents an even more robust expression of the Administration's view of the security landscape.

Like the *NSS*, the *QDR* first highlights U.S. vulnerability in the new globalized environment. As noted by President Bush in his 2003 State of the Union Address, "America is no longer protected by vast oceans."¹⁸ In particular, the *QDR* cites travel and trade as facilitating direct attacks against the U.S. homeland.¹⁹ The interdependency and interconnectedness that undergird globalization render the United States perilously vulnerable because targets of significance are becoming ever more numerous and accessible. For instance, computer network attacks launched from abroad against our economic infrastructure could cause financial havoc; in fact, even attacks mounted against non-U.S. economic assets outside the country, such as oil production and transport facilities, could have dire consequences for the United States.

Although the *QDR* dismisses threats from a peer competitor as unlikely, regional powers are assessed as possibly threatening, particularly along the "arc of instability" which runs from the Middle East to Northeast Asia.²⁰ This arc includes the Bush "axis of evil"—Iraq, Iran, and North Korea—but would also include portions of the Caucasus's, Central Asia, and the Indian subcontinent. Sources of instability in this region include a

17. *Id.* at 7 (emphasis added).

18. President George W. Bush, State of the Union Address, Washington, D.C. (Jan. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

19. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2001, at 3-4 (2001) [hereinafter *QDR*], available at <http://www.defenselink.mil/pubs/qdr2001.pdf>.

20. *Id.* at 4.

“volatile mix of rising and declining powers” and vulnerability to “overthrow by radical or extremist internal political forces or movements.”²¹

Especially problematic is the Middle East, where “several states pose conventional military challenges and many seek to acquire—or have acquired—chemical, biological, radiological, nuclear, and enhanced high explosive (CBRNE) weapons.” These States “are developing ballistic missile capabilities, supporting international terrorism, and expanding their military means to coerce states friendly to the United States and to deny U.S. military forces access to the region.”²² They, together with transnational terrorists, comprise the key drivers to the new U.S. strategy.

Non-State actors are also a source of alarm for the Bush Administration. In the first place, the *QDR* points out that weak and failing States represent fertile ground for the activities of non-State actors, not only as terrorist sanctuaries (for example, pre-9/11 Afghanistan), but also for criminal activities such as drug trafficking. Moreover, while some of these groups enjoy State sponsorship, others are sufficiently organized and resourced to operate autonomously.²³ As is apparent from the current crisis over Iraq, the Administration is especially fearful that such groups have, or may acquire, CBRNE capabilities.

Militarily, the *QDR* notes numerous trends of significance. The first is the “rapid advancement of military technologies.”²⁴ Although technology had previously been regarded almost exclusively as a force multiplier for the United States, the *QDR* offers a different perspective. It perceptively notes that the rapid advance of “technologies for sensors, information processing, precision guidance, and many other areas . . . pose the danger that states hostile to the United States could significantly enhance their capabilities by integrating widely available off-the-shelf technologies into their weapons systems and armed forces.”²⁵ The technological proliferation and the growing expertise that result from globalization exacerbate this challenge, particularly ballistic missile proliferation and biotechnology expertise.²⁶ Additionally, space and cyberspace, and the control and exploitation thereof, are of growing military relevance. What is perhaps most important is the conclusion that these trends generate an “increasing

21. *Id.*

22. *Id.*

23. *Id.* at 5.

24. *Id.* at 6.

25. *Id.*

26. *Id.* at 6-7.

potential for miscalculation and surprise.”²⁷ Specifically, “[i]n the future, it is unlikely that the United States will be able accurately to predict how successfully other states will exploit the revolution in military affairs, how rapidly potential or actual adversaries will acquire CBRNE weapons and ballistic missiles, or how competitions in space and cyber space will develop.”²⁸ Concern over surprise and miscalculation in a security environment replete with CBRNE proliferation and transnational terrorism has, as will become apparent, dramatic strategic implications. Thus, far from being a panacea, technology may represent a Pandora’s box in an era of globalization.

The uncertainty explicit in the *Defense Review* drives the United States away from threat-based to capabilities-based defense planning. In other words, future U.S. armed forces must possess certain military capabilities to meet particular types of threats, such as transnational terrorist groups operating from diverse locations in weak States, possibly with the assistance of State sponsors, and armed with weapons of mass destruction. These capabilities include advanced C4ISR (command, control, communications, computers, intelligence, surveillance, reconnaissance), an ability to quickly deploy and sustain forces around the world, and global precision strike capability. They are indispensable in achieving the four U.S. defense policy aims: (1) assuring allies and friends; (2) dissuading future military competition; (3) deterring threats and coercion against U.S. interests; and (4) decisively defeating any adversary if deterrence fails.²⁹ Realizing these goals will require “transformation.” This term of art implies not only a shift in operational concepts, technologies, and organizations, but also “the emergence of new kinds of war, such as armed conflict in new dimensions of the battlespace.”³⁰

In the aggregate, the *NSS, JV 2020*, and the *QDR* describe a rapidly evolving international security environment. It is unquestioned that the United States will remain engaged in international affairs; isolationism, as distinguished from unilateralism, is simply not an option. Unfortunately, the world with which it will remain engaged is a dangerous one. Weak and failed States present fertile breeding grounds for transnational terrorists and criminals who may turn to destructive technologies in an asymmetrical struggle against the United States and other advanced States. Rogue States complicate matters by offering sanctuary and support for terrorists, includ-

27. *Id.* at 7.

28. *Id.*

29. *Id.* at 11.

ing the possible provision of CBRNE technology and weapons, while also posing a threat on their own. The U.S. response is to “transform” its military by leveraging technological wherewithal and fashioning doctrines to meet the changed threat. In the process, it is engaging in practices and adopting strategies that have enormous normative consequences. Four topics are of particular interest in this regard: terrorism, weapons of mass destruction, humanitarian intervention, and information operations.

III. Terrorism³¹

Terrorism is a core feature of virtually all security related documents emanating from the Administration since 9/11. President Bush expressed his feelings regarding the appropriate response to terrorism with great clarity during a memorial service at the National Cathedral on September 14th. Referring to the attacks that had just occurred, he proclaimed that

our responsibility is clear: to answer these attacks and rid the world of evil. War has been waged against us by stealth and deceit and murder. This nation is peaceful, but fierce when

30. *Id.* at 29. The *QDR* sets six operational goals that are conditions precedent to achieving meaningful transformation:

protecting critical bases of operations (U.S. homeland, forces abroad, allies, and friends) and defeating CBRNE weapons and their means of delivery; assuring information systems in the face of attack and conducting effective information operations; projecting and sustaining U.S. forces in distant anti-access or area-denial environments and defeating anti-access and area denial threats; denying enemies sanctuary by providing persistent surveillance, tracking, and rapid engagement with high-volume precision strike, through a combination of complementary air and ground capabilities, against critical mobile and fixed targets at various ranges and in all weather and terrains; enhancing the capability and survivability of space systems and supporting infrastructure; and leveraging information technology and innovative concepts to develop an interoperable, joint C4ISR architecture and capability that includes a tailorable joint operational picture.

Id. at 30.

31. The National Strategy for Combating Terrorism defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2003) [hereinafter NSCT], available at http://www.odci.gov/terrorism/publications/Counter_Terrorism_Strategy.pdf.

roused to anger. The conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing.³²

For the President, an “act of war” had been committed against the country,³³ and we were involved in an armed conflict; Congress responded accordingly by authorizing the President to employ force in response to the attacks.³⁴

The President included this very quotation in his *National Security Strategy*, issued one year later. That document describes an aggressive and unequivocal approach to terrorism. Specifically, it tasks the U.S. government to “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.³⁵

32. NSS, *supra* note 14, ch. II (header).

33. Indeed, he characterized the attacks as an “act of war against our country” when addressing Congress. President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347 (Sept. 20, 2001) [hereinafter President Bush Response to Terrorist Acts].

34. The President was authorized to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for the Use of Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The essential threads of this strategy are consistent with the military-political environment described above. By referencing “all” elements of national strategy, the President clearly envisages using the military against terrorists. Transnational terrorists receive priority, particularly the possibility of their access to weapons of mass destruction. The United States will seek to preempt actions, not simply deter or react to them, and that preemption will occur outside the United States whenever possible. It is willing to act alone when necessary, and will use force against other States in order to deny terrorists either support or sanctuary.

In February 2003, the President issued the *National Strategy for Combating Terrorism (NSCT)*.³⁶ The *NSCT* refines the *NSS*'s grand strategy for fighting terrorism. There are four foci: (1) defeating terrorists; (2) denying them sponsorship, support, and sanctuary; (3) working to diminish those conditions which lead individuals to turn to terrorism; and (4) defending against terrorists.³⁷

In setting out this strategy, the *NSCT* notes how the nature of terrorism has changed.³⁸ In the past, terrorism was a secular and nationalistic phenomenon, one heavily dependent on the support of State-sponsors. Over time, the United States successfully applied a variety of techniques, including diplomacy and economic sanctions/incentives, against terrorism. Collapse of one of terrorism's key sponsors, the Soviet Union, contributed immensely to the effectiveness of the U.S. counter-terrorism campaign.

Unfortunately, adaptation, rather than defeat, resulted. Leveraging advances in technology, communications, and travel, terrorism became truly transnational, as exhibited by al-Qa'ida operations from scores of countries. Although still tied to States in some cases, terrorist groups have often turned to criminal activities, such as drug trafficking, to finance their activities. Their methodologies have also evolved. For instance, the desire to create mass casualties, exemplified by the 9/11 attacks, heightens the likelihood they will eventually resort to weapons of mass destruction. As

35. *NSS*, *supra* note 14, ch. III (emphasis added).

36. *NSCT*, *supra* note 31.

37. *Id.* at 29.

38. *Id.* at 7.

the *NSCT* notes, “The new global environment, with its resultant terrorist interconnectivity, and WMD are changing the nature of terrorism.”³⁹

The *NSCT* expressly amplifies the strategic threads contained in the *NSS*. First, while law enforcement will continue to be used against suspected terrorists, “decisive military power and specialized intelligence resources” will also be employed.⁴⁰ The sole example of *decisive* military force against terrorists in the past is Operation Enduring Freedom itself. The *NSCT* makes clear that military operations are no longer the exception in counter-terrorism.

It also emphasizes a willingness to act unilaterally and/or preemptively. The asserted legal basis for doing so is self-defense.⁴¹ In citing self-defense, the *NSCT* echoes the *NSS*’s discussion of preemption in international law.

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

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. . . .

39. *Id.* at 10.

40. *Id.* at 17.

41. The *NSCT* states:

The United States will constantly strive to enlist the support of the international community in this fight against a common foe. If necessary, however, we will not hesitate to act alone, to exercise our right to self-defense, including acting preemptively against terrorists to prevent them from doing harm to our people and our country.

Id. at 3.

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.⁴²

One of the primary reasons the United States has adopted a preemptive approach to terrorism is the possibility that terrorists might employ weapons of mass destruction. For the Administration, this prospect fundamentally transforms the nature of the terrorist threat, and, resultantly, the means necessary to respond to it. The danger is that “[s]ome irresponsible governments—or extremist factions within them—seeking to further their own agenda may provide terrorists access to WMD.”⁴³ Again, the United States is unambiguous in articulating its policy. Labeling such a possibility “unacceptable,” the strategy promises “swift, decisive action” to interdict either material support or WMD before reaching terrorists.⁴⁴

The strategy stresses a U.S. willingness to strike not only at terrorists, but also at those who support them or offer sanctuary when necessary. It notes that the permeable borders of the twenty-first century inure to the benefit of terrorists. But the *NSCT* also addresses the reality that terrorists will continue to require bases of operations and points out that “states around the world still offer havens—both physical (for example, safe houses, training grounds) and virtual (for example, reliable communications and financial networks)—that terrorists need to plan, organize, train and conduct their operations.”⁴⁵ In response, the United States will first seek to convince those States to comply with their obligations under international law. Where they do not, it “will act decisively to counter the threat they pose and, ultimately, to compel them to cease supporting terrorism.”⁴⁶

This strategy has numerous normative fault lines. In terms of *jus ad bellum*, the most important are: (1) the use of military force against non-State actors, such as terrorists; (2) the nature of the attack that allows for a military response; (3) crossing borders to conduct counter-terrorist opera-

42. NSS, *supra* note 14, at 15-16.

43. NSCT, *supra* note 31, at 21.

44. *Id.*

45. *Id.* at 6.

46. *Id.* at 12.

tions; (4) the use of preemptive force against either terrorists or their State-sponsors; and (5) the use of force against State-sponsors of terrorism.

1. The Use of Force Against Terrorists

For many centuries, war has been the nearly exclusive province of States. To the extent that non-State actors became involved in systematic violence, the appropriate paradigm was that of international and criminal law enforcement, not armed conflict. For instance, in 1988 terrorists blew up Pan American Flight 103 over Lockerbie, Scotland; 270 people died in the attack. However, President Bush chose not to respond militarily, instead preferring to allow a Scottish Court sitting in the Netherlands to try the suspects following intensive diplomatic efforts to secure their extradition from Libya.⁴⁷ Five years later, a terrorist attack against the World Trade Center killed six and injured over 1000. As with the Lockerbie case, the incident was dealt with exclusively through law enforcement channels, with legal issues centering on extradition and trial, most notably the indictment of Osama bin Laden.⁴⁸ Moreover, the United States has consistently supported tightening the law enforcement regime through strong support of such international agreements as the Terrorist Bombing Convention and Terrorist Financing Convention.⁴⁹

Consistent with this prevailing paradigm, the *jus ad bellum* governing the resort to armed military force by States has typically been interpreted restrictively. Consider Operation El Dorado Canyon in 1986, during which the United States launched attacks against targets in Libya (including terrorist bases and training facilities) following the bombing of a Berlin discothèque by a Libyan-supported group. International reaction to the

47. The accused bombers were tried in *Her Majesty's Advocate v. Al Megrahi*, Case No. 1475/99, at 1 (H.C.J. 2001) (Scot.), available at <http://www.scotcourts.gov.uk/download/lockerbiefjudgement.pdf>. Megrahi was found guilty and sentenced to life imprisonment in January 2001; the Court accepted the allegation that he was a member of Libya's Jamahariya Security Organization. In March 2002, Megrahi's appeal was denied. *Ali Mohamed v. Her Majesty's Advocate*, Appeal No: C104/01 (H.C.J. 2002) (Scot.).

48. Indictment, *United States v. Usama bin Laden*, S(9) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998), available at <http://www.terrorismcentral.com/Library/Incidents/USEmbassyKenyaBombing/Indictment/Start.html>.

49. International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. GAOR 6th Comm., 52d Sess., Agenda Item 152, U.N. Doc. A/52/63 (1997), reprinted in 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR 6th Comm., 54th Sess., Agenda Item 160, U.N. Doc. A/54/615 (1999), reprinted in 39 I.L.M. 270 (2000).

U.S. strikes was generally condemnatory.⁵⁰ Although President Reagan justified the action based on self-defense pursuant to Article 51 of the UN Charter,⁵¹ support for this position came only from the closest U.S. allies, such as the United Kingdom and Israel. The General Assembly even passed a resolution “deploring” the operation.⁵²

Attitudes began to change in the late 1990s. After the 1998 bombings of the U.S. embassies in Nairobi and Dar es Salaam, which resulted in the deaths of 300, including twelve Americans, the United States launched cruise missile attacks against a terrorist facility in Afghanistan and a pharmaceutical plant in Khartoum.⁵³ The plant was allegedly involved in the production of chemical weapons that could be made available to terrorists.

Pursuant to Article 51 of the UN Charter, the United States announced that it had acted in self-defense.⁵⁴ International reaction to this justification is telling. Unsurprisingly, Iran, Iraq, Libya, Pakistan,⁵⁵ Russia, and Yemen condemned the strikes, while Australia, France, Germany, Japan, Spain, and the United Kingdom supported them.⁵⁶ This division illustrates that there was no clear consensus, as there had been in 1986, that crossing into a sovereign State to strike terrorists was necessarily illegal. On the contrary, as the line-up suggests, international politics drove reactions to

50. See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. INT'L L. 3, 33-34 (1999), for a summary of the international reaction to El Dorado Canyon. See also Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99 (1994).

51. The Administration initially seemed to base the operation on both anticipatory self-defense and retaliation. For example, in the President's national address, he noted, “Several weeks ago in New Orleans, I warned Colonel Qadhafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently, I made it clear we would respond as soon as we determined conclusively who was responsible . . .” President Ronald Reagan, Address to the Nation, Washington, D.C. (Apr. 14, 1986), in DEP'T ST. BULL., June 1986, at 1-2. But the President ultimately focused on a classic self-defense justification: “Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight—a mission fully consistent with Article 51 of the U.N. Charter.” *Id.* See also White House Statement, in DEP'T ST. BULL., June 1986, at 1. It is relevant that the United States also believed Libya was planning attacks on up to thirty diplomatic facilities worldwide. See Joint News Conference by Secretary Schultz and Secretary Weinberger, Washington, D.C. (Apr. 14, 1986), in DEP'T ST. BULL., June 1986, at 3.

52. *Israelis Praise It While Arabs Vow to Avenge It*, CHI. TRIB., Apr. 16, 1986, at A9.

53. On the U.S. response, see Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999); Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067 (2000); Reisman, *supra* note 50, at 54.

the operations. Further, the two target sets generated differing reactions. For instance, the League of Arab States' Secretariat only condemned the attacks against the plant.⁵⁷ Similarly, Sudan, the Group of African States, the Group of Islamic States, and the League of Arab States all demanded that the Security Council examine the destruction of the pharmaceutical plant by sending a fact-finding mission to Sudan, but made no such request regarding the Afghanistan component of the operation.⁵⁸

What is particularly significant is that most criticism of the Sudanese strike centered not on the fact that the United States had launched it, but rather on whether the target was actually involved in terrorism. In other words, the issue was one of evidentiary sufficiency, not legal authority to act. The international reaction aptly illustrates the extent to which commu-

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These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin Laden organization. That organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self defence confirmed by Article 51 of the Charter of the United Nations.

Letter, Permanent Representative of the United States of America to the United Nations, to President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), <http://www.undp.org/missions/usa/s1998780.pdf>.

55. Pakistan protested the violation of its airspace. Letter, Permanent Representative of Pakistan to the United Nations, to President of the Security Council (Aug. 24, 1998), U.N. Doc. S/1998/794 (1998).

56. Murphy, *supra* note 12, at 164-65 (1999).

57. Letter, Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/789 (1998).

58. Letter, Permanent Representative of the Sudan to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/786, Annex (1998); Letter, Permanent Representative of Namibia to the United Nations, to President of the Security Council (Aug. 25, 1998), U.N. Doc. S/1998/802 (1998) (Group of African States request); Letter, Charge d'Affaires A.I. of the Permanent Mission of Qatar to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/790 (1998) (Group of Islamic States request); Letter, Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/791 (1998) (League of Arab States request).

nity expectations regarding the direct use of force against terrorists had changed since 1986. But even in the case of these bombings, the military response was limited and the United States relied primarily on law enforcement. Ultimately, an international criminal investigation led to trial in U.S. federal court for a number of those involved.

The attacks of 11 September 2001, and the reaction thereto, clarified matters dramatically. It is indisputable that an on-the-spot military response in the face of the attacks would have been justifiable, but, tragically, by the time the United States could react, the four attacks were over. Instead, it launched an after-the-fact military operation against al-Qa'ida bases in Afghanistan. Upon doing so, it formally notified the Security Council that its legal basis for the operation was self-defense, as it had previously done in the East African cases.⁵⁹ So too did the United Kingdom, which participated in the initial strikes on 7 October 2001.⁶⁰ But does the law of self-defense apply to acts by non-State actors and, if so, under what circumstances?

Article 51 of the UN Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁶¹

Note that the text does not limit self-defense to attacks by States, even though at the time of drafting, State action was obviously, given the conflagration just ended, the intended subject. Similarly, Article 39, which

59. Letter, Permanent Representative of the United States of America to the United Nations, to President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/946 (2001), <http://www.un.int/usa/s-2001-946.htm>.

60. Letter, Charge d'Affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations, to President of the Security Council (Oct. 7, 2001), http://www.ukun.org/xq/asp/SarticleType.17/Article_ID.328/qx/articles_show.htm.

61. U.N. CHARTER art. 51.

provides the basis for Security Council authorization of a use of force in the face of a threat to the peace, breach of peace, or act of aggression, does not refer to the sources of such threats, breaches, or acts. By contrast, Article 2(4), which outlaws the use of force, specifically applies to Members (by definition, States).⁶²

Article 31.1 of the Vienna Convention on the Law of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶³ The first purpose of the United Nations is

[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁶⁴

An interpretation extending the right of self-defense to attacks by non-State actors is therefore consistent with both the ordinary meaning of the text and the purposes of the United Nations. The text fails to mention States in Article 51, although doing so in 2(4), *and*, as evidenced by 9/11 and its aftermath, terrorism can do great violence to international peace and security.

The Vienna Convention also provides that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” is relevant when interpreting an interna-

62. “*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.” *Id.* art. 2(4) (emphasis added). Quite aside from issues of treaty construction, the reference to States (members) in the prohibitory language of 2(4) makes sense, since violence by non-State actors is already criminalized in domestic and international penal law; a Charter prohibition would have been duplicative.

63. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, art. 31.1, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], *reprinted in* 8 I.L.M. 679 (1969).

64. U.N. CHARTER art. 1.1.

tional agreement.⁶⁵ This practice, both before the U.S./UK attacks of 7 October and thereafter, was revealing. In the immediate aftermath of 9/11, the UN Security Council passed a number of resolutions. Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the “inherent right of self-defense as recognized by the Charter of the United Nations.”⁶⁶ Two weeks later, the Council did so again in Resolution 1373.⁶⁷ Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State.

Other intergovernmental organizations also treated the attacks as implicating the right to self-defense. The North Atlantic Council invoked Article V of the North Atlantic Treaty, a provision expressly based on Article 51 of the Charter,⁶⁸ while the Organization of American States invoked Article 3.1 of the Inter-American Treaty of Reciprocal Assistance, its analogous provision.⁶⁹ Australia offered combat forces pursuant to the ANZUS Treaty’s collective self-defense article.⁷⁰ There were also many bilateral offers of combat forces or other forms of support for the prospec-

65. Vienna Convention, *supra* note 63, art. 31.3(b).

66. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., pmb., U.N. Doc. S/RES/1368 (2001). It is interesting that the Security Council did not reference self-defense in response to the 1998 attacks on the East African embassies even though the United States formally invoked Article 51. According to Article 39 of the UN Charter, the Security Council has cognizance over “any threat to the peace, breach of the peace, or act of aggression” and decides upon measures necessary to “maintain or restore international peace and security.” U.N. CHARTER art. 39. Therefore, labeling the acts as a threat to international peace and security is normatively significant in that it empowers the Council to act.

67. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., pmb., U.N. Doc. S/RES/1373 (2001). The General Assembly did not refer to the right to self-defense in its resolution on the topic. G.A. Res. 56/1, U.N. GAOR, 56th Sess., Agenda Item 8, U.N. Doc. A/56/L.1 (2001).

68. Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001), <http://www.nato.int/docu/speech/2001/s011002a.htm>. Article V provides that

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

North Atlantic Treaty, *supra* note 13, art. 5.

tive U.S. military action that can only be interpreted as acknowledgements that a U.S. use of force against the non-State perpetrators was a legitimate exercise of the right of self-defense.⁷¹ Indeed, certain NATO States, as well as NATO itself, appeared somewhat miffed when the United States decided to act with a carefully crafted coalition of the willing of its own choosing. There is no doubt that by October 10, the overwhelming majority of the global community was comfortable with an interpretation of the law of self-defense that allows defensive actions against non-State actors.

Post-October 10 practice was no different. By now, it was clear that the United States was striking directly at terrorists in a well-planned military operation, action beyond simple law enforcement or on-the-spot defense. Nevertheless, in resolution after resolution, the Security Council continued to reaffirm the pre-10/10 resolutions that had referred to the right of self-defense. For instance, a week after the U.S./UK campaign began, the Security Council encouraged “international efforts to root out

69. Terrorist Threat to the Americas, Resolution 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001). Article 3.1 provides:

The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 62 Stat. 1681, 21 U.N.T.S. 77.

70. Prime Minister John Howard, Government Invokes ANZUS Treaty—Press Conference (Sept. 14, 2001), <http://australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml>; see also U.S. Dep’t of State, *Fact Sheet, White House: Operation Enduring Freedom Overview* (Oct. 1, 2001) [hereinafter *White House Fact Sheet*], at <http://www.state.gov/s/ct/rls/fs/2001/5194.htm> (last visited June 18, 2002). Article VI of the ANZUS Treaty provides: “Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.” Security Treaty (Australia, New Zealand, United States), Sept. 1, 1951, art. IV, 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 84.

71. Russia, China, and India shared intelligence, while Japan and South Korea offered logistics support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan agreed to cooperate fully with the United States. Twenty-seven nations granted overflight and landing rights, and forty-six multilateral declarations of support were obtained. *White House Fact Sheet, supra* note 70.

terrorism, in keeping with the Charter of the United Nations” in Resolution 1378.⁷² Subsequent resolutions contained similar verbiage.⁷³ The European Union also expressed support for the counter-terrorist military campaign, while no significant intergovernmental organization objected.⁷⁴ Many States offered bilateral support, both moral and material.⁷⁵

International reaction to the attacks of 9/11 and the military response they engendered complete the trend towards acceptance of the use of force against terrorists as a form of self-defense. This aspect of the new *Bellum Americanum* now seems, over fifteen years after Operation El Dorado Canyon, to be uncontroversial.⁷⁶

2. *Terrorism as an Armed Attack*

While it has become plain that non-State actors can be the source of an “armed attack” under the law of self-defense, the issue of when an individual act of terrorism will rise to that level is murkier. No strategy document issued by the Administration has addressed this issue—with good reason. Setting any particular threshold of violence as an armed attack

72. S.C. Res. 1378, U.N. SCOR, 56th. Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001).

73. See, e.g., S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., U.N. Doc. S/RES/1386 (2001); S.C. Res. 1390, 57th Sess., U.N. SCOR, 4452d mtg., U.N. Doc. S/RES/1390 (2002).

74. Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 49 (2002); Murphy, *supra* note 12, at 248. The European Council “confirm[ed] its staunchest support for the military operations . . . which are legitimate under the terms of the United Nations Charter and of Resolution 1368.” Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, Oct. 19, 2002, SN 4296/2/01 Rev. 2.

75. Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered combat forces. Murphy, *supra* note 12, at 248.

76. But see, e.g., Antonio Cassese, *Terrorism Is also Disrupting Some Crucial Legal Categories of International Law*, European Journal of International Law Discussion Forum, at http://www.ejil.org/forum_WTC/ny-cassese.html. See also Giorgio Gaja, *In What Sense Was There an “Armed Attack”?*, European Journal of International Law Discussion Forum, http://www.ejil.org/forum_WTC/ny-gaja.html.

would tie the hands of those wishing to retain discretion as to when to respond militarily.

The U.S. approach to combating terrorism is very aggressive, one amounting to a global war on terrorism (GWOT). In other words, it is not simply a war on al-Qa'ida, but a war against terrorism generally. That said, not every isolated act of terrorism is an "armed attack" that legally justifies a robust military response pursuant to the law of self-defense. Where does the line lie?

The International Court of Justice (ICJ) addressed the meaning of "armed attack" in its landmark case, *Nicaragua*. In this case, the United States argued that it had the right to act in collective self-defense against Nicaragua on behalf of El Salvador because of the former's assistance to Salvadorian guerillas. The Court held that an armed attack must be of a "sufficient scale and effects," an action of "significant scale."⁷⁷ A simple border incident, for instance, was not enough to satisfy the Court that the "armed attack" line had been crossed.

"Significant" is an imprecise standard, but at least it clarifies that certain uses of force do not entitle the target State to respond forcefully pursuant to the law of self-defense. In seeking further clarification, it is useful to turn to that law itself. There are three criteria for the lawful defensive use of force derived from the celebrated nineteenth century case of the *Caroline*.⁷⁸ First, the use must be proportional, that is, no more than actually required to effectively mount a defense. This may be more or less force than used in the initial armed attack. Second, the defensive use of force may occur only in the face of an ongoing or imminent attack. We shall return to this subject in the context of preemption. Finally, it must be necessary, that is, the last viable alternative. Other avenues of resolving the situation satisfactorily, such as diplomacy, economic sanctions, or judi-

77. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04, para. 195 (June 27) (Merits).

78. The case is described in R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 32, 32-39 (1938). The *Caroline* standard, and the criteria it has been interpreted as representing, were spoken of approvingly by the Nuremberg Tribunal. See International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 205 (1947). The International Court of Justice has done likewise in both the *Nicaragua* case and the *Advisory Opinion on the Use of Nuclear Weapons. Military and Paramilitary Activities*, 1986 I.C.J. at 94, para. 176; *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. para. 41 (July 8); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 905 (1987).

cial remedies, should be either exhausted or reasonably certain not to succeed.

This requirement has enormous implications for the approach proffered in the U.S. strategies. As we are seeing in the case of the attack against Iraq, many States, groups, and individuals react quite negatively when it appears that options short of the use of military force remain open. Of course, States have a stake in preserving barriers to the use of force against States that they do not have with respect to terrorists. Even so, actions seen as precipitous, as demonstrated in the case of the 1998 Sudanese strikes, are unlikely to achieve widespread acceptance as legal.

The most likely situation involving a lack of necessity vis-à-vis terrorists is when law enforcement efforts could adequately address potential terrorism. If so, military operations to counter it would not be permissible under the law of self-defense. The expected terrorism would constitute criminal actions against which all forms of law enforcement could be applied, but it would not be an "armed attack," as that term is used in the *jus ad bellum*.

Arguably, an assessment of the necessity criterion might appear unresponsive to the ICJ's standard, for "significant" suggests a quantum of violence, not the range of options for responding to it. However, the underlying logic of the standard is that an armed attack is an action of a nature to necessitate a forceful response beyond the law enforcement paradigm. Thus, the necessity standard can serve as cognitive shorthand for the ill-defined term "significant." In fact, it actually provides a closer fit with the community objective of fostering peace and security. Although the size of a terrorist attack certainly has bearing on the extent to which international peace and security is affected, the likelihood of it being successfully prevented without escalating the overall level of violence is much more determinative. In other words, a major attack that law enforcement can thwart is less threatening than a lesser one likely to elude authorities unless the military becomes involved. By failing to address this issue, the U.S. strategies create a lacuna that will only be filled as the GWOT continues and State reactions gel into an ascertainable community assessment of individual operations therein.

3. *Crossing Borders*

The U.S. strategies described above envision taking the fight to the terrorists by striking at them outside the borders of the United States. Without question, it may legally do so with the consent of the State on whose territory the operations occur. For instance, as part of its GWOT, in February 2003 the United States announced the deployment of troops to the Philippines to assist that country in its fight against Muslim extremists.⁷⁹ Such operations must comply with applicable U.S. law, the law of the Philippines, and international human rights law, but there is no significant *jus ad bellum* issue because they are occurring with the full acquiescence of the legitimate Philippine government.

Conducting counter-terrorist operations in a State without its consent, by contrast, is problematic because the existing State-centric international system accords great weight to territorial integrity. It is a customary international law right of *jus cogens* status codified in the UN Charter's prohibition on the use of force "against the territorial integrity . . . of any State."⁸⁰ Violation of that prohibition can amount to aggression, even an armed attack that empowers the "victim" State to respond in self-defense.⁸¹ The principle lies at the root of most objections to counter-terrorist operations of the past. For example, El Dorado Canyon evoked condemnation not because of sympathy for Libyan policies and practices, but rather because the United States was viewed as violating one of the core principles of international law, a principle which benefited all States, especially in a bipolar nuclear armed world.

The risk that extraterritorial military actions will escalate into a major superpower confrontation has faded away in the early twenty-first century. This does not mean that States no longer value the principle of territorial

79. Eric Schmitt, *U.S. to Send 1,700 Troops to Philippines*, INT'L HERALD TRIB., Feb. 22-23, 2003, at 2.

80. U.N. CHARTER art. 2(4). In the 1966 Commentary to the Final Draft Articles on the Law of Treaties (Article 50), the International Law Commission stated, in a comment later referred to in the *Nicaragua* judgment, "that the law of the Charter concerning the prohibition of the use of force in itself consists of a conspicuous example of a rule in international law having the character of *jus cogens*." SIR ARTHUR WATTS, II THE INTERNATIONAL LAW COMMISSION: 1949-1998, at 741 (1999). Such peremptory norms cannot be derogated from, even by treaty, and thus represent the most powerful genre of international law.

81. Aggression has been authoritatively defined as including the "use of armed force by a State against the . . . territorial integrity . . . of another State." G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, Annex, art. 1 (definition of aggression), U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 (1974).

integrity, but rather that the global community is increasingly willing to countenance violation of a State's territory when countervailing principles of law are at stake. In the case of terrorism, that principle is the right of the State to defend itself. When conflicting rights clash in international law, the appropriate response is to balance them, seeking the best accommodation of both in a way that maximizes community interests.

In the case of terrorism, the State from which the terrorists operate has a duty to police its territory to keep it from being used to the detriment of others. John Basset Moore provided the classic enunciation of this principle nearly eight decades ago in his dissent in the *Lotus* case: "it is well settled that a State is bound to use due diligence to prevent commission within its dominions of criminal acts against another nation or its people."⁸² Since then, the principle has been repeated in the context of terrorism in such instruments as the 1970 Declaration on Friendly Relations,⁸³ 1994 Declaration on Measures to Eliminate Terrorism,⁸⁴ and multiple pre- and post-9/11 Security Council resolutions insisting the Taliban take action to keep terrorists from operating within Taliban-controlled territory.⁸⁵

The *Caroline* case, from which the core principles of the law of self-defense are drawn, was just such a situation. Canadian rebels were operating from within the United States, which, despite British demands, failed to prevent activities. Only when the United States failed to (or could not) comply with its duty to ensure its territory was not being used to the detriment of its neighbor did the British cross onto U.S. soil for the limited purpose of striking against the rebels. Their forces withdrew as soon as the mission was complete. In the ensuing exchange of diplomatic notes between the United States and United Kingdom, the issue was not the

82. S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

83. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex, U.N. Doc. A/Res/2625 (1970), reprinted in 65 AM. J. INT'L L. 243 (1971).

84. Declaration on Measures to Eliminate Terrorism, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., Agenda Item 142, U.N. Doc. A/49/743 (1994); Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. A/51/631 (1996).

85. See, e.g., S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); S.C. Res. 1363, U.N. SCOR, 56th Sess., 4352d mtg., U.N. Doc. S/RES/1363 (2001); S.C. Res. 1378, *supra* note 72; S.C. Res. 1390, *supra* note 73.

appropriateness of the penetration, but whether the act was excessive or not.

Balancing these aforementioned rights and duties yields a number of conclusions. The right to self-defense, particularly in the face of potentially catastrophic terrorism, must allow States to defend themselves against terrorists wherever they are to be found. However, the principle of territorial integrity would logically grant the State where the terrorists are located an opportunity to put an end to the terrorist presence before the victim-State acts. Moreover, it is only reasonable to impose a duty on the victim-State to demand compliance, as the British did in *Caroline* and the United States did prior to striking Afghanistan,⁸⁶ before non-consensually entering another's territory. Finally, pursuant to the self-defense principle of proportionality, the operation must be limited to those actions necessary to put an end to the terrorists' ability to continue to mount attacks; as soon as this objective is attained, the forces must withdraw.

This analysis is supportive of the U.S. strategy of taking the fight to the terrorists . . . with the important caveats just cited. However, it only answers the question of whether such operations comport with emerging international law norms. It is also necessary to ask *when* they may be conducted.

4. Preemption

As noted, the new U.S. strategies are replete with references to preempting terrorist attacks, as well as the use or transfer of weapons of mass destruction. In the context of terrorism, preemption is most likely to sur-

86. For instance, in an address to Congress, the President insisted that the Taliban:

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

President Bush Response to Terrorist Acts, *supra* note 33, at 1347. The demands were made through Pakistan as well.

face as a purported exercise of the right to self-defense. The specific legal issue raised by preemption is “imminency,” a criterion discussed by Hugo Grotius in the fifteenth century⁸⁷ and by Secretary of State Daniel Webster with respect to the nineteenth century *Caroline* incident. According to Webster, there must be a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation” and the defensive action cannot be “unreasonable or excessive.”⁸⁸

This standard is often mischaracterized as a temporal one, that is, that the act of anticipatory self-defense can only occur immediately preceding the anticipated armed attack. Such an interpretation would, at first glance, make sense, for it would allow the greatest opportunity for exhaustion of non-forceful options prior to the resort to force. Concerns about this purported construal may have motivated the *NSS* conclusion that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”⁸⁹ In particular, the *NSS* argues that the greater the

87. War in defense of life is permissible only when the danger is immediate and certain, not

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

HUGO GROTIUS, *II DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch. I, para. V (Carnegie Endowment trans. 1925) (1625).

88. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *reprinted in* 2 J. B. MOORE, *A DIGEST OF INTERNATIONAL LAW* 409, 412 (1906).

89. *NSS*, *supra* note 14, at 15 (emphasis added). The Secretary of Defense’s Annual Report makes the same point in a “lessons learned” section. “[D]efending the United States requires prevention and sometimes preemption. It is not possible to defend against every threat, in every place, at every conceivable time. The only defense against [sic] is to take the war to the enemy. The best defense is a good offense.” DONALD RUMSFELD, *ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS*, 2002, at 30, <http://www.defenselink.mil/exec-sec/adr2002/index.htm>.

risk posed by a potential terrorist act, the greater the acceptable level of uncertainty as to its time and place.⁹⁰

In fact, the temporal interpretation, although popularly held, is flawed. The purpose of the law of self-defense is to provide States an avenue for defending themselves, at least until the international community can address the situation.⁹¹ However, international law does not create meaningless rights, and waiting to defend oneself until moments before an attack may well be to wait too long. In modern warfare, a single blow can be instantaneous and devastating, particularly in an era of WMD proliferation. Additionally, despite the advances of C4ISR technology, the advent of transnational terrorist groups operating from diverse locations has actually thickened the Clausewitzian fog of war. Thus, as noted in the Bush strategies, twenty-first century conflict exacerbates both uncertainty and risk.

Given this fact, the only logical interpretation of imminency is one allowing for defensive actions during the last viable window of opportunity, the point at which any further delay would render a viable defense ineffectual. In some cases, this window may close long before the armed attack is to occur. For instance, a State may acquire intelligence about the location of a terrorist cell planning a future act of terrorism. Since terrorists are highly mobile, this may represent the last opportunity to prevent the attack. Assuming a law enforcement operation would be unlikely to avert it (the necessity criterion), a State may strike the cell in self-defense. Any other interpretation would gut the right of self-defense.

Thus, international law norms of self-defense are flexible enough to allow for preemptive strategies. However, somewhat more problematic is the assertion in the *NSS* that the level of risk should influence the level of certainty required as to when and where the terrorist attack will take place. This is a novel normative assertion. The greater the uncertainty as to time and place, the less confident one can be that an action in self-defense has occurred only after exhaustion of the alternative remedies (necessity) and

90. *NSS*, *supra* note 14, at 16.

91. The Article 51 reference to using self-defense “until the Security Council has taken measures necessary to maintain international peace and security” is subject to varying interpretations. The question is whether Security Council action can dispossess a State of the right to conduct defensive actions and, if so, how and when. There has been no example of the UN taking steps that purportedly had this effect.

during the last window of opportunity (imminency). Thus, the *NSS* proposal essentially lowers the bar for these two criteria.

In a world of WMD, terrorists, and rogue States, there is great appeal to evolution of the law in this direction. Moreover, support from some corners for the aggressive U.S. response to Iraq's failure to verifiably disarm suggests that there is a trend in this direction. However, a potentially slippery slope looms large. Should India, assessing the risk of Pakistani nuclear weapons, lower the threshold for a preemptive strike, or vice versa? What about North Korea? And so on.

While the approach makes some sense, one must not construe it as lowering the threshold of certainty regarding the *likelihood* of armed attack. This is a quite different matter, for whereas time and place bear on the timing of self-defense, likelihood bears on whether it is needed in the first place. Given that the resort to force is the most dramatic step a State may take in international relations, the only reasonable standard is one approaching the "beyond a reasonable doubt" standard employed in domestic law.⁹² If reasonable doubt exists about whether an armed attack might occur, then it would clearly be contrary to international law's purpose of maintaining international peace and security to allow a defensive resort to force.

The aforementioned logic generally supports the Administration's express intent to preempt attacks on the United States. It is appropriate and legal to employ force preemptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack. This standard combines an exhaustion of remedies component with a requirement for a very high reasonable expectation of future attacks—an expectation that is much more than merely speculative.

Interestingly, much of the brouhaha over the preemption policy derives from a mischaracterization of terrorist attacks as isolated. It is

92. Yoram Dinstein has suggested a "beyond reasonable doubt" standard for determining when non-forceful remedies have been exhausted. Professor Dinstein was specifically addressing a situation in which terrorists or an armed band had already conducted an attack and there was fear of follow-on attacks. He notes that "[t]he absence of alternative means for putting an end to the operations of the armed bands or terrorists has to be demonstrated beyond reasonable doubt." YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 220 (3d ed. 2001). Although proposed here in a slightly different context, the logic of the standard fits.

more fitting to think of them as part and parcel of a single extended campaign. Consider al-Qa'ida. The group was involved in the 1993 World Trade Center bombing and has claimed responsibility for an attack against U.S. Special Forces in Somalia the same year. It was also implicated in the 1998 bombings of the U.S. embassies in East Africa and the 2000 attack on the *USS Cole*. Further, al-Qa'ida has been tied to a number of plots that did not come to fruition, such as a millennium celebration attack in Jordan, a plot to destroy multiple airliners, and assassination of President Clinton and the Pope.⁹³ Of course, it masterminded the 9/11 attacks. Today, the group remains active despite the massive international law enforcement and military coalition arrayed against it. Indeed, CIA Director George Tenet told the Senate Select Intelligence Committee in February 2003 that al-Qa'ida remains the greatest single threat against the United States; during 2002 alone, over 200 people died in al-Qa'ida attacks, nineteen of them American.⁹⁴

So, it is most logical to treat these events as a single campaign that is ongoing, much as a campaign in traditional warfare consists of a series of related tactical operations. In the same way that the conflict does not end upon a tactical pause between operations, a terrorist campaign continues despite hiatuses between attacks. Therefore, once the terrorist campaign is launched, the issue of preemption becomes moot because an operation already underway cannot, by definition, be preempted. Since the right to self-defense has matured fully, the sole issue is whether the campaign is going to continue or not. While this may be questionable after the first strike, it surely is not as the number of attacks climbs. In the case of al-Qa'ida, to even ask the question now approaches absurdity.

In sum, the Administration's preemptive strategies are far more consistent with existing notions of international law than they get credit for. The true test will be the extent to which the United States and other coun-

93. U.S. Dep't of State, *Patterns of Global Terrorism, app. B: Background Information on Terrorist Groups, al-Qa'ida* (Apr. 30, 2001), at <http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm>.

94. *The Worldwide Threat in 2003: Evolving Dangers in a Complex World, Hearing Before the Senate Select Intelligence Comm.*, 108th Cong. (2003) (testimony of George Tenet, Director, Central Intelligence Agency), quoted in U.S. Dep't of State, *Tenet Says Terror Threat Information "Most Specific We Have Seen"* (Feb. 11, 2003), at <http://usinfo.state.gov/topical/pol/terror/03021106.htm>.

tries carrying out such strategies will abide by the requirements of necessity, proportionality, and imminency.

5. *State-Sponsors of Terrorism*

The U.S. strategies unambiguously state that the United States will insist that States police their own territory. As seen, failure to do so, whether because of inability or unwillingness, allows the victim-State to engage in self-help operations against terrorists within the territory of those States. Yet, the United States also asserts a willingness to “compel” those who support or harbor terrorists to desist. Can the victim of terrorism by a non-State actor directly attack a State-sponsor of terrorism, and, if so, when?

Much attention has been paid since September 11th to the law of State responsibility; specifically, when can a State be held responsible for acts carried out from its territory or under its direction? This issue is a red herring in the context of using force directly against that State because the traditional remedies for a breach of State responsibility include restitution, compensation, and satisfaction.⁹⁵ Although countermeasures are also permissible,⁹⁶ Article 50 of the International Law Commission’s Articles on State Responsibility specifically provides that “[c]ountermeasures shall not affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”⁹⁷ Therefore, any use of force in response to a breach of State responsibility must be consistent with one of the two Charter exceptions to the prohibition on the use of force—

95. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 77-85, arts. 34-37 (2002). Restitution is reestablishing “the situation which existed before the wrongful act was committed,” *id.* art. 35; compensation is covering any financially assessable damage not made good by restitution, *id.* art. 36; satisfaction is “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality” that responds to shortfalls in restitution and compensation when making good the injury caused, *id.* art. 37.

96. Countermeasures are “measures which would otherwise be contrary to the international obligations of the injured State vis-à-vis the responsible State if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.” *Id.* at 281.

authorization under Chapter VII (to be discussed in the context of WMD) and self-defense.

Since an “armed attack” is the condition precedent to self-defense, the question is when may terrorist acts be attributed to a State-sponsor such that it has constructively committed an armed attack meriting a defensive response directly against it. Again, the *Nicaragua* case provides guidance. Recall that the United States argued that Nicaragua’s support to guerillas fighting El Salvador amounted to an armed attack, thereby justifying operations against Nicaragua in the collective self-defense of El Salvador. The ICJ rejected this line of reasoning.

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed 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.” This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314(XXIX), may be taken to reflect customary international law.

But the court does not believe that the concept . . . includes . . . assistance to the rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to an intervention in the internal affairs of other States.⁹⁸

97. *Id.* art. 50.1(a). The article is consistent with the International Court of Justice’s decision in *Corfu Channel*. The case involved an incident in which two British destroyers struck mines in Albanian waters while transiting the Corfu Strait in 1946. Though the evidence was insufficient to demonstrate that the Albanians laid the mines, the Court nevertheless held that they had the obligation to notify shipping of the danger posed by the mines. Albania’s failure to do so represented an internationally wrongful act entailing the international responsibility of Albania. But the Court also held that Albania’s failure to comply with its responsibility did not justify the British minesweeping of the Strait, an act that therefore constituted a violation of Albanian sovereignty. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (Merits).

By this standard, the U.S. strategies clearly overreach. They envisage military operations against a State for far less than “sending” terrorists or “substantial involvement” in their activities. On the other hand, they foresee no more than the actions taken against the Taliban; after all the Taliban were more dependent on al-Qa’ida than vice versa. Essentially, all the Taliban offered was safe harbor. Yet, when the United States and United Kingdom attacked on 10 October, Taliban targets were among the first struck. As a result, the attacks offer a unique opportunity to assess community reactions to the new U.S. strategy that they predated.

Strikingly, the reactions were almost uniformly supportive. As 10 October approached, it became clear that the United States had both al-Qa’ida and the Taliban in its crosshairs. However, with the exception of somewhat limited discourse within academia, no State or intergovernmental organization seemed to object.

The failure to distinguish between the Taliban and al-Qa’ida continued as the counter-terrorist operations unfolded. Support for the operations was extraordinarily high. In particular, the Security Council passed a number of normatively relevant resolutions after the attacks began. Resolution 1378, issued in mid-November, not only applauded the “international efforts to root out terrorism,” but also reaffirmed Resolutions 1368 and 1373 (which had referred to self-defense).⁹⁹ It specifically singled out the Taliban, condemning them for “allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qa’ida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qa’ida and others associated with them” and expressing support for the “efforts of the Afghan people to replace the Taliban.”¹⁰⁰ Subsequent resolutions likewise failed to distinguish between the legality of the operations against al-Qa’ida and those targeting the Taliban.¹⁰¹ Moreover, the bilateral support

98. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04, para. 195 (June 27) (Merits). Another judgment of relevance is that rendered by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadić*. There the issue was whether acts of Bosnian Serb forces could be attributed to the Federal Republic of Yugoslavia. The Chamber held that the degree of control necessary for attribution varied based on circumstances. Refusing to apply the *Nicaragua* approach in its entirety, the Chamber adopted a standard of “overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations” for acts by an “organized and hierarchically structured group.” *Prosecutor v. Tadić*, No. IT-94-1, 38 I.L.M. 1518, paras. 120, 145 (1999).

99. S.C. Res. 1378, *supra* note 72.

100. *Id.*

described earlier in the context of self-defense against non-State actors in no way distinguished between the Taliban and al-Qa'ida.

Suggesting that State-sponsors of terrorism may be directly attacked is a radical departure from traditional international law, particularly because the issue has already been addressed, and answered to the contrary, by the International Court of Justice. Thus, we are witnessing a dramatic evolution in the law of self-defense. In the future, States that might consider supporting terrorists, or turning a blind eye to their activities, should think twice. Although the extent and nature of support necessary to attribute a terrorist act to a State-sponsor remains unclear, there is little question that the threshold is dropping precipitously. Arguably, we now have an international *jus ad bellum* equivalent of criminal law's doctrine of accomplice liability. Specifically, States will be liable (deemed to have committed the armed attack) for an act of terrorism if they assist or encourage the act, or if they had a duty to stop it and failed to, intending to effectuate it. Indeed, "liability" may well lie when the State facilitates the crime, for example by providing safe haven or supplying weapons, even if it did not intend for the act to be committed, but knew that it would be.

Such dramatic evolution is explicable for a number of reasons. The international community has become painfully aware of the catastrophic consequences of terrorism. It is also finally grasping the potential of superterrorism, as well as its increasing likelihood in a time of WMD proliferation. This realization coincides with a period in which the possibility of armed conflict between superpowers is *de minimus*; there is far less danger of events spiraling out of control than during the Cold War. Thus, as it always does, law is conforming to the context in which it is to be applied. As the risks of terrorism increase, the risks of robust responses thereto are decreasing. Resultantly, we are witnessing the relaxation of international

101. Indeed, Resolution 1386, which (as with Resolution 1378) expressed support for rooting out terrorism in accordance with the Charter, reaffirmed the pre-October 10 resolutions (1368 and 1373). Thus, the fact that the United Kingdom and United States were now striking directly at the Taliban seemed to make no difference to the Council.

law limitations on State options for dealing with the terrorist threat. United States strategy statements lie at the forefront of this trend.¹⁰²

IV. Weapons of Mass Destruction

The United States is also at the cutting edge of strategy involving weapons of mass destruction. In December 2002, the Administration issued the *National Strategy to Combat Weapons of Mass Destruction (NSCWMD)*.¹⁰³ It echoes concerns about WMD expressed in the *National Security Strategy* and other policy statements and documents.¹⁰⁴ The most noteworthy of these was the President's 2002 State of the Union Address. Referring to Iran, Iraq, and North Korea, President Bush declared that

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic. . . . We'll be deliberate, yet time is not on our side. I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons.¹⁰⁵

102. Note that although the United States and United Kingdom have asserted ties between Iraq and al-Qa'ida, many experts discount the allegations. See, e.g., Rohan Gunaratna, *No Evidence of Alliance*, INT'L HERALD TRIB., Feb. 19, 2003, at 6. This skepticism likely explains their emphasis on self-defense and enforcement of Security Council resolutions as the justification for their attack on Iraq.

103. WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (2002) [hereinafter NSCWMD], available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

104. Note that a state of emergency was declared in response to "the proliferation of weapons of mass destruction and their delivery systems" in 1994. Exec. Order No. 12,938, 30 W.KLY. COMP. PRES. DOC. 2386 (Nov. 14, 1994). President Bush has continued this state. George W. Bush, Message to the Congress of the United States, Washington, D.C. (Nov. 6, 2002), <http://www.whitehouse.gov>.

105. President George W. Bush, State of the Union Address, Washington, D.C. (Jan. 29, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

As with terrorism, it is U.S. policy to act early and decisively. In particular, the *NSCWMD* is based on “three pillars”: (1) counterproliferation to combat WMD use; (2) strengthened nonproliferation to preclude WMD proliferation; and (3) consequence management to respond to WMD use.¹⁰⁶

Of these, counterproliferation is relevant here. The United States seeks the capability to “respond with overwhelming force” to any use of WMD and to “disrupt an imminent attack or an attack in progress, and eliminate the threat of future attacks.”¹⁰⁷ Although the *NSCWMD* does not speak of preemption with the clarity of the other strategies, WMD preemption is implicit in the document and explicit in repeated policy statements from the Administration.¹⁰⁸ Moreover, both the *NSCWMD*¹⁰⁹ and *NSCT*¹¹⁰ call for interdiction of WMD before reaching terrorists. What are the legal implications of this strategy?

The law of self-defense discussed in the context of terrorism applies equally to State possession of weapons of mass destruction. Obviously, a State may defend itself against an ongoing armed attack involving WMD. As to defensive action before the armed attack occurs, recall the discussion of terrorism. Before defensive force may be employed, there must be evidence that establishes, arguably beyond a reasonable doubt, that the alleged aggressor-State intends to use WMD. That use may be either against the State that resorts to self-defense or, consistent with the law of collective self-defense, against any other State that seeks its assistance in defending itself. The defensive actions must be necessary, proportional, and take place only in the face of an imminent attack. Recall that necessity requires an exhaustion of alternatives to the use of force, proportionality limits the defensive force to that required to block the forthcoming armed attack, and imminency requires that the prospective victim wait until the last window of opportunity before defending itself.

The classic case study of self-defense against WMD is the 1981 Israeli air strike against the Osirak nuclear reactor outside Baghdad. Although the best ground for justifying the attack was the existence of an armed conflict between Israel and Iraq,¹¹¹ Israel also claimed that “in

106. *NSCWMD*, *supra* note 103, at 2.

107. *Id.* at 3.

108. The *National Security Strategy* devotes a chapter to the subject. *See NSS*, *supra* note 14, ch. V.

109. *NSCWMD*, *supra* note 103, at 2.

110. *NSCT*, *supra* note 31, at 21.

removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defense within the meaning of this term in international law and as preserved also under the United Nations Charter.”¹¹² After all, it had fought Iraq three times (1948, 1967, 1973) and Iraq denied the right of Israel to exist as a State. Israel understandably concluded that it was a future target of Iraqi nuclear capability, which it estimated would be operational by 1985.¹¹³

The Security Council unanimously rejected this assertion and “condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”¹¹⁴ The following month, the General Assembly overwhelmingly passed a resolution that included a “solemn warning” against any further attacks.¹¹⁵ Criticism centered less on the anticipatory nature of the attack, than on the basis Israel asserted for it. Although in retrospect probably incorrect, at the time many disbelieved Israel’s claims about the plant’s connection to the development of nuclear weapons. Consequently, the attack was unnecessary and occurred prior to emergence of any imminent threat.¹¹⁶

The risk posed by Iraq before the U.S./UK attack was far more aggravated than that it presented in 1981. Interestingly, the congressional joint resolution that authorized the President to order U.S. forces into battle against Iraq cites *both* self-defense and enforcement of UN Security Council resolutions as its bases under international law.¹¹⁷ So too did the President’s notification to Congress that he had acted pursuant to the resolution in ordering the attack.¹¹⁸ Nevertheless, the situation arguably failed to meet the criteria for self-defense, a fact that in part explains the Administration’s emphasis on the latter justification. There is no compelling substantiation that Iraq intended to use whatever weapons it might (or may in the future) have had against the United States or any other country, and no

111. See DINSTEIN, *supra* note 92, discussion, at 169.

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

113. Letter, Israel, to Secretary-General of the United Nations (Oct. 19, 1981), U.N. Doc. A/36/610, S/14732 (1981).

114. S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., U.N. Doc. S/RES/487 (1981).

115. G.A. Res. 37/18, U.N. GAOR, 37th Sess. (1982).

116. For a discussion of the legal aspects of the attack, see Anthony D’Amato, *Israel’s Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584 (1983). The attack did, however, meet the proportionality criterion. The Israeli Air Force skillfully conducted the operation, discriminately targeted the source of a major threat to Israel, and violated Iraqi airspace with only a handful of aircraft for a very short period.

country had asked the United States to come to its assistance pursuant to the collective self-defense provisions of the Charter.¹¹⁹ Even if such evidence existed, other alternatives, most notably the UN inspection regime, remained active. Furthermore, there has been no evidence proffered that demonstrates the attack came during the final window of opportunity to disarm Iraq.

Instead, the dominant justification for acting against Iraq is that it failed to fully disarm as required by Security Council resolutions stretching back over a decade.¹²⁰ This failure was acknowledged by the Security Council in Resolution 1441 (November 2002), which found “Iraq’s non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles”¹²¹ a threat to international peace and

117. The resolution provides:

Whereas Iraq’s demonstrated capability and willingness to use weapons of mass destruction, the high risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its armed forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify the use of force by the United States in order to defend itself . . . [The President may] use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq; and . . . enforce all relevant United Nations Security Council resolutions regarding Iraq.

Authorization for the Use of Military Force Against Iraq, Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1499, 1501.

118. Letter from President George W. Bush to the Speaker of the House of Representatives and the President pro Tempore of the Senate (Mar. 21, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030321-5.html>. The British justification was more closely tied to Security Council resolutions—Iraq had breached the cease-fire that suspended hostilities in 1991 (Security Council Resolution 687), thereby reviving the use of force authority contained in Resolution 678 of 1990. United Kingdom Attorney General Lord Goldsmith, *Legal Basis for the Use of Force Against Iraq* (Mar. 17, 2003), <http://www.pmo.gov.uk/output/Page3287.asp>. Secretary Powell alluded to a similar justification immediately before the attack, although with less normative clarity. Secretary of State Colin L. Powell, Briefing on Situation with Iraq, Washington, D.C. (Mar. 17, 2003), <http://www.state.gov/secretary/rm/2003/18771.htm>. An interesting scholarly treatment of using force to enforce Security Council resolutions without an explicit Council mandate is Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124 (1999).

119. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04, para. 195 (June 27) (Merits).

security, and a material breach of its obligation under Resolution 687, the resolution that imposed cease-fire terms on Iraq following Operation Desert Storm. Additionally, 1441 reminded Iraq that it “will face serious consequences as a result of its continued violations of its obligations.”¹²²

This situation raises the question of the second exception to the UN Charter’s prohibition on the use of force—Security Council authorization to use force pursuant to Chapter VII. There are essentially two questions in this regard: (1) When may the Council authorize military action, in this case in the face of possession of WMD; and (2) Who has a right to enforce Security Council resolutions? It should be noted that the law regarding Security Council authorized actions applies equally to terrorism; however, in the vast majority of cases, States will act against terrorists in the exercise of their right of self-defense, instead of seeking a Council mandate.

The process for authorizing the use of force under Chapter VII is rather clear-cut. First, the Council must make a determination (pursuant to Article 39) that a particular situation amounts to a “threat to peace, breach of the peace, or act of aggression.”¹²³ This finding allows it to “decide what measures shall be taken . . . to maintain or restore international peace and security.”¹²⁴ One option consists of “measures not involving the use of armed force,”¹²⁵ such as an economic embargo, under Article 41. Once such measures have failed, or should the Security Council decide they are likely to, it may “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security” pursuant to Article 42.¹²⁶

The sole requirement for the exercise of Chapter VII authority is a threat to the peace, breach of the peace, or act of aggression. The Council is making such findings with increasing frequency.¹²⁷ Moreover, the discretion to label situations a threat and fashion an appropriate response has

120. Security Council Resolution 1441, that on which the United States and United Kingdom base their argument regarding legality, “recalls” Resolutions 661 (Aug. 6, 1990); 678 (Nov. 29, 1990); 686 (Mar. 2, 1991); 687 (Apr. 3, 1991); 688 (Apr. 5, 1991); 707 (Aug. 15, 1991); 715 (Oct. 11, 1991); 986 (Apr. 14, 1995); 1284 (Dec. 17, 1999); and 1382 (Nov. 29, 2001). See S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

121. *Id.*

122. *Id.* para. 13.

123. U.N. CHARTER ch. VII, art. 39.

124. *Id.*

125. *Id.* art. 41.

126. *Id.* art. 42.

been exercised quite creatively. For instance, in 1992, the Council characterized Libya's lack of cooperation in judicial proceedings regarding the bombing of Pan American 103 to be such a threat;¹²⁸ it has also used findings of a threat to create international tribunals¹²⁹ and no-fly zones.¹³⁰ There is absolutely no doubt that the Council may find virtually any circumstance related to WMD, including failure to disarm or cooperate with international weapons inspectors, to be a threat to the peace and mandate either Article 41 or 42 measures.

It is important to understand that the mere threat WMD poses to international peace and security is sufficient basis for doing so. In the current crisis, everyone agrees that the Council *could* have authorized the use of force; the sole issue is whether it *should* have taken that step. Along these lines, there has been a great deal of discussion about whether Iraq was in material breach of 1441. That discussion has no normative significance.

127. For instance, in 2002 the Council made such finding regarding, *inter alia*, events in Iraq, S.C. Res. 1441, *supra* note 120; Moscow, S.C. Res. 1440, U.N. SCOR, 57th Sess., 4632d mtg., S/RES/1440 (2002); Bali, S.C. Res. 1438, U.N. SCOR, 57th Sess., 4624th mtg., U.N. Doc. S/RES/1438 (2002); Congo, S.C. Res. 1417, U.N. SCOR, 57th Sess., 4554th mtg., U.N. Doc. S/RES/1417 (2002); S.C. Res. 1399, U.N. SCOR, 57th Sess., 4495th mtg., U.N. Doc. S/RES/1399 (2002); Afghanistan, S.C. Res. 1413, U.N. SCOR, 57th Sess., 4541st mtg., U.N. Doc. S/RES/1413 (2002); S.C. Res. 1390, *supra* note 73; Liberia and the Surrounding States, S.C. Res. 1408, U.N. SCOR, 57th Sess., 4526d mtg., U.N. Doc. S/RES/1408 (2002); Angola, S.C. Res. 1404, U.N. SCOR, 57th Sess., 4514th mtg., U.N. Doc. S/RES/1404 (2002); Sierra Leone, S.C. Res. 1400, U.N. SCOR, 57th Sess., 4500th mtg., U.N. Doc. S/RES/1400 (2002).

128. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992).

129. *See, e.g.*, STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, U.N. Doc. S/25704, at 36, Annex (1993); S/25704/Add.1, U.N. Doc. S/RES/827 (1993) (established by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993)), <http://www.un.org/icty/index.html>; STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, 33 I.L.M. 1602 (1994) (established by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994)), <http://www.ictf.org>; STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE (established by S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000)), <http://www.sierra-leone.org/specialcourtstatute.html>. Note that the authority of the Council to establish such tribunals was unsuccessfully challenged in an interlocutory appeal before the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Tadić, No. IT-94-1-T (Aug. 10, 1995) (Decision on Jurisdiction); *see* George H. Aldrich, *Comment: Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996).

130. For example, NATO's Operation Deny Flight over Bosnia-Herzegovina pursuant to Security Council Resolution 816, U.N. SCOR, 3191st mtg. (1993).

“Material breach” is a legal concept of relevance to the law of cease-fires; when one party materially breaches the terms of a cease-fire, that breach releases the other side from its obligation to refrain from further use of force. However, there is no requirement for a breach, material or otherwise, of any term of a prior resolution before the Council may authorize a use of force under Article 42.

Thus, the authority of the Council to sanction the use of force to address threats to the peace caused by possession (or potential possession) of WMD is unfettered. The question then becomes who is authorized to enforce such a resolution. There are three possibilities.

First, the Council may grant the mandate to use force to a coalition of the willing, as it did in the 1991 Gulf War and as it has done with regard to the Interim Security Assistance Force in Afghanistan.¹³¹ Second, the Council may provide it to an intergovernmental organization. For instance, the Council authorized “Member States and relevant international organizations to establish the international security presence in Kosovo” following Operation Allied Force in 1999.¹³² The “international organizations” verbiage was clearly meant as a reference to NATO, but because the Council sought the participation of certain other States, especially the Russian Federation, it also extended the mandate to “Members.” KFOR resulted. Finally, the Council may mandate creation of a military force under UN command and control, as it has done for Sierra Leone with UNAMSIL.¹³³

131. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990) (Gulf War); S.C. Res. 1368, *supra* note 66 (Afghanistan).

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

133. The operation was initially authorized pursuant to Security Council Resolution 1270, U.N. SCOR, 54th Sess., 4054th mtg., U.N. Doc. S/RES/1270 (1999). Subsequent revisions of the mandate and operation occurred with Security Council Resolution 1289, U.N. SCOR, 55th Sess., 4099th mtg., U.N. Doc. S/RES/1289 (2000); Security Council Resolution 1346, U.N. SCOR, 56th Sess., 4306th mtg., U.N. Doc. S/RES/1346 (2001); and Security Council Resolution 1436, U.N. SCOR, 57th Sess., 4615th mtg., U.N. Doc. S/RES/1436 (2002).

A fourth option is purportedly action to counter WMD without Security Council sanction. Clearly, this would be appropriate if it met the requirements of self-defense. If not, can States nevertheless act?

In the current crisis, President Bush referred the matter to the Security Council and urged it to act.

We agree that Saddam Hussein continues to be in violation of U.N. Security Council Resolution 1441. We agree that the terms of that resolution must be fully respected. By Resolution 1441, the Security Council has taken a clear stand, and it now faces a clear choice. With all the world watching, the Council will now show whether it means what it says.¹³⁴

However, the President also unwaveringly maintained the position that “if the United Nations can’t act, and if Saddam Hussein won’t act, the United States will lead a coalition of nations to disarm Saddam Hussein.”¹³⁵

There is no basis in the UN Charter for the use of force absent either a Security Council mandate or a necessity for self-defense, a fact that explains the discomfort of many U.S. allies, including the British, over acting without a resolution beyond 1441. Indeed, even the statements supporting the U.S. position by the “Gang of Eight”¹³⁶ and the “Vilnius 10”¹³⁷

134. Remarks by President Bush and Spanish President Jose María Aznar, Crawford, Texas (Feb. 22, 2003), <http://www.whitehouse.gov/news/releases/2003/02/20030222-2.html>.

135. Remarks by President George W. Bush, Sioux Falls, South Dakota (Nov. 3, 2002), <http://www.whitehouse.gov/news/releases/2002/11/20021103-3.html>.

136.

The U.N. Charter charges the Security Council with the task of preserving international peace and security. To do so, the Security Council must maintain its credibility by ensuring full compliance with its resolutions. We cannot allow a dictator to systematically violate those resolutions. If they are not complied with, the Security Council will lose its credibility and world peace will suffer as a result. We are confident that the Security Council will face up to its responsibilities.

United We Stand, Statement by Jose María Aznar (Spain), Jose-Manuel Durao Barroso (Portugal), Silvio Berlusconi (Italy), Tony Blair (United Kingdom), Vaclav Havel (Czech Republic), Peter Medgyessy (Hungary), Leszek Miller (Poland), and Anders Fogh Rasmussen (Denmark) (Jan. 20, 2003), <http://www.hungaryemb.org/Media&Communication/Statements/UnitedWeStand.htm>. Each is the Prime Minister except for Mr. Havel, who is the Czech president.

emphasized that it was the Security Council's responsibility to enforce its resolutions. The delay in striking Iraq while seeking a follow-up resolution to 1441 illustrates, despite the saber rattling, the Administration's sensitivity to the discomfort even some of its closest supporters had about operating without Council sanction.

Thus, the announced U.S. strategy vis-à-vis action outside the Charter framework to address WMD exceeds the current boundaries of use of force law. Indeed, as a strict matter of law, such threats could be said to violate the UN Charter, Article 2(4), prohibition on threats of the use of force.¹³⁸ That said, law evolves through practice.¹³⁹ As Operation Iraqi Freedom proceeds, the extent of support it receives from the international community will indicate the degree to which the law regarding extra-Charter actions is, or is not, evolving. The limited support obtained thus far is not horribly suggestive of any noteworthy evolution.¹⁴⁰

V. Humanitarian Intervention

As discussed above, the Security Council's authority to mandate operations under Chapter VII is unfettered. This includes operations necessitating the use of force in order to protect and care for a population or group within the population. For instance, when the deteriorating situation in Somalia collapsed altogether in late 1992 despite the efforts of

137. "The clear and present danger posed by Saddam Hussein's regime requires a united response from the community of democracies. We call upon the U.N. Security Council to take the necessary and appropriate action in response to Iraq's continuing threat to international peace and security." Statement by the Foreign Ministers of Albania, Bulgaria, Croatia, Estonia, Latvia, Lithuania, Macedonia, Romania, Slovakia, and Slovenia (Feb. 5, 2003), http://www.mfa.government.bg/index_en.html.

138. Not all threats of the use of force are unlawful. For instance, threatening to employ force pursuant to a Security Council mandate is completely lawful. Thus, the legality of the threat depends on the legality of the threatened use. The International Court of Justice noted this point in *Legality of the Threat or Use of Nuclear Weapons*: "if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter." Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. para. 47 (July 8).

139. The practice may either serve to shape an existing norm by indicating the international community's present understanding of it or create an altogether new norm of customary international law. See *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, June 26, 1945, art. 38.1, 59 Stat. 1031, 1043, 1978 U.N.Y.B. 1185, 1197. Before the latter occurs, the practice must evidence *opinio juris sive necessitates*, a belief on the part of States engaging in it that the practice is legally obligatory. The requisite duration and scope of the practice is a matter of controversy.

UNOSOM I, the Security Council authorized “member States . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”¹⁴¹ The next day, President Bush authorized Operation Restore Hope, conducted by the multinational Unified Task Force (UNITAF).¹⁴² In 1993, UNOSOM II, endowed with Chapter VII powers by the Security Council, replaced UNITAF.¹⁴³ It is unquestioned that the mandates granted both UNITAF and UNOSOM II were appropriate exercises of the Council’s authority to meet a threat to the peace created by the internal situation in Somalia.

The more troublesome question is the legality of actions outside the Charter framework, for they appear to violate the prohibition on the use of force against the territorial integrity of other States. Although the U.S. strategies do not directly assert a right to humanitarian intervention, the

140. On 20 March 2003, the White House cited direct military participation, logistical and intelligence support, specialized chemical/biological response teams, overflight rights, humanitarian and reconstruction aid, and political support from the following countries: Afghanistan, Albania, Australia, Azerbaijan, Bulgaria, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Palau, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, United Kingdom, and Uzbekistan. It further asserted that the Coalition was growing. Press Release, White House, Coalition Members (Mar. 20, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030320-11.html>. Only Poland, the United Kingdom, and Australia had committed combat troops by 29 March 2003.

Opposition to Operation Iraqi Freedom was widely voiced. French President Chirac warned that the war would have “serious consequences,” German Chancellor Schroeder opined that thousands would “suffer terribly,” Russian President Putin labeled military action a “big political error,” Iran called the attack “unjustifiable and illegitimate,” the Arab League urged international efforts to stop the conflict, Belgian Prime Minister Verhofstadt claimed the Iraqis were “caught between the anvil and hammer,” Turkish President Sezer questioned the operation’s legitimacy, and the Vatican said it was “deeply pained.” *World Leaders Express Applause, Regret and Anger*, REUTERS, Mar. 20, 2003.

141. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992).

142. In addition to the United States, UNITAF included forces from Austria, Belgium, Botswana, Canada, Egypt, France, Germany, Greece, India, Italy, Kuwait, Morocco, New Zealand, Nigeria, Norway, Pakistan, Saudi Arabia, Sweden, Tunisia, Turkey, United Arab Emirates, United Kingdom, and Zimbabwe.

143. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993).

United States conducted exactly such an operation by leading NATO forces against the Federal Republic of Yugoslavia in 1999.

This was not the first time a regional organization had undertaken a humanitarian intervention. In 1990, ECOWAS, without UN approval, established the Cease-Fire Monitoring Group (ECOMOG) to address internal conflict in Liberia that had resulted in “a state of anarchy and total breakdown of law and order.”¹⁴⁴ In January 1991, despite the absence of a mandate, a Security Council Presidential Statement was issued that “commended the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia.”¹⁴⁵ When fighting broke out again in 1992, the Security Council commended ECOWAS for its role in addressing this “threat to international peace and security.”¹⁴⁶ The next year it created UNAMSIL to monitor ECOWAS activities.¹⁴⁷

In 1997, ECOWAS conducted another humanitarian intervention without Security Council sanction, this time in Sierra Leone.¹⁴⁸ A bloody civil war had been underway in the country since 1991, when in 1997 a military coup toppled the newly elected president of the country, Ahmed Kabbah. The Organization of African Unity urged ECOWAS to “restore the constitutional order”; it responded by sending troops into the country. At that point, the Security Council had merely asked ECOWAS to mediate. Following the intervention, though, the Council, as in the Liberia case, issued a Presidential Statement commending ECOWAS for the “important role” it was playing “towards the peaceful resolution of this crisis.”¹⁴⁹ When violence broke out again, the Council continued to praise ECOWAS and ECOMOG;¹⁵⁰ eventually, UNAMSIL replaced ECOMOG.¹⁵¹

144. See, e.g., REGIONAL PEACEKEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 73 (Mark Weller ed., 1994).

145. U.N. Doc. S/22133 (1991).

146. S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992).

147. S.C. Res. 856, U.N. SCOR, 48th Sess., 3263d mtg., U.N. Doc. S/RES/856 (1993); S.C. Res. 866, U.N. SCOR, 48th Sess., 3281st mtg., U.N. Doc. S/RES/866 (1993).

148. For an interesting discussion of the normative implications of this case, see Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321 (1998).

149. U.N. Doc. SC/6481 (1998).

150. U.N. Doc. SC/6518 (1998); S.C. Res. 1260, U.N. SCOR, 54th Sess., 4035th mtg., U.N. Doc. S/RES/1260 (1999).

151. S.C. Res. 1289, *supra* note 133.

There are several commonalities between these cases. Perhaps, most important is the fact that a regional organization conducted them. Additionally, in neither case was there any opposition to the interventions in the Security Council, and the humanitarian situation in both Liberia and Sierra Leone had reached horrendous proportions. In each, the Security Council subsequently “approved” of the operations by commending them, eventually sending in “Blue Helmets.”

The crisis in Kosovo took humanitarian intervention a step further. What is normatively significant is that the intervention took place in the face of opposition from two of the Security Council’s permanent members, China and Russia, but was led by a third member of that body, the United States, with the cooperation of the remaining two, France and the United Kingdom. Moreover, as it involved the United States, it is at least an indication of U.S. views on the subject of humanitarian intervention.

The situation had been tense in Kosovo since 1989, when President Slobodan Milosevic revoked the autonomous status the province enjoyed since 1974. By early 1998, violence had erupted. The Security Council condemned the brutality on both sides¹⁵² and reimposed an arms embargo on the country.¹⁵³ In September, the Council threatened to “consider further action . . . to restore peace and stability” if the two sides did not resolve their problems and “avert the impending humanitarian catastrophe.”¹⁵⁴ Negotiations between the parties began, but in March 1999 Yugoslavia rejected an agreement proposed by France, Germany, Italy, the United Kingdom, and the United States (the Contact Group) at Rambouillet, France. Without seeking approval from the Security Council, NATO responded by launching an air campaign against Yugoslavia on March 24.

Unlike the Liberia and Sierra Leone cases, here NATO intentionally avoided going to the Security Council because of the likelihood of a veto. Moreover, this time there was vocal and important opposition to the operation. The Russians argued that Allied Force was in violation of the Charter and that “the unilateral use of force will lead precisely to a situation with truly devastating . . . consequences.”¹⁵⁵ China objected that the situation was a purely internal matter in which NATO was illegally interfer-

152. See, e.g., S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998).

153. S.C. Res. 1160, *supra* note 152.

154. S.C. Res. 1199, *supra* note 152.

155. U.N. SCOR, 54th Sess., 3988th mtg., at 2-3, U.N. Doc. S/PV.3988 (1999).

ing,¹⁵⁶ while India argued that even if the intervention was meant to prevent human rights abuses, “[t]wo wrongs do not make a right.”¹⁵⁷ Following Council debate, a resolution labeling NATO’s “unilateral use of force . . . a flagrant violation of the United Nations Charter” was defeated by a vote of three to twelve.¹⁵⁸ In May, an agreement brokered by Russian Prime Minister Chernomyrdin and Finnish President Ahtisaari terminated hostilities. The Security Council, acting under Chapter VII, then authorized deployment of an international civil and security presence, which implicitly included NATO, in Kosovo.¹⁵⁹

Although NATO defended its operation on humanitarian grounds, States, including the United States, have been reticent to explicitly advocate a right to humanitarian intervention. Even during the NATO intervention, individual Member States struggled to fashion a consistent legal argument for the operation. All that can be said at this point is that while humanitarian interventions cannot be deemed illegal *per se* (witness Liberia and Sierra Leone), the international community will continue to make case-by-case assessments whenever they occur.

Numerous efforts have been made to determine the standards that should be used in such assessments.¹⁶⁰ Among the best are two by Ved Nanda of the University of Denver. In 1992, Professor Nanda looked at interventions in Northern Iraq, Yugoslavia, Iraq, and Haiti, concluding that the international community will evaluate lawfulness against five criteria:

- (1) the necessity criterion, whether there was genocide or gross, persistent, and systematic violations of basic human rights;
- (2) the proportionality criterion, the duration and propriety of the force applied;

156. *Id.* at 12.

157. *Id.* at 16.

158. U.N. SCOR, 54th Sess., 3989th mtg., at 6, U.N. Doc. S/PV.3989 (1999) (China, Russia, Namibia v. Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United States, United Kingdom).

159. S.C. Res. 1244, *supra* note 132.

160. *See, e.g.*, Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFF., Nov.-Dec. 2002, at 99; REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001).

- (3) the purpose criterion, whether the intervention was motivated by humanitarian consideration, self-interest, or mixed motivations;
- (4) whether the action was collective or unilateral; and
- (5) whether the intervention maximized the best outcome.¹⁶¹

In 1998, a subsequent study by Professor Nanda and colleagues considered Somalia, Bosnia, Haiti, Rwanda, and Liberia.¹⁶² The group exhibited greater liberality vis-à-vis actions conducted by regional organizations or individual States than in 1992, but essentially confirmed the criteria set forth in the earlier study.

Although both studies predated Operation Allied Force, the criteria enunciated reflect those on which debates about the legality of the operation focused. For instance, with regard to necessity, some argued that the operation was premature, that the suffering had not reached genocidal proportions. Indeed, at the time, there was discussion as to whether a new policy of anticipatory humanitarian intervention was emerging.¹⁶³ Others suggested that the operation was disproportionate because it triggered a massive displacement of the civilian population. Still others urged that far from being a humanitarian intervention, its true purpose was to demonstrate the relevance of NATO in the post-Cold War world. Finally, the core criticism was that although “collective,” it occurred outside the Charter framework and in the face of opposition from key members of the international community.

The law in this area is moving slowly, accompanied by much trepidation on the part of States. In the future, humanitarian interventions are likely to be deemed legitimate only when they comply with the Nanda criteria and evoke no significant opposition from key global and regional actors; hence, the failure to explicitly base operations against Iraq on this basis.¹⁶⁴ Nevertheless, the guarded espousal of a right of humanitarian

161. Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 330 (1992).

162. Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998).

163. E.g., Jonathan I. Charney, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999).

intervention does represent some movement away from unyielding insistence on strict interpretation of the Charter scheme for the use of force. This being so, it may have some slight synergistic effect on other assertions, such as that discussed in the WMD context, of a right to act without Security Council authorization or a firm basis in the law of self-defense.

VI. Cyber War¹⁶⁵

In February 2003, the White House released its *National Strategy to Secure Cyberspace*,¹⁶⁶ one of the implementing strategies for the *National Strategy for Homeland Security* and the *National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*.¹⁶⁷ This document highlights the vulnerability of major sectors of the nation's infrastructure. Particularly attractive as a target is the economy, which relies on a "network of networks" for its efficient functioning.¹⁶⁸ The impact of a cyber attack on these and other networked systems can range from inconvenience to loss of life. Today, the United States is at the point of determining its options for handling cyber attacks, as well as its options for using them. It has the advantage of influencing the vector of the *jus ad bellum* from the

164. Although Administration officials have repeatedly spoken of the "liberation" of Iraq—indeed, the operation has been dubbed "Iraqi Freedom"—there is no basis for suggesting that the suffering of the Iraqi people had reached levels justifying humanitarian intervention *as a matter of international law*.

165. Information operations are "actions taken to affect adversary information and information systems while defending one's own information and information systems," whether during peacetime, crises, or "war," and at the strategic, operational, or tactical levels of armed conflict. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 203 (12 Apr. 2001). Information operations can include such diverse activities as operations security, psychological operations, military deception, electronic warfare, physical attack, and computer network attack.

A subcategory of information operations is information warfare (IW), that is, "information operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries." *Id.* The defining aspect of IW is not what is affected (as a subset of IO, by definition the objective is affecting information, or the use thereof), but rather the circumstance in which it occurs—crisis or conflict. Cyber war is a term in common usage that generally refers to the computer network attack aspect of IW.

166. WHITE HOUSE, NATIONAL STRATEGY TO SECURE CYBERSPACE (2003) [hereinafter NSSC], available at <http://www.whitehouse.gov/pcipb>.

167. NATIONAL STRATEGY FOR HOMELAND SECURITY (2002); NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS (2003).

168. NSSC, *supra* note 166, at 5.

very inception of cyber war. Thus, the practice it engages in, and the legal positions it assumes, will have great weight in shaping this body of law.¹⁶⁹

Cyber attacks raise a number of complex legal issues.¹⁷⁰ The first is whether they violate the international law governing the resort to force. Article 2(4) is the touchstone. The question is whether a cyber attack, because it does not involve the use of kinetic force, is a prohibited use of force under the Charter and customary international law. This is a particularly appropriate topic in light of the fact that the U.S. mounted cyber operations in advance of the kinetic military operations against Iraq that began on 19 March 2003.¹⁷¹

The nature of the prohibition was addressed by the International Court of Justice in the *Nicaragua* case. Recall that the Court found that although the funding of guerrilla forces was not a use of force, arming and training them was. This finding supports a conclusion that a use of force need not be kinetic in nature.¹⁷²

On the other hand, the Charter drafting history sets a threshold below which a use of force does not lie. At the San Francisco Conference, there was discussion of including economic coercion within the meaning of the

169. For U.S. forces, information operations policy is set forth in, *inter alia*, U.S. DEP'T OF DEFENSE, DIR. S-3600.1, INFORMATION OPERATIONS (9 Dec. 1996); JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS (9 Oct. 1998); JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, JOINT DOCTRINE FOR COMMAND AND CONTROL WARFARE (7 Feb. 1996); CHIEF OF NAVAL OPERATIONS, INSTR. 3430.26, IMPLEMENTING INSTRUCTION FOR INFORMATION WARFARE/COMMAND AND CONTROL (18 Jan. 1995); AIR FORCE DOCTRINE DOCUMENT, INFORMATION OPERATIONS 2-5 (5 Aug. 1998).

170. For surveys of the subject, see COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Naval War College International Law Studies, Michael N. Schmitt ed., 2002); THOMAS C. WINGFIELD, THE LAW OF INFORMATION CONFLICT 124-25 (Aegis Corp. 2000); Eric T. Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT'L L. 207 (2002); Michael N. Schmitt, *Wired Warfare: Computer Network Attack and International Law*, 84 INT'L REV. RED CROSS 365-99 (2002); Christopher Joyner & Catherine Lotrionte, *Information Warfare as International Coercion: Elements of a Legal Framework*, 12 EUR. J. INT'L L. 825 (2001); Michael N. Schmitt, *Computer Network Attack and Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. TRANSNAT'L L. 885-937 (1999).

171. Thom Shanker & Eric Schmitt, *Threats and Responses: Hearts and Minds*, N.Y. TIMES, Feb. 24, 2003, at A1.

172. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 118-19, para. 228 (June 27) (Merits). For jurisdictional reasons the Court was not actually applying Article 2(4) *qua* 2(4), but instead the customary international law prohibition on the resort to force.

use of force prohibition; conferees roundly rejected this proposal.¹⁷³ Other treaties on the subject,¹⁷⁴ as well as the General Assembly's Declaration on Friendly Relations,¹⁷⁵ also fail to include economic (or political) coercion in the ambit of the term.

If these are known points on the continuum of the use of force, we can begin to develop criteria for assessing cyber operations. The key is to move from an instrument-based paradigm (economics, politics, kinetic military force) to one based on the consequences caused by the action. In other words, does the operation create consequences that are more like those caused by economic and political coercion or by physical coercion? In making this determination, which I have described in greater depth elsewhere,¹⁷⁶ seven criteria are useful: (1) severity of the consequences; (2) how immediately the consequences occur; (3) the directness of the attack and the consequences, i.e., the extent of the cause-effect relationship between them; (4) the invasiveness of the attack; (5) the measurability of the consequences; (6) the presumptive legitimacy of the action under both domestic and international legal regimes; and (7) the extent to which the State is responsible for the attack.¹⁷⁷

The criteria should not be applied mechanistically. Rather, the assessment is holistic. How many criteria are implicated? To what degree? In what geo-political context? And so forth. The goal is to anticipate the international community's likely appraisal of a particular action. In other words, the normative expectations of the community are what matter. Only through State practice (and the community reaction thereto) can better-defined normative standards emerge. Absent such practice, the best a

173. 6 U.N.I.O. Docs. 334, 609 (1945); Doc. 2, 617 (e)(4), 3 U.N.C.I.O. Docs. 251, 253-54 (1945).

174. Inter-American Treaty of Reciprocal Assistance, Sept. 7, 1947, art. 1, 1947 T.I.A.S. 1838, 21 U.N.T.S. 77 ("undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty"). See also Pact of the League of Arab States, art. 5, Mar. 22, 1945, 70 U.N.T.S. 238, which only speaks of force: "Any resort to force in order to resolve disputes arising between two or more member States of the League is prohibited." *Id.*

175. U.N. Doc. A/AC.125/SR.114 (1970). See also *Special Committee on Friendly Relations, Report*, 24 U.N. GAOR, 24th Sess., Supp. No. 19, U.N. Doc. A/7619, at 12 (1969); Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1 (1972).

176. See generally Schmitt, *Normative Framework*, *supra* note 170.

State considering a cyber operation can do is speculate as to the community's likely ex post facto legal assessment.

The second major *ad bellum* issue is when does cyber war amount to

177. Thomas Wingfield has very usefully set out examples of the types of queries that the various criteria would suggest:

Severity:

- How many people were killed?
- How large an area was attacked? (scope)
- How much damage was done within this area? (intensity)

Immediacy

- Over how long a period did the action take place? (duration)
- How soon were its effects felt?
- How soon until its effects abate?

Directness

- Was the action distinctly identifiable from parallel or competing actions?
- Was the action the proximate cause of the effects?

Invasiveness

- Did the action involve physically crossing the target country's borders?
- Was the locus of the action within the target country?

Measurability

- How can the effects of the action be quantified?
- Are the effects of the action distinct from the results of parallel or competing actions?
- What is the level of certainty?

Presumptive Legitimacy

- Has this type of action achieved a customary acceptance within the international community?
- Is the means qualitatively similar to others presumed legitimate under international law?

Responsibility

- Is the action directly or indirectly attributable to the acting state?
- But for the acting State's sake, would the action have occurred?

Overall Analysis

- Have enough of the qualities of a use of force been identified to characterize the information operation as a use of force?

an “armed attack” that allows a State (or other States acting in collective self-defense) to respond forcefully in self-defense. The analysis proposed above is inapplicable, for, as noted in the *Nicaragua* decision, “use of force” and “armed attack” are not synonymous terms. This distinction makes sense in light of the Charter’s central purpose, “[t]o maintain international peace and security.”¹⁷⁸ Essentially, this objective creates a rebuttable presumption against the resort by States to violence. Thus, it is logical to interpret the prohibition on the use of force expansively, but characterize exceptions that lie outside the community decisional architecture, such as self-defense, narrowly.

What then is an armed attack? Consequence-based analysis again provides the answer. The scope of the term “armed attack” cannot be limited to application of kinetic force. Consider CBRNE weaponry. Chemical, biological, and radiological attacks do not necessarily have to involve the application of kinetic force. For instance, chemical weapons can be spread by aerosol dispensers, released from crop dusting aircraft, or even, when in gaseous form, simply allowed to drift in the wind towards intended victims. Indeed, the biological attacks involving anthrax that killed five in 2001 were conducted through the U.S. postal system. Yet, it is undeniable that chemical, biological, and radiological attacks (of the requisite scale and effects) can constitute armed attacks permitting a defensive response by the victim-State. This is so, despite the absence of kinetic force, because their consequences can include serious suffering or death of human beings or physical damage to tangible objects.

Identical reasoning would apply to cyber operations. A cyber attack that causes significant human suffering or property damage is obviously an armed attack justifying a response under the law of self-defense. Appropriate responses may involve conventional weaponry as long as its use is proportionate and no viable non-forceful alternatives exist; there is no requirement that the defensive response be in kind. An attack falling short of this standard might amount to a prohibited use of force or other international wrong, but characterizing it as an armed attack would be questionable.

The approach tracks the “object and purpose”¹⁷⁹ of Article 51. States were not concerned about a particular modality of violence (kinetic force); instead, they were convinced of the need to allow States an avenue for

178. U.N. CHARTER art 1.1.

179. Vienna Convention, *supra* note 63, art. 31.1.

averting serious consequences should the Charter collective security mechanism fail. The formula “armed attack” simply offered an understandable “cognitive shorthand” which, given the state of warfare in 1945, achieved that aim. Including cyber operations that produce the requisite consequences, particularly in light of the fact that they did not exist when the Charter was adopted, is thus quite reasonable.

So, assuming a planned or ongoing cyber attack is an armed attack, when can the target State respond with the use of military force? Again, analysis tracks that outlined above in other contexts. First, a cyber attack is an armed attack justifying a forceful response in self-defense if it causes physical damage or human injury or is part of a larger operation that constitutes an armed attack. Second, self-defense is justified when a cyber attack is an irrevocable step in an imminent (near-term) and unavoidable attack (preparing the battlefield). Finally, a State may react defensively during the last possible window of opportunity available to effectively counter an armed attack when no reasonable doubt exists that the attack is forthcoming.

VII. Conclusion

At the outset, it was suggested that law is reactive, contextual, and directional. There is little doubt that events of the past five years are signalling a sea change in the *jus ad bellum*. Slowly but surely this body of law is becoming more permissive in response to the demise of nuclear-armed bipolar competition and the rise of both transnational terrorists and WMD proliferation. It is a permissiveness heralded in virtually all U.S. strategic pronouncements.

Today, it is clear that strikes by non-State actors may amount to “armed attacks” that allow victim-States to respond militarily over extended periods. Moreover, victim-States may conduct counter-terrorist operations in the territory of third States if those States do not effectively prevent their territory from being used as a base for terrorist operations, although there are certain hurdles that must first be surmounted. As to State-sponsors of terrorism, although the nature of support that justifies an attack directly against them is uncertain, the threshold is plummeting.

Less clear is the law regarding forceful responses to the possession of weapons of mass destruction. There is no doubt that a response pursuant to Security Council authorization is entirely appropriate. Similarly, a

defensive response, even an anticipatory one, is appropriate when necessary, immediate, and proportional. What remains ambiguous is the extent to which a State may act beyond a strict Charter regime, either preemptively or to enforce Security Council resolutions. International reaction to Operation Iraqi Freedom will prove normatively influential in this regard.

Likewise, despite NATO's 1999 humanitarian intervention in Yugoslavia, the precise line of legality for such endeavors remains very vague—except when authorized by the Security Council. They are likely to continue to be evaluated on a case-by-case basis by reference to such criteria as necessity, proportionality, purpose, inclusivity, and maximization of outcome. Although not a humanitarian intervention, the international community's normative assessment of Iraqi Freedom will, because it is an extra-Charter operation, have blow-back effect on the international law regarding interventions conducted without Security Council mandate.

Finally, cyber war constitutes a new dimension of warfare. Therefore, those States that have the capability and will to conduct cyber attacks have a unique opportunity to shape the law through practice. Whether they will do so in a manner that leads to a permissive or restrictive normative regime remains an open question. The dilemma is that the States most capable of conducting cyber attacks are precisely the ones most vulnerable to them. Until the law governing these operations matures, the characterization of a cyber attack as an Article 2(4) use of force will likely depend on a holistic evaluation employing such criteria as severity, immediacy, directness, invasiveness, measurability, presumptive legitimacy, and responsibility. However, if an attack causes physical damage or human injury it will almost certainly be characterized as an "armed attack" that justifies a forceful response pursuant to the law of self-defense.

The global community finds itself at the cusp of normative change regarding the use of force. International law has proven more malleable than even the most prescient observer would have anticipated five years ago. But powerful voices are being raised in alarm. This being so, whether *Bellum Americanum* becomes fact or fiction is yet to be seen.