Preemption and Law in the Twenty-First Century†
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I. INTRODUCTION

No aspect of the Bush Administration's foreign policy has caused greater consternation in Europe, at the United Nations, and among the Academy than the doctrine of "preemption." As the President has made clear, both in the 2002 National Security Strategy of the United States of America ("NSS") and in numerous other public statements, the United States claims the legal right to take military action to preempt gathering threats to its national security, with or without the sanction of the UN Security Council. Despite the outraged cries of critics, both at home and abroad, the doctrine of preemptive self-defense is well-grounded in customary international law, fully consonant with the UN Charter, and promises to be an indispensable part of American statecraft in the twenty-first century.

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The discussion that follows uses the terms preemption and anticipatory self-defense interchangeably to describe the use of force undertaken in anticipation of an enemy attack or hostile action. This is deliberate, as it is the authors’ contention that the doctrine of preemption is, in all important respects, the doctrine of anticipatory self-defense as developed through the actual practice of states.

In the past, preemption often has been described as “anticipatory” self-defense, and it is an integral part of the most fundamental legal right, the right to self-preservation, held by individuals and states alike. It was described by Emmerich de Vattel, one of the eighteenth century’s great international law “publicists,” as follows:

[O]n Occasion, where it is impossible, or too dangerous to wait for an absolute certainty, we may justly act on a reasonable presumption. If a stranger presents his piece at me in a wood, I am not yet certain that he intends to kill me; but shall I, in order to be convinced of his design, allow him to fire? What reasonable casuist will deny me the right of preventing him? But presumption becomes nearly equal to a certainty, if the prince, who is on the point of rising to an enormous power, has already manifested an unlimited pride and insatiable ambition.3

Vattel, of course, was writing to justify armed action against Louis XIV’s France (after the Bourbon family inherited the Spanish throne—and empire—in 1701), but the rule is equally applicable to modern dangers, whether in the form of transnational terrorist networks or rogue states seeking weapons of mass destruction (“WMD”). As a practical matter, no state can be expected to watch threats to its security develop and then to accept and absorb a first strike before itself taking action. Neither law nor reason would support such a result.

This is not to say, of course, that the doctrine of preemption cannot be, or has not been, abused. Over time, states have often used the right of anticipatory self-defense as a pretext for aggression. Indeed, only a hopelessly unimaginative statesman would be unable to articulate some plausible-sounding defense claim for belligerent aims, whatever they might be. In 1939, for example, Hitler invaded Poland because of alleged Polish incursions into German territory, and later attacked the Soviet Union on the pretense that Stalin was planning military action against the Third Reich.4 Similarly, Stalin sought to cast Moscow’s seizure of the Baltic States and part of Poland as actions undertaken in anticipation of inevitable capitalist aggression against the socialist motherland. Nevertheless, the right of self-defense, including the right to preempt an attack before it is launched, has remained a hardy perennial of international law. Whatever the fashion in intellectual circles, the government officials actually charged with protecting their nations’ interests have consistently exercised the option of using

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4 German defendants argued during the Nuremberg trial that Hitler’s attack against the USSR, dubbed Operation Barbarosa, “was justified because the Soviet Union was contemplating an attack upon Germany, and making preparation to that end.” International Law: Process and Prospect 258 (Transnational 2d ed 1995), quoting International Military Tribunal, Judgment, in 1 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November – 1 October 1946: Official Documents 171, 215 (1947). These arguments were, of course, dismissed by the Tribunal.
force in anticipation of attack, even in circumstances where the threat remains relatively distant and arguably uncertain.

II. THE TRADITIONAL DOCTRINE OF ANTICIPATORY SELF-DEFENSE

Although the doctrine of anticipatory self-defense has existed for centuries, international law experts generally cite the 1837 Caroline incident for its modern exposition. That case involved the British destruction of an American steamship in US territorial waters, near the New York shore of the Niagara River. Britain claimed the right to take this action because the Caroline had been used, and would likely be used again, to support a rebellion then ongoing in Canada. Despite calls for war as a result of this British "invasion," the United States ultimately accepted a British apology. In that context, American Secretary of State Daniel Webster acknowledged that anticipatory action may be taken in self-defense, although he sought to define those circumstances more narrowly than those actually presented by the Caroline case: "Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'"

In fact, by the mid-nineteenth century, the actual practice of states suggested a far broader rule than that articulated by Webster in relation to the Caroline. In 1587, for example, England's Queen Elizabeth I sent a fleet commanded by Sir Francis Drake to attack Spanish and Portuguese harbors—primarily Cadiz—in an effort to prevent, or at least delay, the arrival of the

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5 This Section draws on David B. Rivkin, Jr., Lee A. Casey, and Darin R. Bartram, Remember the Caroline, Natl Rev 17 (July 1, 2002). For a more thorough description of the Caroline incident, see Kenneth R. Stevens, Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842, 121 (Alabama 1989).

6 Daniel Webster, Secretary of State, Letter to Lord Ashburton, British Plenipotentiary (Aug 6, 1842), reprinted in John Bassett Moore, 2 A Digest of International Law 412 (GPO 1906).

7 Some commentators have also argued the entire Caroline incident is miscast as an exemplar of the anticipatory self-defense doctrine because the ship was used to resupply the Canadian insurgents prior to its destruction and hence could have been considered to be engaged in ongoing armed operations against Britain. This claim is, of course, debatable. Regardless of the actual facts on the ground, however, what makes the Caroline case significant in the development of customary international law is that both Britain and the United States chose to apply the anticipatory defense paradigm in setting up the legal framework for handling the incident—even though they may have disagreed about its proper application to the Caroline incident. For an excellent discussion of the significance of this point, see generally R.Y. Jennings, The Caroline and McLeod Cases, 32 Am J Intl L 82 (1938).
Similarly, in 1801 and 1807, Britain launched preemptive attacks on the Danish navy to ensure that these “assets” did not fall into French hands during the Napoleonic Wars. More recently, in 1939, Britain and France exercised their anticipatory self-defense right in warning Hitler that they would consider an attack on Poland to be a *casus belli*, and acted accordingly once their warnings were disregarded. Germany’s armed forces were not, of course, at that time menacing either Britain or France, and the only legal right either state would have had to issue an ultimatum to Germany—since Poland was not British or French territory—was rooted in their right to anticipate future attacks.9

The writings of early international publicists reflected this practice. Hugo Grotius endorsed anticipatory self-defense in his monumental treatise, *The Law of War and Peace* (1625), noting that self-defense was permissible—both upon being attacked and also before—where “the deed may be anticipated.”10 Similarly, writing a century later, Vattel made clear that states “may even anticipate the other’s [aggressive] design,” although he also cautioned that they must not “act upon vague and doubtful suspicions.”11 As Michael Glennon notes, by the twentieth century, a robust self-defense prerogative was so firmly rooted in international law that
during the negotiation of the Kellogg-Briand Peace Pact of 1928 [the high point of the efforts to limit the use of force by states], Secretary of State Kellogg observed that there was no need to state it expressly in the terms of

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8 Max Boot of the Council on Foreign Relations also mentions a notable eighteenth century example: Frederick the Great’s 1756 preemptive attack on Saxony and Bohemia to forestall what he perceived to be an impending attack by Russia, France, and Austria. Max Boot, *Who Says We Never Strike First?,* NY Times 27 (Oct 4, 2002).

9 In fact, it is this same fundamental principle that justifies NATO’s “collective security” scheme, where more than two dozen states pledged armed support if the territory of any one state were attacked.

10 Hugo Grotius, *The Law of War and Peace* 173 (Clarendon 1925) (Francis W. Kelsey, trans). The doctrine of anticipatory defense was not, of course, infinitely elastic and could not be properly invoked to deal with all contingencies. Thus, according to Grotius:

>[but quite inadmissible is the doctrine proposed by some, that by the law of nations it is right to take up arms in order to weaken a rising power, which, if it grew too strong, might do us harm. I acknowledge that in councils of war such a question does come up, but not on any ground of justice, only of expediency. If for any other reason a war would be justified, for this reason it may seem prudent to undertake it. The authorities cited on the subject say nothing more. But that the bare possibility that violence may be some day turned on us gives us the right to inflict violence on others is a doctrine repugnant to every principle of justice.

Id at 77.

the pact; even the adoption of texts that seem inconsistent with exercise of the right, he said, do not preclude reliance upon it. Moreover, the preemptive use of force has always been an implicit component of American strategic doctrine and, during the nuclear age, the potential for nuclear “first-use” became an explicit component of American security policy.

Nevertheless, despite this venerable pedigree, the Bush Administration’s critics claim that the NSS’s very explicit articulation of preemption as a tool of America statecraft, and its failure to limit preemption to circumstances involving imminent threats, violated international law and, in particular, the United Nations Charter. In fact, although the Charter certainly has limited the legitimate use of armed force as a means of settling international disputes, it has not eliminated, or meaningfully limited, the traditional right of self-defense.

III. THE USE OF FORCE UNDER THE UNITED NATIONS CHARTER

Critics of the anticipatory self-defense doctrine are quick to point out that, whatever may have happened in the past, the adoption of the United Nations Charter—which requires member states to “settle their international disputes by peaceful means”—changed everything. Indeed, some scholars have questioned the relevance of historical state practice, not merely with respect to the anticipatory self-defense doctrine but even with respect to the overall right of self-defense. Thus, Professor Dinstein argues that

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13 The first-use policy entailed the declared American willingness to use nuclear weapons either in response to a conventional attack by the Soviet Union or even in anticipation of such an attack. The US consistently rejected frequent calls, emanating from Moscow and various pro-Soviet Western disarmament advocates, for a no first-use pledge, asserting that such a declaratory strategy would undermine the credibility of our deterrence. This was done despite the fact that US nuclear forces were inherently capable of executing a variety of first-strike options, irrespective of the US declaratory doctrine. For an excellent discussion of these issues, see generally Lawrence Freedman, The Evolution of Nuclear Strategy (MacMillan 1981); Colin S. Gray, War, Peace and Victory: Strategy and Statecraft for the Next Century (Simon & Schuster 1990).

14 For an argument that the Bush Administration’s embrace of preemption is not unique and that, traumatized early in our national history by the 1814 British burning of the White House and the US Capitol, American statecraft has long made liberal use of, usually unilateral, preemption, see John Lewis Gaddis, Surprise, Security and the American Experience (Harvard 2004).
up to the point of the prohibition of war [which he views as a relatively recent development], to most intents and purposes, ‘self-defence was not a legal concept but merely a political excuse for the use of force’. Only when the universal liberty to go to war was eliminated, could self-defence emerge as a right of signal importance in international law.\textsuperscript{15}

Although this view would conveniently eliminate much of the precedent that supports the legality of anticipatory or preemptive self-defense, it is based upon an incorrect premise—that war, including aggressive war, was entirely lawful until the United Nations was founded. In fact, there have been international norms governing the legitimate resort to armed force—carrying as much force and effect of law as any other modern international norm or treaty, including the UN Charter—since antiquity.\textsuperscript{16} Indeed, even by the time Homer wrote \textit{The Iliad}, there was a clear recognition that some legitimate \textit{casus belli}, other than a desire for plunder, was necessary to justify a resort to war—in that case, the abduction of a Greek queen. By the close of the Middle Ages in Europe, an entire theology of “just war” had developed, and the “laws of war” were among the earliest international norms to be recognized as something more than “political excuses.”\textsuperscript{17} In this regard, Grotius explained that, although “[t]he

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\item Indeed, efforts to constrain substantially the use of violence are as old as, or in some instances even older than, war itself. While violence in which individuals kill one another has been around since the dawn of time, war as we understand it did not arise until the advent of the organized state. Indeed, in the words of noted American anthropologist Harry Turney-High, the key indicia of the organized state’s existence was “the rise of the army with officers.” Harry Turney-High, \textit{Primitive War: Its Practice and Concepts} 253 (South Carolina 2d ed 1971), quoted in John Keegan, \textit{A History of Warfare} 91 (Vintage 1994). Before that time, primitive societies dwelled, in Turney-High’s apt formulation, “below the military horizon.” Interestingly, despite the major differences between the primitive combat, prewar style, and the organized war, both were governed by an elaborate set of rules. For an excellent discussion of complex cultural and religious strictures governing and limiting the use of force in societies existing both “below the military horizon” and above, see Keegan, \textit{A History of Warfare} at 24–46, 84–136.
\item The \textit{just ad bellum}'s focus was on providing the ethical and legal guidance to the just—in the form of the so-called just war theory—who were expected to conform their use-of-force decisions to a complex set of ethical principles. The just war theory blended the moral theology of St. Augustine and other Christian theologians with the legal principles of Hugo Grotius and other international law scholars. Significantly, restraining the wrongdoers was an altogether different and difficult (some would have said hopeless) enterprise, and there was no particular expectation that they would adhere to the just war theory’s precepts. Moreover, despite the recent position of the Vatican on Iraq and other modern armed conflicts, traditional just war thinking did not view war as a strategy of last resort. Instead, the overarching goal was to maintain a just order through the means necessary to that end. For an excellent discussion of the just war theory and its application to contemporary circumstances, see George Weigel, \textit{The Morality of War}, 116 Commentary 50 (July 2003); George Weigel, Ethics and Public Policy Center, \textit{Just War and Pre-emption: Three Questions} (Oct 2, 2002), available online at <http://www.eppc.org/news/newsID.1407/news_detail.asp> (visited Nov 14, 2004).
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grounds of war are as numerous as those of suits at law . . . [t]hree justifiable causes for war are generally cited: defense, recovery of property, and punishment."18 Likewise, as Balthazar Ayala explained at the start of his 1582 Three Books on the Law of War and on the Duties Connected with War and on Military Discipline.

How scrupulously the Romans considered what legal principles were applicable to each occasion, whether of peace or of war, may be learned from their historians; and it ought not to excite surprise that they were uniformly so successful in their wars, seeing that they never took up arms save on just grounds.19

One may well disagree with this optimistic conclusion about Roman political ethics, but there is no doubt that commentators and statesmen thought in terms of legal obligations with respect to the use of armed force well before the mid-twentieth century.

A. Stassen's Revenge

These days, of course, those seeking to limit the right of preemptive or anticipatory self-defense argue that the UN Charter effectively outlawed war, limiting the use of armed force not otherwise authorized by the UN Security Council to the narrow set of circumstances articulated in Article 51. In relevant part, Article 51 provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."20

Because of the phrase "if an armed attack occurs," it often is claimed that, absent an ongoing armed attack, individual states cannot initiate a military response. Moreover, there is little doubt that this was the intent of at least some of the Charter's drafters, particularly Harold Stassen. A perennial candidate for political office and sometimes Governor of Minnesota, Stassen served on the US delegation to the San Francisco Conference, which produced the Charter. Evidently, it was Stassen who insisted that this phrase be included in Article 51.21 Building on his efforts in Article 51, as well as Article 2(4)'s injunction that

19 Balthazar Ayala, Three Books on the Law of War and on the Duties Connected with War and on Military Discipline 3 (Carnegie Inst 1912) (J. P. Bate, trans). Ayala's interpretation of the Roman behavior, while somewhat ahistorical, was in accord with the then-prevailing fashion of ascribing the high standards of probity and virtue to the statecraft of the ancients, particularly of the Greek and Roman variety.
member states “refrain in their international relations from the threat or use of force,” others have claimed that “[i]nternational law underwent a metamorphosis... in the twentieth century,” 22 a metamorphosis that effectively left self-defense as little more than the right to return fire.

This reading, however, puts far more weight on the UN Charter than it can bear. Whether its adoption constituted a “metamorphosis” is a question for the historians of future generations, rather than the lawyers of today. Although those who are personally committed to a more internationalist model for organizing the global community prefer to view the Charter’s adoption as a unique watershed in law (they might usefully recall that Tsar Alexander I also considered his Holy Alliance to be a new and permanent organizing principle), the United Nations Charter is nothing more than a treaty—part and parcel of the general settlement at the close of World War II. Indeed, at the time the Charter was drafted and ratified in 1945–46, its membership was almost entirely composed of the victorious Allies—who to this day remain the only permanent (and veto-wielding) members of the Security Council. Moreover, and perhaps more to the point, that document must be interpreted as a whole and against the legal background in which it was adopted, i.e., in accordance with the otherwise extant rules of international law.

B. READING THE CHARTER

Upon joining the United Nations, member states accept a general obligation to “settle their international disputes by peaceful means,” 23 and there is no doubt that the Charter was intended to make the resort to war more difficult. However, at no point does the Charter reserve to the United Nations alone, or its Security Council, the legal authority to authorize military action. Rather, it defines three circumstances in which force cannot be employed by UN members. In this regard, Article 2(4) provides that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” 24 Thus, based on the plain language of this provision, the use of force is prohibited only when it is designed to deprive a State of territory, destroy its independence, or is otherwise inconsistent with the UN’s purposes.

Those purposes include, first and foremost:

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24 Id, art 2, ¶ 4.
To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.25

Any use of force not inconsistent with these purposes and not designed to seize territory or impose a colonial-style government on another state is not forbidden by the Charter. Moreover, those who argue that the Charter vests the right to authorize the use of force only in the Security Council tend to ignore the words highlighted above—especially “security,” “effective,” and “international law.” Military actions taken to preserve international security and ensure effective action that are otherwise consistent with international law—as that law existed when the Charter was adopted—are manifestly permitted. Further, the primary responsibility of the United Nations is to maintain the global peace (i.e., the general peace established at the close of World War II).26 Obviously, there are times when that peace can be maintained only through the use of force—an eternal truth acknowledged even by the UN’s spiritual father, Woodrow Wilson, who sent young Americans to die on Europe’s battlefields in a “war to end all wars.”27 Nothing in the Charter suggests, however, that every use of force by states must inherently be considered a threat to that peace.

This construction of the Charter is fully supported by its other provisions. Most importantly, although Chapter VII outlines the authority of the Security Council, it nowhere forbids unilateral action by individual states. Rather, consonant with the UN’s purpose, to “maintain . . . international peace and security,” the Security Council is granted the authority—indeed, it is required—to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . .”28 These may or may not involve the use of armed force. If the Security Council opts for a military response, it also is given the right to call upon some or all of the member states to provide the necessary forces and to impose an obligation on member states to respond in these circumstances.29

25 Id, art 1, ¶ 1 (emphasis added).
26 This interpretation of “the peace” as the general or global peace is confirmed in Chapter VIII of the Charter, which makes clear that regional arrangements designed to maintain regional peace and security are permissible, simply imposing an obligation to ensure that these arrangements also are consistent with the UN’s purposes. See id, arts 52–54.
27 Similarly, traditional just war theory has also justified the use of force by reference to the overarching need to maintain just and secure order. See Weigel, 116 Commentary at 50 (cited in note 17).
29 See id, arts 42–43, 48.
It is, of course, Chapter VII in which Article 51 appears. Putting aside questions regarding the meaning of “armed attack,” it is important to recall that Article 51 neither creates, nor abolishes, a right of self-defense. Nor, for that matter, does it purport to define one. In fact, by its own terms it appears to be nothing more than a rule of construction—making clear that nothing else in the Charter purports to eliminate the right of self-defense in the face of armed attack, and providing an example of an instance where the self-defense right would clearly apply—an illustration of a much broader set of self-defense-related powers available to all sovereign states. Thus, even if Governor Stassen’s purpose was to eliminate anticipatory self-defense, he left the job unfinished.

Moreover, it is highly questionable whether the Charter could have limited the ability of states to defend themselves against an obvious, growing threat that has not, as yet, manifested itself in a first strike. As a rule, customary international law norms can be modified by treaty, at least among the parties to a particular agreement, or by inconsistent state practice. There are, however, certain rules that are so fundamentally a part of the international system that they cannot be altered by treaty. These norms are identified by the Latin term *jus cogens*, and there is no end of debate about what principles may fall within this

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30 A number of scholars have construed Article 51 in this way. See, for example, Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* 232–41 (Yale 1961); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, 1986 ICJ 347–48 (1986) (Schwebel dissenting). It is also worth noting that Article 51 refers only to an armed attack “against a member of the United Nations.” When the Charter was ratified and for decades thereafter, a number of states chose not to join the UN. To construe Article 51 as the exclusive rule for using force that has completely supplanted the traditional customary law norms would mean such states would have no self-defense rights at all. For a view that Article 51 does proscribe anticipatory self-defense, see Louis Henkin, *How Nations Behave: Law and Foreign Policy* 295 (Columbia 2d ed 1979); Philip C. Jessup, *A Modern Law of Nations* 165–66 (MacMillan 1952).

31 Article 51’s language aside, its rather accidental legislative history does not support the claim that most of the Charter’s drafters conceived of it as an important substantive right-creating provision. Andru Wall notes that Article 51 was not in the original [Charter] drafts because the drafters believed the customary international law right of self-defense was incorporated without alteration into the Charter. The US delegation in San Francisco proposed Article 51 to ensure that the obligations of collective self-defense against armed attacks arising from the Chapultepec Act were incorporated into the Charter. While self-defense was uniformly accepted as a customary right of States, collective self-defense was an emerging right.

Andru Wall, *International Law and the Bush Doctrine*, 33 Israeli Handbook Hum Rts 193, 200–01 (2004). Moreover, the fact that the ICJ, in considering one of the most important cases concerning the use of force to come before it (in the *Nicaragua* decision), chose to parse the customary international law for guidance provides a compelling rebuttal of the arguments that the entire body of customary *jus ad bellum* was displaced by the Charter. See *Nicaragua v United States*, 1986 ICJ at 347 (cited in note 30).
critical category. The right of self-defense, however, is certainly among them. As Vattel explained:

In treating of the law of safety, we have shewn that nature gives men a right to use force, when it is necessary for their defence, and the preservation of their rights. This principle is generally acknowledged; reason demonstrates it, and nature herself has engraven it on the heart of man.\(^3\)

As noted above, this right has been considered to be so fundamental that it was acknowledged even in the context of the most extravagant treaty-driven effort to “outlaw” war, the Kellogg-Briand Pact.\(^3\) As American Secretary of State Frank Kellogg explained during his eponymous Pact’s negotiation, the right of self-defense was so well-settled in customary international law that “there was no need to state [the customary right of self-defense] expressly in the terms of the pact [and] even the adoption of texts that seem inconsistent with exercise of the right . . . do not preclude reliance upon it.”\(^3\)

Thus, it is highly questionable whether a key aspect of the overall self-defense right that allows nations to anticipate a threat before the damage actually is done can be modified—or somehow transferred to the UN Security Council.\(^3\) This is particularly the case in an age where absorbing a first strike may well mean accepting casualties on a massive, or even decisive, scale. Vesting exercise of the anticipatory self-defense right in the Security Council—where five often mutually competitive if not outright hostile powers enjoy veto authority—would effectively destroy that right. Indeed, it is significant that, throughout its entire operating history, both during the Cold War and after, the Security Council has never acted in the way that opponents of a preemptive right, based on a restrictive reading of the Charter, expected it to act.\(^3\) Although the Council has determined on several occasions that a breach of the peace or a threat to the peace existed, it has never actually mandated the use of military force for enforcement measures. At the time the UN adopted the Korean War Resolution\(^3\) and the Gulf War Resolution,\(^3\) which clearly are its strongest

\(^{32}\) Vattel, 3 *The Law of Nations* at 438 (cited in note 3).

\(^{33}\) See Treaty providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 46 Star 2343 (1928).

\(^{34}\) Kellogg, Telegram to the US Ambassador in France (cited in note 12).

\(^{35}\) A *jus cogens* principle could, at least in theory, be altered based on the agreement of all states. The UN Charter, however, did not command such universal assent at the time it was adopted, and subsequent state practice suggests that the “Stassen” view has not in the years since been accepted as the correct interpretation of Article 51.


actions to date, the Council simply recommended that member states render assistance to South Korea and Kuwait.

Overall, Article 51 is best understood as the practical equivalent of a “safe harbor” in American administrative law. If an armed attack occurs, then the use of force to repel it, per se, will not be considered to be a threat to international peace and security. By contrast, if an armed attack has not already been launched, then a state using force must weigh all of the circumstances, going through the type of analysis set forth in Article 2(4), in considering whether a threat may be preempted—being sure, in Vattel’s phrase, to avoid acting upon “vague and doubtful suspicions.”

Indeed, given the wording of Article 51, some international law experts have argued that, rather than constraining the ambit of self-defense powers, the Charter’s drafters “merely desired to list one situation in which a state could clearly exercise that right.” See Anthony C. Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* 73 (Routledge 1993). D.W. Bowett also described Article 51 as being “declaratory of an existing right.” D.W. Bowett, *The Use ofForce in the Protection of Nationals*, 43 Transactions of the Grotius Society 111, 115–16 (1962) (“Art 51 is permissive not prohibitive and, as we have seen, the only prohibitive article (art. 2(4)), leaves the right of self-defence unimpaired.”). This interpretation of Article 51 is buttressed by similarly laconic treatment of self-defense related matters in the language of the Kellogg-Briand Pact, reflecting the doctrine’s well-established character. See text accompanying note 34. William H. Taft, IV, the State Department’s current Legal Advisor, also notes that:

> The notion of preemption is inherent in the right of self-defense, recognizing the need to adapt the concept of imminence of the anticipated attack to the capabilities and objectives of today’s adversaries. The use of force preemptively in self-defense is the right of each state and does not require Security Council action.


Vattel, *The Law of Nations* at 130 (cited in note 11). The view that Article 51 is meant only to be a safe harbor has been vociferously criticized by the advocates of the restrictive reading of the Charter. For example, Yoram Dinstein wonders,

> what is the point in stating the obvious (i.e., that an armed attack gives rise to the right of self-defence), while omitting a reference to the ambiguous conditions of preventive war? Preventive war in self-defence (if legitimate under the Charter) would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater.

Dinstein, *War, Aggression and Self-Defence* at 168 (cited in note 15). However, this criticism manifests an obvious failure to grasp that the whole idea of a legal safe harbor is to delineate precisely those circumstances that can be easily dealt with, leaving the more difficult circumstances to a case-by-case analysis. Thus, the whole purpose of Article 51 is to indicate that, whenever one uses force after he has been the victim of an armed attack, he is always legally in the right and no further analysis of the circumstances is necessary. By contrast, it is precisely because the application of anticipatory self-defense can be, and has been, used as a pretext for aggression—à la Hitler or Stalin—that a more complex, all-facts-and-circumstances-type analysis under Article 2 is necessary. This interpretation is supported by the fact that the framers of the Charter were quite familiar with the arguments used by both the Nazi and Japanese leadership (which were rejected during the Nuremberg and Tokyo war crimes trials)
C. IMPLEMENTING THE CHARTER

In addition, Article 51 must be interpreted in accordance with international law generally. Arguments that the Charter swept away all that had gone before are belied both by its language—as noted above, even the instrument’s primary purposes are framed with reference to international law—and by the Charter’s application over the past sixty years. In fact, this is the most important indicia of the Charter’s meaning. As the Marquise de Merteuil suggested in Choderlos De Laclos’s *Les Liaisons Dangereuses*, don’t listen to what people tell you, watch what they do. In the international law arena, the actual practice of states continues to determine both the applicable norms, whether customary or conventional, and their proper interpretation.

In the years since the UN Charter was adopted, states have frequently invoked the right to use armed force to defend their interests, particularly the right to use anticipatory or preemptive force. Indeed, as Professor Michael Glennon (who argues that the Charter was designed to forbid preemptive or anticipatory self-defense) has noted:

States can no longer be said to regard the Charter’s rules concerning anticipatory self-defense—or concerning the use of force in general, for that matter—as binding. The question—the sole question, in the consent-based international legal system—is whether states have in fact agreed to be bound by the Charter’s use-of-force rules. If states had truly intended to make those rules obligatory, they would have made the cost of violation greater than the perceived benefits.

They have not. The Charter’s use-of-force rules have been widely and regularly disregarded. Since 1945, two-thirds of the members of the United Nations—126 states out of 189—have fought 291 interstate conflicts in which over 22 million people have been killed.

that they were engaged in anticipatory self-defense. Looking to the future, leaders of a state that has used force in a manner consistent with Article 51 could feel safe from prosecution, even if they had lost the war. It is also worth noting that interpreting Article 51 as a safe harbor provision harmonizes it with Article 2(4); by contrast, a “broad” interpretation of Article 51, barring all unilateral uses of force except in response to an armed attack, would render Article 2(4) entirely superfluous. This interpretive approach, which vitiates any meaning one or more provision of a treaty or a statute, is, of course, strongly disfavored.

Significantly, neither the ICJ nor any other international tribunal has ever expressly considered the post-1945 legality of the anticipatory self-defense doctrine. In the *Nicaragua* case, the ICJ “noted that since the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised, the Court expresses no view on that issue.” *Nicaragua v United States*, 1986 ICJ at 343 (cited in note 30).

The 1956 “Suez Crisis,” where France, Britain, and Israel launched military operations against Egypt based on President Nasser’s seizure of the Suez Canal, must be counted as among the most important post-Charter uses of force without Security Council authorization. This affair was a political disaster for the governments involved, but it is highly significant that Britain and France—both charter members of the United Nations and permanent members of the Security Council—claimed that the Israeli-Egyptian military clash, which took place in close proximity to the Suez Canal, was a threat to the world’s economy and therefore adequate to justify armed action. Needless to say, this was a very broad formulation of anticipatory self-defense indeed, since the fighting around the Suez Canal posed no threat to the British or French territories.

Similarly, in 1967, Israel launched a preemptive war against Egypt, Syria, and Jordan. It was neither condemned nor sanctioned by the UN for this action. In 1981, Israel also attacked and destroyed an Iraqi nuclear power facility, again citing “self-defense” as justification. Although on this occasion the Security Council condemned Israel’s action, no action was taken to address this supposed “aggression.” Recalling the Marquise’s maxim, whatever the verbiage used, this international inaction strongly suggests a fundamental recognition that Israel acted in accordance with her rights under international law to anticipate, and foil, attacks before they are launched. Significantly, this action stretched anticipatory self-defense to a point arguably inconsistent with Grotius’s view, which would not permit attacking a “rising” power that might, at some indefinite point in the future, pose a threat.

Israel, of course, has not been alone in exercising the right of anticipatory self-defense. In 1982, Britain claimed a two-hundred mile exclusion zone, applicable to all non-British vessels, around the Falkland Islands, and in 1983, Sweden asserted the right to use armed force against any foreign submarine sailing within twelve miles of her territorial sea. President Reagan in 1986 ordered attacks against terrorist targets in Libya to prevent their future use against US interests. In 1989, the George H.W. Bush Administration forcibly ousted Panamanian strongman Manuel Noriega, arguing he posed a threat to the safety of the American service members present in Panama and their families. All of these actions can be justified only by a right of anticipatory self-defense.

However, the 1962 Cuban Missile Crisis is probably the most important modern example, before Operation Iraqi Freedom was launched, of preemptive or anticipatory self-defense. In order to prevent the installation of Russian short-

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43 Significantly, at the time, President Reagan described the US bombing raid as a “preemptive action” that was “fully consistent with Article 51 of the United Nations Charter.” Ronald W. Reagan, President of the United States, Address to the Nation on the United States Air Strike Against Libya (Apr 14, 1986), 1 Pub Papers 468, 469 (1986).
and intermediate-range offensive nuclear missiles in Cuba—which could have reached most of the continental United States in a matter of minutes—the Kennedy Administration imposed a “quarantine” on the island. This was, in reality, a blockade, directed at the Soviet ships delivering nuclear missiles to arm the installations, and constituted a belligerent act under the traditional rules of international law. This blockade was publicly justified as an act of self-defense, both of the United States and the Western Hemisphere, by senior US government officials, up to and including President Kennedy. This was the case even though no actual attack had been launched by either the Soviet Union or Cuba, nor was there any imminent threat that the Russian missiles would be launched at the United States once they were in place.

In making the case for a robust American response to this new deployment, President Kennedy emphasized numerous factors: the purpose of the Soviet deployments—“to provide a nuclear strike capability against the Western Hemisphere”; the fact that the buildup was “secret, swift and extraordinary”; the notion that the Soviet conduct amounted to “a deliberately provocative and unjustified change in the status quo which cannot be accepted by this country, if our courage and our commitments are ever to be trusted again by either friend or foe”; and last, but not least, the point that the Soviet leaders had been lying through their teeth about their actions. Although the US threat assessment was also shaped by a perception that the impulsive (and possibly irrational) Khrushchev had engaged in nuclear saber-rattling, threatening the United States in Berlin and elsewhere, Kennedy’s bottom-line conclusion was clearly that, in a nuclear age, an effort by an avowed American foe to change precipitously the strategic balance of power was itself a sufficient threat to American security to justify the use of force. If his actions in this regard were legally justified by anything, it was the anticipatory self-defense doctrine.


45 In 1962, the United States enjoyed strategic nuclear superiority over the Soviet Union, approaching something close to a genuine “first strike” capability. This meant that the US could have eliminated all, or virtually all, of the USSR’s long-range nuclear assets—primarily strategic bombers—in a first strike, while maintaining a substantial probability of escaping Moscow’s retaliation. However, because the Soviet Union had deployed extensive short- and medium-range nuclear forces, it could have retaliated against European targets. Soviet strategists understood, though, that this “hostage Europe” strategy was an inadequate basis for a robust deterrence; thus, Moscow tried to remedy the situation by engaging in the so-called missile bluff, with the Soviet Party leader Nikita Khrushchev claiming that it was producing and deploying a large force of intercontinental ballistic missiles. Within months of President Kennedy taking office, this strategy was exposed and Moscow faced what it perceived to be a situation of strategic inferiority. For an excellent discussion of the early Soviet nuclear force posture and associated employment strategy, see generally Raymond L. Garthoff, The Soviet
To be sure, several of President Kennedy's former advisors and his brother, Senator Ted Kennedy, have fiercely disputed the claim that the Cuban Missile crisis was an exercise in anticipatory self-defense. They note, for example, that President Kennedy ruled out both a preemptive air strike—which would have destroyed the Soviet-built facilities designed to house the yet-to-be-delivered missiles—and a general invasion of Cuba, settling instead for a presumably less provocative naval "quarantine." That naval quarantine, however, was a blockade directed at the Soviet vessels bringing the nuclear warheads to Cuba. As a matter of law, this was an indisputably belligerent act on...

46 Of course, the reason the naval blockade was an effective option was only because the missiles had not yet been installed in Cuba and could be delivered to the island only by sea.
Kennedy’s part, even if it was more restrained than launching an air strike or invasion. All three are equally acts of war and could only have been justified by the United States’s right to self-defense. Since no attack had actually been launched by Soviet or Cuban forces, this exercise of the self-defense right was anticipatory. If anything, Kennedy’s choice of a blockade was merely an effort to ensure that the American response was proportional to the provocation.

There are, of course, those who argue that the various instances of anticipatory self-defense that have occurred since the UN Charter was adopted have merely been violations of the Charter. This, however, suggests a particularly dogmatic approach to the Charter’s interpretation, as well as a tacit rejection of the validity of State practice as the lodestone of international law. The fact that states, including permanent members of the Security Council, have continued to claim the right to use military force to anticipate and meet threats to their national security strongly suggests that the UN Charter supplemented, but did not vitiate, the traditional *jus ad bellum* norm of anticipatory self-defense. That instrument, far from being a comprehensive legal edifice barring all uses of force except Article 51-compliant situations and various forms of collective action, simply sharpened the long-standing rule against the *aggressive* use of force and effectively established a “safe harbor” in Article 51 for the use of force necessitated by an armed attack.

**D. ANTICIPATORY SELF-DEFENSE “LITE”**

Despite state practice, a number of scholars have attempted to shore up the proposition that only the Security Council can authorize a preemptive use of force. The undercurrent here appears to be a recognition that the Stassen rule, whatever its merits were in an age before the advent of intercontinental ballistic missiles, WMD, and transnational terror is unrealistic today—states can no more be expected to absorb a potentially catastrophic first strike than Vattel’s wanderer in the woods could be expected to take a bullet in the chest before defending himself. As a result, a number of compromise positions have been floated, with Professor Yoram Dinstein’s “interceptive” self-defense being the

47 The declaration of a blockade has long been acknowledged as the act of a belligerent, see, for example, *The Prize Cases*, 67 US 635, 670 (1863), and it is difficult to see how Kennedy’s use of the word “quarantine” could have changed the legal character of the act. Soviet ships were forbidden from approaching Cuba, under threat of military force, a threat they, fortunately, took seriously.

48 See note 56. Changes in technology and the nature of the threat to the United States have largely vitiated the proportionality prong in assessing the legality of preemptive force. It is not that concerns about proportionality are not present, it is that the parties threatening the US are less rational than the Soviets and have shown a willingness to cause mass civilian casualties on US soil, making a greater use of force against them not only legal, but necessary.
most prominent. The interceptive rule would permit a state to preempt an attack, but only if it is "imminent" and "unavoidable."\(^{49}\)

As examples of acceptable interceptive defense, Professor Dinstein offers the circumstances surrounding Japan's attack on Pearl Harbor in 1941 and the 1967 Arab-Israeli War. He argues that if the United States had attacked Admiral Yamamoto's carrier battle groups as they steamed towards Pearl Harbor, but before launching their planes, America could have found justification in interceptive self-defense. Similarly, he argues that Israel was legally justified in attacking Egypt, Syria, and Jordan in 1967, based upon the range of openly hostile measures these states had taken. In particular, the Egyptian government had ejected UN observers from the Gaza Strip and Sinai, closed the Straits of Tiran, and mobilized its armed forces, which then engaged in threatening movements. All of these activities were accompanied by shrill anti-Israeli rhetoric.

There is, of course, no doubt that both of these instances would have met the traditional test for a lawful exercise of anticipatory self-defense. Dinstein's test, however, is difficult to apply with anything but hindsight. Would interceptive self-defense by the United States have been justified if Japan's fleet was not planning an attack, but merely maneuvering as a show of force? How would it have been possible to tell the difference, absent that most unachievable of grails, perfect intelligence? What if Israel's neighbors had been preparing to negotiate, but preferred to do so from a position of overwhelming strength? Even with the most reliable intelligence estimates, unless a state waits until an attack has been physically launched,\(^{50}\) which would meet even Governor Stassen's test, it is impossible to know in advance whether an attack is genuinely "unavoidable."

Only if one assumes that certain events are inevitable does interceptive self-defense provide a sound legal basis on which states could actually base their security. But certainty in history is the exception rather than the rule. The past is replete with examples of crises building to a crescendo, when the use of force seemed imminent and inevitable, only to dissipate because of last-minute diplomatic interventions, a change of government, a failure of nerve, or merely a change of mind. For instance, in the years leading up to World War I, there were several instances when war was avoided at the last minute. Examples include the 1909 Austrian Annexation of Bosnia-Herzegovina, the 1911 "Agadir Crisis," and the 1912-1913 Balkan wars. In fact, it is often easier to predict, based on an analysis of the long-term trends, what is eventually going to happen rather than


\(^{50}\) In which case, the doctrine becomes virtually indistinguishable from the traditional narrow reading of Article 51 of the UN Charter.
what will happen tomorrow, because the quality of strategic threat forecasts, which involve broad shifts in the balance of power, tend to be better than the assessment of tactical threats, which are particularized threats to the nation’s security. Accordingly, anticipatory self-defense against medium- and long-term threats makes more sense, and appears more reliable, than interceptive self-defense, which is geared toward thwarting unavoidable and imminent attacks.

Additionally, perhaps the most fundamental weakness of the “interceptive” defense formulation is that any attempt to ground the doctrine in Article 51 would stretch the language of the Article beyond recognition. In 1967, for example, no attack had actually “occurred” against Israel. It certainly looked likely, but it had not happened—unless the movement of troops into positions that would permit an attack meant that it was occurring. However, if the word “occurs” is taken this far, then it could also perfectly well accommodate the traditional doctrine of anticipatory self-defense in full and allow preemption of the far more distant threats.

E. COLLECTIVE ACTION

A second attempt at vindicating the Security Council’s primacy, but nevertheless permitting direct action by states without its blessing, can be described as the collective action principle. Supporters of this view maintain that only the Security Council can authorize the use of preemptive force by individual states, but that collective actions can be justified where the Council fails to act. For example, one European scholar, Brian Crowe, in attempting to reconcile his opposition to the US-led regime change in Iraq with his endorsement of the US-led campaign against Serbia in 1999, argues that, if the Security Council was immobilized by the opposition of only one permanent member, military intervention by a group of states could nevertheless proceed.51

51 In the case of Kosovo, Russia was firmly committed to the support of the Milosovic regime and threatened to veto any Security Council resolution authorizing the use of force against Serbia. Brian Crowe, A Breathtaking Assertion of Pax America, 3 Euro Aff 28 (Fall 2002), available online at <http://www.europeanaffairs.org/current_issue/2002_fall/2002_fall_20.php4> (visited Nov 8, 2004). Ironically, given the efforts by the Bush Administration’s critics to portray the Kosovo intervention as being legal under the UN Charter, this particular intervention was not legal, even under the most aggressive definition of anticipatory self-defense. See Laura Geissler, The Law of Humanitarian Intervention and the Kosovo Crisis, 23 Hamline L. Rev 323, 340-41 (2000); Ved P. Nanda, NATO’s Armed Intervention in Kosovo and International Law, 10 US Air Force J Intl Stud 1, 10 (1999-2000). While the Milosevic regime was committing genocide against Kosovars, it could not credibly be claimed that he posed even the most attenuated military threat to any of the NATO members or any of his neighbors (while Milosevic had launched aggressive wars, using both Belgrade’s military and paramilitary proxies, against Slovenia, Croatia, and Bosnia-Herzegovina, he was defeated and the prospects of renewed fighting in these areas was nonexistent). Thus, the embrace of NATO’s Kosovo campaign by critics of the US-led regime change in Iraq demonstrates the infinite elasticity of the underlying legal rules. Similarly,
“If, on the other hand, preemptive [US] military action were to follow total disagreement in the Security Council, the effect on the United Nations and international order and legitimacy would be devastating, the consequences far-reaching and the historical responsibility heavy.” Similarly, other commentators, including Yale’s Bruce Ackerman and the University of Houston’s Jonathan Paust, argue that the Charter blesses regional, collective actions, while limiting states acting “unilaterally” to Governor Stassen’s view of Article 51.

Thus, Professor Ackerman asserts that President Kennedy “relied on the regional peacekeeping provisions of the U.N. Charter” because the US blockade was endorsed by the Organization of American States (“OAS”), implying that these provisions, and not the anticipatory self-defense doctrine, provided the legal basis for Kennedy’s actions. However, the Charter’s “regional” provisions, found in Chapter VIII, do not permit a regional organization to operate as the Security Council’s surrogate—quite the opposite. Article 53 denies such organizations the right to take “enforcement action” pursuant to the Charter, reserving this to the Security Council.

As a matter of international law, a group of states has no more inherent right to use force than any one of its nation-state members, just as the illegal action of an individual can not be legalized merely because he obtains the agreement and assistance of his friends. To paraphrase the defense of Archbishop Thomas Laud, two hundred couple of black rabbits do not a black horse make. Thus, it is not surprising that during the Cuban Missile Crisis the foundation of the right of both the United States and the OAS to take action against the Soviet Union and Cuba was the inherent right of individual and collective self-defense, including the right to anticipate threats. In fact, the October 23, 1962, OAS resolution supporting the quarantine of Cuba specifically described the threat to the security of the Western Hemisphere posed by the installation of offensive Soviet ballistic missiles. Overall, although the imprimatur of a regional organization, or a military alliance like NATO, may

European criticisms of the Iraq liberation are driven not by law, but policy and politics, cloaked in a pseudolegalistic language.

Crowe, 3 Euro Aff at 28 (cited in note 51).

Bruce Ackerman, But What’s the Legal Case for Preemption?, Wash Post B2 (Aug 18, 2002). This view, in addition to its analytical idiosyncrasies, is belied by a 1962 DOJ legal opinion on the Kennedy Administration’s range of options with respect to Cuba and their legality, which specifically noted that the UN Charter “does not prohibit the taking of unilateral preventive action in self-defense prior to the occurrence of an armed attack.” Department of State, Office of Legal Counsel, Legal Opinion (1962).


be a valuable diplomatic tool, it does not create a legal right to use force in and of itself.

F. PARADE OF HORRIDES

Another argument advanced against preemption is that it will result in more, not fewer, conflicts. Where once it was argued that the Soviet nuclear buildup was merely a reaction to a US-initiated arms race, it now is asserted that the key to maintaining international peace and stability is to “ratchet up” the level of justification necessary for the use of armed force. The reasoning here appears to be that, by allowing states to use force in advance of an actual attack, the use of military force for defense purposes will be more, and not less, frequent. The recent Pakistan-India standoff, and its attendant dangers, is often cited as the archetype for problems posed by preemptive military postures.

There is, of course, no doubt that the anticipatory self-defense right can be misused, and that a “rush” to military action can result in terrible miscalculation. These dangers, however, must be weighed against the nature and scope of the threats presented in today’s world. As suggested above, a rule of law requiring that a state stay its hand until the enemy’s first broadside is fired was hopelessly unrealistic, even at the time the UN Charter was adopted. Indeed, even the “imminence” requirement suggested by Webster in his Caroline correspondence (assuming that this is accepted as a prerequisite to preemptive action) must be interpreted today in a different light than in 1842, when the most powerful weapon was a muzzle-loading naval cannon with a maximum range of about three miles. Given the manner in which al Qaeda and its allies prepare and carry out attacks, the only way to preempt such groups successfully may well be to act months, or even years, in advance of the actual attack being launched. For example, even if the US had toppled the Taliban regime in the summer of 2001, or succeeded in eliminating bin Laden himself during that time period, it would not have necessarily prevented the September 11 attacks. Most of the perpetrators had already infiltrated the US, and they could have proceeded without additional help or instructions from their superiors.56

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56 The final aspect of the Caroline doctrine that is salient to anticipatory self-defense is Webster’s notion that it must be proportional to the threat, involving “nothing unreasonable or excessive.” See Daniel Webster, Letter to Lord Ashburton (cited in note 6). However, given the potential availability of WMD to terrorists and rogue states, the United States should not be appreciably hampered by this consideration. Few would disagree that, a dozen years after the Cold War’s end, the world remains a dangerous place—in some respects more so now than when the superpowers glared at each other across the Elbe. The US response to a hostile dictatorship that is seeking to acquire weapons of mass destruction can be decisive and lethal; carrying out a regime change would be perfectly appropriate.
The principle of deterrence, which may serve as a substitute, did avoid a general war between the NATO and the Warsaw Pact; even though numerous conflicts raged in the Third World, both superpowers primarily used surrogates and proxies to carry them out. But deterrence can be effective only against states or individuals that may be deterred. It is the emergence of men and organizations that are “beyond” deterrence that makes the right to preemptive defense so critical. President Bush has clearly articulated this problem: even the most robust deterrence “means nothing against shadowy terrorist networks with no nation or citizens to defend,” and containment is not possible “when

57 In both Korea and Vietnam, the US confronted Soviet allies and advisors. In Afghanistan, the Soviets faced indigenous opposition that was aided by the US. In many other instances, neither Washington nor Moscow were directly engaged, with their respective surrogates battling it out in places ranging from Angola to Ethiopia to Nicaragua. Most of these conflicts were protracted affairs and preemption was not a key policy imperative. Moreover, as the ICJ pointed out in the Nicaragua case, such techniques as the use of proxy forces, provision of arms and advisors, intelligence sharing, and other forms of support, while in the nature of the use of force, did not amount to an armed attack sufficient to come within the purview of Article 51 of the UN Charter. See Nicaragua v United States, 1986 ICJ at 347 (cited in note 30). These techniques were, of course, equally available to both sides, although Moscow used them more frequently during the Cold War than did the US.

58 Robert D. Kaplan cogently argues that we are facing today an ancient, yet reborn, type of an enemy:

... who, in Homer’s words, “call up the wild joy of war” [and for whom] like Achilles and the ancient Greeks harassing Troy, the thrill of violence substitutes for the joys of domesticity and feasting. Achilles exclaims, “You talk of food? I have no taste for food—what I really crave is slaughter and blood and the choking groans of men.”

Robert D. Kaplan, Warrior Politics: Why Leadership Demands a Pagan Ethos 118-19 (Vintage 2002). One of America’s best military historians, Victor Davis Hanson, emphasizes the importance of appearing tough and decisive in all aspects of our warfare, arguing, for example, that our restraint during the major combat phase of the Iraq conflict has emboldened the enemy and has set the stage for a more dangerous insurgency campaign.

Worried about inflicting excessive damage on a tottering enemy in front of a worldwide television audience, we employed non-explosive GPS bombs, passed over retreating units of the Republican Guard, and avoided hitting infrastructure. Such magnanimity and caution in the midst of a deadly conflict, while admirable and understandable, may in hindsight have sent the wrong message, first to looters, who made free with the infrastructure we spared, then to nascent private militias, and finally to entire cadres of resistance in Fallujah and Najaf—the message, that is, that US forces, overly circumspect in war, would not in its aftermath put down those who could and should be put down.

Victor Davis Hanson, Do We Have Enough Troops in Iraq?, 117 Commentary 30-31 (June 2004). Charles Dunlap has made the same point, albeit in the larger context of fighting against a broad range of today’s rogue regimes. See generally David B. Rivkin, Jr. and Lee A. Casey, Leashing the Dogs of War, 73 Natl Interest 57 (Fall 2003). The proposition that a perception of weakness on the part of a prosperous state usually invites attacks by the barbarians is as old as history itself and has been articulated by, among others, Edward Gibbon. See Edward Gibbon, 2 History of the Decline and Fall of the Roman Empire ch 38 (Harper 1880).
unbalanced dictators with weapons of mass destruction can deliver those weapons surreptitiously to our shores or secretly provide them to terrorist allies.”

IV. EUROPE’S REJECTION OF PREEMPTION: SHOULD WE TAKE HEED?

A. OLD FRIENDS AND NEW ENEMIES

In addition, of course, the Bush Administration’s assertion of the right to preempt threats has been condemned because it has “alienated” the international community in general, and Europe in particular. This may well be so. Certainly UN Secretary-General Kofi Annan has asserted that the use of armed force against Saddam Hussein, by the United States and its Coalition of the Willing, was illegal because the UN Security Council had not specifically authorized the action. Moreover, there is no doubt that a majority of Europe’s people, and the governments of important European states such as France and Germany, support the Secretary-General’s rejection of America’s legal position. They opposed the use of military force to depose Saddam Hussein and by extension the United States’s appeal to preemptive defense. Indeed, even the British Government, which joined the United States in the Iraq campaign, invoked previous UN Security Council resolutions authorizing the use of force against Iraq, rather than anticipatory self-defense, as the legal justification for the war.

60 Kofi Annan articulated the view that, outside of the narrow self-defense circumstances arising out of an armed attack, all uses of military force had to be derived from “the unique legitimacy provided by the United Nations Security Council.” Kofi Annan, Secretary-General of the United Nations, Address at the College of William and Mary, Williamsburg, Virginia (Feb 8, 2003), available online at <http://www.un.org/apps/sg/sgstats.asp?nid=252> (visited Oct 22, 2004). In September 2004, Annan elaborated upon his earlier claims by arguing explicitly that the Iraq war was illegal. See CNN, Annan: Iraq War Was ‘Illegal’ (Sept 16, 2004), available online at <http://edition.cnn.com/2004/WORLD/meast/09/16/iran.annan.ap/> (visited Nov 14, 2004). As a continuation of this legal offensive, a study group, convened by Kofi Annan, whose ostensible charter was to study ways to reform the UN, is apparently drafting guidelines designed to limit the circumstances in which anticipatory defense can be invoked. See Heather J. Carlson, UN Panel to Frame Guidelines on Legality of Pre-Emptive Strike, Wash Times A1 (Oct 6, 2004). The fact that such guidelines would be of no legal significance does not diminish their political importance.
61 For an interesting discussion of the way in which this issue was handled by British Attorney General Lord Goldsmith, see Andrew Gilligan, Why Did the Attorney General Change His Advice?, Spectator 12 (Mar 6, 2004). In his article, Gilligan describes the rather convoluted manner in which Goldsmith has proceeded, apparently first ruling in late September 2002 “that a war to topple Saddam Hussein would be illegal,” but later changing his mind in March of 2003. “The
Why this should be the case, given that European states both developed the concept of anticipatory self-defense and have used it to their benefit for centuries, is not entirely clear—although there are a number of possible explanations.

First, the Bush Administration’s open proclamation of the preemptive right as a matter of principle, rather than simply employing it in practice, doubtless irritated European diplomatic sensibilities. Even those who may privately concede the legal point see little merit in the NSS’s blunt wording. This, however, misunderstands the proper relationship between that document’s ends and means. Although a declaration of principle is most useful when it both deters enemies and reassures friends, these goals cannot always be achieved simultaneously. It is evident that, in the Bush Administration’s view, the need to deter enemies was paramount, given the unusually acute threat from groups or regimes that are exceptionally difficult to deter. As observed by Walter Russell Mead:

While critics saw this [NSS] as part of a pattern of irresponsible crisis mongering, there is little doubt that the administration believed that it was more important to frighten and deter potential enemies than to reassure friends. If the good guys had to be scared in order to make sure the bad guys knew you were serious, so be it. This approach not only reflected the Jacksonian element in the administration; it was also a message to Jacksonian opinion in the United States that the Bush administration considered defense of the American homeland its primary interest and duty,

difference [according to Gilligan’s description of Goldsmith’s subsequent thinking] is that in November 2002 the UN has passed a further resolution 1441, offering Iraq a ‘final opportunity’ to disarm. Iraq failed to comply. That failure ‘revived’ an earlier authorization to use force under resolutions 687 and 678, 13 and 12 years old respectively . . . .” See id. The notion that earlier Security Council resolutions had somehow become “stale” and had to be “revived” is somewhat bizarre. The more legally attractive view is that, even prior to the passage of Resolution 1441, the entire body of preexisting Security Council Resolutions provided an ample legal basis to effect a regime change in Iraq. Resolution 1441 was certainly helpful, but not necessary. In any case, one, unfortunately, senses that even Britain has adopted a most crabbed interpretation of jus ad bellum rules. In reality, the US-led regime change in Iraq could be legally supported on multiple grounds, including the argument that the first Gulf War, circa 1991, never ended—Saddam Hussein has violated his cease-fire commitments and there have been ongoing hostilities between his forces and Coalition troops. See, for example, Andru Wall, The Legal Case for Invading Iraq and Toppling Saddam Hussein, 32 Israeli YB Hum Rts 165 (2002). For a discussion of the entire range of legal grounds for the Coalition action against Saddam Hussein, see David B. Rivkin, Jr. and Lee A. Casey, We Have a Right to Oust Saddam, Wall St J A20 (Feb 27, 2002). However, the legality of the Iraq War came to be analyzed primarily within the context of anticipatory self-defense, in part because the war’s critics believed that, here, they were on strongest grounds.
and that nothing, not even relations with allies, would be allowed to compromise this mission.62

Moreover, although domestic critics challenge the Bush Administration's alleged undue emphasis on preemption, many do not deny its overall validity. Indeed, during the September 2004 presidential debates, Senator John Kerry declared that any American President would use preemptive strikes, if necessary. The contrast between him and President Bush was over the circumstances in which preemption could be employed.

In addition, there is little doubt that some European critics of the NSS were also motivated by concerns with preemption's potential for abuse, and even an impractical—if deeply held—desire to abolish war in all its forms. Nevertheless, the motivation of many—especially officials in France and Germany—appears to have involved a heavy dose of simple anti-Americanism.63 It is, of course, the United States which is viewed as the most obvious beneficiary of the anticipatory self-defense doctrine at this time, and, for more than a few European policymakers, curbing US power in general, and military capabilities in particular, has clearly become a policy priority.64

The emergence of a "unipolar" state of affairs after the Cold War, dominated by what one former French foreign minister described as the American "hyperpower,"65 is the principal threat scenario that appears to trouble Paris, Berlin, and Brussels. Just as importantly, Europe's ability to itself project military power, or even to make a meaningful contribution to those military

63 Some observers have remarked upon the existence of an interesting synergistic relationship between anti-Americanism and pacifism. As noted by George Orwell, long before the Bush Administration came into office, pacifism has often been driven by anti-Americanism. Writing in 1945, Orwell bemoaned the existence of intellectual pacifists, whose real though unacknowledged motive appears to be hatred of Western democracy and admiration for totalitarianism. Pacifist propaganda usually boils down to saying that one side is as bad as the other, but if one looks closely at the writing of the younger intellectual pacifists, one finds that they do not by any means express impartial disapproval, but are directed almost entirely against Britain and the United States.66

George Orwell, Notes on Nationalism (Polemic 1945), reprinted in George Orwell, Essays 878 (Knopf 2002) (John Carey, ed).

64 The use of law as a way of disciplining American power can be described as "lawfare." See Charles J. Dunlap, Jr., The Role of the Lawyer in War: It Ain't No TV Show; JAGs and Modern Military Operations, 4 Chi J Int'l L 479, 480 (2003) ("Lawfare is specifically the strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective."). For a discussion of these issues, see David B. Rivkin, Jr. and Lee A. Casey, The Rocky Shoals of International Law 62 The Natl Interest 35 (Winter 2000–01).

ventures of which it does approve—such as the deployments to Bosnia and Kosovo—has decreased to the point of embarrassment.\textsuperscript{66} Although the post-World War II alliance between the United States and Western Europe was always asymmetrical, current and projected European defense budgets and demographic trends suggest that the Old World is simply incapable of dispatching large numbers of troops to fight alongside the United States. Indeed, Europe has been so strained by the comparatively modest requirements of the Afghan mission—involving the deployment of fewer than 9,000 troops\textsuperscript{67}—that it is difficult to envision how Germany or France could have contributed much to the Iraq operation, even if they had supported the Bush Administration's aim to remove Saddam Hussein from power. Not surprisingly, the simple inability to go to war goes hand-in-hand with efforts to make resorts to force as difficult as possible, including efforts effectively to proscribe anticipatory self-defense.\textsuperscript{68}

\textsuperscript{66} Lord George Robertson, former Secretary-General of NATO, has repeatedly commented on Europe's poor military preparation. See Lord George Robinson, Speech at the First Magazine Dinner, Claridge's Hotel, London (Jan. 24 2002), available online at <http://www.nato.int/docu/speech/2002/s020124a.htm> (visited Nov 18, 2004); Lord George Robinson, Remarks at The Brookings Institution, Brookings Leadership Forum (Oct 22, 2002). For instance, Germany "suffers from major shortcomings in precision-guided munitions, command and control ability, and strategic airlift," and it "had to charter Ukrainian aircraft to transport 2,300 troops to Afghanistan." See Nicole A. Manara, Center for Strategic and International Studies, Military Trends in Germany: Strengths and Weaknesses 13 (July 28, 2004). The situation is not much better in France—according to Jane's military assessment of the country, "[t]he French armed forces are not configured for modern warfare, in which high technology is critical." Mehmet Emre Furton, Center for Strategic and International Studies, Military Trends in France: Strengths and Weaknesses 6 (July 26, 2004). See also Jackson Diehl, NATO's Myth' in Afghanistan, Wash Post A17 (July 5, 2004).

\textsuperscript{67} The official command structure in Afghanistan underwent a change in 2004, with the so-called Eurocorps—established in 1992 as the European Union's fledgling army—taking over from NATO. This, however, has not resulted in an increase in the number of troops deployed in that country. Moreover, virtually all air assets have come from the US; the European troops had to hire Ukrainian-owned transport planes to deploy to Afghanistan in the first place. As described by Jackson Diehl,

[[last year the allies resolved to expand a modest peacekeeping force in Kabul to provincial centers around the country, an operation critical to bolstering the authority of the weak pro-Western government and making possible the national elections planned for [October 2004]. Yet, after months and months of haggling, European governments were only barely able to commit at [the Istanbul NATO summit] to staffing three new provincial centers, each with a couple of hundreds troops. The cup-rattling forced on Secretary-General Jaap de Hoop Scheffer was humiliating: With 26 nations and 5 million men in arms to draw on, Scheffer struggled to obtain just three helicopters for the Afghan operation.]

Diehl, NATO's Myth' in Afghanistan (cited in note 66).

\textsuperscript{68} For an excellent description of the entire range of American-European differences on key military and foreign policy issues, see generally Robert Kagan, Of Paradise and Power: America and Europe in the New World Order (Knopf 2003); Francis Fukuyama, State Building: Governance and
Moreover, Europe appears to be more concerned with the possibility that states embracing the anticipatory defense strategy will overreact and strike without sufficient provocation than with the consequences of failing to stop a WMD-seeking foe before it attacks. These European views reflect some rather fundamental differences between the US and most Western European elites over the nature of the threat the West faces in the post-September 11 world, and the extent to which the promotion of democracy and freedom should constitute Western foreign policy goals in the Greater Middle East.

Of course, these profound transatlantic differences are not new. They have been around for decades, but were largely obscured by the imperatives of the Cold War, in which Europe’s need for the infusion of American military, political, and economic power to offset the Soviet threat caused it to temporarily forego the pacifism prompted by World War I. As argued by Max Boot,

...because one war [WWI] had been senseless, many concluded that all wars must be senseless. The myopic militarism of the pre-1914 generation produced, in reaction, an equally myopic pacifism among the post-1918 generation that gave free rein to predatory states like Nazi Germany and imperial Japan. The children of 1945, in turn, spurned appeasement and held the line against communism for almost half a century.

Now a new generation is in charge in Europe: the children of 1989. Their political sensibility was shaped by the end of the Cold War...a struggle between good and evil—no longer speaks to them. World War I exemplifies their vision of warfare: cruel and senseless. They do not want to...
fight alongside the United States, in Iraq or anywhere else; they see nothing worth fighting for.\textsuperscript{71}

In short, with the immediate and obvious threat posed by the Soviet Union gone, Europe itself peaceful, and the burden of ensuring global security firmly mounted on America's back, Europe is free to indulge itself in the luxury of pacifism—even to a point of denying states, or at least the United States, the legal right to defend itself in accordance with the traditional laws and customs of war.

\section*{B. POLICY DIFFERENCES}

Finally, there are simply profound policy differences between Washington and Europe over how the "war on terror" should be fought, with Europe's elite favoring a solution to what then-EU External Relations Commissioner Christopher Patten has called "the root causes of terrorism and violence,"\textsuperscript{72} and over how the Iraq issue should have been handled. While these differences are

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\textsuperscript{71} Max Boot, \textit{Risky Path for Pacifist Europe}, LA Times B11 (June 3, 2004). An old adage states that generals are always refighting the last war. For Europe's politicians, however, the war they remain obsessed with is World War I, which they see as essentially a meaningless conflict, with no great moral issues at stake, triggered by failures of statecraft on all sides, and causing appalling casualties from which many European countries never fully recovered. The fact that some historians view these assertions as oversimplistic and ascribe substantial responsibility for the war to a distinctly aggressive Wilhelmine Germany does not negate the enduring power of the more traditional European assessments. For an excellent discussion of these issues, see generally David Fromkin, \textit{Europe's Last Summer} (Knopf 2004).

\textsuperscript{72} Jonathan Freedland, \textit{Interview: Breaking the Silence}, Guardian (London) 8 (Feb 9, 2002). Interestingly, a recent op-ed by the Saudi Ambassador to the United States, Prince bin Sultan bin Abdulaziz Al-Saud, argues that the only root cause of terrorism is the evil nature of terrorists and that eliminating them is the only way to survive.

[Today's] deviants did not appear for the first time in our era . . . . The deviants did not appear because [our] nation has connections with America or with Christians and Jews, or because of Israel's aggression against the Palestinian brethren, or because of events in Fallujah or Chechnya . . . . Enough blaming others when the reason lies within our own ranks! Enough demagoguery at this critical stage in our history! We must all, as a state and as a people, recognize the truth about these criminals. These criminals have disseminated corruption in the land, and it is incumbent upon us—the rulers, the clerics, and the citizens—to keep the word of Allah: "The punishment of those who wage war against Allah and His Messenger and strive to spread corruption in the land is only this, that they should be murdered."

\textit{Verbatim: Prince Bandar; A Diplomat's Call for War}, Wash Post B4 (June 6, 2004). It is ironic that a devout Wahabi Muslim, a member of the Saudi Arabian royal family, and a man who clearly disapproves of many aspects of American policy in the Middle East nevertheless understands far better that most European politicians the folly of looking for so-called root causes. The fact that his article was not written for the Western audience, but appeared in the Saudi government daily, \textit{Al-Watan}, and deployed the most powerful argument in the Islamic intellectual tradition—comparing today's terrorists to the deviants of the yesteryear who opposed Prophet Mohammed and the early Caliphs—rendered it particularly authoritative.
\end{flushright}
usually cloaked in the language of law, they are not legal in nature. For example, when European opinion largely supported armed intervention against Serbia in 1999, the lack of a UN Security Council resolution authorizing the use of force (or even a plausible argument based in self-defense) did not prevent European governments, and particularly the governments of France and Germany, from supporting military intervention. In an effort to resolve this contradiction, some commentators have argued that humanitarian interventions, like the one in Kosovo, enjoy a special status under international law and are always legally permissible.

However, it is at best inconsistent to argue that humanitarian intervention to aid the residents of another country who are being brutalized by their rulers is legal under the UN Charter (presumably because it is always consistent with the Charter’s laudable goals), but a national interest-driven intervention based on anticipatory self-defense considerations is somehow illegitimate. Leaving aside the issue of a rather idiosyncratic reading of the UN Charter, which, on its face, does not actually legitimize humanitarian interventions even if authorized by the Security Council unless they genuinely present a threat to the peace, it is not obvious why this humanitarian intervention principle only applies to the protection of foreign nationals, rather than a state’s own citizens. In a post-September 11 world, US actions to destroy terrorist organizations and their

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73 Some scholars also argue that NATO’s use of force against Milosovic’s Serbia was simply more consonant with the UN’s purposes. See Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond*, 35 Cornell Int’l L.J. 533, 546 (2002). For a contrasting view, see Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 Harv. J. L. & Pub. Pol’y 765, 777-78 (2004). This argument, however, whatever its intrinsic merits, is about policy and not law.

74 The argument, usually used by the proponents of humanitarian intervention, is that after the decades of development of international humanitarian law, which has sharply curtailed the ability of governments to treat their citizens in any way they see fit, there has arisen the so-called “responsibility to prevent.” This duty to prevent, described in a recent report commissioned by the UN Secretary-General, allegedly establishes not simply a right but a duty to intervene whenever sufficiently grave human rights abuses are found to take place, even if such an intervention does not command support of the Security Council. United Nations, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec 2001), available online at <http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf> (visited Nov 8, 2004). While a few scholars acknowledge that this view of international law is generally inconsistent with a narrow reading of Article 51, most of the humanitarian intervention advocates do not seem to acknowledge this problem.

75 While the UN has in the past extolled the legal permissibility of humanitarian interventions, see id, only a few proponents of the legality of humanitarian intervention espouse the view that the Charter is similarly permissive when it comes to national security-driven interventions. See generally Lee Feinstein and Ann-Marie Slaughter, *A Duty to Prevent*, 83 Foreign Aff. 136 (Jan/Feb 2004).
sponsors are the equivalent of a humanitarian intervention in defense of American citizens.

Indeed, humanitarian intervention imperatives can even buttress, rather than discredit, strategies of anticipatory self-defense. Today's attacks by rogue states and al Qaeda-type groups typically involve attacks on civilians, rather than strikes against military targets. Protecting civilians, to the extent possible, from the ravages of war is one of the primary humanitarian goals underlying the law of armed conflict. It follows that any comprehensive acceptance of humanitarian intervention must necessarily consider options that will prevent these attacks on civilians, foremost among which is anticipatory self-defense.

In this connection, it certainly is reasonable to argue that removing from power a man like Saddam Hussein—who sought nuclear weapons, developed, deployed, and used both chemical and biological weapons on his own people and his neighbors, viewed himself as a modern day Saladin, and defied Security Council resolutions for well over a decade—was entirely consistent with the UN Charter and the various Security Council resolutions authorizing the use of force against Iraq and demanding that Saddam comply with the obligations that he accepted as the price of a cease-fire during the Persian Gulf War.

C. THE MISSING STOCKPILES

Since Saddam Hussein was deposed, critics have claimed that the war was illegal, and the doctrine of preemption discredited, because no WMD stockpiles were uncovered in Iraq. As a legal matter, however, the principle of anticipatory self-defense does not, and has never, required that the threat have been genuine—only that it be perceived to be so in good faith. In this respect, Saddam's agreement to disarm did not, obviously, render his regime harmless. Iraq retained active WMD development programs and engaged in an elaborate strategic cat-and-mouse game, denying any WMD-related ambitions, while behaving as if it already had substantial weapon stockpiles. Moreover, by 2003, the policy of containment, based on UN sanctions, was under severe pressure, with permanent Security Council members France and Russia working to relieve Saddam of even this burden.

It is also the case that, if Saddam Hussein's regime had outlasted the UN sanctions—something that was within Iraq's grasp by the late 1990s—the
regime would have most likely shifted to a far more robust WMD development and deployment strategy. Overall, it would have been impossible to predict precisely when Saddam Hussein would have fully completed rebuilding his arsenal of weapons of mass destruction. Certainly, the past record of predicting the pace and particulars of the Soviet and Chinese nuclear weapons programs, for example, was far from perfect. Aside from the inherent difficulties of penetrating a closed, repressive society, the pace of any complicated weapons program is impossible to gage reliably. In all likelihood, even Saddam Hussein himself may have not known for sure when his efforts would have borne fruit. Meanwhile, Saddam’s use of chemical weapons against his own people, his support for terrorist organizations, and his oft-stated hatred for the United States—which he correctly regarded as the only impediment to his domination of the Arab world—made his intentions quite clear.

In any case, from beginning to end, the burden was on Saddam Hussein to prove that he had fully disarmed—not on the anti-Saddam Coalition to prove that he retained weapons stockpiles or research programs. The broader point, repeatedly made by the Bush Administration during the months leading up to the war, was that rogue regimes that played hide-and-seek games rather than pursuing various confidence-building measures capable of reassuring the international community that they were fully and irreversibly disarmed would be disarmed, by force if necessary.

V. CONCLUSION

There are many commentators, activists, and government officials who would like to substantially limit the right of anticipatory self-defense by vesting the legal power to authorize the use of military force, both before and after an attack is actually launched, in the UN Security Council alone. This, they evidently believe, would serve to constrain the use of American military power, and presumably channel its use in ways that will serve their own policy preferences.

Acceptance of such a rule, however, would require the United States and its citizens, as well as the citizens of other states, to absorb an enemy’s first strike. This was unrealistic in 1945, and it remains so today. Indeed, the development of ever more destructive weapons and the growing ability of nonstate actors to obtain chemical, biological, and, potentially, nuclear weapons make such a rule irresponsible and reckless. The alternative to preemption was, and remains, deterrence. Deterrence, however, is a strategy that assumes rational actors who share the fundamental values of international peace and security, or at least who benefit from a healthy instinct for self preservation. It is of little value against individuals and organizations who value their own lives not much more than the lives of their victims.
Providing for the common defense is the most fundamental role of any government—the very purpose of the social contract. The right of states to anticipate threats to their territory, citizens, and interests, and to act preemptively, has been recognized since commentators began to discuss the law of nations, and practiced a good deal before that. The United Nations Charter did not eliminate this right, and the practice of states since that instrument was drafted confirms this conclusion. There is little doubt that the right of anticipatory self-defense or preemption can be, and has been, abused over time—few rights have not been. Nevertheless, it remains one of the most basic norms of international law.