The Role of Military Force in Foreign Relations, Humanitarian Intervention and the Security Council

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If international law is, in some ways, at the vanishing point of law, the law of war is, even more conspicuously, at the vanishing point of international law.
—Hersch Lauterpacht[1]

At 8:46 on the morning of September 11th, 2001, a handful of terrorists propelled the globe into an era of profound change. The immediate and palpable consequence of al Qaeda's attack – the deaths of thousands of innocent civilians and the immutable gash in the skyline of the United States' most populous city[2] – is relatively transient compared to the consequences of the response to 9/11. Whether or not recognized, acknowledged, or asserted, 9/11 and the response thereto brought forth a nascent legal regime that will alter for all time the way nation states apply the rule of law in combating terrorism. While Usama bin Laden affected countless lives in most primitive and horrific fashion, the United States and its allies, in responding, are effecting a metamorphosis of the legal landscape that structures our society and the relationships between states. Although al Qaeda's attacks have impacted profoundly the world's physical landscapes, the armed response is impacting the international legal regime to a degree evoking the eras of post-Westphalian peace[3] and the new world order emerging from the chaos of World War II.

Over the past several years, the United States Government has faced the challenge of attempting to apply the existing laws of war to a global war on terrorism. In so doing, it perhaps has come better to appreciate the truth in Hersch Lauterpacht's remark. Given our recent experience, one could add to Lauter-

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[1] See Hersch Lauterpacht, The Problem of the Revision of the Law of War, 9 Brit. Y.B. Int'l L. 360, 382 (1952).

[2] See, e.g., Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead, Wash. Post, Sep. 12, 2001, at A1; Eric Lipton, Struggle to Tally All 9/11 Dead by Anniversary, N.Y. Times, Sep. 1, 2002, at 1 (the final World Trade center death toll will drop no lower than about 2,750, not including the 10 hijackers. Counting the 233 killed in Washington and Pennsylvania, it will remain the second-bloodiest day in United States history, behind the battle of Antietam in the Civil War). The dead include citizens of more than 90 countries. <http://www.comptroller.nyc.gov/bureaus/bud/reports/impact-9-11-year-later.pdf>.

[3] Treaty of Westphalia, Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies, October 24, 1648, available at <http://www.yale.edu/lawweb/avalon/westphal.htm>.

pacht's assessment the observation that if the law of war is at the vanishing point of international law, then the war with al Qaeda, and more broadly, the global war on terrorism, raise issues that are at the vanishing point of the law of war. This is a new war not envisioned by the soldiers and statesmen comprising the authors of the present-day law of war.

On February 10, 2004, Professor Rüdiger Wolfrum,[4] in his remarks opening the Max Planck Institute conference on differing American and European perceptions of international law, stated that international law was in "transition". Correctly recognizing a profoundly changed global situation, he referred to a "reformulation" of self-defense concepts in order to meet concerns regarding the "legitimacy" of the use of force.[5] Indeed, law and policy associated with the employment of the military instrument arguably already have shifted dramatically in the post-9/11 era.

Pressured by circumstances that seem to have evolved more substantially, and well in advance of the attendant legal norms, we find ourselves today in a situation where military force has been used in controversial ways that highlight, in magnitude unprecedented, the differing perceptions of international law that divide Europe and the United States.[6] To a large extent, however, perceived legal differences are in actuality reflective of several discrete issues of another sort – changed circumstances associated with terrorism's ascendance, variances regarding whether armed intervention is appropriate as a matter of policy as opposed to law, and more fundamental jurisprudential differences regarding appropriate mechanisms for international governance. To the end of better understanding the issues animating our differing perceptions, this paper addresses three significant United States actions responding or related to the terrorist attack of 9/11: Operation Enduring Freedom, Operation Iraqi Freedom, and the publication of the 2002 National Security Strategy. The latter two actions are frequently associated with a strained U.S.-European relationship, but this paper attempts to demonstrate how the U.S. legal position regarding these actions is a natural outgrowth of the demonstrated international consensus regarding Operation Enduring Freedom and is far easier to justify legally than recent humanitarian interventions, such as that in Kosovo.

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

[5] Professor Rüdiger Wolfrum, Introductory Remarks at the Max Planck Institute for Comparative Public Law and International Law Conference on The American/European Dialogue: Different Perceptions of International Law? (Feb. 10, 2004).

[6] See. e.g., Chirac: Iraq War Illegal, U.P. Int'l, Mar. 21, 2003 ("French President Jacques Chirac Friday said the U.S.-led war against Iraq was illegal. Speaking at a EU Summit in Brussels, Chirac threatened to veto a resolution handing control of the post-war reconstruction of the country to the United Nations."); Dinah A. Spritzer, CSSD Declares Iraq War is Illegal, Prague Post, Apr. 2, 2003 ("Fist pounding, whistling, and hot tempers characterized the March 30 Social democratic (CSSD) debate over Iraq, which yielded a resolution that condemns the U.S.-led war."); Ju-Lin Tan, "Iraq War Was Illegal", Blix Says, Press Assn., Mar. 5, 2004.

Operation Enduring Freedom

In response to the 9/11 terrorist attacks, the United States and allies launched a military strike against al Qaeda and Taliban forces in Afghanistan on October 8, 2001. A relative absence of international dissent with respect to this military intervention has resulted in a paucity of legal analyses associated with this use of force. Careful scrutiny, however, reveals that the Afghanistan intervention may evidence a greater international acceptance of particular emerging self-defense criteria. Operation Enduring Freedom sheds light on evolving norms regarding several controversial and significant areas of self-defense theory: 1) anticipatory self-defense; 2) reprisal; and 3) state responsibility. The last two norms are beyond the purview of this short note as it pertains primarily to those most controversial notions with respect to the U.S.-European dialogue on *jus ad bellum*. They are mentioned here, however, because they play an important role in terms of the possible forms transition may take.[7]

Since 1945, the language of the United Nations Charter has remained intact, but the breadth of actions asserted as being subsumed by the language of Article 51 has evolved to accommodate the legitimate security needs of member states. The bane of terrorism has further discredited the most literal readings of Article 51 and the most conservative articulations of self-defense law. Recent global responses to terrorism appear to have further advanced more utile constructs including those recognizing "anticipatory self-defense". Operation Enduring Freedom is one such action.

9/11 is the first time since the U.N. Charter entered into force that the United States has been compelled to respond to an unequivocal cross-border "armed attack". To many, the absence of such an armed attack has been the gravamen of their

[7] The scope of this comment does not permit extensive discussion regarding the doctrine of peacetime reprisal or that of state responsibility. In the case of the former, one could argue that it may be reemerging as a potential characteristic of the use of force that, in conjunction with anticipatory self-defense, bolsters legitimacy. The intervention in Afghanistan was retributive to the extent it was carried out in retaliation for 9/11. But see Derek W. Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l L. 213 (1972) (explaining that "few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal"). With respect to state responsibility, one could argue that this military intervention evinces a movement away from the twin declarants of old law with respect to the field – the *Nicaragua* and *Iran Hostages* cases, which embodied the principle that a state was only responsible for the illegal actions of those present within its territory, if the bad actors were agents of the state or were controlled by its government. Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14 (June 27), para 191-95, reprinted in: Barry E. Carter/Phillip R. Trimble, International Law 1329, 1995 (holding that a State is responsible for "sending by or on [its] behalf armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein"); United States Diplomatic and Consular Staff in Tehran, (*U.S. v. Iran*), 1980 I.C.J. 3, 42 (Judgment of May 24). See also, Greg Travalio/John Altenburg, State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force, 4 Chi. J. Int'l L. 97 (2003) (arguing that the severity of the intervention authorized should be directly commensurate with the degree of a state's active assistance to terrorist entities).

condemnation of past U.S. military interventions.[8] Those detractors did not assess the post-9/11 intervention as suffering the same legal weaknesses of previous interventions, and accepted it as consistent with Article 51 of the U.N. Charter.[9] A closer analysis of the circumstances associated with military intervention in Afghanistan – and terrorism generally – reveals, however, that the same underlying concerns informing past rejections of anticipatory self-defense theories in fact apply in this case as well.[10]

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

At its core, Operation Enduring Freedom is a quintessential example of appropriate application of the previously controversial doctrine of anticipatory self-defense. The circumstances reveal little in terms of differentiating characteristics for which the strict constructionist can explain departure from a pattern of criticizing U.S. interventions undertaken in the name of anticipatory self-defense. Even given the cross-border incursion, that incursion had ceased without defensive action, and, as stated above, there was most certainly time between 9/11 and the initiation of U.S-led hostilities in Afghanistan for United Nations Security Council action on this matter. Moreover, given that the Security Council had acted in Resolution 1368 to condemn the attacks and to recognize the applicability of a self-defense right[12] but not specifically to authorize the use of force, consistency with past prac-

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[8] See, e.g., Ian Brownlie, International Law and the Use of Force by States, 275-80 (1963); Louis Henkin, How Nations Behave: Law and Foreign Policy 141 (2nd ed. 1979). But see Myres S. McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 A.J.I.L. 597, 599 (1963) (arguing that the Charter's drafters, by inserting Article 51, did not intend to impose new limitations on the self-defense right); Oscar Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1634-35 (1984); Abraham D. Sofaer, International Law and Kosovo, 36 Stan. J. Int'l L. 1, 16 (2000); Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks, 97-99 (2002).

[9] See generally Sean D. Murphy, Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter, 43 Harv. Int'l L.J. 41 (2002); Carsten Stahn, International Law Under Fire: Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism, 27 Fletcher F. World Aff. 35 (2003).

[10] But see Yoram Dinstein, War, Aggression and Self-Defense 165–69 (2001) (criticizing anticipatory self-defense and stressing the need for a precipitating armed attack). Dinstein would apparently not impose a temporal requirement on self-defense action as discussed *infra*. Id.

[11] U.N. Charter Art. 51.

tice would have prompted the strict constructionist to assert that the United Nations' Resolution was not intended to justify military intervention.

Some might argue that the 9/11 attack obviated the need to justify a response under anticipatory self-defense theory; the distinguishing feature of this intervention being not the clarity of evidence adumbrating hostile intent so much as the fact of a previous attack. But given the general aversion with which reprisal has been viewed – no one ever has claimed that a retaliatory/reprisal strike is appropriate under the Charter – unsanctioned interventions have consistently been justified as acts of "self-defense", not as a response to prior attack.[13] Previous criticisms of anticipatory self-defense actions due to the absence of across-border attack are simply not answered by the fact that Enduring Freedom was preceded by a single attack nearly a month prior.

This military intervention, and the international acceptance of it, may portend an emerging acknowledgment of the fact that the most conservative renditions of anticipatory self-defense theory are clearly inadequate in this day and age of terrorism. Requiring a particularized, imminent attack essentially authorizes terrorists to operate with impunity, so long as their specific conspiracies and capabilities are not disclosed. Such a constraint could limit terrorism response options to only those cases where the intelligence regarding future attacks is extremely well developed. This would be inadequate from both protective and deterrent viewpoints.

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

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[12] See S.C. Res. 1368, U.N. SCOR, 4370th mtg., 40 I.L.M. 1277 (12 Sep. 2001). The Resolution includes the text, "[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter". Id.

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

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

Operation Iraqi Freedom

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

Particularly noteworthy among the relevant "bad facts" was the failed U.S. attempt to secure an authorizing Security Council Resolution in the Spring of 2002, the relative paucity of shareable intelligence, and the *coup de grace* – an inability to confirm predicating assumptions regarding the existence of weapons of mass destruction. From a legal perspective, none of these factors should be relevant to an analysis of the exercise of "inherent" right of self-defense consistent with Article 51. A Security Council veto cannot eliminate an inherent right, classification concerns do not lessen a threat, and the absence of suspected weapons after the fact cannot change the perceived threat *ex ante*. Law is rarely beholden to logic, however, and the accumulation of unfortunate *pre-* and *post facto* circumstances will undoubtedly impact future U.S. foreign policy, and perhaps even the law itself.

From a European perspective, Operation Iraqi Freedom is possibly the most controversial use of force by the United States in the last century. Critics view the U.S. action as the *denouement* in a trend of pejorative exceptionalism and unilateralism that had been mounting for several years.[14] Even before 9/11, the Bush administration was the subject of significant international condemnation for its decisions to move away from such international conventions as the Kyoto Protocol,[15]

[14] See Greek Defence Minister Fears New U.S. Arrogance After Iraq, Agence France Presse, Apr. 14, 2003; Europeans Dismayed by U.S. Arrogance in World Issues, Xinhua News Agency, Apr. 10, 2001; U.S. Arrogance Iraks Allies, Chi. Sun Times, Jun. 29, 1997, at 34.

[15] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Conference of the Parties, 3rd Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1997), reprinted in: 37 I.L.M. 22 (1998). See also Traci Watson/Jonathan Weisman, 6 Ways to Combat Global Warming. Debate

the Rome Statute creating the International Criminal Court,[16] the Comprehensive Test Ban Treaty,[17] and the Protocol to the Biological Weapons Convention.[18] As a result, U.S.-European relations are thought by many to have deteriorated to their worst state in the past 50 years.

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

Legal Authority for Operation Iraqi Freedom – the Technical Argument

If "bad facts make bad law", then the intervention in Iraq is a dangerous model for future legal constructs. In this case, however, we again should be careful to se-

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Moves Past Whether It's Happening to What, If Anything, Should be Done About It, USA Today, Jul. 16, 2001, at 1A. The treaty aimed to cut emissions of so-called greenhouse gases, which are blamed for warming the Earth's atmosphere, by 5.2 percent from their 1990 levels. Bush announced in March 2001 that the United States would not accept the treaty, arguing that the protocol was flawed and would harm the U.S. economy. Id.

[16] Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998). See also Jeremy Rabkin, Don't Tread on Us!; How to Handle the International Criminal Court, The Weekly Standard, May 20, 2002 (Vol. 7, no. 35), at 11 ("After a year of internal debate, the Bush administration announced a decision last week: The United States would no longer consider itself a signatory to the Rome Treaty establishing the International Criminal Court.").

[17] Comprehensive Nuclear Test Ban Treaty, opened for signature Sept. 24, 1997, S. Treaty Doc. No. 105.28. On October 13, 1999, the U.S. Senate voted not to ratify the CTBT. See 145 Cong. Rec. S12504-01 (daily ed. Oct. 13, 1999) (Senate Vote on Ratification of the Comprehensive Nuclear Test Ban Treaty). See Angelique R. Kuchta, A Closer Look: The U.S. Senate's Failure to Ratify the Comprehensive Test Ban Treaty, 19 Dick, J. Int'l L. 333, 535 (2001). See also, Jack Kelley, U.S. Rebuked on Test Ban Vote Nations Cite "Dangerous" Message, USA Today, Oct. 15, 1999, at 01A; Barbara Crossette, World Leaders Criticize the U.S. for Defeat of Test Ban Treaty, Sun Sentinel, Oct. 15, 1999, at 12A.

[18] Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 (entered into force Mar. 26, 1975 and the Protocol to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, BWC/ADOCGROUP/CRP.8, 3, at <http://www.armscontrol.org/pdf/bwcprotocol.pdf> (Apr. 3, 2001). See Jenni Rissanen, United States' Position on Protocol Unmoved, available at <http://www.acronym.org.uk/bwc/bwc11.htm> (Oct. 15, 2001).

parate law and policy. Bad facts may cause some to question the decision to intervene in Iraq, but those facts should have substantially less impact on the legal analysis. Post-conflict realizations that there may have been no weapons of mass destruction against which to defend or to destroy cast a pall over the rationale for intervention,[19] but the strongest – or easiest – legal argument is not premised on finding weapons of mass destruction, it is based on United Nations Security Council Resolutions unique to Iraq.[20]

The continuing authority of U.N. Security Council Resolutions 678 and 687 from the first Gulf War worked in tandem to establish cease-fire conditions and provide the authority to enforce those resolutions with force.[21] Those conditions, ultimately unsatisfied by Iraq, triggered U.N. member State authority in Resolution 678 to use "all necessary means" to uphold Resolution 660 (condemning Iraq's invasion of and demanding their withdrawal from Kuwait) and all relevant subsequent resolutions and to "restore international peace and security" to the region.

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[19] See Jason Pedigo, Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?, 32 Ga. J. Int'l & Comp. L. 199, 203 (Winter, 2004).

[20] August 2, 1990, Iraq invaded Kuwait. Virtually at once, the Security Council adopted U.N. Security Council Resolution 660, the first of many condemning Iraq's actions and demanding withdrawal from Kuwait. See S.C. Res. 660 (Aug. 2, 1990), 29 I.L.M. 1325 (1990). Additional Council actions were designed to apply further pressure and bring about Iraq's withdrawal. See Resolution 611 (Aug. 6, 1990), 29 I.L.M. 1326 (1990) (imposing broad sanctions on Iraq); Resolution 662 (Aug. 9, 1990), 29 I.L.M. 1327 (deciding that Iraq's annexation of Kuwait was null and void and demanding that Iraq rescind its actions purporting to annex it); Resolution 664 (Aug. 18, 1990), 29 I.L.M. 1328 (reaffirming those decisions and demanding that Iraq rescind its order that foreign diplomatic and consular missions in Kuwait be closed, facilitate departure and consular access for nations of third states, and take no action to jeopardize their safety, security, or health); Resolution 665 (Aug. 25, 1990), 29 I.L.M. 1329 (calling upon member states to use such measure commensurate to the specific circumstances as many be necessary to ensure implementation of trade restrictions); Resolution 667 (Sep. 16, 1990), 29 I.L.M. 1332 (demanding that Iraq release foreign nationals that it had abducted); Resolution 670 (Sep. 25, 1990), 29 I.L.M. 1334 (imposing restrictions on air traffic); Resolution 674 (Oct. 29, 1900) 29 I.L.M. 1561 (inviting states to collate and make available to the Council information on grave breaches committed by Iraq); and Resolution 667 (Nov. 28, 1990), 29 I.L.M. 1564 (condemning Iraqi attempts to alter Kuwait's demographic composition and destroy the civil records of the legitimate government of Kuwait); Resolution 687, 30 I.L.M. 846 (1991) (Declaring that, upon official Iraqi acceptance of its provisions, a formal cease-fire would take effect, and imposing several conditions on Iraq, including extensive obligations related to the regime's possession of weapons of mass destruction.) See William H. Taft IV/Todd Buchwald, Preemption, Iraq, and International Law, 97 A.J.I.L. 557 (2003). Neither the United Kingdom nor Australia invoked self-defense as a legal justification for military action against Iraq. See UK Attorney General Lord Peter Henry Goldsmith, Legal Basis for Use of Force Against Iraq (Mar. 17, 2003), available at <http://www.ukonline.gov.uk>; see also the Australian Attorney General's Department and the Department of Foreign Affairs and Trade, Memorandum of Advice on the Use of Force Against Iraq (Mar. 18, 2003), available at <http://www.smh.com.au/articles/2003/03/19/1047749818043.html>. Nor did the United States invoke its inherent right of self-defense under Article 51 of the UN Charter in the legal justification it submitted to the U.N. Security Council. Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2003/351 (2003) (arguing that "the actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991)").

[21] Id.

The "all necessary means" language has been traditionally understood as the authorizing language for a use of force that otherwise would violate Article 2(4) of the Charter.[22]

Among the cease-fire conditions set by Resolution 687 were extensive obligations related to the Iraqi regime's possession of weapons of mass destruction; these obligations were repeatedly violated in the years between 1991 and 2003. Moreover, several subsequent Security Council Resolutions confirmed that Iraqi actions continued to threaten "international peace and security".[23] In this regard, the legal authority for the invasion of Iraq in 2003 need not be premised on the inherent right to self-defense; it flows directly from Security Council authorization.[24]

In addition to the central argument of specific Security Council authorization, some have also cited collateral justifications related to the substantive effect of pertinent resolutions. The strongest draws from the fact that the first Gulf War essentially concluded via a cease-fire agreement.[25] A breach of that agreement essentially vitiates any obligation to continue the cessation of hostilities. Under the 1907 Hague Regulations – a seminal document governing land warfare – "[a]ny serious violation of [an] armistice by one of the parties gives the other party the right of denouncing it".[26] Some contend that both the law governing armistices as well as international law regarding a state's right to suspend obligations when there has been a "material breach" of a treaty independently justify Operation Iraqi Freedom.[27]

While these collateral instruments and bodies of law may reinforce the primary legal justification for going to war with Iraq, they should not be deemed to suffice in the absence U.N. Charter-based authority – Security Council authorization or legitimate self-defense needs. The independent derivation of authority from armistice or treaty law would be akin to establishing a norm that once an armed conflict is initiated, if, for any reason, the *status quo* shifts so that continued justification

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22 See Provisional Verbatim Record, 45th Sess., 2963rd mtg. at 76-77, U.N. Doc. S/PV.2963 (1990) (reporting Mr. Al-Ashtal, Yemen, referring to S.C. Res. 678, as "in effect authorizing States to use force" and calling it a "war resolution"); Id., at 58 (reporting Mr. Malmierca Peoli, Cuba, calling the resolution "a virtual declaration of war" and a "deadline for war"); Id., at 62 (reporting Mr. Qian Qichen, China, stating that "all necessary means" is language that "in essence, permits the use of military action").

23 See, e.g., S.C. Res. 707, U.N. SCOR, U.N. Doc. S/Res/707 (1997) (stating that Resolution 687 itself described "conditions essential to the restoration of peace and security"); S.C. Res. 1441, U.N. Doc. S/RES/1441, at 13-14 (Nov. 8, 2002) (finding, *inter alia,* Iraq's development of weapons of mass destruction (WMD), support for terrorism and repression of the civilian population presented a continuing threat to international peace and security).

24 See Taft/Buchwald, *supra* note 20, at 557.

25 S.C. Res. 687, *supra* note 20.

26 1907 Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

27 See, e.g., John Yoo, International Law and the War in Iraq, 97 Am. J. Int'l L. 563 (2003) (arguing that law governing armistices justified the invasion of Iraq by U.S. forces). Yoo also contends that well-established treaty law would permit the invasion based on a "material breach" by Iraq. Id. This argument would require one to conceive of the pertinent Security Council resolution as a multilateral treaty.

for the conflict is no longer necessary – only an enforceable international peace treaty can restore the *status quo ante*.[28] Israeli lawyers used an argument of this sort in attempting to justify their 1981 attack on the Tuwaitha Nuclear Research Center (no armistice was in effect with Iraq). The unanimous Security Council vote condemning the attack[29], however, demonstrated the international community's unwillingness to recognize the viability of Israel's claim to existing in a continuing state of hostilities with Iraq simply due to want of a definitive end to hostilities.[30]

The fact that one body of law would permit an action should not be used to justify a use of force that is otherwise regulated by the U.N. Charter. This legitimate concern also provides the strongest counter to what is otherwise an analytically sound technical argument favoring the United States' justification to use force in Iraqi Freedom. Admittedly, Resolution 678 is over 13 years old and the argument that at some point it should "sunset" is compelling. Some claim that authority of that resolution has expired or somehow been eclipsed by the more recent Resolution 1441, which "found Iraq in material breech" of earlier U.N. Resolutions and warned that Iraq would face "serious consequences as a result of its continued violations of its obligations" to divest of all chemical, biological, or nuclear weapons or ballistic missile systems, but did not specifically reaffirm the "all necessary means" authorization of 678.[31] Nevertheless, unlike a use of force in self-defense, which is circumstance-driven, a Security Council Resolution can be drafted to accommodate temporal concerns. In fact, several resolutions have been modified at later times or built self-executing termination dates into the initial issuance.[32] 678's authority still stands, however, its continuing authority having been tested several times between its adoption and the 2003 overthrow of Saddam Hussein's regime. Throughout that period, a "no-fly zone" was enforced by American, British, and – in earlier days – French air forces; it was the basis for a strike against a Baghdad nuclear facility[33] in January of 1993; and it was the justification for Operation Desert Fox in 1998.[34]

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[28] But see Taft/Buchwald, *supra* note 20, at 558 (arguing that S.C. Res. 687 did not return the situation to the status quo ante).

[29] Marian Nash Leich, U.S. Dep't of State, Cumulative Digest of United States Practice in International Law 1981-1988 (1995), at 2933-35.

[30] See Yoram Dinstein, War, Aggression and Self-Defense 45 (2001) (arguing the on-going nature of hostilities to be the only "plausible legal justification for the bombing.").

[31] S.C. Res. 1441, *supra* note 23.

[32] See, e.g., S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. at 2, U.N. Doc. S/RES/1031 (Dec. 15, 1995), at 3 (terminating use of force authority associated with a previous resolution regarding Bosnia); S.C. Res. 929, U.N. SCOR, 49th Sess., 3392rd mtg. para. 10 (Jun. 22, 1994) (limiting to two-months a previously approved mission regarding Rwanda).

[33] Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions (Jan. 19, 1993), 2 Pub. Papers of George Bush, 2269-70 (1993). Interestingly, Secretary-General Boutros-Ghali publicly confirmed his belief in the legality of the 1993 raid. See Transcript of Press Conference by Secretary-General, Boutros Boutros-Ghali Following Diplomatic Press Club Luncheon in Paris on 14 January, UN Doc. SG/SM/4902/Rev.1, at 1 (1993).

Despite the political rhetoric that attended the adoption of Resolution 1441, it is difficult to read that resolution as undermining any authority available by virtue of Resolution 678. Resolution 1441 stated that the Council would convene "upon receipt of a report [regarding weapons of mass destruction inspections] ... in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security".[35] It did not, however, establish a requirement for further decision.[36] The real political issue was the extent of U.S. action, not the legality of its use of force.

Sadly, the ill-fated attempt to secure a final resolution specifically authorizing an invasion force left many with the lasting (and accurate) impression that the sitting Security Council members did not approve of U.S. action. Indeed, the controversy in the Security Council during the buildup for Operation Iraqi Freedom, left the public with the impression that the invasion was anything but a sanctioned use of force.[37] The fact of the matter is that the legal argument to justify Operation Iraqi Freedom is fairly easily made without recourse to self-defense analysis. This argument, however, was not forcefully advanced in a public setting; many still analyze the lawfulness of U.S. actions from a pure "right of self-defense" perspective and, in so doing, find that justification deficient.

Operation Iraqi Freedom and Self-Defense

Though Security Council authorization represents the center of gravity for the United States' technical justification for the intervention in Iraq, preemptive, self-defense motivations were clearly evident and continue to animate U.S. domestic and international debate on the issue. In fact, many who analyze Operation Iraqi Freedom from a self-defense perspective, view that legal rationale associated with

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[34] See Davis Brown, Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla, 26 Hastings Int'l & Comp. L. Rev. 159, 171 (Winter, 2003).

December 16-19, 1998, in a campaign known as Operation Desert Fox, U.S. and British forces conducted a series of strikes against military targets in Iraq. The purpose of the operation was to attack Iraq's weapons of mass destruction and "its ability to threaten its neighbors". The operation was in direct response to Iraq's failure to cooperate with the U.N. in its effort to oversee Iraqi disarmament. Writers on the subject generally agree that Iraq was not in compliance with the disarmament and inspection provisions of S.C. Res. 687, *supra* note 20. While the rationale for this operation relied on Iraq's failure to comply with the original cease-fire terms that abated the Persian Gulf War of 1991, Desert Fox received far less international support.

[35] S.C. Res. 1441, *supra* note 23, at 13-14 (Nov. 8, 2002) (finding, *inter alia,* Iraq's development of weapons of mass destruction (WMD).

[36] See Yoo, Iraq, *supra* note 27, at 3 (commenting on the British Government's desire for an additional resolution authorizing force). See Lord Goldsmith, Legal Basis for Use of Force Against Iraq (Mar. 17, 2003) (statement by UK attorney general at Parliament) available at <http://www.labour.org.uk/legalbasis>.

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

"preemption" as quite problematic.[38] Conversely, others claim that Iraqi Freedom was justified both as a matter of Security Council authorization and in anticipatory self-defense – especially considering the aggravated threat associated with an Iraq armed with weapons of mass destruction (WMD) and the potential for cooperation with international terrorist organizations.[39]

Preemption's role (or the lack thereof) as legal justification for this intervention, notwithstanding, the discussion regarding its import in evolving circumstances is a worthy one. The fact that so many have found reason to criticize the intervention in this case may suggest that both United States constituencies and the international community are: 1) unaware of the legal arguments predicating the intervention; and 2) concerned about the development of a "prevention" or "preemption" doctrine that may trumpet a new era of unchecked power by the United States. From the international perspective, some may take seriously Lord Acton's concern about the corrupting affect of power – particularly of the hegemonic sort.[40]

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

Here the international community finds itself face-to-face with the specter of future *jus ad bellum,* and we are forced to come to terms with the mandate to identify the legal regime we seek. That regime must permit necessary use of force in self-defense, but it must also provide sufficient assurance to other states that they need not fear an unbridled exercise of national power.

Looking toward this regime, it is not entirely clear why the legal case for preemptive action in Iraq would be seen as so much weaker than it was for Afghanistan. In both cases there was a celebrated, acknowledged threat involving both intent and capability. Indeed, with respect to Iraq one could conclude that that threat was made substantially more serious by the potential WMD destruction. If one acknowledges that the post-9/11 terrorist threat changes the landscape forming the backdrop for *jus ad bellum,* the potential play of WMD does so in spades. The significant characteristic highlighted in Iraqi Freedom – the alleged possession of WMD and the perceived ability and willingness of the attack's object to transfer

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[38] See Travalio/Altenburg, *supra* note 7.

[39] See Yoo, Iraq, *supra* note 27.

[40] "Power corrupts; absolute power corrupts absolutely." J. Dalberg-Acton, Acton-Creighton Correspondence, in: G. Himmelfarb (ed.), Essays on Freedom and Power, 1948, 357, 364.

WMD to even more nefarious entities – is more directly raised in a contemporaneous U.S. action: the publication of National Security Strategy 2002.

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

A strategic shift is a necessary and appropriate response to changed circumstances in which a terrorist threat cannot be specifically anticipated, yet the availability of weapons of mass destruction and a demonstrated penchant for civilian targets could make that threat or consequent attack devastating in nature and scope. The 2002 U.S. National Security Strategy, which, in view of its temporal coupling with the Iraq intervention, has induced substantial international consternation, establishes both the imperative and framework for this new mode of thought. Critics have dubbed it a "dangerous new ... policy", that undermines the international order. Leading political and diplomatic historian John Gaddis, however, has referred to it approvingly as "a grand strategy ... in every sense".[41]

In its discussion of what has been referred to controversially as the doctrine of "preemption", the President's National Security Strategy[42] embraces the need to develop and advance traditional concepts of self-defense. The Administration asserts that a simple, straightforward application of language from the famous *Caroline* Case[43] – language frequently referenced when articulating the standard against which a proposed use of force in self-defense should be measured – would make no sense in present-day contexts. At its essence, President Bush's preemption policy is nothing more than an articulation of what a significant sector of the international community already has accepted in practice – the clearly increased need for a practical doctrine of anticipatory self-defense.

An appreciation and understanding of the degree of anxiety this strategy has generated in some circles requires a close review of its language. Throughout the document, two threats are repeatedly emphasized as potentially warranting the use of military force: terrorist organizations of global reach and weapons of mass destruction. One is a potential adversary, and the other a means that an adversary might use to defeat us, but each is directly indicative of the changed circumstances

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[41] John Lewis Gaddis, Surprise, Security, and the American Experience, 2004, 94.

[42] President George W. Bush, The National Security Strategy of the United States of America (Sep. 17, 2002), Part III, available at <http://www.whitehouse.gov/nss> [hereinafter National Security Strategy 2002] ("We will disrupt and destroy terrorist organizations by: ... defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. ... we will not hesitate to act alone ... to exercise our right of self-defense by acting preemptively against terrorists, to prevent them from doing harm against our people and our country ..."). See also Matt Donnelly, Hitting Back? The United States' Policy of Pre-Emptive Self-Defense Could Rewrite the Rules of Military Engagement, Aug. 28, 2002, ABC News Online, available at <http://abcnews.go.com/sections/world/DailyNews/preempt020828.html>.

[43] The *Caroline* (exchange of diplomatic notes between Great Britain and the United States, 1842). 2 J. Moore, Digest of International Law 409, 412 (1906).

of the 21st century. Each enjoys the focused prominence of an entire chapter in the strategy; and each is associated in its chapter's title with the word "prevent".[44] While both threats and the concomitant security interests lend themselves to a strategy involving the military instrument, neither is conducive to being described as the object of war. Indeed, even the "terrorists of global reach" moniker evinces an inability to identify the adversary except by the means used. The real object of concern is the means as well – all those who could and would employ terror to harm our society.

The terminology here is important because it illuminates the basis of much of the concern regarding what is viewed as a new use of force doctrine. The fact that the term "prevent" is used in such close proximity to these threats is evidence that in neither case can the threat itself be the object of attack. Thus, the strategy, which obviously involves a proactive, aggressive, and focused effort, leaves open-ended the potential adversary. Many have found significant fault already in the term "war on terrorism".[45] Couple this with the fact that the terms "prevention" and "preemption" are used as well as the temporal propinquity of the Iraq invasion and one can more readily understand an apprehension that the "new doctrine" involves a claimed authority to attack uncertain targets even if the goal is only to preclude the possibility of an attack.

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

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries ...[46]

To be sure, the language portends change, but it does not mandate or even define that change. The lion's share of the new National Security Strategy simply describes the changed circumstances of the post-9/11 era; it lays out the case for transformation, but its operative paragraphs read more like an invitation to dialogue than a pronouncement of new policy. In fact, the verbiage of this passage re-

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[44] National Security Strategy 2002, *supra* note 42, at 5, 13 (Chapter III is entitled, "Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends". Chapter V is entitled, "Prevent our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction".)

[45] Kenneth Roth, Executive Director of Human Rights Watch, for example, suggests that use of the term as it applies to terrorism should only be metaphoric – as a hortatory device. See Kenneth Roth, The Law of War in the War on Terror, Foreign Affairs 2 (Jan/Feb 2004).

[46] National Security Strategy 2002, *supra* note 42, at 15.

flects back to traditional concepts used to identify appropriate occasions for the use of force in anticipatory self-defense. The fact that those concepts need to be adapted to meet new circumstances has been an attribute of *jus ad bellum* for centuries.

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

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.[47]

This language is entirely consistent with U.S. practice in numerous armed interventions over the past century. It does, however, introduce the gravity of the threat as a potential factor for use of force analysis – a prudent starting point for discussion regarding "transition". Regardless, the salient fact for this discussion is recognition of the fact that at its core, we are talking simply about anticipatory self-defense. The United States has made no claim as to the propriety of any military action that exceeds the bounds of Article 51's inherent right to self-defense or what was widely accepted by the international community in Operation Enduring Freedom. The National Security Strategy makes clear that the United States continues to look to international law – *jus ad bellum* – to regulate its use of force.

Reviewing the areas of concern in the Strategy, one finds that they are directly related to the asymmetric characteristics terrorism brings to bear on self-defense analysis. These characteristics can be summarized as follows. First, unlike traditional warfare as it was understood at the time the U.N. Charter was drafted, terrorist attacks today are usually isolated; they are not part of an ongoing armed campaign. Accordingly, we find little if any utility in classically defensive measures. Moreover, there is no utility in traditional deterrence. When self-defense begins, the attack is over. Without anticipatory self-defense, there would be no self-defense at all.

Second, because of the isolated and complete-at-first-strike nature of a terrorist attack, surprise is at a premium for the terrorist both tactically and strategically. While surprise is a concept upon which military commanders always seek to capitalize, including in more symmetrical conflicts, it rarely has currency above the tactical or operational level. A conventional armed conflict is usually known to be taking place; the opposing parties are on notice to be in a defensive, if not retaliatory posture. Traditional conflict is often readily anticipated; even before the first shot of a military engagement, the necessary efforts to prepare people, equipment, and armaments for the rigors of an extended armed conflict often can be observed openly.[48] In the post-9/11 world, one can anticipate little opportunity to note the "imminent" nature of an impending terrorist attack. To be aware of it would likely

[47] Id.

be to frustrate it. As suggested in the 2002 National Security Strategy, the dictionary definition of imminent – "impending, about to happen" – simply makes no sense when applied operationally to combat terrorism.[49]

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

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

Unfortunately, this is not the only possible reading. Attributing to the Strategy only laudable motives is not reflective of the interpretations of much of the international community. While imprecise provisions may evince a humble willingness to engage in dialogue regarding the future of *jus ad bellum*, other more clear provisions such as that declaring our commitment to anticipatory self-defense can be read as a bold affront to those who view the law differently. Many in that group view such a statement as consistent with a general trend toward unilateralism and even imperialism.[50] They see the United States decision not to join the International Criminal Court as turning our back on the rule of law;[51] the decision to walk away from the Ottawa Anti-Personnel Landmines Convention[52] as a rejection of humanitarian principles; refutation of the Kyoto Protocol[53] as a step away from multilateralism; and U.S. rejection of the Comprehensive Test Ban Treaty[54] as

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[48] See generally John Quigley, Politics, Law, and Society: Palestine and Israel: A Challenge to Justice (1990); Nora Boustany/Patrick E. Tyler, Iraq Masses Troops at Kuwait Border, U.S. Puts Gulf Warships on Alert as Tensions Rise Over Oil Quotas, Wash. Post, Jul. 24, 1990, at A1.

[49] The Oxford Dictionary and Thesaurus 734 (Amer. ed. 1996). See Yoo, Iraq, *supra* note 27, at X. (" ... the concept of imminence must encompass an analysis that goes beyond the temporal proximity of a threat to include the probability that the threat will occur.").

[50] See generally Michael Bothe et. al., New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 243 (1982).

[51] ICC Statute, Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9, note 835 (1998).

[52] See Craig S. Sharnetzka, The Oslo Land Mine Treaty and an Analysis of the United States Decision Not to Sign, 16 Dick. J. Int'l L. 661, 673-6 (Spring, 1998).

[53] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Conference of the Parties, 3rd Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1997), reprinted in 37 I.L.M. 22 (1998).

a rejection of disarmament. To the cynic, the ambiguous part of the U.S. National Security Strategy then is nothing more than a veiled warning that the United States intends to employ force preemptively whenever it sees fit.[55]

Clearly, better communication from the United States is required. Equally importantly, however, it may be time for the international community to recognize the changed circumstances and take the next step in articulating standards for self-defense in the post-9/11 epoch. Part III of National Security Strategy, 2002, that dealing most directly with the global terrorism threat, has as its focus, "Strengthen Alliances ...".[56] The strategy recognizes the need for coordinated effort, and it speaks of "forging new, productive international relationships and redefining existing ones in ways that meet the challenges of the twenty-first century".[57] This task cannot be accomplished if the United States is at odds with its allies regarding the legal norms that govern counter-terrorism efforts.

Humanitarian Interventions

Operation Iraqi Freedom perhaps touches on every *jus ad bellum* concept with relevant currency. Technically justified by U.N. Security Council action in accordance with Chapter 7 of the Charter, the operation also clearly implicates traditional self-defense concepts and the limits of those concepts explored in the 2002 National Security Strategy. Moreover, one cannot help but note that many of the same humanitarian justifications underlying intervention in the Kosovo situation were extant in Iraq; Saddam Hussein's crimes against his own people and those of neighboring nations have been well-documented, yet, the full extent of his thuggish brutality is only now being brought to light.[58] At minimum, Saddam's crimes against humanity and perhaps even genocidal behavior have been stopped.

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

On March 24, 1999, NATO forces under the command of General Wesley Clark, U.S. Army, began attacking the State forces of Serbia. The action had been preceded by multiple attempts at a negotiated settlement and was attended by

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[54] Comprehensive Nuclear Test Ban Treaty, opened for signature Sept. 24, 1997, S. Treaty Doc. No. 105.28.

[55] Gaddis, *supra* note 41.

[56] National Security Strategy 2002, *supra* note 42, at Part III, 5

[57] Id.

[58] See, e.g., Michael Casey, U.N. Chief Says Mass Graves in Iraq Shows Atrocities Committed by Saddam's Regime, Associated Press Worldstream, Aug. 22, 2003.

claims of genocide and other war crimes on the part of Serbian President Slobodan Milosovic and other government officials. This intervention was undertaken without seeking Security Council authorization in the face of publicly stated opposition from Russia and China.[59] Given that the use of force in Kosovo could not be justified under the Chapter 7 authority of the U.N. Security Council, the rubric of the Charter left only self-defense as potential authority. As an unsanctioned use of force by United Nations members, the intervention into Kosovo would appear to be illegal on its face. Only the most tortured analysis could posit a claim of self-defense for NATO members taking part in the intervention. Most legal commentators, even those favoring the intervention, have shared this view.[60]

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

Post-conflict legal apologists have set forth justifications ranging from a claim of consistency with other portions of the U.N. Charter[61] to the theory that it was necessary as a matter of collective self-defense given the potential for the continued flow of refugees to destabilize the region.[62] Prime Minister Tony Blair provided perhaps the most celebrated explanation in his April 1999 speech to the Chicago Economic Club;[63] he essentially argued for the adoption of a new values-based "just war" doctrine reflecting a notion of "international community".[64] Avoiding any discussion of the text of the U.N. Charter, Prime Minister Blair acknowledged that "non-interference has long been considered an important principle of international order", before going on to claim that "non-interference" must yield

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[59] See Jane E. Stromseth, Rethinking Humanitarian Intervention: The Case for Incremental Change, in Humanitarian Intervention: Ethical, Legal, and Political Dilemmas 234 (J. L. Holzgrefe & Robert O. Keohane eds. 2003).

[60] The Charter of the United Nations: A Commentary 13-18 (Bruno Simma ed. 1994) ("Under the U.N. Charter, forcible humanitarian intervention can no longer, therefore, be considered lawful.").

[61] U.N. Charter preamble (reciting humanitarian purposes of Charter).

[62] See Henry H. Perritt, Kosovo: Internal Conflict, International Law, 144 Chi. Daily L. Bull. 2, July 24, 1998; Guy Dinmore, New Kosovo Massacre May Spur NATO to Act, Wash. Post, Sept. 30, 1998, at A1 (asserting that the massive refugee flows from Kosovo into the neighboring countries of Albania and Macedonia arguably posed a "threat to international peace and security" and did so long before NATO's bombing campaign).

[63] See Prime Minister Tony Blair Address at the Chicago Economic Club (Apr. 24, 1999) [hereinafter Blair Speech to Chicago Club]. See also Tony Blair, A Military Alliance, and More, OpEd, N.Y. Times, Apr. 24, 1999, at A19; Tony Blair, A New Moral Crusade, Newsweek, June 14, 1999, at 35 ("We are succeeding in Kosovo because this was a moral cause ...").

[64] The speech does not actually use the term, "just war". But see Chris Abbott/John Sloboda, The "Blair Doctrine" and After: Five Years of Humanitarian Intervention (Apr. 22, 2004), available at <http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html> (characterizing the Blair speech as introducing a "just war" doctrine).

in cases of genocide, oppression resulting in massive refugee flows, and potentially when a government loses "legitimacy" because it represents minority rule. He concluded that "[Kosovo] is a just war, based not on any territorial ambitions but on values".[65] None of the justifications rendered by Blair or others are particularly cogent legally.

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

Much of the international community (including the United States) has justified Operation Allied Force by labeling it "legitimate", even if "illegal".[66] The difficulty with this analysis is manifest. The rule of law is not furthered when unlawful actions can be sanctioned as "legitimate". In fact, such semantic legerdemain does more harm than good to the concept of a rule of law and contravenes the relevant language itself.[67] At best, to preserve a claim of adherence to the rule of law, one could say that a customary exception to the norm of sovereign inviolability is emerging.[68] It is difficult, however, to determine that a practice has been accepted so frequently as to amount to custom when that very custom flies so directly in the face of relatively unambiguous treaty text.

Certainly the claim can and has been made that changed global circumstances necessitate an adjustment to *jus ad bellum* as it pertains to humanitarian intervention.[69] In what has been termed the "Blair doctrine", Tony Blair identified five factors for determining whether military intervention is appropriate. None of these factors, however, sounds in terms of legality; rather, they speak to the issue of domestic political interests[70] and their subjectivity leaves the doctrine ripe for abuse. More importantly, however, the biggest problem in seeking solace in "changed cir-

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[65] Id.

[66] See Sashi Tharoor, Relief After Despair, The Hindu, Apr. 13, 2003 (asserting that the U.N. may yet play a humanitarian role in Iraq, stating "four years ago, another military conflict not sanctioned by the U.N. resulted in a Security Council resolution that asked the U.N. to legitimate the post-war dispensation in Kosovo and to run the civil administration there").

[67] The Oxford Dictionary defines legitimate as "... lawful, proper, regular, conforming to the standard type ..." The Oxford Dictionary and Thesaurus 856 (Amer. ed. 1996).

[68] Gaddis, *supra* note 41.

[69] See, e.g., Abbott/Sloboda, *supra* note 64 (arguing that current circumstances urgently beg for a "universally acceptable humanitarian doctrine" for intervention).

[70] See Blair Speech to Chicago Club, *supra* note 63. The five factors are: 1) certainty of facts; 2) exhaustion of diplomatic options; 3) availability of military options; 4) preparedness for long-term commitment; and 5) involvement of national interests. He also identified four precautionary measures involving having right intentions, intervention being a last resort, using proportional means, and having reasonable prospects for success. Id.

cumstances" as the basis for "adjusting" the rule of law is that the U.N. Charter's text leaves no room for it with respect to humanitarian intervention.[71] The non-intervention principle inhabiting the Charter's text could not be clearer. Absent Security Council authority, treaty parties agreed to use force only to exercise their inherent right to self-defense. Thus, even if changed circumstances warrant a transformation of *jus ad bellum* with respect to humanitarian intervention, the desired "evolution" is simply not textually available; it requires a violation of the treaty.

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

Conclusion

Jus ad bellum needs to be and is in transition. Prior to 9/11, the moral imperative associated with humanitarian intervention was already severely pressuring fundamental concepts of *jus ad bellum*, and the 10-year anniversary of the Rwandan genocide again drew attention to the need to create legal structures to facilitate intervention and mitigate human tragedy.[72] The apparently uncontroversial nature of many humanitarian interventions would seem to militate in favor of such change, but such a modification effected as an evolution in state practice within the U.N. Charter framework would be textually difficult to say the least. The Charter regime for humanitarian interventions is clear.[73]

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[71] The Charter of the United Nations: A Commentary 123-4, *supra* note 60. Indeed, United Nations Secretary-General Kofi Annan asked the international community to try to develop consensus on how to approach emerging humanitarian intervention issues in speeches to the U.N. General Assembly in 1999 and 2000. In September 2002, Canada responded and established the International Commission on Intervention and State Sovereignty (ICISS). The ICISS concluded that the U.N. Security Council was the appropriate body for humanitarian intervention authorizations and that the international community should work to improve the performance of that body. See Abbott/Sloboda, *supra* note 64.

[72] See Mort Rosenblum, U.N. General Warns of Lessons not Learned from Rwandan Genocide, San Mateo County Times, March 27, 2004; Richard Holbrooke, How Did 'Never Again' Become Just Words?, Wash. Post, Apr. 4, 2004, at B2.

[73] The Charter of the United Nations: A Commentary 124, *supra* note 60 ("Under the U.N. Charter, forcible humanitarian intervention can no longer, therefore, be considered lawful."). Unlike self-

9/11 and the proliferation of WMD has wrought a politically sensitive but more practically important exposition of the need for legal modification of *jus ad bellum*. The nature of terrorism and the character of modern warfare threatens the very existence of our society and mandates this transformation. Though post-9/11 controversies have muddied the water with respect to the necessary direction of that change, the U.N. Charter provides a far more favorable textual basis for evolutionary movement of state practice in this area than it does for humanitarian intervention.[74]

U.S. National Security Strategy, 2002 is a good start, but it is only a start. The challenge for the United States and indeed, Europe, is to promote and refine this transformation of the law regarding anticipatory self-defense. International disagreements over Iraq and lesser *jus in bello* issues have greatly complicated this task. Nevertheless, transformation is needed. Critics of preemption in a general sense will lose, because it is impossible to conceive of how military force used against terrorism can be anything but preemptive. Indeed, terminology and concepts are appropriate fodder for debate, but an intelligent discussion cannot take place without recognition of the fact that any use of military force in response to terrorism will be either preemptive or punitive.

National Security Strategy 2002 suggests exploring alternative views of the "imminent" requirement derived from *Caroline*.[75] The document has correctly identified the area that cries out for adjustment, but it is difficult to conceive of an appropriate definition that does not do violence to the English language. U.S. Secretary of State, Daniel Webster's mid-19th century words admirably checked illegitimate or fraudulent uses of force in the name of self-defense, but the standards simply do not fit today's threats.

Finally, by speaking to a new criterion – gravity of the threat – the 2002 Strategy implicitly recognizes the fact that any appropriate adjustment in the realm of "imminent" will tend to relax restrictions on unsanctioned defensive use of force. Gravity of the threat has traditionally been considered important to the proportionality prong of self-defense analysis (i.e., military action taken in self-defense must be proportional to the threat), but it may now be appropriate to consider it

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defense, the San Francisco drafters were not so prescient regarding humanitarian intervention. Some have suggested, reflecting on U.S. Justice Holmes' claim that the Constitution is not a "suicide pact", that humanitarian crises this grave simply require a departure from the words of our international community's constitutive document – perhaps a *jus cogens* norm trumps the Charter's requirements. Others have suggested a listing of factors to justify international humanitarian intervention, and still others an emerging U.N. Charter "common law" in which the absence of a condemning Security Council resolution *ex post facto* satisfies the requirement of an *ex ante* resolution, but only in the instance of a humanitarian intervention. Another would claim the existence of a threat to international peace and security as a generally sanctioned justification for use of force. Many, in the absence of a good legal argument take solace in the "legitimate" characterization even if it is coupled with the adjective "illegal".

74 Id.

75 National Security Strategy 2002, *supra* note 42, at 15.

also as a threshold requirement to justify the application of a more relaxed standard with respect to the imminence criteria.

Some comment on the mechanism for change is appropriate. This paper has presumed an approach based on the establishment of a customary state practice with respect to self-defense under Article 51. Especially considering the textual difficulties of changing the law with respect to humanitarian interventions, one may question whether some other means of assisting *jus ad bellum's* transition may be appropriate. The difficulty with any treaty-based mechanism for change is that *jus ad bellum* concerns are inextricably linked to the U.N. Charter and the authority and make-up of the United Nations Security Council. While most would agree that the Security Council system is in need of repair, few would contend that any reasonable prospect for change is now on the horizon.

The current Security Council regime reflects a pragmatic deference to real politic while nodding to egalitarian principles that animate the General Assembly. This regime is a direct outgrowth of and was feasible only because of the years of bloodshed that preceded formation. Absent a similarly momentous triggering event, it is unlikely countries would agree to any plan that locked in place a diminution of national influence. This is not to say that the Security Council could not be refashioned to make sense in a 21st Century world beset by terrorism, but the time for that change does not appear to be now.

A more recondite difficulty that may arise in a treaty-making scenario derives from what some have described as fundamentally different jurisprudential concepts that separate the United States from Europe. French foreign minister, Dominique de Villepin described the problem by stating that differences between Europe and the United States are not simply about Iraq, they are about "two visions of the world".[76] Robert Kagan claims that Americans and Europeans have fundamental disagreements about the role of international law.[77] Yale Professor Jed Rubenfeld has suggested that where the U.S. legal tradition derives from a democratic national constitutionalism perspective, Europe, which collectively wields greater international lawmaking influence than does the United States as a technical matter, tends to organize around universalist constitutionalizing views.[78] Reflecting on the fact that our current international legal regime is an outgrowth of World War II, differing American and European views regarding international law are grounded in substantially different perceptions regarding the meaning and impact of that war. Where the United States perceived World War II as a victory for nationalism and democracy, Europe viewed it as the defeat of excessive nationalism run amok.[79] Where the United States sometimes sees international law as a dangerous constraint

[76] Robert Kagan, A Tougher War for the U.S. is One of Legitimacy, N.Y. Times (Jan. 24, 2004).

[77] Id.

[78] See Jed Rubenfeld, The Two World Orders, Wilson Quarterly (Autumn 2003) (contrasting European perceptions that World War II exemplified the horrors of popular nationalism, while for the Americans, winning the war represented a victory for nationalism).

[79] Id.

on national sovereignty, Europe looks to international law as the check on national power, democratic excess, and popular will.[80] The veracity of these observations is obviously suspect when applied to any large collectivity. Nonetheless, as a practical matter, it is clear that legal transformation will not come easily, and it is unlikely to arrive with the precision of a negotiated international instrument.

As with Europe, United States interests extend beyond mere preservation of freedom of action to fight the war on terrorism. We, like others, are benefited by the establishment and development of a legal regime that constrains rogue behavior, permits appropriate self-defensive action, and promotes predictability. Dialogue, on both sides of the Atlantic must be the constant companion of action, but it yet may be premature to attempt a definitive articulation of the whole of 21st century *jus ad bellum.* Debate regarding post-9/11 law of war is only now in its infancy. As Robert Kagan has pointed out, the post-World War II international legal order that has brought us to the present was not conceived in the immediate aftermath of that war; it required years of discussion, contemplation, and practice to identify key norms and standards.[81] American jurist Oliver Wendell Holmes' observation is appropriately recollected, "the life of the law has not been logic, but experience".[82] A new, inexperienced lawyer may lament this observation, given that the law has always been defended best by logical analysis and argument. A more mature attorney, however, is likely to see not only the verity in Holmes' comment, but the wisdom in adopting it as a maxim as well. The terrorists of a previous era did not have the ability to kill thousands of civilians in a matter of minutes. History has repeatedly shown that often only experience can reveal to us the failings of our own logic.

In the stream of history, governments rise and fall, philosophies traverse the path from respected to detested, and the people, organizations, and movements that begin as good and right become bad and wrong, and then return again to their origins. The only constant is change, but that change is rarely perfectly envisaged or anticipated. In attempting to influence the ordering of our world, then – in an attempt to identify and secure that which is good in structuring our society – we fall victim to our inability to predict that which lies around the next bend. Yet, there are times when we can and must choose – forks in the stream that provide rare opportunities to influence our course in a more profound and transcendent way. Sadly, those moments so frequently arise in the midst of bloody conflict when the "fog of war"[83] further inhibits our already rheumy foresight. Now is such a time and place.

Today we are engaged in a war against terrorism – a war of survival – a war of necessity. Terrorism is not new to our civilization, but the enemies we fight today – those who felled the World Trade Center, tore a hole through the Pentagon, and

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[80] Id.

[81] See Robert Kagan, Power and Weakness, Policy Review Online, No. 113, June-July 2002.

[82] Lecture 1 – Early Forms of Liability, in Oliver Wendell Holmes, The Common Law (1881).

[83] Clausewitz describes the fog of war as the realm of uncertainty that is inherent in any conflict. See Karl von Clausewitz, On War 120, in: Michael Howard/Peter Paret (eds.), 1991.

slaughtered innocents on the streets of Madrid seek a very different end than the terrorists of Bogota, London, Paris, and Moscow. Looking back, we see that the attacks of 9/11 were perpetrated, not by persons seeking to alter governmental policies, but by those who endeavor to destroy our values, our laws and the very order of the global community.[84] We must recognize the profound nature of this conflict, and we must develop the legal structures that will ensure that we both prevail and retain the fundamental values that define our society. If there is a consistent "good" that seems to persist through all the stops and starts, forks, rapids and falls of our unpredictable course – a principle or value that does not vacillate over time – it is the preeminence of the rule of law. The substance of that law may change. Indeed, the good that was mandated in one era may be evil prohibited in the next. But the law's authority over all persons and activities is a check on the malice and caprice of man; it serves as a bulwark for our civilization. The concept, *lex rex* served us well in the past; if we work together to develop the law for tomorrow, it will continue to serve us into the future.

[84] See W. Michael Reisman, In Defense of World Public Order, 95 A.J.I.L. 4, 833 (October, 2001) (distinguishing the 9/11 attacks from other terrorist acts, and noting the profound implications of the altered character).