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Governing the Use-of-Force in International Relations

The Post 9/11 US Challenge on International Law

Aiden Warren and Ingvild Bode

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Governing the Use-of-Force in International Relations

The Post-9/11 US Challenge on International Law

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Abbreviations and Acronyms

ASIL	American Society on International Law
BWC	Biological Weapons Convention
CBRN	Chemical, Biological, Radiological and Nuclear
CIA	Central Intelligence Agency
CWC	Chemical Weapons Convention
DCI	Director of Central Intelligence
DOD	Department of Defense
DOE	Department of Energy
DOJ	Department of Justice
DOS	Department of State
DOT	Department of Treasury
DMZ	Demilitarized Zone
DPRK	Democratic People's Republic of Korea
EPA	Environmental Protection Agency
FRY	Federal Republic of Yugoslavia (FRY)
G20	Group of 20
HDBTs	Hardened and Deeply Buried Targets
HIL	Hegemonic International Law
IAEA	International Atomic Energy Agency
IAF	Iraqi Armed Forces
ICBMs	Intercontinental Ballistic Missiles
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IED	Improvised Explosive Device
IHL	International Humanitarian Law
ILC	International Law Commission
IMF	International Monetary Fund
IRBM	Intermediate Range Ballistic Missile
JCS	Joint Chiefs of Staff
MOU	Memorandum of Understanding
MRBM	Medium Range Ballistic Missile
MTCR	Missile Technology Control Regime
NIE	National Intelligence Estimate
NPR	Nuclear Posture Review
NPT	Non-proliferation Treaty
NSC	National Security Council

NSPD	National Security Presidential Directive
NSS	National Security Strategy
OAS	Organization of American States
OSD	Office of the Secretary of Defense
QDR	Quadrennial Defense Review
RNEP	Robust Nuclear Earth Penetrator
ROK	Republic of Korea
SNIE	Special National Intelligence Estimate
SRBM	Short-Range Ballistic Missile
TPP	Tehreek-e Taliban Pakistan
UHI	Unilateral Humanitarian Intervention
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
UNSCR	United Nations Security Council Resolution
UNSYG	United Nations Secretary General
WMD	Weapons of Mass Destruction

Introduction

State recourse to the use-of-force has long been considered the main threat to international peace and security. In extending back to the horrific human devastation and calamitous economic consequences of World War I, it is evident that there were some attempts to restrain the still-accepted right of states to use war in attaining their national interests. The *Covenant of the League of Nations* proscribed in broad terms the option to force and instituted several mechanisms, including "an arbitration, a judicial framework in the Permanent Court of International Justice, and elaborate disarmament processes as confidence-building measures."[1] The focus on disarmament was enhanced by the League's attempt to put "collective security" at the core of its powers. Of course, the League's inability to ultimately prevent World War II engendered extensive questioning of both its rationale and the very notion that war could be mitigated through reliance on law and international norms. Many in the international community argued that this in itself was a dangerous approach, given the natural propensity of states to utilize force as the foundation of their self-defense. Conversely, others contended that the disaster was the result of the League being insufficiently resourced and supported, most notable in the absence of its erstwhile champion, the United States, as a member. This latter insight proved the inspiration for US President Roosevelt's planning and President Truman's execution of the post-World War II international order.[2]

Indeed, with the end of one of the most devastating conflicts the world has ever seen in 1945, the newly created United Nations on 24 October of the same year declared that its foundational aim was to "strive to save succeeding generations from the scourge of war."[3] While this in itself was a defining moment in international relations, its significance was based on the inclusion of the general prohibition of the use-of-force in Article 2(4) of its Charter. Yet, even more surprising is that the language of this article was originally drafted by the delegation of the United States, which had just asserted itself as a global superpower through its leadership in the victorious alliance that brought World War II in Europe to an end. Seen in the world context at the time, US President Harry Truman's address to the *United*

Nations Conference on International Organization on 26 June 1945 was notable: "We all have to recognize – no matter how great our strength – that we must deny ourselves the license to do always as we please. No one nation, no regional group, can or should expect, any special privilege which harms any other nation."[4]

Despite the positive sentiments of Truman's rhetoric, however, the actualization of peace has not been easy to attain. Moreover, it is obvious that Truman's statements did not apply to the special privileges of the United States itself, evident in his administration's subsequent use of military force in its most extreme form in the cities of Hiroshima and Nagasaki on 6 and 9 August 1945, respectively. The great ambivalence inherent in both Truman's words and, broadly, the US use-of-force policy are illustrative of the level of commitment to international peace and security the United States has displayed over the course of the last 60-plus years. In simple but dynamic terms, *Pax Americana* has seen the regulation of the use-of-force, but with special privileges for the way in which the United States undertakes its *own* use-of-force. Indeed,

> US impulses have been paradoxical, even when not strictly contradictory: On the one hand, throughout the twentieth century the United States sought to shape (when not actually creating) multilateral architecture on a broad range of issues; on the other, it often either stayed out of the ensuing organizations or worked, intentionally or unwittingly to undermine them.[5]

In fast-forwarding to the devastating terrorist attacks of 11 September 2001, it is evident that like the conclusion of World War II, the United States again stood at an "international constitutional moment."[6] As a significant driver in this book's discussion, it will be argued that the decisions of the two post-9/11 administrations of Bush and Obama, in fact, have also shared the aforementioned ambivalent tendencies in their own approaches to the use-of-force, long since characteristic of US policy in this area. In this regard, the question of how the Bush and Obama administrations reacted to the challenges posed with regard to the recourse to military force in the post-9/11 era will be the book's central focus. In simple terms, it will evaluate and assess the extent to which both administrations crossed the threshold toward legitimizing the greater use-of-force in their efforts to thwart the threat of non-state actors, terrorism and weapons of mass destruction (WMD) proliferation.

For the Bush administration, the core and most contentious strategy with regard to the use-of-force pertained to the concepts of preventive/preemptive military action. The international legal foundation of the administration's *jus ad bellum* paradigm in the global "War on Terror" was articulated in the "Bush Doctrine" – a philosophy, a set of speeches and grouping of

policies – that encouraged the early use-of-force in self-defense against imminent (preemptive) and developing (preventive) threats. Although there is some justification – at least in principle – under the UN Charter *jus ad bellum* regime for a counterproliferation strategy of preemption that adheres to the balance of necessity and proportionality, the Bush doctrine's form of preemption was in reality preventive in character, and therefore, clearly outside the limits of international law.

With the election of Obama in 2008, "hopes were raised of a dramatic shift in the US attitude towards international law, but subsequent appraisals of that shift have been cautious in their optimism."[7] Indeed, as this book will argue, Obama appears to have, for the most part, merely adjusted rather than reversed Bush's stance toward the use-of-force. This is particularly visible in his administration's increased reliance on drones since 2009. The manner in which these military devices are used and described by senior officials as "invaluable tools" suggests that they fulfill the self-defense conditions of necessity and proportionality by definition – due to their supposed surgical precision. While the Obama administration has been more open and frequent in offering legal justifications for their use-of-force, the content of these justifications point to a continued stretching of the self-defense article in the direction of mixing preemption and prevention; particularly in regard to its promotion of an increasingly diffused concept of imminence. Despite removing references to the "War on Terror" from its public pronouncements, the Obama administration has arguably continued the Bush administration's war on international law.

In order to provide a substantive evaluation of the Bush and Obama administration's use-of-force policies in the post-9/11 era, the book is organized in two main parts: the first part encompassing chapters 1–3 presents the foundational intricacies of the UN Charter's *jus ad bellum* regime; the second part, chapters 4–6, analyzes the extent to which the Bush and Obama administration's use-of-force policies relate to international law as established in the Charter era.

At the center of the UN Charter's *jus ad bellum* regime regulating state recourse to force is Article 2(4)'s general prohibition of the use-of-force. As such, Chapter 1 seeks to develop a legal understanding of this core article in assessing its essential components of "force" and the phrase "territorial integrity or political independence." The chapter also examines two interpretive debates that have arisen in the Charter era surrounding the scope of potential exceptions to the prohibition enshrined in Article 2(4) – prodemocratic intervention and humanitarian intervention. Although Article 2(4) has been subject to differing interpretations, it is found to contain a solid normative core. In fact, as will be argued, when UN member states' behavior has not been consistent with the general prohibition of the use-of-force, they have tended to justify their actions with reference to Article 51 of the UN Charter, rather than putting Article 2(4) into question.

Chapter 2, therefore, follows directly from this assessment in closely examining the purview of Article 51, the self-defense article, and the main exception to the prohibition of the use-of-force. The history of its interpretation has shown two distinct readings of its provisions: one linear and restrictive, the other expansive and broad. The differences in these readings pertain mainly to the legal standing of the preemptive and preventive variants of self-defense. Preemptive and preventive measures relate to different standards of imminence with regard to threats. While preemptive reactions are designed to counter immediate and concrete threats, the preventive recourse to force deals with those threats that are longer in range and less definitive. As the chapter will illustrate, the linear reading of Article 51 rejects both of these expansions to the right of self-defense, arguing that the wording of the article only allows the use-of-force in response to an actual armed attack that has already occurred. By contrast, the expansive reading provides legal space for the preemptive use-of-force in response to imminent threats based on the article's qualification of the right to self-defense as "inherent," thus referencing customary international law valid in the pre-Charter period as defined by the "Caroline incident." Here, preemptive self-defense is considered legal if the threat is imminent in a temporal sense, the recourse to force is strictly necessary, and the eventual use-of-force is proportional. As such, in comprehending any preemptive right to self-defense, the chapter will necessarily examine the requisite principles of imminence, necessity and proportionality in great detail. At this point it will hold that while a right to preemptive self-defense may find legal support in both Charter provisions, historical legal discourse and customary international law, preventive self-defense is – practically – universally considered to be outside the scope of international law.

Additionally, the chapter will also assess how the self-defense provisions of Article 51 relate to the use-of-force against non-state actors, in this case, terrorist actors. Applicable international law in this area is generally characterized by a substantial lack of clarity – especially as terrorist actors invariably use the territory of states for planning their attacks, who may or may not be supporting these actors. The chapter will outline the complex legal scenarios and draw attention to a consensus position supported by rulings of the International Court of Justice, which holds that the use-of-force on the territory of sovereign states is permissible if the state "hosting" terrorist actors is found to be supporting or sponsoring these acts. The legal assessment is more complicated in the event of "host" states which are unwilling or unable to fulfill their counterterrorism obligations *vis-à-vis* terrorist actors. As we will outline, the use-of-force in this scenario may still be lawful if it is based on compelling evidence, is only aimed at terrorist targets or the "host" state provides consent.

Building on the historical US ambivalence toward the use-of-force as discussed at the beginning of this introduction, Chapter 3 puts US recourse

to preemptive and preventive self-defense, in particular, into historical perspective. It will argue that the use-of-force of both the preemptive and preventive variant featured continuously and prominently in policy deliberations and decisions of several US administrations from Kennedy to Reagan and Clinton. Although deliberation was extensive, the Kennedy administration's decision-making processes in the 1961 Cuban Missile Crisis eventually showed reluctance to engage in the use of preemptive force. This also applied to the Clinton administration during the 1994 North Korean crisis. Aside from these examples of restraint, the chapter will point to examples in which force was *actually* undertaken in response to terrorist threats, revealing how the Reagan and Clinton administrations' preemptive use-of-force positions precariously rode the line of prevention, that is, they were responding to distant, less concrete threats of attack. Indeed, the Clinton administration's multiple air strikes on Iraq throughout the 1990s are clear examples in which the preventive use-of-force was used to thwart that country's alleged development of WMDs.

Therefore, the positions included in the so-called Bush doctrine formulated during the course of the Bush administration's two terms in office from 2000 to 2008 have to be seen in the context of these historical precedents. Rather than representing a substantial departure, to some extent Bush followed on from tendencies of previous US administrations, albeit in an amplified fashion. As Chapter 4 will reveal, the main tenets of the Bush doctrine, as formalized in the *National Security Strategy of 2002*, placed a special emphasis on "pre-emptive"/preventive options, and although the imminence concept underlying these two variants of self-defense is dissimilar, they were used interchangeably during Bush's tenure in office. Aside from the preemption/prevention prevarication, the chapter will argue that the events of 9/11 became the driving force for the systematic disregard of established international rules on human rights, the treatment of combatant prisoners, the use of military force and provided the ideal opportunity to redefine the global legal order. In this light, international law for the Bush administration was perceived as an impediment on the United States' capacity to defend itself, execute its "War on Terror" and protect its economic and military interests around the world. Indeed, the four *Geneva Conventions*, the *International Covenant on Civil and Political Rights* (1969), the *United Nations Convention against Torture* (1984) and the *UN Charter's* prohibition on the use-of-force all became obsolete in the post-9/11 paradigm. In linking back to the core premise of this book, the Bush administration's *jus ad bellum* approach to the global "War on Terror" can be viewed as an attempt to dismantle the regime governing the use-of-force – the very regime that the United States played an integral role in defining after World War II.

Building on these arguments, chapters 5 and 6 will look at the Obama administration's propagated stance and decisions with regard to the use-of-force. Chapter 5 examines the broad tenets of Obama's use-of-force policy,

which is generally characterized by a great dualism, or to return to the terminology used with relation to President Truman, a great ambivalence. Obama made change the central purview of his presidency, especially in relation to re-taking the United States' global leadership role in support of international peace and international law through living up to its ideals in rhetoric and practice. As a consequence, the Obama administration professed a specific emphasis on the multilateral rather than the unilateral side of its use-of-force policy. Concurrently, official statements of President Obama and senior officials suggested that the United States would retain the right to use force unilaterally, if necessary, especially in relation to non-state actors and terrorist threats. Thus, while Obama rhetorically dropped Bush's "War on Terror" from the security paradigm, he continued to characterize the US counterterrorist effort as a war against Al Qaeda and its affiliates and adherents. Chapter 5 underlines this point in particular with a detailed treatment of the Bin Laden raid.

Moreover, the chapter illustrates the extent to which the "necessary" characterization of the use-of-force has taken a specific position in Obama's rationale and force disposition, particularly in regard to the use-of-force for humanitarian purposes. Drawing on the just war tradition, his administration has promoted humanitarian intervention as a necessary recourse to force – to be used both on a multilateral and unilateral basis. In this regard, the just war line of thinking espoused by Obama has proven to be a particularly useful reference point in relation to unilateral humanitarian intervention, that is, humanitarian intervention without a Security Council mandate, so as to legitimize this recourse to force inconsistent with international law. Notwithstanding such rhetoric, the chapter will specifically contend that the administration's actions did not follow these clear-cut convictions in its responses to the crises in Libya and Syria. Of course, in the context of "adjusting" international law, the chapter will also consider the extent to which the Obama administration has challenged the legal threshold in its apparent continuation of rendition.

Finally, Chapter 6 will provide a detailed critical assessment of the Obama administration's drone policy in relation to international law. The use-of-force in the form of drone attacks has become a regular staple of the administration's counterterrorism drive both inside and outside declared theaters of conflict, that is, both in Afghanistan and in Iraq, but also outside combat zones in Pakistan, Yemen and Somalia. Following an overview of US drone practice, the chapter evaluates the legal arguments put forward by Obama and senior officials in support of the administration's drone policy. It will be revealed that these arguments come in *jus ad bellum* and *jus in bello* categories, that is, those supporting when and if force may be used and those supporting the manner of its usage.

As to *jus ad bellum*, administration officials argue that using drones to target terrorist leaders is lawful because the United States is in a state of

armed conflict with Al Qaeda and its affiliates and acts strictly in self-defense. As the chapter contends, the Obama justification is found to contain at least two major problems: First, the self-defense argument is based on a particularly broad concept of imminence that conflates a particular group identity with representing an imminent threat. Embodied in this line of thinking is the notion that all Al Qaeda members, affiliates and adherents are defined and "packaged" as an imminent threat, with no further evidence necessary on whether they are planning attacks or not. Second, because drones are implicitly considered a proportional means to counter these "imminent" terrorist threats, the three controlling principles of the use-of-force in self-defense – imminence, necessity and proportionality – virtually become obsolete. As the use-of-force in self-defense through drone attacks is therefore by definition lawful, it is no longer necessary to check their legality on a case-by-case basis. Additionally, the war against Al Qaeda and its affiliates and adherents continues to be distinctly global in scope as it extends to wherever its terrorist actors go. Following this reasoning, law of war principles regulating the use-of-force are not only applicable in specific theaters of war but almost everywhere. Such actions thereby normalize the application of principles designed for exceptional circumstances and all but contravene the fine-line threshold of international human rights law.

As a last point with regard to *jus ad bellum*, the chapter considers the extent to which the Obama administration justifies drone attacks on the territory of sovereign states such as Pakistan, Yemen and Somalia. Here, the administration holds that it only conducts targeted strikes with the prior (tacit) consent of the country in which they take place or after a determination that the state has been "unable or unwilling" to take action against the threat itself. The reliance on the subjective "unable or unwilling" formula is demonstrated to extend clearly beyond the law of self-defense in the face of terrorist threats. Additionally, although consent seems to be relatively durable in the cases of drone strikes in Somalia, Pakistani authorities have officially withdrawn their consent as strikes continue unabated and Yemeni legislative and executive decision-makers display divided opinions.

A second section of the chapter considers the Obama administration's arguments with regard to drone strikes' adherence to *jus in bello* standards of necessity, distinction and proportionality. This is clearly where the argumentative focus lies as drones are propagated to be particularly precise surgical weapons, which are supposedly much more distinctive and proportional than any other weapons system. We question this so-called "drone myth" in relation to all three principles. First, the compilation of kill lists suggest that the Obama administration is targeting not only operational terrorist leaders but also individuals on the lower ranks of the Al Qaeda network – thereby not strictly fulfilling the criterion of necessity. Whether the administration's drone strikes adhere to the principles of distinction and proportionality, in practice, both are difficult to verify due to lack of transparency and

accountability associated with the largely classified drone program. Further doubts with the administration's self-proclaimed high standards surface with regard to its usage of signature strikes and associated unclear definitions of civilians. In sum, the manner in which drones are used by the Obama administration, the way their supposed surgical precision makes the use-of-force easier and their firm inclusion as seemingly the administration's main counterterrorism strategy mark a normalization of exceptionalism with regard to the use-of-force.

As one of the most significant junctures in modern international relations, the events of 9/11 played a significant role in the Bush and Obama administration's reinterpretation, and in many instances, attempts to redefine international law. As a novel "international constitutional moment," US policies after 9/11 have, however, continued to be defined by long-standing inconsistencies and ambiguities that have engendered extensive scrutiny and new critical questions in international relations and international law discourse. While the perceived dualism is not necessarily surprising, the omnipresent theme of discontinuities or disjuncture present concerns on where this will actually leave the international legal regime and the broader global order should the United States continue with an approach that has veered between the following: stated intentions and tangible outcomes; what it conveys in the context of international rule of law and what it actually is in certain scenarios; its promotion of the principle of sovereign equality and US exceptionalism; what it seems to think other states should do and what it does itself; US engagement at different points in time; and where it stands in regard to adhering to the principles on the use-of-force, to what it actually does. As this introduction has articulated, the book will assess these apparent contradictions, marked elements of continuity, ongoing dichotomies and various departures that the Obama administration has undertaken in the use-of-force and the contribution it has made to the overall governing of force.[8] Upon receiving the Noble Peace Prize in 2009, Obama stated that United States could not "insist that others follow the rules of the road if we refuse to follow them ourselves" and that "adhering to the standards strengthens those who do, and isolates and weakens those who don't."[9] In examining the transition between the Bush and Obama administrations and the extent to which both have legitimized the use-of-force in their efforts to thwart the threat of non-state actors, terrorism and WMD proliferation, it will be argued that there have been greater continuities in their "treatment" of the "rules," rather than actual departures.

1
The International Legal Paradigm: The UN Charter *jus ad bellum* Regime

Under the George W. Bush administration, the post-9/11 War on Terror "drive" saw an immense challenge to long-standing pillars of international law that included the legal justification for military engagement – specifically on the conditions for the use-of-force – and the nature in which prisoners of war could be captured, questioned and tried.[1] In appearing to "straighten up" the United States' international reputation, the election of Democratic candidate Barack Obama in 2008 as the 44th president of the United States "sought nothing less than to bend history's arc in the direction of justice, and a more peaceful, stable global order."[2] Having lost much credibility during the Bush tenure in office, the electoral victory of Obama promised a "realignment"[3] in which "hopes were raised in the US attitude towards international law."[4] In evaluating the transition from the Bush and Obama administrations in the context of international law, and specifically, their respective approaches to the use-of-force, this foundational chapter provides an overview and evaluation of the international legal paradigm as seen through the UN Charter *jus ad bellum* regime. It will be argued that both the Bush and Obama doctrines were neither created nor exist in a legal vacuum, but were incorporated, or perhaps even entwined, in a comprehensive system of normative rules leading the use-of-force in international relations – that being, the UN Charter *jus ad bellum* regime.

In establishing the international legal context within which the Bush and Obama administrations sought to execute their respective global campaigns against terrorism, the chapter begins with a broad introduction to the principles and procedures of the Charter *jus ad bellum* regime, the key provision of which is the Article 2(4) general prohibition on the use-of-force. While the Charter regime is often viewed – at least on the surface – as a comprehensive arrangement for regulating the use-of-force, many commentators have argued that the continued occurrence of global violence and conflict has for all intents and purposes relegated it to a position of "obsolete" law. A careful assessment of such arguments, however, indicates that notions of the Charter's demise are greatly exaggerated. Not only is the Charter regime alive and relevant, it also still remains a significant option in the context

of regulating international force. Notwithstanding the viewpoints of many international legal commentators, the Charter regime has superseded and subsumed the customary use-of-force regime; UN members do not have the option of reverting to customary law whenever the Charter rules are not to their liking.

In saying this, however, it is important to note that the Charter's rules are by no means set in concrete. The wording of the Charter is often imprecise and ambiguous, making it susceptible to interpretation when conditions and events in the global order evolve and change. As such, the chapter examines some of these interpretative arguments, focusing specifically on debates pertaining to the interpretation of two key elements in Article 2(4), that being, the term "force" and the phrase "territorial integrity or political independence." Two arms of these interpretative debates will then be evaluated in the context of the discourse surrounding humanitarian intervention and pro-democratic intervention. As the examination of these debates illustrates, the Charter is very much open to interpretation and thereby, predisposed to change and attempts to alter it. The chapter next considers this process of change or what can be defined as the ongoing reinterpretation of the Charter. Indeed, states pursue the adaptation of the Charter regime commensurate to the shifting global conditions via a process of claim and consent on par to the customary international law-making process, but, unlike that process, one that is defined by the textual and normative structure of the Charter regime. Finally, the chapter argues that regardless of apparent interpretative ambiguity, the essence of the Charter *jus ad bellum* regime – Article 2(4) – retains a robust normative core, and it is one of the reasons states have pursued great levels of malleability in their use-of-force as they attempt to broaden the Article 51 self-defense exception in lieu of interpreting the general prohibition of force itself. The Bush and Obama administrations' campaign in the fight against global terrorism to this end will be the subject of the subsequent chapters.

The prohibition of the use-of-force in Article 2(4) and its interpretations

As World War II was coming to its demise in 1945, representatives from 50 states gathered in San Francisco to draft the charter of the new global organization, the United Nations.[5] Created in the spring of the said year, the UN Charter put forward a set of provisions pertaining to the maintenance of international peace and security to the Security Council. These included

> collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement

> of international disputes or situations which might lead to a breach of the peace.[6]

In attempting "to save succeeding generations from the scourge of war,"[7] the Charter's architects constructed a regime that required states to pursue conciliatory means for the resolution of international disputes, and one that rigorously regulated the conditions in which the use-of-force could be undertaken in the international context. As such, the UN Charter sought to establish a normative order that would severely restrict the resort to force[8] and, through Article 2(4), articulated the necessity of states to "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."[9]

Based on its inference that its principle on the non-use-of-force is binding on all states of the international system, whether UN members or not, it has been argued that Article 2(4) reflects customary international law.[10] Indeed, the International Law Commission (ILC) posited in 1966 that "the law of the Charter" pertaining to the prohibition of the use-of-force in itself "constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."[11] That said, the Article 2(4) prohibition on the use-of-force is certainly not absolute. There is a specific exception to the general prohibition encompassed in Article 51 that allows for individual and collective self-defense. As stated, there is "nothing in the present Charter" that will restrict "the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[12] Additionally, the article signifies that 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 impact 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."[13]

There are two components of Article 51 that need to be considered. First, the article refers to the "inherent" right of self-defense. For the likes of Yoram Dinstein, arguments pertaining to this "inherent" right deriving from the transcendental notion of natural law and/or the sovereignty of states are not plausible.[14] In his view, a more balanced interpretation is reflected by the International Court of Justice (ICJ), which held in *Nicaragua (Merits)* that "it is hard to see how this inherent right of self-defence can be other than of a customary nature."[15] By referring to this "inherent right" in Article 51, the Charter *jus ad bellum* regime incorporates the customary rules on self-defense as they were during the period in which the Charter was drafted; although there is a substantial divergence among analysts as to what was the substance of the then prevailing customary rules.[16] The second component pertains to

the period of this right of self-defense, and this too has engendered varying levels of disagreement. David Harris argues that this right is temporary and that a state may execute its right of self-defense only until such time as the Security Council "has taken measures necessary to maintain international peace and security."[17] In this regard, the Council could *inter alia* (i) give its retrospective seal of approval to the exercise of self-defense; (ii) impose a general cease-fire; (iii) demand withdrawal of forces to the original lines; (iv) insist on the cessation of the unilateral action of the defending state supplanting it with measures of collective security; or (v) decide that the state engaged in so-called self-defense is in reality the aggressor.[18] It is here that Council measures supersede state action taken in self-defense. Thomas M. Franck, on the other hand, endorses John Foster Dulles's interpretation of the Charter at the time of its drafting, in which self-defense actions taken under Article 51 can move alongside Security Council measures.[19] This interpretation was evident during the 1991 Gulf War and in the aftermath of the 9/11 attacks when the Security Council recognized "the inherent right of individual or collective self-defense" in this context.[20] It appears to be generally accepted, however, that should the Security Council be reluctant or incapable of taking effective action in the execution of its duty to reestablish international peace and security – as has been distinctly evident in the past – a state's right to undertake self-defense measures continues uninterrupted.[21]

It can be argued that the provisions of the Charter *jus ad bellum* regime are certainly not fixed and unchangeable. There are many terms and definitions in the relevant articles – such as "force" in Article 2(4) or the "inherent right of self-defence" in Article 51 – that are ambiguous and have spurred extensive debate and interpretation since the inception of the Charter. UN institutions and states, as well as the legal literature itself, have not been successful in solidifying these terms in a coherent or an agreed-upon fashion.[22] This is not to say, however, that this is a failure specifically unique to the Charter; disputes pertaining to the meaning of rhetoric and vague formulations have been endemic to all international treaties as they are the outcomes of state compromises. Indeed, no word formula can have, apart from context, any single "clear and unambiguous" or "popular, natural and ordinary" meaning that predetermines decisions in infinitely varying controversies.[23] The task of treaty interpretation, especially the interpretation of constitutional documents devised in the UN Charter, "is not one of discovering and extracting from isolated words some mystical pre-existent, reified meaning," particularly when viewed in "the developing future."[24] Rather, it is one of giving that meaning to "both words and acts, in total context, which is required by the principal, general purposes and demands projected by the parties to the agreement."[25] It is in this light that the UN Charter, as comparable to a constitutional document in the international order, can be viewed as an evolving organ – its provisions drafted with an element of ambiguity that enables some degree of reinterpretation based on

changing international conditions. Nonetheless, this also presents some vexing questions. That being, to what extent are these provisions so imprecisely written as to leaving them susceptible to virtually any interpretation as a means of complimenting a state's particular political interests? Moreover, to what extent is there a solid substantive core to the UN Charter *jus ad bellum* regime that extends beyond the conditions of the moment? We will provide answers to these questions in examining the legal debate surrounding two further possible exceptions to the prohibition on the use-of-force: pro-democratic intervention and humanitarian intervention.

Article 2(4) and pro-democratic intervention

A significant issue that has generated extensive debate in the context of Article 2(4) pertains to the alleged right of pro-democratic intervention – that being, an assertive intervention in another state as a means to instill a democratic regime in that state. In this scenario, it appears that the literal textual assessment of the Charter would preclude such a right. The prohibition on the use-of-force in Article 2(4), in combination with the prohibition on intervention in the domestic affairs of states in Article 2(7),[26] could be read to protect state sovereignty from external interventions to implement democracy.[27]

For the likes of Oscar Schachter, Article 2(4) can be interpreted so as to amplify the probability of a people's free choice of government and political structure – in other words, that the intervention is legal if it engenders popular rule.[28] However, the argument put forward by W. Michael Reisman that "ongoing self-determination" is a superior principle of international law that opposes the exact interpretation of Article 2(4) and justifies the use-of-force, provides no definitive independent support.[29] Subordinating the general prohibition in Article 2(4) to the right of pro-democratic intervention is a drastic departure from that principle,[30] as such intervention undoubtedly undermines the said article. As stated, "an invasion, however brief in duration, violates the essence of territorial integrity … Moreover, for a foreign power to overthrow the government of an independent state is surely 'against the political independence of that state'."[31] Juxtaposing arguments necessitate an "Orwellian construction" of the article's terms.[32] It is here that reinterpreting Article 2(4) in a fashion that endorses pro-democratic intervention would establish a new "normative basis for recourse to wax." That is, it would give strong states an almost unlimited right to overthrow governments deemed to "be unresponsive to the popular will or to the goal of self-determination … That invasions may at times serve democratic values must be weighed against the dangerous consequences of legitimizing armed attacks against peaceful governments."[33] In the context of history, it is evident that powerful states have misused the supposed right to intervene in the name of what they view to be legitimate causes. To provide states with such a right is certainly not conducive to stability and order. Nor will the

world "be made safe for democracy through new wars of invasions of the weak by the strong."[34]

Of course, for W. Michael Reisman, Article 2(4) must be interpreted in terms of the "key postulate of political legitimacy," that is, the extent to which it enables the opportunity for peoples to define their political fate, or what he argues is the continuity of "self-determination."[35] It is on these grounds that every use-of-force must be assessed as some interventions can potentially enhance peoples' freedom of choice in deciding their government and political structure. A perfunctory interpretation of Article 2(4), on the other hand, can undermine this autonomy of choice in superimposing a change on "an unwilling polity, an elite, an ideology and an external alignment alien to its wishes."[36] This can be as destructive to the political independence of a community as would be a massive outside invasion. For Antony D'Amato, there is no legal principle permitting pro-democratic intervention; however, human rights law justifies and, indeed, requires such intervention. He maintains that this is not intervention in pursuant of democracy or another form of government but, instead, an intervention against tyranny.[37] In the context of the 1989 US invasion to reinstate democracy in Panama, D'Amato argues that this did not undermine Article 2(4) as there was not an objective to annex part or all of Panamanian territory, and thus, the intervention left the territorial integrity of Panama intact. As stated, "[n]or was the use-of-force directed against the 'political independence' of Panama, the United States did not intend to colonialize, annex or incorporate Panama. Before and after the intervention, Panama was and remains an independent nation."[38]

Just war theorist Michael Walzer posits an interesting assessment of pro-democratic intervention.[39] He acknowledges that intervention is acceptable as a means to support representative secessionist movements, to realign previous interventions of other powers, or to save people from an imminent genocide;[40] however, it is not permitted to implement "freedom" to a people. In this regard, Walzer subscribes to the approach of John Stuart Mill in which it is the peoples of a political community who are entitled to determine their own affairs.[41] They must pursue their own freedom and must be dependent upon the presence of individual virtue, attained in the struggle for self-determination.[42] To put the argument somewhat differently, for political freedom to be enduring, a people must attain ownership through their own efforts, however volatile those efforts might be. If successful, they will deeply appreciate a freedom that has been attained. If given to them by outside forces, however, they have invested nothing in it. They have yet to learn – or to pay – the cost of freedom and, hence, to appreciate its value. In essence, foreign intervention stymies the political capacities of the people that only the exercise of self-determination can bring. As Walzer concludes, "As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good."[43]

Notwithstanding the aforementioned attempts to clarify and qualify, the pro-democratic intervention position in relation to Article 2(4) and the Charter *jus ad bellum* regime remains a contested debate. As with humanitarian intervention, its legal standing is unclear. Cedric Ryngaert argues that there is still a limited right of pro-democratic intervention.[44] In contrast, Christine Gray argues that state practice does not endorse such a right.[45] Similarly, Michael Shaw posits that aside from the complexity in defining "democracy," the supposed right of pro-democratic intervention is not acceptable under the Charter's provisions. Additionally, he argues, even if such a right could be said to exist, there is nothing to indicate that "it could constitute a norm superior to that of non-intervention."[46]

Article 2(4) and humanitarian intervention

Even more so than the pro-democratic intervention, the legal standing of humanitarian intervention presents an immense challenge to the future of global order. The core legal question is relatively easy to construct but notoriously difficult to answer, at least on a legal level: To what extent should international law allow states to intervene militarily as a means to impede genocide or analogous atrocities? This question, of course, has attained even greater importance in the wake of unilateral military interventions in Kosovo and Iraq, that is, interventions without Security Council authorization,[47] non-intervention in Rwanda and the Sudan and the apparent indecisiveness pertaining to violations of human rights on a massive scale in Egypt, Libya and Syria.

A conventional definition of humanitarian intervention is "the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights."[48] As Thomas G. Weiss remarks, there are two defining features of humanitarian intervention: first, the unsolicited use of military force, that is, force used in the sovereign territory of another state without that state's consent, and second, the expression of a prominent humanitarian rationale behind the use-of-force,[49] that is, force used to protect or defend the human beings whose rights are being violated on a massive scale or who face genocide and other mass atrocities.

Humanitarian intervention does not have an accepted definition in international law,[50] but grounds for its legal standing can be found in one of the UN Charter regime's defining, unresolved tensions. This tension unfolds between Articles 2(4) the prohibition on the use-of-force, 2(7) the non-intervention into the internal affairs of sovereign member states and 55 and 56, which outline fundamental human rights and commit members to action on these rights.[51] At its most basic level, humanitarian intervention in its various forms challenges what many legal scholars agree upon

to be the defining principle of international order – territorial sovereignty, as also expressed in Article 2(1) of the UN Charter. However, "sovereignty cannot be used as an excuse for not performing duties that [states] have agreed upon."[52] The protection of basic human rights and fundamental freedoms is one of these duties as it is part of not only the UN Charter but also of a range of specialized human rights treaties that the majority of states have ratified. Moreover, sovereign states are not protected against outside interference when their actions represent a threat or breach to the peace, at which point the Security Council can decide to take collective military action against that state.[53] This formula provides the legal basis for Security Council-authorized humanitarian intervention – particularly as the Council has become progressively more willing to consider human rights violations within sovereign states as threats to international peace and security.

Indeed, since the 1990s, the agenda of the Security Council has begun to consistently define human rights violations – such as the protection of civilians and children in armed conflict – as threats to international peace and security and has seen a greater preparedness toward the use-of-force in relation to such contexts.[54] An early example, which is frequently mentioned as a starting point, is Security Council resolution 688 (1991), which provided the authorization basis for the US-led operation to protect Kurdish and Shiite civilians in Northern Iraq in the aftermath of the First Gulf War.[55] However, while the notion of Security Council mandated humanitarian intervention has gained ground in the past two decades, it has not always been accompanied by political will.[56] This is, for example, demonstrated by the Security Council's policies toward the former Yugoslavia, characterized by issuing mandates for ever more demanding peacekeeping missions, which were never backed up with the necessary military contingents to effectively protect human beings on the part of member states.[57] Despite the growing acceptance and relevance of humanitarian intervention, this has mainly been applicable to those multilateral interventions with explicit Security Council authorization. The unilateral variant, that is, intervention by a single state or a group of states without Security Council authorization, continues to have no standing in international law – notwithstanding its occasional usage, evident during Cold War examples of the Indian intervention in East Pakistan/Bangladesh in 1971, Tanzanian intervention in Uganda in 1978–1979 and Vietnamese intervention in Cambodia in 1978–1979.[58]

Proponents of unilateral humanitarian intervention came to prominence in the late 19th century,[59] described by Ryan Goodman as "admittedly a period in which international law allowed states to use force on a variety of grounds (and imperialism reigned)."[60] In the contemporary context, however, the advocates of legalizing humanitarian intervention have "essentially lost the debate."[61] While proponents of a right to unilateral humanitarian intervention point to the moral dilemmas associated with Security Council inaction in the face of mass atrocities,[62] critics argue that the

key impediment to legalizing unilateral humanitarian intervention is the prevailing concern that states would use the pretext of humanitarian intervention to wage wars for ulterior motives.[63] Specifically, the concern that has long dominated academic and governmental debates is the likelihood of some states taking advantage of a humanitarian exception in validating military aggression. This concern engages the intrinsic worth of humanitarian salvation against the revulsion of having expanded opportunities for aggressive war. Even when considered in the context of state practice, where governments have "engaged in humanitarian intervention without Security Council approval, there has been a disinclination to validate such actions by reference to a right to engage in UHI [unilateral humanitarian intervention]."[64] Unilateral humanitarian intervention is therefore not lawful based on international treaty law. Although there has been some state practice supporting unilateral intervention, its standing in customary international law is also weak to say the least. As the ICJ formulated in *Nicaragua v. United States* (1986):

> [W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. . . . The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification or the conduct of the United States.[65]

In the post-Cold War period, the NATO-led unilateral intervention in Kosovo in 1999 sparked international debate on the legal standing of interventions outside the Security Council framework.[66] The debate was also taken to the ICJ, when, on 25 April 1999, the Federal Republic of Yugoslavia (FRY) lodged a submission and the ICJ initiated proceedings against ten NATO countries.[67] The FRY accused the respondents of contravening *inter alia*, the general prohibition on the use-of-force by partaking in the NATO military strike action on its territory on 24 March 1999. In a testimony before the court and also a response to FRY's request for the indication of provisional measures – that is, a halt to NATO's bombing campaign before the Court – only the Counsel for the Kingdom of Belgium, Rusen Ergeç, articulated his government's legal justification for NATO's actions.[68] In what has been regarded by some analysts as a very detailed legal rationalization for humanitarian intervention,[69] Ergeç presented three doctrinal justifications: (1) implied authorization of armed action based on UN Security Council resolutions, (2) armed humanitarian intervention and (3) a state of necessity. In the context of armed humanitarian intervention, he argued that NATO was required to intervene so as to obviate a continuing humanitarian disaster and to defend essential human rights that had achieved the status of *jus cogens*.

As the intervention was not directed against the political independence or the territorial integrity of the FRY, it was congruent with a narrow reading

of Article 2(4). In this instance, NATO's action was commensurate with the general prohibition on the use-of-force. Additionally, it was also lawful based on sufficient precedents in state practice,[70] implied authorization in Security Council resolutions and the Council's refusal of a Russian draft resolution reproving NATO's armed action. The Russian Federation had prepared a draft resolution that referred to NATO intervention as a clear violation of the UN Charter and called for an immediate cessation of the use-of-force that only received three votes in favor and 12 against with no abstentions.[71] Rather than condemning the illegality of the intervention, as had been Russia's intention, this vote arguably increased the intervention's legitimacy. Ergeç highlighted the key strands of NATO's armed intervention to the court. First, mitigating a humanitarian catastrophe was viewed by the Security Council as presenting a looming threat to international peace and security. Second, precluding the threat of an aggressive repression of minorities and/or a threat to regional stability – for which the FRY was responsible. In such circumstances, therefore, NATO's actions were "a lawful armed humanitarian intervention for which there [was] a compelling necessity."[72]

In juxtaposition to the aforementioned argument of lawful humanitarian intervention, Ian Brownlie, Counsel for the Government of Serbia and Montenegro, put forward his own viewpoint.[73] He contended that "the reference to humanitarian motives for the bombing fails on the facts. As a matter of sound logic, the legality of the humanitarian intervention is a question which is secondary to the question whether, on the facts, there was a genuine case of humanitarian intervention."[74] While he did not expand on the question of validity before the Court – concentrating instead on the specifics of the case – he did point to a jointly authored article in which he examined the debate.[75] The article in essence challenged the lawfulness of armed humanitarian intervention, in which the supposed right was not companionable with the UN Charter. Additionally, it also argued that the Charter's orchestrators did not intend the terms "territorial integrity or political independence" in Article 2(4) to have a qualifying impact.[76] Furthermore, he posited, the greater part of reliable legal opinion had rejected the claimed lawfulness of the doctrine,[77] and state practice provided no definitive evidence to signify that they had altered their views and come to accept the legality of humanitarian intervention as a principle of customary international law.[78] Of course, the notion of attaining firmer definition on this point of law was left idle when the Court unanimously ruled on 15 December 2004 that it did not have authority to adjudicate Serbia and Montenegro's claims.[79] In essence, this removed the Court's considered opinion on the legality of humanitarian intervention from the debate, and the lawfulness of the doctrine with respect to the Article 2(4) general prohibition on the use-of-force remained a somewhat ambiguous entity.[80] In the famous words of the Independent International Commission on Kosovo, the Kosovo intervention was generally seen as "illegal but legitimate."[81]

The unilateral humanitarian intervention in Kosovo also fostered the writing of two key documents reevaluating the use-of-force for humanitarian purposes: the report by the independent International Commission on Intervention and State Sovereignty (ICISS),[82] entitled *The Responsibility to Protect* and Secretary-General Kofi Annan's *In Larger Freedom* report.[83] Both clearly reaffirm the Security Council's broad monopoly in authorizing the use-of-force and therefore contain no new provisions, nor consideration pertaining to the plausibility of making unilateral humanitarian intervention lawful.[84] While not specifying the context or purpose, the ICISS report is quite firm in renouncing state recourse to unilateral use-of-force. As stated

> unilateral intervention is seen as illegitimate because [it is] self-interested. Those who challenge or evade the authority of the UN as the sole legitimate guardian of international peace and security in specific instances run the risk of eroding its authority in general and also undermining the principle of a world order based on international law and universal norms.[85]

The ICISS and Annan reports were discussed at the 60th anniversary session of the General Assembly in 2005 – the so-called World Summit – which included the responsibility to protect (R2P) as a new ideational reference point, chosen consciously to distance itself from the more objectionable term of "humanitarian intervention." R2P transfers responsibility for protecting a state's nationals to the international community should that state be unwilling or unable to protect its citizens from four large-scale international crimes, encompassing crimes against humanity, genocide, war crimes and ethnic cleansing. Its mandates, however, still necessitate strict Security Council authorization. Although it represents crucial state support for the cause of intervening in the case of grave human rights violations, on a legal note, the World Summit Outcome only affirmed what the Security Council had already practiced in terms of intervention for humanitarian purposes throughout the 1990s.

The status of Article 2(4) and customary international lawmaking in the Charter era

As previously discussed, the Charter *jus ad bellum* regime elicits a diverse range of interpretations. But if it is open to elucidation, then it is also open to change. The Charter is not a "written in stone" document but, rather, a dynamic regime. Indeed, the Charter regime must develop if it is to retain its importance in international relations. As Reisman articulates, once "expressed in relatively enduring textual form . . . its rate of decay is minimal; the rate of decay of the encompassing socio-political situation [however] will always be greater and may, indeed, be extremely rapid."[86]

Law is almost always already outdated at the time of its writing. Therefore, a gap emerges between the text of the Charter and its sociopolitical context. A means by which to close this gap is to formally amend the Charter to update its rhetoric so as to better represent the changing international order. Article 108 stipulates the procedures in which amendments of the Charter can take place: Proposed amendments require the approval of two-thirds of UN members in the General Assembly, as well as the ratification of two-thirds of the parliaments of member states, and all five Security Council permanent members.[87] However, this formal process has rarely been utilized. To give an example, despite proposals for deletion, Article 53 of the Charter continues to refer to "enemy states" and therefore allows regional agencies to undertake measures against "any state, which during the Second World War has been an enemy of any signatory of the present Charter."[88] As all former "enemy states" have become members of the UN, this Article, however, turned into "dead letter law."[89] In its 65-plus year history, there have only been five essentially procedural amendments to the Charter.[90] Indeed, aside from these minor changes, the rhetoric of the Charter remains the same as that drafted in San Francisco in 1945.

The Charter regime, however, has not remained static but, to the contrary, has been modified through a process of what can be defined as evolving reinterpretation. In other words, through informal and continuing means UN institutions and members provide contextual significance to the terms and principles incorporated in the Charter's text. Specifically, the General Assembly has expanded on Charter norms governing the use-of-force in several resolutions, in particular, the *Declaration on Friendly Relations* (1970), the *Definition of Aggression* (1974) and the *Declaration on the Use-of-force* (1987). Additionally, the International Court of Justice has pursued clarification of these principles in its rulings on controversial cases and in its advisory recommendations – the most pertinent among these being *Nicaragua (Merits)* (1986) and the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996).[91]

Aside from UN institutions, the Charter has also been interpreted through the practice of UN members via their *own* respective use-of-force undertakings, the justification posited by states for it, the response of other states inside and outside the UN and other organizations and their public rhetoric in debates on General Assembly resolutions on the use-of-force – not to mention an extensive treaty practice including friendship treaties, non-aggression pacts, border treaties, mutual defense agreements and regional arrangements.[92] It has developed in a fashion akin to that of customary international law,[93] in which the customary international law-making process is for all intents and purposes one of claim and consent. That is, a state asserts a right through an act or claim; the response of other states to the act will establish as to whether it is considered a contravention of existing international rules or whether it is one foreshadowing the development of a new

rule of international law. Generally speaking, a state may reply to an act or claim through three avenues: open consent, objection and acquiescence. Open consent on the part of the vast majority of interested states fosters the development of the asserted right into a new rule of international law. In contrast, extensive protest from concerned states prevents such a development and the asserted right remains an infringement of existing rules rather than the forerunner of a new rule. These first two reactions are relatively clear, as they comprise unambiguous expressions of acceptance or dissatisfaction for the asserted right. In terms of acquiescence, the scenario is not as straightforward. A state that has "acquiesced" a claim or act of another state has intentionally decided not to propose open consent or objection to the claim or act. In essence, a state remains "unvoiced" in the face of the asserted right. Some legal scholars, such as Michael Byers, argue that "support for a customary rule does not need to be actively expressed" and "a country may thus be bound to a new rule as a result of doing nothing."[94] However, given the uncertain status of this response, a greater accretion of state practice in which other states have acquiesced to an asserted claim would be required before one could conclude that this claim has emerged as a new right under international law.

Although the evolving reinterpretation of the Charter *jus ad bellum* regime is therefore similar to customary international lawmaking, in contrast, the Charter-based process is based on a very precise textual structure, in which the state constructs its claim as to the legitimacy of a particular use-of-force by reference to accepted Charter rules.[95] Other states then accept, reject or acquiesce to this claim based on their judgment on whether the use-of-force in question is in alignment with – or whether it portends a new understanding greater than – the existing interpretation of Charter rules. In other words, the Charter requirements on the use-of-force stipulate the general textual framework within which the ongoing interpretative debate exists.

Conclusion

As the above discussion illustrates, the ambiguities and complexities deriving from the interpretation of Article 2(4) – as well as other Charter provisions that together make up the Charter *jus ad bellum* regime – will remain a regular feature in international relations/law discourse. But does this mean that one needs to subscribe to D'Amato's notion that there is no "objective" language in international law and that all rules of law must be interpreted; that all interpretation varies with context and is necessarily subjective?[96] While Oscar Schachter argues that Article 2(4) does not offer "clear and precise answers" to all the interpretative questions highlighted, it nonetheless, has a "reasonably clear core meaning . . . that core meaning has been spelled out in interpretative documents such as the *Declaration of Principles of International Law*, adopted unanimously by the General Assembly in 1970. The International Court and the writings of scholars reflect the wide area

of agreement on its meaning."[97] This core meaning in simple terms subscribes to the notion that any use of state force by members – whatever the rationale – is prohibited unless unambiguously endorsed by the Charter.[98] As Schachter argues, it is not accurate to propose that Article 2(4) "lacks the determinate content" necessary to enable it to function as a legal rule of restraint.[99]

Indeed, it is specifically because Article 2(4) *has* a core meaning that states have referred to the Article 51 self-defense exception as a means to attain greater traction in justifying the use-of-force.[100] In this regard a host of "embellished" interpretations of Article 51 have emerged since the Charter first came into existence. One pertains to the claim that a state may resort to armed self-defense in response to attacks by terrorists, insurgents or surrogates operating from another state. Another claim is that self-defense may be exercised against the source of ideological subversion abroad. Additionally, the claim that a state may act in self-defense to rescue or protect its citizens abroad has also been utilized, while another assertion is that a state may act in self-defense to anticipate and preempt an imminent armed attack. Finally, the claim that the right of self-defense is available to abate an egregious, generally recognized, yet persistently unredressed wrong, including the claim to exercise a right of humanitarian intervention, has also garnered weight.[101] Such claims will be assessed in the next chapter so as to provide the necessary foundation in evaluating the tenures of both the Bush and Obama administrations, as well as any continuities and shifts between the two.

2
Self-Defense in International Law: Preemptive/Preventive Requisites

This chapter will investigate and assess the legal requisites of prevention and preemption, particularly in the context of the UN Charter's Article 51 – "the self-defense article." As a foundational pillar for analyzing the specific preventive/preemptive strategies of both the Bush and Obama administrations' use-of-force policies in the fight against global terrorism, the chapter will evaluate the extent to which such strategic options have been accepted more generally as justifiable measures of self-defense. Simply put, what was the standing of prevention and preemption under international law, and more specifically, their position under the UN Charter *jus ad bellum* regime before the inception of the Bush doctrine? In addressing this question, the chapter will evaluate the ongoing debate over the scope of self-defense permissible in international law and specifically the standing of the preventive and preemptive use-of-force in three interrelated sections.

The first section begins by distinguishing between *prevention* and *preemption*, which relate to different standards of "imminence" – the former looking to longer-range and less definitive threats, while the latter is "conscious" of those more immediate and concrete. The section will then outline the extent to which the concept of preemption has been a tradition in international law extending back to the scripts of classical international jurists such as Alberico Gentili, Hugo Grotius and Emmerich de Vattel. Additionally, the section will assess the status of this "right" in the UN Charter era, particularly given the provisions that the Charter affords the Security Council in utilizing the preventive or preemptive use-of-force under its Chapter VII powers. Of course, the main discussion will assess the scope to which states are entitled to act unilaterally – without previous and comprehensible Security Council authorization – as a measure of self-defense. As will be discussed, the answer depends on the degree to which one follows the linear interpretation of Article 51 or the expanded understanding of that article. The first section will therefore close with assessing the positions that both ends of the spectrum have put forward in support of their respective

positions using the treaty-interpretation provisions of the *Vienna Convention on the Law of Treaties* (1969) as a guide.

The second section of the chapter continues from there in evaluating the legal standards that define the wider interpretation of Article 51. In other words, if anticipatory self-defense is considered a legitimate position under the Charter *jus ad bellum* regime, which rules from customary international law define its application? The section will take a detailed look at the "Caroline incident," which is the case basis for the two main criteria supposed to govern the use of anticipatory force: necessity and proportionality. In terms of *necessity*, there are two core components: the use-of-force in self-defense must be the final resort after all other "reasonable" non-forcible actions have been weighed up and immediacy requires that anticipatory force be used only to impede an impending attack in which there is an obvious and overwhelming threat. The condition of *proportionality* stipulates that the force used in self-defense must be commensurate with the predicate armed attack. This can be measured via one of three approaches: (a) the equivalent retaliation approach, (b) the cumulative proportionality approach and (c) the deterrent proportionality approach.

In a third and final section, the chapter will relate the law of self-defense to the issue of terrorist attacks by non-state actors, an area of international law that lacks considerable clarity.

Prevention and Preemption: Under the UN Charter *jus ad bellum* regime

In beginning the chapter's formal discussion, it is imperative to distinguish between the terms preemption and prevention – two distinct types of anticipatory defensive military action.[1] Both concepts are "controlling" strategies in that they presume aggressive intent on the part of the foe and, thereby, the potential target state has no alternative but to foil the opportunity to counter these intentions.[2] This lies in juxtaposition to "coercive" strategies – such as deterrence – that attempt to influence the adversary's decision calculus, that is, to induce the enemy into thinking that "tough resistance" or "punitive retaliation" will attain no significant gain from taking military action.[3] As will be discussed in greater detail, the key difference between the two strategies lies in the basis of the imminence of the threat they seek to counter.

Prevention aims to forestall the emergence of a potential long-term military threat. Action is taken to impede or quash the adversary's existing capabilities and/or to preclude its acquisition, development and deployment of threatening capabilities. Additionally, action may be taken to eliminate the aggressive regime from control and, hence, to eliminate the specter of attack once and for all. Preventive operations are executed well before the adversary has begun preparations for an actual attack and possibly well before it

has even made a decision to attack. Consequently, the defender has much greater flexibility as to the timing of the preventive action, ideally initiated at a time when the adversary is inferior in capabilities and unprepared for the strike.[4] The preventive motivation of conflict or war is structured on the premise that military conflict, while not imminent, is probably inevitable, and that it is better to undertake the conflict now while the costs and/or risks are low(er) than later when the costs are high(er). In most instances, a preventive war is fought in order to preclude the diminishing level of an individual state's power in relation to an ascending adversary.

Another way to look at prevention pertains to the military strategy undertaken by states as a means to address long-term tensions emanating from hostile and/or powerful rivals. Like preventive medicine, preventive war is employed "upstream" as a means to confront the factors that are likely to contribute to the development of a threat before they have a chance to become specific, direct or immediate. The dominant state strives to take advantage of a window of opportunity – "a period during which a state possesses a significant military advantage over an adversary" – before a window of vulnerability – "a window of opportunity from the perspective of the disadvantaged side" – appears likely to open.[5] As Jack S. Levy stipulates:

> [P]revention involves fighting a winnable war now in order to avoid the risk of war later under less favourable circumstances . . . [it] is a response to a threat that will generally take several years to develop . . . [and] aims to forestall the creation of new military assets. The consequence of non-action . . . is the gradual deterioration of . . . relative military power and the risk of a more costly war from a position of inferiority.[6]

The classic example of preventive war is the Peloponnesian War, which, according to Thucydides, was made inevitable by the "growth of Athenian power and the fear which this caused in Sparta."[7] More recently, the 1981 Israeli air strike against the Iraqi Osirak nuclear reactor was portrayed as a preventive operation, which was designed to keep Iraq's nuclear weapons capability from "happening or existing a number of years down the road."[8]

Preemption, on the other hand, aims to disrupt an actual imminent military threat. It is an attempt to seize the military initiative in order to gain strategic advantage, ideally through surprise attack, and to avoid conceding the initiative to the adversary which could have possibly disastrous results. Preemptive operations are taken usually in the heat of a crisis within a relatively narrow window: After the adversary has made the decision to attack – as suggested through indicators such as belligerent statements of hostile intent, mobilization and forward deployment of armed forces and so on – but before they have actually initiated offensive military operations.[9] Preemption, in the most basic sense, is nothing more than a quick draw. Upon detecting

evidence that an adversary is about to attack, a threatened state beats the opponent to the punch and attacks first as a means to thwart the impending strike.[10] It is employed "downstream," in response to a more specific, direct and immediate threat where "the necessity of self-defense becomes so instant and overwhelming that it leaves no choice of means and no moment for deliberation."[11] As stated again by Levy:

> [P]re-emption involves the initiation of military action because it is perceived that an adversary's attack is imminent and that there are advantages to striking first or at least in preventing the adversary from doing so . . . it is a tactical response to an immediate threat . . . designed to forestall the mobilization and deployment of the adversary's existing military forces.[12]

For example, the 1967 Six-Day War in which Israel launched an "unprovoked" attack upon the Egyptian, Syrian and Jordanian armies massing on its borders was, in the purest sense, a preemptive war.

One additional definitional difference must be acknowledged between preventive or preemptive attack and preventive or preemptive war.[13] In the context of counterproliferation, the goal of both attack and war is to eradicate the enemy's weapons of mass destruction (WMD) capabilities. As a means to determine the success of a preventive or preemptive attack – that is, a brisk and precise strike on a limited range of strategic targets – it is dependent on not only whether the targets have been destroyed but also on whether the enemy accepts the action as a *fait accompli* and does not react in a military fashion.[14] Moreover, the strike should not overstep the enemy's "threshold of tolerance," – that being, "the level of punishment a state will endure before responding with military force."[15] In contrast, preventive or preemptive war encompasses large-scale military operations planned to conquer the enemy, after which the occupying military dismantles the defeated enemy's weapons and military infrastructure. In this instance, whether the enemy responds militarily or not is not a major consideration as the preemptive attacker is already in a state of war with the adversary.[16]

In essence, there are four distinctive forms of anticipatory counterproliferation action: preventive attack, preventive war, preemptive attack and preemptive war. While all forms aim to disrupt and impede an expected military threat, they are positioned at different stages of that perceived threat. As the aforementioned discussion illustrates, the core difference between prevention and preemption lies in the imminence of the perceived threat – the former looking to longer-term and less certain challenges while the latter is concerned with immediate and concrete military threats. In terms of attack and war, the key difference is whether or not the defender tries to remain within the "threshold of tolerance" of the expected attacker, that

is, whether that state places emphasis on trying to avoid provoking an escalatory military response on the part of the enemy.

Historical context – classical international jurists

While Article 51 of the UN Charter posits that actions in self-defense are only lawful in the direct face of attack, if one considers the writings of various classical international jurists, there appear to be historical precursors for a right of anticipatory self-defense. Most of these jurists have the just war tradition as a common background. Alberico Gentili, for example, was a proponent of preempting impending threats while also preventing the development of potential future threats. He argued that "[a] defense is just which anticipates dangers that are already meditated and prepared [i.e., pre-emption], and also those which are not meditated, but are probable and possible [i.e., prevention]."[17] However, he stipulated that there must be a clearly defined foundation for impeding the threat in which "a just cause for fear is demanded; and suspicion is not enough."[18] Additionally, he argued that aggressive intent alone was not adequate justification for anticipatory action. As stated, "one ought not to be punished merely because of his desire to do harm . . . [but for] an impulse which was accompanied with action, as is made clear elsewhere."[19]

Similarly, Hugo Grotius conceded that preemptive action may be taken to hinder or thwart an imminent attack and that mere suspicion or supposition was not enough to justify such action. Indeed, for Grotius, war as a form of defense is "permissible only when the danger is immediate and certain," not when it is based on assumption.[20] The threat, again, must be immediate and imminent in point of time – and that if the assailant seizes weapons "in such a way that his intent to kill is manifest, [the] crime can be forestalled."[21] Conversely, those states who accept fear as a means to justify anticipatory attack are "themselves greatly deceived, and deceive others."[22] Preemptive action was a measure of last resort, to be utilized only when all other options had been exhausted. That is, if a state is not planning an immediate attack, but it has been established that that state has orchestrated a "plot," or it is preparing an ambush, or that they are "putting poison in our way" or that it is "making ready a false accusation and false evidence, and is corrupting the judicial procedure," it still cannot lawfully be "killed" if the "danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided."[23] Generally speaking, a delay that will "intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences; as the proverb runs, 'There's many a slip 'twixt cup and lip.'"[24]

For Emmerich de Vattel, the greater the probability and destructiveness of an approaching attack, the better the justification for taking preemptive actions. That is, a state is justified in forestalling a danger in "direct ratio to the degree of probability attending it, and to the seriousness of the evil with

which one is threatened."[25] If the threat in question be "endurable, if the loss be of small account, prompt action need not be taken," then there is no great risk in delaying actions of self-protection until the state is "certain that there is actual danger of the evil. But suppose the safety of the State is endangered? . . . Are we to delay averting our destruction until it has become inevitable?"[26] In this type of scenario, a state does not need to wait until the threat is evident but may act on the basis of a "reasonable presumption" of threat. As de Vattel articulates, "presumption becomes almost equal to certitude if the Prince who is about to acquire enormous power has already given evidence of an unbridled pride and ambition."[27]

But where do prevention and preemption fit in the UN Charter regime? Is the preventive or preemptive use of military force lawful under the regime anchored on these two provisions?

Prevention and preemption under the UN Charter regime: Narrow and broad interpretations of Article 51

It is evident from other provisions of the Charter that the Security Council can resort to the preventive or preemptive use-of-force under its Chapter VII powers.[28] As signified in Article 39, the Council is permitted to undertake forceful actions in response to "any threat to the peace, breach of the peace, or act of aggression."[29] The "threat to the peace" indicates that the Security Council can act – or authorize members to act – prior to a violation of the peace or prior to whether an act of violence has actually taken place. This is reaffirmed in language used in Chapter VII Article 50, which refers unambiguously to "preventive or enforcement measures against any state . . . taken by the Security Council."[30] The issue, however, is whether states are allowed to act unilaterally – without previous and unambiguous Security Council approval – in preventive or preemptive military fashion as a measure of self-defense. In simple terms, this depends upon one's understanding of Article 51 – specifically, whether the article permits the anticipatory use-of-force in self-defense. Indeed, the discourse surrounding the legitimacy of anticipatory self-defense – unilateral actions of military force taken by a state to prevent a likely armed attack – has been one of the most controversial and long-standing debates associated with the Charter *jus ad bellum* regime.

There are basically two challenging interpretations of Article 51: a constricted and a broad interpretation. The restrictive or constricted interpretation stipulates that a state may undertake its right of self-defense only in response to an actual armed attack. However, the non-restrictive or broad interpretation emphasizes that a state may also exercise this right in anticipation of a looming armed attack. Both ends of the spectrum have put forward plausible arguments as a means to substantiate their respective positions. Where these positions sit in the context of the three general approaches to treaty interpretation set out in Articles 31 and 32 of the

Vienna Convention on the Law of Treaties (1969) will be discussed in the following.

In terms of Article 31 (1) of the *Vienna Convention*, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context."[31] This can be defined as the *objective approach*[32] and emphasizes the interpretation of the semantics of the treaty text. In the context of Article 51, the discussion on textual meaning has focused on the phrase "if an armed attack occurs against a Member of the United Nations." Proponents of the linear interpretation of Article 51 argue that the ordinary meaning of the phrase prohibits preventive or preemptive military action.[33] That is, an attack must actually be in progress before the targeted state can respond with what can be termed as an assertive form of self-defense. Interestingly, in the French text of Article 51 the wording comes across in a more ambiguous fashion. As stated, "dans le cas où un membre . . . est l'objet d'une agression armée" – which literally translates to "in the case where a member . . . is the object of an armed aggression." It is here that a state *can* be the object of an armed attack before the attack itself actually begins.[34] Conversely, the Spanish text – "en caso de ataque armado" – is substantially more akin to the meaning in the English version.[35] In terms of the other two official languages, both the Russian and Chinese versions refer to an "armed attack," respectively as a "military attack."[36] In relation to the standing of preemptive self-defense, the Russian version is closer to the English version in referring to an imminent trigger as necessary to exercise the right to self-defense, thereby ruling out a preemptive version of that right.[37] However, the Chinese version, somewhat akin to the French, does not include any temporal qualification as to the "military attack," which therefore does not preclude preemptive self-defense.[38]

In essence, proponents of the restricted construction of Article 51 argue that the phrase "if an armed attack occurs" has been construed by many analysts as being "if, *and only if* [emphasis added], an armed attack occurs,"[39] assertive measures of self-defense are permitted only after an armed attack has started (the "principle of the second blow"[40]). As McDougal and Feliciano argue, "[a] proposition that 'if A, then B' is *not* equivalent to, and does *not* necessarily imply, the proposition that 'if, and only if, A, then B.'"[41] In addition, advocates of the broader interpretation argue that the French text, referred to in the above, is not articulated in conditional form. This indicates that the English "if" used in Article 5l presents a hypothesis rather than a condition.[42] Additionally, to extend a similar form of "questionable reasoning" to the phrase "against a Member of the United Nations," would in essence mean that UN members have no right to participate in the collective defense of non-members – a result belied by the actions of members to help defend South Korea (a non-member at the time) during the Korean War.[43] Moreover, if anticipatory self-defense is not permitted under Article 51, then the phrase "measures necessary to maintain international

peace" is an inappropriate choice of words. If peace must be broken before assertive actions of self-defense are allowed, then the Security Council can only "restore," not "maintain" peace.[44] For the proponents of the wider interpretation, these semantic challenges lead to the conclusion that if the restricted version is in fact the appropriate textual reading of Article 51, then that article can be deemed as an incompetent form of draftsmanship.[45]

The second approach, defined as the *subjective approach*,[46] assesses the intentions of the treaty's drafters as a means to understand its articles. To distinguish between these intentions, Article 32 of the *Vienna Convention* posits that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[47] This includes a treaty's *travaux préparatoires* or preliminary documents, including preceding drafts of treaty provisions and working group reports on treaty drafts. Proponents of the broad interpretation argue that the drafters' intent was to protect, not confine, the customary international right of self-defense of which anticipatory self-defense in the context of necessity and proportionality conditions – emanating from the "Caroline incident" (discussed in detail later on) – has traditionally been a part. For instance, Committee I at the San Francisco Conference in defining Article 2(4) and the general prohibition on the use-of-force emphasized that "the use of arms in legitimate self-defense remains admitted and unimpaired."[48] Additionally, Committee III/4A incorporated the Article 51 exception as a means to placate existing regional defense organizations – specifically, the inter-American system established by the *Act of Chapultepec*[49] (3 March 1945) – with the Security Council's powers and responsibilities to maintain international peace and security.[50] It was not intended that the article define or limit the customary right in any way. Indeed, it is in Article 51 that the reference to the "inherent" right of self-defense is made – a right that the International Court of Justice (ICJ) held in *Nicaragua (Merits)* can only be of a customary nature.[51] This makes it difficult to deduce that the words in the article were intended to impinge upon that right.[52]

Moreover, as with the principle of restrictive interpretation,[53] states continue to benefit from rights previously held except when they have been relinquished under the Charter.[54] The principle of restrictive interpretation can be viewed as a negative formulation in which the "clarification of contradictions, completion of gaps, and resolution of ambiguities" should not be carried beyond what is completely necessary for the implementation of major purposes and "should not be extended to imposing new purposes and unnecessary detailed obligations upon the parties."[55] Article 51 does not mean that a state has to relinquish its traditional right of self-defense, nor is its requirement of self-defense in the face of an attack an overextensive listing of the conditions when assertive defensive actions are allowed.[56] In other words, the provisions of Article 51 do not necessarily exclude the right of self-defense in scenarios not covered by this article. If the right of

self-defense is inherent as has been claimed in the past, then each member retains the right subject only to such limitations as those contained in the Charter.[57]

Advocates of the narrow interpretation query this assessment of the drafters' intentions. Ian Brownlie argues that the significance of the inclusion of Article 51 is articulated in terms of the principle of collective self-defense, regional actions and mutual support against aggression.[58] However, there is no suggestion that the right of self-defense in the article was in contrast with any other right of self-defense permitted by the Charter or that the phrase "if an armed attack occurs" was anything other than a characterization of the right of self-defense.[59] Indeed, why would the Charter's architects have stipulated the circumstances for the exercise of the right of self-defense, with no indication that they were only partial, if they had not intended them to be exhaustive?[60] Moreover, it does not make sense to argue that specific treaty provisions do not hinder the wider range of customary law. If they do not, why have treaty provisions at all?[61]

According to Brownlie, the essence of the customary right of self-defense may in fact be closer to Article 51 than what many critics presume. He argues that from the period of 1920 to 1939, there is minimal evidence of anticipatory measures taken in self-defense, aside from limited actions against armed groups operating from neighboring territories, for example, the Soviet Union in Outer Mongolia (1921) and Manchuria (1929).[62] For the main extent, self-defense in state practice appeared predominantly as a response to an armed attack on the territory of a state. During the period when the Charter was actually being drafted, self-defense as a response to an actual armed attack was perceived to be the only legitimate use-of-force – and the delegates attending the San Francisco Conference did not consider Article 51 as being any sort of advancement in the law. Those writers who argue that Article 51 does not impede a members' "customary right of self-defense" assume that the customary law became stagnant by 1920 or earlier, and disregard the prospect that the customary right may have "received more precise delimitation in the period between 1920 and 1945."[63]

In what can be termed as the third or *teleological approach*[64] to treaty interpretation, the emphasis shifts to the object and rationale of the treaty in determining its evaluation. Article 31(I) of the *Vienna Convention* states that a treaty shall be interpreted in good faith "in light of its object and purpose."[65] Relating this to the Charter, Article 1 sets out four purposes for the United Nations, the first being "to maintain international peace and security."[66] Those who subscribe to the narrow interpretation argue that – consistent with this prevailing security rationale – the Charter's architects constructed the *jus ad bellum* regime so as to decrease the unilateral use-of-force and to incorporate it under the umbrella of the UN organization.[67] Conversely, proponents of the broad interpretation argue that it cannot be consistent with the object and purpose of the Charter to coerce states to wait

for a first and perhaps significant military strike before they may use force in self-defense.[68] This has become a significant issue with the continual development of weapons with immense destructive power and coinciding means of rapid delivery that threaten to remove the ability for a state to defend against – if not to survive – before it has even had a chance to counter in self-defense.[69] Indeed, it is hardly conceivable that the foremost "security" purposes of the parties to the Charter could in a contemporary context be sufficiently served by an interpretation "which would reduce 'self-defense' to assumption of the posture of the sitting duck."[70]

While there is merit to this argument, the issue lies in determining when the "blow" is about to take place. An anticipatory response is based on an appraisal of capabilities as well as intent of the adversary – an assessment that is very difficult to make. Substantiation of a looming attack is often indefinite and, given the temperament of the international system, unavoidably left to the subjective determination of the state.[71] Additionally, even if there is confirmation signifying the planning for an attack, at what point can a state be said to be irreversibly committed to the attack and, thereby, a justified target of preemptive military action? Such ambiguity inevitably leaves the use of anticipatory measures of self-defense susceptible to error, abuse, and in the wrong situation could engender the very catastrophe that it seeks to avoid.[72] It is here that advocates of the narrow interpretation assert that a broad right for preemptive self-defense is not consistent with the object and purpose of the Charter. In their eyes, it is better to restrict self-defense to a response to an actual armed attack that is "clear, unambiguous, subject to proof and not easily open to misinterpretation or fabrication."[73]

In an attempt to resolve these conflicting viewpoints, Dinstein proposed the theory of "interceptive" self-defense against an incipient armed attack. Interceptive self-defense takes place after the adversary has committed itself to an armed attack in an apparently irreversible fashion. Whereas a preventive strike anticipates an armed attack that is simply "foreseeable" – or even just "conceivable" – an interceptive strike counters an armed attack which has been deemed "imminent" and virtually "unavoidable."[74] Dinstein highlights the Pearl Harbor attack in December 1941 as an example of where interceptive self-defense could have been employed. If the US Pacific Fleet had detected and destroyed the Japanese carrier striking force before it had come within range of Hawaii, this would not have been an act of preventive war on the part of the United States "but a miraculously early use of counter-force."[75] Malcolm Shaw subscribes to Dinstein's concept of interceptive self-defense, arguing that it circumvents the issues of evidence and the risks of abuse associated with anticipatory self-defense, while not forcing the target state to decide between adhering to the law or suffering a brutal attack.[76] However, one limitation of this concept is that waiting for the adversary to cross the threshold[77] – or to commit the "last irrevocable act" – seems to compel the target state to put off its reaction until it is

potentially too late.[78] Indeed, given the capabilities of modern military technology, there really is no "last irrevocable act" for which a state can wait.[79] In the context of WMDs, must the target state wait until that last crucial point in time before taking interceptive measures of self-defense?

Of course, the Pearl Harbor counterfactual example cited in support of Dinstein's concept is not conclusive. While the Japanese fleet moving briskly through the Pacific could have only one imaginable target, it may have been ordered to engage in "gunboat diplomacy" rather than to carry out an air attack on the US Pacific Fleet. Therefore, its early interception would not have necessarily been a straightforward measure of self-defense. Complicating affairs further, what if, in December 1941, a Japanese naval force was identified steaming south through the South China Sea? Such a force could have multitude of possible missions: an attack on US forces based in the Philippines, an invasion of the Dutch East Indies, an attack on the British in Singapore, and/or reinforcement of the Japanese stronghold in French Indochina. It could even reverse course if there was a diplomatic breakthrough in negotiations with Washington. At what point could it be deemed to have crossed the threshold and, thereby, allow for measures of interceptive self-defense? Furthermore, who would have been permitted to take such measures – the Americans, British or Dutch? As this discussion illustrates, the concept of interceptive self-defense does not resolve many of the complicated issues associated with the general concept of anticipatory self-defense.

Self-defense in customary international law

The principles of necessity and proportionality preside over the resort to measures of anticipatory self-defense – as they do in any defensive use-of-force.[80] That said, such principles are not overarching in their authority. As the ICJ posited in *Nicaragua (Merits)*, if illegal military actions conform to the conditions of necessity and proportionality that does not make them legal. However, action taken legally may be unlawful if it breaches these conditions.[81] If one adheres to the narrow interpretation of Article 51 in prohibiting preventive or preemptive attacks, then such anticipatory action will be illegal regardless of whether it meets these two conditions. But if the broad interpretation of Article 51 is accepted, then a breach of these conditions will amount to a "ground of wrongfulness" for an otherwise legal act. The assertion of these principles is embodied in the "Caroline incident,"[82] which has been defined by some analysts as the "locus classicus" of the law of self-defense.[83]

Beginning in early December 1837, William Lyon Mackenzie led an unsuccessful insurgence against the British colonial establishment in Toronto, the capital of Upper Canada. After escaping the capital, he reestablished an insurgent base on Navy Island on the Canadian side of the Niagara River where he announced a Provisional Government of Upper Canada. Many

sympathetic American and ex-patriot Canadian recruits based in the United States sent weaponry on a daily basis. Sir Francis Bond Head, British Lieutenant Governor of Upper Canada, sent a letter to New York Governor Marcy requesting that he obstruct insurgent activities in his state, to which he received no reply. In a 7 December letter, John Forsyth, US Secretary of State, instructed the US attorneys in the Districts of New York, Vermont and Michigan to implement the state's impartiality laws, but this did little in halting the movement of men and supplies to the insurgents on Navy Island.[84]

On 29 December a 1000-man rebel army fired on the British battery at Chippewa as well as on a small boat with a Royal Navy officer on board observing the rebel defenses from the river. That evening, Captain Andrew Drew from the Royal Navy, led a force of 50 men across the Niagara River and destroyed the US steamer, *Caroline*. As a private vessel, the *Caroline* had been hired to transport supplies to the rebels on Navy Island, and had completed three trips earlier on the 29th. Unable to locate the steamer at the island, the raiding group moved onto Schlosser, New York, where the *Caroline* had docked. The group forcefully apprehended the steamer, towed it into the river's current, set it on fire and let it drift over the falls. Two Americans were killed in the incident.[85] On 12 November 1840, Alexander McLeod was arrested in Lewiston, New York, and charged with murder and arson in relation to this episode. The British minister in Washington sent Forsyth a letter on 13 December demanding McLeod's immediate release. Forsyth refused to take action, arguing that the matter was within the authority of the New York courts.

The succeeding Secretary of State, Daniel Webster, continued on with the matter, agreeing with the British position that McLeod had been acting under the influence of superior officers during the incident and, therefore, could not be held responsible for the act. Despite this, he vehemently disagreed with the British view that the destruction of the *Caroline* had been an act taken in self-defense. In a 24 April letter addressed to Fox, he defined the conditions under which self-defense was the appropriate validation for the use-of-force by one state against another in the well-known and regularly cited formulation conveyed here. Lord Ashburton – who negotiated a resolution of the *Caroline* and McLeod affairs with Webster – agreed with the Secretary of State's formulation, but was adamant that the British act was consistent with such requirements, a position that Webster opposed. Nonetheless, Ashburton conceded that the British government should have apologized to Washington for the contravention of its sovereignty at the time of the incident. On 6 August, Webster accepted the apology, and the issue finally concluded when McLeod was found not guilty of the charges brought before a New York court.[86]

In response to the British claim of self-defense, US Secretary of State Daniel Webster said that it was imperative for the British Government to

demonstrate a necessity of self-defense, leaving no choice of means, and no moment for deliberation. Additionally, it needed to show that the local authorities of Canada – even supposing the necessity of the moment – "authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly with it."[87] This argument is generally acknowledged as articulating the customary international law pertaining to the use-of-force in self-defense. In a more recent context, the Nuremberg Tribunal (1945–1946) highlighted the *Caroline* doctrine as establishing the customary rules on self-defense when it rejected the defendants' argument that Nazi Germany invaded Norway in an act of anticipatory self-defense.[88] In *Nicaragua (Merits)*, the ICJ stated that the "specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it [is] a rule well established in customary international law."[89] The Court later posited in its advisory opinion on the legitimacy of the threat or use of nuclear weapons, that these principles apply equally to Article 51 of the UN Charter.[90]

Necessity

Taken from Webster's formulation, the two key principles regulating the use-of-force in self-defense are *necessity* and *proportionality*. The principle of *necessity* requires that force be used in self-defense only as a last resort, after all reasonable non-forcible measures have been considered. That is, efforts must be made to resolve disagreements between states in a peaceful fashion before any acts of force are undertaken. The Charter *jus ad bellum* regime embodies the core essence of the peaceful settlement of international disputes principle.[91] The primary rationale of the world organization is articulated in Article 1(1) – that being, "to maintain international peace and security, and to that end . . . to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[92] It is in this light that member states are required under Article 2(3) to pursue the peaceful settlement of disputes that might arise between them. Chapter VI of the Charter concerning the *Pacific Settlement of Disputes*, which notably precedes the forcible regulations of Chapter VII, elaborates on this requirement in which parties to a disagreement of which the continuance is likely to undermine 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."[93]

The Security Council may involve itself at any period in the dispute via its powers of investigation (Article 34) and recommendation (Articles 36 to 38). In contrast to the Security Council assertion under Chapter VII, Council

suggestions in this context are not obligatory upon members. Even under Chapter VII, the use of military force is articulated as the last step in a series of Security Council measures responding to "any threat to the peace, breach of the peace, or act of aggression."[94] In acknowledging the existence of the challenges to international peace and security, the Security Council first utilizes non-forcible actions encompassing the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations."[95] It is only when these appear to be insufficient that military action under Article 42 can be considered.[96] Indeed, the Charter regime is intended to reaffirm the principle that armed force is used only in conditions of complete necessity when no peaceful resolution alternatives are available.

By insisting that all peaceful options for resolution be considered, an effective defensive action against a looming threat faces some limitations and may run out of time. As conference states advising the secretary-general's panel on UN reform cautioned, "a conflict-averse insistence on exhausting these various [non-forcible] options" can periodically slow down international deliberations and serve as an impediment "to timely and effective action against a genuine and growing threat."[97] It is in this instance that the antagonist may intentionally resort to lengthening such settlement dealings as a means to gain time to complete preparations for an attack and forestall defensive action by the target state. Therefore, states must make a reasonable rather than a supreme effort to resolve their disputes by peaceful means – although what constitutes "reasonable" is the topic of much ongoing debate.

Imminence

The nucleus of both the Bush and Obama administrations' legal paradigms for preemption encompass an expanded notion of "imminent threat." As articulated above, the classic assertion of the imminence principle – as established in the "Caroline incident" – stipulates that the requirement for self-defense must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[98] Despite this apparent limited explanation, it is possible to approximate the connection between the motivation for preventive or preemptive counterproliferation action and the acquisition-to-use/nuclear threat timeline.[99] This can be done by identifying the time of the following: *Research and Development* – in which the emerging proliferator seeks to attain the materials, technologies/expertise needed to complete the nuclear fuel cycle, the capacity to produce weapons-grade fissile material and the ability to design and engineer a workable nuclear weapon. The next stage pertains to *Production and Deployment* – here, the proliferator engages in large-scale production of the weapon and associated delivery systems and deploys these weapons to its stockpile or arsenal. The final stage relates to *Mobilization and Use* – this is where the

proliferator prepares plans, mobilizes the necessary forces and performs a nuclear strike/attack.

As a means to thwart the threat over its life cycle, a range of counterproliferation strategies are employed or what Ashton Carter describes as the "8 Ds" of counterproliferation. Established during the Clinton Administration, the terms incorporate: *Dissuasion* – the process in which the threatened state persuades the threatening state to forego the WMD option through the forging of stable alliances that offer them better security – in this case under the US umbrella – than they would gain with the possession of unconventional weapons. *Disarmament* – pertains to encouraging the state to adhere to non-proliferation regimes in which they formally and reciprocally relinquish their rights to acquire WMD. *Diplomacy* – aims to encourage potential proliferators to abandon their WMD efforts through a combination of political, economic and other incentives. *Denial* – the process in preventing potential proliferators from attaining sensitive technologies and materials through multilateral control regimes. *Defusing* – attempts to encourage WMD states to adopt equipment and procedures designed to prevent accidental or unauthorized use of these weapons.[100] *Deterrence* – aims to persuade WMD states – via threats of massive retaliation against the targets they value the most – that the costs of WMD use far exceed the benefits. *Defenses* – pertains to the employment of reactive measures encompassing chemical warfare suits to ballistic missile defenses – aimed to disrupt and minimize the effects of a WMD attack. *Destruction* – the final of the 8 Ds in which preventive or preemptive strikes are executed with the aim of eliminating threatening WMD capabilities at the source.[101]

At varying intervals in the nuclear threat cycle, different counterproliferation strategies are likely to dominate. That is, *dissuasion, disarmament, diplomacy* and *denial* are central during the *Research and Development* stage of the threat cycle – as efforts are directed toward preventing the potential proliferator from attaining the materials, technologies and expertise required to develop nuclear capabilities and conclude the nuclear fuel cycle. *Defusing* and *deterrence* come to the fore once the proliferator has acquired nuclear weapons and deploys those weapons to its arsenal during the *Production and Deployment* stage – as other states "adapt" to the proliferator's nuclear capabilities. Finally, *defenses* and *destruction* become central when it is apparent that the proliferator is actively preparing to execute a nuclear attack on another state during the *Mobilization and Use* stage.

In must be noted that such strategies are not mutually exclusive, nor are they restricted exclusively to the stage with which they have been preliminarily aligned to in this discussion. Specifically, strategies of destruction – that is, preventive or preemptive strikes can be considered at various intervals within each stage. In fact, it is possible to assume that there are three distinct thresholds at which the motivation for the target state to take preventive or preemptive action: First, when the probable proliferator draws

near completion of the nuclear fuel cycle during the *Research and Development* stage – as in the 1981 Osirak Bombing and the 1994 North Korean nuclear crisis. It is here that the proliferators' enemies will be under incredible pressure to precipitate a war early in the development cycle so as to remove the nuclear competitor before the arsenal is "too developed." Second, when the proliferator deploys nuclear weapons and the applicable delivery systems to its arsenal or to strategic launch sites during the *Production and Deployment* stage – as in the 1962 Cuban Missile Crisis and the 1969 Sino-Soviet Border Crisis. Third, when the proliferator is close to utilizing their nuclear forces in an attack during the *Mobilization and Use* stage.

Indeed, the third threshold – that is, the impending employment of nuclear weapons – can be deemed as the one that most closely corresponds to the classic notion of imminence as described by Webster. In this regard there are four key components of threat pertaining to armed attacks, including the *likelihood* of the attack, the *imminence* of the attack, the *vulnerability* of the asset and the *consequences* of the attack. The upper end of the threat range would include a nuclear weapon positioned in the heart of a city that intelligence had confirmed beyond reasonable doubt was to be detonated within 24 hours – a high-likelihood, imminent WMD attack against a exposed human target, with devastating consequences. It is essential to assess the threat in its distinct parts, so as to clearly identify and understand the sensitivity of the threat assessment to changes in these factors. Imminence is a temporal not a consequential condition. The ramifications of a "rogue" state or terrorist nuclear attack may be of critical – indeed, decisive – significance in the overall assessment of emerging threats, and will continue to be considered as a potential foundation for allowing some form of anticipatory self-defense. That said, it is still regarded by many analysts as being irrelevant to the temporal appreciation of that threat and should not be encompassed into the concept of imminence.[102] Whether a solitary rifle shot or a massive nuclear attack, an *imminent* threat is just that – one that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[103]

Proportionality

This concept requires that any defensive use-of-force, whether preemptive or otherwise, must be commensurate with the executed attack. While this is uncomplicated in principle, the standard is difficult to assess in practice. The three approaches to proportionality are as follows: (a) the *equivalent retaliation* approach; (b) the *cumulative proportionality* approach; (c) the *deterrent proportionality* approach.

In the *equivalent retaliation* approach, the quantity of force used is proportionate to the immediate threat and does not extend beyond that which is necessary to repel the threat.[104] Schwebel's comments in *Nicaragua (Merits)*

pertaining to the proportionality of US actions against Nicaragua provide a detailed insight into this approach. As stated,

> [t]o the extent that proportionality of defensive measures is required . . . in their nature, far from being disproportionate to the acts against which they are a defense, the actions of the United States are strikingly proportionate. The Salvadoran rebels, vitally supported by Nicaragua, conduct a rebellion in El Salvador; in collective self-defense, the United States symmetrically supports rebels who conduct a rebellion in Nicaragua. The rebels in El Salvador pervasively attack economic targets of importance in El Salvador; the United States selectively attacks economic targets of military importance, such as ports and oil stocks, in Nicaragua. Even if it be accepted, *arguendo*, that the current object of United States' policy is to overthrow the Nicaraguan Government – and this is by no means established – that is not necessarily disproportionate to the obvious object of Nicaragua in supporting the Salvadoran rebels who seek the overthrow of the Government of El Salvador.[105]

This illustration conveys the crucial characteristic defining the *equivalent retaliation* approach – that being, the equilibrium of the defensive response to the predicate attack. In the above context, an *equivalent retaliation* approach suggests that the limited use of tactical nuclear weapons in thwarting an approaching nuclear attack from a "rogue" state could be proportionate, assuming that collateral damage – that is, civilian deaths and property destruction – from the explosion and fallout is minimized.

The ICJ evaluated this general issue in *The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, in July 1996. The Court noted the arguments of those states that believed such usage could be deemed as legal in specific circumstances. From a UK perspective, nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some instances, such as the use of a low yield nuclear weapon against warships or troops in sparsely populated areas, it is possible to have a nuclear attack. In this regard, "it is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties."[106]

For opponents of such arguments, nuclear weapons are indiscriminate weapons whose effects cannot differentiate between civilian populations and military combatants, or civil objects and military objectives. Additionally, they argue, it is impossible to determine the extensive destruction and damage that would be inflicted upon civilians in a nuclear strike. Therefore, nuclear use is prohibited under any circumstances.[107] The Court found that supporters from both ends of the spectrum provided adequate information or resonable arguments to rule on the legitimacy of their respective views.[108] Moreover, the Court was conscious of "the fundamental right of

every state to survival, and thus, its right to resort to self-defense"[109] and, thereby, argued that "it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake."[110] In the context of this discussion, the Court's non-decision indicates that nuclear weapons may – and, then again, may not – be a proportionate defensive option consistent with the *equivalent retaliation* approach in extreme circumstances where a probable nuclear attack threatens the very survival of the targeted state.

Indeed, the United States itself has not removed the potential use of tactical nuclear weapons in eliminating an adversary's threatening WMD capability. Extensive debate pertaining to the effectiveness of "mini-nukes" in a counterproliferation role came to the fore in the early 1990s. According to Thomas Dowler and Joseph Howard II, the United States needed to develop nuclear weapons with very low yields that "could provide an efficient response for countering the adversary in the type of crisis [i.e., circumstances in which a rogue dictator uses chemical or biological weapons against American troops], while not undermining the principle of proportionality."[111] Again, these debates remain unresolved and contested.

In terms of the *cumulative proportionality* option, the amount of defensive force used is limited to that which is approximately comparable to the precipitate attack in terms of the number of deaths inflicted and the extent of property damaged.[112] In the context of an ongoing terrorist campaign, this option takes into account the cumulative death and destruction from a series of small-scale terrorist attacks as the criteria to which the assessment of proportionality is made, rather than one large-scale defensive counterterrorist operation. As far as the nuclear threat posed by "rogue" states, the estimated casualties from even one nuclear attack on a civilian target provides the measure of the proportionality of preventive or preemptive military action. Such an attack could have devastating ramifications. As then Deputy Secretary of Defense Paul Wolfowitz warned, the United States cannot "wait until 30,000 Americans or 300,000 or even possible 3,000,000 die" as a result of an attack by WMDs, to deal with the threat posed by states that have the weapons and/or development capabilities. The danger is that instead of losing 3000 people in a single day, it "could be 10 or 100 or even 1000 times as much, and that is not a threat we want to continue living with indefinitely."[113]

Schmitt, for one, rejects both the *equivalent retaliation* and *cumulative proportionality* approaches. Confining the size and scope of the defensive response to that of the predicate attack is "the most common error" in attempting to apply the proportionality principle.[114] Instead, he advocates the *deterrent proportionality* approach in which the deliberation of scale, scope, consequences and targets of the first strike are irrelevant. Rather, compliance is assessed exclusively against the force necessary to defeat or

preempt the underlying strike that validates the right to self-defense.[115] Coll describes *deterrent proportionality* as a fitting standard in which "the violence threatened or actually used in deterring an adversary should be the minimum necessary to persuade him not to undertake aggression in the future."[116]

Self-defense against terrorist actors

Self-defense can also apply to attacks by non-state actors. Indeed, there is nothing contained in Article 51 that limits its application in this regard as it simply refers to "an armed attack," and does not contain specific provisions on the identity of the attacker.[117] The provisions of Article 2(4) are also relevant and establish the same hierarchy of peaceful over non-peaceful means of conflict resolution when it comes to responding to threats posed by non-state and terrorist actors.[118] Although acknowledging that this is not reflected in state practice, Antonio Cassese notes: "It follows that only after every effort has been made to deal with a terrorist attack by peaceful means should States resort to military action."[119] In this regard, the use-of-force has to be a necessary measure, which "is fundamental to the law of self-defense."[120] The international community therefore agrees upon the fact that the use-of-force against terrorist targets has to comply with the standard criteria for self-defense in the case of state attack, occurs in response to an actual or imminent armed attack and reflects the criteria of necessity and proportionality.[121]

That said, the use of military force in response to terrorist attacks opens up a complex set of issues with regard to self-defense. The two most substantive legal problems in the international arena are their non-state character and the very definition of terrorism. While such international legal debate predated the events of 9/11, especially in relation to the Middle East conflict, it has since garnered much conjecture in international discourse. Questions of how to respond to terrorist attacks have been particularly pertinent to US policymakers, "as American citizens have continued to be the number one target of terrorists worldwide."[122] Of course, responding to such attacks has been constrained by the simple legal fact that the international community has been notoriously slow in finding a common definition for terrorism.[123] This has led to scholars such as Abraham Sofaer[124] to express a sense of pessimism with regard to international law: "At its worst the law has in important ways actually served to legitimize international terror, and to protect terrorist from punishment as criminals. These deficiencies are not the product of negligence or mistake. They are intentional."[125]

Although a comprehensive international legal agreement dealing with terrorism is still, for all intents and purposes, "missing," states have nonetheless been able to forge as many as 13 different conventions dealing with specific forms of terrorism since the 1960s.[126] A comprehensive consensus has

still not been reached on the issue, but the definition of terrorism proposed by the High-Level Panel on Threats, Challenges, and Change is generally considered to contain key elements reflecting a tentative international consensus. As the document illustrates, terrorism refers to acts that are "intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its very nature of context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing an act."[127] In short, terrorist attacks involve the use of armed force targeted at civilians for political motives and, on this basis, violate international law as enshrined in the four 1949 *Geneva Conventions* and the 1977 *Additional Geneva Protocols*.

The second legal controversy surrounding terrorists is their non-state character. There are three types of military force that have been used against terrorists and which have been supported by self-defense claimants: first, targeted killings of terrorist leaders; second, strikes against terrorist bases; and third, strikes against states that are supposedly sponsoring terrorism.[128] Up until 9/11, only two states in the international system, the United States and Israel, responded forcefully against terrorist attacks and have been routinely criticized for their use-of-force in these circumstances.[129]

Legal discourse surrounding the extent to which force may be lawfully used against terrorists has put forward two qualifiers: the self-defense threshold and the terrorists' relationship to the state whose territory they are invariably using to plan, stage or conduct attacks. The threshold criterion pertains to the plausibility of a terrorist attack actually reaching a certain scale so as to justify a forcible action on the part of the targeted state.[130] Proponents of a high self-defense threshold such as Francis Boyle purport that a single terrorist attack – such as the bombing of the West Berlin discotheque La Belle frequented by US soldiers in April 1987 by Libya-sponsored terrorists – does not amount to an "armed attack against the state itself"[131] and therefore does not qualify for self-defense arguments. In contrast, scholars arguing for a low self-defense threshold, such as Alberto Coll, hold that Article 51 does not contain any qualifiers in regards to the scale of an armed attack and should thus not be read "as an absolute prohibition on military response to terrorism."[132] As terrorist attacks constitute acts of war against nationals of a targeted state, they justify forcible state action following that state's *inherent* right to self-defense.[133]

There is also a middle ground approach that advocates a moderate self-defense threshold. Analysts such as James Rowles argue that the use-of-force in self-defense against terrorist targets can be lawful if terrorist attacks are not isolated events, but part of an ongoing campaign that could feasibly "attain" the scale heights of an armed attack.[134] A consensus on the self-defense threshold argument as proposed by Antonio Cassese could be the following: In order for self-defense against terrorist attacks to be lawful, the said terrorist attack must be an isolated attack of "a very serious nature"

or "must form part of a consistent pattern of violent terrorist action."[135] His argument is based on the principle of the use-of-force being the last resort in which "sporadic or minor attacks do not warrant such a serious and conspicuous response as the use-of-force in self-defense."[136]

A second point of contention turns around the degree of state involvement in terrorist activity. Although terrorist groups are non-state in nature, they use the territory of sovereign states to plan their attacks. Legal scholars differentiate between as many as four different degrees of state attachment to terrorism, as summarized in Table 2.1.[137] These differentiations are assumed to be crucial when determining situations of lawful self-defense against terrorist attacks on the sovereign territory of other states (Table 2.1).

Boyle, for example, notes that attacks against terrorists on the sovereign territory of states can only be considered lawful if there is incontrovertible evidence that implicates the state sponsorship of terrorism.[138] In this sense, the use-of-force against non-state actors acting from the territory of a UN member state has traditionally only been permissible when that attack is attributable to the state itself.[139] This legal reasoning has been subject to change in the post-9/11 era. Discussion among the international community of states appears to have "lumped" together state support and state sponsorship, while state toleration has frequently been qualified with the "unable and unwilling" formula to justify the use-of-force in self-defense. That is, if a state has over time been found to be "unable or unwilling" to meet its obligations to counter terrorist actors within its own territory, the use-of-force may be employed by a victim state.

State obligations to counter terrorist action from within their borders are manifold. Although the counterterrorism measures set by Security Council resolution 1373 in 2001 are the most recent and comprehensive statement of these obligations,[140] they were already contained in the range of international treaties dealing with specific manifestations of terrorism agreed upon since the 1970s. Cassese refers to the principle of *aut judicare aut dedere* in this regard: "[C]ontracting States on whose territory those reasonably suspected of terrorist acts happen to be must either try them or hand them over to whichever other contracting State requests their extradition in accordance with the treaties. They cannot just allow the terrorists to go scot free."[141]

Table 2.1 Varieties of state attachment to terrorist actors

A	*Without state toleration, support or sponsorship*	
B	*State toleration*	State knows of usage of territory by terrorist actors but fails to act against terrorist actors
C	*State support*	State provides support in the form of weapons, intelligence, funds, etc.
D	*State sponsorship*	State contributes actively to planning and directing terrorist organizations

Proponents for the use-of-force on the territory of a state that has been characterized as unwilling or unable to meet its counterterrorism obligations, such as Coll, reason that the legal grounds for this action is the absence of multilateral enforcement provisions: "hence, states have no choice but to act as 'judges and avengers,' even when their actions may be open to charges of partiality, prejudice and selectivity."[142] This is a somewhat ironic argument: Proponents therefore say that they have little choice but to act as the judge, because the international community did not decide to enforce its counterterrorism measures. But actually, the very fact that the international community did not decide to include enforcement measures in case of a failure to meet obligations makes the unilateral use-of-force illegal. A further qualification that has been raised in the "unwilling or unable" context is that this use-of-force on the part of the victim state may only be directed at terrorist targets within the state's territory. Again, this argument has been met with mixed reactions by the legal community. Scholars such as Kimberly Trapp hold that "using force against the base of operations of non-state terrorist actors within another state's territory surely amounts to a violation of that state's territorial integrity, even if the use of force is defensive and not targeted at the state's apparatus."[143] At the same time, Cassese argues that the use of military force against terrorist targets in host states may be legally justified because these states are not upholding their responsibilities according to international law.[144]

In short, the "unable or unwilling" formula has been met with its fair share of criticism, based mainly on the subjective standards of judgment it encompasses. In its ruling on *Nicaragua v. United States*, the ICJ supported a narrower interpretation of state attachment, holding that even the provision of logistical help to armed non-state groups – that is, state support as outlined in Table 2.1 – did not provide sufficient grounds for a self-defense attack against the state.[145] This view was questioned by Judges Schwebel and Jennings as contained in the ICJ ruling,[146] as well as other legal scholars.[147] Notwithstanding the apparent dissent, as Trapp posits, "[a] majority of the International Court of Justice has consistently held that the right to use force in self-defense against an attack by non-state actors only applies where the attack is attributable to the State in whose territory defensive force is being used."[148] After *Nicaragua v. United States*, this was reconfirmed in the ICJ's *DRC v. Uganda* in 2005.[149]

During Obama's two terms in office, as will be argued in Chapter 6, host state consent has been brought in as a legal justification for the use of military force in that state's territory, reflecting a response to the "unable" part of the formula. If consent is indeed obtained, this provides a sound legal basis for the use-of-force – however, as will be demonstrated later, the substance of the consent is not always clear-cut.

In sum, and as succinctly summarized by Cassese in the late 1980s, the lack of legal clarity regarding the use-of-force in self-defense against non-state actors is a cause for serious worry:

> In the long run clear, rigorous legal restraints on the use of force are needed, for, without them, we can all too easily descend into a whirlpool of spiraling violence. . . . Another danger of not having absolutely clear and limited legal restraints on the use of force is that the pressure on States to resolve the root causes leading to terrorism is removed.[150]

Because "clear" rules can take a very a long time to be actualized, this statement appears to be remarkably close to the current context – particularly when looking at the use-of-force policies undertaken by the Bush and Obama administrations in response to terrorist threats.

Conclusion

While a preemptive right to self-defense in response to an imminent threat is generally assumed to be compatible with Article 51, most legal commentators, and also state practice, indicate that this is not the case for preventive self-defense. As stated in the *Chatham House Principles on the Use-of-Force in Self-Defense*, the doctrine on preventive self defense "has no basis in international law. A fatal flaw in the so-called doctrine of prevention is that it excludes by definition any possibility of an *ex post facto* judgment of lawfulness by the very fact that it aims to deal in advance with threats that have not yet materialized."[151] In evaluating the lawfulness of a specific self-defense action, the criteria of imminence, necessity and proportionality – as formulated in the "Caroline incident" – continue to hold legal weight in customary international law. Notably, these also apply to determining the lawfulness of self-defense against terrorist attacks. Altogether, self-defense law in relation to terrorism, however, lacks clarity. A consensus position among legal scholars holds that it is lawful for a state to use military force against terrorist targets in sovereign states in response to a sufficiently serious armed attack or an imminent such attack, if the state "hosting" terrorist actors is found to be supporting or sponsoring these acts. Whether the use-of-force is permissible if the "hosting" state is simply unwilling or unable to fulfill its counterterrorism obligations *vis-à-vis* terrorist actors is contested. Use-of-force in this scenario may still be lawful if the attack is based on compelling evidence, is only aimed at terrorist targets, or the "host" state consents to the use-of-force on its territory.

3

Preventive and Preemptive Self-Defense in US National Security Policy: A Brief History

This chapter will argue that the strategy of prevention/preemption, which was stipulated in the Bush doctrine and continued to a large extent in the counterterrorism measures employed by the Obama administration, did not necessarily signify an unparalleled innovation in US national security policy. Preemption/prevention considerations have been an unequivocal element of US counterproliferation policy since the end of the Cold War. Indeed, it is evident that the core theoretical thrust underpinning the Bush doctrine, and specifically, the preventive motivation for war, has long been an intrinsic part of the strategic thought of policymakers, officials and military planners at the highest levels of the US government. While it has often been depicted as a distinct and markedly new national security strategy, the Bush doctrine was, in fact, neither new nor era defining. As Peter Lavoy argues, the Bush administration's "new" strategy read much like "old wine in a new bottle" and hardly represented the fundamental policy shift that many portend.[1]

Since the dawning of the nuclear era in 1945, at least three other US presidents have faced the potential threat of nuclear technology in the hands of states hostile to their respective administrations, and each dealt with the same decision faced by President Bush in 2003: whether to use preventive military force as a means to counter the proliferation of such nuclear weapons technology. Each was forced to make their decision regarding the preventive use-of-force in the face of uncertainty. Each had to weigh the costs – many of them unknown – of preventively striking an adversarial state perceived to be developing nuclear weapons against the costs of refraining from preventive intervention and employing diplomatic methods, even while the threat of future military conflict lingered. The historical record of the last half-century is replete with examples of high-level US decision-makers who seriously considered the undertaking of major unilateral preventive military actions as a means to thwart the proliferation of nuclear weapons by "rogue" states. As early as January 1946, in a

foreboding memorandum on the military implications of the development of nuclear weapons, US General Leslie Groves, then wartime commander of the Manhattan Project, expressed the simple but compelling temptation of preventive war thinking:

> If we were ruthlessly realistic, we would not permit any foreign power with which we are not family allied and in which we do not have absolute confidence, to make or possess nuclear weapons. If such a country started to make nuclear weapons we would destroy its capacity to make them before it had progressed far enough to threaten us.[2]

In looking at the 1962 Cuban Missile Crisis and the 1994 North Korean nuclear crisis examples, however, it is evident that past administrations have been unwilling to undertake counterproliferation strikes even when faced with serious, albeit long-term, nuclear threats. While recognizing the opportunity in containing an emerging threat through limited counterproliferation strikes, previous US administrations deemed such options as being either ineffective or containing the risk of triggering an unmanageable escalation to general war. Moreover, such options were viewed by some policymakers as illegal.

This chapter also considers the self-defense precedents set by previous US administrations with regard to terrorist attacks or terrorist threats. Focusing exemplarily on decisions undertaken by the Reagan and Clinton administrations, it will highlight commonalities between the legal arguments purported here and those used by the Bush and Obama administrations. Although these arguments were elaborated on further in the post-9/11 era, the basic justifications underlying US self-defense actions are also quite similar.

Policy and practice of previous US administrations

The strategy of prevention/preemption articulated in the Bush doctrine was not the extraordinary innovation in US national security policy that many at the time portended – the United States has long reserved the right to preempt looming military threats.[3] In general, it has subscribed to three forms of self-defense: against an actual use-of-force, or aggressive act; preemptive self-defense against an impending use-of-force; and self-defense against an ongoing threat.[4] In the post-Cold War era, President George H. Bush was the first to order a counterproliferation policy "to develop new capabilities to defend against proliferants, including capabilities for pre-emptive military action."[5] The Clinton administration continued on with this in its Defense Counterproliferation Initiative 1993,[6] which incorporated preemption as a part of the counterforce element of the new policy. As argued at the time, the counterforce area of the Department of Defense (DoD) needed to work

on ways "to improve capabilities to defeat NBC [i.e., nuclear, biological and chemical] threats *before they could be used"* against the United States, allied and coalition forces and non-combatants.[7]

Despite this recognition of the potential role of preemptive military action, the Clinton administration still gave greater weight to non-proliferation efforts in thwarting the expansion/movement of weapons of mass destruction (WMDs). *Executive Order No. 12,938* (1994) pronounced that WMD proliferation constituted an unusual and extraordinary threat to the national security, foreign policy and economy of the United States.[8] The measures posited in the order to preclude this security "development" were restricted to international negotiations, export controls and sanctions, while preemptive military action was conspicuously absent from the list. Indeed, while preventive and/or preemptive military action against the WMD capabilities of adversarial states has always been a serious policy consideration for the United States, past administrations have been unwilling to take up these options as the following two examples demonstrate.

The 1962 Cuban Missile Crisis

In the early fall of l962, the Soviet Union began to install offensive nuclear missiles in Cuba.[9] Aside from basing Ilyushin-28 nuclear-capable jets at Cuban air bases, it planned to covertly deploy a minimum of 64 medium-range ballistic missiles (MRBM) and intermediate-range ballistic missiles (IRBM) on 40 launch pads under construction on the island.[10] At its conclusion, the USSR would be in a position to present the United States with the type of threat scenario that could alter the military balance and greatly shift the global political balance between the two superpowers. On 14 October, the US U-2 investigation mission photographed missile launching pads under construction at San Cristobal in Cuba. When informed of this development on the morning of 16 October, President Kennedy ordered his senior advisors to come up with different response options.[11]

After extensive and lengthy discussion, the advisors met with Kennedy on 20 October and briefed him on the status of the Soviet Military build-up in Cuba. On the same day, the CIA had produced a Special National Intelligence Estimate (SNIE) signifying that "16 launchers for 1,100 nm [nautical miles] MRBMs" were considered to be operational, while "four of the fixed launchers for the 2,200 nm IRBMs could become operational within the next six weeks. The other four would become operational in 8 to 10 weeks."[12] With the operational status attained, the MRBMs and IRBMs could be fired in eight hours or less and five hours, respectively. Additionally, both capabilities could refire in roughly four to six hours for the MRBMs and six to eight hours for the IRBMs.[13] While this capability did not necessarily present an imminent military attack on the continental United States, it posed a serious challenge to the global balance of power. According to some analysts, a major Soviet objective in their military build-up in Cuba was to demonstrate that the global balance of forces had greatly shifted to the extent that

the United States could no longer prevent the progression of Soviet offensive power – even into its own hemisphere. Subsequently, US compliance to this build-up would provide strong encouragement to Communists, pro-Communists and the more anti-US sectors in Latin America. In the long run, this scenario could engender a loss of confidence in US power and determination and a serious decline of US influence, particularly in the region. Should any additional Latin American government fall to the Communists, the Soviets would feel free to establish bases in the country in question if they chose. An immediate consequence would be that the Soviets would probably estimate lower risks in pressing the United States hard in other confrontations, such as Berlin.[14]

While some policymakers expected the missile deployment to contribute to the Soviet's total strategic capability,[15] CIA analysts did not foresee an attack against the United States upon the immediate readiness of the missiles. Indeed, even in response to a strike against or invasion of Cuba, they did not expect the Soviets to respond with missile strikes. Nonetheless, National Security Council (NSC) members agreed during the 20 October meeting that the administration should limit its objective to thwarting the offensive missile preparations in Cuba,[16] rather than to seeking to overthrow the regime itself.[17] During discussions, two defining options were posited. The first pertained to a *quarantine* (forcible countermeasure) in which the United States would implement a naval blockade in the zone around Cuba, preventing the entry of additional strategic missiles. Additionally, it would negotiate with the Soviet Union for the removal of those missiles already in Cuba.[18] The second option discussed was *Oplan 312 – Air Strike* (preventive attack)[19] in which the United States would bomb Cuban missile sites, either with or without advance warning of the pending strikes.[20]

In the context of this book, focus will be given to the second option – the preventive air strike – particularly in terms of the core arguments favoring preventive military action and those against such action. Those subscribing[21] to striking missile sites argued that – at this stage of the crisis – it was the last opportunity to do so before the Soviet missile capability became fully operational. For General Maxwell D. Taylor, Chairman of the Joint Chiefs of Staff, the principal argument was that "now was the time to act because this would be the last chance we would have to destroy these missiles."[22] If the United States did not act now, the missiles would be "camouflaged" in such a way as to make it impossible for "us to find them."[23] Therefore, if they were not destroyed, the United States would have to live with them with all the associated issues deriving from such a development.[24] Additionally, he argued, if a strike was delayed, the military cost to take out the missiles would be that much greater.[25] Conversely, critics[26] of the air strike option questioned the extent to which it could be effective based on the risks of escalation. Secretary of Defense Robert McNamara warned that an air strike "would not destroy all the missiles and launchers in Cuba," and, at best, the

United States could knock out two-thirds of these missiles; those missiles not destroyed could be fired from mobile launchers not destroyed.[27]

In terms of the second point, opponents argued that an air strike risked intensification on two levels. First, it would inescapably lead to a US invasion of Cuba. Second, it would elicit an action-reaction escalatory cycle with the Soviet Union that could rapidly get out of control. As McNamara again argued, a strike would result in several thousand Russians being killed, chaos in Cuba and efforts to overthrow the Castro government.[28] In his view, there was a high probability that an air strike would lead to an invasion. He doubted that the Soviets would take an air strike on Cuba without resorting to a "significant" response. In this scenario, the United States would lose control of the situation and a spiraling into general war would take place.[29] Kennedy found the opponents' arguments persuasive and decided on a blockade (subsequently labeled a "quarantine"[30]) with preparations for an air strike against the missiles and missile sites only should the blockade prove ineffective.[31] He rejected the air strike option because there was no certainty that such a strike would destroy all missiles now in Cuba. Echoing the words of McNamara, he argued that while the United States "would be able to get a large percentage of these missiles, they could not get them all."[32] Additionally, it would be difficult to ascertain if any of these missiles were operationally ready with their nuclear warheads and that intelligence had discovered *all* the missiles in Cuba. As a result, while attacking the ones it had located, it "could not be certain that others unknown to us would not be launched against the United States."[33] Finally, an air strike would increase the danger of a worldwide nuclear war. In essence, a preventive strike would not ensure the destruction of every strategic missile in Cuba, and "would end up eventually in our having to invade."[34]

Interestingly, in establishing the legal validation for the quarantine, the United States did not refer to its inherent right of self-defense under Article 51 of the UN Charter. Instead, it attempted to legitimize this action on the basis of an Organization of American States (OAS) resolution authorizing the use-of-force, individually or collectively, to enforce the naval blockade and based on a "collective judgment and recommendation of the American Republics made under the Rio Treaty."[35] It was considered not to breach Article 2, paragraph 4, because it was a measure adopted by a regional organization in compliance with the provisions of Chapter VIII of the Charter. The purposes of the organization and its activities were considered to be consistent with the purposes and principles of the United Nations as provided in Article 52. This being the case, the quarantine would no more violate Article 2(4) than measures voted for by the Security Council under Chapter VII, by the General Assembly under Articles 10 and 11, or taken by United Nations members in conformity with Article 52.[36]

For Abram Chayes, the United States did not justify its action as a measure of anticipatory self-defense because this would have appeared to be

trivializing legal justification.[37] No doubt the phrase "armed attack" in Article 51 of the UN Charter must be construed broadly enough to allow some anticipatory response. But it is a very different matter to expand it to include threatening deployments or demonstrations that do not have an imminent attack as their purpose or likely outcome. To allow that interpretation is to make the "occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either."[38] Whenever a state believes that its interests – which in the heat and pressure of a crisis it is prepared to characterize as vital – are threatened, its use-of-force in response would become permissible. In this sense, "an Article 51 defense would have signaled that the United States did not take the legal issues involved very seriously, that in its view the situation was to be governed by national discretion, not international law."[39]

At the 20 October NSC meeting, Kennedy made another significant decision. In addition to approving the blockade, he authorized a third option – preliminary actions for a military invasion of Cuba.[40] Throughout the crisis, this option was ever present in the background as administration officials debated alternative military and diplomatic courses of action. The third option, *Oplan 316 – Invasion of Cuba* (preventive war), was to invade Cuba seven days after initial comprehensive air strikes had been carried out against all significant military targets. This would be followed up with US ground forces.[41] A review of the unclassified transcripts of the NSC/ExComm meetings over the 13-day period of the crisis does not reveal a discussion of this option similar to the one that took place in the 20 October meeting with respect to the blockade and air strike options. There appeared to be an air of inevitability regarding this option, at least among some of Kennedy's advisors.[42] However, the SNIE of 20 October did address the risks associated with an invasion of Cuba. In response to any US use-of-force against the Castro regime – whether air strike or invasion – the Soviet Union would be under immense pressure to retaliate in such a fashion as to exact a commensurate attack on US interests elsewhere.[43] The view was that whatever retaliation was chosen, Soviet leaders would intentionally take measures to initiate or risk general war.[44]

Moreover, the risk of escalation through miscalculation could not be ruled out: "We must of course recognize the possibility that the Soviets, under pressure to respond, would again miscalculate and respond in a way which, through a series of actions and reactions, could escalate to general war."[45] In terms of the relative merits of an invasion, the SNIE interestingly believed this presented less risk of Soviet retaliation than did a more limited use-of-force. They argued that the Soviets would be "less likely to retaliate with military force in areas outside Cuba in response to speedy, effective invasion than in response to more limited forms of military action against Cuba."[46] The SNIE recognized that "such an estimate cannot be made with very great

assurance and does not rule out the possibility of Soviet retaliation outside Cuba in case of invasion." Moreover, "we believe that a rapid occupation of Cuba would be more likely to make the Soviets pause in opening new theaters of conflict than limited action or action which drags out."[47] Despite these sentiments, neither invasion nor limited preventive military action was required. After 13 days, the crisis was averted when Khrushchev and Kennedy came to an agreement in which the Soviet Union withdrew its offensive missiles from Cuba in exchange for a US promise not to invade the island[48] and a secret commitment to withdraw America's obsolete Jupiter missiles from Turkey.[49]

The 1994 Democratic People's Republic of Korea (DPRK) nuclear crisis

A more recent case in which preventive options were extensively considered pertains to the Democratic Republic of North Korea (DPRK) in 1993–1994. Once again, the United States was confronted with a "strange, secretive, dangerous, and deeply troubled small country" actively working to acquire a nuclear capability.[50] Often known as the "hermit kingdom," North Korea was, in short, viewed by many US policymakers as an extremely volatile and highly militarized old-fashioned communist state dominated by a ruthless dictator committed to reunification of the Korean peninsula under his terms. As contended by Michael O'Hanlon and Mike Mochizuki, North Korea is a "major military threat to South Korea . . . as well as American forces in the ROK [Republic of Korea], Japan's nearby population centers, and the region as a whole with the possibility of a second unprovoked war, including massive artillery and missile attacks."[51] Indeed, North Korea at the time had the second largest military in Asia (behind China) including one million troops out of a population of only 22 million. In per capita terms, this represented the highest percentage in the world and ten times the global average.[52] Moreover, North Korea also devoted a far greater share of its gross domestic product to its armed forces than any other state in the world, thus contributing to the Korean demilitarized zone's (DMZ) characterization as the "densest concentration of firepower in the world."[53]

Aside from the creation of a nuclear weapon for its own individual use, the specter of newly developed and inadequately safeguarded North Korean nuclear materials becoming "lost" was a further concern. As Ashton B. Carter and William J. Perry reported, if nuclear weapons are controlled by a state "enmeshed in social and political turmoil," they might end up "commandeered, bought or stolen by terrorists. Who knows what might happen to North Korea's nuclear weapons as that state struggles to achieve a transformation, possibly violent, to a more normal and prosperous nation."[54] Such potentiality garnered sentiments of striking first, because once North Korea had produced nuclear materials – given the small size of a critical mass of plutonium and the porous nature of international borders – thwarting their transfer would be virtually impossible. As confirmed by Joel S. Wit et al., "this

scenario is as stealthy as it is worrisome . . . A detonation somewhere might well be the first evidence of such a transfer . . . The US could not expect to prevent, deter, or defend against such an act."[55]

Additionally, the United States was once again concerned that North Korea's acquisition of nuclear weapons could engender a "chain reaction." As explained by Carter and Perry, the United States had successfully persuaded South Korea to forgo nuclear weapons "on the grounds that North Korea had none and with the US as an ally the South did not need nukes for its defense." That argument could be undermined if North Korea attained a nuclear weapon – "the next dominoes to fall might be Japan and Taiwan."[56] Indeed, it was viewed that if North Korea was able to develop nuclear weapons, a regional arms race could result, producing significant and destabilizing tensions within Japan, South Korea and Taiwan as well other states within the region. If such an arms race began, it was hard to predict where it might lead and how it might end. As Secretary of State Dean Rusk argued in 1961, "[if the US abetted nuclear proliferation], it would start us down a jungle path from which I see no exit."[57] It is with this in mind that when confronted with the 1994 North Korean nuclear crisis – in which a "rogue" state was actively engaging in the proliferation of nuclear weapons – the Clinton administration, like its predecessors, seriously "contemplated its own act of pre[vention] against the strange, isolated regime then considered the greatest threat to US national security."[58]

In 1994, the building tensions between North Korea and the international community came to the fore over the former's nuclear program – particularly as it had begun to unload 8000 irradiated fuel rods from its five-megawatt nuclear reactor at Yongbyon.[59] According to the International Atomic Energy Agency (IAEA), when chemically treated, these fuel rods could yield approximately 25 to 30 kilograms of plutonium, the nuclear material required to construct atomic weapons.[60] If it can be accepted that five kilograms of plutonium are necessary to create a nuclear weapon, then this represented sufficient weapons-grade material for up to five or six nuclear weapons.[61] Additionally, IAEA inspectors, in March 1994, attained evidence that North Korea was building a second unmonitored reprocessing line at its Yongbyon chemical reprocessing facility.[62] Moreover, construction had continued on a 200-megawatt reactor for which the projected time of completion was 1995, and that would potentially yield sufficient plutonium for ten to 12 nuclear weapons annually.[63]

In simple terms, North Korea appeared to be very close to acquiring a weapons grade plutonium production.[64] The Clinton administration viewed these latest developments as critical, though not based on the threat of imminent military attack on US forces in South Korea or on mainland United States. Instead, the threat was based on the long-term challenge a nuclear-capable North Korea posed to US regional and global interests. Indeed, if the DPRK developed a nuclear weapons capability, it could in combination

with its large conventional military forces, extort or blackmail South Korea to secure economic benefits, technology transfer or favorable reunification terms. There were other potential scenarios that could evolve from this development, including a regional nuclear arms race in which other states would attempt to "break out," and the exporting of nuclear technology and components to other "pariah" states or terrorists. For the Clinton administration, the process had to be stopped sooner rather than later. While understanding that action to prevent North Korea from reprocessing plutonium carried with it the danger of a general war, they believed they had to move now. As Secretary of Defense William Perry argued at the time, the risks the United States was facing by actions "taken today" will be less than should it try to face the North Korean program two years in the future – "after they had developed a substantial inventory of nuclear bombs and missiles for their delivery vehicles."[65]

In essence, the administration's pressing objective in the crisis was to prevent North Korea from increasing its plutonium production and from gaining a strategic nuclear capability.[66] To do this, it was considering three options.[67] First, the use of *economic sanctions* (non-forcible countermeasures) in which it would persuade the UN Security Council to authorize a rigorous program of economic and other sanctions intended to pressure North Korea. Second, a *military augmentation* (forcible countermeasures) by increasing the readiness and combat power of United States and Republic of Korea forces through temporarily deploying specific assets to the peninsula and proceeding with planned modernization initiatives.[68] Third, a *counterproliferation strike* (preventive attack)[69] launching precision air and cruise missile strikes to destroy or deactivate North Korea's nuclear facilities.

In the context of this book, focus will be given to the third option – the *counterproliferation strike*. At the time, there were varying arguments both for and against this approach. Reservations about the preventive attack option were highlighted on the grounds of effectiveness and the risks of escalation. Notions of ineffectiveness derived from what was said to be a lack of intelligence on the North's nuclear facilities, thereby limiting serious targeting problems.[70] Additionally, some of North Korea's facilities had been built underground, making it difficult to reach them even with "bunker-busting" weapons.[71] Related to the efficiency issue was the risk of contamination associated with counterproliferation strikes. Even with sound intelligence and accuracy in striking exposed targets, "direct hits that breached the core of North Korea's 5 megawatt reactor at Yongbyon, 60 miles north of Pyongyang, could cover Seoul with radioactive fallout within a few hours and southern Japan the next day."[72] Moreover, there was the risk of escalation into a fully-fledged war. A restricted counterproliferation strike could engender an uncontainable action-reaction sequence that could lead to full-scale conventional war or even nuclear war – especially given the unpredictable leadership of North Korea.[73] The costs of such a general war were

alarming given the projection of 52,000 US and 490,000 South Korean casualties in the first 90 days of a war and a financial burden in the vicinity of US$61 billion.[74]

Despite this, advocates of the preventive attack argued that in the context of this evolving threat, it was better to strike North Korea's nuclear facilities now, rather than endure the ramifications of a nuclearized North Korea. As stated by then Senator John McCain:

> To all those apologists for the Administration's appeasement policy who argue that we must refrain from responses that might provoke the North into launching a military attack, I ask one question: Would an attack be more or less likely after North Korea acquires a nuclear arsenal and after it has completed its production of ballistic missiles capable of delivering nuclear warheads to Tokyo? I think the answer is obvious.[75]

Additionally, proponents rejected doubts pertaining to the effectiveness of such preventive strikes. For them, the United States *did* have sufficient intelligence to carry out precision strikes against the Yongbyon reactor and reprocessing facilities.[76] They were also adamant that the risks of contamination could be contained. Instead of striking the reactor and reprocessing facilities, "secondary" infrastructure essential to the operation of these facilities could be destroyed.[77] In terms of striking the reactor and reprocessing plant, even if this did take place it could be done in a fashion as to severely damage them without significant radiation release. That is, the reactor could be attacked before it was refueled, and if it was refueled and restarted, it could be "targeted in such a way as to cause the building to collapse in on itself without seriously damaging any fuel rods in the core."[78]

The administration gave serious consideration to the preventive attack option. For Perry, there obviously was a "theoretical alternative" of going in and taking out the nuclear reactor, but on consideration, this path was not recommended.[79] Perry's reason for rejecting the preventive attack option was based on the undesirable risk of escalation: "We were looking for ways of avoiding a general war, not ways of starting a general war."[80] Putting aside the preventive strike option, the Clinton administration decided on a unified approach encompassing both the first and second options,[81] that is, the United States would pursue sanctions against North Korea in the Security Council while emboldening its military forces in and around the peninsula. Eventually, the crisis was averted diplomatically in mid-1994 – only to reemerge again in 2002 in the context of Bush's infamous "axis of evil" references in his *State of the Union Address*. North Korean leaders, after meeting with former president Jimmy Carter, eventually agreed to recommence bilateral negotiations with the United States, and, as a precondition, the North would have to halt refueling and reprocessing activities as well as to allow IAEA inspections at the Yongbyon nuclear complex.[82]

Self-defense against terrorist attacks in the Reagan and Clinton administrations

While the aforementioned examples resisted preemptive/preventive actions, there have been several other instances in which strike options have been undertaken, coming precariously close to contravening the fine line of international law. On 15 April 1986, the United States undertook airstrikes against Libya in response to the April 1986 bombing of a discotheque in West-Berlin, which was frequented by US soldiers. Despite US justifications, many states condemned the strike, evident in the subsequent resolution A/RES/41/38 passed by the UN General Assembly in November 1986.[83] The resolution called upon the government of the United States in this regard "to refrain from the threat or use of force in the settlement of disputes and differences with the Libyan Arab Jamahiriya and to resort to peaceful means in accordance with the Charter of the United Nations."[84] The most vocal critiques of the US strikes came, not surprisingly, from the Non-Aligned Movement, the League of Arab States and the Organization of African Unity, which described US actions as an act of aggression and in clear violation of international law.[85] Notably, US allies such as West Germany and France also expressed serious concerns – which even led to Spain and France denying US use of their airspace for overflights.[86] Legal critique of US actions turned around the argument that the strikes did not fall under self-defense Article 51, because neither did the discotheque bombing amount to an armed attack, nor was there incontrovertible evidence that the state of Libya was even responsible for the attack in the first place.[87] Moreover, the Reagan administration clearly had not exhausted peaceful means of conflict resolution as provided for in Article 33 of the UN Charter. Not even the United Kingdom, usually the United States' closest ally in these endeavors, supported the strike: "By contrast, Thatcher publicly stated at the time that any proposed or contemplated US military action against Qaddafi would violate basic principles of international law."[88]

Of course, the official US response presented to the Security Council on 14 April 1986 contended that it had acted in self-defense in full accordance with Article 51: "over a considerable period, Libya has openly targeted US citizens and US installations."[89] Additionally, it had "exercised great care in restricting its military response to terrorist targets."[90] In reference to previous discussion in Chapter 2, the Reagan administration therefore followed a low self-defense threshold in responding to terrorist attacks, justified it in terms of characterizing singular terrorist acts making up a consistent pattern, and through not targeting the state of Libya as such, but terrorist targets within the state.

The Clinton administration also relied on a similar line of argument in justifying US airstrikes against terrorist targets. In the summer of 1998, the United States attacked a pharmaceutical plant in Sudan and a terrorist base

in Afghanistan due to their alleged connection to Al Qaeda – then referred to as the "Bin Ladin organization" – which was deemed responsible for attacks on US embassies in Nairobi and Dar Es Salaam.[91] In an equivalent letter to the Security Council, the Clinton administration reported that it "exercised its right of self-defense in responding to a series of armed attacks against United States embassies and United States nationals."[92] Again, this represents a low-threshold for self-defense against terrorist attacks argument, while the Clinton administration also highlighted previous efforts to resolve this conflict diplomatically and to strike compliance with the criteria of necessity and proportionality.[93] Importantly, the letter to the Security Council also explicitly refers to the preemptive/preventive nature of these strikes due to the imminent threat Al Qaeda posed. As stated:

> That organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from the same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.[94]

The Clinton administration further used force against Iraq on several occasions, in 1993, 1996, 1998, 1999 and 2000.[95] For the most part, these strikes were justified as forceful responses to violations of the US-imposed no-fly zones over northern and southern Iraq. On 3 and 4 September 1996, for example, Clinton launched 44 cruise missile strikes in southern Iraq in response to Saddam's Hussein's military actions against Kurdish resistance groups in the north.[96] Additionally, in 1998, the Clinton administration, in conjunction with the United Kingdom, conducted *Operation Desert Fox*, which comprised four days of military strikes on Iraq for its repeated unwillingness to cooperate with the United Nations Special Commission on Weapons Inspection.[97] It should be noted that the air strike on 26 June 1993 was an exception to the general pattern, as the Clinton administration attacked military targets based on evidence of Iraq's complicity in the failed assassination plot against former president George H. Bush during his visit to Kuwait in April 1993.[98] Although most of the missiles launched struck military targets, three came down in a residential area which resulted in civilian casualties.[99] Clinton notably justified these attacks with reference to Article 51.[100]

Both the 1993 and the 1998 strikes were considered violations of international law among legal scholars and members of the international community. As Mary Ellen O'Connell summarizes, the 1993 strike against Iraq was criticized because "[i]t met none of the elements of self-defense: the United States apparently made no mention of any on-going campaign; the bombing was out of proportion to the injury and not necessary for self-defense."[101] Notably, rather than justifying the 1998 strikes on military

targets as self-defense, both the United States and the United Kingdom claimed that "[c]oalition forces are acting under the authority provided by the resolutions of the Security Council."[102] Their use-of-force against military and security targets was therefore constructed to be justified by way of Iraq's failure to comply with previous Security Council resolutions and to cooperate fully with the weapon inspectors of the United Nations Special Commission (UNSCOM).[103] This interpretation was subsequently challenged by a wide range of states at a Security Council session discussing the strikes.[104] Among the Security Council members, only the Japanese delegation expressed support for the strikes, while most referred to the exclusive authority of the Council in deciding upon the use of military force.[105] Such developments illustrate, as Tom Ruys posits "that concrete customary practice prior to 2001 did not accept the recourse to use force in response to the threat of armed attacks – whether they be imminent or non-imminent."[106]

Indeed, in the response to the disastrous events of 11 September, 2001, and a perceived threat from Iraq, the Bush administration articulated his concept of preemption – the use of military force in advance of a first use-of-force by the enemy. In what appeared to be stretching preemptive force to an even more controversial level by the administration, it was evident that the Bush "doctrine" was going to be contentious in the context of international law. Although traditional international law required there to be "an imminent danger of attack" before preemption would be permissible, the administration argued in its 2002 *National Security Strategy (NSS)* that the United States "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[107] Additionally, it contended that "[t]he 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."[108] Was this more permissive approach to preemption (prevention in reality) acceptable under current international law? Of course, as discussed throughout this book, the answer is dependent on how one understands the complexities and nuances – both narrow and broad – of contemporary international law. Under the United Nations Charter paradigm for the use-of-force, unilateral preemptive force without an imminent threat is clearly unlawful. However, if the charter framework no longer accurately reflects existing international law, then the Bush doctrine of preemption and Obama's own use-of-force "adjustments" may, in fact, be lawful – even if they are politically imprudent.

Conclusion

In sum, examining the preventive/preemptive resorts to force of US administrations show that, as affirmed by Marc Trachtenberg, the sort of thinking one finds in the Bush policy documents is not to be viewed as anomalous: "Under Roosevelt and Truman, under Eisenhower and Kennedy, and even

under Clinton in the 1990s, this kind of thinking came into play in a major way. Concerns about the future – about what might happen if nothing were done – weighed heavily on American policy during the period from 1941 through 1963."[109] This continued through to the end of the Cold War and the 1990s, and will no doubt continue on in the 2010s and "beyond."[110] It is apparent that previous US administrations viewed prevention and preemption as strategic options to thwart the proliferation of WMDs and react to terrorist attacks and threats. The aforementioned cases are examples in which the United States either seriously considered resorting to preventive attacks to defend and protect its long-term security or, indeed, used force for these objectives. Most of these were not instances of preemption as the respective "developments" against the United States were not perceived as imminent. Instead, military action was considered as a means to prevent the emergence of what was viewed as long-term threats. As the Cuban Missile Crisis and the 1994 DPRK nuclear crisis demonstrated, while understanding the opportunity to thwart an emerging threat via limited counterproliferation strikes, US decision-makers came to the conclusion that such attacks would either not be effective – or, rather, not effective enough – or risked setting off an uncontrollable escalation to general war. The Clinton administration's actions with regard to the threat posed by WMD proliferation in Iraq already pointed in a different direction. However, as will be discussed in the next chapter, the Bush administration in its overt penchant for preventive and preemptive counterproliferation action, was willing to challenge international law in what it deemed to be a new security environment.

4
Bush and the Use-of-Force

Released in 2002, the *National Security Strategy of the United States of America* – and the lesser-known *National Strategy to Combat Weapons of Mass Destruction* – defined the Bush administration's strategic response to the events of 11 September 2001. In essence, the controversial documents made two significant declarations. First, "WMD – nuclear, biological, and chemical – in the possession of hostile states and terrorists represent one of the greatest security challenges facing the US."[1] Second, "[o]ur enemies have openly declared that they are seeking WMDs . . . the US will not allow these efforts to succeed . . . as a matter of common sense and self defense, America will act against such emerging threats before they are fully formed."[2] Taken together, these two assertions – that the most vital threat to the national security of the United States was the linkage of "radicalism and technology" and that such developments needed to be destroyed "before" they were "fully formed"[3] – created the basis for what became known as the "Bush doctrine." Created via an assortment of post-9/11 speeches, particularly at West Point in 2001 and the State of the Union speech in January 2002, and formalized with the release of the *National Security Strategy of the United States of America* (hereinafter NSS 2002) of September 2002, the Bush doctrine came to dominate US international political discourse as political leaders, academic scholars, analysts and the general public debated the ramifications of this broad and contentious initiative.

The most controversial aspect of the doctrine's global "War on Terror" was its preparedness to use preventive/preemptive military action. In the Bush use-of-force prescription, the terms skewed the *jus ad bellum* right to initiate violence as a means to prevent "rogue" states from acquiring WMD capabilities, either to use themselves or to pass on to "sub-national" actors. In assessing the legal context of prevention/preemption as defined in the Bush doctrine, this chapter will necessarily engage with the conceptual difference between the doctrine itself and current prevailing international conceptions

as discussed in Chapter 2 – that of the temporal dimension of self-defense or, more specifically, the requisite imminence of the threat permitting forcible measures of anticipatory self-defense. It will be demonstrated that there is a significant difference between the concepts of imminence underlying the preventive and preemptive resort to force, despite the two terms often being used loosely – and intentionally – as interchangeable. As will be shown, in standing international law – specifically, the UN Charter *jus ad bellum* regime – the Bush administration's "interpretation" and equivocation of prevention/preemption posed some serious questions and immense challenges to the international regime governing the use-of-force.

Preceding considerations of prevention/preemption

In statements made before the publication of the NSS 2002, it was evident that the Bush administration considered prevention/preemption a viable option in its counterproliferation strategy. Speaking in South Carolina on 23 September 1999, the then-presidential candidate Bush indicated that under his presidency the United States would be prepared to take action in precluding future security challenges. In this context, when direct threats to the United States emanating from the "troubled frontiers of technology and terror" are discovered, "the best defense" will be a "strong and swift offense – including the use of Special Operations Forces and long-range strike capabilities."[4] Of course, it was the events of 9/11 that brought the option of "pre-emption" to the fore.

The administration's first definitive articulation of preemption was incorporated in the statement of the *Quadrennial Defense Review* report.[5] Issued 19 days after 9/11, the report argued that defense of the US homeland is the highest priority for the US military and that the United States "must deter, pre-empt and defend against aggression targeted at US territory sovereignty, domestic population, and critical infrastructure."[6] Secretary of Defense Donald Rumsfeld reaffirmed these sentiments, arguing that defense now required "prevention, self-defense and sometimes pre-emption."[7] Specifically, he argued, it is not possible to "defend against every conceivable kind of attack in every conceivable location at every minute of the day or night. Defending against terrorism and other emerging 21st century threats may well require that we take the war to the enemy. The best, and in some cases, the only defense is a good offense."[8] Similarly, Vice-President Richard Cheney cited with approval Israel's 7 June 1981 preventive attack on Iraq's Osirak nuclear facility near Baghdad as inflicting a "severe setback" to Iraqi President Saddam Hussein's nuclear ambitions.[9]

The rhetoric of the president also signified that he too was moving toward the explicit adoption of prevention/preemption as a key arrow in the United States' security strategy: "[We] will not wait for the authors of mass murder to gain the weapons of mass destruction."[10] In his *State of the Union Address*

on 29 January 2002, this determination to act proactively in preventing the spread of WMD was extended to include the term "rogue." The second objective in the global "War on Terror," Bush argued, was preventing state sponsors of terror – in particular, the "axis of evil" states of North Korea, Iran and Iraq – from attaining WMD with which to threaten the United States and its allies.[11] It was these regimes that posed a grave and growing danger, in that they "could provide WMDs to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States."[12] However, it was in the speech given to the graduating class of West Point that the president overtly raised the prospect of preemptive/preventive action in which the United States must "confront the worst threats before they emerge."[13] He further warned that "if we wait for threats to fully materialize, we will have waited too long. . . . [O]ur security will require all Americans . . . to be ready for pre-emptive action when necessary to defend our liberty and to defend our lives."[14]

The National Security Strategy of the United States of America 2002 (NSS 2002)

As indicated, it was in the NSS 2002 that the Bush administration formally articulated its concept of prevention/preemption. According to the document, the threat confronting the United States pertained to the nexus of transnational terrorism and WMD proliferation. In the post-9/11 world, new deadly challenges "have emerged from rogue states and terrorists."[15] The nature and motivations of these new adversaries, their determination to attain destructive powers "hitherto available only to the world's strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today's security environment more complex and dangerous."[16] As a means to address such threats, the deterrence strategy of the past – while remaining a strategic option under certain circumstances – was unable "to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons."[17] Moreover, it is impossible to deter terrorists who have no state or population to defend and are willing to die in their efforts to inflict massive civilian casualties and widespread destruction. Thus, the document continued, the United States cannot rely on a reactive deterrent posture for its security as it did during the Cold War. Nor can it rely solely on defenses, such as missile defense, to cope with potential attacks from "rogue" states and their terrorist allies.[18] As stated:

> . . . in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather. We will always proceed deliberately, weighing

> the consequences of our actions. To support preemptive options . . . our actions will be clear, the force measured, and the cause just.[19]

Of course, the NSS 2002 emphasized that this "type" of option was not an innovation in international law. "For centuries," it argued, "international law recognized that states need not endure an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."[20] Additionally, legal scholars and international jurists had often based the validity of preemption on "the existence of an imminent threat, most often a visible mobilization of armies, navies, and air forces preparing to attack."[21] Nor is this option an innovation in US security policy, if not in practice. As the NSS 2002 points out, the United States has long reserved the right to take "pre-emptive" action in the face of an imminent security threat.[22] However, it is necessary, the document continues, to adapt the concept of imminent threat to the security circumstances of today, that is, to the determination of "rogue" states and terrorists to use weapons of mass destruction in attacks aimed at US civilian and military targets.[23] This extended understanding of imminent threat leads logically to a consideration of preemption as a strategic option in confronting that threat. As stated:

> 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 pre-emptively.[24]

The NSS 2002 also added that preemption will not necessarily be the first or the only option considered when confronting these threats. Nor, it cautioned, should other states use this option as a pretext for aggression.[25] But henceforth, it insisted, the United States retains the option of acting "pre-emptively" when the cause is just – in other words, preemption if necessary, but not necessarily preemption.

Confirming the strategy

The prevention/preemption option articulated in the NSS 2002 engendered extensive controversy in both domestic and international circles. In response, the administration reiterated the document's core premise with statements intended to elaborate on, and to some extent qualify, the basic tenets of its preventive/preemptive strategy. In the first instance, the administration emphasized that the United States had not completely relinquished previous strategic doctrines in favor of prevention/preemption, nor had it enshrined this strategy as the fundamental element in its overall national

security policy – although some commentators at the time vehemently disagreed. Condoleezza Rice maintained that prevention/preemption was only one in a range of strategic options open to the United States in the global "War on Terror."

For Rice, the *National Security Strategy of 2002* did not overturn five decades of doctrine by jettisoning containment or deterrence.[26] These strategic concepts, she argued, would continue to be employed where appropriate; however, new threats are so "potentially catastrophic – and can arrive with so little warning, by means that are untraceable – that they cannot be contained."[27] Moreover, she continued, extremists who seem to view perishing as a sacrament are unlikely to ever be deterred.[28] Therefore, new methods and the preparedness to utilize technology "requires new thinking about when a threat actually becomes imminent,"[29] and as a matter of common sense, "the United States must be prepared to take action, when necessary, before threats have fully materialized."[30] Secretary of State Colin Powell also reiterated Rice's sentiments:

> As to pre-emption's scope, it applies only to the undeterrable threats that come from non-state actors such as terrorist groups. It was never meant to displace deterrence, only to supplement it. As to its being central, it isn't. The discussion of pre-emption in the NSS takes up just two sentences in one of the document's eight sections.[31]

Rice was also quick to point out that prevention/preemption was an option of last resort – to be taken only when the threat is grave and all other means of confronting it have been exhausted.[32] This approach, she argued, must be treated with great caution, as the number of cases in which it might be justified will always be small.[33] It does not give a green light to the United States or any other nation to act first without exhausting other means, including diplomacy. In this regard "pre-emptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action."[34]

William H. Taft IV also supported Rice's remarks, emphasizing the dual-pillar requirement of necessity for preventive/preemptive action, that is, a plausible imminent threat and the exhaustion of diplomatic resolutions. In a memorandum presented to the Council on Foreign Relations, he maintained that "after the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat [in the Administration's expanded understanding of that term], a nation may take pre-emptive action to defend its nationals from unimaginable harm."[35] These qualifying statements from Bush administration officials were an attempt to placate and/or quash what they perceived to be a misconception in which the NSS 2002 signified the adoption of a use-of-force doctrine – where preventive/preemptive military action was

the method of choice in the administration's fight against international terrorism and WMD proliferation.[36] Despite such attempts to palliate this transition, however, the reality was that the administration was unbridled in its determination to put the "method" to the fore of its security strategy.

The NSS 2002 in practice

After the September 11 attacks, the Bush administration was resolute in its determination to remove the Taliban from power when they had refused a final US demand to extradite Bin Laden. Bush articulated a policy indicating that "those" who harbor terrorists were on par with being terrorists themselves, and therefore, a friendly regime in Kabul was imperative in enabling US forces to search for Al Qaeda operatives within that state or states nearby.[37] As Balz and Woodward observed, however,

> the President and his advisers started America on the road to war that night [i.e., 11 September 2001] without a map. They had only a vague sense of how to respond [to the 9/11 attacks], based largely on the visceral reactions of the President. But nine nights later, when Bush addressed a joint session of Congress, many of the important questions had been answered.[38]

Through a series of incremental and *ad hoc* decisions and measures taken in the aftermath of this terrorist outrage, the administration gradually laid out an international paradigm on the right to use military force in the global "War on Terror." The administration sought UN endorsement for military action, and despite the result being less defined than anticipated, attained UN Security Council Resolution 1368 that expressed "its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001."[39] According to Kenneth Katzman,

> this was widely interpreted as a UN authorization for military action in response to the attacks, but it did not explicitly authorize Operation Enduring Freedom to oust the Taliban. Nor did the Resolution specifically reference Chapter VII of the UN Charter, which allows for responses to threats to international peace and security.[40]

Proponents of the Bush doctrine and preventive war argued that it was imperative for the United States to "do something big" after September 11 as a means to restore its damaged deterrent capability. While the Afghanistan campaign was a sufficiently strong response to the terrorist acts themselves, it was not expected to be assertive enough to effectively signify US resolve in preventing the acquisition of nuclear weapons by "rogue" states. To be an effective treatment for proliferation, preventive war must not only remove

the direct threat, it must also dissuade would-be proliferators. According to Galia Press-Barnatha, "[t]he US has demonstrated its willingness to use force since the end of the Cold War, but most of its activities were limited to air war and to relatively small-scale missions."[41] It was, therefore, not at all clear that a US Administration would be willing and able to engage in a serious ground war that was not preceded by an attack on the United States itself. In light of this problem, "waging a preventive war was to serve the goal of re-establishing the credibility of the US deterrent capability, which was undermined after September 11, and, in turn, to give credibility to the new preventive doctrine."[42] Indeed, "rogue" states such as Iraq, Iran and North Korea, it was argued, needed to be shown that significant challenges to US supremacy, especially the proliferation of nuclear weapons, would not go unnoticed and would be countered by a prompt and devastating response. As stated by Walter R. Mead, "the enemy had to learn who was the strongest and, if it came to that, the most ruthless. From this standpoint the subsequent invasion of Iraq was in the nature of a warning shot: a warning that future attacks on the pre-eminence of the US will be followed by even more overwhelming responses."[43]

Therefore, unfortunately, the main avenue for the United States to effectively communicate this new and powerful determination would be to actually engage in a preventive war. As asserted by Robert J. Pauly and Tom Lansford:

> For any strategy to be deemed credible, decisive action to back rhetorical promises is essential. That is why the Bush administration's release of the National Security Strategy coincided with the President's issuance of an ultimatum to Saddam to disarm and desist from sponsoring terrorist organizations . . . and that is why the Bush administration ultimately decided to use force to remove Saddam from power.[44]

Indeed, even former US Secretary of the Treasury Paul O'Neill, an ardent opponent of undertaking preventive war against Iraq, conceded that taking such action could

> act as a "demonstration model" of what other countries that were considering actions hostile to the US might face . . . [preventive war] would persuade other countries to change what they've been doing by harboring or supporting terrorists [and developing nuclear weapons].[45]

In essence, after the September 11 attacks, the United States needed to make a "big, fast, bold, simple move that would send a signal at home and abroad, a signal that said 'don't mess with Texas. Or America,' " and according to its proponents, waging preventive – framed interchangeably as "preemptive" – war was quite simply the only way in which this could be achieved.[46]

It was therefore the Iraq War in which the Bush strategy truly manifested itself. On 19 March 2003, just hours after he had ordered the first attacks on Iraq, Bush announced his decision to attack Iraq to the American public and spoke of the Iraqi threat. As stated, "we meet that threat now, with our Army, Air Force, Navy, Coast Guard and Marines, so that we do not have to meet it later with armies of fire-fighters and police and doctors on the streets of our cities."[47] Even as he announced the commencement of war with Iraq, Bush reconnected with 9/11 – an event wholly unrelated in practical terms to Iraq as there was no evidence for a connection between Iraq and Al Qaeda – to justify the action. Bush chose the preventive option because he believed it could allow him to recoup the pre-9/11 *status quo* of American invulnerability, and this could be attained by ousting Saddam Hussein, disarming Iraq and therefore averting future attacks similar, but more deadly, than 9/11. According to Cheney,

> [a]fter we got hit on 9/11 the President said no more and enunciated in the Bush doctrine that we will hold states that sponsor terror, that provide sanctuary for terrorists to account, that they will be treated as guilty as the terrorists themselves of whatever acts are committed from bases on that soil.[48]

The fact that Bush ordered the invasion before inspections had been completed indicated that when it came to Iraq, preventive military force was not a last resort. A tendency to disregard information both from the intelligence community and from his advisers – specifically Colin Powell – which ran contrary to his goal of regime change, also suggested that Bush sought war with Iraq as a way to reestablish the pre-9/11 *status quo* and avert a future loss to US national security. Bush and his team disregarded intelligence analysts whose conclusions did not coincide with their own, and at the same time, challenged intelligence that questioned Iraqi WMD or Saddam's ties to Al Qaeda, or generally, called into question the ultimate goal of regime change in Iraq. Powell, who believed disarmament could be achieved without war, was regularly "out-weighted" by Cheney, Rumsfeld and Wolfowitz, all of whom embraced Bush's view that war was necessary to permanently disarm Iraq. Illustrating how removed Powell was from influencing the "final" decision, Bush chose preventive war and conducted it in a manner that contradicted Powell's doctrine of overwhelming force. Rumsfeld's "speed and mobility" won out and the post-Saddam occupation occurred without a clear vision for the future or an exit strategy.[49]

In making the decision on how to handle the perceived proliferation of nuclear weapons in Iraq, Bush gave small thrift to options other than preventive war on the grounds that they had been tried to no avail, albeit not during his administration. The president made repeated declarations regarding the dire nature and immediacy of the Iraqi threat and embedded these

declarations with images of a nuclear 9/11 orchestrated by Saddam Hussein – even when there was little evidence to link Saddam to terrorism or to 9/11 – and in fact, in the face of a statement by the CIA expressing a view that Saddam would not attack the United States unless attacked first.[50] That Bush viewed the 9/11 attacks as a type of harbinger of extreme consequences to follow if he did not act to avert them also likely played a role in his decision to opt for preventive war. As he later stated in the *National Security Strategy of 2006*:

> For America, the September 11 attacks underscored the danger of allowing threats to linger unresolved. Saddam Hussein's continued defiance of 16 UNSC resolutions over 12 years, combined with his record of invading neighboring countries, supporting terrorists, tyrannizing his own people, and using chemical weapons, presented a threat we could no longer ignore. The UNSC unanimously passed Resolution 1441 on November 8, 2002, calling for full and immediate compliance by the Iraqi regime with its disarmament obligations. Once again, Saddam defied the international community.[51]

As alluded to earlier, Rice's decision-making process was also heavily defined by the events of 9/11. As late as 2000, Rice felt Iraq could be deterred much as the Soviet Union had been over the last 40 years. Against Iraq and North Korea, she advocated that "the first line of defense should be a clear and classical statement of deterrence – if they do acquire weapons of mass destruction, that weapon will be unusable because any attempt to use them will bring national obliteration."[52] Yet, after 9/11, Rice's views on how to conduct foreign policy underwent a sea change:

> The international system has been in flux since the collapse of Soviet power. Now it is possible – indeed probable – that the transition is coming to an end . . . This is, then, a period akin to 1945 to 1947, when American leadership expanded the number of free and democratic states – Japan and Germany among the great powers – to create a new balance of power that favored freedom.[53]

Within this context, Rice stressed the new vulnerability facing the United States in the wake of 9/11:

> It will take years to understand the long-term effects of September 11th. But there are certain verities that the tragedy brought home to us in the most vivid way. Perhaps most fundamentally, 9/11 crystallized our vulnerability . . . Today's threats come less from massing armies than from small, shadowy bands of terrorists, less from strong states than from weak

> or failed states. And after 9/11, there is no longer any doubt that today America faces an existential threat to our security.[54]

Rice clearly discussed both the loss on 9/11 of America's sense of security and the future threats, which must be averted.[55] In the same speech, she also illustrated how the September 11 attacks influenced her thinking on how the United States should respond to other threatening actors in order to avert future similar losses: "Since 9/11, our nation is properly focused as never before on preventing attacks against us before they happen."[56]

A manifestation of Rice's new perspective was the NSS 2002, which embodied the Bush doctrine and created a framework for foreign policy, which Rice arguably believed would allow the United States to recoup its pre-9/11 *status quo* feeling of security. Using 9/11 as context, Rice asserted that adopting the Bush doctrine did not constitute the relinquishment of containment or deterrence, but that these traditional concepts were not enough to prevent future losses caused by terrorist attacks. In authoring the NSS 2002, Rice therefore married the threat and dangers of terrorism to warnings about Saddam Hussein and his desire to acquire weapons of mass destruction in orchestrating the strategy to reattain the pre-9/11 position of preeminence and to mitigate future losses – which she suggests may come in the form of terrorist attacks similar to, but even deadlier than, those perpetrated on 9/11. On this basis, Rice made the case for going after Iraq as part of the "War on Terror":

> Terrorists allied with tyrants can acquire technologies allowing them to murder on an ever more massive scale. Each threat magnifies the danger of the other . . . For these reasons, President Bush is committed to confronting the Iraqi regime, which has defied the just demands of the world for over a decade . . . The danger of Saddam Hussein's arsenal is far more clear than anything we could have foreseen prior to September 11th. And history will judge harshly any leader or nation that saw this dark cloud and sat by in complacency or indecision.[57]

When it came to choosing between the available options, Rice was not diametrically opposed to seeking a UN resolution on Iraq or renewing inspections, because this method of disarmament had actually worked in South Africa. She initially advocated going to the UN to obtain a new resolution on Iraq and encouraged the president to at least try new weapons inspections, likely because, even if they failed, US efforts at the UN could justify and possibly garner international support for a war in Iraq. However, Rice ultimately believed that the only way to remove the perceived threat of Iraqi WMD was to launch a preventive war. She told House minority leader Nancy Pelosi at a meeting at the White House on 5 February 2003 that "[w]e tried

sanctions, we tried limited military options, we tried resolutions. At some point, war is the only option."[58]

Although Rice entered the Bush administration as a well-known Realist, who advocated a foreign policy that focused on big, powerful states in pursuit of the national interest, after the 9/11 terrorist attacks, she began to frame external threats to the United States differently. When asked by Bush if he ought to pursue war, Rice answered:

> Yes, because it isn't American credibility on the line, it is the credibility of everybody that this gangster can yet again beat the international system . . . To let this threat in this part of the world play volleyball with the international community this way will come back to haunt us someday. That is the reason to do it.[59]

Indeed, it was the administration's ideologically driven framing of the Iraq issue, and the mindset that regime change in Iraq was necessary to prevent another 9/11, that resulted in a tendency to overlook nuance and to reduce complex issues to simple, Boolean choices, which produced an all or nothing perspective on the decision problem regarding Iraq. Even before he went to the UN, Bush publicly cast the decision on how to handle Iraq as a choice between two options – doing nothing or toppling the regime – while ignoring any options in the middle. In a November 2002 speech, he stated that there is a "risk in all action we take. But the risk of inaction is not a choice, as far as I'm concerned. The inaction creates more risk than doing our duty to make the world more peaceful."[60] This characterization of the options did not in fact reflect the way Bush approached his available alternatives, suggesting that his depiction of the options as (a) go to war, (b) do nothing and put your fate in the hands of Saddam Hussein, was rhetoric constructed as a means to persuade the American people to back military action.

Bush never considered inaction an option and viewed all options other than military action as distinctly limited. His conviction that regime change was a necessary step in preventing another 9/11 manifested itself to the extent that the president believed that options other than military force had already been exhausted. For example, in the weeks before he made the decision on Iraq, Bush dismissed two new options proposed by UN members with the justification that they had been tried in some shape or form and had failed: a German and French proposal for a tougher program of coercive inspections and renewed UN inspections under an explicit threat of force – until it was established with certainty that Saddam Hussein had dismantled his weapons program or inspectors were obstructed from completing their jobs.[61] Bush was convinced that regime change was the only viable option for achieving Iraqi disarmament and, thus, making the United States more secure – suggesting that the president approached the UN not to prevent a war with Iraq, but to justify one. Such logic would again be prevalent in the

National Security Strategy of 2006. And once again, replacing preventive war with preemption, he stated:

> When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of pre-emption. The place of pre-emption in our national security strategy remains the same. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.[62]

One additional point should be noted concerning the administration's prevention/preemption option. The NSS 2002 refers to preemptive actions as the means to "forestall and prevent hostile acts" against US interests by its enemies. In this context, Bush administration officials referred approvingly to the Cuban Missile Crisis as an example of such preemptive action.[63] In what sense, though, was this an instance of successful preemption? As discussed in Chapter 3, the offensive military operations contemplated (i.e., the air strike and invasion options) were preventive and not preemptive in nature. Moreover, these preventive options were rejected in favor of forcible countermeasures short of war in the form of the naval quarantine. How, then, can administration officials cite this incident as illustrative of successful preemption?

As discussed, the Bush administration sought to extend, or blur, the concept of preemption to include preventive military operations[64] in order – in part – to make such actions more acceptable to the international community by enclosing them within the less intolerable concept of preemption. Moreover, the administration did not regard preemption as being restricted exclusively to military attack or large-scale war operations. In an interview given prior to the formal publication of the NSS 2002, Rice explained that preemption "really means early action of some kind . . . It means forestalling certain destructive acts against you by an adversary."[65] It could involve the preventive/preemptive use of a variety of forcible countermeasures short of military attack or war, such as "information operations (for example, disrupting command, control, and communications); special operations forces; or Coast Guard/Navy boarding ships, imposing blockades, or turning back/sabotaging shipments."[66] Therefore, while the quarantine approach used during the Cuban Missile Crisis should more properly be termed a preventive forcible countermeasure – given that there was no threat of imminent military attack – it lay naturally within the Bush administration's extended conception of preemptive action.

While preemption and prevention signify two very different paths to conflict, they both derive from a crucial assessment that inaction is not viable and "that the future will be bleak unless [some anticipatory action] is undertaken or at least a belief that this world will be worse than the

likely one produced by the war."[67] As Victor Cha further admonished, "in a pre-emptive situation doing nothing means being the victim of imminent aggression. In a preventive situation, doing nothing means growing inferiority."[68] In both instances, the expected costs of peace are higher than the potential costs of conflict and, thereby, necessitate a state to act proactively and assertively. Nonetheless, regardless of their similarities and differences and the Bush administration's seeming attempts to confound the two concepts, it is apparent that what was really being pursued in the Bush doctrine was a strategy of preventive war.

Bush and imminence

While conceding that the existence of an imminent threat defined the legitimacy of "preemption," the NSS 2002 also notably emphasized that the classic statement of this requirement had lost some of its relevance in the period after 9/11. A "new security environment" now required that the United States adapt the concept of what constituted an "imminent threat" to the capabilities and objectives of "today's adversaries."[69] Speaking before a European audience in December 2002, then-Deputy Secretary of Defense Paul Wolfowitz argued that it was difficult – if not impossible given the circumstances at the time – to establish the extent to which a threat was imminent. The notion that the United States could wait to prepare a response assumed that it knew when the threat was imminent. When were the attacks of September 11 imminent? Certainly they were imminent on 10 September; however, the United States did not know it. In fact, according to Wolfowitz, the 9/11 terrorists "had established themselves in the United States long before that date – months or even a couple of years before. Anyone who believes that we can wait until we have certain knowledge that attacks are imminent has failed to connect the dots that led to September 11."[70]

The administration's concept of imminence was also explained by Richard Pearle, who in simple terms asked the question: "how imminent must the attack be to justify the pre-emptive response?"[71] Highlighting the 1981 Israeli attack on the Osirak nuclear reactor, he argued that there were "thresholds" in the development of threatening capabilities – and once such capabilities crossed a specific threshold, precluded effective counterforce action.[72] From an Israeli perspective, he argued, what *was* imminent and what has to be acted against in a preemptive manner was not necessarily the final emergence of the threat, but the development of what would lead inescapably to the ultimate emergence of the threat. They had to counter a perceived threshold that once crossed, would leave them without an effective military option at that moment. If imminence is viewed in this context – where once thresholds are crossed the states' precarious situation will be exacerbated – then such thresholds should be prohibited from being

"crossed."[73] This then accounts for a low threshold in responding with the use-of-force in self-defense.

The notion of thresholds was a significant component of the Bush administration's "readjustment" of the imminence condition. Indeed, this form of imminence is often mischaracterized as a temporal one in which the act of anticipatory self-defense can only be undertaken – immediately – prior to the anticipated armed attack. Initially, this interpretation appears to make sense as it enables the greatest opportunity for exhausting all non-forceful options prior to the resort to force. That said, there is an argument that waiting to defend itself until moments before an attack may well be too long to wait for a state. As a result, the only sound "interpretation of imminency is one allowing for defensive actions during the last viable window of opportunity, the point at which any further delay would render a viable defense ineffectual. In some cases, this window may close long before the armed attack is to occur."[74]

In its depiction of the relationship between the imminence of the threat and the motivation for preventive/preemptive action, the NSS 2002 offered no definitive guidance as to what these thresholds were. It argued, "the greater the threat, the greater the risk of inaction" and therefore, the more compelling the case for taking anticipatory action to defend itself, even if uncertainty remains as to the time and place of the enemy's attack.[75] In simple terms, the administration contended that the United States could not wait "idle while dangers gather."[76] From the position of galvanizing international support for defensive action, it may be overly cautious to wait until the adversary approaches the third threshold discussed in Chapter 2,[77] at which point the imminence of the threat is clearly apparent to all. However, if the United States waited until that point in the threat cycle, it may have been too late to take effective defensive action. As Rice conveyed in the lead up to the 2003 invasion of Iraq, specifically in relation to Hussein's alleged activities to develop WMDs: "We don't want the smoking gun to be a mushroom cloud."[78] While preventive action at the first or second threshold may present a greater chance of success in slowing or thwarting the threat, it is much more difficult to demonstrate to the global community that the adversary has actually crossed the threshold.[79]

Again, in the context of the Bush administration's decision to invade Iraq in March 2003, at what point was the threshold crossed? Obviously, there is no conclusive answer as to the precise moment when the president made up his mind to invade Iraq, or when he would have irreversibly committed himself to that action. However, it is evident that many of the decision points fell within what could broadly be encompassed in the *Mobilization and Use* stage referred to in earlier discussion. If uncertainty blurs intentions in this final stage of the threat cycle, how much more difficult is it to ascertain when a state has made an irreversible decision in the earlier two stages? Indeed,

the problem with the administration's expanded concept of imminence was the weight it placed on "exquisite"[80] intelligence pertaining to the capabilities and intentions of the adversary; especially in light of the later findings on how intelligence reports were influenced by senior members of the Bush administration.[81] The criterion for such intelligence should have been much more demanding. Considering that the resort to force is the most significant step a state may take in international affairs, the only acceptable standard is one that is commensurate with the "beyond a reasonable doubt" standard employed in domestic law. If reasonable doubt on whether an armed attack might occur exists, then it would clearly be contrary to international law's principle of maintaining international peace and security to allow a defensive resort to force.[82]

It was this standard that Iraqi WMD intelligence failed to meet. Despite the cost of some US$40 billion annually across 14 agencies, the US intelligence community was unable to ascertain the existence of Iraq's WMD capabilities.[83] Still, the alleged pursuit for WMDs on the part of "rogue" states was deemed to be ample indication of long-term aggressive intent; a presumption that was an integral element in the very definition of a "rogue" state.[84] The limitation with this approach is that it assumes that hostile attitudes manifest themselves and inevitably translate into hostile actions in the future. While the general state of relations between two states is a contributing factor to any decision to use force, the presumption that past words of hostility signify an adversary's willingness to cross the threshold ignores the complex of factors that go into any decision to initiate a use-of-force. It is with this in mind that the US intelligence system, as the 9/11 and Iraqi WMD intelligence failures demonstrate, could not support a policy of anticipatory self-defense based on an expanded notion of imminence.[85] As Jeffrey Record articulates, "an effective strategy of counter-proliferation via preventive war requires intelligence of a consistent quality and reliability that may not be obtainable within the real-world limits of collection and analysis by the US intelligence community."[86]

Bush, proportionality and the nuclear option

In its drive toward preventive/preemptive military action, the Bush doctrine also undermined the restrictive influence of the proportionality principle – particularly evident with the release of the congressionally mandated *Nuclear Posture Review (NPR)* of 2001 and its nuclear considerations. The document argued that the proliferation of hard and deeply buried targets (HDBTs) were one of the most relevant and significant threats to US security. This was supported by the US intelligence community, which had identified over 1400 known or assumed strategic sites – underground facilities protecting WMD and missile delivery systems, leadership or the upper command and control – in some 70 states.[87] The depth and uncertainty over their position; the lack of accurate intelligence and the ability to precisely deliver conventional

weapons on target; and the limited ground penetration capability of the nuclear-armed earth penetrator in the US arsenal – made these sites difficult to destroy.[88]

As a result, the *NPR* vied for new tactical nuclear capability that would wield the same destruction to the target, but at a lower explosive yield and with less fall-out.[89] Notwithstanding this point, many commentators argued that it was physically impossible to penetrate deeply enough to avoid widespread collateral damage and fallout.[90] For instance, a one-kiloton weapon exploded 20–50 feet underground would produce a crater the size of Ground Zero in New York and decimate one million cubic feet of radioactive debris into the atmosphere, while a ten-kiloton weapon would have to penetrate over 850 feet to avoid fallout in the adjoining area. A weapon dropped from a plane at 40,000 feet would penetrate less than 100 feet of loose dirt or less than 30 feet of rock. Simply put, there is no casing material strong enough to endure the physical forces of driving through even 100 feet of granite.[91] The issue of limiting collateral damage is further complicated when the targeted nuclear facilities are positioned within civilian centers – in essence, turning the human population into "shields" against counterproliferation attacks. Hence, from both a physical and operational viewpoint, the capacity of tactical nuclear weapons to successfully destroy HDBTs with minimal collateral damage and fallout is limited.[92]

Aside from the above limitations in employing a tactical form of nuclear weapons, Vice President Cheney argued that the United States had to come to terms with "the proposition that the biggest threat" it faces is the "possibility of terrorists coming into the United States and smuggling in a deadlier weapon than has before been used against us."[93] This could be a biological agent or even a nuclear weapon, and that having something like that detonate in the center "midst of one [of] our cities, obviously, could threaten the lives of hundreds of thousands of Americans."[94] Moreover, he argued, considering the potential size of the destruction, the low likelihood of such an attack – bearing in mind the complexities associated with developing and delivering a nuclear weapon for a "rogue" state, much less a terrorist organization – is irrelevant: "If they're [i.e., WMD-armed terrorists] only successful one time out of a thousand, that's not good enough, from our perspective, because that kind of an attack can be devastating."[95] John Parachini also articulated his apprehension "against axiomatically suggesting that the Al Qaeda movement or any other terrorist group will inevitably successfully use CBRN [chemical, biological, radiological and nuclear] weapons in a catastrophic attack against the United States."[96] Conversely, "[w]hile a nuclear attack would by no means be easy for terrorists to carry out, the probability that terrorists could succeed in doing so is large enough to justify doing 'everything in our power,' in President Bush's words, to prevent it."[97] Regardless of such dichotomous approaches, all academic experts agreed that the threat of WMD terrorism was not one which decision-makers could be complacent with.

Other less technologically and operationally demanding threats pertain to that of a radiological or "dirty" bomb attack.[98] Radioactive materials that could be utilized in such attacks are located in thousands of research institutions and commercial facilities/sites around the United States, many of which may not be sufficiently protected against theft by non-state actors. While such attacks would result in some deaths, they would not result in the hundreds of thousands of fatalities that could be caused by a crude nuclear weapon. That said, radiological attacks could infect large urban centers with radiation levels that exceed Environmental Protection Agency (EPA) health and toxic material guidelines. Additionally, they could contaminate dozens of city blocks at a level that would necessitate an immediate evacuation. Since there are often no effective ways to decontaminate buildings that have been exposed at these levels, demolition would be the only practical solution if such an event were to take place, resulting in losses of potentially trillions of dollars.[99]

Of course, after the horrific events of 9/11, the instinctive route for decision-makers was to "play it safe and extrapolate worst-case conclusions from imperfect information."[100] The main concern with this uneven focus on terrorist and/or "rogue" state WMD use was that it downplayed the higher probability of a conventional mass-casualty terrorist attack and potentially led to a misappropriation of resources.[101] Additionally, a hypothetical disastrous WMD attack can be used to validate almost any level of preventive or preemptive action – even that which causes extremely high collateral damage. In this extreme discipline of threat assessment, whatever the worst-case scenario that one could envisage becomes the core threat to which preventive military action is gauged. On face value, the rationale of this argument seems plausible, particularly when viewed in the context of saving millions of citizens or the survival of the state. However, upon further deliberation it becomes evident that these arguments leave the concept of proportionality empty. Indeed, a state can substantiate whatever preventive actions it wants by simply conveying a suitably calamitous – though highly uncertain – threat.

There is also the legitimate argument that if nuclear weapons are made more usable, they are more likely to be used and, thereby, destabilize the international nuclear non-proliferation and non-use regime.[102] Proponents of the "bunker buster" option argued that the development of such a weapon would actually embolden deterrence. Strengthening deterrence, they argued, involved denying sanctuary to adversaries and tailoring nuclear weapons to the target type. It did not necessarily increase the likelihood of their usage. It is with this in mind that Congress – albeit somewhat reluctantly – agreed to finance a three-year feasibility study into the Robust Nuclear Earth Penetrator (RNEP) (beginning in April 2002) and ascertain as to "whether an existing warhead in a 5,000 pound class penetrator would provide significantly enhanced earth penetration capabilities compared to the B61 Mod

11."[103] While Congress quashed funding in 2004,[104] the Bush administration did not relinquish this option in its entirety. In a 10 January 2005 statement to the Energy Secretary Spencer Abraham, Secretary of Defense Rumsfeld articulated his endorsement of resuscitating the study; subsequently, the administration included a request for US$8.5 million to complete the study in the 2005 budget submission to Congress.[105]

In examining the nuclear considerations of Bush, it is evident that notions of proportionality assessed in the context of his doctrine would unavoidably drive the state toward the use of extreme preventive or preemptive measures. Of course, the extent to which practical political and operational military conditions allow the actual resort to such extreme measures (in all cases) is another matter entirely. The Bush administration was determined that the threat of WMD acquisition by "rogue" states – and the interconnected risk of these states using such weapons or transferring them on to their terrorist allies – was so potentially catastrophic that practically any preventive/preemptive action was justified in preventing this from occurring. When the threat is defined in this way, the notion of proportionality effectively loses all meaning.

This argument is underlined by the Bush administration's assumptions with regard to the possibility of deterring "rogue" states. That traditional deterrence is found to have no defining impact on terrorists as expressed in the NSS 2002 has already been mentioned.[106] But the NSS 2002 also warned that "deterrence based only on the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations."[107] Despite this statement, the administration thought that it was still possible to influence the decision rationale of these "rogue" state leaders through forms of deterrent threats. Indeed, the NPR sought to discourage attacks on the United States by holding at risk what opponents value, including their instruments of political control and military power, and by denying opponents their war aims.[108] The logical extension of this viewpoint encompassed the need for more extreme preventive measures as a means to convey the deterrence message to "rogue" state leaders, convincing them that pursuing their assertive actions was high risk. The capacity of the proportionality principle in checking the use of unilateral state force is therefore weakened even more: The more "undeterrable" the enemy evidently is, the greater the level of threatened or actual violence is justified to drive home the deterrent message.

Conclusion

On 11 September 2001, the United States suddenly found itself in what appeared to be a new and perplexing world in which the old structures no longer seemed adequate. President George W. Bush and his advisors defined

the main lines of the administration's new security policy,[109] in which US policy would no longer be based on the principle of deterrence "while dangers gather."[110] It had to identify the threat and impede such threats before they reached "our borders,"[111] and act alone if necessary against "rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends."[112] The policy had to be proactive and "take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."[113] In this "new world," Bush declared that "the only path to peace and security is the path of action."[114] Reading the Bush doctrine in the context of international law, the intention to act "pre-emptively" as a means to stymie the emergence of terrorist networks also became the subject of controversy in international public arenas.

As we have discussed in Chapter 2, the debate over the legitimacy of anticipatory self-defense has been one of the most controversial and extensive disputes connected with the UN Charter *jus ad bellum* regime. On a general level, there have been two competing interpretations of Article 51. The restrictive or *narrow* interpretation posited that a state may exercise its right of self-defense *only in response to* an actual armed attack. The non-restrictive or *broad* interpretation, conversely, emphasized that a state may also undertake this strategy in *anticipation of* an impending armed attack. Both sides of the equation have articulated and conveyed powerful arguments in support of their respective positions. But while there may be a substantial, and admittedly controversial, basis for preemptive counterproliferation strategies in international law, there is much less so for preventive strategies. It seems reasonable to recognize the legitimacy of anticipatory self-defense in the face of a clearly defined imminent threat. As has often been said, international law in general – and the UN Charter regime, in particular – is not a suicide pact. No state can be expected to sit passively and absorb an aggressor's impending attack. At the same time, however, active defense does not necessarily imply that preemptive action should be taken in all circumstances against all threats.

Nevertheless, there is a place for preemption both in a state's national security policy and in international law. This does not extend, however, to the brand of prevention/preemption set out in the Bush doctrine, in so far as it does not meet the conditions of necessity and proportionality that regulate the anticipatory use of defensive force under the current interpretation of the UN Charter *jus ad bellum* regime. The reason is, quite simply, that the strategic option enshrined in the doctrine – as argued extensively throughout the above – is not preemption but, rather, prevention cloaked in the rhetoric of preemption. This is more than just semantics. As also demonstrated in the chapter – as well as in chapters 2 and 3 – the international community had serious reservations concerning preventive military action. Such action, based often on ambiguous evidence of potential long-term

threats has engendered greater scope for abuse, that is, for the pursuit of aggressive ends under the guise of anticipatory self-defense, as well as for major informational mistakes in which thousands die as a result.

In order to make its preventive strategy more palatable to the international community, and hence, lessen instinctive opposition to the strategy, the Bush administration attempted to convey this strategic option as preemption. It drew the conceptual link to preemption through its emphasis on an expanded notion of imminence, a key element in the condition of necessity as it relates to preemption. Here again, the Bush doctrine embellished the concept of imminence beyond the semantic breaking point. The doctrine, for example, pushed imminence back to the early research and development stage of the nuclear threat cycle, where the time to develop an operational nuclear weapons capability was measured not in days, weeks or even months but, rather, in years. Nuclear activities at this stage of the threat cycle do not pose an imminent threat in the true meaning of the word. This is not to argue for complacency in the face of such a potential long-term threat, and it may call for determined non-military action in order to prevent its realization. But it is not an imminent threat in the sense of a clear and impending attack, the basis for truly preemptive action.[115]

This leads to the second component of the necessity condition on which the Bush doctrine's brand of preemption faltered. Traditionally, necessity requires that force be used as a last resort after all reasonable non-military alternatives have been exhausted. It is difficult to credibly make the argument that there is no alternative to the use-of-force when dealing with a WMD capability whose emergence to the point where they actually pose an existential threat to the target state is measured in years. In such circumstances, the target state certainly has time for "a hundred visions and revisions" of its counterproliferation efforts. The Bush doctrine attempted to bypass the issue of time by portraying conflict with the adversary as inevitable. It assumed that the irrational hostility of the leaders of "rogue" proliferators was such that, once they acquired nuclear weapons, they would – not might – use them against the United States and its friends either directly or through their terrorist proxies. That being the case, it was better to "impede now," when there was a better chance of success at relatively low cost, than later when the threat was more fully developed.[116]

The final point where the Bush doctrine's version of preemption faced limitations pertained to the second condition of regulating the defensive use-of-force – proportionality. The target state should not, for example, incinerate an aggressor's city in response to a rifle shot at a border post. For preemption of a perceived nuclear threat, in particular, the severity of the response turns critically on the characterization of that threat. In its public pronouncements, the Bush administration focused on the worst-case scenario imaginable – a nuclear holocaust unleashed on US cities at the cost of hundreds of thousands, if not millions, of lives – to underpin its

preventive/preemptive strategy. Can this scenario be completely ruled out? Obviously not. Yet, it is not only the consequences of a catastrophic event but the likelihood of that event that must be assessed in order to place a particular threat scenario in its proper perspective among the panoply of other possible threats to the nation's security. This was particularly important when the threat response under consideration was preventive military action, with all the intended – and unintended – consequences that can flow from such action. The target state must have the ability to gather and assess accurate, reliable and timely intelligence on the capabilities and intentions of the adversary.

As several US committees studying the 9/11 and Iraqi WMD intelligence failures revealed, the US intelligence system did not demonstrate that it had this capacity, certainly to the degree necessary to underpin a strategy of prevention.[117] In the absence of such a capacity, falling back on worst-case scenario planning to "cover the bases" had the associated consequence of rendering the concept of proportionality irrelevant. The hypothesized demise of millions of innocents effectively served to justify any level of preventive military action. It is here that while there may have been grounds, at least in principle, under the UN Charter *jus ad bellum* regime for a counterproliferation strategy of preemption that satisfied the conditions of necessity and proportionality, the Bush doctrine's brand of preemption – prevention by any other name – was extensively limited in the context of international law.[118]

Overall, the administration entered the White House with a determination to redefine international rules and, broadly speaking, an international order, which would be more conducive to US security, prosperity and its overall interests.[119] After the events of 9/11 this effort rapidly evolved into an assault on law.[120] This penchant intensified and "accelerated the use-of-force" paradigm, at least in the minds of the administration and, most importantly, the president. The administration's presentation of the September 11 tragedies did not simply define the attacks as immoral activities, but instead, depicted them as acts of terror intended to precipitate a global war effort. Classifying the terrorist attacks as an act of war enabled it to construct the platform in which the "question of culpability" and the "propriety of war" were posited for public consumption and acceptance.[121]

By defining the attacks *as* acts of war, Bush extended the framework for interpreting these actions and challenged the sufficiency of existing laws and policies that limited what he deemed to be a suitable government response. Indeed, the events of 9/11 were the catalyst for the systematic disregard of established international rules on human rights, the treatment of combatant prisoners, and the use of military force around the world and provided the ideal opportunity to redefine the global legal order. International law was viewed as an impediment on the United States' ability to defend itself, undertake the "War on Terror" and protect its economic and military

interests around the globe. The four *Geneva Conventions*, the *International Covenant on Civil and Political Rights* (1949), the *United Nations Convention against Torture* (1984) and the UN Charter's prohibition on the use-of-force all became obsolete in the Bush post-9/11 paradigm. In essence, the Bush administration's *jus ad bellum* approach to the global "War on Terror" was an attempt to dismantle the regime governing the use-of-force – the very regime that the United States played an integral role in creating.

5
Obama and the Use-of-Force

The extent to which the Bush doctrine emerged as an accepted interpretation of the Charter *jus ad bellum regime* has continued to be challenged since Bush's departure from office. However, there is no question that it has impacted the debate over the rules governing the use-of-force in the context of Obama and will continue to do so in the years to come. If one considers the actions of the Obama administration, it would appear that while such interpretation has been adjusted, it certainly has not been rejected. In fact, Obama's use-of-force and associated counterterrorism policies display great dualism and can therefore best be characterized as a change in style rather than in substance.

As this chapter will argue, the release of Obama's own *National Security Strategy* in 2010 did not contain any fundamental changes to the Bush administration's use-of-force. The document conveyed a message that the United States will make a bigger effort to follow international law before employing the use-of-force, avoids using the terms preemption/prevention at any stage and revokes so-called enhanced interrogation techniques, a move associated with upholding "American values." In line with the Obama administration's focus on altering the tone that US foreign policy takes on the use-of-force, it accentuates the importance of and preference for multilateral cooperation and US belief in international organizations such as the United Nations. Despite all these assurances, however, it clearly preserves itself the right to act unilaterally and outside the law when the state deems it to be necessary – leaving the door ajar for (a preemptive/preventive) use-of-force without Security Council approval. Even the apparent departure from the Bush era interrogation methods is not as absolute as official statements suggest. In fact, according to some commentators, the Obama administration has continued the practice of rendition at an arguably greater level than its predecessor.

The chapter will consider two basic sets of policies in examining the administration's stance toward the use-of-force: The first set relates to the preemptive/preventive use-of-force in the "war against Al Qaeda," while

the second set concerns the unilateral use-of-force for humanitarian concerns, particularly in relation to the Libyan and Syrian conflicts. As we will cover the role the use-of-force plays in the Obama administration's counterterrorism policies in more detail in Chapter 6, this chapter serves to provide an assessment of the departures and continuities between Obama and Bush. A specific focus will be on the Obama administration's propagated stance on humanitarian intervention, where it showed a greater willingness to engage in the (unilateral) use-of-force than its predecessors. Aside from considering the legality of the Obama administration's practices in words and deeds, the chapter will also consider the "legitimacy aspects." In contrast to the Bush administration, Obama made a point in explaining the legitimacy of his administration's policy choices with regard to the use-of-force – frequently through referencing the just war tradition, which played a particular role in qualifying the administration's stance on the legitimacy of humanitarian intervention. The reason for this, as we will argue, can also be found in the fact that just war thought provides legitimacy to the promoted option of unilateral humanitarian intervention not found in international law. Nonetheless, the Obama administration's policies with regard to the conflicts in Libya and Syria only show a limited translation of this rhetoric into practice, something that has been a common occurrence of the administration.

Indeed, according to John Brennan, Obama's adviser on counterterrorism, the administration's approach toward standing counterterrorism policies can be characterized as "pragmatic:" "where the methods and tactics of the previous administration have proven effective and enhanced our security, we have maintained them."[1] As we examine at the end of the chapter, the consequence of Obama's strategy has for all intents and purposes, presented many of the Bush administration's counterterrorism and use-of-force policies as being both indispensable and without a real alternative – a disappointing outcome for Obama proponents.

The path toward the National Security Strategy (2010)

Looking back to 2008, the election of Barack Obama as the 44th president of the United States promised significant changes to US foreign policy and the overall approach to international affairs. Under the leadership of his predecessor, George W. Bush, the United States had witnessed the first attack upon its soil since Pearl Harbor, an attack that spurred a global "War on Terror" and consumed the public consciousness for the duration of the president's two terms in office. The Bush drive would come to challenge long-standing pillars of international law, including the legal justification for military engagement and the nature in which prisoners of war could be captured, questioned and tried. Additionally, Bush's tenure would mark the beginning of a rapid escalation in funding for both military operations and intelligence

gathering capabilities.[2] As a significant theme of this book, Obama sought to realign the US position *away* from what he saw to be the dubious excursions and legal balancing acts on the unilateral use-of-force. This apparent departure, he argued, would require a necessary move to preserve the United States' "soft power" and the ability to attract support through leading by moral example.[3] In this light, the safeguarding of American security and ideals under Obama's watch would become mutually reinforcing and feature regularly in his speeches and public pronouncements after taking office. Evidentiary of this approach can be seen in his address to a Joint Session of Congress in 2009: "There is no force in the world more powerful than the example of America. . . . Living our values doesn't make us weaker, it makes us safer and it makes us stronger."[4]

This emphasis on US soft power had already been evident through many of Obama's campaign speeches and was clearly underlined in his first week in office through Executive Orders 13491 and 13492.[5] Executive Order 13491 revoked the notorious previous Executive Order 13440 that the Bush administration had used to justify coercive and enhanced interrogation techniques by the CIA and, essentially, redefined the common Article 3[6] of the four Geneva Conventions. Executive Order 13491 emphasized lawful interrogations and saw the closure of secret CIA detention facilities that drew much criticism during Bush's time in office. Asked about the circumstances under which the president may be free to disregard international human rights treaties in a campaign questionnaire, Obama answered that "it is illegal and unwise for the President to disregard human rights treaties that have been ratified by the United States Senate, including and especially the Geneva Conventions."[7] In another questionnaire on the role of international law in US foreign policy prepared by the American Society on International Law (ASIL), Obama responded in the following way to a similar question:

> I believe that the United States can detain and interrogate suspected terrorists – lawfully and humanely – without amending the laws of war. . . . We should be championing the Geneva Conventions, instead of looking for ways to evade or rewrite them.[8]

Indeed, in his detailed account of the first one and a half years of the Obama administration, Bob Woodward describes the then president-elect's shocked reaction when briefed by the CIA about the six "enhanced" interrogation techniques it was still using.[9] As indicated in Executive Order 13491, Obama abolished the CIA's enhanced interrogation program and made the agency follow the provisions of the Army Field Manual, which abides by the Geneva Conventions in a strict sense.[10]

Despite these measures, Executive Order 13491 did not revoke the disputed practice of rendition, that is, handing over alleged terrorists to third

states for interrogation and (indefinite) detention. In fact, Executive Order 13491 instituted a Special Task Force charged with reviewing US interrogation and transfer policies,[11] which published its report in the summer of 2009. Although recommending a closer monitoring of their detention and interrogation conditions, the report also concluded that "when the United States transfers individuals to other countries, it may rely on assurances from the receiving country."[12] This is, in fact, an exact continuation of the Bush administration's stance, which was working with a similar "assurances" caveat.[13] Rendition is therefore still considered a viable option in the Obama era, despite the substantial legal criticism this practice has encountered in the context of violating basic human rights. Specifically, it infringes on the prohibition of torture, as well as arbitrary arrest and forcible transfer enshrined in core international human rights treaties such as the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the 1966 *International Covenant on Civil and Political Rights*. NGOs such as the American Civil Liberties Union have expressed grave disappointment with regard to this step and noted how relying on "diplomatic assurances as its centerpiece will be ineffective at preventing torture."[14]

Indeed, despite now relying even more on diplomatic assurances that detainees will not be subject to torture or inhumane and degrading treatment than its predecessor, one might question whether the validity in continuing with rendition as a practice is the "foreseeable possibility" of torture.[15] Why else would the United States continue to transfer individuals to places where torture may be expected, rather than detaining them, if not because it relies on this practice as a useful means of gaining intelligence? This point has also been raised by Stephen Carter who notes that the "temptation to torture" is inherent to the demands the "War on Terror" places on obtaining information.[16] He therefore goes as far as calling Obama's policy on coercive interrogation "tragically" logical: "Once President Obama decided to continue pursuing the War on Terror, he had no choice but to decide, also, to continue to press, and press hard, for information."[17] This points to a perturbing argument – that the use-of-force policies pursued by the Bush administration were not so much the exception that they were made out to be, but rather characteristic of a strong tendency in the post-9/11 thinking of US decision-makers. Non-forcible policy alternatives are increasingly left out of the realm of practically relevant policy choices in the face of "War on Terror" priorities.

Notwithstanding such stark realities, the symbolism of Obama's early action against enhanced interrogation pointed to a greater respect for international law to be exercised by the United States. This shift was reflected and supported in several foreign policy speeches by Obama and key officials. The best examples are Obama's speech in Prague in April 2009, in which he promoted a nuclear weapon-free world, and at Cairo University in June 2009, which set the tone for "a new beginning between the United States and

Muslims around the world."[18] Characteristic of such speeches during this period is the following:

> There is violence and injustice in our world that must be confronted. We must confront it not by splitting apart but by standing together as free nations, as free people. I know that a call to arms can stir the souls of men and women more than a call to lay them down. But that is why the voices for peace and progress must be raised together.[19]

While this kind of rhetoric accounts for the myriad of high expectations placed on the Obama-led administration, it only tells part of the story. If one reads between the lines, is it evident that Obama's campaign speeches and/or responses already displayed another tendency. As noted by Peter Bergen, Obama's vehement critique of US intervention in Iraq by no means makes him a pacifist, nor indeed does it make him opposed to the unilateral use-of-force.[20] Obama's stance in this regard had already been noticed and had come under attack in a 2007 speech as a candidate for presidential nomination. Noting that the Bush administration chose to fight the "wrong war" in Iraq at the expense of focusing on the "right war" against Al Qaeda and affiliates in Afghanistan/Pakistan, he formulated the following as a response to terrorist-safe havens in Pakistan's tribal areas:

> There are terrorists holed up in those mountains who murdered 3,000 Americans. They are plotting to strike again. . . . If we have actionable intelligence about high-value terrorist targets and President Musharraf [then President of Pakistan] won't act, we will. . . . I will not hesitate to use military force to take out terrorists who pose a direct threat to America.[21]

Although this speech was given prior to Obama's Democratic presidential nomination, his expansion of the US drone program, which is the subject of Chapter 6, clearly shows that this kind of thinking was evident prior to his tenure in the White House.

Early indications of then presidential candidate Obama's stance on the use-of-force can also be found in a survey conducted by the ASIL in early 2008. Asked about his views on the preemptive use-of-force doctrine championed by his predecessor, Obama replied:

> I will not hesitate to use force, unilaterally if necessary, to protect the American people or our vital interests whenever we are attacked or imminently threatened. There is no greater responsibility than that of acting as the commander in chief of our armed forces. [. . .] There are some circumstances beyond self-defense in which I would be prepared to consider using force, for example to participate in stability and reconstruction operations, or to confront mass atrocities. But when we do use force in

> situations other than self-defense, we should make every effort to garner the clear support and participation of others – as President George H. W. Bush did when we lead the effort to oust Saddam Hussein from Kuwait in 1991. The consequences of forgetting that lesson in the context of the current conflict in Iraq have been grave.[22]

At least three passages from this quote can be considered as significant: First, Obama explicitly underlines the US prerogative to use force "unilaterally if necessary" in circumstances covering self-defense situations in which the United States or its "vital interests" are "imminently threatened." Second, he apparently expands the potential unilateral use-of-force to "circumstances beyond self-defense," in other words, for humanitarian and post-conflict-related purposes. Legal scholars such as Christian Henderson highlight the implications of portraying the use-of-force as "necessary" in this regard.[23] A Security Council mandate with regard to using force in these circumstances is not explicitly mentioned, which suggests that the Obama administration chooses to see unilateral humanitarian intervention as a viable policy option – although in light of what has been written in Chapter 1, an option not supported by international law. Third, although Obama mentions that multilateral support is key when using force in situations other than for self-defense purposes, this is prefaced by a conditional – "we *should* make every effort to garner the clear support and participation of others." Despite choosing to omit the terms "pre-emptive use-of-force" in letter, the sentiment is there in spirit.

The National Security Strategy (2010)

The Obama administration's long-awaited *National Security Strategy* of 2010 spelled out its official stance with regard to the use-of-force and the ongoing conflict with Al Qaeda for the first time. The document essentially affirms Obama's dualistic approach to the use-of-force as outlined in previous statements. With constant references to the importance of international cooperation and commitment to international norms and the rule of law, the document strikes the reader as being decidedly different to the formulations used by his predecessor.[24] Bush's unfortunate "War on Terror" denominator is, for example, substituted with the more concrete war against the specific Al Qaeda network and its affiliates.[25] It does not, therefore, come as a surprise that the *NSS 2010* attempts the expected clear break from the previous administration's policy choices on some crucial points, in particular with regard to detention practices and the objective of fostering positive relations with Muslim communities across the world. In essence, the *NSS 2010* connects US soft power and successful global leadership as a means to symbolize a commitment to democracy, human rights and the rule of law.[26] It consistently makes the point that these values should not

be "compromised in pursuit of security"[27] and expresses the importance in refraining from using "brutal methods of interrogation."[28]

Throughout the document there is also an apparent focus on engagement with the international community through a multilateral approach.[29] In terms of identifying an Obama–Clinton doctrine – espoused by US State Department Legal Adviser Harold Koh in his 2010 speech to ASIL[30] – the document appears to be framed toward other states. The *NSS 2010* reflects this in four key commitments: first, to "principled engagement;" second, to diplomacy; third, to "strategic multilateralism;" and fourth, to the notion that living through its values makes the Unites States stronger and safer, by following rules of domestic and international law and "following universal standards, not double standards."[31]

In contrast to the 2006 Bush *NSS* where there was not a singular explicit reference to international law, the *NSS 2010* mentions it three times.[32] Still, it also shows an apparent preference for using the terms "international norms" or "international standards."[33] This was also evident in Obama's Nobel Peace Prize acceptance speech in which he repeatedly referred to "*standards* that govern the use-of-force" and the "rules of the road,"[34] while remaining ambiguous in relation to acknowledging international law in the context of the use-of-force.[35] As Christine Gray argued: "[t]his may not seem a significant difference, but in a policy instrument such as the NSS, this choice of wording must have been deliberate."[36] Moreover, the three references to international law in the *NSS 2010* are made in the context of enforcing it – which is incidentally also the most common context for references the document makes to international norms: "We are strengthening international norms to isolate governments that flout them and to marshal cooperation against non-governmental actors who endanger our common security."[37] This creates a specific effect in which a reference is made to international law, but depicted as something that applies to others, rather than being explicitly acknowledged as a constraint on the United States.[38]

Despite some departure regarding the significance of international law/standards, the *NSS* also argues that "military force . . . may be necessary to defend our country and allies or to preserve broader peace and security, including by protecting of civilians facing a grave humanitarian crisis."[39] As a means to undertake this path, the United States would rely on such means as diplomacy, development, international norms and institutions to help resolve conflicts, thereby "mitigating where possible the need for the use-of-force."[40] The document goes on to say that "we will exhaust other options before war *whenever we can*, and carefully weigh the costs and risks of *action* against the costs and risks of *inaction*."[41] In essence, the administration seeks to treat the use-of-force as a last resort for action and only used if there is a high likelihood of success, very much commensurate with the premises of the just war tradition. As indicated in the above, there are apparent caveats in the wording and the tendency to maintain a hegemonic

disposition: "[the United States] must reserve the right to act unilaterally if necessary to defend the nation and its interests, yet it will also *seek to adhere* to standards that govern the use-of-force." As Gray further articulates, "the formulations 'seek to adhere' and 'whenever we can' are indications of a rather weak commitment, weaker than, for example, that proclaimed in the European and Russian security strategies."[42]

Again, there is both departure and continuity in these passages. The departure is most clearly visible in the kind of language Obama uses and the constant references to the legitimacy of US actions. Under the Obama watch, force would be utilized "in a way that reflects our values and strengthens our legitimacy and we will seek broad international support, working with such institutions as NATO and the UN Security Council."[43] Nonetheless, force may and indeed should be used if *necessary*, even on a unilateral basis. Legal scholar Henderson considers this necessity-based reasoning the defining feature of Obama's use-of-force policy.[44] Although he evaluates such arguments as being in line with standing international law with regard to self-defense, he argues that the Obama administration may be diluting the concept of necessity in the context of humanitarian intervention.[45] Consider the following passage from President Obama's speech at the acceptance of the Nobel Peace Prize:

> For make no mistake: Evil does exist in the world. A non-violent movement could not have halted Hitler's armies. Negotiations cannot convince al Qaeda's leaders to lay down their arms. To say that force may sometimes be necessary is not a call to cynicism – it is a recognition of history; the imperfections of man and the limits of reason.[46]

What this passage effectively does, Henderson argues, is issue a blank check for the use-of-force in the face of "evil" actors in two ways: First, evil actors, by definition, cannot be countered using peaceful means, thereby moving the use-of-force away from a last resort option; and second, force may be necessary irrespective of whether an armed attack on the part of these actors has already occurred or is an imminent threat, thereby moving the use-of-force away from having to comply with even widely defined self-defense standards.[47]

Senior officials, such as Brennan, followed this lead when commenting on the administration's counterterrorism efforts: "This is a war – a broad, sustained, integrated and relentless campaign that harnesses every element of American power. And we seek nothing less than the utter destruction of this evil that calls itself al-Qa'ida."[48] When asked about his then impending choice to use force against Syria, President Obama repeated this reference to "evil" in the context of the chemical weapons usage in Syria in August 2013: "the challenge that all of us face when we believe in peace but we confront a world that is full of violence and occasional evil."[49] This repeated usage

of "evil" is notable, not only because one of Obama's predecessor's most notorious lines was the "axis of evil," but also because of the potential legal ramifications of declaring force necessary by definition in the face of "evil" actors. That said, "evil" does not appear in legal texts, not even in the 1948 *Convention on the Prevention and the Punishment of the Crime of Genocide*, and for good reason, as it can potentially invite the excessive use-of-force.

With regard to the preventive and preemptive use-of-force, the *NSS 2010* does not contain any specific stipulations – confirming the previous rhetorical practices of the Obama administration. While the document actually includes a separate section entitled *"Use-of-force"*[50] – unlike Bush's National Security Strategies – there is little tangible substance here, and it leaves many of the controversial issues of its predecessor unresolved. The only pointers are to be found in a passage relating to denying safe havens:

> Wherever al-Qa'aida or its terrorist affiliates attempt to establish a safe haven – as they have in Yemen, Somalia, the Maghreb, and the Sahel – we will meet them with growing pressure. We will [...] disrupt terrorist operations *before they mature*; and address potential safe-havens before al-Qa'aida and its terrorist affiliates can take root.[51]

The *NSS 2010* goes on to mention "new practices to counter evolving adversaries,"[52] offering one of the few allusions to the administration's already-ongoing drone policy. Other than emphasizing that the use-of-force must be a last resort, the *NSS 2010* remains general and non-committal. Additionally, it leaves open questions on the extent to which the United States still asserts the right of preemptive self-defense put forward by President Bush, and whether it is proclaiming a right of unilateral humanitarian intervention.

Still, assumptions pertaining to Obama's apparent silent continuation of many of Bush's stances on the use-of-force in counterterrorism can be underlined further through examining key statements of the president himself, as well as government officials. From the day of his inauguration, Obama has continuously highlighted the ongoing nature of the conflict with Al Qaeda and the constant threat the organization poses. In an early speech focusing on a new strategy for Afghanistan and Pakistan, Obama stated that "multiple intelligence estimates have warned that Al Qaeda is actively planning attacks on the US homeland from its safe haven in Pakistan."[53] In terms of legal reasoning, this serves to highlight that, first, the United States has been using force strictly in self-defense and that, second, the "original" conflict party continues to pose an imminent threat to the United States which justifies the continued use-of-force in self-defense: "And we will insist that action be taken – *one way or another* – when we have intelligence about high-level terrorist targets."[54] The focus on the ongoing imminence of the threat that Al Qaeda poses is frequently combined with emphasizing that the United

States did not enter into the Afghanistan war voluntarily, but necessarily had to use force in self-defense. As stated in Obama's address to US armed forces in Afghanistan: "We did not choose this war. This was not an act of America wanting to expand its influence; of us wanting to meddle in somebody else's business. We were attacked viciously on 9/11."[55]

One of the very few instances where prevention was mentioned explicitly was Vice-President Joe Biden's address to the 45th Munich Conference on Security Policy in early 2009. Interestingly, this speech refers both to the use-of-force as a last resort – which became something of a mantra in the administration's official speeches, albeit arguably less so in its actions – and the preventive use-of-force in greater scope:

> We'll strive to act preventively, not pre-emptively, to avoid whenever possible, or wherever possible the choice of last resort between the risks of war and the dangers of inaction. We'll draw upon all elements of our power – military and diplomatic, intelligence and law enforcement, economic and cultural – to stop crises from occurring before they are in front of us.[56]

Although embedded in a range of non-forcible elements, the preventive (unilateral) use-of-force is clearly still entertained as a viable policy option. Indeed, the war in Afghanistan, although repeatedly championed by Obama as a "war of necessity" in contrast to the "war of (bad) choice" in Iraq, is at best a preemptive war and at worst a preventive war of self-defense. It was not waged in response to an imminent attack but rather in preventive response to an attack that might happen sometime in the future, while uncertainty reigns in terms of when or where.[57]

The Bin Laden raid

Of course, a defining illustration of Obama's resolve to use force was the capture and killing mission of Osama Bin Laden, which reportedly happened on 2 May 2011.[58] The mission was undertaken by 25 members of the Navy Seals and raised international legal consideration because it took its US military team into Abbottabad – a suburb of the Pakistani capital of Islamabad – and therefore deep into the sovereign territory of Pakistan.[59] Pakistan had not been informed about the raid, and the months of intelligence planning that went into the mission had been carefully kept under the Pakistani radar.[60] Pakistani intelligence was reportedly informed by US authorities that a raid on a high value target was taking place only when the Seals' helicopters had entered Pakistani air space.[61] Senior members of the Obama administration have since characterized Bin Laden's death as a major US victory in its continued fight against Al Qaeda. Moreover, they have frequently expressed a sense of pride in this achievement, calling it a "gutsy decision"[62] on the

part of Obama, as well as commenting on the risks involved and how well these paid off.[63] One of the most notable risks was that the US administration only had circumstantial evidence that Bin Laden was or had ever been present in the target compound[64] – but as Obama stated in his address to the nation: "I determined that we had enough intelligence to take action, and authorized an operation to get Osama Bin Laden and bring him to justice."[65]

Interestingly, neither the fact that the United States used lethal force in Pakistan without that country's knowledge or consent, nor the question whether Bin Laden could have possibly been captured during the raid instead of killed, were subject to much critical attention by state leaders in the operation's aftermath.[66] Initially, Pakistani authorities were apparently reluctant to criticize the United States. An op-ed published by Pakistani President Zardari in the *Washington Post* just two days after the mission even went so far as welcoming Bin Laden's death.[67] This, however, quickly turned with senior Pakistani officials, such as Foreign Secretary Salman Bashir, warning the United States against undertaking future raids into their territory: "No self-respecting nation would compromise or allow others to compromise its sovereignty."[68] The delayed reaction may be attributed to the fact that Pakistan found itself on the receiving end of US criticism for not being aware of Bin Laden's whereabouts, whose compound was ironically in the direct vicinity of Pakistan's military academy.[69] Senior officials such as John O. Brennan and Hillary Clinton had previously commented that certain elements within the Pakistani government must know – approximately – where Bin Laden is hiding.[70] Still, the message sent by the Obama administration was far from clear. Clinton, for example, has also certified that Pakistani authorities have been providing invaluable help in the fight against Al Qaeda[71], and, as we will argue in Chapter 6, the US drone program in Pakistan relies on a precariously balanced form of Pakistani consent. In the immediate aftermath of the Bin Laden raid, Obama simply declared: "Over the years, I've repeatedly made clear that we would take action within Pakistan if we knew where Bin Laden was. That is what we've done."[72]

Regarding the potential capture of Bin Laden, different accounts exist as to whether an unarmed Bin Laden was killed immediately when sighted or, as another version of events go, an unarmed Bin Laden was sighted, who then ducked into a room and was only then shot at in self-defense because it was suspected that he might reach for a weapon.[73] There was no official version presented by Obama administration officials. The exact turn of events is crucial in determining the legality of Bin Laden's killing. In circumstances other than self-defense – such as the possibility of capturing Bin Laden alive – this would be "an extrajudicial killing without due process of the law."[74] Official statements hold that the killing of Bin Laden as an enemy combatant was lawful because he was the head of Al Qaeda with whom the United States is in a state of armed conflict.[75] However, as legal scholar Philippe Sands argues, this reasoning still opens up the logical

conclusion "that anyone associated with al Qaeda in any country in the world can be taken out, can be executed."[76] Despite Sands' arguments finding support among a range of legal scholars,[77] they did not attain traction among state leaders who welcomed Bin Laden's death, nor engender critique on these points. Most notably, Secretary-General Ban Ki-moon called Bin Laden's death "a watershed moment in our common global fight against terrorism" and referred to his targeting as just.[78] On a more general level, repeated reference to "taking out" Bin Laden by senior administration officials, for example Hillary Clinton,[79] suggest that capture was never seriously considered an option. This is also criticized in a joint statement by the two UN special rapporteurs on extrajudicial killings and counterterrorism and human rights, who note that while lethal force is justified as a last resort, "the norm should be that terrorists be dealt with as criminals, through legal processes of arrest, trial and judicially decided punishment."[80] Again, we will discuss how these issues surrounding targeted killing relate to *jus ad bellum* and *jus in bello* principles in more detail in the subsequent chapter.

On a final general point regarding the Obama administration's use-of-force policy, President Obama's reliance on military means to counter threats posed to the United States can also be underlined with US military spending during his terms in office. As Figure 5.1 illustrates, US military expenditure has increased and reached a consistently higher level than during any year of Bush's two terms. In fact, Obama used his upping of military spending as an argument in favor of his re-election during the foreign policy debate with Republican presidential candidate Mitt Romney in 2012: "Our military spending has gone up every single year that I've been in office. We spend more on our military than the next 10 countries combined."[81] It also features in various other speeches.[82] In light of the use-of-force, Obama also argues that a continuously strong, even superior military is needed not only to act as a credible deterrent, but also to maintain US capabilities across all military dimensions if required for immediate deployment.[83]

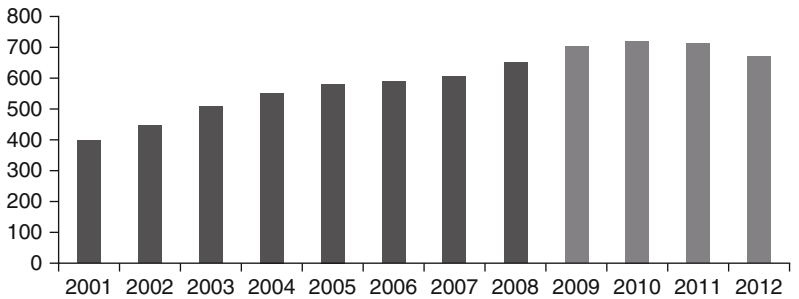

Figure 5.1 US military expenditure in US$ billion from 2001 to 2012[84]

To sum up, while never addressed explicitly, the Obama administration's vague formulations on the use-of-force suggest a silent continuation of many tenets of the Bush era's (preventive/preemptive) use-of-force policy. The lack of express support for these doctrines may be taken not only as an indication of their controversial nature, but also as weakening any argument that they are accepted in international law.[85] Still, the two administrations' similarities in this area are in many ways a surprising revelation, given their supposedly different foreign policy philosophies.

Legitimizing the use-of-force for humanitarian purposes: Obama and the just war tradition

As we argue in this section, the Obama administration promoted a distinct reinterpretation of the unilateral use-of-force in international relations for humanitarian purposes, based largely on a rejuvenation of the just war tradition. This can be seen as an attempt to define the international legal agenda and redefine the UN Charter's *jus ad bellum* regime. To provide some context, this section will first summarize the main tenets of the just war tradition, evaluate their standing in international law and then continue with exploring the way it has been executed in the Obama administration's use-of-force policy.

Just war

The just war tradition is concerned with outlining moral standards to govern the recourse to force. It provides two sets of standards: first, defining when it is justified to use force in the first place (*jus ad bellum*) and, second, outlining conduct limits that should govern this "justified" use-of-force (*jus in bello*).[86] Just war thinking has a long tradition in Western philosophy dating back to ancient Roman and Greek times, but became associated in particular with Christian theology through its well-known advocate Thomas Aquinas in the 13th century. Aquinas provided the first systematic examination of both *jus ad bellum* and *jus in bello* principles. His writing inspired a range of 15th- to 17th-century thinkers, discussed in Chapter 2 in the context of the preemptive use-of-force – Alberico Gentili, Hugo Grotius and Emmerich de Vatel. In the 20th century, philosopher Michael Walzer became the most important reference point for the just war tradition, which has become an increasingly popular focus of research in international relations. While the tradition came to prominence in the mid-1990s in light of debates surrounding humanitarian intervention, it was not surprisingly, the events of 9/11 that saw just war discourse attain further attention.[87]

One can summarize the arguments of just war thinkers by applying "standard" lists of *jus ad bellum* and *jus in bello* "criteria." In terms of *jus ad bellum*, a war is considered to be "just" if it meets three principles: First, it has a just cause. In Aquinas' terms, a war is just if it "avenges wrongs."[88] Just causes

are usually thought to be "self-defense from external attack; the defense of others from such; the protection of innocents from brutal, aggressive regimes; and [the] punishment for a grievous wrongdoing which remains uncorrected."[89] Second, a war is just if it is pursued with the right intention. The intent behind waging the war should be limited to the pursuit of the just cause and not include ulterior motives, such as revenge or power. And third, just wars are waged by the right or legitimate authority. This refers to the political authority or sovereign as designated in the political system – war waged by private individuals or waged without consideration of the due process of declaring war valid in the respective political system is therefore considered *not* just. In the 20th century – and more so in the post-World War II period – two further prudential criteria were added to this list: Wars should be waged as a last resort, once all viable peaceful means of conflict resolution have been exhausted. Just wars are only those wars that are waged with a high probability or "reasonable expectations" of success in reaching the just cause.[90] A further important qualifier for a war being called "just" is that it has to fulfill *all* key principles – if, for example, it pursues a just cause but is not waged with the right intention, it does not qualify to be called a just war.

There are likewise shared *jus in bello* principles – the two most basic[91] ones are discrimination and proportionality. Discrimination is the first and most basic principle limiting the conduct of war because it "sets certain persons out of the permissible range of warfare, so that killing any of their members is not a legitimate act of war but a crime."[92] Civilians, those who are not "engaged in harm," therefore enjoy immunity.[93] Although civilians may (unintentionally) be killed in attacks, they should never be deliberately targeted by warring factions and the greatest caution should be paid to avoiding such casualties. The principle of discrimination is a key element of the laws of war, enshrined in the Geneva Conventions. Proportionality refers to the degree of force used, which must be commensurate with the force required to correct the just cause. Just wars have to meet the proportionality principle in which "a state must . . . weigh the universal goods expected to result from it, such as securing the just cause against the universal evils expected to results, notably casualties."[94] The emphasis on this calculation is on universal losses and benefits, as opposed to the state's own expected benefits or losses. This criterion is commonly assumed to rule out the use of weapons of mass destruction, which may never be proportionate to achieving the just cause.

Obama and the just war tradition

Just war thinking has continued to figure prominently in Obama's speeches since he entered office. Ironically, he chose to use the occasion of his Nobel Peace Prize acceptance speech to articulate his philosophy on war. One might argue that in doing so, he was merely responding to the most

prevalent point of critique he was faced with: being a Nobel Peace Prize recipient and, at the same time, Commander-in-Chief of a nation at war – indeed, this apparent oxymoron is evident at the starting point of his speech. Still, the entire focus of the speech is geared toward explaining how war can be justified and is on occasion a necessity. A telling count is the number of times Obama mentions "war" (60 in total), compared to "peace" (53 in total).[95] In the context of just war, President Obama refers to a number of the aforementioned principles that have to be met in order for a war to be morally justified; explicitly, a just cause (self-defense, protection of civilians), the use-of-force as a last resort, the proportional use-of-force and that civilians should be spared from violence wherever possible. Although the just cause figures prominently on this list, the other principles are those of prudential character in the just war tradition, that is, those that serve to temper any drive toward the use-of-force, as Cian O'Driscoll highlights.[96]

Despite this emphasis on prudence, it is notable that just war thinking features prominently in the context of the potential unilateral use-of-force for humanitarian purposes. As stated,

> [t]here will be times when the breakdown of societies is so great, the violence against civilians too substantial that the international community will be called upon to act. This will require new thinking and some very tough choices. . . . I have made it clear that even when America's core interests are not directly threatened, we stand ready to do our part to prevent mass atrocities and protect basic human rights.[97]

The prominence of humanitarian intervention arguments by the Obama administration can also be accounted for by its vocal support among key senior officials,[98] such as the last US Permanent Representative to the UN, Susan Rice, and Samantha Power, US Permanent Representative to the UN in Obama's second term and previously staff member of the National Security Council. Rice, for example, underlined US commitment to the responsibility to protect (R2P) in her very first speech at the Security Council in January 2009.[99] Power notably wrote an influential book criticizing past US failure to prevent the genocides in the former Yugoslavia and Rwanda.[100] Another key administration official, Anne-Marie Slaughter, has also written in support of humanitarian intervention without Security Council approval when morally justified, noting that the UN "cannot be a straightjacket."[101] Additionally, although not speaking specifically on the point of unilateral humanitarian intervention, a 2011 Presidential Directive on Mass Atrocities outlines how "preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States."[102]

In contrast to the principles of international law enshrined in the pivotal treaties and documents of the UN Charter era, the just war tradition has featured as a favorite reference point of Obama's use-of-force arguments. While the "just" arguments he makes have long been part of political

debates, particularly those pertaining to humanitarian intervention, they have frequently been made to highlight the legitimacy of a forcible action, rather than its legal basis. Many of these just war arguments have no standing in international law, not even in what one may call the "soft" law of General Assembly resolutions. Key international documents, such as the report by the independent International Commission on Intervention and State Sovereignty (ICISS) and then Secretary-General Kofi Annan's *In Larger Freedom*, mention just war tradition-based criteria as useful to evaluate when and how the international community should intervene in the face of grave human rights violations.[103]

However, when these documents were discussed at the 60th anniversary session of the General Assembly in 2005, the so-called World Summit, the just war criteria did not receive widespread support by the international community. As discussed in Chapter 1, the *World Summit Outcome* contains a reference to the concept of the responsibility to protect, which transfers responsibility for protecting a state's nationals to the international community should that state be unwilling or unable to protect its citizens from four large-scale international crimes – crimes against humanity, genocide, war crimes and ethnic cleansing. That said, the resolution does not outline any criteria on what such a responsibility-based intervention should look like. Furthermore, R2P only allows the multilateral use-of-force with a clear Security Council mandate. Even this tentative legal basis is therefore a far cry from the one posited by Obama in his Oslo speech:

> We must begin by acknowledging the hard truth: We will not eradicate violent conflict in our lifetimes. There will be times when nations – *acting individually* or in concert – will find the use of force not only necessary but morally justified.[104]

It is apparent that Obama finds broad support for these thoughts in the just war tradition. As Walzer argues, "morality, at least, is not a bar to unilateral action, so long as there is no immediate alternative available."[105] Indeed, states don't lose their "particularist character" by simply acting together. If governments have dichotomous motives, so do coalitions of governments.[106] Therefore,

> [h]umanitarian intervention is justified when it is a response to acts that "shock the collective conscience of mankind." . . . And given that one can make a persuasive argument in terms of those convictions, I don't think that there is any moral reason to adopt that posture of passivity that may be called waiting for the UN.[107]

The Obama administration's choice to justify unilateral humanitarian intervention by way of the just war tradition therefore legitimizes a policy option that does not follow the requirements of international law. We do not

want to enter here into a moral debate on these issues – certainly, there are good arguments to be made on why unilateral action to protect civilians from atrocities, genocide and crimes against humanity is infinitely preferable to negotiating and waiting for a multilateral, Security Council-mandated response that may never come. On a strictly legal basis, however, the use-of-force policy the Obama administration promotes with regard to humanitarian intervention is outside current international law.

Just war in action? The Obama administration's use-of-force policy in Libya and Syria

So far, we have only covered the Obama administration's rhetorical treatment with regard to the use-of-force and humanitarian intervention. We will now move on to consider how these arguments have been played out in practice through considering the Obama administration's policies with regard to events in Libya and Syria.[108] Both countries saw popular mass demonstrations against their rulers – Colonel Muammar al-Qaddafi and President Bashar al-Assad – from the beginning of the Arab Spring that swept across the region starting in Tunisia in January 2011. The administration's use-of-force policies toward these two states make for an interesting comparison: In Libya, the administration reached a comparatively quick decision to use force. Following Qaddafi's threat of committing massacres in the rebel stronghold of Benghazi in early March 2011, the Security Council authorized a NATO military operation to "use all necessary means" – through resolution 1973 – in order to protect civilians in Libya. By contrast, the Syrian crisis dragged on without the employment of forcible policies until the summer of 2013 when there was an incident of chemical weapons usage. Initially, this brought the Obama administration very close to the use of military force without the Security Council's authorization so as to punish the Syrian regime for violating a key principle of international law, the general prohibition of biological and chemical weapons.

Libya

At the very beginning of the Arab Spring, the Obama administration's public statements and actions exercised a great deal of caution – especially with regard to events in the major country of the region, Egypt, led by long-term US ally, President Hosni Mubarak. In this case, Obama only really became a vocal critic of Mubarak when the latter had already agreed to step down.[109] In Libya, governmental forces began to use force against demonstrators in mid-February 2011, and the situation escalated once Qaddafi's government lost control over many eastern cities and ordered air and ground strikes on its own population.[110] This move was quickly condemned across the membership of the UN, which first reacted through instituting a sanctions regime on the financial assets and travels of the Qaddafi family, as well

as instituting an arms embargo, in the form of Security Council resolution 1970 on 26 February 2011.[111] Resolution 1970 also referred the situation in Libya to the International Criminal Court for investigation. Despite these actions, Qaddafi forces continued to advance on opposition-held areas and cities in eastern Libya, especially Benghazi. In a series of "hate speeches" on national television and radio, Qaddafi basically announced plans to commit a massacre on the protesters of Benghazi, referring to them as "traitors" and "cockroaches,"[112] for whom he would search across all households and streets, and declared that "we will show no mercy and no pity to them."[113]

The Security Council reacted with resolution 1973, which called for a cease-fire, declared a no-fly zone over Libyan territory and necessary enforcement for the no-fly zone and the previous arms embargo, and authorized member states "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory."[114] The resolution was accompanied by non-negotiable demands that required Qaddafi to end the violence against Libya's population. When these demands were not met – as Libyan ground forces continued to launch attacks on civilians – a multilateral coalition under NATO command with partners from the Arab region, Qatar and the United Arab Emirates, began "Operation Unified Protector" on 19 March 2011. This mission was entirely conducted on the basis of airstrikes and sea-launched cruise missile attacks on Libyan military targets and infrastructure, with no troops deployed on the ground.

During the initial stages, the Obama administration was brisk in its condemnation of the violence used by Qaddafi's troops. Speaking on 23 February 2011, Obama called the violence in Libya "outrageous," "unacceptable" and "violat[ing] international norms and every standard of common decency."[115] He went on to make an explicit reference to the responsibility to protect that should be exercised by the Libyan authorities:

> Like all governments, the Libyan government has a responsibility to refrain from violence, to allow humanitarian assistance to reach those in need and to respect the right of its people. It must be held accountable for its failure to meet those responsibilities, and face the cost of the continued violations of human rights.[116]

Of course, this also implied the use-of-force as a next policy option in which Obama explicitly asked the administration to "prepare the full range of options that we have to respond to this crisis."[117]

What is interesting about this speech in the context of the just war tradition is that Obama took great care to place American outrage and consideration of "the full range of options" in the context of a universal outrage by the international community. Security Council resolution 1970

condemning the violence in Libya was passed unanimously, and Obama outlined full international support as many as four times throughout this speech, for example: "[the Libyan crisis] is not simply a concern of the United States. The entire world is watching, and we will coordinate our assistance and accountability measures with the international community."[118] This is both an appeal to right intention in just war terms, putting the use-of-force as a measure in the context of backing for a universal cause – the protection of human rights – and a clear differentiation of this potential intervention from the Iraq War.[119]

What is further interesting is the Obama administration's general speed of decision-making, from the time violence was used by Libyan governmental forces to the decision to advocate and eventually make use-of-force. As mentioned, the first speech that condemned violence in Libya already contained force as an option. Two days later, Obama issued Executive Order 13566 that declared a national emergency from the threat posed by the situation in Libya and imposed new, targeted sanctions, thereby reversing the rapprochement policy of the previous administration.[120] In a series of speeches held throughout the first two weeks of March 2011, Obama maintained his vehement condemnation of the violence against civilians in Libya (the just cause, always implied, "to right this wrong"), while also signifying a looming threat to use force that could entail regime change, or at the very least, a necessary change of executive leadership: "Muammar Gaddafi has lost the legitimacy to lead and must leave. Those around him have to understand that violence that they perpetrate against innocent civilians will be monitored and they will be *held accountable* for it."[121] Following the series of "hate speeches" by Qaddafi in the week of 17 March 2011, the Obama administration stepped up its diplomatic efforts at the Security Council in joining the drafting of what became Security Council resolution 1973, authorizing the use-of-force in Libya on 18 March 2011. Two permanent members, the Russian Federation and China, as well as three non-permanent members, Brazil, Germany India, abstained; the abstentions by the permanent members were significant because they allowed the use-of-force to proceed. Speaking just a day after the resolution was passed, Obama noted that the use-of-force is directly connected to preventing a massacre in Benghazi, quoting specifically from Qaddafi's most recent speeches, and therefore limited to protecting the civilians in Libya.[122]

For Obama, the use-of-force in this case was now an imperative. As the following quote demonstrates, his administration's decision was defined by the turn of events in Libya: "the United States did not seek this outcome. Our decisions have been driven by Qaddafi's refusal to respect the rights of his people, and the potential for mass murder of innocent civilians."[123] In aptly tying the use-of-force to the concept of necessity, it in essence rendered the decision making, in a "real" sense, almost superfluous. This, however, also led some observers to view the Obama administration as being buffeted by

events rather than shaping them – coined in the non-complimentary phrase "leading from behind."[124]

Obama's concluding sentence again refers to the main tenets of the just war tradition – just cause, proportional use-of-force to reach a limited objective and universalist standing:

> The United States of America will not stand idly by in the face of actions that undermine global peace and security. So I have taken this decision with the confidence that action is necessary, and that we will not be acting alone. Our goal is focused, our cause is just, and our coalition is strong.[125]

Recalling the full range of criteria that are part of the just war tradition, it is notable that Obama at no point preferred to draw attention to the criterion of right authority. This takes on significance in his decision to participate in using force against Libya without congressional authorization.[126] Following the just law principle of right authority, Obama would have, however, had to seek authorization from US Congress. This suggests that even in legitimizing his administration's use-of-force policy for humanitarian purposes in line with the more "allowing" principles of just war, Obama employed a selective "pick-and-choose" approach that would not endanger his presidential authority.

Syria

While in the Libyan case the Obama administration let forcible actions closely follow its strong words on the potential use-of-force, it long remained reluctant to consider the use-of-force in response to the crisis in Syria. Here, peaceful demonstrations for the resignation of Assad and regime change had equally been met with violence and armed responses on the part of governmental troops since April 2011.[127] By early 2012, when rebels took up arms to fight against governmental forces, the situation in Syria had turned into an asymmetrical civil war. In essence, from 2011 to 2013, the situation on the ground had been characterized by severe clashes between rebels and governmental forces, with the government side making use of heavy weaponry including large-scale artillery operations, indiscriminate shelling and cluster munitions against opposition strongholds (such as Homs and Aleppo).[128] Estimates in December 2013 indicated that more than 130,000 people had perished in the Syrian conflict,[129] while the United Nations High Commissioner for Refugees (UNHCR) announced that two million refugees fled Syria for neighboring countries and 4.25 million were internally displaced by September 2013.[130]

All of this, however, did not lead the Obama administration to seriously consider the use-of-force in Syria during the period of 2011 and 2012 – despite its strong words to the contrary in various speeches extending back

to the spring of 2011.[131] The only forcible measure was the US imposition of sanctions with the EU against the Syrian regime in May 2011. Of course, this markedly changed in response to events on 21 August 2013 when a chemical weapons attack – more precisely rockets containing the nerve agent Sarin – occurred in the Ghouta suburbs of Damascus and killed 355 people at the very least.[132] On the basis of its intelligence sources, the Obama administration quickly became convinced that the attack had been ordered by governmental forces. A range of high-level administration officials, such as Secretary of State John Kerry, condemned the chemical weapons attack and put the blame on the Syrian government.[133] Obama then made the decision to use unilateral force against Syria in order to punish it for violating basic international law and to end the bloodletting.[134] He asked Congress to authorize the use-of-force in Syria on 1 September 2013.[135] Amid heated domestic debates and dichotomous international opinions, the use-of-force drive of the United States was averted when the Russian foreign minister reacted positively to an "off the cuff" remark by Kerry to bring the Syrian chemical weapons stockpile under international control.[136] Since 10 September 2013, the Obama administration has pursued a non-forcible path toward Syria that led to a Syrian-supported agreement brokered between the Russian Federation and the United States in November 2013.[137]

Although force was ultimately avoided by the Obama administration in the Syrian context, it is still imperative to consider its preparedness to do so. Respective speeches on the reasoning to undertake this path of action are devoid of any US–Security Council authorization references or consideration, nor is there an articulated "need" for UN weapons inspectors to confirm details on the chemical weapons attack: "I am confident in the case our government has made without waiting for UN inspectors. I am comfortable going forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable."[138] Similarly, other senior officials such as Susan Rice argued that while some form of Security Council action would be a more preferable option, concluded with "let's be realistic – it's just not going to happen. Believe me, I know."[139] While Rice certainly makes a valid point in relation to the Chinese and Russian delegation vetoing draft resolutions on Syria on three different occasions, one might wonder how the United States would have reacted if those permanent members responded in a way that was not to their "liking."[140] Although the moral outrage expressed with regard to the situation in Syria indeed seems a fully understandable and preferable reaction, the major dilemma of considering unilateral use-of-force outside the UN Charter framework – even for legitimate reasons – weakens the UN Charter regime and opens space for other member states to use force in other circumstances. As the United States certainly would not support this, what it is claiming here appears to be an exception to the rules applicable only to itself and in support of its interests.[141]

Coming back to the administration's stance toward Syria, although Obama tried to find a supportive coalition for unilateral action outside the Security Council at the G20 meeting in St. Petersburg – a move that resulted in at least 10 countries joining the United States in a condemning statement calling for strong international action[142] – his statements also made it clear that his administration would be willing to proceed with the use-of-force on its own: "We are prepared to strike whenever we chose."[143] The lack of attention paid to the legality of this use-of-force can, as legal scholar Craig Martin remarked, only be called "paradoxical given that one of the primary justifications for the strikes is that they are to punish the Syrian government for its violations of international law."[144] In further speeches during September 2013, Obama made a point to include just war references in support of this intended punitive use-of-force. He repeatedly stated that the Assad regime needed to be held accountable for violating international law (just cause), underlined both the limited nature of the envisioned strike against Syria and its proportionality, and mentioned a strike's deterrent effect: "This is a limited proportional step that will send a clear message not only to the Assad regime, but also to other countries that may be interested in testing some of these international norms, that there are consequences."[145] Legal evaluations of the unilateral use-of-force in this case are divided. Opponents note that the UN Charter regime clearly designates the Security Council as the sole organ with the authority to sanction the use of military force. Sidestepping this organ therefore immediately raises serious questions. The use of chemical weapons violated international law as enshrined in the 1925 *Geneva Protocol*,[146] the 1972 *Biological Weapons Convention* (*BWC*)[147] and the 1993 *Chemical Weapons Convention* (*CWC*),[148] as well as customary international law. Syria is a state party to the *Geneva Protocol* and a signatory to the *BWC* but, in August 2013, had not been a member of the *CWC* – it only acceded to the treaty as part of the compromise solution negotiated among itself, the Russian Federation and the United States in September 2013. Yet, none of these treaties provides for the use-of-force to enforce their rules.

Proponents such as Geoffrey Robertson note that NATO's 1999 intervention in Kosovo set a precedent for the use-of-force without Security Council's authorization, thereby, enabling a unilateral intervention in the context of Syria to follow.[149] In contrast to the Bush administration's war on Iraq, the Kosovo intervention is generally seen as "illegal but legitimate," in the famous words of the Independent International Commission on Kosovo.[150] This view is also supported by a Security Council vote after the Kosovo intervention. In this instance, the Russian Federation had prepared a draft resolution that referred to the NATO intervention as a clear violation of the UN Charter and called for an immediate cessation of the use-of-force that only received three votes in favor and 12 against, with no abstentions.[151] Rather than condemning the illegality of the intervention, as had been Russia's intention, this vote arguably emboldened the

intervention's legitimacy. Despite the interesting comparison, it needs to be acknowledged that the Syrian case differs from the Kosovo case – and, incidentally also the Iraq case – on one important point. That being, in relation to both Kosovo and Iraq, the Security Council had agreed on substantive resolutions outlining a number of concrete demands.[152] Although neither of these resolutions included a mandate to "use all necessary means," they still represented the will of the international community and provided some grounds for enforcement.

If one accepts the Obama administration's argument that a Security Council mandate had not even been pursued because it was expected to fail anyway, then why did the United States not choose, at least, to try to seek General Assembly support? Although this would not have put unilateral intervention on indisputable legal safe ground – as the General Assembly's resolutions are not legally binding – it could have given an intervention the symbolic support of a majority of UN member states. Legal scholar Dapo Akande identifies two probable reasons on as to why this did not happen.[153] First, the Obama administration could not be sure of gaining a majority in the General Assembly and thus, did not want to risk losing face and associated legitimacy. Second, on a strategic level, the administration did not want to see the General Assembly "overriding" the Security Council for fear of the precedent this might set. After all, the United States certainly does not want to contribute to the erosion of the monopoly the Security Council has within the United Nations peace and security architecture.

Proponents of the use-of-force have maintained that if force is used, it would have to conform to standards of proportionality, that is, limited only to deterring any future chemical weapons attacks by the Syrian government.[154] In order to be justifiable, the party employing unilateral force would, however, still need to provide indisputable proof that it had been, in fact, the Syrian government who carried out these attacks. While UN inspectors have found clear evidence of the usage of chemical weapons in the Syrian conflict,[155] evidence on which party used these weapons remains contested, despite many sources pointing to governmental authorities.[156] Indeed, based on satellite detection, human and signals intelligence, the Obama administration has argued that it could identify the Syrian government as the perpetrator of the attack with "high confidence."[157] Prior to the envisaged congressional vote on the use-of-force, a corresponding classified report was circulated to Members of Congress; however, its viability was heavily dependent on a single intercepted phone conversation, and was generally not considered to include "hard" evidence.[158] Of course, suspicion of US intelligence reports continues to run high both domestically and internationally in light of the dubious intelligence provided regarding Iraq's possession of WMDs by the Bush administration.

Given the uncertain legal ground for the use-of-force in the Syrian scenario, where does the just war tradition sit in the equation? The Obama administration frequently mentioned that force is used as a last resort in

Syria after "exhausting a host of other measures."[159] As discussed earlier, although just war authors such as Walzer support the unilateral use-of-force for humanitarian purposes, one might wonder why the use of chemical weapons, in particular, should serve as a just cause when – until 21 August 2013 – more than 100,000 people had already died in the Syrian conflict and their suffering did not trigger humanitarian intervention.[160] While there certainly is a just cause to intervene on humanitarian grounds in Syria, it was present long before the chemical weapons attack and, in fact, continued to be present after the Obama administration decided to engage in a political resolution. The indiscriminate bombing of Aleppo by the Syrian regime in mid-December 2013, for example, did not trigger a policy change on the side of the administration,[161] and raised questions about the subjectivity of intervention criteria and Obama's so-called red line.

If we extend back to August 2012, Obama expressed his administration's willingness to use military force in Syria should the regime use chemical weapons.[162] In just war terms, this again raises questions about Obama's right intention as it suggests that what was, in fact, at stake when deciding upon the use-of-force in Syria was not reversing "wrongs" in line with the "just cause," but safeguarding US credibility. Obama's national security adviser Susan Rice mentions as much in a speech on Syria in early September 2013, and places humanitarian reasoning and the violation of international law to the foreground: "Rejecting the limited military that President Obama strongly supports would raise questions around the world as to whether the US is truly prepared to employ the full range of its power to defend our national interests."[163] In his address to the nation on Syria, Obama even goes as far as adding self-defense to the mix of reasons for the use-of-force, in which there is the potential that Al Qaeda might acquire or "draw strength in a more chaotic Syria."[164]

In summing up, while the events in Syria certainly fall under the responsibility to protect, the fact that no resolution has yet been accepted by the Security Council should also be understood in the context of US and NATO policies pursued in Libya. Although the mandate of Security Council Resolution 1973 only covered a very limited use-of-force to enforce the no-fly zone and protect civilians, some NATO operations also included targets close to Qaddafi, thereby "overstepping" the mandate given to them toward regime change.[165] This resulted in criticism from the Chinese and Russian delegations to the United Nations who, through abstaining from the Security Council votes, made R2P-based intervention possible, yet have since been incredibly reluctant to behave in a similar fashion in the case of the Syrian conflict.[166] Indeed, many commentators note that Syria is basically paying the price of the Libya intervention. Martin provides a succinct summary of these points:

> Vigilante justice, while purporting to enforce legal norms, typically erodes the normative power of the legal system it seeks to support, and further

> undermines the rule of law. The ramifications of the Libya operation reflect the harm caused merely by exceeding existing legal authority, while the profound harm to the system caused by the unlawful invasion of Iraq in 2003 are yet to be fully understood.[167]

Conclusion

Judging from the general tone of its first *National Security Strategy*, it appears that the Obama administration shifted markedly in relation to the United States' use-of-force. However, despite the apparent "adjustment" of the Bush administration's right to "act preemptively" in order to forestall or prevent hostile acts by adversaries, the Obama administration has for all intents and purposes retained the right to unilaterally use force; evident in the "loopholes" the *NSS 2010* contains and the sheer fact that it does not mention a reversal of the Bush's administration's stance with regard to preemption. In fact, the only explicit reversals of past stances and references to past shortcomings occur in the context of interrogation techniques. President Obama maintained that the United States was still at war and still sought to defeat the "far-reaching network of hatred and violence" by military means. He may have abandoned President Bush's language of the global "War on Terror" and proclaimed his commitment to moral leadership, but his administration's use-of-force policy leaves room for the danger that Obama, like his predecessor, will prefer to operate under the "law of 9/11" rather than the rule of law in his use of targeted killings outside the battlefield. Indeed, as with the Bush tenure in office, perhaps Obama also wants to put forward an interpretation of the Charter *jus ad bellum* regime that would de facto arrogate to itself exceptional discretion in the use-of-force within an international legal system possessing many of the key features of hegemonic international law.

Moreover, the problems associated with rendition as a policy option may have contributed to the greater use of drone strikes instead of attempting to capture terrorist leaders. The Obama administration's use-of-force policies are, in one way or the other, all targeted toward moving away from the "boots on the ground" strategy. As the cases of Libya and Syria clearly demonstrate, when the Obama administration vocally considered the use-of-force, it was always accompanied with the emphasis on a limited, targeted approach and not the deployment of troops. Ultimately, however, the supposed "light footprint approach" with its general tendency to rely heavily on targeted killings has stretched the administration's earlier penchant for international "decency" to unrecognizable and unfathomable proportions.

6
The Rise of Drones

Recent legal debates over preventive force have focused on the Obama administration's use of drones[1] to target terrorists and insurgents. In line with the argument made in Chapter 5 – that the transition from Bush to Obama saw an adjustment in tone rather than in substance with regard to use-of-force pursued by the United States – the Obama administration has made the use of drones a key staple in its counterterrorism strategy. While the Bush administration only used drones sporadically, the number of (documented) drone strikes under Obama's watch has increased decisively since 2009, with strikes occurring both *inside* and *outside* declared theaters of war, that is, not only within the combat zones of Afghanistan and Iraq, but also in Pakistan, Somalia and the Yemen. Not surprisingly, discourse pertaining to the standards governing drone usage gained attention when legal adviser to the Department of State, Harold Koh, posited his concerns in a speech at the American Society of International Law (ASIL) in 2010. These sentiments were followed – albeit somewhat belatedly – in the spring of 2012 with a series of key senior officials commenting publicly on the Obama administration's use-of-force policy, specifically the administration's approach to targeted killing. Despite further criticism from United Nations Secretariat actors and non-governmental organizations, the practice has continued to expand during Obama's second term. Proponents and many US strategic planners have argued that drone strikes are the only viable alternative to reducing "boots on the ground" and maintaining the military capacity to protect US interests. In fact, it is evident that the dynamics of Obama's counterterrorism priorities have for the main extent led to a stronger reliance on drones.

In examining this apparent "rise," this chapter will begin by offering a brief introduction to drones and their increased usage in the Obama administration's counterterrorism efforts. It will then proceed to examine the legal arguments put forward by administration officials in support of this practice. Following Koh's lead, senior officials have mainly defended the legality

of drones on two bases: First, the United States is in a state of war with Al Qaeda and its associates and exercises its right of self-defense in targeting senior terrorist leaders both inside and outside "traditional" combat zones. In this light, drones are portrayed as a necessary means that the US employs in this conflict. Second, the United States conducts all targeted strikes with drones in line with the law of war principles, mainly proportionality and distinction. Indeed, as the argument posits, drones are much better suited to successfully consider *jus in bello* principles, because they allow for more precise and smaller-scale targeting. Therefore, such arguments encompass both *jus ad bellum* and *jus in bello* reasoning at varying levels. In referring to drones as a "necessary means" in US counterterrorist efforts, the administration has effectively separated the consideration of their usage from imminence standards. Further, the argumentative focus of administration officials has been much more on the *jus in bello* principles, in other words how drones should be used, rather than on the *jus ad bellum* principles, that is, when or if drones should be used, which are frequently "ticked off" quickly.[2] The Obama approach in this regard has demonstrated the capacity to leave major legal questions pertaining to the use of drones unanswered.

In expanding on these points, the chapter considers the manifold issues arising from the administration's justification in two sections on *jus ad bellum* and *jus in bello* implications. The *jus ad bellum* section discusses the geographical scope of warfare that a "war against al Qaeda and affiliates" implies, as well as those relating to sovereignty. Indeed, the justification that the war on Al Qaeda shifts to wherever its terrorist leaders venture implies a global war zone. Thus, the law of war principles regulating the use-of-force are not only applicable in specific theaters of war but can be applied virtually everywhere, and in doing so, normalize the application of principles designed for exceptional circumstances and undermine international human rights law. In terms of sovereignty considerations, the Obama administration holds that it only conducts targeted strikes with the prior (tacit) consent of the country in which they take place or else, after a determination that the state has been "unable or unwilling" to take action against the threat itself. Determining whether a state is "unable or unwilling" offers something of a *carte blanche* for the use-of-force, as the intention of their behavior is judged by the United States.[3] The *jus ad bellum* section further considers the latency-based interpretation of imminence put forward by the Obama administration in its broad interpretation of self-defense. As a leaked 2012 Department of Justice White Paper asserts, operational leaders of Al Qaeda constitute imminent threats by their very status, even in the absence of clear evidence that they are planning a specific attack on the United States in the immediate future.

The section dealing with *jus in bello* examines the extent to which drone strikes can be said to adhere to International Humanitarian Law (IHL) standards of necessity, proportionality and distinction. While "easier" adherence

to these principles is regarded as the main strength of drones by its proponents, their claims are questionable across all three. In terms of necessity, the compilation of "kill lists" on which targeting decisions are based – as well as the usage of signature strikes – suggests that the Obama administration is targeting not only operational terrorist leaders but also individuals on the lower ranks of the Al Qaeda network. In other words, it targets "other" individuals to those who fall under the expanded concept of an imminent threat. With regard to proportionality and distinction, due to lack of transparency and accountability associated with the largely classified drone program, it is practically impossible to verify the extent to which the United States under the Obama administration is, in fact, adhering to the high standards it proclaims. Additionally, the usage of signature strikes and qualifying comments also pose serious questions as to how the administration defines who is a civilian in counting victims from drone strikes. In sum, whether one follows the argument that drones are more capable than other alternatives in adhering to the *jus in bello* principles depends on one's acceptance of what some commentators have called "the drone myth."[4] Although drones are theoretically able to strike more precisely for a number of technological reasons, if they are *de facto* able to do so depends once again on the quality of the intelligence their targets are selected and their strikes are based on.

Notwithstanding the argument that drones are not so different from other remote weapon delivery systems, the manner of their usage, the way their supposed surgical precision lowers the threshold toward the use-of-force and their firm inclusion in US national security policy mark a normalization of exceptionalism with regard to the use-of-force. It also sets a dangerous precedent in customary international law for other states to follow.

Drone attacks as US practice

The use of drones extends back to the counterterrorism policies of the Bush era. Although initially only used for surveillance and reconnaissance purposes, the well-known "Predator" and the more heavily armed "Reaper" drones equipped with hellfire missiles have been deployed in Afghanistan since 2001. One of the main differences between drones and traditional manned aircrafts, such as F-16 fighter jets or A-10 ground attack aircraft, is the duration that they can remain in the air. While traditional aircrafts have to land and refuel after approximately four hours, drones, such as the Predator, can remain operational for more than 24 hours.[5] The first reported use of a drone outside an established theater of armed conflict also occurred during the Bush administration. In 2002, a strike in Yemen killed Al Qaeda leader Ali Qaed Senyan al-Harthi, suspected perpetrator of the 2000 attack on warship USS Cole, along with five other suspected Al Qaeda affiliates.[6]

Since Obama took office, drone strikes have increased in number, both inside and outside declared theaters of conflict. Reliable numbers remain notoriously difficult to come by, especially as attacks outside combat zones are classified as "covert" actions. Although Obama declassified the mere fact that his administration was engaged in covert operations as part of the war against Al Qaeda in Somalia and Yemen in June 2012, the existence of a similar program in Pakistan – although well known and in fact publicly commented upon by himself in May 2013 – remains classified.[7] Table 6.1 summarizes numbers provided by the New America Foundation (NAF) and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for drone attacks in Pakistan, Yemen and Somalia. For comparison, Table 6.2 summarizes US drone strikes in the declared theaters of war in Afghanistan, Iraq and Libya from 2008–2013 based on numbers published by the US Air Force in the case of Afghanistan and the Bureau of Investigative Journalism.[8]

Table 6.1 shows the frequently cited numbers comparison, indicating that Obama authorized more drone strikes in his first year in office alone than Bush did during his entire two terms.[9] Such numbers clearly illustrate the extent to which drone strikes have become an increasingly important policy during the course of Obama's tenure – especially outside declared theaters of

Table 6.1 Numbers of reported drone strikes in Pakistan, Yemen and Somalia (2001–2013)[10]

	Pakistan	**Yemen**	**Somalia**
2001–2008	41	1	/
2009	52	/	/
2010	122	1	/
2011	73	8	9
2012	48	46	2
2013	24	24	1

Table 6.2 Numbers of reported drone strikes in Afghanistan, Iraq and Libya (2001–2013)

	Afghanistan[11]	**Iraq**[12]	**Libya**
2008	130[13]	43	0
2009	196	4	0
2010	277	0	0
2011	294	0	105
2012	494	1	0
2013	44 (as of January)	0	0

war. Drones have also played an increasingly important role in Afghanistan, as Table 6.2 demonstrates. The technological advances made in combat drones, as well as the financial resources that became available with the winding down of the US military presence in Iraq, however, can be said to have provided Obama with the opportunity to make greater use of drones. With the possible addition of Israel, the United States is the only state to use drone strikes in the sovereign territory of another.[14]

While drone strikes in combat zones are executed by the US armed forces, outside of such zones they have long been executed by the CIA[15] and the Joint Special Operations Command (JSOC), which is a military unit of the US Special Forces that was also charged with the Bin Laden operation and has been growing in importance since 9/11.[16] A policy change in the spring of 2013 transferred responsibility for all drone programs outside combat zones to JSOC, although this will likely only come into full effect by the end of 2014.[17] Drones controlled by the CIA are reportedly piloted from headquarters in Langley, Virginia, and controlled by civilians who are either CIA officers or privately contracted, retired CIA and military personnel.[18] Their "controllers" rely on information obtained from intelligence officers on the ground and signals intelligence in order to correctly identify a target.[19] Increased reliance on drones for reconnaissance, surveillance and targeting activities is also evident in the number of drones in the US army's arsenal: While there were, for example, 167 drones of all different types in the possession of the DOD in 2002, by 2010, their number had increased to 7500.[20] In addition, given the number of reported drone strikes in Table 6.1, the CIA has clearly advanced its number of drones in operation, but does not disclose information on this.[21]

The Obama administration's public acknowledgment of drone strikes outside theaters of war took a long time to surface. From early on, however, the killing or capturing of Al Qaeda leaders was presented as one of the administration's success stories. President Obama's first State of the Union speech in 2010, for example, highlighted that "in the last year, hundreds of al Qaeda's fighters and affiliates, including many senior leaders, have been captured or killed – far more than in 2008."[22] US successes in breaking Al Qaeda's momentum, "knowing that they can't escape the reach of the USA," have also been connected to the United States strategically retaking its leadership role as "the one indispensable nation in world affairs."[23] Reports on how these successes have been achieved are at times spurious and require some reading between the lines. Obama thus spoke to the General Assembly in 2010 of "a more targeted approach" where the United States employs its counterterrorist efforts "without deploying large American armies."[24] His counterterrorism adviser, Brennan, used similar drone-reminiscent language in speaking about "delivering target, surgical pressure" as part of Obama's National Strategy for Counterterrorism in June 2011 while also avoiding explicit references to drones: "We will apply the right tools in the right

way and in the right place with *laser focus*. . . . In some places, such as the tribal regions between Afghanistan and Pakistan, we will deliver *precise and overwhelming force* against al Qaeda."[25]

Apart from an early reference to the administration's targeted killing practices in the Harold Koh scene-setting speech to ASIL in 2010, it was only in 2011 and 2012 that key senior officials – Attorney General Eric Holder (March 2011),[26] John O. Brennan (September 2011[27] and April 2012)[28] and General Counsel of the Department of Defense Jeh C. Johnson (February[29] and November 2012)[30] – provided more information on the policy in a series of speeches. The first time President Obama mentioned drone strikes was in response to an interview question in January 2012.[31] The first time he spoke at length about his administration's drone program was during the May 2013 speech given at the National Defense University.[32] Despite the time appropriated to drones, the formula Obama presented in the speech centered on the process in which his administration decided on *when* and *how* strikes should be undertaken. In essence, it mirrored previous official statements and was devoid of new revelations or insights.

With the exception of the first report by Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and a congressional hearing by the Committee on Oversight and Government Reform entitled "Rise of the Drones: Unmanned Systems and the Future of War" in 2010, the US drone program has long been subject to surprisingly little criticism and scrutiny, particularly on the international level.[33] This dynamic only changed in 2012 and garnered traction with a hearing of the US Senate Committee on the Judiciary entitled "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing" in April 2013. This was followed with two further UN reports – a second report by Alston and a first drone-related report by Ben Emmerson, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – as well as two NGO reports from Human Rights Watch and Amnesty International in the fall of 2013.[34]

In examining the purview of international law with regard to drone strikes against terrorist targets, there are two apparent difficulties. First, although international law has over time come to include provisions on how to respond lawfully to terrorist threats, developments in this area have generally been slow and long been stalled by the international community's failure to agree on a definition of terrorism, as described in Chapter 2. International law, therefore, continues to retain an interstate character, which makes decisions on the (lawful) use-of-force against terrorists harder to examine. Second, international law is ill-equipped to deal with the myriad of advances in weapons technology; by the time law is adjusted for one set of technologies, a new set emerges. Therefore, the use-of-force in the context of drones poses questions to international law that, as it stands, it is by no means designed to definitively address.

Drone attacks and their legality: *Jus ad bellum*

Although drones are only one of the instruments used in the Obama administration's war on Al Qaeda, the first set of legal questions surrounding their use centers on *when*, and indeed, *if*, they might lawfully be used – embodied in the *jus ad bellum* principles. There are two key paradigms to examine here: the law of (non-international) armed conflict and the exercise of the right to self-defense, which is in turn restricted by the principles of necessity and imminence. It is important to note here that although the terms necessity and proportionality also figure as key legal standards in *jus in bello*, they have different specific legal meanings and applicable criteria in the context of *jus ad bellum*. Here, necessity "requires that force only be used when there is no other [viable] alternative course of action to deter the attacks against a state."[35] An imminent threat is considered to be defined in international customary law by the *Caroline* standards as "instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[36]

As mentioned in the introduction to this chapter, the legal arguments put forward by senior officials of the Obama administration to defend the drone policy have not concerned themselves with *jus ad bellum* in much detail. In line with the administration's arguments pertaining to the use-of-force on a more general level, the United States is in a state of "*armed conflict* with Al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its *inherent right to self-defense* under international law."[37] Similar arguments, using almost the same turn of phrase, are made by Brennan and Holder:

> [W]e are at war with al-Qa'ida. In an indisputable act of aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, al-Qa'ida seeks to attack us again. Our ongoing armed conflict with al-Qa'ida stems from our right – recognized under international law – to self-defense.[38]

As these words illustrate, the Obama administration has employed a mixture of the law of armed conflict and self-defense arguments in its campaign to legitimize the use of lethal force though drone strikes, which we in turn now examine.

Drones as a necessary means of self-defense used in a state of armed conflict

First, using drones, just like other means of military force, can be deemed as legal because the United States is in a *state of (non-international) armed conflict with Al Qaeda*. IHL, applicable to situations of armed conflict, allows more leeway for using force in war contexts than during peacetime. This is an

important point to make by the administration as targeting specific individuals with the sole purpose of using lethal force outside situations of armed conflict violates international human rights law, in particular the right to life, which is also a norm of *jus cogens*.[39] By contrast, in an armed conflict, "a State is permitted to kill designated 'combatants' and to incur civilian casualties so long as they comply with the *jus in bello* principles."[40] Drones are in this sense just another form of targeted killing that may be employed by states in armed conflict. The conduct of war in war zones is clearly delimited, openly declared and involves troops stationed on the ground. On this basis, many legal scholars agree that drone usage inside declared theaters of war – in this case in Afghanistan, Iraq and Libya – does not pose *jus ad bellum* questions, while their usage has to be conducted in line with *jus in bello*. Indeed, used in the context of armed conflict, drones are assumed to be no worse than other instruments of conventional warfare, such as ballistic missiles, rockets and the like.[41]

Critics of the practice, such as UN Special Rapporteur Alston, however, argue that drones represent a significant change in the conduct of warfare because they "mak[e] it easier to kill targets, with fewer risks to the targeting state,"[42] which may result in lowering the state's threshold for using force. Indeed, as succinctly articulated by Michael Walzer: "The easiness of killing should make us uneasy."[43] For the likes of Peter Singer, an expert on robotic technologies in warfare, the remoteness of the person pulling the trigger may make the act of killing easier as it dehumanizes victims, impersonalizes the battle and reduces personal accountability.[44] Building on this sentiment, Air Force Major General James Poss describes it as

> the overwhelming advantage we get is that if you want to go and talk to a world expert on Iraq or Afghanistan, maybe you don't need to go to Iraq or Afghanistan. Maybe you need to talk to that young captain down at Creech [Air Force Base, Nevada], because they've been staring at that ground for the past nine years.[45]

In this regard, therefore, targeting actions are executed by people who are not, and never have been, even in close physical proximity to their targets and frequently have no "real-life" experience of the war zones they only encounter on screen.

In the context of drone attacks within the territory of sovereign states – such as Pakistan – there is another twist to drones and how they in effect lower the threshold to use force. Because they do not necessitate deploying US troops "into harm's way," drones are not only a more acceptable choice for US policymakers in the Obama administration, but they can also be perceived to be the more acceptable intervention option for target states. Although Pakistan has expanded its criticism of US drone strikes, discussed below, for an extensive period of time it seemed to more readily acquiesce itself with intervention in the form of targeted strikes. In Obama's eyes,

despite the potential challenges such practices present to bilateral relations with regard to territorial integrity, the "recipient" states' role is imperative:

> Probably our ability to respect the sovereignty of other countries is enhanced by the fact that we are able to pinpoint strikes on an Al Qaeda operative in a place where that military of that country may not be able to get them. . . . For us to get them in another way would probably involve a lot more intrusive military actions than the one that we are already engaging in.[46]

The president also expressed this view in his May 2013 address, when noting how the 2011 Osama Bin Laden raid did (apparently) more to damage the relationship with Pakistan than seven years worth of drone strikes on their territory – even to the extent of diplomatic relations being cut off.[47] Because the National Defense University speech was designed to highlight the legality and legitimacy of drone usage, its true essence should of course be taken with a degree of caution.

That drones make the use-of-force easier, and therefore lower the threshold for the use-of-force on a number of different levels, opens up other debates. On top of the "state of armed conflict" argument, Koh also holds that the United States is *acting in self-defense*, linking US drone policy to another (distinct) set of legal justifications. In this regard, the self-defense argument goes beyond limiting the use-of-force to the declared theaters of war *only*, but instead makes "it applicable" and lawful wherever attacks are staged and planned by Al Qaeda "without doing a separate self-defense analysis each time."[48] As Koh argues,

> Al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law . . . to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.[49]

Therefore, "US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."[50] Variations of the ongoing conflict with Al Qaeda argument are also evident in all key speeches on drones, as well as practically every single time Obama or any of his administration's senior officials mention Al Qaeda. Compare, for example, then CIA director Leon Panetta speaking in 2009:

> Its [Al Qaeda's] leaders in Pakistan continue to plot against us. Its affiliates and followers in Iraq, North and East Africa, the Arabian Peninsula and other countries continue to work to develop plans that threaten this country and that threaten the potential for our ability to survive.[51]

The key terms used in Panetta's arguments are "self-defense" and "ongoing conflict." Therefore, justification for the use-of-force is based on Article 51 of the UN Charter, although not explicitly mentioned, and the fact that attacks are currently in the process of being planned by members of Al Qaeda, the Taliban and associated forces. But what does this mean? The entire argument hinges upon the continuous and constant, in other words, *imminent* threat of attacks planned by Al Qaeda and its affiliates. In this regard, we will consider two major legal issues in some more detail here: the concept of imminence this reasoning implies, which is frequently mixed with the principle of necessity, and the group of actors who are identified as incessantly planning attacks.

What constitutes *an imminent threat* depends upon whether one follows a preventive or preemptive understanding of the degree of imminence. As in Chapter 2, preemptive self-defense pertains to responding to a near-certain threat in the near future, or in simple terms, attacks on the brink of being launched; and are generally thought to be consistent with customary international law. In contrast, preventive self-defense is a response to "an intangible and theoretical prospective threat in order to prevent that threat from coming to fruition . . . is almost universally regarded as an illegal use of force."[52] Comparing this with the arguments provided by Koh, Holder and Brennan illustrate the extent to which the Obama administration's targeted killing campaign is, in fact, engaging in legally dubious preventive self-defense in the sense that Al Qaeda and affiliates do not pose a threat that is imminent in a strict temporal sense.[53] Yet, as the official argument posits, responding to terrorist threats has necessitated working with different imminence standards. Terrorists, by the very nature that defines them, constitute a constant, imminent threat because they are considered to be always in the process of planning the next attack and possess the means to carry these out. As Holder summarizes,

> [Al Qaeda] leaders are continually planning attacks against the United States, and they do not behave like a traditional military – wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place and manner of an attack become clear. . . . In hours of danger, we simply cannot afford to wait until deadly plans are carried out – and we will not.[54]

Legal scholar Ruth Wedgwood, therefore, calls terrorist attacks "underway, not simply potential."[55] Given the complete lack of transparency surrounding the planning of terrorist attacks, which makes them – in contrast to state attacks – almost undetectable in advance, these concerns are certainly warranted.[56] Nonetheless, only few legal scholars support the

notion that what constitutes as an imminent threat should be contextual and that the right to self-defense should be flexibly interpreted as "appropriate to the threats and circumstances of the day."[57] However, this "interpretation of the word 'imminent' that bears little relation to traditional legal concepts" was, as we have discussed in Chapter 4, prevalently used by the Bush administration.[58]

Of course, the clearest definition of the imminence concept used by the Obama administration can be found in a leaked Department of Justice memo that outlines the circumstances to which US citizens can be the subject of drone attacks.[59] It notes that the existence of an imminent threat "does not require the US to have clear evidence that a specific attack on US persons and interests will take place in the immediate future."[60] This is clearly a preventive understanding of imminence. What is more, as Rosa Brooks argues, the memo also disassociates imminence from its common temporal connection to "immediacy"[61] and conflates the identification of an imminent threat with the status of belonging to a particular group: "an individual poses an imminent threat of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force." Because in this reasoning Al Qaeda leaders present perpetual imminent threats;[62] one of the key criteria to be examined before using force is therefore *always* already fulfilled in countering terrorist threats, rendering its controlling power obsolete.

In evaluating such contested debates and definitions posited by the aforementioned analysts, it is evident that the reasoning put forward by the Obama administration is a continuum of the imminence concept espoused and wielded by the Bush administration. As Brennan states:

> We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. . . . Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an "imminent" attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.[63]

The supposed increase in support for an expansion of the imminence concept is neither visible in legal opinion, nor as Brennan purports, in state practice with the possible exception of the stance taken by the United Kingdom.[64] Likewise, he does not provide any precise stipulations on how the understanding of imminence has been expanded. In any case, two supportive states do not make general state practice qualifying, nor suggest an alteration of customary international law – instead, as discussed in Chapter 2, the latest formulation of *opinio juris* on the matter in the *World*

Summit Outcome 2005 stated, to the contrary, that the original formulation of the law of self-defense continues to be relevant.

Aside from the usually temporal criterion of imminence, force should only be used in self-defense if it is *necessary*. We have already drawn attention to the frequent characterization of the use-of-force as "necessarily" employed by the Obama administration on a general level in Chapter 5. It also appears as the standard replica in practically all drone-related speeches. To recall, necessity in *jus ad bellum* means that force is used as a last resort when there is no feasible non-forcible alternative. Obama expressed his preference for capturing terrorist leaders[65] and senior officials pointed to a "feasibility examination" of capturing terrorists taking place before a decision to use force is reached.[66] That said, they also highlight how capture tends to be unfeasible *per se* when talking about terrorists, particularly outside combat zones: "These terrorist are skilled at seeking remote, inhospitable terrain – places where the United States and our partners simply do not have the ability to arrest or capture them."[67] In light of the priority attributed to the war against Al Qaeda in the Obama administration's security policy, drones take on an increasingly important role because they represent the most (cost)efficient way of "taking out" terrorist leaders without having to deploy US soldiers. In a much publicized remark after a public lecture in 2009, Leon Panetta, then director of the CIA, referred to the US drones practice in Pakistan as "the only game in town in confronting and trying to disrupt the al Qaeda leadership."[68] In defining the use of drones as always fulfilling the criterion of necessity in the case of self-defense against Al Qaeda, such arguments and definitions render the necessity principle – a principle that is supposed to limit the use-of-force – essentially superfluous.

The role proportionality plays in the Obama administration's reasoning is also limited. Proportionality as a *jus ad bellum* principle restricts the defensive force that may be used "to those actions necessary to defeat the armed attack."[69] The administration has not explicitly addressed the principle of proportionality, presumably because drones are supposed to be proportional in character, due to their "precise" ability to take out individual Al Qaeda leaders and thereby mitigate the threat. Indeed, when one combines this reasoning with the characterization of the use of drones as necessary *per se* and the previous discussion on imminence, it becomes clear that for the Obama administration, the use-of-force in the form of drone strikes is *automatically* legal by definition.

The global scope of the war against Al Qaeda and its affiliates and adherents

Apart from legal justifications based on armed conflict and self-defense, the Obama administration's arguments also raise legal issues in regards to the *scope of the armed conflict*. Following the arguments put forward by the administration, as well as its predecessor, it is evident that there are no

geographical limits whatsoever to this war against Al Qaeda. Obama articulated these sentiments in his *2011 State of the Union*: "we've sent a message from the Afghan border to the Arabian Peninsula to all parts of the globe: we will not relent, we will not waver, and we will defeat you."[70] Obama also notes that "[b]eyond Afghanistan, we must define our effort not as a boundless 'global war on terror,' but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America."[71] But how targeted is this effort really? In essence, such statements endorse the US drive to use force wherever Al Qaeda and its affiliates go; and the lawful characterization of the use-of-force becomes a sheer prop to open up the path toward declaring a global state of war.

The global potential that such actions may engender, of course, is enhanced by the broad group of actors the United States is in a war against. Although no longer a "war on terror," Koh, for example, referred to the "war against al Qaeda, the Taliban and affiliates," and Holder pointed to the continuing threat posed by "al Qaeda, the Taliban, and associated forces."[72] This was further specified in the National Counterterrorism Strategy of 2011: "The preeminent security threat to the United States continues to be from al-Qa'ida and its affiliates and adherents."[73] The *group of actors against whom lethal force may be lawfully used* is therefore quite broad, particularly if one considers the inclusion of affiliates defined as "groups that have aligned with al-Qa'ida" and the somewhat elusive "adherents." In the context of Al Qaeda, it is evident that it is something of a "franchise" of international terrorism that has seen the formation of varying regional Al Qaeda groups and members. As such, this broad identification of threatening actors opens up the possibility to expand the use-of-force as part of the US counterterrorism efforts almost indefinitely. In 2010, Al Qaeda on the Arab Peninsula (AQAP) in Yemen and Al Shabaab in Somalia were added to the group of actors planning attacks against the United States – and therefore became, as the Obama administration put it, targets of lawfully used lethal force. Table 6.1 highlighted the practical consequences of this decision. The *National Strategy for Counterterrorism of 2011* mentioned seven global regions from South Asia, to the Arabian Peninsula, East Africa and Maghreb and the Sahel as "areas of focus," raising the potential for a further extension of drone targets.[74]

While making the connection between Al Qaeda "proper" and groups – such as AQAP – is relatively straightforward, especially as AQAP members have been linked to attacks on US soil,[75] identifying Al Shabaab as planning attacks on US soil proves to be more challenging.[76] Al Shabaab makes use of terrorist tactics both inside and outside Somalia, clearly evident with their attacks on aid workers and peacekeepers of the African Union Mission to Somalia (AMISOM), as well as the August 2013 attack and hostage crisis in Nairobi's Westgate Mall.[77] Although it has threatened attacks on "all enemies of Islam," including in the main the United States, the focus of its reported

activities has remained regional thus far.[78] That said, its Al Qaeda associations already make Al Shabaab leaders in Somalia lawful targets of the United States' use-of-force in self-defense. In legal terms, this (continued) possible expansion of lawful targets for the use-of-force has enabled the further dilution of what counts as an imminent threat. For instance, in Afghanistan, the target list for drone attacks presented to the Senate Foreign Relations Committee in 2010 also included as many as 50 Afghan drug lords who were suspected of helping finance the Taliban, but had no reported links to Al Qaeda.[79] In its efforts to secure continued cooperation from the Pakistani authorities, the Obama administration has also added a Taliban operational unit in Pakistan – whose status of presenting an imminent threat to the United States is also doubtful – to its target list for drone strikes.[80]

As acknowledged openly in the *National Strategy for Counterterrorism* of 2011, adherents to Al Qaeda are

> individuals who have formed collaborative relationships with, act on behalf of, or are otherwise inspired to take action in furtherance of the goals of al-Qa'ida – the organization and the ideology – including by engaging in violence regardless of whether such violence is targeted at the United States, its citizens or interests.[81]

The broad linking of terrorist groups to Al Qaeda, whose operational leaders by definition constitute an imminent threat, has serious consequences for the *geographical expansion of the war on Al Qaeda* and affiliates in two ways. First, it takes the use-of-force outside so-called declared theaters of war or combat zones to wherever Al Qaeda and its affiliates find "safe havens" from which to stage their attacks. By 2013, this led the United States to use drone attacks on the sovereign territory of three UN member states, namely Pakistan, Yemen and Somalia. Al Qaeda and Taliban fighters seeking refuge in the mountainous, inhospitable and under-administered border region of Afghanistan and Pakistan – especially in the Federally Administered Tribal Areas (FATA) to the North – and setting up training camps from where they plan and launch attacks on Afghanistan and the United States have been a main concern of both the Bush and Obama administrations. As a remnant of British colonialism in the region, the Afghanistan-Pakistani border is a particularly vague one. There is no full agreement on the exact location of the so-called Durand Line, and military officials in the region report that "rival maps show discrepancies of multiple kilometers."[82]

On a legal basis, scholars such as vocal drone critic Mary Ellen O'Connell have emphasized that using force on the territory of states "not responsible for any armed attack on the defender under Article 51" is not lawful, nor does "the presence of an organized armed group, even one engaged in attacks on the defender . . . justify attacking a state not responsible in Article 51 terms."[83] This line of thinking is based on preserving the territorial integrity of states and the prohibition of the use-of-force in Article 2(4) of

the UN Charter. In this sense, the use-of-force against non-state actors acting from the territory of a UN member state has traditionally been only permissible when that attack is attributable to the state itself, as we have discussed in Chapter 2.[84] The Obama administration, however, follows a different legal interpretation that builds upon and continues legal arguments on the use-of-force purported by the Bush administration. The basis of such arguments is that a state's right to self-defense can supersede the territorial integrity principle. If, acting in self-defense, the state uses force against non-state actors operating from the territory of another state – who is not attributable for these attacks – it can be still considered legal if solely the non-state party but not the state itself is targeted.

Legal arguments supporting the use-of-force after 9/11 also challenge the extent to which the state from where terrorist attacks are planned or launched is able or willing to deny safe havens to terrorists. Security Council resolutions passed unanimously in the 9/11 aftermath clearly "condem[n] the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network" and Security Council resolution 1373 obligated them to implement an unprecedentedly wide range of counterterrorist measures, including to "deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens."[85] There is, however, still an important dichotomy between states who harbor terrorists willingly, such as Afghanistan in September 2001, and those who are not in effective control of all of their territory, such as Somalia. Whether a state is unable to deny safe haven to terrorist actors is difficult to ascertain. Reports in regard to Pakistan, for example, have claimed that it simply does not have the capacity to go after all terrorists acting from its territory and that it actively supports,[86] or at least tolerates, terrorist actors acting from "within" its borders.

Although the counterterrorism obligations instituted by Security Council resolution 1373 are demanding, the resolution does not authorize the use-of-force on the territory of a member state in the case of non-compliance – which is precisely what the Obama administration purports and does. According to Koh, the administration's targeting decisions consider both "the sovereignty of the . . . states involved, and the willingness and ability of those states to suppress the threat the target poses."[87] The administration, therefore, follows arguments presented by its predecessor in which the use-of-force on the territory of a sovereign state with whom the United States is not at war is "consistent with . . . international legal principles if conducted, for example, with the consent of the nation involved – or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States."[88] The legality of these arguments, as far as the "unwilling or unable" formulation goes, has been challenged since the Bush administration's tenure. In his May 2013 speech on drones, Obama reformulated this argument, albeit slightly, in which authorizing the use-of-force is applicable "when there are no other governments capable

of effectively addressing the threat."[89] Despite such attempts to redefine, it does not change the core essence of its role in the US use-of-force policy.

Another leeway into circumventing the basic territorial integrity provision comes in the form of the *consent* to the use-of-force by the affected state, through either tacit agreement or invitation. Examining the three known cases of drone strikes on the territory of sovereign states does not provide straightforward answers to this topical issue. Pakistani authorities are, for example, assumed to have tacitly consented to and cooperated with US drone practices for a considerable amount of time.[90] Although civil society organizations and political parties in opposition have long been critical of the practice, it was only in 2011 that tensions came to the fore. In October 2011, Pakistan's main intelligence agency, the Inter-Services Intelligence (ISI), claimed that "Americans unilaterally choose their targets."[91] In essence, the CIA would send a monthly fax to its intelligence partners in Pakistan "outlin[ing] the boundaries of the airspace the drones would use . . . referred to as flight 'boxes,' " who would then acknowledge receipt but not officially endorse the strikes.[92] This, "combined with the continued clearing of airspace to avoid midair collisions" was therefore assumed to be a form of tacit consent on the part of Pakistani authorities.[93] As conveyed in Chapter 5, the Bin Laden raid in May 2011 was met with considerable anger on the part of Pakistani authorities and led to the ISI ceasing to acknowledge the receipt of the monthly CIA reports; although it should be noted that the reports have continued to be sent.[94]

The situation escalated in November 2011, when a NATO drone strike near the Afghan border killed 28 Pakistani soldiers, leading Pakistani authorities to close truck supply routes into Afghanistan and a refusal to give the United States permission for using Shamsi airbase to launch future drone attacks.[95] The United States has since staged all of its drone strikes in Pakistan from Afghani territory.[96] The attack also led to a parliamentary review process, and in March 2012, the Pakistani parliament demanded an end to US drone strikes on Pakistani territory on account of them violating Pakistani sovereignty.[97] Despite these actions, the strikes have continued. The latest example for the increasingly dubious character of consent given by Pakistan pertains to the drone strike on 1 November 2013, which killed the leader of the Tehreek-e Taliban Pakistan (TTP), Hakimullah Mehsud. As Pakistani authorities were engaged in peace talks with Mehsud, the killing sparked extensive criticism.[98] Ironically, the Obama administration justified the strike by stating that Mehsud was killed out of military necessity and stated that the peace talks were a matter of Pakistani internal affairs on which they could not comment.[99] The increased Pakistani condemnation of drone strikes has also been accompanied by some international attention. According to Ben Emmerson, UN Special Rapporteur on counterterrorism and human rights:

> The position of the Government of Pakistan is quite clear. It does not consent to the use of drones by the United States on its territory and it considers this to be a violation of Pakistan's sovereignty and territorial integrity. As a matter of international law the US drone campaign in Pakistan is therefore being conducted without the consent of the elected representatives of the people, or the legitimate Government of the State. It involves the use of force on the territory of another State without its consent and is therefore a violation of Pakistan's sovereignty.[100]

As of December 2013, relying on the argument of tacit consent by Pakistani authorities to justify US drone strikes remains on unstable footing to say the least.

The case of governmental consent in *Yemen* is a more definitive example, particularly since the change in leadership from Ali Abdullah Saleh to vocal drone supporter Abd-Rabbo Mansour Hadi in late 2011. Hadi has emphasized both his personal involvement in the authorization process of strikes on Yemeni territory and his belief in the effectiveness of drones as a means of combating Al Qaeda.[101] Previously, President Saleh had only issued tacit consent for US drone strikes; on some occasions, Yemeni authorities even claimed public responsibility for drone strikes on their territory that were actually implemented by the United States in order to avoid public disclosure of such support.[102] Although governmental consent has become certain with Hadi, strikes have also been met with increasing criticism relating to the amount of civilian casualties and lingering questions pertaining to the effectiveness of drones in actually thwarting terrorism.[103] The most prominent case was the testimonial given by Farea al-Muslimi to the US Senate Judiciary Sub-Committee on the Constitution, Civil Rights and Human Rights in April 2013.[104] Al-Muslimi, a native of Yemeni village Wasseb that was hit by a drone strike, criticized the Obama administration for not complying with *jus ad bellum* standards in its targeting decisions. He argued that the Al Qaeda leaders who were killed in the strike alongside civilians could have easily been captured, and the use-of-force "as a last resort" was not applied.[105] In a December 2013 vote, the Yemeni parliament urged the United States to stop drone attacks in the country, underlined with concerns for civilian casualties and Yemeni sovereignty.[106] Although the parliament can only issue non-binding motions in Yemen's political system, this indicates growing domestic opposition to drone strikes and increasingly qualified "consent."

Additionally, the emergence of drone strikes in *Somalia* also needs to be included in the equation. Because the United States only started targeting the African state in 2010, it has received the least coverage so far, and few civilian casualties have been reported. That said, the few reports that do exist show support/consent on the part of governmental actors, who have lacked central control over most of Somalia's territory since the early 1990s, as well as some popular disquiet with the military necessity of the policy.[107]

In sum, the Obama administration argues that its drone targeting policy both inside and outside declared theaters of conflict is legal because it is in a state of international armed conflict with Al Qaeda and its affiliates, and as such, uses force strictly in self-defense. Of course, such arguments are dependent upon defining terrorists as imminent threats by default, underlined with necessity arguments that drones fulfill *per definitionem*, and thereby, cancel out the prudential *jus ad bellum* criteria. In justifying the war against Al Qaeda and its affiliates in this fashion, "a radically new and geographically unbounded use of state-sanctioned lethal force"[108] can take place.

Drone attacks and their legality: *Jus in bello*

The second dimension of legality when examining drone strikes pertains to the question of *how* their usage can be considered as lawful. IHL – also referred to as the law of armed conflict – is applicable in this context. It states that any kind of armed attack has to conform to three primary principles: *necessity*, *proportionality* and *distinction*. Part of both the *Geneva Conventions* and *Additional Protocols* and customary international law, these principles define warfare that targets civilians, specifically or indiscriminately, as illegal. In essence, they are designed to protect civilians and mitigate any harm that can be done to them.[109] As such, these principles will now be considered with regard to justifications provided by the Obama administration in its drone policies.

As per previous discussion, it is evident that while the Obama administration takes greater heed to the *jus in bello* principles, the first principle – military *necessity* – appears to receive the most limited treatment. Necessity, in the IHL case, does not view the use-of-force as a last resort but is based on case-by-case evaluation, depending on whether it is necessary to achieve the specific goal of a military operation.[110] The specific goal of the military operation in which the United States uses drones is defeating Al Qaeda, which should make, in particular, senior leaders of Al Qaeda legitimate targets because they present the most imminent of threats. According to Holder, lethal targeting decisions against "a senior operational leader of al Qaeda or associated forces" are lawful, even when the target is a US citizen, and when "the US has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States" and "capture is not feasible."[111] Despite this professed focus on senior leaders – which is already based on an expanded concept of imminence – past targeting decisions have shown that a much wider group of people have been the subjects of targeted killings or have appeared on so-called kill lists. In his testimony to the US Senate Judiciary Subcommittee in April 2013, Peter Bergen summarized that "overwhelmingly the victims of the strikes are lower-level militants who do not have the capacity to plot effectively against the United States."[112] This poses serious questions as to the military necessity

of drone strikes, as those targeted could have been, according to Bergen, easily captured but instead were killed. Arguments put forward by senior officials on who might legitimately be targeted are not entirely consistent on this point. Indeed, while there is supposedly a focus on senior leaders as targets of drone strikes, Brennan equates the targeting of enemy leaders during World War II with considering "individuals who are part of al-Qa'ida or its associated forces . . . legitimate military targets," without classifying their level of seniority in the organization.[113]

Moreover, the system of compiling "kill lists" consisting of suspected militant leaders for drone strikes is elusive to say the least. Reportedly, there is a weekly routine: Officials from several US agencies review a group of preselected, terrorist leader suspects on the basis of their threat potential.[114] Both the selection criteria of this group and the preselection criteria remain unclear, as does the extent to which imminence and other law of war standards are considered in the equation.[115] Additionally, it is also unclear on who exactly compiles these "kill lists." To just war theorist Walzer, this problem is exacerbated by the fact that the CIA – and not the military – is in charge of most of this compilation, rendering the procedure entirely secret and evidently not subject to any legal code or judicial mechanisms.[116] The elusive approach has been linked to an attempt to "shield officials involved against possible court challenge"[117] and further highlights the similarities in the counterterrorism policies pursued by the Obama and Bush administrations.

Most of the valid information senior officials provide on the review process is an appeal to the (American) public to quite literally put "trust" in the moral standards that go into targeting decisions by the administration, and particularly Obama himself. As Brennan states,

> [t]here is absolutely nothing casual about the extraordinary care we take in making the decision to pursue an al-Qa'ida terrorist, and the lengths to which we go to ensure precision and avoid the loss of innocent life. . . . To ensure that our counterterrorism operations involving the use of lethal force are legal, ethical and wise, President Obama has demanded that we hold ourselves to the highest possible standards and processes.[118]

Speaking at a campaign event, Biden noted,

> [t]he buck literally stops on the President's desk in the Oval Office. Only the toughest decisions land on that desk. And often as not, his advisors are in disagreement. The President sits there by himself and has to make the decision, often reconciling conflicting judgments that are made by very smart, honorable, informed people. And the President is all alone at that moment. It's his judgment that will determine the destiny of this

> country. He must make the hard calls. I'd respectfully suggest President Obama has made those hard calls with strength and steadiness.[119]

The rationale of the aforementioned speeches presents some significant concerns. First of all, they raise the question on whether such portrayals are even realistic. Given the number of drone strikes that have been authorized during Obama's tenure, it seems highly unlikely that his schedule has allowed the time to *personally* decide on each. Additionally, it should be noted that the most explicit speeches outlining the Obama administration's legal reasoning on drone attacks only came in the spring of 2012 when the presidential election campaign was in full swing. This illustrates the moral high ground that President Obama supposedly occupies in the drone target decision-making process – as long as he is deciding, it is "acceptable" to *not* conform to international law or any form of rules. In contrast, during the election campaign Mitt Romney was portrayed as an unknown quantity who should not attain such moral privileges. As Biden said at the time: "In my view, he [Romney] would take us back to the dangerous and discredited policies that would make America less safe and Americans less secure."[120] What this policy choice largely ignores is that even if one wants to follow the administration's appeals to trust, they overlook the precedents set for future presidential authority and the potential for other international legal "adjustments."[121]

We turn now to examining the Obama administration's legal arguments on proportionality and distinction, both of which are closely interrelated in IHL. *Proportionality*, in practical terms, refers to the act of balancing between reaching military objectives and incurring civilian casualties.[122] Attacks with civilian deaths are therefore considered war crimes when launched "in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage."[123] As Brennan states:

> Targeted strikes conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.[124]

Koh argues that "targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects."[125] Because drones have superior "sensors and processing power," they can "lessen the number of mistakes made, as well as the number of civilians inadvertently killed."[126] Brennan highlighted this technological advantage prominently in his 2012 speech:

> A pilot operating this aircraft remotely . . . might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision – the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qa'ida terrorist[127] while limiting damage to the tissue around it – that makes this counterterrorism tool so essential.[128]

Drones are therefore considered a proportional weapon *par excellence* – or so senior officials claim – because their precision makes reaching key military objectives with a very low risk of civilian casualties possible. In an attempt to embolden and further legitimize these sentiments, Obama's May 2013 speech twice highlighted the disproportionate amount of force used by Al Qaeda in comparison: "Remember that the terrorists that we are after target civilians, and the death toll of their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes."[129]

Drone strikes are also, again almost by definition, in clear fulfillment of the principle of distinction, which holds that the use-of-force must make every effort to differentiate between combatant and civilian targets. As again stated by Brennan:

> Targeted strikes conform to the principle of distinction . . . . With the *unprecedented* ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that *never before* has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.[130]

Simply put, drones are far more capable of using force both proportionally and discriminately than many other weapons commonly used and will, therefore, remain a significant pillar in the Obama administration's counterterrorism suite.

In the context of a *jus in bello* perspective, some of the most concerning legal arguments presented by the Obama administration are that drones offer, by their very "nature," a better fulfillment of law of war principles than other means of warfare. As Eric Holder's speech illustrates, the official line of argument lists the law of principles that the United States complies with followed by a brief statement signifying how the use of drones adheres to such principles.[131] The Obama administration's *jus in bello* arguments therefore combine to create what has been called the "drone myth,"[132] which has been criticized on a number of levels. First, that drones can lower the risk of civilian casualties "[b]y loiter[ing] and gather[ing] intelligence for long periods of time before a strike, coupled with the use of precision-guided munition" has been characterized as "a positive advantage from a humanitarian law perspective."[133] However, additional information to interpret that footage in the process of decision-making on individual strikes is still required. This

additional information is supplemented by informants in the field who may or may not be reliable, signals intelligence, or intelligence officers on the ground. In other words, "the strikes are only as accurate as the intelligence that goes into them."[134] As Sarah Kreps and John Kaag state, "Some observers wrongly conflate increasingly sophisticated technology with increasingly sophisticated individual judgment."[135]

Additionally, as noted by UN Special Rapporteur Alston, these accuracy claims are "impossible for outsiders to verify."[136] There are two reasons for this: First, the majority of US drone programs are classified as covert and therefore report no official numbers of civilian casualties. Reports made by two non-governmental organizations (NGOs) based on news coverage and other sources display a wide range of civilians killed in drone strikes as Table 6.3 illustrates.

A second reason that makes it hard to evaluate the principles of proportionality and discrimination is that the numbers of civilian deaths occurring from drone strikes are subject to the definition of "civilian." IHL notes that civilians are "all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*." Civilians "enjoy general protection"[137] and "shall not be the object of an attack,"[138] "unless and for such a time as they take a direct part in hostilities."[139] The kinds of activities that constitute taking direct part in hostilities have been subject to different state interpretation, which is why the detailed interpretive guidance of the matter provided by the IHL authority of the International Committee of the Red Cross (ICRC) is a key source. Acts amounting to direct participation in hostilities must meet the following narrowly circumscribed and cumulative criteria:

> (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.[140]

Unfortunately, brevity does not allow us to enter into the intricacies of this definition. That said, what should be surmised are three qualifications for

Table 6.3 Civilian deaths from drone strikes in Pakistan and Yemen

	New America Foundation	**Bureau of Investigative Journalism**
Pakistan (2004–2013)	258–307 (unknown 199–334)[141]	504–1151[142]
Yemen	77–83 (unknown 31–50)[143]	59–125[144]

direct participation on hostilities: first, a threshold for the likely military or physical (death, injury, etc.) harm affected by the act; second, to be able to determine a significant causal relationship between the act and the likely harm caused; and third, the act must be specifically designed to support one party in the conflict at the expense of another.[145] The temporal dimension to when civilians lose their protected status is another important qualifier: Unless they engage in "continuous combat," they only lose their civilian protection "for such a time" as they participate directly in hostilities.

Following the ICRC's guidance, civilians would probably not "lose" their protection when they give Al Qaeda leaders a lift to the next town – unless they are doing so in conscious support and then only for the duration of that action. Or, if a group of people planted an improvised explosive device (IED) on the roadside – this would qualify as active participation in direct hostilities, and only for the duration of the act. Therefore, the same people could not be targeted at a different time, unless they continuously engage in active participation in direct hostilities of this type. Such examples illustrate that even with the ICRC guidelines, determining what constitutes "taking active part" in direct hostilities – not to mention where they begin and end – presents a common dilemma in warfare despite being quite narrowly circumscribed.[146] In light of the understanding the Obama administration apparently favors, "direct participation in hostilities" turns out to be a more slippery formulation. Reports by the *New York Times* suggest that Obama's definition "counts all military-age males in a strike-zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent."[147] This could account for a lower number of civilian deaths as compared to combatant deaths when determining death tolls produced by drone strikes.

Notwithstanding the complexities, there is an argument that drones could theoretically be used proportionally and discriminatively. Of course, this would be reliant on the information they are executed upon being correct, precise and targets individual leaders of high military importance, thereby, fulfilling the requirement of necessity. As discussed earlier, the past targeting decisions and declared targeting criteria, however, consistently do not fulfill this principle, especially in what are called signature strikes. In this instance, "the US conducts targeting without knowing the precise identity of the individuals targeted."[148] Groups of individuals may therefore be targeted on the basis of patterns of behavior "that the US links to militant activity or association."[149] Once again, the overall secrecy surrounding the administration's drone program, particularly outside combat zones, makes it difficult to assess the usage of signature strikes. In this regard, the numbers of minor-level militants killed by drone strikes provided by the New America Foundation in Table 6.3 may indicate the crucial role they play. Such strikes are a particularly favored measure by the CIA in Pakistan,[150] to the extent that the signature "suite" has extended to encompass "militant"

teenagers,[151] individuals who engage in rescue efforts after drone strikes, and funeral processions in its range.[152]

The controversy surrounding drone usage and the extent to which they undermine human rights has not gone unnoticed. The September 2013 report presented by Ben Emmerson – UN Special Rapporteur on the Promotion and Protection of Human Rights in Countering International Terrorism – to the General Assembly was specifically focused on assessing the degree that drone strikes conducted by UN member states adhere to the proportionality principle. His effort to summarize known civilian fatalities from drone strikes both inside and outside declared theaters of conflict signifies that information on these numbers is far from complete. As stated, "the single greatest obstacle to an evaluation of the civilian impact of drone strikes is lack of transparency, which makes it extremely difficult to assess claims of precision targeting objectively."[153] The lack of transparency and, as a consequence, accountability, Emmerson argues, stands in contrast to complying with the primary objectives of international humanitarian law.[154] Similarly, the UN High Commissioner for Human Rights, Navi Pillay, stated in her August 2013 address to the Security Council that the lack of transparency also "affects the ability of victims to seek redress."[155]

In extending upon Pillay's sentiments, UN Special Rapporteur Alston argues that "assertions by Obama administration officials, as well as by many scholars, that these [drone] operations comply with international standards are undermined by the total absence of any forms of credible transparency or verifiable accountability."[156] Once again, the administration's actions with regard to the use-of-force appear to speak louder than its words – particularly when one considers that increasing transparency has been among the administration's stated objectives in distinguishing itself from its predecessor. As Brennan remarked in 2012: "I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification."[157] This is true in so far as the Obama administration has by now at least acknowledged its drone program, something that was absent during the Bush White House tenure.[158] Yet, if the Obama administration were indeed serious about the high standards it constantly proclaims to adhere to in administering drone strikes, disclaiming numbers and documenting how precisely its attacks meet these high standards should be available for public consumption. Although with this in mind, it can be also argued that any notions of transparency pertaining to the administration's drone policy have been significantly hindered, given the role of the CIA in Pakistan, Somalia and Yemen: "just like all secret services, it operates on the basis of neither confirming or denying its operations."[159] In moving responsibility for drone strikes outside theaters of conflict to the Department of Defense in May 2013, the only "real" change on the issue of drones will not take place until at least the end of 2014.[160] Nonetheless, only time will tell if this "process"

change is more than a symbolic gesture. Many commentators and analysts, of course, are not overly optimistic given that the US Special Operations Forces under JSOC will from this point be responsible for the operation of combat drones, which in essence, does nothing to change the covert nature of the program as this also applies to targeting operations under JSOC command.

Notwithstanding the debate pertaining to the Obama administration's drone policy in international legal circles, within non-governmental organizations and the United Nations Secretariat, UN member states have, for the most part, kept schtum on this issue. Indeed, the drone issue has not even been raised by states in forums such as the Human Rights Council.[161] Although there is no overriding public support to speak of, simply doing nothing may also be considered a measure of silently condoning a state practice in the development of customary international law. In fact, as Rosa Brooks starkly highlights, some states may be keeping silent for strategic purposes, making the US lack of transparency all the more regrettable: "Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and – literally – get away with murder."[162]

Increasing public and legal debate on the drone policy pursued by the Obama administration has also questioned the strategic level – in other words, the extent to which Obama's use-of-force policy is actually reaching his stated objective of eradicating Al Qaeda and international terrorism. Scholars have shown that rather than combating terrorism, drone attacks have in many instances worked to engender the most important recruitment tool for terrorist groups such as Al Qaeda.[163] Other strategic costs of the drone program may include putting the stability and legitimacy of "consenting" local governments at risk and strengthening, or in fact, creating anti-Americanism.[164] To relate this to another example, albeit a slight digression, the policy of targeted killing that Israel has pursued in the West Bank and the Gaza strip since the 1970s has certainly not led to an end of Palestinian terrorist attacks. In the Obama context, the increasing overreliance on drone strikes by his administration may indeed lead to strategic failings for US foreign policy objectives insofar as spurring opposition against the United States and/or alienating its strategic partners. In this regard, the case of Pakistan provides an apt example and much ground for strategically questioning a program which "has killed many civilians inside a politically fragile, nuclear-armed country with which the US is not at war."[165]

Conclusion

Despite the administration's reassurances that its approach to using force through drone strikes complies with the applicable standards of

international law, it is evident – as this chapter has conveyed – that two major uncertainties undermine the accuracy of this claim.

First, the targeted killing of terrorist suspects qualifies as the preventive rather than the preemptive use-of-force in self-defense, and therefore, uses force outside the scope of the UN Charter. The Obama administration has worked with an ever-expanding definition of what constitutes an imminent threat, extending the concept of imminence to all members of Al Qaeda and, more recently, its affiliates and adherents. The point of inclusion for the latter is constructed on the basis that they share Al Qaeda's ideology and objectives and engage in violence "regardless of whether such violence is targeted at the United States, its citizens, or its interests."[166] In subscribing to this rationale, Obama effectively justifies using force against an unprecedentedly wide range of actors without having to present evidence for the imminence of their planned attacks on a case-by-case basis. Read together with the administration's argument that the United States is in a state of armed conflict with the stateless Al Qaeda network and its affiliates and adherents, the preventive use-of-force is therefore legitimized without geographical limits. Indeed, it is this reasoning that explains why *jus ad bellum* arguments are paid such small heed in the administration's rhetoric and policy instruments.

Second, following the Obama administration's line of argument pertaining to *jus in bello*, of all potential ways of using force, drones are by far the best suited to comply fully with two major principles of international humanitarian law: distinction and proportionality. In this regard, the targeted, surgical character of drone strikes is supposed to lead to the lowest level of civilian casualties possible. Again, the compliance of drone strikes with these principles does not appear to be judged on a case-by-case basis, but in general terms. As such, drones are quite simply a distinctive and proportional means of warfare. Of course, as discussed, this line of thinking has been summarized as the "drone myth," that is, drones cannot be proportional and distinctive *per se*. While they could potentially be more distinctive and proportional than other kinds of weapon systems, the extent to which they *actually are* depends on the quality of intelligence and information that formulates their targeting decisions. Moreover, the lack of official information as to combatant and civilian victims of drone strikes and the respective legal definition of these groups make verifying these distinction claims impossible. Further, the administration appears to regard drone strikes as always necessary to counter terrorist threats – therefore violating necessity as a prudential principle both in terms of *jus ad bellum* and *jus in bello*.

On a final legal note, one has to consider the precedents this drone policy has set for the future use-of-force to be employed by other states, and how these have arguably increased impunity with regard to the use-of-force. UN

Special Rapporteur on extrajudicial killings Alston summarized these adverse effects:

> If other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos. The serious challenges posed by terrorism are undeniable, but the fact that enemies do not play by the rules does not mean that the U.S. Government can unilaterally re-interpret them or cast them aside.

Alston's evaluation becomes even more relevant in light of the place the drone program has begun to occupy in the Obama administration's overall counterterrorism policy. Although occasional speeches briefly highlight how the underlying grievances that serve as recruitment tools for international terrorism need to be addressed,[167] drone attacks have virtually become the "only game in town" in the administration's repertoire. But, even if one accepts drones as a viable tactic in the fight against Al Qaeda, they cannot be a strategy. One might also question whether drones are even a particularly "good" counterterrorist tactic – particularly when many of the key legal questions surrounding their usage, such as target selection in light of threat imminence and use outside declared combat zones, have not been sufficiently addressed.

Overall, when one thoroughly evaluates the Obama administration's increased reliance on necessity-based arguments for drone usage, the "drone war" *is* the *only viable* option to counter terrorist threats: strictly necessary to avoid future civilian deaths on a large scale and it represents the most proportional, distinctive and humane means of warfare, used only as a last resort.[168] Based on this rationale, why then should the administration look for another policy option that does not include the use-of-force? Rather than being the exception, the drone program therefore makes the use-of-force unexceptional and serves to displace non-forcible "alternative and non-lethal approaches to counterterrorism, such as intelligence-gathering and investigation, detention by the US or partner governments, and preventive measures to stem extremism and militancy."[169] In Oslo in 2009, Obama stated, "even as we confront a vicious adversary that abides by no rules . . . the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is our source of strength."[170] Despite offering various assurances and qualifications in adhering to such "standards," the Obama approach to the most significant new means of warfare in the 21st century[171] has left many questions unanswered and many supporters disappointed.

Conclusion: the Use-of-Force and the Making of Hegemonic International Law – From Bush to Obama

At the Ceremony of the Nobel Peace Prize in Oslo in the December of 2009, Barack Obama, barely a year into his first term and already the first US president to have been awarded the prize while in office, emphasized his particular responsibility as the head of state of the United States of America: a state "which has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms."[1] In this vein, because he *is* the US head of state, he could not "be guided . . . alone" by the examples set by previously admired *non-violent* Peace Prize recipients.[2] Obama therefore used his historical speech to articulate the particular exceptionalist US understanding of the legitimate use-of-force.

Embedded in the exceptionalist discourse of US political culture, both the Bush and Obama administrations, in fact, pursued global campaigns against terrorist networks and WMD proliferation, and in the process hoped to establish what they deemed to be a safer and better world. Howsoever plausible the objective was, the use-of-force policies pursued by both administrations showed distinct opposition to the UN Charter *jus ad bellum* regime. The latter was constructed in 1945 on the principle that the unregulated unilateral use-of-force by states presented the utmost threat to international peace and security. Through the general prohibition on the use-of-force encompassed in Article 2(4), the Charter's (American) architects sought to place the use-of-force in the domain of the international community – overseen by the UN as the representative organ of that community – aside from the limited exceptions of Security Council-authorized action, and individual and collective self-defense under Article 51. Indeed, for the architects of the Charter, the unilateral use-of-force by states was the potential issue, not the solution to tensions.

For the Bush and Obama administrations, however, instead of being part of the problem, the use-of-force by the United States and its allies has been viewed as a necessary solution in thwarting the security threat presented by global terrorist networks and WMD proliferation. The "type" of use-of-force

embodied in the Bush doctrine continued and, with respect to the use of drones, even expanded under the Obama administration. Indeed, through this approach both administrations arguably sought to undermine what they deemed to be impediments of the Charter use-of-force regime – particularly for states wanting to confront terrorist actors and their "rogue" state advocates.

In unpacking the aforementioned complexities, the concluding chapter is organized as follows: First, it will summarize the book's discussion on the continuities in the use-of-force policies from the Bush to the Obama era. Second, it will connect both administrations' policies to the broader framework of hegemonic international law (HIL). It will be concluded that, when each element of the administrations' use-of-force policies is examined on its own, it is initially difficult to take the position that they go beyond the "threshold," understood as sitting completely outside the UN Charter *jus ad bellum* regime. However, when the elements are viewed as a whole and as a developing continuum from Bush to Obama, the overall "drive" of their use-of-force policies effectively established an exceptionalist position under the law for the global hegemon, which cannot be reconciled with the most astute international legal understanding of UN rules.

The use-of-force from Bush to Obama

The Bush doctrine was developed incrementally over a span of approximately eight months from January to September 2002. Beginning with the 2002 *State of the Union* address, President George W. Bush laid the foundation for a proactive strategy of counterproliferation. States such as Iraq, Iran and North Korea and allies were identified and defined as an "axis of evil" that was aiming to threaten and undermine the "peace of the world."[3] In their pursuit of weapons of mass destruction, Bush argued that these regimes presented a grave and growing danger, and that the United States would undertake what it deemed to be necessary as a means to preserve and ensure its security. In one of his first statements on prevention, Bush informed his audience that he "will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer . . . and permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."[4]

Six months later, in a Commencement Speech to the US Military Academy at West Point, Bush elaborated upon the burgeoning national security doctrine. Maintaining his assertive posture, he stated that the United States would "take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge . . . security will require . . . preventive action when necessary – to defend our liberty and to defend our lives."[5] For Bush and his administration, the post-9/11 world required a "path of action" and the United States "will act."[6] Polarizing his description of the ensuing "War on Terror," Bush asserted that there could "be no neutrality between justice

and cruelty" and that the United States and its allies were in a conflict between "good and evil."[7] Again, emphasizing his administration's dogmatic course, he informed his audience that he had no qualms in "confronting evil and lawless regimes" and was "prepared to lead the world" in this quest.[8]

Finally, in September 2002, the White House released the *National Security Strategy of the United States of America* – the most comprehensive articulation of the Bush doctrine – thus officially adopting preventive self-defense as a key element of the US security strategy. Here, Bush further justified the use of preventive war and argued that the biggest threat the United States faced were entities at "the crossroads of radicalism and technology."[9] In forthright rhetoric, Bush reiterated that the United States must be prepared to stop rogue states and their terrorist clients before they were able to threaten or use WMD against the United States and its allies. His depiction of rogue states and terrorists necessitated that the United States could no longer solely rely on the reactive posture it had utilized in the past. Once again highlighting the "greater the risk of inaction," the administration made it clear that a "compelling case" for "taking anticipatory action" to defend itself was required.[10] Indeed, as some of the most defining words of his doctrine, Bush argued vehemently that in an era where "uncertainty remains as to the time and place of the enemy's attack – to forestall or prevent such hostile acts by our adversaries, the US, if necessary, will act pre-emptively."[11] In simple terms, the threat must be eliminated before it materialized.

The *National Security Strategy of 2002* was conscious of its historical context and how this new phase would "harshly judge those who saw this coming danger but failed to act."[12] In this new historical stage, the United States would undertake a strategy of action as a means of defending itself, "the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders."[13] Foreshadowing the creation of the Coalition of the Willing, the Bush administration specified that it would strive to enlist the support of the international community; however, if there was a requirement to "exercise" its "right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country . . . we will not hesitate to act alone."[14] Implicit in this strategy was an important linkage: The declared enemy was not only terrorists but also anyone, including states, who aided them. Bush articulated this point on the night of 9/11: "We will make no distinction between the terrorists who committed these acts and those who harbor them."[15]

As the discussion in Chapter 2 illustrated, there is a significant, although admittedly contentious, basis for preemptive counterproliferation strategies in international law; but much less so for preventive strategies. It seems reasonable to acknowledge the legitimacy of anticipatory self-defense in the countenance of a real imminent threat. As has often been said, in international law in general – and in the UN Charter regime, in particular – no state

can be expected to wait submissively and absorb an adversary's approaching attack. At the same time, active defense does not necessarily entail that preemptive action should be taken in all situations against all threats. In many instances, it may be sound military sense to take advantage of the inherent strength of the defense over the offence and allow the aggressor to "break its back" on the target states' defenses. Preemption may not always be the most sufficient strategy from an operational military point of view. Nonetheless, there is a place for preemption in both a states' national security policy and, more to the point of this book, in international (customary) law. This does not include, however, the form of prevention/preemption stipulated in the Bush doctrine, particularly during the period of 2001–2004, in so far as it did not meet the key conditions of necessity and proportionality that regulate the anticipatory use of defensive force under the current interpretation of the Charter *jus ad bellum* regime.

In simple terms, the strategic option encompassed in the doctrine was not preemption but, in reality, prevention cloaked in the rhetoric of preemption. This is more than just word play. As demonstrated in Chapter 2, the international community has serious concerns pertaining to unilateral preventive military action, particularly when based on ambiguous evidence and the *potential* of long-term threats. Moreover, the pursuit of aggressive ends under the mask of anticipatory self-defense has the potential to kill thousands of innocents. Thereby, as a means to make the preventive strategy more acceptable to the international community – and hence, to reduce its instinctive opposition to the strategy – the Bush administration attempted to present this strategic option as preemption. As discussed in Chapter 4, Bush drew the conceptual link to preemption through its emphasis on an expanded notion of imminence, a key element in the condition of necessity as it relates to preemption. However, the Bush doctrine extended the concept of imminence by pressing it back to the early research and development stage of the nuclear threat cycle, where the time to establish an operational nuclear weapons capability was measured not in days, weeks or even months but, rather, in years. Nuclear developments at this point of the threat cycle *do not* pose an imminent threat in the accurate, temporal meaning of the word. This is not to endorse a position of complacency in the face of such potential long-term threats, for it may call for determined non-military action in order to prevent its realization. But it is not an imminent threat in the sense of a clear and impending attack, the basis for truly preemptive action.

As Chapter 4 also highlighted, this leads to the second component of the necessity condition on which the doctrine's form of preemption is deeply flawed. In traditional terms, necessity requires that force be used as a last resort when all reasonable non-military options have been exhausted. It is difficult to plausibly make the argument that there is no other option to the use-of-force when attempting to address a WMD capability whose emergence – to the point where it actually poses an existential threat to

the target state – is calculated in years. In such conditions, the target state certainly has time for extensive planning, assessment and revision of its counterproliferation strategies. The Bush doctrine attempted to distort the issue of time, however, by presenting conflict with the adversary as unavoidable. It assumed that the irrational aggression of the leaders of rogue states was such that, once they attained nuclear weapons, they would – not might – use them against the United States and its friends either directly or through their terrorist proxies.

Therefore, according to the administration, it was better to act *now* when there was a stronger likelihood of success at relatively low cost, rather than *later* when the threat had become robust and potentially unstoppable. This argument, too, was either deceitful or extremely naive. Nothing was inevitable, and this definitely pertains to the domain of international security and politics. In terms of the inevitability of conflict with adversarial states, such arguments have been made all throughout the 20th century and beyond. They were heard coming from "hawks" on both sides of the Cold War divide during the peak of Soviet-American competition. Fortunately, the governments of the two nuclear superpowers had the reasonable sense not to act upon the apprehensions of these doomsday Cassandras.

This leads to the last point where the Bush doctrine's version of preemption fell short. The second condition regulating the defensive use-of-force is proportionality. In simple terms, the defensive response must be in proportion to the predicate attack. The target state should not, for example, destroy an aggressor's city in reply to a rifle shot at a border post. For the preemption of a perceived nuclear threat, in particular, the extremity of the response correlates to the characterization of that threat. In its public pronouncements, the Bush administration focused on the worst-case scenario conceivable – a "nuclear-9/11" attack on American cities at the cost of hundreds of thousands, if not millions of lives – to underscore its preventive/preemptive strategy. While this scenario cannot be completely ruled out, it is not only the consequences of a calamitous event but the probability of that event that must be assessed in order to place a particular threat scenario in its proper perspective among the myriad of other possible threats to the nation's security. This is particularly important when the threat response under consideration is preventive military action, with all the intended – and unintended – consequences that can derive from such action.

The target state must have the capacity to attain and evaluate accurate, reliable and timely intelligence on the capabilities and intentions of the adversary. As several US committees studying the 9/11 and Iraqi WMD intelligence failures have indicated, the US intelligence structure did not exhibit this capacity, certainly to the extent required in emboldening the arguments for prevention. In this absence, amplifying the worst-case scenario planning to "cover the bases" has the connected ramifications of making the concept of proportionality obsolete. The embellished demise of millions of people

in essence works to justify any level of preventive military action. What action can possibly be off limits when positioned against the specter of an imagined (or imaginary) disaster? While there is a basis, at least in principle under the UN Charter *jus ad bellum* regime for a counterproliferation strategy of preemption that satisfies the conditions of necessity and proportionality, the Bush doctrine's form of preemption – prevention by any other name – failed in both domains.

The election of Barack Obama as 44th president of the United States in 2008 was supposed to bring unprecedented change spanning across key areas of domestic and foreign policy. In light of the historical turning point in US–American history that his election represented, Obama's vision and political practice for the US use-of-force appeared to be a departure from the legal balancing acts of his predecessor. Captured in broad strokes, the Obama administration's use-of-force policy was underlined with a strong commitment to finding multilateral solutions for the world's most pressing problems, professed US adherence to global norms and standards, expressed a preference for diplomatic solutions and its unilateral variant overall, appeared to take a less obvious place in President Obama's rhetoric than during the Bush administration's tenure.

Obama saw a greater commitment to the values and ideals that the United States stands for as not only complementary to, but also as strictly necessary to reaffirm the state's "soft power" that had suffered from the Bush administration's more reckless endeavors. The foreword to his *National Security Strategy of 2010* therefore ended with a call to retake US global leadership in uncertain times:

> But even as we are tested by new challenges, the question of our future is not one that will be answered for us, it is one that will be answered by us. And in a young century whose trajectory is uncertain, America is ready to lead once more.[16]

Most US long-term allies were eager to embrace this apparent change in attitude towards international cooperation, and in doing so, perhaps chose to overlook historical and contemporary references to US-American foreign policy exceptionalism. Although the *NSS 2010* did not point explicitly to preemption/prevention, as illustrated in Chapter 5, it nonetheless expressed a continued reliance on the unilateral use-of-force, if necessary. In fact, avowals to seek multilateral support for US actions were riddled with loopholes, as the following statement illustrates: "But when we do use force in situations other than self-defense, we should make every effort to garner the clear support and participation of others."[17] Not only is the qualifier "should" a comparatively weak commitment to seeking multilateral support, but the quote also notes that other more flexible use-of-force rules apply in situations of self-defense. Even under Obama, the United States

would therefore expressly retain the right to use force unilaterally. Two sets of policy practices in particular demonstrated the administration's continued willingness to unilaterally use force: First, its counterterrorist efforts against Al Qaeda and, second, the ways in which it propagates (unilateral) humanitarian intervention through referencing the just war tradition.

On the first point, Obama continued to define US counterterrorist efforts as a war – if not against terror, then against a widely defined terrorist network: Al Qaeda, its affiliates and adherents. From early on in his presidency, he used every Afghanistan/Pakistan-related speech as an opportunity to mention the continuous threat posed by Al Qaeda. In this context, both the state of war and the imminent threat Al Qaeda's members continued to pose would make the use-of-force in self-defense a widespread, regular, even commonplace occurrence during Obama's tenure. Further continuities were even evident with Obama's retention of the Bush era's most controversial phrase in this context that referred to Al Qaeda as an "evil" that had to be destroyed. In fact, the Special Forces raid that led to the killing of Osama Bin Laden in 2011 was not only heralded a major success in the global fight against terrorism, but also highlighted Obama's resolve to use force. Surrounding statements signified a preference for *killing* rather than *capturing* Al Qaeda's leaders. Referring to opponents as "evil" has only served to further underline the tendency to juxtapose international law, where use-of-force is a necessity devoid of "last resort" and/or non-forcible considerations.

On the second set of policy practices, Obama has made a point of advocating the use-of-force for humanitarian purposes arguably more than any of his predecessors. Clearly inspired by the just war tradition, Obama highlighted that the recourse to force is sometimes necessary to prevent large-scale humanitarian catastrophes. Altogether, this statement is not particularly controversial in the context of Security Council-mandated intervention. However, in many of his public pronouncements, including his Nobel Peace Prize acceptance speech, Obama has called for a redefinition of the international legal agenda that supports unilateral humanitarian intervention and, if necessary, a recourse to force that is quite clearly outside the legal purview of the UN Charter. Of course, in regard to Libya and Syria, there has been a marked reluctance to deliver on such rhetorical assurances. As discussed at length in Chapter 5, the Syrian example is the most case point. Having long refrained from advocating or seriously considering the use-of-force in Syria, the Obama administration only pressed for the military intervention option – without Security Council approval – after the alleged involvement of the Syrian government in the August 2013 chemical weapons attack against its opponents. While the attack was eventually averted by a somewhat left-field diplomatic agreement between the United States and Russia, the use-of-force in this case would have rather been a demonstration of arbitrary selectivity, than of actions in clear accordance with the administration's heralded just war principles.

In terms of discussing continuities between the Bush and Obama administrations, Obama's "departure" from Bush era interrogation has not been as absolute as official statements would suggest. Issued in January 2009, just days after taking office, Obama instituted the highly symbolic Executive Orders 13491 and 13492, revoking enhanced interrogation techniques and the closure of the detention facilities at Guantanamo Bay. Indeed, it is with respect to the issue of torture that administration officials used the strongest language in criticizing their predecessor. As stated in the *NSS 2010*:

> Brutal methods of interrogation are inconsistent with our values, undermine the rule of law, and are not effective means of obtaining information. They alienate the United States from the world. They serve as a recruitment and propaganda tool for terrorists. They increase the will of our enemies to fight against us, and endanger our troops when they are captured. The United States will not use or support these methods.[18]

Notwithstanding these bold proclamations, the administration has in real terms continued the practice, and in some instances the practice has taken on greater proportions. Even under Obama's leadership, the United States continues to transfer terrorist suspects for detention and interrogation to countries with dubious human rights records. Indeed, like the "dark days" of the Bush administration, Obama maintains the reliance on these states' diplomatic assurances as "safeguards" against detainees being subjected to torture. In terms of Guantanamo Bay's "closure," despite the optimistic sentiments conveyed in January of 2009, the notion of this actually occurring seems almost farfetched given how deep the president is into his second term.

An area where the Obama administration has not only engaged in a self-labeled "pragmatic" continuation of Bush's policies, but also consistently expanded the use-of-force, is the usage of drones for the targeted killing of terrorist suspects. Since 2009, the United States has amplified the use of armed drones to kill suspected terrorists both inside and outsides combat zones, that is, within declared theaters of war such as Afghanistan and Iraq, but also outside declared theaters of war such as Pakistan, Somalia and Yemen. While the latter, in particular, has begun to draw more extensive criticism, the Obama administration has continued to use the same *jus ad bellum* and *jus in bello* arguments to support this practice, which it considers as entirely within the scope of the international law of self-defense. As we have argued in Chapter 6, these arguments are legally questionable on a number of levels, and therefore suggest that the current US use of drone strikes outside such zones is in violation of standing international law.

To begin with, the Obama administration considers these drone strikes as *per se* in adherence to the three prudential principles of self-defense: imminence, necessity and proportionality. First, drones are used against terrorist targets that are, by definition, imminent threats. Here, the

administration's reasoning follows from an expanded concept of imminence that conflates group identity in representing an imminent threat. In other words, because they are members or adherents of Al Qaeda, and therefore are terrorists, they are considered to be *constantly* planning attacks on the United States. As such, they can be labeled an imminent threat without the United States having to present "clear evidence that a specific attack on US persons and interests will take place in the immediate future."[19] This concept of imminence is thus entirely separate from a temporal understanding of immediacy, clearly preventive in nature and not supported by standing international law. Second, drones have also been labeled as a strictly necessary means of using force. They target terrorists who cannot be feasibly captured because they purposely choose to hide in inaccessible terrain. Third, drones are assumed to adhere to the standard of proportionality because they can target, in a surgically precise manner, individual terrorist leaders. This use-of-force therefore, by definition, pales against any supposedly imminent, large-scale terrorist attacks assumed to cause as much harm as possible. As drones are defined by the Obama administration to already – and *always* – fulfill these three *jus ad bellum* principles, rather than judging the use-of-force through drones on a case-by-case basis, they cease to act as the limit to the exercise of self-defense they were designed for.

Chapter 5 examined two further problematic elements of the Obama administration's *jus ad bellum* arguments: the geographical scope of the war against Al Qaeda and the question of how terrorists may be attacked in the territory of sovereign states that are not supporting/sponsoring them. Because there is no geographical limit on drone targeting, the war against Al Qaeda and its affiliates and adherents extends to wherever the enemy ventures. Additionally, by including the loosely attached affiliates and adherents, what the Obama administration counts as an imminent threat has been further expanded. As to using force in the form of drones on the sovereign territory of states, the administration holds it to be legal if a state has been found "unwilling or unable" to prevent terrorists from using its territory as a safe haven, or if it has consented to US use-of-force. While the "unable and unwilling" points to a subjective evaluation, seeking consent for the use-of-force would provide a more reliable guarantor for lawful military action. However, as the continued usage of drone strikes in Pakistan illustrates in particular, despite that country's persistent statements of dissent, the Obama administration appears to follow a very loose understanding of what consent means in this context.

A similar reasoning applies to the *jus in bello* arguments presented by the Obama administration, that is, those principles governing *how* force can be lawfully used. As the chapter posited, the three key principles are necessity, distinction and proportionality. Necessity restricts the use-of-force in war to those targets with a distinct military value. However, the compilation of "kill lists" on which targeting decisions are based – as well as the

usage of signature strikes that target a group of people on the basis of suspicious activities rather than identified individuals – suggests that the Obama administration is targeting not only operational terrorist leaders, but also individuals on the lower ranks of the Al Qaeda network.

While the necessity of many individual drone strikes is therefore already questionable, the Obama administration has continued to herald drones as a means of military force uniquely capable of adhering to, especially, proportionality and distinction. As Obama's counterterrorism adviser Brennan stated in 2012:

> Targeted strikes conform to the principle of distinction. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qa'ida terrorist and innocent civilians. Targeted strikes conform to the principle of proportionality – the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.[20]

As discussed in Chapter 6, whether the administration in fact adheres to the principles of proportionality and distinction is practically impossible to verify for outsiders due to the covert nature of the drone program and the administration's associated failure to publish official numbers on civilian and combatant deaths. Additionally, statements by senior officials and targeting decisions such as signature strikes, at the very least, also suggest that the Obama administration's definition of civilians is much narrower than those supported by International Humanitarian Law. Critics of Obama's drone policy have noted that drone strikes can only ever be as precise as the information they are based on. Indeed, just because they are considered an application of advanced weapons technology does not make them an automatic adherent to the standards of proportionality and distinction.

Despite the dangerous precedents this may set for other states to follow, it seems in real terms that the Obama administration is not overly concerned with subjecting its drone program to use-of-force standards. In discussing his administration's new strategy for Afghanistan and Pakistan in early 2009, Obama stated that a "campaign against extremism will not succeed with bullets or bombs alone. Al Qaeda offers the people of Pakistan nothing but destruction. We stand for something different."[21] However, when looking at his administration's drone policy, one might legitimately wonder whether the affected population shares these sentiments. As Farea al-Muslimi, a Yemeni national whose home village Wessab was subject to a drone attack,

testified at a Senate Hearing in April 2013: "In the past, most of Wessab's villagers knew little about the United States. . . . Now, however, when they think of America they think of the terror they feel from the drones that hover over their heads ready to fire missiles at any time."[22] Although cognizant of the double character of war as "sometimes necessary" and "an expression of human folly,"[23] the Obama administration appears to have lost parts of its vision in its pursuit of the war against Al Qaeda.

When analyzing the approaches to the expanded use-of-force pursued by the Bush and Obama administrations in the name of self-defense, it is evident that there are decidedly more similarities than differences. In terms of the bigger picture, perhaps this says more about the emerging – and at times concerning consensus – on the use-of-force in US counterterrorist efforts and US security policy; where the preemptive/preventive recourse to force in response to threats has now been sanctioned by both a Republican and a Democratic administration and therefore endorsed on a bipartisan level.[24] But even more concerning has been the fact that despite being positioned at different points on the political spectrum, the two presidents in the form of Bush and Obama have chosen a very similar set of use-of-force policies, leaving any notion of real change moribund on the negotiating table.

Hegemonic international law from Bush to Obama

As we have discussed at length, the legality of key elements of the Bush doctrine, as well as its continuation and expansion in the case of drones by the Obama administration under the prevailing interpretation of the Charter *jus ad bellum* regime, was and remains dubious to say least. There is an argument to be made that the United States was and is *not* trying to dismantle the *jus ad bellum* regime, but rather, attempting to put forward a reinterpretation of the Charter regime as a means to loosen the restrictions on the unilateral use-of-force. Thereby, it could increase its flexibility in forcibly addressing the threats of terrorism and WMD proliferation. Specifically, it could define an exceptionalist legal regime that would enable the United States to execute its vastly superior power assets with very few constraints. Viewed in this context, the two administrations' assertions signified an attempt to redefine the Charter *jus ad bellum* regime in a fashion consistent with the structure of a *de facto* hegemonic international legal system, or, hegemonic international law (HIL). As such, the remainder of this conclusion, following an overview of the term "hegemonic international law," seeks to illustrate this claim through briefly examining how three characteristics of hegemonic international law apply to the actions undertaken by the two post-9/11 US administrations.

Hegemonic international law

Hegemony[25] can be defined as "the striving for leadership or the institutional supremacy of one or more states over other states."[26] The core

essence of hegemony encompasses both a disparity and inequality of political power among states, reflecting differences in military, economic, socio-psychological and technological capabilities.[27] It reflects the hierarchical power structure of the global system and exhibits two distinct features: leadership – unilateral, bilateral, collective or bloc; and territorial reach/influence – global, regional or subregional.[28] For example, with the collapse of the USSR and the emergence of the United States as the sole superpower, the structure of the international system arguably embodies the attributes of a unilateral (i.e., American) global hegemony (notwithstanding the "decline" debates).[29] Hegemony is upheld through two forms of control: coercive control, that being, the threat or use-of-force; and consensual control, in which subordinate states incorporate the values and norms of the hegemon.[30] In essence, hegemonic international law pertains to the international legal system of the broader international system in which one state predominates. Three characteristics define the hegemonic international legal system: first, the hegemon's attempts to define the international legal agenda; second, references the hegemon makes to standing international law that are consciously kept at a vague level so as to allow them maximum leeway; and third, hegemonic statements illustrative of the fact that the novel, more extensive rules – in our case pertaining to the use-of-force – are only lawfully applicable to the hegemon.

Three characteristics of hegemonic international law

First, the hegemon holds an advantaged role in the law-creating process.[31] It is the primary driving force behind the formulation, modification or understanding of conventional as well as customary international law. Simply put, *the hegemon attempts to define the international legal agenda*. In the post-9/11 context, the United States has without a doubt defined the international use-of-force agenda. The UN and the Security Council in particular have been very attentive to the United States in this regard. As then Secretary-General Kofi Annan noted in 2003:

> It is not enough to denounce unilateralism [e.g., pre-emptive military action taken without Security Council authorization], unless we also face up squarely to the concerns that make some states [i.e., the United States] feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action.[32]

However, the international community's attention came with a good deal of apprehension: US agenda-setting attempts have been more successful with regard to international counterterrorist legislation than with regard to creating a consensus for the preemptive/preventive use-of-force.

In looking at how three major international documents, two reports and the General Assembly's 2005 *World Summit Outcome*, authored in the wake

of the 2003 Iraq War dealt with the preemptive/preventive recourse to force, it is evident that there was a tentative acceptance of preemptive self-defense, but a clear disavowal of preventive self-defense. The first document, Annan's 2005 report *In Larger Freedom: Towards Development, Security and Human Rights for All*, recognized a limited right of anticipatory self-defense: "Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened."[33] The latter claim is surprising. As discussed in Chapter 2, while preemptive self-defense has an "easier" standing in international law than preventive self-defense, it has by no means been accepted on the general level implied by Annan. Still, Annan's definition of imminence appears to be a restricted one – especially when read in relation to the second major document, the 2005 report of the High-Level Panel on Threats, Challenges, and Change. Commissioned to identify solutions for strengthening the UN collective security system in the wake of the unilateral intervention in Kosovo 1999, the report refers to a right for preemptive self-defense if "the threatened attack is imminent, no other means would deflect it and the action is proportionate."[34]

In contrast, both the High-Level Panel's and the Secretary-General's reports clearly speak against a right for the unilateral use of preventive force in reaction to latent threats, and both refer to the Security Council's authority with regard to sanctioning the preventive use-of-force.[35] The High-Level Panel's report is particularly outspoken on the dangers unilateral preventive self-defense poses to international law:

> [I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.[36]

While these two reports presented notable legal opinions on the status of preemptive self-defense, the *World Summit Outcome* (2005) itself did not contain anything new in relation to Article 51 and instead only "reaffirm[ed] that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security,"[37] thereby rebuking any wider interpretation. The fact that member states did not agree to include

a reference on imminent threats as part of the self-defense article underlines the precarious stance that even a strictly imminence-based right of preemptive self-defense has in international law.

Although the actions of two US administrations therefore set the agenda for the international community's reflection on the current status of Article 51, their views did not receive widespread support, especially regarding the inclusion of a unilateral right of preventive self-defense in the face of latent threats. At the same time, one has to be mindful of the fact that the hegemon's attempts to redefine what is considered lawful in terms of the use-of-force, is only really meant to be applicable for their own perusal. In this light, the Obama administration's drone program has clearly continued to make use-of-force in self-defense in an expanded, preventive sense, and continues to get away with it. In fact, it has been subject to much less open criticism from its state peers than Bush's use-of-force policy.

Apart from attempting to set the global order agenda and contributing to shaping views, the two post-9/11 US administrations have also attempted to implement a series of legal obligations and responsibilities for states in the context of the "War on Terror." The Bush administration articulated these obligations shortly after the events of 9/11[38]: "Every United Nations member has a responsibility to crack down on terrorist financing. . . . We have a responsibility to share intelligence and coordinate the efforts of law enforcement. . . . We have a responsibility to deny any sanctuary, safe haven, or transit to terrorists."[39] These legal obligations became the core of Security Council Resolution 1373 passed with reference to chapter VII of the UN Charter, which binds all UN member states regardless of their overt consent. Resolution 1373 represents by far the most wide-spanning international counterterrorism legislation yet – and, as we have noted in Chapter 2 – goes far beyond the obligations listed in other more specific international agreements on international terrorism.

In the context of hegemonic international law making, scholars have therefore argued that the United States chose to act through the Security Council instead of "bother[ing] with an international negotiation to which all states and relevant non-governmental organizations would be invited"[40] to speed up the process and maintain a tighter control of the decision's contents. In essence, the "Council's resort to legislation through SC Res. 1373 demonstrates global HIL in action."[41] While it has to be noted that Security Council members, most notably the other permanent four members, could have voted against resolution 1373, it is still clear that through its contents, Washington was able to impress its counterterrorism priorities on the domestic law systems of other states.[42]

The second characteristic of HIL is the *uncertainty of the rules and the conditions of their application*. Generally speaking, the hegemon is disinclined to follow the constraints of treaty and customary law on its freedom of action.[43] It picks and chooses among treaties and treaty provisions, deciding which it

will adhere to, discard or ignore on a case-by-case basis.[44] More significantly, rules to which it does subscribe are left ambiguous and equivocal so that it may interpret and apply them whenever and wherever it deems appropriate in the future.

In the context of the Bush and probably even more so the Obama administration, the rules governing the use-of-force appear to be deliberately imprecise.[45] As the Bush doctrine's formal articulation, the *National Security Strategy 2002* was distinctly silent on the issue of what, if any, decision criteria the US national leadership would apply in considering the possibility of preemptive military action to counter WMD.[46] While the *NSS 2002* was crystal clear as to the adversaries – terrorists and "rogue" states – it was elusive on what action the United States would execute and under what circumstances. It did not specify the degree of the threat that would prompt the consideration of preventive/preemptive action, only that "the greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves."[47] Nor did it necessarily commit the United States to forcible prevention/preemption should the activating threshold be crossed: "The United States will not use force in all cases to preempt emerging threats."[48] Additionally, the *NSS 2002* left undefined the level of evidence to substantiate the claim that the inherent right of self-defense existed, or whether a state must produce such evidence in the first place.[49] Finally, the rules for attributing state responsibility for the aggressive acts of non-state actors were left "purposely vague."[50]

This applies in equal measure to the Obama administration's *NSS 2010*, which is, with regard to preemptive/preventive options, more telling in what it leaves "undiscussed" than in what it actually includes. The document qualifies the use-of-force as "at times necessary to defend our country and allies or to preserve broader peace and security, by protecting civilians facing a grave humanitarian crisis."[51] But it does not provide additional information on how it will "carefully weigh the costs and risks of action against the costs and risks of inaction."[52] Moreover, although the administration's expanded drone program was already in full swing at the time of its writing, the *NSS 2010* does not contain a single reference to this particular means of using force. Even during later speeches that referred to the drone program's legal standing, senior administration officials argued that its targeting policies were in line with international law, but did not specify the applicable legal provisions it (supposedly) complied with: "America's actions are legal. We were attacked on 9/11.... Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces."[53] Indeed, at no time has the Obama administration attempted to clarify the precise legal rules of its drone usage, or, as many commentators have hoped for, attempted to formulate a new set of rules on the use-of-force that might be pertinent and more appropriate to this particular advancement in weapons technology.[54] The overall result of such ambiguities has

enabled the United States under Bush and Obama to choose when *it* would take self-defense measures *it* deemed to be acceptable, and thereby, respond to acts of terror *it* deemed to have overstepped the line based on evidence *it* chose to divulge.

Coming to a third and final characteristic of HIL, the hegemon attains *de facto* or *de jure*, *exceptional rights* not available – or available only in principle but not in practice – to lesser powers. In conceding the hegemon such exceptional rights, either formally or informally, the HIL impinges upon or undermines one of the core principles of the international legal system: the sovereign equality of states.[55] It needs to be stated that the international legal system in many instances deviates from the principle of the sovereign equality of states as all states are *not* equal before the law.[56] Indeed, the system is defined by what can be described as "consensual inequality."[57] The permanent five members (P5) of the Security Council retain veto power over substantive matters, while the *NPT* formally distinguishes between nuclear weapon states and non-nuclear weapon states.[58] Further, both the World Bank and the International Monetary Fund (IMF) are structured on a basis of weighted voting signifying the financial contributions of states.[59] Therefore, a legal regime that recognizes a disparity in rights among states – such as HIL – is not necessarily a bold departure from the current structure of the international legal system.

Nonetheless, it is evident that the Bush doctrine continued to push this preexisting "consensual inequality" further toward a *de facto* exceptional position for the United States in the *jus ad bellum* regime.[60] This push was continued by the Obama administration, particularly in its expanded use-of-force in the form of drone strikes. While there has been a plethora of examples in which the international legal system has adhered to the double standards and exceptional rules serving US interests, for example, the exemption for US peacekeepers from ICC jurisdiction under Security Council Resolution 1422, and US opposition to the Kyoto Protocol,[61] the Bush and Obama administrations in simple terms have reinforced this tendency.

Indeed, it can be argued that the United States has been engaged in a complicated effort to secure applicable legal changes that while in principle are available to all, in practice are only of use to the most powerful of states, in particular an extension of the limited right of preemptive self-defense. The result may provide, if it already hasn't arrived, an unlimited discretion for the United States to undertake military action under international law, but relatively little if any change in the limited scope of discretion available to other less powerful states – a characteristic of *de facto* HIL.[62] In this regard, the *National Security Strategy of 2002* asserted this pre-Charter right of preemption *for* the United States, and simultaneously, cautioned those who considered using or abusing this right. As stated, "To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively . . . nor should nations use pre-emption as a pretext for

aggression."[63] While this was not an explicit denial of the right of preventive or preemptive military action (to be used by others), the administration's ensuing practice indicated that recourse to this right was to be vehemently applied, in essence, to the United States itself.

For instance, in the context of the nexus between terrorism and WMD as defined in the Bush doctrine, there is an argument that India has a case for preventive or preemptive military action against Pakistan, more so than the United States did against Iraq.[64] Pakistan has actively supported Kashmiri separatist organizations since the separation of the Indian subcontinent in 1947 and Kashmir's subsequent accession to India. At the time in 2001–2002, it possessed a small nuclear weapons arsenal, estimated to be around 80–90 weapons,[65] and a leader in its nuclear program, AQ Khan, was the prime figure behind an international nuclear technology smuggling network.[66] Concurrently, while the United States was dealing with Al Qaeda and the Taliban in Afghanistan, a series of Kashmiri terrorist attacks, including attacks against the Indian parliament in December 2001 and an army base in the Indian state of Jammu in May 2002, brought India and Pakistan precariously close to war. Instead of endorsing India's "right" to take preventive military action to end the threat, President Bush insisted on restraint by the Indian Prime Minister, Atal Bihari Vajpayee, and dispatched key administration officials – including Defense Secretary Rumsfeld and Secretary of State Powell – to quell such tensions.[67] Considering the risks and dangerous consequences of a nuclear exchange should armed conflict have taken place between the two states, the administration's efforts to contain the crisis can be viewed as necessary. However, in the context of this discussion, the event is indicative of the US determination in deciding *when* the protection of its security interests demands preventive military action, and adjudicate as to *when* others may or may not have recourse to that right.[68] In practice, the preventive/preemptive option embodied in the Bush doctrine was exclusive to – or to be exclusively conferred on others by – the United States.

While Obama's restrictive statements on how the use-of-force may be employed by other states have been less explicit, he has certainly made an effort to substitute such "shortfallings" with frequent points of reference to American exceptionalism:

> The danger for the world is not an America that is too eager to immerse itself in the affairs of other countries, or to take on every problem in the region as its own. The danger for the world is, that the United States . . . may disengage creating a vacuum of leadership that no other nation is ready to fill. . . . I believe America is exceptional. In part because we have shown a willingness through the sacrifice of blood and treasure to stand up not only for our own narrow self interest, but for the interest of all.

In the context of hegemonic international law, there is no doubt that this unbridled belief engenders many layers of complexities and simplicities that are conducive to attaining most of the United States' core objectives. That is, not only does it suggest that the United States is the only state capable of interpreting and expanding the limits of international law in its favor, but that it is uniquely suited to do so on the basis of its particular normative core values and willingness to lead.

Final words

Through the construction of the Bush doctrine and the continuation of many of its premises in the use-of-force policy of the Obama administration, the United States stipulated an interpretation of the Charter *jus ad bellum* regime that would grant it exceptional discretion in the use-of-force within an international legal system – encompassing many of the key attributes of HIL. For some commentators, this prospect presented a threat to international legal authority and an abuse of that authority by the demands that the hegemon would become a "virtual certainty."[69] But was this potentially a necessary requirement for the post-9/11 context? One could argue, for example, that the United States was using its "hegemonic power to promote communitarian standards of law and governance."[70] Indeed, there is a strong overlap of interest between the concerns of the United States and those of the international community pertaining to the threats of WMD proliferation and global terrorism, as, for example, underlined by the Security Council's agreement on imposing far-ranging counterterrorism policies upon UN member states in resolution 1373. In reinterpreting the use-of-force regime so as to drive the conflict against WMD proliferation and terrorism, it could be argued that the United States' actions were not necessarily self-seeking, but a commitment to restore the broader status quo.

As the global hegemon, it fell to the United States to take the lead in addressing such global concerns. For Koh, the United States is the only state with the capacity and inclination to commit the resources needed "to build, sustain and drive an international system committed to international law, democracy and the promotion of human rights."[71] Therefore, what some perceive to be hegemonic unilateralism, others have argued to be more of an indication of community leadership. Other states may have worked out that it is better to let the United States take the lead and carry the burden in the fight against terrorism and WMD proliferation, than to commit the resources and effort to address such challenges.[72] Without stating the obvious, the burden for providing international order as a global public good falls on the United States. That is, if the United States did not come to the fore in "addressing" WMD proliferation and terrorism, an effective international action may not be forthcoming. As Nye notes, "the alternative [to U.S. leadership] is that the collective bus does not move at all."[73] This may be a sufficiently attractive prospect for other states willing to afford the United

States an exceptional position with respect to the use-of-force – assuming, of course, that the United States does not use this discretionary power in such a fashion as to make things worse.

As with the development of new customary rules in other areas of international law, the materialization of a new interpretation of the Charter *jus ad bellum* regime must await the channel of time as general and consistent state practice accumulates and *opinion juris* crystallizes. The result of this will play a significant role in determining the Bush and Obama presidential legacies, that is, "something durable left by an administration that others will benefit by or have to deal with as a set of problems well into the future."[74] While it can be positive and/or negative, "somewhat controversial or somewhat non-existent" to outsiders, every president "leaves something behind, whether intentional or not."[75] In foreign policy, the Bush administration's quest in transforming the Middle East became mired in Iraq and unraveled in Afghanistan, and the Bush doctrine has been discredited.[76] One of the key legacies of the doctrine has been the nation's isolation in the international community, something that the Obama administration still has to remedy, but, in fact, may well run out of time. Obama's second term has also presented its own distinct challenges, not the least of which has been the continued pursuit of an expanded drone program, the intelligence controversy surrounding the NSA, the Syrian and Ukraine crises[77] and the P5+1 negotiations with Iran. In the context of the use-of-force, while the Obama administration has been more open and frequent in offering legal justifications, the content of these have encompassed a persistent stretching of the self-defense article, particularly in regard to its promotion of an increasingly diffused concept of imminence. Despite removing references to the "War on Terror" from its public pronouncements, the administration has in many ways continued the Bush administration's war on international law. Indeed, having come to office with the goal of "bending history" and "straightening up" the United States' reputation in regards to the way it engages international law in the use-of-force context, the administration's continuum in policy and practice has been marked, and the deviations and departures, minimal.

Notes

Introduction

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2. Ibid.
3. United Nations, "Charter of the United Nations," 1945, preamble, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf.
4. Harry S. Truman, "Address in San Francisco at the Closing Session of the United Nations Conference," *Harry S. Truman Library*, 26 June 1945, http://www.trumanlibrary.org/publicpapers/index.php?pid=73.
5. David M. Malone, "A Decade of US Unilateralism?" in Unilateralism and US Foreign Policy: International Perspectives, David M. Malone and Yueng Foong Khong (eds) (Boulder, CO: Lynne Rienner, 2003), 24.
6. Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment," *Harvard International Law Journal*, 43, no. 1 (2002): 1–21.
7. Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012): 6.
8. Ibid., 2.
9. President Barack Obama, "Remarks by the President at the Acceptance of the Nobel Peace Prize," *The White House*, 10 December 2009, http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize.

1 The International Legal Paradigm: The UN Charter *jus ad bellum* Regime

1. Aiden Warren, *The Obama Administrations Nuclear Weapon Strategy: The Promises of Prague* (London: Routledge, 2013): 3.
2. Amitai Etzioni and Alexandra Appel, "Book Review: Martin S. Indyk, Kenneth G. Liberthal, and Michael E. O'Hanlon, Bending History: Barack Obama's Foreign Policy," *Society* 49, no. 5 (2012): 477.
3. David E. Sanger, *The Inheritance: The World Obama Confronts and the Challenges to American Power* (London: Bantam Publishers, 2009): 447.
4. Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012): 6.
5. Anthony C. Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly* 26, no. 2 (2003): 91.
6. United Nations, "Charter of the United Nations," 1945, Article 1, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf.
7. Ibid., preamble.
8. Arend, "International Law and the Preemptive Use of Military Force," 91.
9. United Nations, "Charter of the United Nations," Article 2, para. 4.

10. See, the International Court of Justice's (ICJ) discussion of this point in International Court of Justice, "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits," 27 June 1986: 99–101, http://www.icj-cij.org/docket/files/70/6503.pdf.
11. Cited in Ibid., 100. A *jus cogens* rule is a peremptory norm of general international law, that is, "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See "Vienna Convention on the Law of Treaties," 23 May 1969, Article 53, http://www.worldtradelaw.net/misc/viennaconvention.pdf. Other examples of *jus cogens* rules that the ILC mentions include the prohibitions on genocide, slavery and piracy. Cited in Malcolm N. Shaw, *International Law*, 4th ed. (Cambridge; New York: Cambridge University Press, 1997): 97.
12. United Nations, "Charter of the United Nations," Article 51.
13. Ibid.
14. Yoram Dinstein, *War, Aggression, and Self-Defense*, 3rd ed. (Cambridge; New York: Cambridge University Press, 2001): 163–165.
15. International Court of Justice, "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits," 94.
16. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963): 274.
17. David John Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998): 901.
18. Dinstein, *War, Aggression, and Self-Defense*; 187–188.
19. Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge; New York: Cambridge University Press, 2002): 49.
20. Security Council, Security Council Resolution 1368, 12 September 2001, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement, preamble.
21. Abid Qureshi, Francis Chang, Peter Copeland, Jasminka Kalajdzic, Paul Michell, "A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina," *Michigan Journal of International Law* 16, no. 1 (1994): 60.
22. Albrecht Randelzhofer, "Article 2(4)," in Bruno Simma and Hermann Mosler (eds.),*The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994): 111–112.
23. Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation and International Coercion* (New Haven: Yale University Press, 1961): 234.
24. Ibid.
25. Ibid.
26. United Nations, "Charter of the United Nations," Article 2, par. 7. The article reads: "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

27. Cedric Ryngaert, *Pro-Democratic Intervention in International Law*, Working Paper (KU Leuven, Institute for International Law, 2004), Article 3, http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP53e.pdf.
28. Oscar Schachter, "The Legality of Pro-Democratic Invasion," *American Journal of International Law*, 78, no. 3 (1984): 647.
29. Ibid.
30. Ibid., 648.
31. Ibid., 649.
32. Ibid.
33. Ibid.
34. Ibid., 650.
35. W. Michael Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)," *American Journal of International Law*, 78, no. 3 (1984): 643. See also W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law*, 84, no. 4 (1990): 866.
36. Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)," 645.
37. Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," *American Journal of International Law* 84, no. 2 (1990): 519.
38. Ibid., 520.
39. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2006): 87–91.
40. Ibid., 108.
41. Ibid.
42. Ibid., 87.
43. Ibid., 89.
44. Ryngaert, *Pro-Democratic Intervention in International Law*, 16.
45. Christine D. Gray, *International Law and the Use of Force* (Oxford; New York: Oxford University Press, 2000): 43.
46. Shaw, *International Law*, 803.
47. Simon Chesterman and Michael Byers, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law," in J. L. Holzgrefe and Robert Owen Keohane (eds.), *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003): 178.
48. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996): 11–12.
49. Combining the term humanitarian with intervention has been subject to its fair share of criticism from a range of actors, for example, from humanitarian nongovernmental organizations, which did not want their work to be associated with the use of military force. Compare Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action* (Cambridge: Polity Press, 2007): 10–11. Coining the "responsibility to protect" therefore represented a means to move toward a less objectionable term.
50. Ibid., 11; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001): 45–87.
51. United Nations, "Charter of the United Nations."
52. Weiss, *Humanitarian Intervention*, 16.
53. United Nations, "Charter of the United Nations," Chapter VII.
54. Weiss, *Humanitarian Intervention*, 1.

55. Security Council, "Resolution 688," 5 April 1991, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement.
56. Weiss, *Humanitarian Intervention*, 41–58.
57. Thomas G. Weiss, David P Forsythe, Roger A Coate, Kelly-Kate Pease, *The United Nations and Changing World Politics* (Boulder, Co: Westview Press, 2007): 65–9.
58. Chesterman, *Just War or Just Peace?*, 71–81.
59. See Brownlie, *International Law and the Use of Force by States*, 338. (Explaining that "[b]y the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention (l'intervention d' humanité) existed").
60. Ryan Goodman, "Humanitarian Intervention and Pretexts for War," *American Journal of International Law*, 100, no. 1 (2006): 108.
61. Ibid., 107.
62. Walzer, *Just and Unjust Wars*, 105–108.
63. Goodman, "Humanitarian Intervention and Pretexts for War," 107.
64. Ibid., 109.
65. International Court of Justice, "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) The Merits," 135.
66. The US-led intervention in Iraq, although occasionally framed in humanitarian terms, is however not considered as having advanced arguments for the potential legality of humanitarian intervention – for the most part due to its obviously mixed intentions.
67. International Court of Justice, "Legality of Use of Force (Yugoslavia v. Belgium), Application Instituting Proceedings, General List No. 105," *International Court of Justice*, 29 April 1999, http://www.icj-cij.org/docket/files/105/7155.pdf. The respondents in the ten cases brought before the Court were the United States, the United Kingdom, France, the Federal Republic of Germany, Italy, the Netherlands, Belgium, Canada, Portugal and Spain.
68. International Court of Justice, "Public Sitting, at the Peace Palace, Vice-President Weeramantry, Acting President, Presiding in the Case Concerning Legality of Use of Force (Yugoslavia v. Belgium), Verbatim Record," *International Court of Justice*, 10 May 1999, http://www.icj-cij.org/docket/files/105/4513.pdf. Belgium was the only NATO member to provide a detailed legal reasoning for intervention grounds.
69. Gray, *International Law and the Use of Force*, 39–41; and Ian Brownlie and C. J. Apperley, "Kosovo Crisis Inquiry: Memorandum on the International Law Aspects," *International & Comparative Law Quarterly*, 49, no. 4 (2000): 881.
70. Ergeç cited as precedents India's intervention in East Pakistan (1971),Tanzania in Uganda (1978), Vietnam in Cambodia (1978–1979) and ECOMOG in Liberia and Sierra Leone (1989–1999). He noted that no UN body had expressly condemned these actions at the time. See International Court of Justice, "Public Sitting (Yugoslavia v. Belgium)," 9. However, Ergeç's use of these "precedents" represents something of a rewriting of history. The interveners in each case did not justify their action on the basis of the doctrine of humanitarian intervention but relied in the first instance on claims of self-defense or regional peacekeeping. See Gray, *International Law and the Use of Force*, 26, 40; Franck, *Recourse to Force*, 139–162.
71. Only the Russian Federation itself, Belarus and Namibia voted in favor. United Nations, "Security Council Rejects Demand for Cessation of Use of Force against Federal Republic of Yugoslavia, UN Document Press Release SC/6659," *United*

Nations, 26 March 1999, http://www.un.org/News/Press/docs/1999/19990326.sc6659.html.

72. International Court of Justice, "Public Sitting (Yugoslavia v. Belgium)."
73. Gray, *International Law and the Use of Force*, 38–39.
74. International Court of Justice, "Public Sitting, at the Peace Palace, President Shi Presiding, in the Cases Concerning the Legality of Use of Force (Serbia and Montenegro v. Belgium); (Serbia and Montenegro v. Canada); (Serbia and Montenegro v. France); (Serbia and Montenegro v. Germany); (Serbia and Montenegro v. Italy); (Serbia and Montenegro v. Netherlands); (Serbia and Montenegro v. Portugal) and (Serbia and Montenegro v. United Kingdom), CN2004/23," *International Court of Justice*, 23 April 2004, para. 20, http://www.icj-cij.org/docket/files/105/4345.pdf.
75. Ibid., para. 25, 34.
76. Brownlie and Apperley, "Kosovo Crisis Inquiry," 878, 885; "Thoughts on Kind-Hearted Gunmen," in Ian Brownlie (ed.), *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973): 146.
77. Brownlie and Apperley, "Kosovo Crisis Inquiry," 891.
78. Ibid., 894.
79. International Court of Justice, "Public Sitting in the Cases Concerning the Legality of Use of Force," par. 20; International Court of Justice, "Judgment, Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)," *International Court of Justice*, 15 December 2004, par. 129, http://www.icj-cij.org/docket/files/105/8440.pdf.
80. Randelzhofer, "Article 2(4)," 106, 123; Gray, *International Law and the Use of Force*, 42–44; and Hugh M. Kindred, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery Publications, Limited, 2000).
81. Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000): 4.
82. Although an independent commission, the work of the ICISS was sponsored, among others, by two state members of the NATO coalition that intervened in Kosovo – the United Kingdom and Canada.
83. Independent Commission on Intervention and State Sovereignty (ICISS), "The Responsibility to Protect," December 2001, http://responsibilitytoprotect.org/ICISS%20Report.pdf; Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General. UN Document A/59/2005/Add.3," 26 May 2005, http://www.ohchr.org/Documents/Publications/A.59.2005.Add.3.pdf.
84. Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General. UN Document A/59/2005/Add.3," 33.
85. Independent Commission on Intervention and State Sovereignty, "The Responsibility to Protect," 48.
86. W. Michael Reisman, "International Incidents: Introduction to a New Genre in the Study of International Law," in W. Michael Reisman and Andrew R. Willard (eds.), *International Incidents: The Law That Counts in World Politics* (Princeton, NJ: Princeton University Press, 1988): 12–13.
87. United Nations, "Charter of the United Nations," Article 108. The article reads: "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of

the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council."

88. Ibid., Article 53.
89. Jean Allain, "The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union," in Armin von Bogdandy and Rüdiger Wolfrum (eds) *Max Planck Yearbook of United Nations Law*, Volume 8 (Leiden: Martinus Nijhoff Publishers, 2005), 240.
90. Articles 23, 27, 61 and 109 were amended in the 1960s and 1970s to reflect the expansion in membership in both the Security Council and the Economic and Social Council. See ibid., introductory note.
91. International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion" (International Court of Justice, 8 July 1996), http://www.icj-cij.org/docket/files/95/7495.pdf.
92. Gray, *International Law and the Use of Force*, 3–4.
93. Michael Byers, "Book Review: Franck, Thomas M. Recourse to Force: State Action Against Threats and Armed Attacks," *American Journal of International Law*, 97, no. 3 (2003): 721.
94. Michael Byers, *War Law: Understanding International Law and Armed Conflicts* (New York: Grove Press, 2006): 4.
95. Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review*, 82, no. 5/6 (1984): 1620–1646.
96. D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," 521.
97. Schachter, "The Right of States to Use Armed Force," 1633.
98. Dinstein, *War, Aggression, and Self-Defense*; Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Michael Barton Akehurst (ed.), 7th. rev. ed. (London: Routledge, 1997): 311.
99. Schachter, "The Right of States to Use Armed Force," 1625.
100. Ibid.
101. Franck, *Recourse to Force*, 52.

2 Self-Defense in International Law: Preemptive/ Preventive Requisites

1. The *Department of Defense Dictionary of Military and Associated Terms* defines *preventive war* as "a war initiated in the belief that military conflict, while not imminent is inevitable, and that to delay would involve greater risk." See US Department of Defense, "Dictionary of Military and Associated Terms, Joint Publication 1-02" (Department of Defense, 12 April 2001), 421, http://www.bits.de/NRANEU/others/jp-doctrine/jp1_02(04).pdf. Preemptive attack, on the other hand, is "an attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent." *See* Ibid., 417. The critical difference between these two forms of anticipatory self-defense is that preventive war is based on a subjective belief in the inevitability of conflict with the adversary, while preemptive attack is based on objective evidence of an impending attack. There are serious conceptual problems with these definitions. Each strategy necessarily mixes subjective and objective elements. One state's belief must be reasonable – that is, intersubjectively validatable, which depends upon others' judgment of hard evidence – even if not incontrovertible. For example, Washington's belief regarding the nature of the Iraqi threat prior to the US invasion of that country

in March 2003 was not fully shared by other states due to differences over some of the evidence. Thus, even if a belief is necessary to trigger preventive action, that action could not be lawful solely on the basis of a good motive without having some objective basis. The very fact that belief can be hard to refute is itself a reason why most states do not favor preventive military action in the absence of Security Council authorization. Incidentally, neither the term "preemptive attack" nor "preventive war" appear in the 2013 version of the *Dictionary of Military and Associated Terms*.

2. Lawrence Freedman, "Prevention, Not Pre-emption," *The Washington Quarterly*, 26, no. 2 (2003): 105–106.
3. Ibid. For further discussion of the concepts of deterrence, prevention and pre-emption, see, Francois Heisbourg, "A Work in Progress: The Bush Doctrine and Its Consequences," *The Washington Quarterly* 26, no. 2 (2003): 73–88; James J. Wirtz and James A. Russell, "US Policy on Preventive War and Pre-emption," *The Nonproliferation Review* 10, no. 1 (2003): 113–123; Jeffrey Record, *Nuclear Deterrence, Preventive War and Counterproliferation*, CATO Institute Policy Analysis (CATO Institute, July 8, 2004), http://www.cato.org/publications/policy-analysis/nuclear-deterrence-preventive-war-counterproliferation.
4. Freedman, "Prevention, Not Pre-emption," 105–107.
5. Richard Ned Lebow, "Windows of Opportunity: Do States Jump through Them?," *International Security*, 9, no. 1 (1984): 147.
6. Jack S. Levy, "Declining Power and the Preventive Motivation for War," *World Politics*, 40, no. 1 (1987): 91.
7. Thucydides, *The History of the Peloponnesian War* (New York: Penguin, 1972): 49.
8. Heisbourg, "A Work in Progress: The Bush Doctrine and Its Consequences," 78.
9. Freedman, "Prevention, Not Pre-emption," 106.
10. Wirtz and Russell, "US Policy on Preventive War and Pre-emption," 116.
11. Anthony C. Arend, "International Law and the Pre-emptive Use of Military Force," *The Washington Quarterly*, 26, no. 2 (2003): 91. This is notably almost an exact quote of the famous formula used by Webster in the "Caroline incident."
12. Levy, "Declining Power and the Preventive Motivation for War," 90–91.
13. Tom Moriarty, "Entering the Valley of Uncertainty: The Future of Pre-emptive Attack," *World Affairs*, 167, no. 2 (2004): 72. Moriarty draws his distinction in the context of a hostile state's acquisition of WMD, in particular, nuclear weapons.
14. Ibid.
15. Ibid.
16. Ibid.
17. Alberico Gentili, *De Jure Belli Libri Tres, the Translation of the Edition of 1612*, trans. John Carew Rolfe (Buffalo: William S. Hein & Co, 1995): 66.
18. Ibid., 62.
19. Ibid., 66.
20. Hugo Grotius, *De Jure Bello Ac Pacis Libri Tres, the Translation of the Edition of 1625*, trans. Francis W. Kelsey (Buffalo: William S. Hein & Co, 1995): 173.
21. Ibid.
22. Ibid.
23. Ibid., 174–175.
24. Ibid., 175.
25. Emmerich De Vattel, *Le Droit Des Gens, Ou Principles De La Loi, Appliqués À La Conduite et Aux Affaires Des Nations Et Des Souverains, the Translation of the Edition from 1758*, trans. Charles G. Fenwick (Buffalo: William S. Hein & Co, 1995): 249.

26. Ibid.
27. Ibid.
28. David M. Ackermann, *International Law and the Pre-emptive Use of Force Against Iraq*, Congressional Research Service: Report for Congress, 11 April 2003, http://www.au.af.mil/au/awc/awcgate/crs/rs21314.pdf; and Michael N. Schmitt, "Pre-emptive Strategies in International Law," *Michigan Journal of International Law*, 24, no. 2 (2003): 526.
29. United Nations, "Charter of the United Nations," 1945, Article 39, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf.
30. Ibid., Article 50.
31. "Vienna Convention on the Law of Treaties" (United Nations, 22 May 1969), Article 31, par. 1, http://www.un.org/law/ilc/texts/treaties.htm.
32. Malcolm N. Shaw, *International Law*, 4th ed. (Cambridge; New York: Cambridge University Press, 1997): 655–656.
33. Josef L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," *The American Journal of International Law* 41, no. 4 (1947): 872–879; Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963): 275; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems; with Suppl.*, [4. pr.] (New York: Praeger, 1964): 269, 797–798; and Michael B. Akehurst, *A Modern Introduction to International Law*, 6th ed. (London: Allen and Unwin, 1987): 261.
34. Akehurst, *A Modern Introduction to International Law*, 261.
35. Brownlie, *International Law and the Use of Force by States*, 275; and Akehurst, *A Modern Introduction to International Law*, 261.
36. Björn Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht: Eine Systematische Ermittlung des Gegenwärtigen Friedenssicherungsrechtlichen Besitzstandes aus Völkerrechtsdogmatischer und Praxisanalytischer Sicht*, Schriften zum Völkerrecht?: SVR, ISSN 0582–0251 197 (Berlin: Duncker & Humblot, 2012): 304.
37. Ibid., 304, 314. The crucial part of the Russian version is the following: "если произойдет вооруженное нападение." Compare United Nations, "Charter of the United Nations, Russian Language Version" (United Nations, 1945), https://www.un.org/ru/documents/charter/chapter7.shtml.
38. Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht*, 305, 314. The crucial part in the Chinese version is the following: "受武力攻击时" Compare United Nations, "Charter of the United Nations, Chinese Language Version" (United Nations, 1945), https://www.un.org/zh/documents/charter/chapter7.shtml.
39. International Court of Justice, "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. USA), Dissenting Opinion of Judge Schwebel" (International Court of Justice, 27 June 1986), par. 137, http://www.icj-cij.org/docket/files/70/6523.pdf.
40. C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law," in Haroldo Valladão (ed.), *Recueil Des Cours, Collected Courses, Volume 81 (1952)* (Leiden: Martinus Nijhoff Publishers): 497, http://www
.nijhoffonline.nl/book?id=er081_er081_451–517.
41. Myres Smith MacDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1961): 237, fn. 261.
42. James L. Brierly, Humphrey Waldock (ed.), *The Law of Nations: An Introduction to the International Law of Peace*, 6th. ed. (Oxford: Clarendon Press, 1963): 419.

43. Derek W. Bowett, *Self-Defense in International Law* (Manchester: Manchester University Press, 1958): 193–195; Brierly, *The Law of Nations*, 419.
44. Brierly, *The Law of Nations*, 420.
45. Smith MacDougal and Feliciano, *Law and Minimum World Public Order*, 234.
46. Shaw, *International Law*, 655–656.
47. "Vienna Convention on the Law of Treaties," Article 32.
48. Bowett, *Self-Defense in International Law*, 182.
49. The *Act of Chapultepec* (1945), adopted by 20 republics, resolved to undertake joint action in repelling any aggression against a US state. This was formalized by the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty, 1947) and constituted a significant step in the history of Pan-Americanism.
50. Waldock, "The Regulation of the Use of Force by Individual States in International Law," 497; Smith MacDougal and Feliciano, *Law and Minimum World Public Order*, 235–236; Brierly, *The Law of Nations*, 417–418; and Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review*, 82, no. 5/6 (1984): 1633–1634.
51. International Court of Justice, "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits," 27 June 1986, par. 14, http://www.icj-cij.org/docket/files/70/6503.pdf.
52. Brierly, *The Law of Nations*, 419.
53. Smith MacDougal and Feliciano, *Law and Minimum World Public Order,* 236, fn. 260.
54. Bowett, *Self-Defense in International Law*, 185.
55. Ibid.
56. Waldock, "The Regulation of the Use of Force by Individual States in International Law," 496–498; Bowett, *Self-Defense in International Law*, 188; Smith MacDougal and Feliciano, *Law and Minimum World Public Order*, 235; Schachter, "The Right of States to Use Armed Force," 1634; and International Court of Justice, "Nicaragua v. USA, Dissenting Opinion Schwebel," par. 173.
57. Quoted in Bowett, *Self-Defense in International Law*, 192–193.
58. Brownlie, *International Law and the Use of Force by States*, 270.
59. Ibid., 271; Concurring, Kelsen, *The Law of the United Nations*, 914; Yoram Dinstein, *War, Aggression, and Self-Defense*, 3rd ed. (Cambridge; New York: Cambridge University Press, 2001): 168.
60. Akehurst, *A Modern Introduction to International Law*, 262.
61. Brownlie, *International Law and the Use of Force by States*, 273; Akehurst, *A Modern Introduction to International Law*, 274.
62. Brownlie, *International Law and the Use of Force by States*, 273.
63. Ibid.
64. Shaw, *International Law*, 656.
65. "Vienna Convention on the Law of Treaties," Article 31, par. 1.
66. United Nations, "Charter of the United Nations," Article 1, par. 1.
67. Brownlie, *International Law and the Use of Force by States*, 273; Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd. ed. (New York: Columbia Univ. Pr., 1979): 141–142; and Albrecht Randelzhofer, "Article 2(4)," in Bruno Simma and Hermann Mosler, eds, *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994): 676.
68. Bowett, *Self-Defense in International Law*, 192; and, Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge; New York: Cambridge University Press, 2002): 98.

69. Waldock, "The Regulation of the Use of Force by Individual States in International Law," 498; Bowett, *Self-Defense in International Law*, 191–192; Smith MacDougal and Feliciano, *Law and Minimum World Public Order*, 238; Stephen M. Schwebel, "Aggression, Intervention and Self-Defense in Modern International Law," vol. 81, *Receuil Des Cours de L'Academie de Droit International* (Leiden: A.W. Sijthoff, 1973): 581; and, Robert Jennings, Arthur Watts, and Lassa Francis Lawrence Oppenheim, eds, *Oppenheim's International Law: Peace*, 9th. ed. (Harlow: Longman, 1992): 422.
70. Smith MacDougal and Feliciano, *Law and Minimum World Public Order*, 260, 236.
71. Akehurst, *A Modern Introduction to International Law*, 263; Randelzhofer, "Article 2(4)," 676; and Shaw, *International Law*, 790.
72. Franck, *Recourse to Force*, 107.
73. Henkin, *How Nations Behave*, 141–142.
74. Dinstein, *War, Aggression, and Self-Defense*, 172.
75. Ibid.
76. Shaw, *International Law*, 790.
77. Dinstein, *War, Aggression, and Self-Defense*, 172.
78. Smith MacDougal and Feliciano, *Law and Minimum World Public Order*, 240.
79. Ibid.
80. There is a broad consensus in the literature on this point. See, Mark B. Baker, "Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)," *Houston Journal of International Law*, 10, no. 1 (1987): 33; Jack M. Beard, "America's New War on Terror: The Case for Self-Defense Under International Law," *Harvard Journal of Law and Public Policy*, 22, no. 2 (2002): 583; and Ackermann, *International Law and the Pre-emptive Use of Force Against Iraq*.
81. International Court of Justice, "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits," par. 237.
82. For further in-depth discussion of the Caroline incident, see, Robert Y. Jennings, "The Caroline and McLeod Cases," *The American Journal of International Law* 32, no. 1 (1938): 82–99; and Martin A. Rogoff and Edward Collins Jr., "The Caroline Incident and the Development of International Law," *Brooklyn Journal of International Law*, 16, no. 3 (1990): 493–528.
83. Jennings, "The Caroline and McLeod Cases," 92.
84. Ibid.
85. Ibid.
86. Ibid.
87. Daniel Webster, "Extract from Note of 24 April 1841 (from Daniel Webster to Henry Fox)" (The Avalon Project at Yale Law School, 24 April 1841), http://avalon.law.yale.edu/19th_century/br-1842d.asp.
88. In its judgment, the Tribunal ruled: "It must be remembered that preventive action on foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation' (The Caroline case, *Moore's Digest of International Law*, II, 412)." See, International Military Tribunal (Nuremberg), "Judicial Decisions IMT (Nuremberg): Judgment & Sentences, 1 October 1946," *The American Journal of International Law*, 41, no. 1 (1947): 205.
89. International Court of Justice, "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits," par. 176.

90. International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion" (International Court of Justice, 8 July 1996), par. 41, http://www.icj-cij.org/docket/files/95/7495.pdf.
91. It is beyond the scope of this Chapter to examine in detail the pacific methods of dispute settlement under the Charter. For such a discussion, see, Peter Malanczuk, Michael Barton Akehurst, eds, *Akehurst's Modern Introduction to International Law*, 7th. rev. ed. (London: Routledge, 1997): 273–305, 385–387; and Hugh M. Kindred, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery Publications, Limited, 2000): 329–396.
92. United Nations, "Charter of the United Nations," Article 1, par. 1.
93. Ibid., Article 33, par. 1.
94. Ibid., Article 39.
95. Ibid., Article 41.
96. According to Schmitt, a state must be "certain beyond reasonable doubt" that these Security Council actions will prove futile (or that the Council will fail to act at all) if it wishes to take pre-emptive military action. See, Schmitt, "Pre-emptive Strategies in International Law," 531; also, Baker, "Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)," 45.
97. The Stanley Foundation, "Capturing the 21st Century Security Agenda: Prospects for Collective Responses" (The Stanley Foundation, October 2004): 70, http://www.stanleyfoundation.org/publications/report/C21CSA04.pdf.
98. Webster, "Extract from Note of 24 April 1841 (from Daniel Webster to Henry Fox)."
99. M. Elaine Bunn, "Pre-emptive Action: When, How, and to What Effect?," *Strategic Forum*, no. 200 (2003): 7.
100. For example, "permissive action links" (or PALs) that electronically "lock up" nuclear weapons and prevent their detonation until an authorization code is entered.
101. Ashton B. Carter, "How to Counter WMD," *Foreign Affairs* 83, no. 5 (2004): 73–76.
102. For the contrary view on this point. See, Christopher Greenwood, "International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq," *San Diego International Law Journal*, 4 (2003): 7–38; Terence Taylor, "The End of Imminence?," *The Washington Quarterly*, 27, no. 4 (2004): 57–72.
103. A particularly useful differentiation between imminent, impending and threatening can be found in Webster's Dictionary: "*Imminent* is the strongest: it denotes that something is ready to fall or happen on the instant; as, in imminent danger of one's life. *Impending* denotes that something hangs suspended over us, and may remain so indefinitely; as, the impending evils of war. *Threatening* supposes some danger in prospect, but more remote; as, threatening indications for the future." See, "Definition: Imminent," *Webster's Revised Unabridged Dictionary*, 1913, http://dictionary.die.net/imminent. The preventive counterproliferation strategy in the Bush doctrine is based on assessments of *threatening* WMD capabilities, not *imminent* WMD attacks, as these terms are defined here.
104. Michael C. Bonafede, "Here, There and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism after the September 11 Attacks," *Cornell Law Review*, 88, no. 1 (2002): 183.
105. International Court of Justice, "Nicaragua v. USA, Dissenting Opinion Schwebel," par. 9.

106. International Court of Justice, "Advisory Opinion, Nuclear Weapons," par. 91.
107. Ibid., par. 92.
108. Ibid., par. 94–95.
109. Ibid., par. 96.
110. Ibid., par. 97.
111. Thomas W. Dowler, I. I. Howard, and H. Joseph, "Countering the Threat of the Well-Armed Tyrant: A Modest Proposal for Small Nuclear Weapons," *Strategic Review* 19, no. 4 (1991): 34–40, quoted in Robert W. Nelson, "Low-Yield Earth-Penetrating Nuclear Weapons," *FAS Public Interest Report: Journal of the Federation of American Scientists (FAS)*, 54, no. 1 (2001): 6.
112. Bonafede, "Here, There and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism after the September 11 Attacks," 184; and John Alan Cohan, "Formulation of a State's Response to Terrorism and State-Sponsored Terrorism," *Pace International Law Review*, 14, no. 1 (2002): 105.
113. Paul Wolfowitz, "Remarks by Deputy Secretary of Defense Paul Wolfowitz, International Institute for Strategic Studies, Arundel House, London, England," *US Department of Defense*, 2 December 2002, http://www.defense.gov/speeches/speech.aspx?speechid=309.
114. Schmitt, "Pre-emptive Strategies in International Law," 532.
115. Ibid., 533; Oscar Schachter, "The Lawful Use of Force by a State against Terrorists in Another Country," *Israel Yearbook on Human Rights*, 19 (1989): 227; and Cohan, "Formulation of a State's Response to Terrorism and State-Sponsored Terrorism," 104.
116. Alberto R. Coll, "The Legal and Moral Adequacy of Military Responses to Terrorism," *American Society of International Law Proceedings*, 81 (1987): 299.
117. Chatham House, "Principles of International Law on the Use of Force by States In Self-Defense," *Chatham House* (October 2005): 969, http://www.chathamhouse.org/publications/papers/view/108106.
118. Antonio Cassese, "The International Community's 'Legal' Response to Terrorism," *International & Comparative Law Quarterly*, 38 (1989): 590.
119. Ibid., 590–591.
120. Chatham House, "Principles of International Law on the Use of Force by States In Self-Defense," 966.
121. The substance of the criterion of imminence, in particular, has been subject to discussion in the context of terrorism, as we will highlight in detail in Chapters 4 and 6.
122. Chatham House, "Principles of International Law on the Use of Force by States In Self-Defense | Chatham House: Independent Thinking on International Affairs," *Chatham House* (October 2005): 966, http://www.chathamhouse.org/publications/papers/view/108106.
123. The well-known reason for this failure is connected to continued disagreement on how to legally separate between what many states perceive as legitimate actions by national liberation movements and terrorist attacks. Compare Gilbert Guillaume, "Terrorism and International Law," *International & Comparative Law Quarterly*, 53, no. 3 (2004): 593. This can be criticized as a false dilemma as national liberation movements employ political violence, targeted at agents and objects of the state as opposed to terrorists, who chose civilian targets. We would like to thank Vesselin Popovski for drawing our attention to this point.
124. Sofaer became legal adviser to the Department of State for the Reagan Administration in 1985, which ensured the inclusion of his more broad approach

to interpreting self-defense provisions with regard to terrorist attacks into US use-of-force policy in that era.

125. Antonio Cassese, "The International Community's 'Legal' Response to Terrorism," *International & Comparative Law Quarterly*, 38 (1989): 590.
126. Javier Rupérez, "The United Nations in the Fight Against Terrorism" (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 2005); 14, http://www.unafei.or.jp/english/pdf/RS_No71/No71_07VE_Ruperez.pdf.
127. High-Level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility. UN Document A/59/565," 2 December 2004, par. 164, http://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565_En.pdf.
128. Arend, *International Law and the Use of Force*, 150–155.
129. Ibid., 156.
130. The discussion of the three self-defense thresholds is based on Arend, *International Law and the Use of Force*, 159–162.
131. Ibid., 163.
132. Coll, "The Legal and Moral Adequacy of Military Responses to Terrorism," 307.
133. Ibid., 298; and Sofaer, "Terrorism and the Law," 919.
134. Rowles, James P., "Military Responses to Terrorism: Substantive and Procedural Constraints in International Law," *American Society of International Law Proceedings*, 81 (1987): 314.
135. Cassese, "The International Community's 'Legal' Response to Terrorism," 598.
136. Ibid., 596.
137. Arend, *International Law and the Use of Force*, 142.
138. Francis A. Boyle, "Military Responses to Terrorism: Remarks," *American Society of International Law Proceedings*, 81 (1987): 295–296.
139. Christian Henderson, "The 2010 United States National Security Strategy and the Obama Doctrine of 'Necessary Force,' " *Journal of Conflict & Security Law*, 15, no. 3 (2010): 422; and Mary Ellen O'Connell, "Evidence of Terror," *Journal of Conflict and Security Law*, 7, no. 1 (1 April 2002): 30.
140. Security Council, "Resolution 1373," 28 September 2001, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement.
141. Cassese, "The International Community's 'Legal' Response to Terrorism," 593.
142. Coll, "The Legal and Moral Adequacy of Military Responses to Terrorism," 300.
143. Kimberley N. Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defense Against Non-State Terrorist Actors," *International & Comparative Law Quarterly* 56, no. 1 (2007): 145.
144. Antonio Cassese, "Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law," *European Journal of International Law*, 12, no. 5 (2001): 997.
145. International Court of Justice, "Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) Merits," par. 195.
146. International Court of Justice, "Nicaragua v. USA, Dissenting Opinion Schwebel," par. 171; and International Court of Justice, "Dissenting Opinion of Judge Sir Robert Jennings" (International Court of Justice, 27 June 1986): 543, http://www.icj-cij.org/docket/files/70/6525.pdf.
147. John Norton Moore, "The Nicaragua Case and the Deterioration of World Order," *The American Journal of International Law*, 81, no. 1 (January 1987): 151.
148. Trapp, "Back to Basics," 142.
149. Ibid., 143–145.

150. Cassese, "The International Community's 'Legal' Response to Terrorism," 600.
151. Chatham House, "Principles of International Law on the Use of Force by States In Self-Defense," 968.

3 Preventive and Preemptive Self-Defense in US National Security Policy: A Brief History

1. Peter Lavoy, "What's New in the New US Strategy to Combat WMD?," *Strategic Insights*, 1, no. 10 (2002): 14–27.
2. US Department of State, *Foreign Relations of the United States. 1946–1954* (Washington, DC: US Department of State, 1946): 1201.
3. James B. Steinberg, Michael E. O'Hanlon, and Susan E. Rice, "The New National Security Strategy and Pre-emption," *Brookings Policy Brief Series*, 2002, http://www.brookings.edu/research/papers/2002/12/terrorism-ohanlon; and Abraham D. Sofaer, "On the Necessity of Pre-Emption," *European Journal of International Law*, 14, no. 2 (2003): 209–210.
4. W. Hays Parks, "Memorandum of Law: Executive Order 12333 and Assassination," *The Army Lawyer*, no. 12 (1989): 7.
5. Quoted in, Jeffrey Record, *Nuclear Deterrence, Preventive War and Counter proliferation*, CATO Institute Policy Analysis (CATO Institute, 8 July 2004): 7, http://www.cato.org/publications/policy-analysis/nuclear-deterrence-preventive-war-counterproliferation.
6. See Les Aspin, "Les Aspin's Remarks to the National Academy of Science on 7 December 1993," *Comparative Strategy*, 13, no. 2 (1994): 239–244.
7. Department of Defense, "Department of Defense Response: Protection – Acquisition – Counterforce," *Federation of American Scientists*, 1996, https://www.fas.org/irp/threat/prolif96/response.html.
8. President William J. Clinton, "Executive Order 12938: Proliferation of Weapons of Mass Destruction," *The White House Archives*, 14 November 1994, https://www.fas.org/irp/offdocs/eo12938.htm.
9. For the recollections of senior Kennedy administration officials of events during the crisis, see, Arthur M. Schlesinger, *A Thousand Days: John F. Kennedy in the White House* (Boston: Houghton Mifflin Company, 1965): 794–841; Theodore C. Sorensen, *Kennedy*, ed. John F. Kennedy (New York: Harper & Row, 1965): 667–718; and, in particular Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (New York: New American Library, 1969). For academic analyses of the crisis see, Irving Lester Janis, *Victims of Groupthink: A Psychological Study of Foreign-Policy Decisions and Fiascoes* (Boston: Houghton, Mifflin, 1972): 132–158; Abram Chayes, *The Cuban Missile Crisis, International Crises and the Role of Law* (London: Oxford University Press, 1974); Alexander L. George and Richard Smoke, *Deterrence in American Foreign Policy: Theory and Practice* (New York: Columbia University Press, 1974): 447–499; and Graham T. Allison and Philip D. Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd. ed. (New York: Longman, 1999). For a selection of declassified American, Cuban, and Soviet documents generated during the crisis, see, Laurence Chang and Peter Kornbluh (eds.), *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader*, rev. ed. (New York: The New Press, 1998).
10. Schlesinger, *A Thousand Days*, 796–797.

11. On 22 October, Kennedy formally established a select group of senior advisors as the "Executive Committee" (or "ExComm") of the National Security Council, and ordered them to meet with him each morning at 10 am to discuss the crisis. See, Sorensen, *Kennedy*. The group included Vice President Lyndon Johnson, Secretary of State Dean Rusk, Secretary of Defense Robert McNamara, Chairman of the Joint Chiefs of Staff General Maxwell Taylor, Special Assistant to the President for National Security Affairs McGeorge Bundy, Secretary of the Treasury Douglas Dillon, CIA Director John McCone, Attorney General Robert Kennedy, Undersecretary of State George Ball, Deputy Secretary of Defense Roswell Gilpatrick, US Ambassador to the Soviet Union Llewellyn Thompson, former Secretary of State Dean Acheson, and Ambassador to the UN Adlai Stevenson.
12. Central Intelligence Agency, "Major Consequences of Certain US Courses of Action in Cuba. SNIE 11-19-62" (Central Intelligence Agency, 20 October 1962), http://www2.gwu.edu/~nsarchiv/nsa/cuba_mis_cri/19621020cia.pdf.
13. Ibid.
14. Ibid., 4–5.
15. Ibid., 4.
16. US Department of State, "Cuban Missile Crisis: Minutes of the 505th Meeting of the National Security Council" (The Avalon Project at Yale Law School, 20 October 1962), http://avalon.law.yale.edu/20th_century/msc_cuba034.asp.
17. Ibid.
18. Ibid.
19. Option 2 represented a *preventive attack* option. There is no indication in the declassified transcripts of the NSC/ExComm meetings that Kennedy and his advisors believed that, absent any countermeasures or military action on the part of the United States, the Soviet Union would launch a nuclear strike against it immediately upon the missiles becoming operational. In other words, they did not fear an imminent nuclear strike that warranted a preemptive attack. Rather, as discussed in the SNIE, they saw the missile capability, once operational, as shifting the balance of power between the United States and the USSR, thereby weakening America's position and credibility as defender of the "Free World" among its allies in Latin America and elsewhere. See Ibid. Thus, the air strike was intended to prevent a shift in the balance of power that would adversely affect long-term US political and security interests, not to disrupt an impending or even a possible future nuclear attack. It is in this sense that the air strike was a preventive rather than a preemptive attack option.
20. Ibid.
21. These included Special Assistant to the President for National Security Affairs McGeorge Bundy; Chairman of the Joint Chiefs of Staff Gen. Maxwell Taylor; the Joint Chiefs of Staff themselves; and, with minor variations, Treasury Secretary Douglas Dillon and CIA Director John McCone. See, Ibid.
22. Ibid.
23. Ibid.
24. Ibid.
25. Ibid.
26. The opponents included Secretary of Defense Robert McNamara; Secretary of State Dean Rusk; Special Counsel to the President Theodore Sorensen; and US Ambassador to the UN Adlai Stevenson. Attorney General Robert Kennedy, CIA Director John McCone, Ambassador-at-Large Llewellyn E. Thompson and

Treasury Secretary Douglas Dillon spoke at various times of a hybrid option involving an initial blockade with follow-up air strikes if the Soviets continued construction of the launch sites. See, Ibid.

27. Ibid.
28. Ibid.
29. Ibid.
30. Ibid. At the 506th meeting of the NSC held the next day, on 21 October 1962, the question of terminology was discussed at greater length. Secretary Rusk maintained that, from a legal standpoint, there was effectively no difference in meaning between "quarantine" and "blockade," but he preferred the former "for political reasons in that it avoids comparisons with the Berlin blockade." See, US Department of State, "Cuban Missile Crisis: Minutes of the 506th Meeting of the National Security Council" (The Avalon Project at Yale Law School, 21 October 1962), http://avalon.law.yale.edu/20th_century/msc_cuba038.asp.
31. US Department of State, "Minutes of the 505th Meeting of the National Security Council."
32. Ibid.
33. Ibid.
34. Ibid.
35. Leonard C. Meeker, "Defensive Quarantine and the Law," *The American Journal of International Law*, 57, no. 3 (1963): 523–524.
36. Quoted in David John Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998): 900–901 However, this rationale neglects to mention the Article 53(1) requirement for UN Security Council authorization of regional enforcement action.
37. Chayes, *The Cuban Missile Crisis*, 65–66.
38. Ibid.
39. Ibid.
40. US Department of State, "Minutes of the 505th Meeting of the National Security Council."
41. US Department of State, "Minutes of the 506th Meeting of the National Security Council."
42. US Department of State, "Minutes of the 505th Meeting of the National Security Council."
43. Central Intelligence Agency, "Major Consequences of Certain US Courses of Action in Cuba. SNIE 11–19–62," 8.
44. Ibid., 9–10.
45. Ibid., 8.
46. Ibid.
47. Ibid., 9.
48. George and Smoke, *Deterrence in American Foreign Policy*, 447.
49. Tad Szulc, *Fidel: A Critical Portrait* (London: Hutchinson, 1987): 586–587.
50. Michael E. O'Hanlon and Mike Mochizuki, *Crisis on the Korean Peninsula: How to Deal with a Nuclear North Korea* (New York: McGraw-Hill, 2003): 23.
51. Ibid., 25.
52. Ibid.
53. Ibid., 25–26.
54. Ashton B. Carter and William J. Perry, "Nuclear over North Korea: Back to the Brink," *The Washington Post*, 20 October 2002, sec. Op-ed, http://belfercenter.hks.harvard.edu/publication/1223/nuclear_over_north_korea.html?breadcrumb=%2Fexperts%2F373%2Fdr_william_j_perry.

55. Joel S. Wit, Daniel B. Poneman, and Robert L. Gallucci, *Going Critical: The First North Korean Nuclear Crisis* (Washington, DC: Brookings Institution Press, 2004): 390.
56. Carter and Perry, "Nuclear over North Korea: Back to the Brink."
57. William Burr and Jeffrey T. Richelson, "Whether to 'Strangle the Baby in the Cradle:' The United States and the Chinese Nuclear Program, 1960–64," *International Security*, 25, no. 3 (January 2000): 62.
58. Carter and Perry, "Nuclear over North Korea: Back to the Brink."
59. For discussions of this crisis in US-DPRK relations, see, William E. Perry Jr., "North Korea's Nuclear Program: The Clinton Administration's Response" (Institute for National Security Studies, US Air Force Academy Colorado, March 1995); Don Oberdorfer, *The Two Koreas: A Contemporary History* (London: Warner Books, 1999): 305–336; and Wit, Poneman, and Gallucci, *Going Critical*.
60. David Albright and Christina Walrond, "North Korea's Estimated Stocks of Plutonium and Weapon-Grade Uranium," *Institute for Science and International Security (ISIS)*, 16 August 2012, http://isis-online.org/uploads/isis-reports/documents/dprk_fissile_material_production_16Aug2012.pdf.
61. Richard P. Cronin, "North Korea's Nuclear Weapons Program: US Policy Options, CSR Report for Congress, CRS94-470F" (Congressional Research Service, 1 June 1994), http://www.fas.org/spp/starwars/crs/94-470f.htm. In late December 1994, US intelligence reported there was a "better than even chance" that the North had extracted enough plutonium for two nuclear bombs from spent uranium fuel removed from its Yongbyon reactor in 1989. See, Perry Jr., "North Korea's Nuclear Program."
62. Cronin, "North Korea's Nuclear Weapons Program."
63. Ibid.
64. William J. Perry, "Statement of Hon. William J. Perry, Secretary of Defense, Security Implications of the Nuclear Non-Proliferation Agreement with North Korea, Hearing Before the Committee on Armed Services, United States Senate, 104th Congress, First Session" (United States Senate, 26 January 1995), http://library.uoregon.edu/ec/e-asia/read/jeff-1.pdf.
65. Quoted in Senator John McCain, "United States Policy and the Crisis in Korea" (Congressional Record, 24 May 1994), http://www.fas.org/spp/starwars/congress/1994/s940524-dprk.htm.
66. Perry, "Statement of Hon. William J. Perry, Secretary of Defense."
67. Cronin, "North Korea's Nuclear Weapons Program."
68. Perry, "Statement of Hon. William J. Perry, Secretary of Defense."
69. Option 3 represented a preventive attack option. As discussed above, the administration did not fear an imminent nuclear attack from the DPRK necessitating a preemptive attack against its nuclear capabilities. Rather, the challenge lay in the threat a nuclear-capable DPRK posed to long-term US security interests. Thus, the aim of a counterproliferation strike was to prevent the DPRK from moving farther along the path toward developing a nuclear weapons capability, not to disrupt a nuclear attack that was thought to be imminent. In this sense, the counterproliferation strike option in this crisis represented a preventive rather than a preemptive attack.
70. John M. Collins, "Korean Crisis, 1994: Military Geography, Military Balance, Military Options, CRS Report for Congress, No. 94-311S" (Congressional Research Service, 11 April 1994), http://www.globalsecurity.org/wmd/library/report/crs/94-311s.htm.

71. Ibid. As Collins notes, the best bunker busting bomb in the USAF inventory at the time – the GBU-28 – could penetrate only one hundred feet of earth or 20 feet of concrete.
72. Ibid.
73. Ibid.
74. Oberdorfer, *The Two Koreas*, 315.
75. McCain, "United States Policy and the Crisis in Korea."
76. Ibid.
77. Cronin, "North Korea's Nuclear Weapons Program."
78. McCain, "United States Policy and the Crisis in Korea."
79. Perry, "Statement of Hon. William J. Perry, Secretary of Defense."
80. Oberdorfer, *The Two Koreas*, 323.
81. The DPRK had warned that it would consider the imposition of sanctions as tantamount to a declaration of war. As Defense Secretary Perry cautioned in a speech to the Asia Society in May 1994: "We may believe, and I do believe, that this is rhetoric on their part but we cannot act on that belief. We have to act on the prudent assumption that there will be some increase in the risk of war if we go to a sanction regime." See John Pike, "North Korea Nuclear Crisis February 1993–June 1994," *GlobalSecurity.org*, 2003, http://www.globalsecurity.org/military/ops/dprk_nuke.htm.
82. Hence, the necessity of pursuing force augmentation in tandem with sanctions. The United States and DPRK eventually reached agreement on 21 October 1994 when the "Agreed Framework" was signed in Geneva. See, "Agreed Framework between the United States of America and the Democratic People's Republic of Korea" (International Atomic Energy Agency, 21 October 1994), http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc457.pdf.
83. Oberdorfer, *The Two Koreas*, 323. By General Assembly standards, the vote was however not clear-cut: the resolution was passed with 79 votes in favor, 28 against and 33 abstentions.
84. General Assembly, "Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Aerial and Naval Military Attack against the Socialist People's Libyan Arab Jamahiriya by the Present United States Administration in April 1986. UN Document A/RES/41/38," 20 November 1986, par. 2, http://www.un.org/documents/ga/res/41/a41r038.htm.
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6 The Rise of Drones

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Conclusion: the Use-of-Force and the Making of Hegemonic International Law – From Bush to Obama

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33. Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General. UN Document A/59/2005/Add.3," 26 May 2005, par. 124, http://www.ohchr.org/Documents/Publications/A.59.2005.Add.3.pdf.
34. High-Level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility. UN Document A/59/565," 2 December 2004, par. 188, http://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565_En.pdf.
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38. *The National Strategy for Combating Terrorism* (2003) spells out in greater detail states' legal obligations in the fight against terror: "UNSCR 1373 clearly establishes states' obligations for combating terrorism. . . . [These include] suppressing

and freezing terrorist financing, prohibiting their nationals from financially supporting terrorists, denying safe haven, and taking steps to prevent the movement of terrorists. Additionally, the 12 international counterterrorism conventions and protocols, together with UNSCR 1373, set forth a compelling body of international obligations relating to counterterrorism. We will continue to press all states to become parties to and fully implement these conventions and protocols." President George W. Bush, "The National Strategy for Combating Terrorism" (President of the United States of America, February 2003), 2, http://www.state.gov/documents/organization/60172.pdf. The United States expects all states to adhere to these international standards of accountability "or else": "We will use UNSCR 1373 and the international counterterrorism conventions and protocols to galvanize international cooperation and to rally support for holding accountable those states that do not meet their international responsibilities." See, Ibid. at 19. Finally, Washington will keep a close eye on all states to ensure that they fulfill these obligations: "To help ensure compliance and maintain oversight, the US Government will support the establishment of a comprehensive plan to monitor and, when appropriate, publicize nations' counterterrorist activities." See, Ibid.

39. President George W. Bush, "Statement by H.E. Mr. George W. Bush President at the 56th Session of the United Nations General Assembly," *United Nations*, 10 November 2001, http://www.un.org/webcast/ga/56/statements/011110usaE.htm.
40. José E. Alvarez, "Hegemonic International Law Revisited," *American Journal of International Law*, 97, no. 4 (2003): 875.
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47. Bush, "The National Security Strategy of the United States of America 2002," 15.
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49. Alvarez, "Hegemonic International Law Revisited," 881.
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54. Peter W. Singer and Thomas Wright, "An Obama Doctrine on New Rules of War," *The Brookings Institution*, 17 January 2013, http://www.brookings.edu/research/papers/2013/01/an-obama-doctrine-on-new-rules-of-war.
55. Vagts, "Hegemonic International Law," 845; and Alvarez, "Hegemonic International Law Revisited," 873.
56. Eyal Benvenisti, "The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies," *European Journal of International Law*, 15, no. 4 (2004): 694.
57. Michael Byers, "Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change," *Journal of Political Philosophy*, 11, no. 2 (2003): 174.
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