

Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism

*William K. Lietzau**

- I. Introduction
- II. The Basics: The U.N. Charter and Jus ad Bellum prior to 9/11
- III. Operation Enduring Freedom
 1. Anticipatory Self-Defense
 2. Reprisal
 3. State Responsibility and Vicarious Liability
 4. Toward a New Concept for Self-Defense—Additional Factors
- IV. Operation Iraqi Freedom
 1. Legal Authority for Operation Iraqi Freedom—the Technical Argument
 2. Operation Iraqi Freedom and Self-Defense
- V. The U.S. 2002 National Security Strategy and the Preemption Doctrine
- VI. Humanitarian Interventions
- VII. Moving Forward
- VIII. Conclusion

* The remarks contained herein are personal reflections and do not necessarily represent the position of the U.S. Marine Corps, the Department of Defense, or the U.S. Government. I am grateful for the advice and assistance of Professor Harvey Rishikof, National War College.

I. Introduction

At 8:46 on the morning of 11 September 2001, a handful of terrorists propelled the globe into an era of profound change. The immediate and palpable consequence of Al Qaeda's attack—the deaths of thousands of innocent civilians and the immutable gash in the skyline of the United States' most populous city¹—is relatively transient compared to the consequences of the response to 9/11. Whether or not recognized, acknowledged, or asserted, 9/11 and the response thereto brought forth a nascent legal regime that will alter the way nation states apply the rule of law in combating terrorism. While Usama bin Laden affected countless lives in the most primitive and horrific fashion, the United States and its allies, in responding, is effecting a metamorphosis of the legal landscape that structures our society and the relationships between states. Although Al Qaeda's attacks have affected profoundly the world's physical landscapes, the armed response is affecting the international legal regime to a degree evoking the eras of post-Westphalian

¹ See, e.g., "Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead", *Washington Post*, 12 September 2001, A1; E. Lipton, "Struggle to Tally All 9/11 Dead by Anniversary", *N.Y. Times*, 11 September 2002, 1 (The final World Trade center death toll will drop no lower than about 2,750, not including the 10 hijackers. Counting the 233 killed in Washington and Pennsylvania, it will remain the second-bloodiest day in United States history, behind the battle of Antietam in the Civil War). The dead include citizens of more than 90 countries. A City of New York Office of the Comptroller estimated the overall economic loss to New York City resulting from the 9/11 attacks as totaling between US\$ 82.8 and US\$ 94.8 billion dollars. See <<http://www.comptroller.nyc.gov/bureaus/bud/reports/impact-9-11-year-later.pdf>>.

peace² and the new world order emerging from the chaos of World War II.³

Over the past several years, the United States Government has faced the challenge of attempting to apply the existing laws of war to a global war on terrorism. In so doing, it perhaps has come better to appreciate the truth in Hersch Lauterpacht's remark that "... if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."⁴ Given our recent experience, one could add to Lauterpacht's assessment the observation that if the law of war is at the vanishing point of international law, then the war with Al Qaeda, and more broadly, the

² Treaty of Westphalia, Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies, 24 October 1648, available at: <<http://www.yale.edu/lawweb/avalon/westphal.htm>>. Ending the Eighty Years' War between Spain and the Dutch, and the German phase of the Thirty Years' War, the Peace of Westphalia recognized the full territorial sovereignty of the Member States of the Holy Roman Empire, rendering the princes of the empire absolute sovereigns in their own dominions. See Encyclopaedia Britannica, 2002, DVD.

³ In 1945, World War II having drawn to an end, representatives of 50 countries met in San Francisco at the United Nations Conference on International Organization to draw up the United Nations Charter. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks, United States in August-October 1944. The Charter was signed on 26 June 1945 by the representatives of the 50 countries. Poland, which was not represented at the Conference, later signed the Charter and became one of the original 51 Member States. The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and a majority of other signatories. The creation of the United Nations is widely recognized as one of the most important events of the post-World War II period. That the delegates were influenced substantially by the war is reflected in the preamble to the U.N. Charter, which provides: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind ...". The fundamental purpose of the Charter is the maintenance of international peace and security (Article 1 (1) U.N. Charter). See R.B. Russell, *A history of the United Nations Charter – the Role of the United States 1940 – 1945*, 1958, 964, providing an in-depth description of the formation of the Charter.

⁴ See H. Lauterpacht, "The Problem of the Revision of the Law of War", *BYIL* 29 (1952), 360 et seq. (382).

global war on terrorism, raise issues that are at the vanishing point of the law of war. This is a new war not envisioned by the soldiers and statesmen comprising the authors of the present-day law of war.

On 10 February 2003, Professor Rüdiger Wolfrum,⁵ in his remarks opening the Max Planck Institute conference on differing American and European perceptions of international law, stated that international law was in “transition.” Correctly recognizing a profoundly changed global situation, he referred to a “reformulation” of self-defense concepts in order to meet concerns regarding the “legitimacy” of the use of force.⁶ Indeed, law and policy associated with the employment of the military instrument arguably already have shifted dramatically in the post-9/11 era—ushering in new, enhanced acceptance of the use of military force to counter terrorism. The ramifications extend far beyond those immediately recognized by most legal observers. The impact can be seen in both *jus in bello* and the more controversial realm of *jus ad bellum*. This article addresses the latter.

Pressured by circumstances that seem to have evolved more substantially than, and well in advance of, the attendant legal norms, we find ourselves today in a situation where military force has been used in controversial ways that highlight, in magnitude unprecedented, the legal and policy differences that separate the international community.⁷ To a large extent, these differences can be explained and perhaps even minimized by identifying legal themes that animate various concepts of *jus ad bellum* and analyzing recent state practice to assess its impact on those themes.

⁵ Professor R. Wolfrum serves as Director of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany.

⁶ R. Wolfrum, *Introductory Remarks* at the Max Planck Institute for Comparative Public Law and International Law—*Conference on the American/European Dialogue: Different Perceptions of International Law?*, *ZaöRV* 64 (2004), 255 et seq.

⁷ See, e.g., J. Chirac, “Iraq War Illegal”, *United Press International*, 21 March 2003: “French President Jacques Chirac on Friday said the U.S.-led war against Iraq was illegal. Speaking at a EU Summit in Brussels, Chirac threatened to veto a resolution handing control of the post-war reconstruction of the country to the United Nations”; D.A. Spritzer, “CSSD Declares Iraq War is Illegal”, *Prague Post*, 2 April 2003: “Fist pounding, whistling, and hot tempers characterized the March 30 Social democratic (CSSD) debate over Iraq, which yielded a resolution that condemns the U.S.-led war”; J.L. Tan, “Iraq War Was Illegal, Blix Says”, *Press Assn.*, 5 March 2004.

To this end, this article reviews three significant United States actions responding or related to the terrorist attack of 9/11: Operation *Enduring Freedom*, Operation *Iraqi Freedom*, and the publication of the 2002 National Security Strategy. With respect to the underlying law, the focus will be on three major concepts: anticipatory self-defense, belligerent reprisal, and state responsibility. The article concludes by proffering a factor-based model to measure degrees of legitimacy in post-9/11 uses of military force.

II. The Basics: The U.N. Charter and *Jus ad Bellum* prior to 9/11

The significance of recent developments can be appreciated best only after a brief review of the state of the law that carried us to those penultimate moments of 9/11. Already, the law governing the use of force had long been a controversial topic—that controversy being a consequence of the pairing of the most recent black-letter articulation of *jus ad bellum*, found in the U.N. Charter, and the circumstances arising in the years immediately following the Charter’s adoption that challenged directly those concepts to which the nations of the world had so readily acceded.

The norms applicable to a decision to make war were perhaps the earliest to be known as international law. First labeled *jus gentium*, Dominican Francisco de Vitoria made his mark on the law of war with the 1532 work, *The Law of War Made by the Spaniards on the Barbarians*,⁸ and the Italian, Albericus Gentilis, followed in 1598 with *Three Books on the Law of War*.⁹ The approach common to both unified in one body of law those doctrines that later would be divided into *jus in bello* and *jus ad bellum* by the generally accepted “father of international law,” Hugo Grotius.¹⁰ Grotius’ *De Jure Belli ac Pacis*, first published in 1625 is the classic rendition of “just war” theory—the doctrine

⁸ G. von Glahn, *Law Among Nations: An Introduction to Public International Law*, 3rd edition, 1976, 38.

⁹ *Ibid.*

¹⁰ H. Lauterpacht, *Oppenheim’s International Law: A Treatise*, Vol. 1, Peace, 8th edition, 1955, 91-94; A. Nussbaum, *A Concise History of the Law of Nations*, 1954, 102-114.

that accords some wars legal (and moral) justification, while condemning others.¹¹

The “just war” doctrine, now reemerging, was muted in the 20th century as those aspects originating in Hobbesian natural law concepts (*jus naturale*) gave way to the more easily cognizable positivist mechanism of treaties.¹² The Kellogg-Briand Pact of 1928 specifically renounced the conduct of hostilities as a means of resolving international disputes.¹³ This aspiration, though obviously short-lived in practice and ineffective in application, was essentially recaptured in the Charter of the United Nations. The U.N. Charter expresses, in directive terms binding on its members—an extremely wide constituency¹⁴—what many believe to be the lone authoritative codification of the law on the use of force. Pursuant to Article 2 (4) of the Charter, “[a]ll 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.”¹⁵

Clearly, the preeminent goal of the San Francisco Convention that produced the U.N. Charter was to develop and deliver a regime for preventing and responding to international violence and to bind Member States to that regime. Consistent with the Charter’s *jus ad bellum* concepts, member nations must settle their international disputes by peaceful means so as not to endanger international peace and security¹⁶ and refrain from the threat or use of force against other states.¹⁷

Under the U.N. Charter paradigm, there are only two instances when force may be used lawfully: when authorized by the Security Council under Chapter VII of the Charter,¹⁸ and in self-defense.¹⁹ Arti-

¹¹ See generally M. Walter, *Just and Unjust Wars*, 1977.

¹² *Ibid.*

¹³ See article 1 of the *Kellogg-Briand Pact* of 27 August 1928, LNTS Vol. 94 No. 2137.

¹⁴ 191 nations are Members of the United Nations.

¹⁵ Article 2 (4) U.N. Charter.

¹⁶ Article 2 (3) U.N. Charter.

¹⁷ Article 2 (4) U.N. Charter.

¹⁸ Article 42 U.N. Charter providing: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

cle 39 of the Charter provides that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”²⁰ If all measures not involving the use of armed force are inadequate, the Security Council may take military actions as may be necessary.²¹

Though its drafters may have envisaged a more active role for the Security Council and undoubtedly favored United Nations sanctioned collective action over independent acts in self-defense, it is Article 51 and its recognition of an “inherent right of ... self-defense” that, since the Charter’s adoption in 1945, has been invoked most frequently in justifying international uses of force.²²

Despite the recognition of this inherent right of self-defense, force was to be used only as a necessary last resort. The collective security as-

Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

¹⁹ In its entirety, Article 51 U.N. Charter reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

²⁰ Article 39 U.N. Charter.

²¹ Article 42 U.N. Charter.

²² For example, the United States invoked Article 51 U.N. Charter to justify the US invasion of Panama, see “Excerpts from Statement by Baker on U.S. Policy”, *N.Y. Times*, 21 December 1989, A9, and to justify air strikes against Libya in 1986, see M.N. Leich, “Contemporary Practice of the United States Relating to International Law”, *AJIL* 80 (1986), 612 et seq. (632). The United Kingdom invoked Article 51 U.N. Charter to justify military action against Argentina in the Falklands dispute, see D.E. Acevedo, “The U.S. Measures Against Argentina Resulting from the Malvinas Conflict”, *AJIL* 78 (1984), 323 et seq. (324). Israel claimed self-defense to justify attacks against terrorist organizations based in Jordan and Lebanon, and the Soviet Union did so to justify intervention in Afghanistan in 1979, see O. Schachter, “Self-Defense and the Rule of Law”, *AJIL* 83 (1989), 259 et seq. (263 note 23).

pects of Security Council authority were designed to be sufficient to meet most needs for self-defense; national use of force consistent with Article 51 was permitted to meet a nation's extreme need in the short-term—only until the Security Council could act.²³ History has mocked this theory, however; the five-decade Cold War effectively eviscerated perceptions of the Security Council as a credible deterrent.²⁴ The unrealistic aspirations pinned on the Security Council by the Charter, coupled with the unanticipated complexities of international relations following World War II, necessitated rejecting a strict interpretation of the parameters of Article 51. Although the principle that there exists an “inherent right of ... self-defense” has not changed, modern expressions and applications of that right. Article 51 has been relied on to justify most appropriate uses of force post-1945,—as well as to rationalize those not so inappropriate.²⁵

Fair analysis and thorough historical review demand a recognition that, as is the case with aspects of any number of international agreements, the negotiation of the U.N. Charter was marked by a lack of consensus on important concepts associated with self-defense.²⁶ At one end of the spectrum, certain states wanted no recognition of self-defense as an exception to the general prohibition on the use of force. At the other extreme, some states were unwilling to forfeit their customary sovereign right to self-defense on the basis of an intangible and untried hope that the proposed collective security arrangement would obviate the need for such.²⁷ The “internationalists” of the mid-20th

²³ Article 51 U.N. Charter.

²⁴ B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1994, 13-18.

²⁵ *Ibid.*, 663: “As the system of collective security has been of little practical significance, (...) international legal practice since 1945, contrary to the intentions of the authors of the Charter, has continued to be determined by unilateral use of force by states. (...) The right of self defense laid down in Art. 51 of the U.N. Charter, being the only exception to the prohibition of force of practical significance, has therefore become the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrate.”

²⁶ See T. Kearly, “Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent”, *Wyoming Law Review* 3 (2003), 663 et seq.

²⁷ Simma, see note 24, 678: “Though the founding members of the UN had at first waived the broad concept of self-defense by adopting Art. 51, subse-

century decried the U.S. insistence on a broad recognition of self-defense.²⁸ In hindsight, of course, we find prescience in those who represented the United States in San Francisco.

As is to be expected in complex international negotiations in which consensus is the desired outcome, in 1945, nations walked away from the negotiating table with differing concepts of Article 51.²⁹ While state practice has by no means sided with the most conservative interpretations of Article 51, that practice also has failed to yield a conceptual framework unattended by controversy. Schema grounded in the flexibility of Article 51's language have diverged along several routes, all of which rely as a textual matter on the "inherent" nature of the right to self-defense³⁰ but differ in defining the precursor event triggering that right or the means by and extent to which it may be invoked.

Literal construction of the Charter would not appear to permit use of force in the absence of an "armed attack."³¹ Given the armed attacks with which many signatories of the U.N. Charter were so unfortunately familiar, it is unsurprising that "plain language" interpretations of the "armed attack" in response to which one has the right to use force in self-defense contemplate a methodical and sustained aggression, preceded by the massing of armies and their movement across bounda-

quent state practice did not confirm that position in such a way as to amount to a uniform pattern of behavior."

²⁸ Ibid.

²⁹ Ibid.

³⁰ I. Brownlie, *International Law and the Use of Force by States*, 1963, 272 – 275: "The prevailing view refers, above all, to the purpose of the U.N. Charter, i.e., to restrict as far as possible the use of force by the individual state, and considers Art. 51 to exclude any self-defense other than in response to an armed attack. (...) The prevailing doctrine is opposed by an approach that regards the customary right of self-defense as not being affected by Article 51, but rather having only received a particular emphasis (...) this approach is intended to serve as a justification for traditional forms of self-defense, even of self-help in particular cases. (...) The content and scope of the customary right of self-defense are unclear and extend far into the sphere of self-help in such a way that its continuing existence would, to a considerable extent, reintroduce the unilateral use of force by states, the substantial abolition of which is intended by the U.N. Charter."

³¹ Article 51 U.N. Charter: "Nothing in the present Charter shall impair the inherent right of ... self defence if an *armed attack* occurs against a Member of the United Nations (...)." (emphasis added).

ries, and in which the acquisition of territory is the immediate objective.³² Modern “attacks,” however, frequently do not fit this paradigm.

Early in the process of identifying the self-defense rights subsumed in the term “inherent,” the concept that such rights could be implicated only within one’s national borders was discarded. In the *Corfu Channel Case*,³³ the International Court of Justice (ICJ) confirmed that military forces operating outside a state’s boundaries could be lawfully defended in accordance with Article 51; a broad consensus has developed to support the notion that attacks against a nation’s civilian citizens abroad are included within the scope of an “armed attack” justifying the use of force in self-defense.³⁴

It is in this expansive view that past U.S. responses to the use of force (the military operation to retake the *Mayaguez*,³⁵ for example) were grounded. While this particular self-defense concept is not among the most controversial,³⁶ its importance with respect to terrorism is manifest. Prior to 9/11, the United States suffered its most recent ter-

³² Simma, see note 24, 669: “An armed attack only exists when force is used on a relatively large scale and with substantial effect.”

³³ *Corfu Channel Case*, ICJ Reports, 1949, 4 et seq. The case concerned Albanian claims that its territorial sovereignty was violated by British warships passing through the Corfu Channel part of which involved Albanian territorial waters. In the context of a determination of whether the British passage was “innocent,” the ICJ quoted a British telegram concerning the action that stated that British passage “was made with ships at action stations in order that they might be able to retaliate quickly if fired upon again.” The ICJ stated that, “[I]n view of the firing from the Albanian battery ... [earlier], this measure of precaution cannot, in itself, be regarded as unreasonable.”

³⁴ See A.C. Arend/ R.J. Beck, *International Law and the Use of Force beyond the U.N. Charter Paradigm*, 1993, Chap. 7; J. Winthrop, “International Law Notes, Attack on the Iraqi Intelligence Service Headquarters”, *Army Law* (August 1993), 46; Simma, see note 24, 124.

³⁵ Letter from Ambassador J. Scali, US Representative to the United Nations to the Secretary-General, 14 May 1975, quoted in: E.C. McDowell, “US Department of State”, *Digest of United States Practice* 777, 1978, stating that “my Government reserves the right to take such measures as may be necessary to protect the lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter.”

³⁶ See L. Henkin, “Use of Force: Law and U.S. Policy”, in: id. (ed.), *Right v. Might: International Law and The Use of Force*, 1989, 37.

rorist attacks in Nairobi, Tanzania, and off the coast of Yemen.³⁷ In an age of terrorism, in which civil aircraft loaded with tons of highly explosive jet fuel double as weaponry, modern “armed attacks” rarely align with the cross-border or geographic objective attack paradigm.

Perhaps even more significantly, the rise of international terrorism highlights a need to implement defensive measures that are not dependent on the ongoing nature of the attack. Terrorists, perhaps relying on the historical reluctance of the United Nations Security Council to resort to force, are likely to mount offensives of short duration—a campaign of relative quiet punctuated by bursts of extreme violence and destruction, followed by immediate withdrawal to safe haven. This dynamic not only exemplifies the need for recognition that defense of extraterritorial interests provides an appropriate basis on which to invoke Article 51, but it also points to the need to permit defensive measures, even when not tied to a precipitating attack.

Many in the international community long ago recognized this truth in more conventional contexts and expanded the exercise of the inherent right of self-defense under Article 51 to include the doctrine of “anticipatory” self-defense.³⁸ This preemptive use of force doctrine does not require a potential victim state to await an armed attack in order to respond with force. Rather, the state may exercise its inherent right to employ force to defend itself in anticipation of an attack. Although con-

³⁷ See “Deadly Attacks Bombs Rip Two African Capitals”, *Akron Beacon Journal*, 8 August 1998, A1; D. Johnston /S.L. Myers, “Investigation of Attack on U.S. Destroyer Moving Slowly”, *N.Y. Times*, 30 October 2000, A10.

³⁸ Arend/ Beck, see note 34, 72, citing Y. Dinstein, *War, Aggression and Self-Defense*, 1988, 172: “While some commentators believe that customary international law permits self-defense only after an armed attack occurs, the more common view is that the customary right of self-defense is also accorded to States as a preventive measure (taken in “anticipation” of an armed attack, and not merely in response to an attack that has actually occurred).” H.B. Robertson states that the terms anticipatory self-defense, preemptive self-defense, and preventive war are terms used to describe a more aggressive use of force in self-defense. See generally, H.B. Robertson, “Contemporary International Law: Relevant to Today’s World?”, in: J.N. Moore/ R.F. Turner (eds), *Readings on International Law From the Naval War College Review 1978-1994*, 1994, 3. For purposes of this paper, the most commonly used terms: anticipatory self-defense and preemptive self-defense, are used interchangeably to describe a use of force to prevent a specific anticipated attack by denying an adversary the means of attack.

troversial, Israel justified its 1967 attack on its Arab neighbors as “anticipatory” self-defense.³⁹

Interpreting *jus ad bellum* to permit a state to preempt an *apparent* but as yet unrealized hostile intent was not seriously contemplated in the course of U.N. Charter negotiations. Given that the potential for unwittingly starting a war is certainly greater when a preemptive attack is triggered by what turns out to be mere mistaken paranoia, the underlying assumption was that individual nations were viscerally inclined to react too quickly based on too little information. A deliberative body such as the Security Council was deemed to be more capable of objectively assessing circumstances and defusing an otherwise volatile situation.⁴⁰ Nevertheless, the pattern of state practice in the last 20 years has clearly evinced an increasing acceptance of anticipatory self-defense such that many now view it as an established part of customary *jus ad bellum*. Recognizing the obvious potential for abuse, even proponents of anticipatory self-defense have identified limiting criteria to preclude the most egregious abuses. The most important criterion, discussed below, qualifies the right by requiring that the anticipated attack be “imminent.”⁴¹

A cursory reading of Article 51, particularly in the context of the Charter’s purpose to proscribe not only war but any use or threatened use of force as well, creates the preliminary impression that reliance on it is restricted to rare circumstances.⁴² The drafters showed remarkable foresight, however, in choosing language that underscores the requisite gravity of the threat giving rise to the self-defense right, while permitting responses necessary to exercise that right in the face of unusual circumstances and threats. In stating that nothing shall “impair the *inher-*

³⁹ The attack followed the eviction of United Nations peace-keeping forces from the area by the Egyptian president, the blocking of Israel’s southern port of Eilat, and the conclusion of a military pact between Jordan and Egypt. M.N. Shaw, *International Law*, 1991, 694. See generally J.N. Moore (ed.), *The Arab-Israeli Conflict*, 1974.

⁴⁰ Simma, see note 24, 676: “Since the (alleged) imminence of an attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the state concerned. The manifest risk of abuse of that discretion which thus emerges would de facto undermine the restriction to one particular case of the right of self-defense.”

⁴¹ See O. Schachter, “The Right of States to Use Armed Force”, *Mich. L. Rev.* 82 (1984), 1620 et seq. (1634-1635).

⁴² Simma, see note 24, 663.

ent right of individual or collective self-defense if an armed attack occurs ... ,” (emphasis added)⁴³ the Charter leaves room for broader expressions of self-defense than that of a geographically confined reaction to an ongoing armed attack.⁴⁴ In recognizing the right of individual states to undertake common sense solutions to self-defense issues in the absence of effective Security Council action,⁴⁵ the flexibility of Article 51’s language can be said to have saved the Charter itself from desuetude. So too today, we should rely on the inherent flexibility of this language both to justify necessary and appropriate preemptive measures,⁴⁶ and to ensure the continuing vitality of the essential components of the Charter’s regime.

Another important *jus ad bellum* concept—rarely conceived as an evolving area of the law—is that of peacetime reprisal. The U.N. Charter creates a regime consistent with the expressed intent of its drafters—that being to minimize, or preclude entirely, the need for a member nation ever to use force unilaterally. Since the Charter’s inception, the concept of peacetime reprisal (the “peacetime” modifier being used to distinguish the concept from “belligerent reprisal,” a *jus in bello* concept associated with particular military actions in an extant armed conflict)⁴⁷ has been considered inconsistent with the Charter’s articulation of *jus ad bellum*.⁴⁸ On 24 October 1970, the United Nations General

⁴³ Article 51 U.N. Charter.

⁴⁴ Dinstein, see note 38, 169-170; but Simma, see note 24, 666 note 25, contending that “the appropriate debate is whether Article 51’s “inherent” language recognizes that the right exists with respect to non-UN members as well; it is not intended to evince “a right of self-defense existing independently from the Charter under natural Law.”

⁴⁵ See G.B. Roberts, “Self Help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals”, *Case W. Res. J. Int’l L.* 19 (1978), 243 seq. (273-274).

⁴⁶ Schachter, see note 22.

⁴⁷ As a threshold matter, peacetime reprisals must be distinguished from belligerent reprisals during armed conflict. According to Oppenheim, the former are “resorted to for the purpose of settling a conflict without going to war, the latter [belligerent reprisals] are retaliations in order to compel an enemy guilty of a certain illegal act of warfare to comply with the laws of war.” L. Oppenheim, *International Law*, Vol. 2, 7th edition, 1948, 143.

⁴⁸ See D.W. Bowett, “Reprisals Involving Recourse to Armed Force”, *AJIL* 66 (1972), 1 et seq. (1), explaining that “few propositions about international law have enjoyed more support than the proposition that, under the

Assembly passed Resolution 2625 (XXV), containing the unequivocal statement that states have a duty to refrain from acts of reprisal involving the use of force.⁴⁹ The United States representative, Herbert Reis, commenting on this statement when it was first agreed upon in the Drafting Committee, opined that it represented a “valuable step forward.”⁵⁰ One commentator succinctly summarized the global collective view of this tenet, stating, “Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal.”⁵¹ While few have pushed for an adjustment of this norm in the recent past, an analysis of the United States’ response to 9/11 and the international support it garnered may evince an emergent acceptance of peacetime reprisal as appropriate under certain circumstances.

Yet another evolving segment of the law of conflict management is the imposition of vicarious liability for an armed attack—better known as the concept of state responsibility. In the *Nicaragua Case*,⁵² the ICJ decision gave definition to the principle that although provision of arms or other forms of aid by one government to guerillas could be considered a use of force, it would not necessarily constitute an “armed attack” upon the other. In the words of Professor Lobel, “[t]his would suggest that a government could not launch counterattacks against terrorist bases in another state unless the terrorists were agents of the state or were controlled by its government.”⁵³ This principle was reaffirmed

Charter of the United Nations, the use of force by way of reprisals is illegal.”

⁴⁹ A/RES/2625 (XXV) of 24 October 1970. As a threshold matter, peacetime reprisals must be distinguished from belligerent reprisals during armed conflict. See also A. Roberts/ R. Guelff (eds), *Documents on the Law of War*, 1982, 15: “A reprisal is an otherwise illegal act of retaliation carried out in response to illegal acts of warfare and intended to cause the enemy to comply with the law.”

⁵⁰ Bowett, see note 48, 1.

⁵¹ Ibid.

⁵² *Military and Paramilitary Activities* (Nicaragua v. US), ICJ Reports 1986, 14 et seq., (101-103), holding that a state is responsible for “sending by or on [its] behalf armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein.”

⁵³ J. Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, *Yale J. Int’l L.* 24 (1999), 537 et seq. (541).

in the *Iranian Hostages Case*.⁵⁴ Since *Hostages*, however, the norm has been severely circumscribed by customary state practice.⁵⁵ Moreover, recent developments in positive international law regarding application of the *aut dedere aut punire* principle to terrorism offenses confirms the international community's unwillingness to permit passive toleration of terrorists within one's jurisdiction.⁵⁶ Ramifications for future uses of defensive force against states unable or unwilling to curtail terrorist activity within their borders are profound.

⁵⁴ *United States Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran), ICJ Reports 1980, 3 et seq. (42). (hereinafter *Iranian Hostages Case*).

⁵⁵ See, e.g., R. Erickson, *Legitimate Use of Force Against State Sponsored Terrorism*, 1989, 100-103; W. Solf, "International Terrorism in Armed Conflict", in: H.H. Han, *Terrorism and Political Violence*, 1993, 317-331; M. Lohr, "Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism", *Naval Law Review* 34 (1985), 1 et seq. (7-9).

⁵⁶ Cf. article 8 of the International Convention for the Suppression of Terrorist Bombing, 15 December 1997. See also article 10 International Convention for the Suppression of the Financing of Terrorism, 9 December 1999. In addition, the Security Council has enacted S/RES/1373, imposing e.g. binding obligations upon states to prevent and suppress the financing of terrorist acts, to refrain from providing any support to terrorists, to deny safe haven to terrorists, to develop effective border controls, and to bring to justice those who commit terrorist acts, and to eliminate the supply of weapons to terrorists, S/RES/1373 (2001) of 28 September 2001, paras 1-2. See also A.D. Sofaer, "Sixth Annual Waldemar A. Solf Lecture in International Terrorism, the Law, and National Defense", *Mil. L. Rev.* 126 (1989), 89 et seq. (108). If not a crime of universal jurisdiction, terrorism is at the very least a crime of expanded jurisdiction. The entry into force of several counter-terrorism conventions that promulgate an *aut dedere aut punire* regime lends credence to the fact that even prior to 9/11, there was a growing consensus view that passive toleration of terrorist presence is no longer acceptable. Restatement (Third) of the Foreign Relations Law of the United States 404 (1987)—(The courts may have jurisdiction for "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even absent any specific connection between the state and the offense. When proceeding on that jurisdictional premise, neither the nationality or the accused or the victim, nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations"). See also *Demjanjuk v. Petrovsky*, 776 F. 2d 571, 582-83 (6th Cir. 1985).

These developments in the interpretation of Article 51 and relevant self-defense concepts arguably demonstrate the necessity of and general international tolerance for departing from an overly restrictive, literal attachment to the language of the Charter; terrorist acts enhance geometrically, the credence and prudence of the argument for such a departure. Prior to 9/11, for example, many respected commentators were unwilling to acknowledge the availability, much less the lawfulness, of the doctrine of anticipatory self-defense as a basis for the use of force.⁵⁷ That the United States and others were routinely pilloried for their invocations of anticipatory self-defense to justify a use of force,⁵⁸ portended significant controversy on this issue with respect to a response to the 9/11 attacks. Such was not the case, however; in the glare of the harsh and unrelenting floodlight illuminating at once both the broken New York cityscape and the global reality of post-9/11 vulnerabilities, the metamorphosis of customary law as reflected in world perceptions and reactions already had begun.

The very nature of terrorism, characterized by brief, discrete, surprise attacks, precludes the execution of a traditional contemporaneous defense; the strictest reading of Article 51 is thus inappropriate.⁵⁹ The questions that remain then are whether it has now been supplanted by an expanded concept of anticipatory self-defense (Afghanistan did not represent an “imminent” threat), a new concept of peacetime reprisal (*Operation Enduring Freedom* was clearly a *response* to 9/11), or some combination of the two; and to what extent these principles may be invoked against states that have demonstrated an inability or unwillingness to curtail terrorist activities within their borders.

⁵⁷ Simma, see note 24, 676: “Self-defense is thus permissible only after the armed attack has been launched. (...) Therefore Art. 51 has to be interpreted narrowly as containing a prohibition of anticipatory self-defense”; accord M. Akehurst, *A Modern Introduction to International Law*, 1984, 223.

⁵⁸ See, e.g., R. Sadurska, “Threats of Force”, *AJIL* 82 (1988), 239 et seq. (256-260).

⁵⁹ But see M. Bothe, “Terrorism and the Legality of Preemptive Force”, *EJIL* (2003), 227 et seq., arguing that the preemptive strike doctrine of National Security Strategy 2002, adapts the perceived threats concept so as to unacceptably expand the right of anticipatory self-defense.

III. Operation Enduring Freedom

In response to the 9/11 terrorist attacks, the United States launched a military strike against Al Qaeda and Taliban forces in Afghanistan on 8 October 2001. *Operation Enduring Freedom* sheds light on evolving norms regarding several controversial and significant areas of self-defense theory: 1.) anticipatory self-defense; 2.) reprisal; and 3.) state responsibility. A relative absence of international dissent has resulted in a paucity of legal analyses associated with this use of force, but careful observation reveals that the Afghanistan intervention may evidence a greater international acceptance of particular self-defense norms or an emerging norm of syncretic approval grounded in myriad factors.

Since 1945, the language of the Charter has remained intact, but the above history demonstrates that the breadth of actions asserted as being subsumed by the language of Article 51 has evolved to accommodate the legitimate security needs of Member States. The bane of terrorism has further discredited the most literal conservative readings of self-defense law. Recent global responses to terrorism appear to have further advanced more utile constructs and significantly improved clarity as to the limits of applicable norms. *Operation Enduring Freedom* is one such action.

9/11 is the first time since the U.N. Charter entered into force that the United States has been compelled to respond to an unequivocal cross-border "armed attack." To many, the absence of such an armed attack has been the gravamen of their condemnation of past U.S. military interventions.⁶⁰ Those detractors did not assess the post-9/11 intervention as suffering the same legal weaknesses of previous interventions, and accepted it as consistent with even stricter readings of Article 51 of the U.N. Charter.⁶¹ But closer analysis of the circumstances asso-

⁶⁰ See, e.g., Brownlie, see note 30, 275-280; L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edition, 1979, 141; but see M.S. McDougal, "The Soviet-Cuban Quarantine and Self-Defense", *AJIL* 57 (1963), 597 et seq. (599), arguing that the Charter's drafters, by inserting Article 51, did not intend to impose new limitations on the self-defense right; Schachter, see note 41, 1634-1635; A.D. Sofaer, "International Law and Kosovo", *Stanford J. Int'l L.* 36 (2000), 1 et seq. (16); T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, 2002, 97-99.

⁶¹ See generally S.D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter", *Harv. Int'l L. J.* 43 (2002), 41 et seq.; C. Stahn, "International Law Under Fire: Terrorist Acts as 'Armed Attack': The Right to Self-Defense, Article 51 (1/2) of the U.N. Charter,

ciated with military intervention in Afghanistan—and terrorism generally—reveals that the same underlying concerns informing past rejections of anticipatory self-defense theories in fact apply in this case as well.⁶²

A restrictive interpretation of Article 51 would not simply require that an “armed attack” (presumably within the state’s territory) occur before self-defense could be lawfully employed; it would mandate, with even greater force, the additional requirement that actions in self-defense serve as only a temporary measure to mitigate the damage visited by an on-going attack. Recall that the pertinent language preserves the self-defense right “until the Security Council has taken measures necessary to maintain international peace and security.”⁶³ If the intent of Article 51 is to permit an exigent response only until the Security Council can act, then the armed intervention into Afghanistan would clearly be illegal—more than a month elapsed between the 9/11 attacks and the United States’ response, affording ample opportunity for U.N. Security Council action in the interim.

1. Anticipatory Self-Defense

In 1986, President Reagan launched an attack, *Operation El Dorado Canyon*, in response to the terrorist bombing of a Berlin discothèque. The attack was initially described by many as a reprisal; later, upon advice of counsel, the President clarified that the attack was an exercise of anticipatory self-defense consistent with Article 51 of the United Nations Charter.⁶⁴ Immediately after 9/11, it appeared that the environ-

and International Terrorism”, *Fletcher Forum of World Affairs* 27 (2003), 35 et seq.

⁶² But see Y. Dinstein, *War, Aggression and Self-Defense*, 2001, 165-169. Criticizing anticipatory self-defense and stressing the need for a precipitating armed attack. Dinstein would apparently not impose a temporal requirement on self-defense action as discussed below.

⁶³ Article 51 U.N. Charter.

⁶⁴ See E. Clift/ J. Nelson, “Official Tells of Decision-Making; Reagan OKd Plans for Earlier Attacks”, *L.A. Times*, 16 April 1986, 1.1. On 5 April 1986, a bomb exploded in a discotheque in Berlin frequented by United States service personnel. Of the 200 injured, 63 were American soldiers; one soldier and one civilian were killed. On the late evening of 15 April and early morning of 16 April 1986, under the code name El Dorado Canyon, the United States launched a series of military air strikes against ground targets

ment mandating such parsing of words had all but evaporated. From an international law and policy perspective, the most noteworthy characteristic of U.S. intervention in Afghanistan was the relative absence of criticism from the international community. The 9/11 terrorist attack was clearly seen as an act of war; the United States intervention in Afghanistan arguably required no explanation or justification.⁶⁵ There seems to have been universal acceptance of the proposition that this particular use of force was both lawful and appropriate. It is not immediately clear, however, what legal analysis justified such an intervention and how that justification could be articulated to provide some predictability for future operations.

Close analysis of *Operation Enduring Freedom* reveals that the circumstances surrounding the attacks of 9/11 provide little “hook” on

inside Libya. The timing of the attack was such that while some of the strike aircraft were still in the air, President Reagan was able to address the US public and much of the world. He emphasized that this action was a matter of US self-defense against Libya’s state-sponsored terrorism. In part, he stated: “Self-defense is not only our right, it is our duty. It is the purpose behind the mission (...) a mission fully consistent with Article 51 of the U.N. Charter.” The President claimed “irrefutable proof” that Libya had directed the terrorist bombing of the disco, citing American intelligence interception of a message from Gaddafi ordering an attack on Americans “to cause maximum and indiscriminate casualties.”

⁶⁵ See M. J. Glennon, “Preempting Terrorism; The Case for Anticipatory Self-Defense”, *Wkly. Standard*, 28 January 2002, 17, 24; D. Polman, “‘War’ is Now More than a Metaphor; Deadly Terror Attacks – and the Promised U.S. Response – Make a Long Overused Word Mean Just What It Says”, *Phila. Inquirer*, 13 September 2001, A5. One could argue that the concept of anticipatory self-defense was not called into question during the initial intervention in Afghanistan. This is because the primary criticism of the doctrine for some had always been the absence of an actual “armed attack”. The events of 9/11 amounted to an armed attack on the United States, and the close association between the Taliban and the perpetrators of the attack justified an imputation of responsibility to Afghanistan. In fact, however, the cross-border attack did little to alter the anticipatory nature of the United States response. The nature of a terrorist attack is such that it is temporally confined – there is no continuing attack that requires immediate defensive measures. Thus, the armed response in this instance was really designed to prevent additional future terrorist attacks. Regardless of the terminology used, however, the United States’ responsive intervention into Afghanistan does not fit neatly into the language of Article 51 of the U.N. Charter. It has, nevertheless, been widely accepted as a lawful act of self-defense.

which the strict constructionist could “hang his hat” in explaining departure from a pattern of criticizing U.S. interventions undertaken in the name of anticipatory self-defense. Even given the cross-border incursion, it is clear that Article 51 intends to sanction the use of force in self-defense against an ongoing incursion only until the U.N. Security Council can act to restore peace and security. Most certainly, there was time between 9/11 and the initiation of U.S.-lead hostilities in Afghanistan for United Nations Security Council action on this matter.⁶⁶ And, given that the Security Council had acted in Resolution 1368 to condemn the attacks and to recognize the applicability of a self-defense right,⁶⁷ but not specifically to authorize the use of force, comity with past practice would have prompted the strict constructionist to assert that the United Nations’ Resolution was not intended to justify military intervention.

When the circumstances leading up to *Operation Enduring Freedom* are broken down into identifiable constituents, we find that, at its essence, the intervention was perhaps the purest example of anticipatory self-defense in recent years. Some might argue that the 9/11 attack obviated the need to justify a response under anticipatory self-defense theory; the distinguishing feature of this intervention being not the clarity

⁶⁶ The US did not initiate intervention in Afghanistan until 8 October 2001, 27 days after the attacks of 11 September; see also Article 51 U.N. Charter.

⁶⁷ See S/RES/1368 (2001) of 12 September 2001:
The Security Council,
Reaffirming the principles and purposes of the Charter of the United Nations,
Determined to combat by all means threats to international peace and security caused by terrorist acts,
Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,
 1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security; (...)
 3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable; (...)
 5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations; (...).

of evidence adumbrating hostile intent so much as the fact of a previous attack. But given the general aversion with which reprisal has been viewed—no one ever has claimed that a retaliatory/reprisal strike is appropriate under the Charter—unsanctioned interventions have consistently been justified as acts of “self-defense,” not as a response to prior attack.⁶⁸ Previous criticisms of anticipatory self-defense actions due to the absence of across-border attack are simply not answered by the fact that *Operation Enduring Freedom* was preceded by a single attack nearly a month prior.

Whether international acquiescence to, if not approval of, the United States’ use of military force against Afghanistan evinces a conscious acceptance of an anticipatory self-defense doctrine may be debated, but the broad-based respect for U.N. Security Council Resolution 1368 clearly undermines any literalist argument that in failing to reference anticipatory self-defense expressly, the Charter renders the theory moot. In pained but clear language, the French Ambassador to the United Nations, who began drafting the resolution only hours after the 9/11 attacks, wrought significant developments in international law. The question as to precisely what those developments are, however, will long provide fodder for debate.

As much as any past intervention, that into Afghanistan calls into question the definition of the term, “defense.” Our military operations in Afghanistan were arguably not “defensive” in nature; we effected the

68 As used in this paper, the term “unsanctioned” refers to uses of force not expressly authorized by the United Nations. A classic case study of unsanctioned self-defense against the weapons of mass destruction threat is the 1981 Israeli air strike against the Osirik nuclear reactor outside Baghdad. Although one justification for the attack was the existence of an armed conflict between Israel and Iraq, Israel also claimed that “in 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.” In assessing the merits of this argument, it is important to note that Israel had fought Iraq three times (1948, 1967, 1973) and Iraq denied the right of Israel to exist as a state. Israel concluded that it was a future target of Iraqi nuclear capability, which it estimated would be operational by 1985. See A. D’Amato, “Israel’s Air Strike Upon the Iraqi Nuclear Reactor”, *AJIL* 77 (1983), 584 et seq. Despite the proportional nature of the attack, Israel’s actions were widely condemned. See also R.F. Teplitz, “Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?”, *Cornell Int’l L. J.* 28 (1995), 569 et seq. (576-583).

overthrow of a regime.⁶⁹ But one can claim that our actions were “pre-emptively” or “preventatively” defensive in that they were designed to preclude another attack. In this regard, the military endeavor represents a classic example of anticipatory self-defense. The most conservative renditions of anticipatory self-defense theory are clearly inadequate in this day and age. Requiring a particularized, anticipated attack essentially authorizes terrorists to operate with impunity, so long as their specific conspiracies and capabilities are not disclosed. Such a constraint could limit terrorism response options to only those cases where the intelligence regarding future attacks is extremely well-developed. This would be inadequate from both protective and deterrent viewpoints.

Looking at the changed circumstances of the post-9/11 world, it would seem that the argument for anticipatory self-defense today proceeds *a fortiori* when compared to the justifications used historically. Disallowing anticipatory self-defense would effectively give license to terrorists, or even mandate victimization. Considering the extreme lethality of weaponry readily available today, the costs of that victimization could quickly rise to unacceptable levels. To reject anticipatory self-defense in cases of terrorism, the world would be telling potential aggressors and state sponsors of terrorist acts that their preparatory actions were essentially immune from recourse.

Classic in one regard, however, the exercise of anticipatory self-defense in *Operation Enduring Freedom* was welcomed internationally in a way that past “classic” examples were not. Moreover, it involved unique characteristics that set it apart from other previous examples. One of those characteristics, discussed below in more detail, was its retributive quality. If it was “anticipatory,” it was so because it anticipated another future terrorist attack for its legal justification. It was also retributive, however, because it was effected in retaliation for 9/11.

Many have long deemed unlawful under the U.N. Charter both of these self-defense related justifications for the use of force: past criticisms of anticipatory self-defense have been most vituperative and sustained due to the absence of a precursor “armed attack” against which to “defend;” peacetime reprisal is impugned for not being defensive at all—rather it responds to a completed act.⁷⁰ Analogizing *jus ad bellum*

⁶⁹ See R. Roeper, “Even Towering Figures are Often Unknowns”, *Chicago Sun Times*, 14 April 2003, 11; “Saddam and His Statue Take a Fall”, *Tulsa World*, 10 April 2003, A18.

⁷⁰ See Bowett, see note 48, 1, explaining that “few propositions about international law have enjoyed more support than the proposition that, under the

to childhood fisticuffs, classic self-defense doctrine is the authority to block punches while an appeal for protective action is made to the U.N. Security Council adult authority. Reprisal is a subsequent retaliatory attack and anticipatory self-defense is a preemptive punch. *Operation Enduring Freedom* fits neither analogy neatly; it is the return punch.

Conceived in this way, the playground fight analogy proves quite apt. While the normative construct involves non-aggression principles and schoolyard authorities to secure that environment, in the absence of effective enforcement, the most acceptable responses (in descending order) would be: 1.) the blocking of a punch (literal, strict-constructionist Article 51—almost certainly acceptable, but perhaps impossible with regard to terrorism); 2.) the return punch (to preempt subsequent blows—likely acceptable unless disciplinary authorities are deemed so effective as to obviate the need); 3.) the preemptive strike (pure anticipatory self-defense—likely resulting in detention unless disciplining authorities acknowledge the certainty of such self-defensive need, and even then they would likely only turn a blind eye, avoiding public approval); and 4.) the subsequent retaliatory attack in revenge (unlikely to curry schoolmarm favor, even when explained by the most effective playground lawyer).

Operation Enduring Freedom fits well in category 2.) The use of force is not in its most essential nature defensive, and it is ultimately a preemptive measure in anticipation of future attacks. Unlike pure anticipatory self-defense (category 3) however, *Operation Enduring Freedom*, which enjoys far greater international acceptance than past uses of force in the anticipatory self-defense category, is characterized by an additional retaliatory component (category 4). Thus, to fully understand the evolving post-9/11 *jus ad bellum* norms, it is useful to review the doctrine of peacetime reprisal.

2. Reprisal

Though retribution has traditionally been deemed prohibited under the U.N. Charter and the concept of peacetime reprisal maligned as antithetical to the Charter's security structure, the dearth of criticism attending *Operation Enduring Freedom* may derive partly from the fact that the counter-attack was not *mere* anticipatory self-defense; it also

Charter of the United Nations, the use of force by way of reprisals is illegal.”

responded to an unambiguous use of force. In other words, a defense-related reprisal, one that responds to a past attack with a view to preventing a future attack, may be lawful. While the concept of peacetime reprisal may no longer reflect customary international law, it appears that the legitimacy of such interventions may be bolstered if they respond to a prior attack.

The last time the United States used the military instrument to respond to a terrorist event was the Tomahawk missile attack ordered by President Bill Clinton in response to the 1998 African embassy bombings.⁷¹ The facts permit several theories as to why that response was not well received internationally. Some may have viewed as insufficient evidence that Al Qaeda had committed the attack; others may have objected to one target of the attack—a Sudanese pharmaceutical plant.⁷² Some, however, would have criticized the attack as amounting to a peacetime reprisal.⁷³ These same criticisms were not verbalized in response to U.S. action in *Operation Enduring Freedom*.

The most visible goal of the U.N. Charter is to prevent an accelerating chain of wrongs that can lead to war. Thus, Article 33 requires parties to seek peaceful means to settle disputes.⁷⁴ The vengeful motiva-

⁷¹ See Lobel, see note 53, 539; B. Woodward, "CIA Paid Afghans to Track Bin Laden: Team of 15 Recruits Operated Since 1998", *Wash. Post*, 23 December 2001, A1.

⁷² See B. Gellman, "U.S. Suspects Al Qaeda Got Nerve Agent from Iraqis; Analysts: Chemical May Be VX, And Was Smuggled Via Turkey", *Wash. Post*, 12 December 2002, A1. In 1998, the Clinton administration asserted that Iraq provided technical assistance in the construction of a VX production facility in Sudan, undertaken jointly with Al Qaeda. In retaliation for Al Qaeda's August 1998 truck bombing of US embassies in Kenya and Tanzania, President Bill Clinton ordered the launch of Tomahawk missiles to destroy the facility, alleged to operate under cover of the al Shifa pharmaceutical plant in Khartoum, Sudan's capital. See also Lobel, see note 53, 556: Noting that most nations, including U.S. NATO allies such as France, Italy, Britain, and Germany, appear to believe that the United States attacked the wrong factory in Sudan.

⁷³ See, e.g., W.M. Reisman/ J.E. Baker, *Regulating Covert Action*, 1992, 93, 101-102.

⁷⁴ Article 33 U.N. Charter: "(1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (2) The Secu-

tions of peacetime reprisal are contrary to this norm, as is the tit-for-tat mentality evoked by the terminology. A reprisal is more likely to initiate or continue a chain of wrongs than to effect a break in that chain.

A strong argument can be made, however, that the deterrent aspect of peacetime reprisals is not contrary to the goal of international peace. Rather, it is the escalatory and vengeful nature of reprisals that is so contemptuous. Thus, retaliatory action for the purpose of deterring an armed attack might be acceptable *if* that deterrence is *necessary* for a nation to meet its self-defense needs and can reasonably be found to be constituent in the “inherent right of self-defense.” That there may be a small area of common ground between a reasonable deterrent action and a punitive reprisal should not undermine the legitimacy of the former.

In carefully comparing elements of peacetime reprisals with those imbuing more traditional self-defense concepts, one is struck by an apparent close relationship between the two. The traditional elements of self-defense are necessity and proportionality.⁷⁵ The necessity prong traditionally is comprised of two sub-elements: 1.) an immediate threat; and 2.) an attempt at redress.⁷⁶ Because proportionality of response can be applied to reprisals as easily as to any traditional self-defense action, it only is the first element, an immediate threat that distinguishes self-defense (based on a future threat) from reprisal (based on a prior violation of international law). Professor Bowett describes it in the following terms: “Self-defense is future-oriented since its goal is state security against threats to its territory or sovereignty. Reprisals, on the other hand, are oriented to the past, they seek to punish previous illegal acts and prevent their recurrence.”⁷⁷ The primary distinction between the two doctrines thus lies in their respective purposes. Actions in self-defense seek to protect and deter; reprisals seek to punish and deter. As Professor Bowett later explains, however, this distinction is much more difficult to make in practice than in theory for two reasons. First, determining a nation’s purpose is “notoriously difficult to elucidate.” And second, “the dividing line between protection and retribution becomes more and more obscure as one moves away from the particular incident

rity Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.”

⁷⁵ *Restatement of the Law, Third, Foreign Relations Law of the United States*, 1987, § 905, comment g.

⁷⁶ See Roberts, see note 45, 277.

⁷⁷ See Bowett, see note 48, 3.

and examines the whole context in which the two or more acts of violence have occurred.”⁷⁸

As the object of the first of several U.N. Security Council Resolutions condemning reprisal, the British discovered how difficult it can be to distinguish the legitimate act of self-defense from the unlawful reprisal.⁷⁹ In 1964, Yemen repeatedly raided the British Protectorate of Aden. The British responded by counter-attacking targets on Yemeni territory. Following a British air attack on the Yemeni Fort of Harib, the Yemeni Government requested Security Council review of the situation, asserting that the British air raid was an unlawful use of force—a reprisal. The United Kingdom Representative to the U.N. claimed the attack was “a defensive response” to protect Aden’s territorial integrity.⁸⁰ Citing the repeated Yemeni attacks in Aden, the representative justified the attack against the Fort, alleged to have served as the staging area for several of the raids, as an action that “has no parallel with acts of retaliation or reprisals, which have as an essential element the purpose of vengeance or retribution. It is the latter use of force which is condemned by the Charter, and not the use of force for defensive purposes such as warding off future attacks.”⁸¹

The United States, together with the United Kingdom, abstained from the Security Council vote on the resolution condemning the Harib action.⁸² Ultimately, the final resolution condemned “reprisals as incompatible with the purposes and principles of the United Nations.”⁸³ Ambassador Adlai Stevenson condemned the reprisal as well, but explained the concern underlying his abstention as grounded in the

⁷⁸ Ibid.

⁷⁹ Bowett, see note 48, 8, quoting S/RES/188 (1964) of 9 April 1964.

⁸⁰ See also Bowett, see note 48, quoting Doc. S/PV.1109 (1964) “It will also be abundantly plain that, contrary to what a number of speakers have said or implied, this action was not a retaliation or reprisal. There is, in existing law, a clear distinction drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed ‘retaliation’ or ‘reprisal’; the other, which is expressly contemplated and authorized by the Charter, is self-defence against armed attack. (...) it is clear that the use of armed force to repel or prevent an attack - i.e., legitimate action of a defensive nature - may sometimes have to take the form of a counter-attack.”

⁸¹ Ibid.

⁸² S/RES/188 (1964) of 9 April 1964, denouncing the reprisals and “deploring” the British action.

⁸³ M. Whiteman, *Digest of International Law*, Vol. 12 (1971) 173-4.

failure of the resolution to assign adequate blame to the Yemeni attacks triggering the use of force against Fort Harib.⁸⁴

In applying a self-defense rationale to justify their action in Yemen, the British used a legal argument akin to the Israeli “accumulation of events” theory on the use of self-defensive force.⁸⁵ Beginning in 1953, the Israelis explained any number of their armed actions on the broad context of defending against repeated attacks on their people.⁸⁶ In analyzing some seventeen Israeli military operations, Professor Bowett concluded that the Security Council rejected this theory and condemned the actions on six occasions.⁸⁷ While Israel directed the majority of the seventeen operations at Jordanian, Syrian, and Egyptian nationals, four raids, all of which were condemned, targeted terrorist sites, both military and civilian.⁸⁸ Nonetheless, in reviewing these instances in which the Security Council has rejected actions purportedly taken in self-defense, it must be borne in mind that the Security Council was concerned with containing potentially explosive situations—situations in which reprisals or reprisal-like actions would likely yield results inconsistent with the Charter.

Until the early 20th century, retaliation via a discrete reprisal represented the customary practice of civilized nations.⁸⁹ One could reasonably contend that, were it not for the devastating effects of World War I and II, the doctrine of peacetime reprisal, at least as narrowly articulated in the 1928 *Naulilaa Case*,⁹⁰ would have retained some validity.

⁸⁴ Ibid.

⁸⁵ See Bowett, see note 48, 5-6.

⁸⁶ Ibid.

⁸⁷ Bowett, see note 48, 33-36.

⁸⁸ Ibid.

⁸⁹ See M.J. Kelly, “Time Warp to 1945 - Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law”, *Journal of Transnational Law & Policy* 13 (2003), 1 et seq.; Whiteman, see note 83, 149.

⁹⁰ See Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (hereinafter *Naulilaa*), 8 Trib. Arb. Mixtes 409 (Port.- Ger. 1928), translated and discussed in W.W. Bishop Jr., *International Law: Cases and Materials*, 3rd edition, 1971, 903-904. The case grew out of Portugal’s neutrality in World War I. In October of 1921, German officials entered Portuguese Angola to secure the purchase of supplies. Misunderstandings ensued, a Portuguese man fired a weapon, and three Germans were killed. German troops, in alleged reprisals, destroyed

A return to the traditional doctrine of reprisal is probably neither desirable nor politically feasible. If reprisals became commonplace, we likely would observe a prominent “revenge” element as in *Naulilaa*. In constructing a coherent theory of self-defense under Article 51, however, there may be some room for a multitude of factors, including the elevated deterrent impact associated with retaliatory action conducted with an anticipatory purpose. In *Naulilaa*, the Germans lost their case against the Portuguese because their overwhelming response served ignoble revenge aims as opposed to the more noble deterrent purposes viewed with greater favor by the arbitral panel.⁹¹

While reprisals and more traditional acts of self-defense share common elements, the reprisal is associated more closely and easily with revenge, retribution and punishment than with deterrence. This *vengeance* aspect of the reprisal motivation was and is most obvious, because it is also the most closely associated in time with the triggering event, and it quenches the visceral instincts that frequently attend hostility. Since 1945, self-defense concepts have neglected the deterrence component of reprisal and stressed stopping the aggression or disabling the aggressor.⁹²

While the deterrent aspects of reprisal should have been unnecessary under the Charter regime, the relative impotence of the Security Council undermined this planned structural protection. The demise of reprisi-

forts and posts in Angola. The 1928 decision of the Arbitral Tribunal found the reprisals illegal because the Portuguese Act was a misunderstanding that was not violative of international law, the German government did not make any demand on the Portuguese government prior to the reprisals, the reprisals actually consisted of six separate acts, and they were not proportionate to the offending act. The Arbitral decision in *Naulilaa* set forth an overview of pre-World War I reprisal doctrine and supported and rearticulated the following rules for reprisal, with the exception of rule 3, which it rejected:

- (1) the occasion for the reprisal must be a previous act contrary to international law;
- (2) the reprisal must be preceded by an unsatisfied demand;
- (3) if the initial demand for redress is satisfied, no further demands may be made;
- (4) the reprisal must be proportionate to the offense.

Further, the decision added a 5th criteria that only a state can attempt a reprisal.

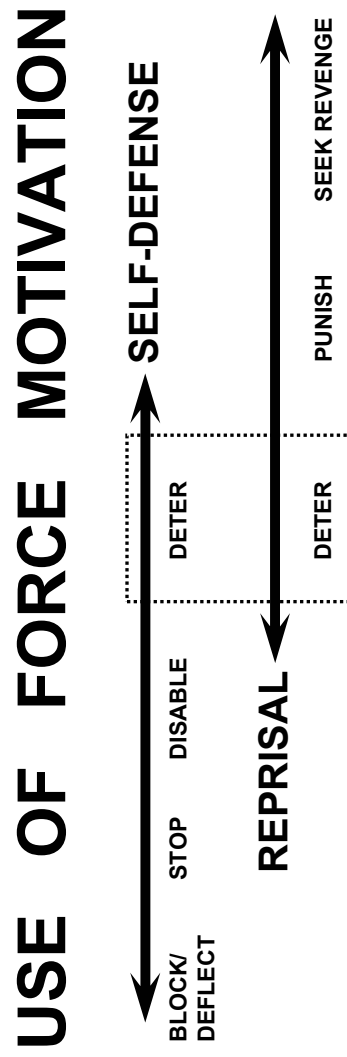
⁹¹ Ibid.

⁹² E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, 1992, 130; see also Kelly, see note 89, 12-21.

sal, however, should not be attended by the deprecation of deterrence as an appropriate self-defense motivation. We should be careful not to throw out the deterrence baby with the bath water of reprisal.

Returning to the simple schoolyard analogy, we see that the intent or motivation underlying a reprisal may be a critical distinguishing feature. If the retaliation is simply a retributive assault, it is properly maligned. If it is better viewed as a counterpunch, however, the retributive aspects actually bolster the legitimacy of the anticipatory strike. Neither reprisal, nor anticipatory attacks enjoy particularly favorable status under either international law or schoolyard law, but each has potentially positive aspects, and the combination may emerge as a well-accepted exercise of the inherent right of self-defense.

The chart below depicts the overlap between concepts of self-defense and the specific act of reprisal.



3. State Responsibility and Vicarious Liability

Another substantial movement in *jus ad bellum* is associated with President Bush's now-famous statement, appearing to afford no accommodation for nations seeking to remain neutral, "[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."⁹³ With this remark, Bush not only unveiled a stunning strategic decision regarding the future conduct of foreign relations, he interpreted and furthered an emerging norm in international law regarding vicarious liability and state responsibility.

In a post-Westphalian world inhabited by non-state entities intent on engaging in international terrorism, some level of proactive combating of the terrorists by relevant states may be a necessary prerequisite to continued viability of the system. Cooperation in the war on terrorism is a reasonable prerequisite to recognition of sovereign rights and immunities.

As mentioned above, the twin declarants of old law: the *Nicaragua* and *Iran Hostages Cases*, embodied the principle that a state was only responsible for the illegal actions of those present within its territory, if the bad actors were agents of the state or were controlled by its government.⁹⁴ The post 9/11 world simply cannot accommodate such a norm. Even prior to President Bush's speech, the *Nicaragua* and *Hostages* concept already had begun to erode, due, in major part, to the emergence of a variety of multilateral counter-terrorism treaties articulating a state responsibility to prosecute or extradite terrorists.⁹⁵ The international response to the President's speech merely solidified the legitimacy of the approach.⁹⁶

⁹³ President George W. Bush, *Address to a Joint Session of Congress and the American People*, Washington DC, 20 September 2001, available at: <<http://www.usembassy.org.uk/bush83.html>>.

⁹⁴ *Nicaragua v. US*, see note 52, 121; *Iranian Hostages Case*, see note 54.

⁹⁵ See below.

⁹⁶ "Bush Address Doesn't Play So Well in Russia", *The Current Digest of The Post-Soviet Press*, Vol. 54 No. 5, 27 February 2002: "The U.S. president said (this is also part of his doctrine) that if the national governments of various countries prove unable to stop terrorists on their territory, America will do it for them. The Philippine justice minister, Hernando Perez, replied, 'This isn't the tone in which the president of a friendly country should speak to

Most marked regarding the Bush announcement is the relative absence of any public critique. The United Nations was silent regarding Bush's apportionment of the world into two broad categories – those “for” and those “against” U.S. efforts in the war on terror—stances of neutrality or assertions of incapability appear to have been disallowed. The world's silence speaks volumes as to the current state of customary international law; Bush's speech was, perhaps unwittingly, a declaration of at least one development in that law. Post 9-11, the international community has apparently rejected the ICJ notion that active state support or control of terrorist actors is necessary to trigger military intervention in self-defense against a state that fails to curtail terrorist attacks commencing from within its borders. The meaning of the term “state sponsor” of terrorism has been expanded in sweeping fashion to encompass states that fail to take appropriate remedial action against terrorists—particularly when they have been warned to do so.⁹⁷

Some have argued that this emerging norm is a sliding scale; the severity of the intervention authorized should be directly commensurate with the degree of a state's active assistance to terrorist entities.⁹⁸ While there may be a visceral appeal or even logic to such an articulation of the norm, it is not clear how one would quantify the standard, and it certainly is not clear that the global community has adopted such a

another friendly country.” Among the NATO allies in Europe, Britain alone supported Bush. The others expressed the concern that America was once again acting on its own.

⁹⁷ The United States demanded that those controlling relevant territory in Afghanistan (the Taliban) turn over the leaders of Al Qaeda to the United States, close all terrorist training camps in Afghanistan, and provide the United States with full access to the camps to confirm their closure. The Taliban declined to do so. Because the United States did not recognize the Taliban regime as the government of Afghanistan and therefore had no diplomatic relations with them, the US demands and the Taliban's rejection of those demands were communicated through the government of Pakistan. See R. Chandrasekaran, “Taliban Refuses to Surrender bin Laden: U.S. Develops Options for Military Action”, *Wash. Post*, 19 September 2001, A1. Further, President Bush issued the demands in a widely reported speech to a joint session of the US Congress, see G.W. Bush, see note 93; see also J.F. Harris/ M. Allen, “President Details Global War On Terrorists and Supporters”, *Wash. Post*, 21 September 2001, A1.

⁹⁸ See G. Travalio/ J. Altenburg, “State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force”, *Chicago Journal of International Law* 4 (2003), 97 et seq.

model. Borrowing a concept from criminal law, one is either guilty or not with respect to aiding and abetting. Punishments meted out may vary, but only within the range permitted by law based on the facts of a particular case. Similarly, the principle of proportionality must always be considered when applying force,⁹⁹ but the right to act in self-defense is either present or it is not.

4. Toward a New Concept for Self-Defense—Additional Factors

Operation Enduring Freedom illuminates several relevant considerations regarding self-defense law, but a complete and articulable standard for military intervention is not easily discerned. Legal justifications for *Operation Enduring Freedom* and other counter-terrorist interventions vary significantly. Some focus on the propriety of anticipatory self-defense.¹⁰⁰ Others allude to the deterrent value of reprisals.¹⁰¹ Still others focus on the state sponsorship/state responsibility prerequisite.¹⁰² All of these concepts are relevant to a discussion of *jus ad bellum*, but none, in isolation, offers a comprehensive theory or philosophy capable of providing an adequate guide for future use of the military instrument in self-defense. Likewise, any one of the justifications taken to its logi-

⁹⁹ The principle of proportionality, as expressed in US Army Field Manuals, mandates that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. *Dep't of the Army, Field Manual 27-10, The Law of Land Warfare* (July 1956), para. 41, change 1 (hereinafter FM 27-10). Proportionality is a key element of self-defense under Article 51 of the U.N. Charter, Simma, see note 24, 673.

¹⁰⁰ See, e.g., J.M. Beard, "America's New War on Terror: The Case for Self-Defense Under International Law", *Harvard Journal of Law and Public Policy* 25 (2002), 559 et seq.; T.M. Franck, "Terrorism and the Right of Self-Defense", *AJIL* 95 (2001), 839 et seq.; M.E. O'Connell, "Lawful Responses to Terrorism", *Jurist*, 18 September 2001 available at: <<http://www.jurist.law.pitt.edu/forum>>.

¹⁰¹ See M.J. Kelly, "Understanding September 11th - An International Legal Perspective on the War in Afghanistan", *Creighton Law Review* 35 (2002), 283 et seq. (284).

¹⁰² See J.A. Cohan, "Formulation of a State's Response to Terrorism and State-Sponsored Terrorism", *Pace Int'l Law Rev.* 14 (2002), 77 et seq.

cal extreme would hardly comfort those concerned about the corrupting influence of power—even American power.

Using international reaction as a measure of legitimacy, we note several important developments in self-defense law. At minimum, we can conclude that the lawfulness of a use of force in self-defense is not fatally undermined by: 1.) the absence of an ongoing attack; 2.) adequate time for the Security Council to act; or 3.) the fact that the culpability of a state that is the object of the attack is based only on vicarious liability associated with a decision not to act. But these conclusions do little to satisfy those who fear a disintegration of restraining principles subsumed by Article 51. They do not provide an outline of legal requirements to justify the use of force; they only undermine falsely dispositive claims of illegality.

While few fail to agree that *Operation Enduring Freedom* was a legally appropriate use of force, fewer still provide a coherent positive theory that may apply to justifying such military interventions in future circumstances. Perhaps the litany of justifications is itself an indication that legitimacy is really a function of a cumulative totality of multiple factors. Just as the lawfulness of a particular use of force can be undermined by more than one lacuna, it may be logical that, as a practical matter, an intervention can be justified by an accumulation of factors militating in favor of a need to respond in self-defense.

Several factors attending the military intervention in Afghanistan may explain the widespread international support it received. Specifically, there was reason to believe that: 1.) there had been a previous attack against United States interests and territory; 2.) the attack had involved an actual cross-border incursion into U.S. territory; 3.) the primary object of United States military actions (Al Qaeda) was responsible for that attack; 4.) the attackers were contemplating other attacks; 5.) the *modus operandi* of the attackers was terrorism (thus providing little or no warning); 6.) target states or states whose territory was to be compromised had been warned to cooperate in suppressing terrorists and had failed to satisfy ultimatums; 7.) there was some level of international recognition of the propriety of the intervention (the Security Council had addressed the issue in a way that favored intervention or at least did not condemn it)¹⁰³; 8.) the character of future terrorist attacks could be devastating; 9.) there was substantial evidence to support the above relevant facts (intelligence and statements by Al Qaeda mem-

¹⁰³ See 9/11 Resolution, see note 67.

bers); and 10.) absent self-defense, there was no apparent ulterior motive for the intervention.

The first three factors provide a factual predicate for reprisal (assuming the legitimacy of reprisal).¹⁰⁴ The next two factors ((4.) and 5.)) lay the groundwork for anticipatory intervention (again, assuming its legitimacy), and the 6th factor provides justification for attaching responsibility to Afghanistan's governing authority. The last four factors listed have been discussed only cursorily. Their relevance in bolstering legitimacy, addressed briefly below, is manifest.

Since international law, especially in the *jus ad bellum* arena, is relatively undefined by judicial authority, international recognition and acceptance of a military intervention not only assists in conferring legitimacy; it helps to define it. This referent authority gleaned from multilateral endorsement and action inhabits every justification for humanitarian intervention not sanctioned by the U.N. Security Council.¹⁰⁵ The argument that it would bolster the intervention in Afghanistan proceeds *a fortiori* with respect to any justification for a humanitarian intervention, however. In the case of *Operation Enduring Freedom*, a number of international organizations in addition to the Security Council, supported intervention, in some cases overtly, in some tacitly. Moreover, Security Council Resolution 1368 specifically referenced the textual authority in Article 51.

Another factor that reinforces legitimacy while neither making nor breaking a legal case for self-defense is found in the 8th factor listed above: the gravity of the potential threat. Some may confuse this notion with proportionality. Although the concepts are related, the 8th factor is slightly different. Proportionality would limit a response to only that appropriate to undermine the threat. In contrast, the 8th factor addresses the very right to respond.

¹⁰⁴ The second factor, touching on issues of peacetime reprisal, is potentially relevant for two unrelated reasons. If deterrence is achievable by sending a message that terrorist attacks will be responded to, then it has value in its own right. With respect to Operation Enduring Freedom, however, it probably played a role in several other ways. Though the law has for at least 50 years rejected a retributive component to uses of force under Article 51, there is little doubt that the visceral reaction of international observers was one that would forgive some intellectual rigor in legal reasoning. More importantly, however, it provides evidence of intent and capability, thus bolstering the "necessity" component subsumed by several of the above factors and found in traditional *Caroline* self-defense analysis.

¹⁰⁵ See below note 120 and accompanying text.

Turning again to the schoolyard analogy, even a counterpunch may not be sanctioned if there is a consensus view that the future or continued threat pertains to relatively low-level violence. If the next strike could render a child unconscious, however, few would deny the appropriateness of a preventive retaliation. So too flows the analysis with respect to a terrorist attack. If the previous and likely future attacks involved vandalism or destruction of property alone, use of force in response may be inappropriate under the Charter. When terrorists have demonstrated the capability and willingness to engage in mass killing, however, a more flexible reading of Article 51 is likely to be permitted.

On 7 June 1981, the Israeli Air Force attacked the Tuwaitha Nuclear Research Center and destroyed Iraq's Osarik nuclear reactor. By unanimous vote, the U.N. Security Council condemned the attack as a violation of Article 2 (4) of the U.N. Charter. Israel's preemptive attack on Iraq's nuclear weapons plant was denounced extensively,¹⁰⁶ but little criticism persists today. The Israeli attack is instructive for the introduction of another component to an assessment of the acceptability, if not the lawfulness of, the use of force—that is, seriousness of the threat. The potentially devastating impact of weapons of mass destruction changes entirely the legal and foreign policy analyses of a military intervention. In a similar vein, 9/11 demonstrated that the lethality of the terrorist threat has grown exponentially.

The penultimate factor listed above—quality of relevant evidence—is also self-evident in its ability to bolster the legitimacy of an intervention. Al Qaeda's widely recognized role in previous terrorist attacks and Usama bin Laden's *fatwas*, declaring war against the United States, went a long way to advancing perceptions as to the propriety of the target. As with the other bolstering factors, the probity of predicating evidence does not itself establish lawfulness, but its absence certainly undermines it.

On 7 August 1998, in response to the East Africa embassy bombings, the United States launched 79 Tomahawk missiles at targets asso-

¹⁰⁶ M.N. Leich, *US Dep't of State, Cumulative Digest of United States Practice in International Law 1981-1988*, 1995, 2933-2935. On 19 June 1981, the Security Council, by unanimous vote, "[s]trongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct", S/RES/487(1981) of 19 June 1981. It appears the touchstone to legality was not the relevance of the target to capability, but a combination of factors, including the absence, at the time, of a demonstration of hostile intent or a precipitating use of force by Iraq.

ciated with Usama bin Laden's terrorist organization in Afghanistan and Sudan.¹⁰⁷ The Afghan targets were paramilitary training camps associated with three militant Islamic terrorist groups, including that of bin Laden,¹⁰⁸ which was identified as the venue for a top-level meeting of Al Qaeda leadership. These bases provided refuge for terrorists, housed their infrastructure, and were used to train them in the tactics and weapons of international terrorism.¹⁰⁹ The Sudan target was an industrial plant in Khartoum—the al Shifa pharmaceutical plant believed to be a manufacturing or transshipping facility for chemical weapons precursors.¹¹⁰ While international reaction was initially mixed,¹¹¹ the absence of evidence confirming the unlawful activities of the al Shifa plant quickly served to undermine any perceived legitimacy with regard to that attack.¹¹²

¹⁰⁷ See Woodward, see note 71.

¹⁰⁸ See W.M. Reisman, "International Legal Responses to Terrorism," *Houston Journal of International Law* 22 (1999), 3 et seq. (31), quoting S.D. Murphy, "Contemporary Practice of the United States Relating to International Law," *AJIL* 93 (1999), 161 et seq.

¹⁰⁹ National Public Radio Morning Edition (NPR), transcript # 98082115-210, 21 August 1998, available at: <www.lexis.com>.

¹¹⁰ See Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 Wkly. Comp. Pres. Doc. 1643, 20 August 1998.

¹¹¹ A number of US allies including Australia, Great Britain, Germany, Israel, New Zealand and Spain openly supported the attacks, while France and Italy offered tepid support. See "World Reaction", *USA Today*, 21 August 1998, 6A; U. Pan / T. Conner, "Ignored Boris Goes Ballistic", *N.Y. Post*, 22 August 1998, A5. China, Cuba, Pakistan, Russia and several Arab countries condemned the attacks, see "Allies Back U.S. Strikes; Russia Among the Dissenters", *Minnesota Star Tribune*, 22 August 1998, 6A; "Some Countries Back U.S. Strikes; Others See a Diversion," *Minnesota Star Tribune*, 21 August 1998, 6A. UN Secretary-General Kofi Annan later criticized "individual actions" against terrorism, apparently implying his disapproval of the forcible measures, see "Annan Faults States' 'Individual Actions' Against Terrorism", *Agence Fr.-Presse*, 21 September 1998.

¹¹² See T. Atlas/ R. Mosely, "'Smoking Gun' for Sudan Raid Now in Doubt", *Chicago Tribune*, 28 August 1998, 1; C. Lynch, "Sudan Working for Better Ties with U.S.," *Boston Globe*, 7 October 1998, A8, noting comments by the French Foreign Minister that America's allies are willing to condone unilateral attacks in certain circumstances, but "you must not get it wrong." See Lobel, see note 53, 556: "That most nations believe that the United States probably did 'get it wrong' in striking the al Shifa plant, means they do not believe the action was legal."

Finally, the absence of ulterior motive substantially fortifies the legitimacy of an armed intervention. One would be hard pressed to identify an economic, political or social benefit to the United States in invading Afghanistan and hunting down cave-dwelling terrorists. Of course, the apparent absence of ulterior motive can hardly be labeled a “recognized criterion” supporting the exercise of self-defense. Its import, however, should not be underestimated—accusations of ulterior motive cloaked in the legitimacy of self-defense have fueled international disapproval of any number of past interventions. The frequency of critical comments associating *Operation Iraqi Freedom* and oil provide recent evidence of the dynamic.

All of the justifying and bolstering factors listed above militate in favor of legitimacy in the case of *Operation Enduring Freedom*. Not surprisingly, otherwise commonplace criticism of United States military action has been noticeably absent in the case of the use of force against Afghanistan. It would seem logical to conclude that this amalgam of factors is more than sufficient to justify armed intervention. Conversely, many of these factors, to a greater or lesser degree, also marked uses of forces that were far less positively received such as *Operation Iraqi Freedom* in Spring of 2003.¹¹³ None of these factors, in itself appears to make the case for legality under *jus ad bellum*, but several touch on relevant concepts that may give a valuable structure to the emerging framework by which self-defensive action may be justified under Article 51.

IV. Operation Iraqi Freedom

If the military intervention in Afghanistan and its international reception provided some clarity regarding the development of 21st century *jus ad bellum* norms, the international reaction to *Operation Iraqi Freedom* proceeded to muddy the waters again. An old legal adage asserts, “bad facts make bad law.” In the case of *Operation Iraqi Freedom*, the facts may not make any law at all, but they certainly do not produce coherent guidance for the future. The effort in Iraq does illustrate the appropriately constraining sensibilities that counterbalance the more visible and chronic pressures brought to bear by terrorism’s ascendance.

¹¹³ See R. Pyle, “Gorbachev Says Bush had ‘Hidden Agenda’ in Invading Iraq”, *Associated Press Worldstream*, 7 October 2003.

Particularly noteworthy among the relevant “bad facts” was the failed U.S. attempt to secure an authorizing Security Council resolution, the relative paucity of shareable intelligence, and the *coup de grace*—an inability to confirm predicated assumptions regarding the existence of weapons of mass destruction. From a legal perspective, none of these factors should be relevant to an analysis of the exercise of the “inherent” right of self-defense consistent with Article 51. A Security Council veto cannot eliminate an inherent right, classification concerns do not lessen a threat, and the absence of suspected weapons after the fact cannot change the perceived threat *ex ante*. Law is rarely beholden to logic, however, and the accumulation of unfortunate *pre-* and *post facto* circumstances will undoubtedly impact future U.S. foreign policy forays, and perhaps even the law itself.

Operation Iraqi Freedom is possibly the most internationally controversial use of force by the United States in the last century. Critics view the U.S. action as the *denouement* in a trend of pejorative exceptionalism and unilateralism that had been mounting for several years.¹¹⁴ Even before 9/11, the Bush administration was the subject of significant international condemnation for its decisions to move away from such international conventions as the Kyoto Protocol,¹¹⁵ the Rome Statute creating the International Criminal Court,¹¹⁶ the Comprehensive Test

¹¹⁴ See “Greek Defence Minister Fears New U.S. Arrogance After Iraq”, *Agence France Presse*, 14 April 2003; “Europeans Dismayed by U.S. Arrogance in World Issues”, *Xinhua News Agency*, 10 April 2001; “U.S. Arrogance Irks Allies”, *Chicago Sun Times*, 29 June 1997, 34.

¹¹⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change, *ILM* 37 (1998), 22 et seq. (hereinafter Kyoto Protocol). See also T. Watson/ J. Weisman, “6 Ways to Combat Global Warming. Debate Moves Past Whether It’s Happening to What, If Anything, Should be Done About It”, *USA Today*, 16 July 2001, 1A. The treaty aimed to cut emissions of so-called greenhouse gases, which are blamed for warming the Earth’s atmosphere, by 5.2 per cent from their 1990 levels. Bush announced in March 2001 that the United States would not accept the treaty, arguing that the protocol was flawed and would harm the U.S. economy.

¹¹⁶ Rome Statute of the International Criminal Court, Doc. A/CONF.183/13 Vol. I. See also J. Rabkin, “Don’t Tread on Us! How to Handle the International Criminal Court”, *The Weekly Standard*, Vol. 7, No. 35, 20 May 2002, 11: “After a year of internal debate, the Bush administration announced a decision last week: The United States would no longer consider itself a signatory to the Rome Treaty establishing the International Criminal Court.” See in this respect also article of M. Benzling, in this Volume.

Ban Treaty,¹¹⁷ and the Protocol to the Biological Weapons Convention.¹¹⁸ As a result, U.S.-European relations are thought by many to have deteriorated to their worst state in decades.

¹¹⁷ Comprehensive Nuclear Test Ban Treaty (hereinafter Comprehensive Test Ban Treaty or CTBT), see text under <<http://www.clw.org/pub/clw/coalition/ctbindex.htm>>. On 13 October 1999, the US Senate voted not to ratify the CTBT, see 145 Cong. Rec. S12504-01 (daily ed. Oct. 13, 1999) (Senate Vote on Ratification of the Comprehensive Nuclear Test Ban Treaty). See A.R. Kuchta, "A Closer Look: The U.S. Senate's Failure to Ratify the Comprehensive Test Ban Treaty", *Dick. J. Int'l L.* 19 (2001), 333 et seq. (535). See also J. Kelley, "U.S. Rebuked on Test Ban Vote Nations Cite 'Dangerous' Message", *USA Today*, 15 October 1999, 01A; B. Crossette, "World Leaders Criticize the U.S. for Defeat of Test Ban Treaty", *Sun Sentinel*, 15 October 1999, 12A.

¹¹⁸ Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, at: <<http://www.unog.ch/disarm/review/bpart1.htm>> (hereinafter Biological Weapons Convention) and the Protocol to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, at: <<http://www.armscontrol.org/pdf/bwcprotocol.pdf>> (hereinafter Draft Protocol). Six and a half years after negotiations of the Draft Protocol for enforcing compliance with the Biological Weapons Convention began, the United States rejected both the draft Protocol and any further efforts to create a Protocol. On 25 July 2001, Ambassador Donald Mahley, the head of the US Ad Hoc Group delegation, in a speech before the Ad Hoc Group, said the United States would not support the current text, even were it changed. The United States has numerous reasons for rejecting the draft Protocol. One of the main concerns of the Bush Administration was that the measures proposed in the draft Protocol were intrusive on the US Government and private companies, putting national security and commercial proprietary information at risk. According to the United States, the safeguards included in the draft Protocol with a view to protecting proprietary information were inadequate, the inspection regime envisioned by the draft Protocol was insufficient to deter or impede a rogue state's ability to have a biological warfare program, and State Parties least likely to be proliferators would be most often targeted. The United States reasserted its commitment to finding other tools to strengthen the Biological Weapons Convention. See J. Rissanen, *United States' Position on Protocol Unmoved*, 15 October 2001, available at: <<http://www.acronym.org.uk/bwc/bwc11.htm>>; see also US Department of State International Information Programs, *Wolfowitz Cites Importance of Biological Weapons Treaty*, 28 July 2001, available at: <<http://www.usembassy.org.uk/acda245.htm>>.

At its essence, the problem is more one of perception and public relations than of legality. Nevertheless, as with many other areas of policy disagreement, pundits frequently blanket their critique in claims of illegality. Indeed, the policy discussion may be inapposite to an assessment of legality, but the perception that U.S. action was premised on an inherent right to self-defense places the use of force squarely within the framework of a *jus ad bellum* debate. And that debate reflects substantial differences between U.S. and European postures that will present as vitally significant in evolving an appropriate legal strategy for the future. The value of this colloquy is limited, however, by the fact that the actual legal justification for *Operation Iraqi Freedom* was not grounded in Article 51 and the inherent right to self-defense.

1. Legal Authority for Operation Iraqi Freedom—the Technical Argument

If “bad facts make bad law,” then the intervention in Iraq is a dangerous model for future legal constructs. In this case we again should be careful to separate law and policy. Bad facts may cause some to question the decision to intervene in Iraq, but those facts should have substantially less impact on the legal analysis. Post-conflict realizations that there may have been no weapons of mass destruction against which to defend or to destroy cast a pall over the rationale for intervention,¹¹⁹ but the strongest—or easiest—legal argument is not premised on finding weapons of mass destruction, it is based on United Nations Security Council resolutions unique to Iraq.¹²⁰

¹¹⁹ See J. Pedigo, “Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?”, *Ga. J. Int’l & Comp. L.* 32 (2004), 199 et seq. (203).

¹²⁰ On 2 August 1990, Iraq invaded Kuwait. The Security Council quickly adopted UN Security Council Resolution 660, the first of many condemning Iraq’s actions and demanding withdrawal from Kuwait, see S/RES/660 (1990) of 2 August 1990. Additional Council actions were designed to apply further pressure and bring about Iraq’s withdrawal, see S/RES/661 (1990) of 6 August 1990, imposing broad sanctions on Iraq. S/RES/662 (1990) of 9 August 1990, deciding that Iraq’s annexation of Kuwait was null and void and demanding that Iraq rescind its actions purporting to annex it. S/RES/664 (1990) of 18 August 1990, reaffirming those decisions and demanding that Iraq rescind its order that foreign diplomatic and consular missions in Kuwait be closed, facilitate departure and consular access

The continuing authority of U.N. Security Council Resolutions 678 and 687 from the first Gulf War worked in tandem to establish cease-fire conditions and provide the authority to enforce those resolutions with force.¹²¹ Those conditions, ultimately unsatisfied by Iraq, trig-

for nations of third states, and take no action to jeopardize their safety, security, or health. S/RES/665 (1990) of 25 August 1990, calling upon Member States to use such measures as may be necessary to ensure implementation of trade restrictions. S/RES/667 (1990) of 16 September 1990, demanding that Iraq release foreign nationals that it had abducted. S/RES/670 (1990) of 25 September 1990, imposing restrictions on air traffic. S/RES/674 (1990) of 29 October 1990, inviting states to collate and make available to the Council information on grave breaches committed by Iraq. Eventually on 29 November 1990, the Council adopted UN Security Council Resolution 678, which authorized the use of “all necessary means” to uphold and implement Resolution 660 and subsequent relevant resolutions, and to restore international peace and security in the area. The resolution provided Iraq with “one final opportunity” to comply with the Council’s earlier decisions and authorized the use of force “unless Iraq on or before 15 January 1991 fully implements” the Council’s resolutions. It specifically invoked the authority of Chapter VII. On 3 April 1991, the Council adopted Resolution 687, that resulted in a cessation of hostilities but did not return the situation to the status quo ante. Rather it declared that, upon official Iraqi acceptance of its provisions, a formal cease-fire would take effect, and it imposed several conditions on Iraq, including extensive obligations related to the regime’s possession of weapons of mass destruction. As the Council described it, Resolution 687 provided the “conditions essential to the restoration of peace and security.” See W.H. IV Taft/ T. Buchwald, “Preemption, Iraq, and International Law”, *AJIL* 97 (2003), 557 et seq. Neither the United Kingdom nor Australia invoked self-defense as a legal justification for military action against Iraq. See UK Attorney General Lord P.H. Goldsmith, *Legal Basis for Use of Force Against Iraq*, 17 March 2003, available at: <<http://www.ukonline.gov.uk>>; see also the Australian Attorney General’s Department and the Department of Foreign Affairs and Trade, Memorandum of Advice on the Use of Force Against Iraq, 18 March 2003, available at: <<http://www.smh.com.au/articles/2003/03/19/1047749818043.html>>. Nor did the United States invoke its inherent right of self-defense under Article 51 of the U.N. Charter in the legal justification it submitted to the UN Security Council, letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, Doc. S/2003/351 (2003), arguing that “the actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991).”

¹²¹ Ibid.

gered U.N. Member States authority in Resolution 678 to use “all necessary means” to uphold Resolution 660 and all relevant subsequent resolutions and to “restore international peace and security” in the area. The “all necessary means” language has been traditionally understood as the authorizing language for a use of force that otherwise would violate Article 2 (4) of the Charter.¹²²

Among the cease-fire conditions set by Resolution 687 were extensive obligations related to the Iraqi regime’s possession of weapons of mass destruction; these obligations were repeatedly violated in the years between 1991 and 2003. Moreover, several subsequent Security Council Resolutions confirmed that Iraqi actions continued to threaten “international peace and security.”¹²³ In this regard, the legal authority for the invasion of Iraq in 2003 needs not be premised on the inherent right to self-defense; it flows directly from Security Council authorization. The United States’ technical reliance on this basis for authority is confirmed by its explication in the *American Journal of International Law* by the Legal Advisor to the U.S. Department of State, William Taft, IV, and Associate Legal Advisor, Todd Buchwald.¹²⁴

In addition to the central argument of specific Security Council authorization, some have also cited collateral justifications related to the substantive effect of pertinent Resolutions. The strongest draws from

¹²² See, e.g., Doc. S/PV.2963 (1990), 76-77, reporting Mr. Al-Ashtal, Yemen, referring to Security Council Resolution 678, as “in effect authorizing States to use force” and calling it a “war resolution”; *ibid.*, 58, reporting Mr. Malmierca Peoli, Cuba, calling the resolution “a virtual declaration of war” and a “deadline for war”; *ibid.*, 62, reporting Mr. Qian Qichen, China, stating that “all necessary means” is language that “in essence, permits the use of military action.”

¹²³ See, e.g., S/RES/707 (1991) of 15 August 1991, stating that Resolution 687 itself described “conditions essential to the restoration of peace and security”; S/RES/1441 (2002) of 8 November 2002, 13-14, finding, *inter alia*, Iraq’s development of weapons of mass destruction (WMD), support for terrorism and repression of the civilian population presented a continuing threat to international peace and security.

¹²⁴ See Taft/ Buchwald, see note 120, 557. See generally, N. Rostow, “Determining the Lawfulness of the 2003 Campaign against Iraq”, discussing the factual predicate and legal underpinnings for the Iraq campaign, copy on file with author. But see, T.M. Franck, “What Happens Now? The United Nations after Iraq”, *AJIL* 97 (2003), 607 *et seq.*; R.A. Falk, “What Future for the UN Charter System of War Prevention”, *AJIL* 97 (2003), 590 *et seq.*, arguing that additional Security Council authorization was required.

the fact that the first Gulf War essentially concluded via a cease-fire agreement.¹²⁵ A breach of that agreement essentially vitiates any obligation to continue the cessation of hostilities. Under the 1907 Hague Regulations¹²⁶—a seminal document governing land warfare—“[a]ny serious violation of [an] armistice by one of the parties gives the other party the right of denouncing it ... ” (article 40). Thus, in addition to the law governing armistices, some have contended that international law regarding a state’s right to suspend obligations when there has been a “material breach” of a treaty independently justifies *Operation Iraqi Freedom*.¹²⁷

While these collateral instruments and bodies of law may reinforce the primary legal justification for going to war with Iraq, they should not be deemed to suffice in the absence of U.N. Charter-based authority—Security Council authorization or legitimate self-defense needs. The independent derivation of authority from an armistice or treaty law would be akin to establishing a norm that once an armed conflict is initiated, for any reason, the *status quo* shifts so that continued justification for the conflict is no longer necessary—only an enforceable international peace treaty can restore the *status quo ante*.¹²⁸ Israeli lawyers used an argument of this sort in attempting to justify their 1981 attack on the Tuwaitha Nuclear Research Center (no armistice was in effect with Iraq). The unanimous Security Council vote condemning the attack, however, demonstrated the international community’s unwillingness to recognize the viability of Israel’s claim to existing in a continuing state of hostilities with Iraq simply due to want a definitive end to hostilities.¹²⁹

The fact that one body of law would permit an action should not be used to justify a use of force that is otherwise regulated by the U.N.

¹²⁵ S/RES/687 (1991) of 3 April 1991.

¹²⁶ 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 1 Bevans 631.

¹²⁷ See, e.g., J. Yoo, “International Law and the War in Iraq”, *AJIL* 97 (2003), 563 et seq., arguing that law governing armistices justified the invasion of Iraq by US forces. Yoo also contends that well-established treaty law would permit the invasion based on a “material breach” by Iraq (575). This argument would require one to conceive of the pertinent Security Council resolution as a multilateral treaty.

¹²⁸ But see Taft/ Buchwald, see note 120, 559, arguing that Resolution 687 did not return the situation to the status quo ante.

¹²⁹ Leich, see note 106, 2933-2935.

Charter. This legitimate concern also provides the strongest counter to what is otherwise an analytically sound technical argument favoring the United States' justification to use force in *Operation Iraqi Freedom*. Admittedly, Resolution 678 is over 13 years old and the argument that at some point it should "sunset" is compelling. Some claim that authority of that resolution has expired or somehow been eclipsed by the more recent Resolution 1441, which found Iraq "in material breach" of earlier U.N. resolutions and warned that Iraq would face "serious consequences as a result of its continued violations of its obligations" to divest of all chemical, biological, or nuclear weapons or ballistic missile systems, but did not specifically reaffirm the "all necessary means" authorization of 678.¹³⁰ Nevertheless, unlike a use of force in self-defense, which is circumstance-driven, a Security Council resolution can be drafted to accommodate temporal concerns. In fact, several resolutions have been modified at later times or built self-executing termination dates into the initial issuance.¹³¹ But Resolution 678's authority still stands, its continuing authority having been tested several times between its adoption and the 2003 overthrow of Saddam Hussein's regime. Throughout that period, a "no-fly zone" was enforced by American, British, and—in earlier days—French air forces; it was the basis for a strike against a Baghdad nuclear facility¹³² in January of 1993; and it was the justification for *Operation Desert Fox* in 1998.¹³³

¹³⁰ S/RES/1441, see note 123.

¹³¹ See, e.g., S/RES/1031 (1995) of 15 December 1995, terminating use of force authority associated with a previous resolution regarding Bosnia; S/RES/929 (1994) of 22 June 1994, limiting to two-months a previously approved mission regarding Rwanda.

¹³² Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions (19 January 1993), 2 Pub. Papers of George Bush, 1993, 2269-2270. Interestingly, Secretary-General Boutros Boutros-Ghali publicly confirmed his belief in the legality of the 1993 raid. See Transcript of the Press Conference by Secretary-General, Boutros Boutros-Ghali, Following Diplomatic Press Club Luncheon in Paris on 14 January, Doc. SG/SM/4902/Rev.1 (1993), 1.

¹³³ See D. Brown, "Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla", *Hastings Int'l & Comp. L. Rev.* 26 (2003), 159 et seq. (171). On 16-19 December 1998, in a campaign known as Operation Desert Fox, US and British forces conducted a series of strikes against military targets in Iraq. The purpose of the operation was to attack Iraq's weapons of mass destruction and "its ability to threaten its neighbors." The operation was in direct response to Iraq's failure to cooperate with the UN in its effort to oversee Iraqi disarmament. Writers on the

Despite the political rhetoric that attended the adoption of Resolution 1441, it is difficult to read that resolution as undermining any authority available by virtue of Resolution 678. Resolution 1441 stated that the Council would convene “upon receipt of a report [regarding weapons of mass destruction inspections] ... in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.”¹³⁴ It did not, however, establish a requirement for further decision.¹³⁵ As a technical matter, Resolution 1441 provided more additional legal authority than any similar resolution for the operations mentioned above. The real political issue was the extent of U.S. action, not the legality of its use of force.

Sadly, the ill-fated attempt to secure a final resolution specifically authorizing an invasion force left many with the lasting (and accurate) impression that the sitting Security Council members did not approve U.S. action. Indeed, the controversy in the Security Council during the buildup for *Operation Iraqi Freedom* left the public with the impression that the invasion was anything but a sanctioned use of force.¹³⁶ The fact of the matter is that the legal argument to justify *Operation Iraqi Freedom* is fairly easily made without recourse to self-defense analysis. This argument, however, was not forcefully advanced in a public setting; many still analyze the lawfulness of U.S. actions from a pure

subject generally agree that Iraq was not in compliance with the disarmament and inspection provisions of S/RES/687. While the rationale for this operation relied on Iraq’s failure to comply with the original cease-fire terms that abated the Persian Gulf War of 1991, Desert Fox received far less international support.

¹³⁴ S/RES/1441, see note 123, para. 12.

¹³⁵ See Yoo, see note 127. The British Government, which clearly desired an additional resolution authorizing force, explained that “Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq’s failures, but not an express further decision to authorize force.” See Lord Goldsmith, *Legal Basis for Use of Force Against Iraq*, 17 March 2003, statement by UK Attorney General at Parliament, available at: <<http://www.labour.org.uk/legalbasis>>.

¹³⁶ As with the possibility of a sunset provision, the notion that a Security Council authorization should only have force if its sitting members would continue to approve it is a textually achievable construct. No change in the law would be required, and practical concerns should drive that debate.

“right of self-defense” perspective and, in so doing, find that justification deficient.

2. Operation Iraqi Freedom and Self-Defense

Though Security Council authorization represents the center of gravity for the United States’ technical legal justification for intervention in Iraq, preemptive self-defense motivations were clearly evident and continue to animate public international debate on the issue. Ironically, Taft and Buchwald, while presenting a cogent argument for legality under applicable Security Council Resolutions, start and end their brief article with a comment on anticipatory self-defense or “preemption.” They begin their defense of U.S. action by acknowledging the common critique that *Operation Iraqi Freedom* is “unlawful because it constitutes preemption.”¹³⁷ They conclude by stating, “preemptive use of force is certainly lawful where [there is an ongoing conflict and] it is consistent with the resolutions of the Security Council.” Advocating on behalf of the United States, they effectively narrowed the legal question; but such analysis then begs the more important question as to the limits of preemption—without Security Council authorization—in the post-9/11 war on terrorism.

In fact, many who analyze *Operation Iraqi Freedom* from a self-defense perspective, view that legal rationale associated with “preemption” as quite problematic. Greg Travalio and John Altenburg, for example, reserved their sole condemnation regarding United States compliance with *jus ad bellum* for *Operation Iraqi Freedom*.¹³⁸ Criticizing the nascent “preemption” doctrine, and its application to justify the Iraq intervention, they charged that “mov[ing] in a direction that is clearly contrary to customary law ... undermines the moral authority of the United States to rely upon an international order and to demand that others adhere to it.”¹³⁹ Conversely, Professor John Yoo, claims that the Operation was justified both as a matter of Security Council authorization and “in anticipatory self-defense because of the threat posed

¹³⁷ See Yoo, see note 127, see also Taft/ Buchwald, see note 120.

¹³⁸ See Travalio/ Altenburg, see note 98.

¹³⁹ *Ibid.*, 118.

by an Iraq armed with weapons of mass destruction (WMD) and in potential cooperation with international terrorist organizations.”¹⁴⁰

Preemption’s role (or the lack thereof) as legal justification for this intervention, notwithstanding, the discussion regarding its import in evolving circumstances is a worthy one. The fact that so many have found reason to criticize the intervention in this case may suggest that both United States domestic constituencies and the international community are: 1.) unaware of the legal arguments predicating the intervention; and 2.) concerned about the development of a “prevention” or “preemption”¹⁴¹ doctrine that may trumpet a new era of unchecked exercise of United States power.

The first conclusion causes concern because it demonstrates a United States inability, or perhaps unwillingness, to communicate to its domestic and international publics the fact that it continues to evaluate seriously its lawful obligations under the U.N. Security Council resolutions pertaining to Iraq. By failing to broadcast the legal rationale for its intervention, the United States may leave the wrong impression that only immediate policy interests drive its actions. From the perspective of those who fear U.S. power, the United States not only acts with international impunity, it exercises that ability with nary a self-regulating regard for the rule of law. *Operation Iraqi Freedom* highlights a serious public diplomacy problem, but equally important, it highlights the lack of clarity regarding *jus ad bellum*.

While a robust public relations campaign regarding legality is important from a U.S. perspective, of even greater significance for the future is the outpouring of protestations associated with the evolving “preemption” or “anticipatory self-defense” doctrine. Here the international community finds itself face-to-face with the specter of future *jus ad bellum*, and we are forced to come to terms with the mandate to identify the legal regime we seek. That regime must permit necessary use of force in self-defense, but it must also provide sufficient assurance

¹⁴⁰ See Yoo, see note 127, 575.

¹⁴¹ The term “prevention” is most commonly used as a pejorative for evolving administration self-defense doctrines because it evokes a sense of the broadest possible authority (i.e., while “preemption” and “anticipatory” imply an extant threat, prevention may suggest that force can be used to undermine a mere ability). The terms are used interchangeably in this paper since the relevant concept is the legal authority regarding an “inherent right to self-defense.” That authority does not derive from any of the politically-charged terms at issue.

to other states that they need not fear an unbridled exercise of national power. From the international perspective, some may take seriously Lord Acton's concern about the corrupting affect of power—particularly of the hegemonic sort.¹⁴²

When viewed as a self-defense matter, the intervention in Iraq appears to mirror the very concerns that militate in favor of the most conservative interpretations of U.N. Charter-based self-defense concepts. From a critic's perspective, the Iraq intervention is characterized by several factors that together abused and misapplied self-defense authorities to justify naked aggression. Among the factors causing concern are the facts that: 1.) the United Nations Security Council had time and ability to act more forcefully but elected not to; 2.) neither cross-border attack nor an attack against U.S. interests had clearly occurred; 3.) the traditionally requisite criteria for anticipatory action were not present (imminent threat with no moment for deliberation); and 4.) evidence supporting the factual predicate to justify anticipatory action was weak. This does not mean that the use of military force against Saddam Hussein could not be justified from a self-defense perspective; it does mean that any such justification must be crafted carefully with a view to mitigating the impact of these factors in order to create precedent that may be useful in future military interventions.

Turning again to the criteria and bolstering factors set forth above with regard to *Operation Enduring Freedom*, we find it possible to construct a case for self-defense-related intervention in Iraq. The Iraq case is weaker than that applicable to *Operation Enduring Freedom*, however. With respect to reprisal-related factors, there had been no physical attack against United States interests that could be directly tied to Iraq. Thus, any anticipatory action would not enjoy the increased credibility that comes from responding to a previous attack. With respect to the factors necessitating anticipatory action, the threat did involve terrorist tactics, but unlike *Operation Enduring Freedom*, the threat was somewhat removed from the target. That is, Iraq was thought simply to be a facilitator that could supply weapons of mass destruction to terrorists. No specific evidence of a direct terrorist threat associated with Iraq was presented. Moreover, unlike Al Qaeda, Iraq had not openly declared its intent directly to harm U.S. interests. Finally, with respect to the bolstering factors we find two militating in favor of intervention, and the others being of less benefit in advancing U.S. justifications than in the

¹⁴² J. Acton, "Power corrupts; absolute power corrupts absolutely", in: id./ G. Himmelfarb (eds), *Essays on Freedom and Power*, 1984, 357 et seq. (364).

case of Afghanistan. Clearly the target state whose territorial integrity was to be compromised had been warned. Additionally, WMD provided the nearest thing to a “trump card” in assessing the destructiveness of the potential threat. Conversely, the level of international support for the invasion of Iraq was far more limited than that with respect to Afghanistan.¹⁴³ Well publicized were claims of several ulterior motives ranging from an intent to control Iraqi oil, to a political vendetta based on Hussein’s ability to survive the first Gulf War and its aftermath, to revenge of a more personal nature—punishment for Hussein’s sponsorship of an assassination attempt against George H.W. Bush, father of the sitting President. One ubiquitous critique focused on the “unilateral” character of the intervention as compared to others.

While the “inherent” modifier in Article 51 is arguably flexible enough to justify almost any perceived need to act, the case for self-defense with respect to Iraq is weaker than many, save the one important factor of WMD. Indeed, even our simple schoolyard analogy here breaks down as well for reason of the inability to comprehend this factor’s significance. One could not imagine the playground where a student would be permitted to attack a potential assailant who had never directly attacked him (having instead once attacked a different student), who had never stated an intent to attack him (though the assailant was known to have contemptuous feelings toward the potential victim), and who’s only threatening characteristic was a potentially extreme capability that could be shared with other potential assailants. That all factors do not militate in favor of intervention is not dispositive of the legality question, however. Schoolyard bullies do not possess WMD.

¹⁴³ A note regarding unilateralism is appropriate here. We should be clear on the relevant legal principle. Many who condemn the United States invasion into Iraq would differentiate it from Kosovo due to the “multilateral” nature of the Kosovo intervention. Ironically, at the time of this writing there are over 80 countries involved in Operation Iraqi Freedom at Central Command Headquarters and over 30 nations have put troops on the ground in Iraq—significantly more than participated in Operation Allied Force in Kosovo. Nevertheless, the point is irrelevant regardless of its veracity. The fact is that there is nothing in the U.N. Charter to suggest that “unilateral” interventions are illegal while multilateral ones are not. The Charter provides for one mechanism to authorize use of force. It is a very specific mechanism, and it would be a strange argument indeed to suggest that a general preference for collective action so favors multilateralism that the simple claim to multilateral support is sufficient to transform that which is a clear violation of the treaty into something authorized by it.

Indeed, if one acknowledges that the post-9/11 terrorist threat changes the landscape forming the backdrop for *jus ad bellum*, the potential play of WMD does so in spades. How much this change impacts traditional determinants of the appropriate uses of force is yet to be determined. For reasons stated above, this question needs not be answered to justify *Operation Iraqi Freedom*. One might argue that *Operation Iraqi Freedom* presents bad facts from which to derive legal norms regarding self-defense. The unique characteristics discussed above, coupled with the availability of other less subjective legal justifications, recommends against Iraq as an example on which to build new customary international law for the future. That said, however, the significant characteristic highlighted in the *Operation Iraqi Freedom*—the alleged possession of WMD and the perceived ability and willingness of the attack's object to transfer WMD to even more nefarious entities—is more directly raised in a contemporaneous U.S. action: the publication of National Security Strategy 2002.

V. The U.S. 2002 National Security Strategy and the Preemption Doctrine

A strategic shift is a necessary and appropriate response to changed circumstances in which a terrorist threat cannot be specifically anticipated, yet the availability of weapons of mass destruction and a demonstrated penchant for civilian targets could make that threat or consequent attack devastating in nature and scope. The 2002 U.S. National Security Strategy, which, in view of its temporal coupling with the Iraq intervention, has induced substantial international consternation,¹⁴⁴ establishes both the imperative and the framework for this new mode of thought. Critics have dubbed it a “dangerous new ... policy,” that undermines the international order. Leading political and diplomatic historian John Gaddis, however, has referred to it approvingly as “a grand strategy ... in every sense.”¹⁴⁵

In its discussion of what has been referred to controversially as the doctrine of “preemption,” the President’s National Security Strategy¹⁴⁶

¹⁴⁴ The National Security Strategy of the United States of America, September 2002, available at: <<http://www.whitehouse.gov/nsc/nss.pdf>>.

¹⁴⁵ J.L. Gaddis, *Surprise, Security, and the American Experience*, 2004, 94.

¹⁴⁶ National Security Strategy 2002, see note 144, Part III: “We will disrupt and destroy terrorist organizations by: (...) defending the United States, the

embraces the need to develop and advance traditional concepts of self-defense. The Administration asserts that a simple, straightforward application of language from the famous *Caroline Case*¹⁴⁷—language frequently referenced when articulating the standard against which a proposed use of force in self-defense should be measured—would make no sense in present-day contexts. At its least, President Bush’s preemption policy is nothing more than an articulation of what a significant sector of the international community has already accepted in practice. At most, it has been seen as a provocative declaration of intent to disregard legal norms. Any provocative characteristics aside, the President’s National Security Strategy, while accurately signaling the law’s transition, fails to articulate a replacement standard either for a literal reading of the Charter or for the more expansive doctrines that have evolved in the years since its inception.

An appreciation and understanding of the degree of anxiety this strategy has generated in some circles requires a close review of its language. Throughout the document, two threats are repeatedly emphasized as potentially warranting the use of military force: terrorist organizations of global reach and weapons of mass destruction. One is a potential adversary, and the other a means that an adversary might use to defeat us, but each is directly indicative of the changed circumstances of the 21st century. Each enjoys the focused prominence of an entire chapter in the strategy; and each is associated in its chapter’s title with the word “prevent.”¹⁴⁸ While both threats and the concomitant security

American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. (...) we will not hesitate to act alone (...) to exercise our right of self-defense by acting preemptively against terrorists, to prevent them from doing harm against our people and our country. (...).” See also M. Donnelly, “Hitting Back? The United States’ Policy of PreEmptive Self-Defense Could Rewrite the Rules of Military Engagement,” 28 August 2002, *ABC News Online*, available at: <<http://abcnews.go.com/sections/world/DailyNews/preempt020828.html>>. At a West Point graduation ceremony in June 2002 Bush stated: “The war on terror will not be won on the defensive. We will take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.”

¹⁴⁷ The *Caroline* (exchange of diplomatic notes between the United Kingdom and the United States, 1842), J.B. Moore, *A Digest of International Law*, 1906, 2.Sect., 409, 412.

¹⁴⁸ National Security Strategy 2002, see note 144, 5, 13, Chapter III is entitled “Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends,” Chapter V is entitled, “Prevent our

interests lend themselves to a strategy involving the military instrument, neither is conducive to being described as the object of war. Indeed, even the “terrorists of global reach” moniker evinces an inability to identify the adversary except by the means used. The real object of concern is the means as well—all those who could and would employ terror to harm the United States or U.S. interests.

The terminology here is important because it illuminates the basis of much of the concern regarding what is viewed as a new use of force doctrine. The fact that the term “prevent” is used in such close proximity to these threats is evidence that in neither case can the threat itself be the object of attack. Thus, the strategy, which obviously involves a proactive, aggressive, and focused effort, leaves open-ended the potential adversary. Many have found significant fault already in the term “war on terrorism.”¹⁴⁹ Couple this with the fact that the terms “prevention” and “preemption” are used as well as the temporal propinquity of the Iraq invasion and one can more readily understand an apprehension that the “new doctrine” involves a claimed authority to attack uncertain targets even if the goal is only to preclude the possibility of an attack.

But the Cassandras need not be overly concerned. The policy’s stated intent to prevent terrorist and WMD attacks is accompanied by a clear commitment to comply with the law of war. Of greatest significance for this discussion is the recognition that changed circumstances require new thinking. Part V of the strategy, pertinent in this regard, provides:

“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 ... ”¹⁵⁰

Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction.”

¹⁴⁹ Kenneth Roth, Executive Director of Human Rights Watch, for example, suggests that use of the term as it applies to terrorism should only be metaphorical—as a hortatory device. See K. Roth, “The Law of War in the War on Terror”, *Foreign Aff.* 83 (2004), 2 et seq.

¹⁵⁰ National Security Strategy 2002, see note 144, 15.

To be sure, the language portends change, but it does not mandate or even define that change. The lion's share of the new National Security Strategy simply describes the changed circumstances of the post-9/11 era; it lays out the case for transformation, but its operative paragraphs read more like an invitation to dialogue than a pronouncement of new policy. In fact, the verbiage of this passage reflects back to traditional concepts used to identify appropriate occasions for the use of force in anticipatory self-defense. The fact that those concepts need to be adapted to meet new circumstances has been an attribute of *jus ad bellum* for centuries.

A subsequent passage makes clear that the strategy statement occasions no fundamental change in concept:

“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.”¹⁵¹

This language is entirely consistent with U.S. practice in numerous armed interventions over the past century. It does, however, more clearly articulate the need for anticipatory self-defense than did previous statements of U.S. strategic posture. It also introduces two issues that were not previously as prominent in justifying the use of the military instrument: 1.) the preference for continuing to rely on, while adapting the concept of “imminent” threat; and 2.) the introduction of the gravity of the threat as a factor. These issues are each worth exploring in greater detail, but the starting point for discussion should be recognition of the fact that at its core, we are simply talking about anticipatory self-defense. The United States has made no claim as to the propriety of any military action that exceeds the bounds of Article 51's inherent right to self-defense. The National Security Strategy makes clear that the United States continues to look to international law—*jus ad bellum*—to regulate its use of force.

Reviewing the areas of concern in the Strategy, one finds that they are directly related to the asymmetric characteristics terrorism brings to bear on self-defense analysis. These characteristics can be summarized as follows: first, unlike traditional warfare as it was understood at the

¹⁵¹ Ibid.

time the U.N. Charter was drafted, terrorist attacks today are usually isolated; they are not part of an ongoing armed campaign. Accordingly, we find little if any utility in classically defensive measures. Moreover, there is no utility in traditional deterrence. When self-defense begins, the attack is over. Without anticipatory self-defense, there would be no self-defense at all.

Second, because of the isolated and complete-at-first-strike nature of a terrorist attack, surprise is at a premium for the terrorist both tactically and strategically. While surprise is a concept upon which military commanders always seek to capitalize, including in more symmetrical conflicts, it rarely has currency above the tactical or operational level. A conventional armed conflict is usually known to be taking place; the opposing parties are on notice to be in a defensive, if not retaliatory posture. Traditional conflict is often readily anticipated; even before the first shot of a military engagement, the necessary efforts to prepare people, equipment, and armaments for the rigors of an extended armed conflict often can be observed openly.¹⁵² In the post-9/11 world, one can anticipate little opportunity to note the “imminent” nature of an impending terrorist attack. To be aware of it would likely be to frustrate it. As suggested in the 2002 National Security Strategy, the dictionary definition of imminent—“impending, about to happen”—simply makes no sense when applied operationally to combat terrorism.¹⁵³

Finally, the isolated nature of the attack and the likely inability of the aggressor to capitalize on it in future operations are such that the terrorist is more likely to rely on the devastating nature of the initial strike. Therefore, a new factor of severity is introduced to the rubric—not only as regards proportionality and the nature of the response or retaliation, but as a factor to be considered with respect to whether a preemptive self-defense measure should even be undertaken. Indeed, Section V of the National Security Strategy, containing the above-cited language, is that portion of the document addressing weapons of mass destruction.

¹⁵² See generally J. Quigley, *Politics, Law, and Society: Palestine and Israel: A Challenge to Justice*, 1990; N. Boustany/ P.E. Tyler, “Iraq Masses Troops at Kuwait Border, U.S. Puts Gulf Warships on Alert as Tensions Rise Over Oil Quotas,” *Washington Post*, 24 July 1990, A1.

¹⁵³ The Oxford Dictionary and Thesaurus, 1996, 734. See also Yoo, see note 127, 572 “(...) the concept of imminence must encompass an analysis that goes beyond the temporal proximity of a threat to include the probability that the threat will occur.”

The language of National Security Strategy 2002 is not precise, nor should it be. As with the time immediately following World War II, we are at an historic inflection point, and the law written today may guide international relations for years to come. The gravity of the task is worth the time to get it right. Moreover, for one country to dictate unilaterally the evolution of international law would represent inappropriate temerity. Like this article, the pertinent language of the National Security Strategy is better read as a contribution to the discussion.

Unfortunately, such is not the only possible reading. Attributing to the Strategy only laudable motives is not reflective of the interpretations of much of the international community. While imprecise provisions may evince a humble willingness to engage in dialogue regarding the future of *jus ad bellum*, other more clear provisions such as that declaring our commitment to anticipatory self-defense can be read as a bold affront to those who view the law differently. Many in that group view such a statement as consistent with a general trend toward unilateralism and even imperialism.¹⁵⁴ They see the United States decision not to join the International Criminal Court as turning our back on the rule of law;¹⁵⁵ the decision to walk away from the Ottawa Anti-Personnel Landmines Convention¹⁵⁶ as a rejection of humanitarian principles; refutation of the Kyoto Protocol¹⁵⁷ as a step away from multilateralism; and our rejection of the Comprehensive Test Ban Treaty¹⁵⁸ as a rejection of disarmament. To the cynic, the ambiguous part of the U.S. National Security Strategy then is nothing more than a veiled warning that

¹⁵⁴ See generally, Bothe, see note 59.

¹⁵⁵ ICC Statute, see note 116.

¹⁵⁶ C.S. Sharnetzka, "The Oslo Land Mine Treaty and an Analysis of the United States Decision Not to Sign", *Dick. J. Int'l L.* 16 (1998), 661 et seq. (673-676). On 17 September 1997, after a two week long conference in Oslo, Norway, almost one hundred nations agreed on a Treaty to ban the use of anti-personnel land mines. This Treaty was the result of an eleven-month long process, initiated in Canada, which became known as the Ottawa Process and was the first international agreement to totally ban the use of anti-personnel mines. The United States sought major adjustments to the treaty including the ability to use anti-personnel land mines deployed along the Demilitarized Zone in Korea and the ability to use "smart" self-destructing anti-personnel land mines as components in mixed anti-tank munition packages. The United States' proposals were rejected in Oslo and President Clinton decided not to sign the treaty.

¹⁵⁷ See note 115.

¹⁵⁸ See note 117.

the United States intends to employ force preemptively whenever it sees fit.¹⁵⁹

Clearly, better communication is required. More importantly, however, it may be time to take the next step in articulating standards for self-defense in the post-9/11 epoch. The problem for the present may be one of public diplomacy more than differences in legal understandings, but there are different legal understandings nonetheless. Part III of the National Security Strategy, 2002, that dealing most directly with the global terrorism threat, has as its focus, “Strengthen Alliances ...”.¹⁶⁰ The strategy recognizes the need for coordinated effort, and it speaks of “forging new, productive international relationships and redefining existing ones in ways that meet the challenges of the twenty-first century.”¹⁶¹ This task cannot be accomplished if the United States is at odds with its allies regarding the legal norms that govern counterterrorism efforts.

Indeed, those areas where there exist substantive differences between the United States and its allies are also those areas that directly relate to the changed circumstances associated with the ascendance of terrorism. Change is always hard, and post-9/11 history has provided insufficient evidence to determine who is “right.” The United States has arguably taken the lead with respect to state action indicative of its perspective on international law. It has not, however, taken as much of a lead in the colloquy that can help to shape agreed norms. On the one hand, for example, the National Security Strategy 2002, implicitly suggests that a use of force’s legality may be influenced by not only the imminent nature of the threat, but also by the gravity of the threat—implying that a WMD threat would warrant preemptive action more so than would a threat of potentially lesser harm. Yet this factor would not appear to be a prerequisite under traditional necessity/proportionality analysis.

One other self-defense concept addressed specifically in the National Security Strategy is worthy of comment because of its reliance not on a factors-based approach, but on the *Caroline* standard regarding “imminence.” Unlike the WMD factor mentioned above, the United States’ willingness to accept imminence of attack as a presumptive requirement for use of force militates against a factors-based ap-

¹⁵⁹ Gaddis, see note 145, 99-100.

¹⁶⁰ National Security Strategy 2002, see note 144, Part III, 5.

¹⁶¹ *Ibid.*

proach to self-defense by relying on traditional language that attempts to make the legality of self-defense objectively identifiable.

The long-standing rule flowing from *Caroline* permits military response only when “[n]ecessity of that self-defense is instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation.”¹⁶² Such an articulation, though imbued with common sense when conceiving of war as it was known in the mid 19th century when it was penned—or throughout the 20th century when it was applied—is inappropriate today. Today’s National Security Strategy argues that we need to “adapt” these concepts to “the capabilities and objectives of today’s adversaries.”¹⁶³ In fact, it may be time to take an even larger step away from *Caroline* principles.

Statements made by U.S. Secretary of State Daniel Webster during the 1837 *Caroline* incident,¹⁶⁴ are considered the classic articulation of the standard for anticipatory self-defense. The incident arose when the steam ship, *Caroline* began supplying Canadian insurgents who were fighting against British rule with materiel from the United States. In anticipation of and to preempt further resupply, a British force entered U.S. territory at night, torched the *Caroline*, and launched it over the Niagara falls, killing two U.S. citizens in the process. To counter the British claim that they were acting in self-defense, Webster propounded his “instant, overwhelming, ... no choice of means, ... no moment for deliberation” standard. Webster’s definition has since been widely cited and accepted. Soon after the incident, British special minister Lord Ashburton essentially acceded to the validity of these criteria in undertaking to justify Britain’s actions in accordance with Webster’s test.¹⁶⁵

¹⁶² J.B. Moore, see note 147, 412; H. McCoubrey/ N.D. White, *International Law and Armed Conflict*, 1992, 91-96; O. Schachter, *International Law in Theory and Practice*, 2nd edition, 1991, 150-152.

¹⁶³ National Security Strategy 2002, see note 144, 15.

¹⁶⁴ See Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington, 24 April 1841, in: *British and Foreign State Papers 1840-1841*, 29 (1857), 1138. See also “International Military Tribunal (Nuremberg), Judgment and Sentences”, *AJIL* 41 (1947), 172 et seq. (205): “preventive action in foreign territory is justified only in case of ‘an instant and overwhelming necessity for self- defense, leaving no choice of means, and no moment for deliberation’”, quoting the *Caroline* Case; see also D.W. Bowett, *Self-Defence in International Law*, 1958, 142-143.

¹⁶⁵ See Letter from Lord Ashburton to Daniel Webster, US Secretary of State, 28 July 1842, *British and Foreign State Papers 1841-1842*, 30 (1858), also

Indeed, we could work with Webster's language and define its terms in such a way as to permit actions in self-defense at any time they are clearly necessary.¹⁶⁶ In this regard, the 2002 National Security Strategy is on the right track. Webster's language, however, is not conceived with appropriate regard for the nature and character of the threat, but with an eye toward the position of the defender. If the British were responding not to the danger of resupply but to a terrorist attack using WMD, the requirement to wait until there was neither "choice of means" nor "moment for deliberation" would appear patently ridiculous.

We should also remember that Webster's words were chosen to criticize the British for what the United States viewed as an overly aggressive and unnecessary self-defensive measure. It is indeed unusual that a political statement with such little authority beyond its polemic utility would end up bearing the mantle of defining self-defense law. One might argue that today it should not. At the very least, when coupled with the most literal reading of Article 51, it would require that armed force be used only after a terrorist attack had been initiated. Terrorists are unlikely to accommodate such a concept of self-defense.

The *Caroline* language presumes a state adversary who will continue to pursue an attack. Turning once again to the playground fight analogy, it permits one both to block a punch and counterstrike if there is no other way to stop the attack. But today's adversary, the terrorist, operates from a different paradigm altogether. He attacks at times and places of relative peace, punctuating that peace with discreet violence directed at non-combatants—sometimes while committing suicide. As a practical matter, the terrorist intends to strike only once; he will not strike again until his victim's guard is down. Or he may commit suicide in the process; one cannot counterpunch against a suicide bomber intent on sacrificing all. Perhaps more importantly, terrorists may gain the capacity to make that single, discrete attack supremely devastating by employing weapons of mass destruction. Given its many temporal con-

available at: <<http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>>.

¹⁶⁶ See, e.g., Yoo, see note 127, 574, noting that the definition of "imminent" has become more nuanced due to the advent of weapons of mass destruction and claiming that the term now must subsume a number of factors: "probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat."

straints, *Caroline's* concepts of "self-defense" simply do not fit the modern age.

National Security Strategy, 2002, recognizes the difficulty of adhering to traditional *Caroline* language. It also implies that additional factors, such as the gravity of the threat, may be appropriately included in the calculus of 21st century self-defense analysis. The ensuing debate, however, has been less than coherent; it is time for the next step. The law needs to be developed through both action and dialogue. And in order to be effective for the future, it ultimately should be condensed into a succinct articulation that can guide future lawyers and policy-makers.

VI. Humanitarian Interventions

Operation Iraqi Freedom perhaps touches on every *jus ad bellum* concept with relevant currency. Technically justified by U.N. Security Council action in accordance with Chapter VII of the Charter, the operation also clearly implicated traditional self-defense concepts and the limits of those concepts explored in the 2002 National Security Strategy. Moreover, while cited forcefully only after the fact, one cannot help but note that many of the same humanitarian reasons underlying intervention in the Kosovo situation were extant in Iraq; Saddam Hussein's crimes against his own people and those of neighboring nations have been well-documented, yet, the full extent of his thuggish brutality is only now being brought to light.¹⁶⁷ At minimum, Saddam's crimes against humanity and perhaps even genocidal behavior have been stopped.

Though not directly applicable to the problem of terrorism, a thorough look at developments in *jus ad bellum* would be incomplete without some discussion of the unsanctioned use of force for humanitarian intervention. Prior to 9/11, the most significant developments in the law governing the use of force resided in this milieu. NATO's intervention into Kosovo, *Operation Allied Force*, serves as a quintessential example, illuminating the unique issues associated with this type of use of force.

¹⁶⁷ See, e.g., M. Casey, "U.N. Chief Says Mass Graves in Iraq Show Atrocities Committed by Saddam's Regime", *Associated Press Worldstream*, 22 August 2003.

On 24 March 1999, NATO forces under the command of General Wesley Clark, U.S. Army, began attacking the state forces of Serbia. The action had been preceded by multiple attempts at a negotiated settlement and was attended by claims of genocide and other war crimes on the part of Serbian President Slobodan Milošević and other government officials. This intervention was undertaken without seeking Security Council authorization in the face of publicly stated opposition from Russia and China.¹⁶⁸ Given that the use of force in Kosovo could not be justified under the Chapter VII authority of the U.N. Security Council, the rubric of the Charter left only self-defense as potential authority. As an unsanctioned use of force by United Nations members, the intervention into Kosovo would appear to be illegal on its face. Only the most tortured analysis could posit a claim of self-defense for NATO members taking part in the intervention. Most legal commentators, even those favoring the intervention, have shared this view.¹⁶⁹

The dilemma confounding international lawyers addressing this issue cannot be overstated. Unlike previous interventions by the United States, criticized by Europeans and others for their purportedly inadequate factual predicates warranting the use of force in self-defense, the Kosovo intervention garnered a broad base of European support. Unlike *Operation Iraqi Freedom*, which can be easily identified as “lawful” but has suffered the slings and arrows of numerous policy critics, *Operation Allied Force* was opposed by a mere few, yet its legitimacy as a legal matter was and remains highly suspect.

Post-conflict legal apologists have set forth justifications ranging from a claim of consistency with other portions of the U.N. Charter¹⁷⁰ to the theory that it was necessary as a matter of collective self-defense given the potential for the continued flow of refugees to destabilize the region.¹⁷¹ Prime Minister Tony Blair provided perhaps the most cele-

¹⁶⁸ See J. E. Stromseth, “Rethinking Humanitarian Intervention: The Case for Incremental Change, in Humanitarian Intervention: Ethical, Legal, and Political Dilemmas”, in: J.L. Holzgrefe/ R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, 2003, 234.

¹⁶⁹ Simma, see note 24: “Under the U.N. Charter, forcible humanitarian intervention can no longer, therefore, be considered lawful.”

¹⁷⁰ U.N. Charter preamble reciting humanitarian purposes of Charter.

¹⁷¹ See H.H. Perritt, “Kosovo: Internal Conflict, International Law”, *Chicago Daily Law Bulletin*, 24 July 1998; G. Dinmore, “New Kosovo Massacre May Spur NATO to Act”, *Washington Post*, 30 September 1998, A1, asserting that the massive refugee flows from Kosovo into the neighboring coun-

brated explanation in his April 1999 speech to the Chicago Economic Club;¹⁷² he essentially argued for the adoption of a new values-based “just war” doctrine reflecting a notion of “international community.”¹⁷³ Avoiding any discussion of the text of the U.N. Charter, Prime Minister Blair acknowledged that “non-interference has long been considered an important principle of international order,” before going on to claim that “non-interference” must yield in cases of genocide, oppression resulting in massive refugee flows, and potentially when a government loses “legitimacy” because it represents minority rule. He concluded that “[Kosovo] is a just war, based not on any territorial ambitions but on values.”¹⁷⁴ None of the justifications rendered by Blair or others are particularly cogent legally.

The U.N. Security Council regime was not drafted so as to outline the reasons for war as a substantive matter; it outlined a *process* for establishing international legitimacy when the conduct of hostilities was deemed necessary as a last resort. Under the Charter, only self-defense is identified as a subjective determination by the state involved. Other interventions are a matter for U.N. action or authorizing delegation. In the end, we can mitigate a claim of illegality of intervention in Kosovo with little more than the fact that there was no Security Council Resolution condemning the intervention.¹⁷⁵

Much of the international community (including the United States) has justified *Operation Allied Force* by labeling it “legitimate,” even if “illegal.”¹⁷⁶ The difficulty with this analysis is manifest. The rule of law

tries of Albania and Macedonia arguably posed a “threat to international peace and security” and did so long before NATO’s bombing campaign.

¹⁷² See Prime Minister Tony Blair, Address at the Chicago Economic Club (24 April 1999). See also T. Blair, “A Military Alliance”, *N.Y. Times*, 24 April 1999, A19; T. Blair, “A New Moral Crusade”, *Newsweek*, 14 June 1999, 35: “We are succeeding in Kosovo because this was a moral cause (...).”

¹⁷³ The speech does not actually use the term “just war.” But see C. Abbott/ J. Sloboda, *The “Blair Doctrine” and After: Five Years of Humanitarian Intervention*, 22 April 2004, available at: <http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html>, characterizing the Blair speech as introducing a “just war” doctrine.

¹⁷⁴ See note 172.

¹⁷⁵ J.D. Levitte, “France, Germany and the U.S.: Putting the Pieces Back Together”, *Address at the Council on Foreign Relations*, 25 March 2003, 14, available at: <<http://www.cfr.org/publication.php?id=5774>>.

¹⁷⁶ See S. Tharoor, “Relief After Dispair,” *The Hindu*, 13 April 2003, asserting that the UN may yet play a humanitarian role in Iraq, stating “four years

is not furthered when unlawful actions can be sanctioned as “legitimate.” In fact, such semantic legerdemain does more harm than good to the concept of a rule of law and contravenes the relevant language itself. The Oxford Dictionary defines legitimate as “... lawful, proper, regular, conforming to the standard type”¹⁷⁷ At best, to preserve a claim of adherence to the rule of law, one could say that a customary exception to the norm of sovereign inviolability is emerging.¹⁷⁸ It is difficult, however, to determine that a practice has been accepted so frequently as to amount to custom when that very custom flies so directly in the face of relatively unambiguous treaty text.

Certainly the claim can and has been made that changed global circumstances necessitate an adjustment to *jus ad bellum* as it pertains to humanitarian intervention.¹⁷⁹ In what has been termed the “Blair doctrine,” Tony Blair identified five factors for determining whether military intervention is appropriate. None of these factors, however, sound in terms of legality; rather, they speak to the issue of domestic political interests¹⁸⁰ and their subjectivity leaves the doctrine ripe for abuse. More importantly, however, the biggest problem in seeking solace in “changed circumstances” as the basis for “adjusting” the rule of law is that the U.N. Charter’s text leaves no room for it with respect to humanitarian intervention.¹⁸¹ The non-intervention principle inhabiting

ago, another military conflict not sanctioned by the U.N. resulted in a Security Council resolution that asked the U.N. to legitimate the post-war dispensation in Kosovo and to run the civil administration there.” S. Tharoor, “Why America Still Needs the United Nations”, *Foreign Aff.* 82 (2003), 1 et seq. Arguing for the importance of legitimacy as well as legality.

¹⁷⁷ Oxford Dictionary, see note 153, 856.

¹⁷⁸ Gaddis, see note 145, 78-83.

¹⁷⁹ See, e.g., Abbott/ Sloboda, see note 173, arguing that current circumstances urgently beg for a “universally acceptable humanitarian doctrine” for intervention.

¹⁸⁰ See Blair Speech to Chicago Club, see note 172. The five factors are: 1.) certainty of facts; 2.) exhaustion of diplomatic options; 3.) availability of military options; 4.) preparedness for long-term commitment; and 5.) involvement of national interests. He also identified four precautionary measures involving having right intentions, intervention being a last resort, using proportional means, and having reasonable prospects for success.

¹⁸¹ Simma, see note 24, 123-124. Indeed, United Nations Secretary-General Kofi Annan asked the international community to try to develop a consensus on how to approach emerging humanitarian intervention issues in speeches to the UN General Assembly in 1999 and 2000. In September 2002, Canada responded and established the International Commission on

the Charter's text could not be clearer. Absent Security Council authority, treaty parties agreed to use force only to exercise their inherent right to self-defense. Thus, even if changed circumstances warrant a transformation of *jus ad bellum* with respect to humanitarian intervention—even if a nascent state practice militates in favor of a new normative construct—the desired “evolution” is simply not textually available; it requires a violation of the treaty.

Indeed, if the law as it was understood and negotiated in 1945 failed to recognize the humanitarian crises of today, perhaps it is morally appropriate to violate the law. It is difficult to argue, however, that the post-World War II negotiators who had watched and survived the heinous crimes of Nazi Germany were unable to foresee the possibility of a dictatorial despot engaging in atrocious human rights violations against his own people. The truly changed circumstance in this regard is the inability of the Security Council to combat international crises effectively. That circumstance was foreseen, however, and compensated for by the text of Article 51. Transformation of *jus ad bellum* may be needed in several areas. Only with respect to self-defense law was it anticipated, however, and the legal arguments for the evolution of a more robust authority in the arena of anticipatory self-defense are far stronger than for unsanctioned humanitarian interventions.

These specific issues associated with humanitarian intervention are only tangentially relevant to the challenges posed by the war on terrorism.¹⁸² Nevertheless, they mark unresolved incongruities in the law and thus will have some play in shaping the legal environment in which we must work to formulate *jus ad bellum* for the future. International law cannot long endure a situation in which its violation is deemed the “right” course of action by a substantial portion of the international

Intervention and State Sovereignty (ICISS). The ICISS concluded that the UN Security Council was the appropriate body for humanitarian intervention authorizations and that the international community should work to improve the performance of that body. See Abbott/ Sloboda, see note 173.

¹⁸² But see Blair Press Briefing, 5 March 2004, available at: <<http://www.number-10.gov.uk/output/Page5470.aspt>>. In this speech, Prime Minister Tony Blair linked the responsibility of humanitarian intervention to the war on terrorism and the proliferation of weapons of mass destruction, stating “[c]ontainment will not work. (...) The terrorists have no intention of being contained. Emphatically I am not saying that every situation leads to military action. But we surely have a right to prevent the threat materialising; and we surely have a responsibility to act when a nation's people are subjected to a regime such as Saddam's.”

community. Such simply reinforces Abba Eban's cynical view of international law as the law "the wicked do not obey and the righteous do not enforce",¹⁸³—a view we should not seek to perpetuate by giving fuel to the wrong-headed "illegal but legitimate" characterization.

In this regard, it must be noted that many of the "critics" of past United States' uses of force are proponents of the bombing campaign in Kosovo and other humanitarian interventions. Their arguments against the use of force in other cases—often based on claims of illegality—should be unmasked to reveal their inconsistencies. At minimum, the United States should never yield that moral high ground associated with claims of legality with respect to the use of force. Rather, it should focus attention on the legality of its decisions and actions when fashioning legal/policy decisions in the war on terrorism. The relative stability of legal norms provides a useful counterbalance to the fleeting nature of "legitimacy" as defined by international public opinion.

VII. Moving Forward

Jus ad bellum needs to change, and it is changing. Prior to 9/11, the moral imperative associated with humanitarian intervention was already severely pressuring fundamental concepts of *jus ad bellum*, and the 10-year anniversary of the Rwandan genocide again drew attention to the need to create legal structures to facilitate intervention and mitigate human tragedy.¹⁸⁴ The apparently uncontroversial nature of many humanitarian interventions would seem to militate in favor of change, but such a modification effected as an evolution in state practice within the U.N. Charter framework would be textually difficult to say the least. The Charter regime for humanitarian interventions is clear.¹⁸⁵

¹⁸³ Person to Person (CBS television broadcast, Sept. 20, 1957).

¹⁸⁴ See M. Rosenblum, "UN General Warns of Lessons not Learned from Rwandan Genocide," *San Mateo County Times*, 27 March 2004; R. Holbrooke, "How Did 'Never Again' Become Just Words?," *Washington Post*, 4 April 2004, B2.

¹⁸⁵ Simma, see note 24: "Under the U.N. Charter, forcible humanitarian intervention can no longer, therefore, be considered lawful." Unlike self-defense, the San Francisco drafters were not so prescient regarding humanitarian intervention. Some have suggested, reflecting on US Justice Holmes' claim that the Constitution is not a "suicide pact," that humanitarian crises this grave simply require a departure from the words of our international

9/11 and the proliferation of WMD has wrought a politically sensitive but more practically important exposition of the need for legal modification of *jus ad bellum*. The nature of terrorism and the character of modern warfare mandate this transformation. Though post-9/11 controversies have muddied the water with respect to the necessary direction of that change—and perhaps even the need for it—the U.N. Charter provides a far more favorable textual basis for evolutionary movement of state practice in this area than it does for humanitarian intervention.¹⁸⁶ Where the Charter defines appropriate occasions for intervention, it simply recognizes the inherent right to self-defense. Since it is an “inherent” right, it can be sufficiently flexible to accommodate whatever threat gives rise to it. Within the language of Article 51, there is room to effect a new paradigm for anticipatory self-defense.

U.S. National Security Strategy 2002, is a good start, but it is only a start. The challenge for the United States and indeed, Europe, is to promote this transformation of the law regarding anticipatory self-defense. International disagreements over Iraq and lesser *jus in bello* issues have greatly complicated this second task. Nevertheless, clear articulation of U.S. intentions and legal justifications can help to rectify past misunderstandings. Logic is on our side. Critics of preemption in a general sense will lose, because it is impossible to conceive of how military force used against terrorism can be anything but preemptive. Indeed, terminology and concepts are appropriate fodder for debate, but an intelligent discussion cannot take place without recognition of the fact that any use of military force in response to terrorism will be either preemptive or punitive. Indeed, past actions suggest that legal authority is greatest when the response is both. Yet, animating anti-intervention sentiments are legitimate concerns regarding the hubris of U.S. power and an international inability to check that power. To firmly establish a

community’s constitutive document—perhaps a *jus cogens* norm trumps the Charter’s requirements. Others have suggested a listing of factors to justify international humanitarian intervention, and still others an emerging U.N. Charter “common law” in which the absence of a condemning Security Council resolution *ex post facto* satisfies the requirement of an *ex ante* resolution, but only in the instance of a humanitarian intervention. Some would claim the existence of a threat to international peace and security as a generally sanctioned justification for the use of force. Many, in the absence of a good legal argument take solace in the “legitimate” characterization even if it is coupled with the adjective “illegal.” See Tharoor, see note 176.

¹⁸⁶ Ibid.

jus ad bellum schema to take us into the future, we must address these concerns by articulating workable standards to regulate the use of force in self-defense.

National Security Strategy 2002, suggests exploring alternative views of the “imminent” requirement derived from *Caroline*.¹⁸⁷ The document has correctly identified the area that cries out for adjustment, but it is difficult to conceive of an appropriate definition that does not do violence to the English language. Webster’s words admirably checked illegitimate or fraudulent uses of force in the name of self-defense, but the standards simply do not fit today’s threats.

By speaking to a new criterion—gravity of the threat—the 2002 Strategy implicitly recognizes the fact that any appropriate adjustment in the realm of “imminent” will tend to relax restrictions on unsanctioned defensive use of force. Gravity of the threat has traditionally been considered important to the proportionality prong of self-defense analysis (i.e., military action taken in self-defense must be proportional to the threat), but it may now be appropriate to consider it also as a threshold requirement to justify the application of a more relaxed standard with respect to the imminence criteria.

Finally, in addition to confirming and developing the concept of anticipatory self-defense, 9/11 has made manifest the necessity of relaxing ICJ standards with respect to vicarious culpability. In a world where sub-national groups have the ability to engage in devastating transnational attacks, states can no longer be held responsible only when they actively promote the criminal enterprise. State responsibility law can no longer permit passivity with respect to international terrorists. Though it admittedly threatens the most central “right” in the post-World War II international legal order—sovereign inviolability¹⁸⁸—intervention in self-defense must be permitted against states that are either unwilling or unable to suppress terrorists within their borders.

Together, these tentative developmental steps in the transformation of *jus ad bellum* militate in favor of what appears to be a nascent factors-based approach to self-defense law—a “just war” doctrine that applies only to self-defense. The experience associated with *Operation Enduring Freedom* is instructive in its delineation of a number of characteristics that appear to enhance perception as to the legitimacy of a use of force. Combining these with those factors implicit in the U.S.

¹⁸⁷ National Security Strategy 2002, see note 144, 15.

¹⁸⁸ Article 2 (4) U.N. Charter.

National Security Strategy 2002 we can derive the following criteria that tend toward an appropriate invocation of anticipatory self-defense: 1.) the extent to which evidence supports the likelihood of a future terrorist attack; 2.) whether there was a previous attack for which retribution is appropriate (and which evidences a likely intent to perpetrate another); 3.) the extent to which any future attack can be forecast; 4.) the potential gravity of the anticipated attack; 5.) the extent to which the opportunity for peaceful resolution was offered through ultimatum or other means; 6.) the extent of international cooperation or recognition of the propriety of the intervention; 7.) the extent to which ulterior motives for the intervention may be present; and 8.) the quality of evidence from which to draw relevant conclusions.

In this regard and continuing a factors-based approach to the cataloguing of relevant considerations, the following, in addition to those characteristics associated with anticipatory self-defense generally, may be appropriate when considering the legality of armed intervention into a state found to host terrorists: 1.) whether there is evidence that the target terrorists are present in the host nation; 2.) whether the host nation is aware of the presence and the criminal nature of the entity; 3.) whether the host nation is genuinely unwilling or unable to take remedial action against the terrorists; 4.) if unable, whether the host has permitted external assistance in remediation or if unwilling, whether the host has been warned that continued failure could result in self-defensive intervention; and again 5.) the quality of the evidence from which relevant conclusions can be drawn.

These two sets of criteria are just a point of departure for a discussion regarding the future of anticipatory self-defense norms. If they are indeed indicative of factors relevant to legitimacy, they warrant debate and, eventually, clear articulation. State practice may be technically sufficient to establish a customary norm, but unaccompanied by an interpretive explanation, it is a miserable strategy for establishing a certain legal regime. It is highly unlikely that any two observers will interpret a state's undeclared actions the same way. Perhaps more importantly, precise circumstances will never be repeated precisely; words do not suffer the same failing. Few remember the facts of the *Caroline* case, but Webster's words are commonplace for the international lawyer. The pen is mightier than the sword.

Some comment on the mechanism for change is appropriate. This article has presumed an approach based on the establishment of a customary state practice with respect to self-defense under Article 51. Especially considering the textual difficulties of changing the law with re-

spect to humanitarian interventions, one may question whether some other means of assisting *jus ad bellum*'s transition may be appropriate. The difficulty with any treaty-based mechanism for change is that *jus ad bellum* concerns are inextricably linked to the U.N. Charter and the authority and make-up of the United Nations Security Council.¹⁸⁹ While most would agree that the Security Council system is in need of repair, few would contend that any reasonable prospect for change is now on the horizon.

The current Security Council regime reflects a pragmatic deference to real politic while nodding to egalitarian principles that animate the General Assembly.¹⁹⁰ This regime is a direct outgrowth of and was feasible only because of the years of bloodshed that preceded formation. Absent a similarly momentous triggering event, it is unlikely countries would agree to any plan that locked in place a diminution of national influence or prestige.¹⁹¹ This is not to say that the Security Council

¹⁸⁹ See discussion of the formation of the U.N. Charter, see note 3. See also D.W. Bowett, *The Law of International Institutions*, 4th edition, 1982, 28-33. Article 23 (1) U.N. Charter: "The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance, to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization and also to equitable geographical distribution."; Article 23 (2) U.N. Charter: "The non-permanent members of the Security Council shall be elected for a term of two years. (...) A retiring member shall not be eligible for immediate re-election."; Article 23 (3) U.N. Charter: "Each member of the Security Council shall have one representative."; Article 27 (1) U.N. Charter: "Each member of the Security Council shall have one vote." Article 27 (3) U.N. Charter: "Decisions of the Security Council (...) shall be made by an affirmative vote of nine members including the concurring votes of the permanent members (...)."

¹⁹⁰ Article 9 U.N. Charter: "1. The General Assembly shall consist of all of the Members of the United Nations ..."; Article 18 (1) U.N. Charter: "Each member of the General Assembly shall have one vote."

¹⁹¹ The most popular initiative outside the United States is to expand the Security Council's membership and concomitantly to reduce the influence of individual members—particularly the permanent five members.

could not be refashioned to make sense in a 21st century world beset by terrorism, but the time for that change does not appear to be now.

A more recondite difficulty that may arise in a treaty-making scenario derives from what some have alluded to as fundamentally different jurisprudential concepts that separate the United States from Europe. French foreign minister, Dominique de Villepin described the problem by stating that differences between Europe and the United States are not simply about Iraq, they are about “two visions of the world.”¹⁹² Robert Kagan claims that Americans and Europeans have fundamental disagreements about the role of international law.¹⁹³ Yale Professor Jed Rubenfeld has suggested that where the U.S. legal tradition derives from a democratic national constitutionalism perspective, Europe, which collectively wields greater international lawmaking influence than does the United States as a technical matter, tends to organize around universalist constitutionalizing views.¹⁹⁴ Reflecting on the fact that our current international legal regime is an outgrowth of World War II, differing American and European views regarding international law are grounded in substantially different perceptions regarding the meaning and impact of that war. Where the United States perceived World War II as a victory for nationalism and democracy, Europe viewed it as the defeat of excessive nationalism run amok.¹⁹⁵ Where the United States sometimes sees international law as a dangerous constraint on national sovereignty, Europe looks to international law as the check on national power, democratic excess, and popular will.¹⁹⁶ And were the United States focuses on fundamental principles as the touchstone of legality, Europe places greater emphasis on the value of consensus and collective action. The veracity of these observations is undoubtedly suspect when applied to any large collectivity. Nonetheless, as a practical matter, it is clear that legal transformation will not come easily, and it is unlikely to arrive with the precision of

¹⁹² R. Kagan, “A Tougher War for the U.S. is One of Legitimacy”, *N. Y. Times*, 24 January 2004.

¹⁹³ *Ibid.*

¹⁹⁴ See J. Rubenfeld, “The Two World Orders”, *Wilson Quarterly*, Autumn 2003, contrasting European perceptions that World War II exemplified the horrors of popular nationalism, while for the Americans, winning the war represented a victory for nationalism.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

another international instrument. We should seek to develop a mutually agreeable pattern of customary state practice.

As with Europe, United States interests extend beyond mere freedom of action to fight the war on terrorism. We, like others, are benefited by the establishment and development of a legal regime that constrains rogue behavior, permits appropriate self-defensive action, and promotes predictability. Dialogue, on both sides of the Atlantic must be the constant companion of action, but it yet may be premature to attempt a definitive articulation of the whole of 21st century *jus ad bellum*. Debate regarding post-9/11 law of war is only now in its infancy. As Robert Kagan has pointed out, the post-World War II international legal order that has brought us to the present was not conceived in the *denouement* of that war; it required years of discussion, contemplation, and practice to identify key norms and standards.¹⁹⁷ American jurist Oliver Wendell Holmes' observation is appropriately recollected, "the life of the law has not been logic, but experience."¹⁹⁸ A new, inexperienced lawyer may lament this observation, given that the law has always been defended best by logical analysis and argument. A more mature attorney, however, is likely to see not only the verity in Holmes' comment, but the wisdom in adopting it as a maxim as well. The terrorists of Webster's era did not have the ability to kill thousands of civilians in a matter of minutes. History has repeatedly shown that often only experience can reveal to us the failings of our own logic.

VIII. Conclusion

In the stream of history, governments rise and fall, philosophies traverse the path from respected to detested, and the people, organizations, and movements that begin as good and right become bad and wrong, and then return again to their origins. The only constant is change, but that change is rarely perfectly envisaged or anticipated. In attempting to influence the ordering of our world, then—in an attempt to identify and secure that which is good in structuring our society—we fall victim to our own inability to predict that which lies around the next bend. Yet, there are times when we can and must choose—forks in the stream that

¹⁹⁷ See R. Kagan, "Power and Weakness", *Policy Review Online*, No. 113, June-July 2002.

¹⁹⁸ O.W. Holmes, "Lecture 1—Early Forms of Liability", in: id., *The Common Law*, 1949.

provide rare opportunities to influence our course in a more profound and transcendent way. Sadly, those moments frequently arise in the midst of bloody conflict when the “fog of war”¹⁹⁹ further inhibits our already rheumy foresight. Now is such a time and place.

Today we are engaged in a war against terrorism—a war of survival—a war of necessity. Terrorism is not new to our civilization, but the enemies we fight today—those who felled the World Trade Center, tore a hole through the Pentagon, and slaughtered innocents on the streets of Madrid seek a very different end than the terrorists of Bogota, London, Paris, and Moscow. Looking back, we see that the attacks of 9/11 were perpetrated, not by persons seeking to alter governmental policies, but by those who endeavor to destroy our values, our laws and the very order of the global community.²⁰⁰ We must face the profound nature of this conflict, and we must develop the strategies that will ensure that we prevail. As we do, however, we must retain the society we intend to preserve. If there is a consistent “good” that seems to persist through all the stops and starts, forks, rapids and falls of our unpredictable course—a principle or value that does not vacillate over time—it is the preeminence of the rule of law. Perhaps, in the end, we have proved the prescience of Alexis de Tocqueville, and Americans have successfully exported the idea that all political questions eventually become legal ones.²⁰¹ The substance of that law may change. Indeed, the good

¹⁹⁹ K. von Clausewitz, *On War*, edited and translated by M. Howard/ P. Paret, 1976, 120. Clausewitz described the fog of war as the realm of uncertainty that is inherent in any conflict.

²⁰⁰ See W.M. Reisman, “In Defense of World Public Order”, *AJIL* 95 (2001), 833 et seq., distinguishing the 9/11 attacks from other terrorist acts, and noting the profound implications of the altered character.

²⁰¹ P. Bradley (ed.), *Alexis de Tocqueville, Democracy in America*, Vol. I, 1945. “Scarceley any political question arises in the United States that is not resolved, sooner or later, into a judicial question”, *ibid.*, 280.

that was mandated in one era may be evil prohibited in the next. But the law's authority over all persons and activities is a check on the malice and caprice of man; it serves as a bulwark for our civilization. The concept, *lex rex* served us well in the past, and it will serve us into the future.

