U.S. SECURITY STRATEGIES: A LEGAL ASSESSMENT

MICHAEL N. SCHMITT*

In less than five years, the United States has participated in three major military campaigns, each an apparent departure from then-prevailing use-of-force paradigms. NATO conducted the first, Operation Allied Force, in 1999, to end abuse of the Kosovar Albanians by ethnic Serbs of the Yugoslav security forces and to force President Slobodan Milosovic back to the negotiating table after his breach of the Rambouillet accords.[1] Although humanitarian interventions had been mounted with United Nations Security Council approval (sometimes *ex post facto*) in the past,[2] this was the first

* Professor of International Law, George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany. The views expressed herein are those of the author in his personal capacity and do not necessarily represent those of any U.S. or German government agency.

1. NATO's demands were set forth in a Statement issued at the Extraordinary Ministerial Meeting of the North Atlantic Council on 12 April 1999 and reaffirmed by the Heads of State and Government at Washington on 23 April. They included a cessation of military action, as well as ending violence and repression of the Kosovar Albanians; withdrawal from Kosovo of military, police, and paramilitary forces; an international military presence in Kosovo; safe return of refugees and displaced persons and unhindered access to them by humanitarian aid organizations; and the establishment of a political framework agreement on the basis of the Rambouillet Accords. Press Release, NATO, The Situation In and Around Kosovo: Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council Held at NATO Headquarters, Brussels (Apr. 12, 1999), http://www.nato.int/docu/pr/1999/p99-051e.htm; Press Release, NATO, Statement on Kosovo: Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington, D.C. (Apr. 23, 1999), http://www.nato.int/docu/pr/1999/p99-062e.htm.

2. When order collapsed in Somalia during 1992, the Security Council authorized "Member States . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 3, U.N. Doc. S/RES/794 (1992). The United States responded with Operation Restore Hope, conducted by the multinational Unified Task Force (UNITAF). The following year, acting under Chapter VII, the Council replaced UNITAF with the United Nations Operation in Somalia (UNOSOM) II. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg. at 4, U.N. Doc. S/RES/814 (1993). As to *ex post facto* expressions of approval, the Economic Community of West African States (ECOWAS) intervened in Liberia in 1990 without a U.N. mandate. The next year, a Security Council Presidential Statement "commend[ed] the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia." *Note by the President of the Security Council*, U.N. SCOR, 46th Sess., 2974th mtg., U.N. Doc. S/22133 (1991). When fighting broke out again in 1992, the Council praised ECOWAS for its role in addressing

conducted by "normatively mature" states without a mandate and in the face of opposition from a permanent Council member, Russia.[3]

Two years later, on September 11, al Qaeda operatives hijacked four commercial aircraft, flying two into the World Trade Center and one into the Pentagon. The fourth crashed in Pennsylvania after passengers courageously attempted to seize control from the terrorists. Nearly 3,000 individuals perished in the attacks.[4] The U.S. response was swift and aggressive. In less than a month, U.S. and British armed forces launched Operation Enduring Freedom against al Qaeda targets in Afghanistan, and against the Taliban, the *de facto* rulers of most of the country.

In terms of international law, Enduring Freedom charted new ground. Cooperative law enforcement was the generally accepted response paradigm for terrorism at the time of the September 11 attacks. The United States, however, treated the attacks as acts of war and replied militarily.[5] Moreover, not only did the United States strike al Qaeda targets, but it also attacked a regime that, although offering sanctuary to al Qaeda, had not provided the level of support theretofore legally necessary to justify military action against a State sponsor.

While operations continued in Afghanistan, attention turned to Iraq, which was in material breach of a number of United Nations Security Council resolutions regarding weapons of mass destruction and terrorism. The United States, *inter alia*, referred the matter to the Security Council, which, in November 2002, condemned Iraqi breaches, mandated a new inspection regime, and warned Iraq of "serious consequences" in the event of non-compliance.[6] When United Nations weapons inspectors concluded that Iraq was in non-

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this "threat to international peace and security." S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg. at 1, U.N. Doc. S/RES/788 (1992). In 1997, ECOWAS conducted a humanitarian intervention into Sierra Leone without Security Council mandate. An *ex post facto* Presidential Statement commended ECOWAS for the "important role" it was playing "towards the peaceful resolution of this crisis." *Statement by the President of the Security Council*, U.N. SCOR, 53d Sess., 3857th mtg., U.N. Doc. S/PRST/1998/5 (1998).

3. *See generally* Adam Roberts, *The So-called "Right" of Humanitarian Intervention*, 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3 (H. Fischer & Avril McDonald eds., 2000).

4. Eric Lipton, *Death Toll Is Near 3,000, but Some Uncertainty Over the Count Remains*, N.Y. TIMES, Sept. 11, 2002, at G47.

5. President George W. Bush explicitly labeled them as such. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1337, 1337 (Sept. 20, 2001) [hereinafter Address Before a Joint Session of Congress].

6. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 5, U.N. Doc. S/RES/1441 (2002).

compliance,[7] the United States sought a Council use-of-force mandate. Although unsuccessful in securing one,[8] on 19 March 2003, the United States led a "coalition of the willing" in an invasion of Iraq.[9]

Formally, the legal justification for the attack relied on a series of Security Council resolutions stretching back over a decade to the first Gulf War,[10] the most important being Resolutions 678 (the use-of-force mandate, 1990)[11] and 687 (the cease-fire, 1991).[12] In addition to the official legalistic explanation, myriad other justifications surfaced from both Administration and academic sources: preemption of weapons of mass destruction proliferation, preemption of terrorism, humanitarian intervention, and regime change numbered among the most visible.[13] Yet again, the preexisting normative envelope appears to have been pushed. In particular, the United States presented the international community with an argument that it was appropriate for individual States to force Iraq into compliance with demands issued by a body that could not itself agree on the need for military action.

Since September 11, the United States and its coalition partners have also been conducting a "global war on terrorism" (GWOT). An

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7. *See* Hans Blix, Oral Introduction before the Security Council of the 12th Quarterly Report of UNMOVIC (Mar. 7, 2003), http://www.un.org/apps/news/infocusnewsiraq.asp?NewsID=414&sID=6. Chief weapons inspector Blix stated that although recent "initiatives" "now undertaken by the Iraqi side with a view to resolving some long-standing open disarmament issues can be seen as 'active' or even 'proactive,' these initiatives 3-4 months into the new resolution cannot be said to constitute 'immediate' cooperation. Nor do they necessarily cover all areas of relevance." *Id. See* S.C. Res. 1441, *supra* note 6, at 4-5 (demanding that Iraq "cooperate immediately, unconditionally, and actively" with inspections).

8. *See* U.N. News Service, *U.S., U.K., Spain Won't Seek Vote on Draft Resolution, May Take 'Own Steps' to Disarm Iraq* (Mar. 17, 2003), http://www.un.org/apps/news/storyAr.asp?NewsID=6472&Cr=iraq&Cr1=inspect.

9. At the time of the attack, forty-eight nations were publicly committed to the Coalition. Support ranged from contributions of troops to political actions. Press Release, White House, Operation Iraqi Freedom: Coalition Members (Mar. 21, 2003), http://www.whitehouse.gov/news/releases/2003/03/20030321-4.html.

10. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Mar. 20, 2003), U.N. SCOR, 58th Sess., U.N. Doc. S/2003/351. *See also* Statement by the Attorney General, Lord Goldsmith, in Answer to a Parliamentary Question (Mar. 18, 2003), http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394383&a=KArticle&aid=1047661460790 (setting forth the U.K. justification, which was nearly identical to the U.S. position).

11. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

12. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

13. In his 2004 State of the Union address, the President cited enforcement of U.N. demands, ousting Saddam Hussein, and "freeing" the Iraqi people. President George W. Bush, State of the Union Address (Jan. 20, 2004), http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

illustrative GWOT operation occurred in 2002 when a CIA-controlled Predator drone attacked a car carrying Qaed Senyan al-Harthi, al Qaeda's senior operative in Yemen.[14] Consider the unique nature of that use of force. U.S. intelligence officers used military equipment to conduct a deadly attack in a country in which no armed conflict was underway, all with the cooperation of that country's intelligence service. Covert operations by intelligence agencies, even fatal ones, are hardly novel events. But in this case, the United States openly admitted carrying out the strike, arguing that such attacks are entirely appropriate in the global war on terrorism. Indeed, President Bush has signed a finding authorizing the Central Intelligence Agency to kill selected terrorists without further authorization when they cannot be captured.[15]

The decisions to use force in Yugoslavia, Afghanistan, Iraq, and the broader global war on terrorism amounted to a strategic choice by the United States to conduct operations that did not seem, at first glance, to fit neatly within existing boundaries of the *jus ad bellum*. To explore the trend, this article briefly outlines the U.S. vision of the international security milieu as set forth in official U.S. publications. It next describes the resultant security strategies developed by the United States to address prevailing security threats. The article concludes with a legal analysis of the more contentious elements contained in those strategies.

I. THE WORLD ACCORDING TO WASHINGTON

With regard to the military perspective on the future, no document better expresses the U.S. *Weltanschauung* than the Joint Chiefs of Staff's *Joint Vision 2020* (JV 2020).[16] Although issued in 2000, before the Bush Administration took office, JV 2020 continues to serve as the U.S. military's "conceptual template" for guiding transformation.[17] Because transformation strategy relates perceptions of future international threats to the resources available to meet them, it offers unique insight into those features of the security landscape

14. James Risen, *Drone Attack: An American Was Among 6 Killed by U.S., Yemenis Say*, N.Y. TIMES, Nov. 8, 2002, at A13.

15. James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at A1.

16. JOINT CHIEFS OF STAFF, JOINT VISION 2020, at 5 (2000), http://www.dtic.mil/jointvision/jv2020a.pdf, http://www.dtic.mil/jointvision/jv2020b.pdf [hereinafter JV 2020].

17. *Id.* at 1.

that most drive U.S. strategic decision-making.

Joint Vision 2020 assumes that the United States will remain a global power with global interests.[18] The military implication of worldwide engagement is a need to maintain the capability to "win" across the full range of military operations.[19] Yet, JV 2020 predicts that the U.S. military advantage will shrink as adversaries become better organized, more elusive, and more deadly. Those opponents, both States and non-State actors, will leverage the increasing affordability and accessibility of technology to narrow the current military gap between the U.S. and potential opponents.[20] As JV 2020 notes, "We should not expect opponents in 2020 to fight with strictly 'industrial age' tools."[21]

The most significant characteristic of the evolving security environment is the likelihood that opponents will counter the United States' current conventional and nuclear advantages by adopting asymmetrical tactics and strategies.[22] Incapable of fielding armed forces that can match the U.S. military on the field of battle, adversaries will strike with unconventional weapons and against non-military targets. JV 2020 characterizes asymmetrical attack as the "most serious danger the United States faces in the immediate future," specifically singling out "long-range ballistic missiles and other direct threats to U.S. citizens and territory."[23] Its prescient warning is chilling in the aftermath of September 11.

This strategic vision was amplified in the September 2001 *Quadrennial Defense Review* (QDR), the Defense Department's assessment of U.S. military capabilities to defend the country against external threats.[24] Although its underlying analysis was completed before the September 11 attacks, the QDR is striking in the extent to which its conclusions anticipated the security environment that emerged in the following two years.

The QDR emphasizes that globalization contains the seeds not only of economic opportunity, but also of threat and vulnerability.[25] Travel

18. *Id.* at 4.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 4-5.
23. *Id.* at 5.
24. U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW (2001), http://www.defenselink.mil/pubs/qdr2001.pdf [hereinafter QDR].
25. *Id.* at 3-4.

and trade routes, for instance, facilitate direct attack against the U.S. homeland.[26] Similarly, globalization increases the number and accessibility of potential targets.[27] As an example, a strike against an overseas target, such as an oil production facility, could affect U.S. business as dramatically as an attack in the United States itself. Static defense of the hundreds of thousands of potential targets of significance to the United States worldwide is out of the question.

Of particular concern, according to the QDR, is an arc of instability stretching from the Middle East to Northeast Asia.[28] This area contains a "volatile mix of rising and declining regional powers" and nations that are vulnerable to "overthrow by radical or extremist internal political forces or movements."[29] In the Middle East, "several states pose conventional military challenges and many seek to acquire—or have acquired—chemical, biological, radiological, nuclear, and enhanced high explosive (CBRNE) weapons."[30] The QDR highlights these States' development of ballistic missile capabilities and support for international terrorism.[31]

QDR authors recognize that non-State actors, such as terrorists, pose a unique threat.[32] As demonstrated in Afghanistan, a weak and failing State can serve as a valuable base of operations for such groups, some of which operate autonomously, others with State support or sponsorship. Weak States also constitute fertile breeding ground for criminal activities, which in turn often finance terrorism. The QDR also echoes the Joint Chiefs' apprehension that the accessibility of affordable technology will inevitably dull the U.S. technological edge as adversaries integrate off-the-shelf technology into their weapons and forces.[33]

Most significantly, the uncertainty inherent in these trends, as well as their synergistic interplay, finds expression in the QDR's warning of strategic surprise by American enemies and/or miscalculation by the United States.[34] Given CBRNE proliferation and transnational terrorism that seeks spectacular, high-casualty results, this vision of

26. *Id.* at 4.
27. *See id.* at 3-7.
28. The arc encompasses Iraq, Iran, the Caucasus, Central Asia, the Indian subcontinent, and North Korea.
29. *Id.* at 4.
30. *Id.*
31. *Id.*
32. *Id.* at 5.
33. *Id.* at 6.
34. *Id.* at 7.

the security environment has dramatic strategic implications.

II. US SECURITY STRATEGIES

In 2002 and 2003, the Bush administration issued a series of related security strategies designed to counter the strategic threats described above—terrorists and other criminal actors, state sponsors of terrorism, weak States, rogue regional actors, and the proliferation of CBRNE. The capstone document is the *National Security Strategy of the United States* (NSS), issued in September 2002.[35] Its pervasive theme is the U.S. vulnerability to attack from new sources and by different means than in the past: "America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few."[36] Although the NSS paints a broad picture of U.S. strategic concerns, it concentrates on two direct threats to the United States: terrorism and weapons of mass destruction.

The NSS terrorism strategy reflects the President's assertion at the national memorial service for the September 11 victims that "our responsibility to history is ... clear: to answer these attacks and rid the world of evil .... This conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing."[37] Specifically, the strategy calls for disrupting and destroying terrorist networks by "direct and continuous action using all the elements of national ... power."[38] The "all elements" language makes clear that the U.S. counterterrorist strategy includes a military component, and the "direct and continuous" phrase indicates that use of the military will not be on a by-exception basis.

The NSS envisions taking the fight to the enemy by destroying the threat before it reaches the United States.[39] In some cases, operations may be mounted preemptively, a policy that, as discussed later, has evoked great controversy. Although the United States prefers coalition warfare, the NSS unambiguously expresses a willingness to act alone if international support is not forthcoming.[40] Finally, it states

35. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), http://www.whitehouse.gov/nsc/nss.pdf [hereinafter NSS].

36. *Id.* at 1.

37. President George W. Bush, Remarks at National Day of Prayer and Remembrance (Sept. 14, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html.

38. NSS, *supra* note 35, at 6.

39. *Id.*

40. *Id.*

that the United States will forcefully compel States to cease sponsorship and/or support of terrorist groups, including the provision of sanctuary, where necessary.[41]

In February 2003, the White House augmented the NSS with its *National Strategy for Combating Terrorism* (NSCT).[42] Noting that terrorism is no longer predominately secular and nationalistic or necessarily dependent on State-support, it perceptively points out that the changed nature of terrorism makes traditional responses such as diplomacy or economic sanctions much less effective.[43] Moreover, the NSCT recognizes that twenty-first century terrorists desire mass casualties; effectively leverage modern technology, communications, and travel; and benefit from transnational crime as a source of financing.[44] It also links terrorism to the second direct threat to the United States, Weapons of Mass Destruction (WMD): "Some irresponsible governments—or extremist factions within them—seeking to further their own agenda may provide terrorists access to WMD."[45] These changes in the nature of terrorism justify a new approach to the use of military force, preemption, and unilateral action.

Weapons of Mass Destruction play a seminal role in President Bush's strategic thinking. In his January 2002 State of the Union Address, he labeled Iran, Iraq, and North Korea an axis of evil "arming to threaten the peace of the world," including by "seeking weapons of mass destruction," and expressed the fear that "[t]hey could provide these arms to terrorists, giving them the means to match their hatred."[46] The President then portentously proclaimed, "I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."[47] By June 2002, he was unmistakably threatening to use preemptive force to prevent a serious WMD threat from materializing.[48]

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41. *Id.*

42. WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM (2003), http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf.

43. *See id.* at 15.

44. *Id.* at 7.

45. *Id.* at 21.

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

47. *Id.*

48. *See* President George W. Bush, Remarks by the President at 2002 Graduation

The National Security Strategy made such proclamations a formal component of U.S. security strategy. In particular, it based adoption of a preemptive strategy on the insufficiency of deterrence strategies. As the NSS accurately noted, deterrence, with its threat of retaliation, "is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations."[49]

In December 2002, the Administration issued a complementary *National Strategy to Combat Weapons of Mass Destruction* (NSCWMD).[50] The NSCWMD retains the logic of deterrence strategy by emphasizing that the United States will respond with overwhelming force in the event of a WMD attack.[51] But the United States will also disrupt imminent attacks and interdict weapons of mass destruction before they can be transferred to terrorists.[52] The concept of imminence, a term that has normative significance, had previously been addressed in the NSS. Specifically, the NSS stated that U.S. application of the concept would be conditioned by the fact that present day WMD can be "easily concealed, delivered covertly, and used without warning."[53] The administration argues that the catastrophic consequences of a WMD attack merit a very liberal interpretation of imminence.[54]

Taken together, the U.S. strategies raise a number of pressing issues for international law.[55] Five stand out, each implicated in the global war on terrorism, Operation Enduring Freedom, or Operation Iraqi Freedom:

> (1) When is it appropriate to use military force against terrorists?
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> (2) When is it legal to act without a mandate from the U.N. Security Council?

Exercise of the United States Military Academy at West Point (June 1, 2002), http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html.

49. NSS, *supra* note 35, at 15.

50. WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (2002), http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.

51. *See id.* at 3.

52. *See id.* at 2, 3.

53. NSS, *supra* note 35, at 15.

54. *See id.*

55. The United States has also issued a homeland security strategy. It is not discussed here, since it has few *jus ad bellum* implications. OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY (2002), http://www.whitehouse.gov/homeland/book/index.html.

(3)When may a State act preemptively in the face of future terrorism, WMD attack, or WMD transfer to terrorists?

(4)When can counterterrorist or counter-WMD operations be conducted on foreign soil?

(5)When may a State sponsor of terrorism be attacked?

As an aside, the issue of humanitarian intervention, which constituted the underlying rationale for Operation Allied Force, is visibly absent from the Bush strategies. Therefore, the U.S. strategy for handling humanitarian crises remains uncertain.

III. WHEN IS IT APPROPRIATE TO USE MILITARY FORCE AGAINST TERRORISTS?

Current U.S. security strategies regard terrorism as the defining threat to the country and foresee the robust use of the military to combat it. Before September 11, however, law enforcement agencies were generally responsible for counterterrorism measures. For example, when Libyan sponsored terrorists bombed a Berlin discothèque frequented by U.S. military personnel in 1986, President Reagan ordered air strikes against both terrorist and government targets in that country (Operation El Dorado Canyon). Most of the international community rejected the U.S. justification of self-defense.[56] Two years later, President Bush refrained from ordering military action when terrorists blew up Pan American flight 103 over Lockerbie, Scotland, killing 270. Rather, he deferred to prosecution by a Scottish court sitting in the Netherlands.[57] Similarly, the legal system was the preferred remedy following the 1993 World Trade Center bombing, with legal issues focusing on such matters as the extradition and trial of the suspects, particularly Sheik Omar Abdel Rahman.[58] Throughout this period, the United States championed

56. *See, e.g.*, W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 33-34 (1999) (indicating that "with the exception of Britain, Israel, and South Africa, and to a lesser extent Canada, many of the United States' allies opposed the raid and questioned its legality" and noting the United Nation's "unambiguous disapproval"); Stuart G. Baker, *Comparing the 1993 U.S Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99 (1994).

57. Her Majesty's Advocate v. Al Megrahi, Case No. 1475/99 (H.C.J. 2001), *available at* http://www.scotcourts.gov.uk/opinionsv/lockerbie.html. Megrahi's appeal was denied in Al Megrahi v. Her Majesty's Advocate, Appeal No. C104/01 (H.C.J. 2002), *available at* http://www.scotcourts.gov.uk/opinionsv/c104_01.html.

58. Joseph P. Fried, *Sheik and 9 Followers Guilty of a Conspiracy of Terrorism: Security Is Tight: Jury Finds Men Planned Four-Year Campaign of Urban Violence*, N.Y.

international law enforcement cooperation by backing such treaties as the Terrorist Bombing Convention and the Terrorist Financing Convention.[59]

By the end of the decade, though, the international community was growing more tolerant of forceful responses to terrorism. Most notably, reaction was mixed when the United States launched cruise missile strikes into Afghanistan and Sudan in response to the 1998 terrorist bombings of its embassies in Nairobi and Dar-es-Salaam. Although the usual suspects (Iran, Iraq, Libya, Pakistan, and Russia) condemned the U.S. attacks, Australia, France, Germany, Japan, Spain, and the United Kingdom defended them.[60] Criticism that distinguished between the two components of the operation was especially telling. For instance, the League of Arab States condemned the attack on the Sudanese pharmaceutical plant that the United States alleged was tied to terrorism, but remained silent over strikes against terrorist facilities in Afghanistan.[61] Similarly, Sudan, the Group of African States, the Arab League, and the Group of Islamic States urged the Security Council to launch an investigation into the former, while making no such request regarding the latter.[62]

Condemnation of the Sudanese strikes centered on purported insufficiency of the evidence. Many believed the United States had acted precipitously on faulty intelligence.[63] The lesson seemed to be that the international community would countenance counterterrorist

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TIMES, Oct. 2, 1995, at A1.

59. *International Convention for the Suppression of Terrorist Bombings*, G.A. Res. 52/164, U.N. GAOR, 52d Sess., 72d plen. mtg., Annex, Agenda Item 152, U.N. Doc. A/RES/52/164 (1998), *reprinted in* 37 I.L.M. 249 (1998); *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th plen. mtg., Annex, Agenda Item 160, U.N. Doc. A/RES/54/109 (2000), *reprinted in* 39 I.L.M. 270 (2000).

60. *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 164-65 (1999) (edited by Sean D. Murphy).

61. Letter from the Charge d'Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), U.N. SCOR, 53d Sess., U.N. Doc. S/1998/789.

62. Letter from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), U.N. SCOR, 53d Sess., U.N. Doc. S/1998/786; Letter from the Permanent Representative of Namibia to the United Nations Addressed to the President of the Security Council (Aug. 25, 1998), U.N. SCOR, 53d Sess., U.N. Doc. S/1998/802 (conveying Group of African States request); Letter from the Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), U.N. SCOR, 53d Sess., U.N. Doc. S/1998/791 (conveying League of Arab States request); Letter from the Charge d'Affaires A.I. of the Permanent Mission of Qatar to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), U.N. SCOR, 53d Sess., U.N. Doc. S/1998/790 (conveying Group of Islamic States request).

63. *See supra* note 62.

military action as long as the underlying intelligence is reliable and other viable remedies have been exhausted or would almost certainly prove fruitless.

International reaction to the attacks of September 11 demonstrably illustrated the increasing acceptance of military action as an appropriate and legal response to transnational terrorism. The next day, the United Nations Security Council adopted Resolution 1368, which affirmed the inherent right of self-defense with regard to the attacks.[64] Although law enforcement agencies can perform self-defense functions, the armed forces bear primary responsibility for defense of the State. Since no one was seriously suggesting a State was behind the attacks, the Council was by definition implicitly acknowledging the acceptability of using military force against terrorists under the law of self-defense. And the Council did so repeatedly in the weeks and months that followed. For instance, Resolution 1373, adopted on September 28, again explicitly affirmed the right of self-defense.[65] Perhaps more significantly, the Council reaffirmed 1368 and 1373 on numerous occasions *after* October 7, the day U.S. and U.K. forces launched Operation Enduring Freedom against al Qaeda and the Taliban.[66]

Not only did the Security Council treat the use of military force against terrorists as lawful under the circumstances, but so too did other international organizations, as well as individual States. NATO and the Organization of American States invoked the collective defense provisions of their respective treaties,[67] as did Australia with regard to the ANZUS treaty.[68] Further, many States offered material and verbal support immediately following September 11, and many

64. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

65. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

66. *E.g.*, S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001); S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., U.N. Doc. S/RES/1386 (2001); S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452d mtg., U.N. Doc. S/RES/1390 (2002).

67. North Atlantic Treaty, Apr. 4 1959, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), http://www.nato.int/docu/pr/2001/p01-124e.htm; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/RES.1/01 (Sept. 21, 2001), *available at* http://www.oas.org/oaspage/crisis/rc.24e.htm.

68. Security Treaty, Sept. 1, 1951, U.S.-Aust.-N.Z., art. IV, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; Brendan Pearson, *PM Commits to Mutual Defence*, AUSTRALIAN FIN. REV., Sept. 15, 2001, at 9, 2001 WL 27344413.

did likewise after Operation Enduring Freedom began.[69]

Simply put, there was no meaningful opposition to, or criticism of, the use of military force against al Qaeda. This does not mean that military force has supplanted law enforcement as the exclusive counterterrorist option. On the contrary, the international cooperative law enforcement regime has been dramatically strengthened since September 11.[70] Moreover, the requirements of self-defense—proportionality and necessity—still apply to the use of military force. Both principles, discussed below, require the insufficiency of law enforcement in heading off a future attack as a condition precedent before a State may employ its military in a counterterrorist role. Nevertheless, state practice has unambiguously demonstrated that the use of military forces to combat terrorists, which the U.S. security strategy envisions, is no longer questionable as a matter of principle.

IV. WHEN IS IT LEGAL TO ACT WITHOUT A MANDATE FROM THE SECURITY COUNCIL?

The post-World War II positivist use-of-force paradigm is straightforward: Article 2(4) of the United Nations Charter prohibits 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."[71] There are but two Charter exceptions to the prohibition.

The first is enforcement action authorized by the Security Council under Chapter VII.[72] Once the Security Council determines that "any threat to the peace, breach of the peace, or act of aggression" has occurred,[73] it may authorize "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[74] The Council can grant the Chapter VII mandate to individual States, coalitions of the willing, or U.N. commanded and

69. Russia, China, and India agreed to share intelligence with the United States, while Japan and South Korea offered logistics support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan agreed to cooperate fully with the United States. Twenty-seven nations granted overflight and landing rights and forty-six multilateral declarations of support were obtained. White House, Fact Sheet: Operation Enduring Freedom Overview, *at* http://www.state.gov/s/ct/rls/fs/2001/5194.htm (Oct. 1, 2001). For post-October 7 support, *see infra* text accompanying notes 116-18.

70. *See, e.g.*, Charles M. Sennott, *Wide Dragnet Splinters Al Qaeda: Global Crackdown Slows a Network Aiming to Regroup*, BOSTON GLOBE, June 21, 2002, at A20.

71. U.N. CHARTER art. 2, para. 4.

72. *Id.* arts. 39-51.

73. *Id.* art. 39.

74. *Id.* art. 42.

controlled forces.[75]

No structural or procedural mechanism limits the Security Council's Chapter VII discretion. Illustrative of its wide competence, the Council has mandated peacekeeping operations,[76] humanitarian interventions,[77] regime change,[78] weapons inspections,[79] maritime intercept operations,[80] no-fly zones,[81] and war.[82] Seldom has its enforcement authority been meaningfully questioned. In light of this acceptance of U.N. authority, any military action taken to achieve the ends set forth in the U.S. security strategies would be legal under international law if authorized by the Security Council.

Self-defense is the second Charter exception to the use-of-force prohibition. 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."[83] A State acting in self-defense need not seek pre-approval of any international body, although it must report any defensive action it takes to the Security Council.[84] Article 51, and the customary law it codifies, is especially relevant to the U.S. security strategies, focused, as they are, on defense of the country against terrorists and weapons of mass destruction. Further, the United States explicitly maintains that it will act alone when necessary. There is absolutely no doubt it is entitled to do so by the

75. The Council used ad hoc coalitions for operations against Iraq in 1990-91, S.C. Res. 678, *supra* note 11, and to set up the initial International Security Assistance Force in Afghanistan in 2001, S.C. Res. 1368, *supra* note 64. By contrast, the Council turned to NATO to lead the Kosovo Force in 1999. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999). An example of a "blue helmeted" force is the U.N. Mission in Sierra Leone, which received its first mandate in 1999. S.C. Res. 1270, U.N. SCOR, 54th Sess., 4054th mtg., U.N. Doc. S/RES/1270 (1999).

76. E.g., the United Nations Protection Force in the Balkans. S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992).

77. *E.g.*, *supra* note 2.

78. E.g., in Haiti. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994).

79. E.g., in Iraq immediately before Operation Iraqi Freedom. S.C. Res. 1441, *supra* note 6.

80. E.g., NATO Operation Sharp Guard in the Adriatic to enforce U.N. sanctions in the Balkans. IFOR Final Fact Sheet, Operation Sharp Guard, *at* http://www.nato.int/ifor/general/shrp-grd.htm (last modified Oct. 2, 1996).

81. E.g., NATO Operation Deny Flight over Bosnia-Herzegovina. S.C. Res. 816, U.N. SCOR, 48th Sess., 3191st mtg., U.N. Doc. S/RES/816 (1993).

82. E.g., the first Gulf War. S.C. Res. 678, *supra* note 11.

83. U.N. CHARTER art. 51.

84. *Id.*

very terms of the Charter *if* the right to self-defense has matured.

Since "armed attack" is a condition precedent to lawful self-defense, the term must be defined. The International Court of Justice addressed the issue in *Military and Paramilitary Activities*. In the case, the United States justified its support of guerillas engaged in operations against Nicaragua as a collective defense action with El Salvador, which was under attack by Nicaraguan-backed rebels. The Court held that

> the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, *if* such an operation, because of its *scale and effects*, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."[85]

Thus, only attacks of a particular scale and of certain effects are "armed attacks" justifying a military response in self-defense.

In the context of the current U.S. security strategies, any use of a weapon of mass destruction would obviously meet the threshold. Acts of terrorism may or may not. Despite the international community's support for military action against al Qaeda, the large number of 9/11 fatalities precludes drawing bright line conclusions as to the precise scale and effects necessary to constitute an armed attack. That said, the reference in *Military and Paramilitary Activities* to frontier incidents indicates that the threshold for an armed attack is very low; therefore, it is logical to conclude that most violent attacks by transnational terrorists would rise to this level.

The second issue is the temporal relationship between response and attack. Responses that precede attacks, otherwise known as anticipatory self-defense, are addressed in the next section. However, if an attack is over, may the victim strike back? Although U.S. security strategies assume so, Article 51 provides only for *defensive* action. Nowhere does the Charter recognize retribution or punishment as a basis for the use of force.

Of course, no reasonable State attacked with weapons of mass destruction would ever assume the conflict ended with that first blow. Clearly, defensive operations remain permissible even if the individual attack appears over; given the scale of the attack, further hostilities are logically inevitable.

Some have suggested that a State may react militarily to a terrorist

85. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) (emphasis added).

attack that is underway, but once it is over only law enforcement is available to deal further with the incident. This, however, was clearly not the international community's interpretation in the aftermath of September 11, for it supported operations against al Qaeda even though no definitive evidence existed that specific future attacks were imminent.

Resolution of this apparent inconsistency necessitates characterizing multiple terrorist attacks by a particular group as a "campaign." In much the same way that a military campaign consists of a series of related tactical engagements, so too does a terrorist campaign. Consider al Qaeda. The group has planned or executed terrorist attacks against the United States for over a decade.[86] September 11 was the most spectacular, but not the first or last. This being so, strikes against al Qaeda are neither anticipatory, i.e., launched in anticipation of an attack, nor punitive. Rather, they are defensive responses to an armed terrorist campaign that is currently underway. As such, their timing comports with the law of self-defense.

The aggressive U.S. security strategies against terrorism and WMD, based normatively in the law of self-defense, must also comply with the requirements of necessity and proportionality.[87] Necessity requires that there be no viable alternative to the use of force. In the context of terrorism, the most obvious options are

86. The organization had allegedly been involved in the 1993 World Trade Center bombing, the 1998 bombings of the U.S. embassies in Kenya and Tanzania, and the attack on the USS Cole in 2000. *See, e.g.*, Erik Eckholm, *Pakistanis Arrest Qaeda Figure Seen as Planner of 9/11: Suspect Has Also Been Linked to Cole and Embassy Bombings*, N.Y. TIMES, Mar. 2, 2003 at A1. The group had also claimed responsibility for the 1993 attack on U.S. special forces in Somalia, as well as three separate 1992 bombings intended to kill U.S. military personnel in Yemen. UNITED STATES DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2000 app. B (2001), http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm. Moreover, the United States Department of State alleges the existence of al Qaeda plots (not executed) to kill the Pope, attack tourists visiting Jordan during the millennium celebration, bomb U.S. and Israeli embassies in various Asian capitals, blow up a dozen passenger aircraft while in flight, and assassinate President Clinton. *Id.*

87. These requirements derive historically from the 19th century *Caroline* case and correspondence between Secretary of State Daniel Webster and his British counterparts. *See* Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), *in* 29 BRITISH AND FOREIGN STATE PAPERS, 1840-1841, at 1129, 1138 (1857). Both the Nuremberg Tribunal and the International Court of Justice have recognized them. *See* International Military Tribunal (Nuremberg), Judgment and Sentences, *reprinted in* 41 AM. J. INT'L L. 172, 219-23 (1947); Military and Paramilitary Activities, *supra* note 85, at 94; Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 (July 8); Oil Platforms (Iran v. U.S.), at paras. 43, 74, 2003 WL 23335678 (I.C.J. Nov. 6, 2003); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987).

international law enforcement and counterterrorist operations conducted by the State from which the terrorists operate. If either is reasonably certain to prevent subsequent attacks in the campaign, the victim's use of military force would be unnecessary as a matter of law. In most cases, this possibility is doubtful. Law enforcement or host State counterterrorist operations may help prevent further attacks, but given the shadowy, global nature of 21st century transnational terrorism, there will seldom be sufficient confidence in success to preclude the military option.

Weapons of mass destruction are an easier case. Once used, it would be absurd to expect any victim to conclude that defensive use of force is unnecessary because non-forceful measures would suffice to prevent follow-on strikes. The victim State may conclude as a matter of policy that it should react non-forcefully, but as a matter of law it need not do so.

Proportionality limits the force used to that required to defeat the ongoing campaign. Given the fanatical nature of modern terrorists, it is hard to imagine a counterterrorist strike that would be disproportionate, i.e., more forceful than necessary to end their operations. After all, many terrorists are prepared to pay the ultimate price for their beliefs. The same logic applies to a State that has used weapons of mass destruction. The egregiousness of such conduct always merits a forceful response, lest the attacker strike again. In other words, the consequences of failing to forestall a follow-on WMD attack are so momentous that even very violent defensive actions will usually be lawful. The International Court of Justice implicitly recognized this in *Use of Nuclear Weapons*, when it refused to rule out affirmatively the possibility that the use of nuclear weapons would be legal if the survival of a State were at stake.[88]

With regard to the 2003 Iraq War and the issue of using force without the approval of the Security Council, note that both the United States and United Kingdom justified their action on Security Council resolutions stretching back to 1990. Specifically, they argued that Iraq's material breach[89] of the cease-fire that ended active hostilities in the First Gulf War,[90] allowed them to use force pursuant to the 1991 resolution authorizing military action by States

88. Legality of the Threat or Use of Nuclear Weapons, *supra* note 87, at 263.

89. In Resolution 1441 the Council found Iraq in material breach. S.C. Res. 1441, *supra* note 6, at 3.

90. S.C. Res. 687, *supra* note 12.

cooperating with Kuwait following the Iraqi invasion.[91] Thus, the controversy over the March 2003 attack on Iraq is not about whether it was appropriate for coalition forces to attack without a mandate, but whether the string of resolutions from 678 to 1441 amounted to such authorization. Although U.S. and British officials repeatedly claimed the need to defend themselves against Iraqi WMD, whether wielded by the Iraqis or transnational terrorists, these were policy, not legal, arguments.

V. WHEN MAY A STATE ACT PREEMPTIVELY IN THE FACE OF FUTURE TERRORISM, WMD ATTACK, OR WMD TRANSFER TO TERRORISTS?

The most controversial aspect of the U.S. security strategies is the assertion of the right to act preemptively. Interestingly, the National Security Strategy itself suggested the need for a rethinking of the law on the subject:

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.[92]

Such rumination was unnecessary and unfortunate, for it ignited a firestorm of controversy in the international law community, with many suggesting the strategy was illegal. Such assertions are overbroad, for preemption is neither necessarily lawful nor unlawful. As the legal adviser for the Department of State has judiciously pointed out, the lawfulness of the policy depends on the circumstances in which the preemptive strike is launched.[93]

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91. S.C. Res. 678, *supra* note 11.

92. NSS, *supra* note 35, at 15.

93. William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

Preemption is a form of self-defense that must comply with the attendant necessity and proportionality requirements described above. The former is especially relevant because the fact that the strike has not occurred by definition creates an opportunity to try non-forceful measures of resolution. Of course, should such measures be certain to fail, the necessity threshold is met without attempting them.

In the preemption context, a related criterion is indeed that attack be imminent. This requirement derives from the 1837 *Caroline* case involving the British destruction of an American steamboat in United States territory.[94] Secretary of State Daniel Webster argued then that defensive actions require "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. . . . [and must be] justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[95] Traditionally, the imminency criterion was viewed in terms of temporal proximity; i.e., self-defense can only occur as the pending, armed attack is about to be launched.

This approach made sense when armies had to mobilize to go to war and combat was linear, concentrated along a fairly well defined line. However, the NSS correctly points to changes in the context in which the criterion is applied. Today, attacks can be launched without warning; indeed, that is the prevailing modus operandi of terrorists. Moreover, terrorist attacks may be catastrophic in an era of WMD. To require States to wait until the blow is about to fall would often render them defenseless.

A more fruitful approach is to interpret imminency in light of its underlying purposes—permitting States to defend themselves effectively against attack while allowing the greatest opportunity possible for means short of the use of force to resolve the situation.[96] Balancing these purposes in the current security context yields an interpretation that allows a State to act anticipatorily (preemptively) if it must strike immediately to defend itself in a meaningful way and the potential aggressor is irrevocably committed to attack. The determinative question when evaluating claims to anticipatory self-

94. *See generally* Martin A. Rogoff & Edward Collins, *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L. L. 493 (1990).

95. *See* Letter from Daniel Webster, *supra* note 87, at 1138.

96. The Congressional Joint Resolution authorizing the use of force adopted this more liberal approach to imminency (in addition to emphasizing the need to enforce relevant Security Council resolutions). Authorization for the Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1499.

defense is whether the defensive action occurred during the last possible window of opportunity in the face of an attack that was almost certainly going to occur.

In the case of terrorism, the last window of opportunity may be just before the attack; indeed, if the place and method of attack is known, it may be feasible to foil a terrorist action simply through a combination of static defenses and law enforcement. Surprise is the essential element of every terrorist strike. Deny surprise to the terrorists and you have closed *their* window of opportunity.

Often, however, reliable intelligence may indicate that a particular group has definite plans to conduct an attack, but the target or time of attack is unknown. In such cases, the last chance a State may have to foil an attack could arise weeks, even months, earlier. For instance, counterterrorist forces may locate a key operative long before an attack. If so, and if he or she cannot be apprehended (principle of necessity), the State may lawfully target the individual if this is in all likelihood the only opportunity it will have to foil the attack.

The same approach applies to development, possession, or transfer of WMD. A State with knowledge of a pending WMD attack may act preemptively at any point that could reasonably be deemed its last viable window of opportunity. For instance, U.S. security strategies are apprehensive about WMD transfer to terrorist groups. Should the United States have reliable evidence that a transfer is looming, it may legally use force to prevent the exchange. This is justified because a State's ability to locate and destroy the weapons drops precipitously once they pass to terrorists. Similarly, if a State is developing WMD and it is reasonable to conclude that it intends to use the weapons against the United States, U.S. forces may strike anticipatorily in self-defense if they cannot reliably destroy the WMD inventory once developed. Again, the issue is not temporal proximity, but rather relative opportunity to mount an effective defense. Thus, the National Security Strategy's willingness to take "anticipatory action to defend ourselves, even if uncertainty remains as to time and place of the enemy's attack" is, depending on the facts at hand, lawful.[97]

One recurring concern surrounding preemption is the quality of evidence necessary to justify an anticipatory strike. As reaction to both the 1998 strike into the Sudan and the U.S. failure to find a smoking gun vis-à-vis an Iraqi WMD program or ties to terrorism

97. NSS, *supra* note 35, at 15.

have demonstrated,[98] the international community insists that States resorting to force do so only on the basis of solid evidence. Although no express standard of proof exists in international law, "clear and compelling" appears to be an acceptable criterion. The United States articulated this standard in its October 2001 notification to the Security Council that it was acting in self-defense when attacking al Qaeda and Taliban assets in Afghanistan.[99] It also cited the standard when briefing the North Atlantic Council on the complicity of the two groups in the September 11 attacks.[100] Neither the Security Council nor the North Atlantic Council criticized the ensuing military operations, thereby suggesting the suitability of the clear and compelling standard. Since the United States proffered the criterion in the first place, it is reasonable to hold the U.S. to it when its military mounts the preemptive operations envisioned in U.S. security strategies.

Finally, recall the discussion above regarding terrorist campaigns. If a terrorist group is engaging in an extended campaign against a State, as was al Qaeda when it attacked on September 11, issues of preemption are moot. Had the United States been able to strike at the group before the attacks, such operations would not have been preemptive in nature, but rather conducted in the course of an ongoing terrorist campaign.

It is revealing that the United States did not characterize Operation Iraqi Freedom as a preemptive action in accordance with its security strategies, at least not as a matter of law. Any such argument would have been legally weak. This is true even though the United States would have been judged on what it reasonably believed at the time, not on the evidence, or lack thereof, uncovered after the operation.[101]

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98. With regard to the Sudan strike, *see supra* text accompanying notes 61-63.

99. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946.

100. Statement by Secretary General Lord Robertson at NATO Headquarters (Oct. 2, 2001), http://www.nato.int/docu/speech/2001/s011002a.htm.

101. This principle was articulated in the *Rendulic* case. Accused of excessive destruction during the German evacuation of Norway, General Rendulic was acquitted on the basis of his (mistaken) belief that his forces were being pursued by the Russians and that therefore the destruction was necessary to deny them resources. *See* United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 759, 1253-54 (1950) (The Hostages Case). Note that the International Criminal Court Statute provides that mistake of fact is a ground for excluding criminal responsibility if it negates the mental intent element of the offense. Rome Statute of the International Criminal Court, July 17, 1998, art. 32, U.N. Doc. A/CONF.183/9 (1998), *available at* http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).pdf.

Without question, Iraq presented a threat to the U.S., particularly given its ties to transnational terrorism, its demonstrated willingness to use weapons of mass destruction, its earlier possession of such weapons, and its decade-long hostility to the country.[102] That said, there was no clear and compelling evidence of an Iraqi plan to use WMD against the United States, nor did Iraq posses a reliable means of delivering those weapons over great distances. Although Iraq did have connections to terrorism, and was condemned for such involvement in Resolution 1441,[103] there was insufficient evidence of a planned WMD transfer to terrorists to justify anticipatory military action.[104]

In this regard, recall that both the United States and United Nations were closely monitoring events in Iraq. Furthermore, given Operation Enduring Freedom, the Iraqi leadership surely realized it would have been suicidal to use WMD against the United States or to transfer weapons to terrorists for that purpose. Quite aside from a devastating defensive response by the United States, such actions would have immediately silenced opposition to a use-of-force mandate in the Security Council. To conclude in these circumstances that March 2003 represented the last window of opportunity to defend effectively against Iraqi use of weapons of mass destruction, or the transfer of those weapons to terrorists, would have been wholly illogical. Wisely, the United States elected not to base its legal justification for the operations on such an assertion, instead relying upon Security Council approval, however tenuous the legal logic underlying that position.

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102. The U.N. Security Council recognized as much in Resolutions 687 and 1441. S.C. Res. 687, *supra* note 12; S.C. Res. 1441, *supra* note 6.

103. S.C. Res. 1441, *supra* note 6, at 2 ("*[d]eploring* . . . that the Government of Iraq has failed to comply with its commitments pursuant to resolution 687 (1991) with regard to terrorism. . ."). Resolution 687, the 1991 cease-fire, required Iraq to "inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism." S.C. Res. 687, *supra* note 12, at 9.

104. On 8 January 2004, Secretary of State Powell, referring to "evidence of a connection between Saddam Hussein and al-Qaida and . . . a likelihood that he would transfer weapons to al-Qaida," stated that he has "not seen smoking-gun, concrete evidence about the connection, but I think the possibility of such connections did exist and it was prudent to consider them *at the time that we did*." Colin L. Powell, Secretary Powell's Press Conference (Jan. 8, 2004), http://www.state.gov/secretary/rm/28008.htm (emphasis added). Thus, he appears to have justified the attack in part on the *Rendulic* logic, *see supra* note 101.

VI. WHEN CAN COUNTERTERRORIST OR COUNTER-WMD OPERATIONS BE CONDUCTED ON FOREIGN SOIL?

The U.S. security strategies unambiguously assert an intention to conduct operations outside U.S. territory whenever possible. Obviously, if an international armed conflict is underway, counterterrorist operations related to the conflict can occur on the belligerent territory or the high seas, but not (generally) in neutral territory. In most other cases, operations require the consent of the State on whose territory they are to occur. For instance, the Yemeni government consented with, and cooperated in, the attack on Qaed Senyan al-Harthi cited at the outset of this article.

Counterterrorist operations conducted without the consent of the State of situs are much more problematic. Article 2(4) of the U.N. Charter prohibits the use of force against the territorial integrity of any State.[105] That prohibition extends to any nonconsensual penetration of another State's territory.[106] On the other hand, the right of States to defend themselves against an armed attack is also a customary right codified in Article 51. If terrorists could strike without warning only to withdraw behind the inviolable curtain of a sympathetic State's border, the right to self-defense against terrorists would be meaningless in many cases. Thus, a fair balance between these two potentially conflicting rights must be sought, one that best approximates their underlying purposes.

In addition to the aforementioned rights, States have a duty to "use due diligence to prevent the commission within its dominions of criminal acts against another nation or people,"[107] one that by now

105. U.N. CHARTER art. 2, para. 4 ("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."); *see also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Annex, Agenda Item 85, at 4, U.N. Doc. A/RES/2625 (XXV) (1970), *reprinted in* 65 AM. J. INT'L L. 243 (1971):

> Every State has a duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

Id. The General Assembly adopted the resolution by acclamation.

106. Albrecht Randelzhoffer, *Article 2(4)*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 123 (Bruno Simma ed., 2d ed. 2002).

107. S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. 1) No. 10, at 88 (Sept. 7) (Moore, J., dissenting).

expressly includes preventing one's territory from being used for terrorist ends.[108] Therefore, it is appropriate to require States exercising their right to self-defense first to demand that the State in which the terrorists are located police its own territory. If it does not do so after a reasonable time (measured by the threat terrorists pose to the other State), or if it cannot do so, the defending State may non-consensually cross the border for the sole purpose of conducting counterterrorist operations, withdrawing as soon as it eradicates the terrorist threat. Since it enjoys a right under international law to conduct defensive operations, any resistance by the armed forces of the State where the terrorists are located will itself constitute an armed attack against which counterterrorist forces may legally defend themselves.[109]

This scenario preceded Operation Enduring Freedom. The United Nations Security Council had demanded on multiple occasions (both before and after September 11) that the Taliban put an end to terrorist activities on territory it controlled.[110] President Bush also publicly demanded that the Taliban take action, and insisted the group turn over Osama Bin Laden and others responsible for the 9/11 attacks and permit U.S. forces to verify that Afghan territory was no longer being used for terrorist purposes.[111] When these demands went unanswered, U.S. and U.K. forces struck. Had the Taliban not been attacked on October 7, and had they subsequently opposed the operations, coalition forces would have been within their rights to strike directly at the Taliban in self-defense. What is interesting is that the Taliban were targeted even before they had the chance to resist. This raises the issue of when State sponsors of terrorism may be attacked.

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108. *See, e.g., Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. A/51/631 (1996); *Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., U.N. Doc. A/49/743 (1994); *Declaration on Principles of International Law Concerning Friendly Relations*, *supra* note 105; S.C. Res. 1373, *supra* note 65; S.C. Res. 1363, U.N. SCOR, 56th Sess., 4352d mtg., U.N. Doc. S/RES/1363 (2001); S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); S.C. Res. 1189, U.N. SCOR, 53d Sess., 3915th mtg., U.N. Doc. S/RES/1189 (1998).

109. Perhaps the most significant case of a State crossing into another to deal with attacks is the *Caroline* itself, since the correspondence between Webster and Ashburton is universally cited as the source of the requirements of self-defense. *See supra* note 87. In that case, British troops crossed into the United States and captured the *Caroline*, a vessel used to support Canadian rebels during the McKenzie Rebellion. *See* Rogoff & Collins, *supra* note 94, at 493-95.

110. *See, e.g.*, S.C. Res. 1390, *supra* note 66; S.C. Res. 1378, *supra* note 66; S.C. Res. 1363, *supra* note 108; S.C. Res. 1267, *supra* note 108.

111. *See* Address Before a Joint Session of Congress, *supra* note 5.

VII. WHEN MAY A STATE SPONSOR OF TERRORISM BE ATTACKED?

The U.S. security strategies posit an aggressive approach to State sponsorship of terrorism, particularly when WMD are involved. As discussed, forcefully interdicting the transfer of WMD to terrorists is generally appropriate as a matter of anticipatory self-defense, unless law enforcement could successfully accomplish the same objective.

However, whereas the WMD case is relatively straightforward (generally a question of the sufficiency of evidence and viability of alternatives to the use of force), the legal character of other forms of state support is less clear. The law surrounding the state support of terrorism has undergone a sea change over the past two decades. As discussed earlier, U.S. air strikes against government facilities during Operation El Dorado Canyon resulted in widespread criticism despite Libyan support for the terrorists who attacked the La Belle disco.[112] In fact, U.N. Secretary-General Javier Perez de Cueller announced that he "deplored" the "military action by one member state against another,"[113] and the General Assembly passed a resolution condemning the operation as violating international law.[114]

In 1986, the International Court of Justice's judgment in the *Military and Paramilitary Activities* case focused the legal community's attention on the issue. The ICJ held that a State committed an armed attack by "'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein.'"[115] In other words, before State support reaches the level of an armed attack such that the State supporter is itself subject to attack in self-defense, the group in question must be acting on behalf of the State or that State must have been otherwise highly involved in the terrorist attack.

Operation Enduring Freedom illustrates the extent to which the international community's appreciation of the standard has shifted in the face of the emergence of transnational terrorism and the

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112. *See supra* note 56 and accompanying text.

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

114. GA Res. 41/38, U.N. GAOR, 41st Sess., 78th plen. mtg. at 34, U.N. Doc A/RES/41/38 (1986).

115. Military and Paramilitary Activities, *supra* note 85, at 103. The opinion went on to state that "[t]his description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law." *Id.*

proliferation of WMD. It is a shift consistent with the approach adopted in the U.S. security strategies.

When the U.K. and U.S. attacked the Taliban directly on October 7 because it had "allow[ed] the parts of Afghanistan that it controls to be used by [al Qaeda] as a base of operations,"[116] hardly a word of criticism was uttered. On the contrary, in addition to U.K. participation in the first wave of strikes, Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan provided airspace and facilities.[117] China, Egypt, Russia, and the European Union publicly backed the operations, while Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.[118] Even the Organization for the Islamic Conference merely urged the United States to restrict its campaign to Afghanistan.[119] What is normatively significant is that this outpouring of support for Operation Enduring Freedom occurred in spite of the fact that the Taliban depended more on al Qaeda (for support against the Northern Alliance) than vice versa. No evidence of support even beginning to approach the *Military and Paramilitary Activities* level existed.

State practice has unambiguously signaled a lowered threshold above which the international community will characterize support of terrorism as an armed attack. What remains unclear is the precise level of support that meets the threshold. Possibly distorting identification of that standard is the sheer horror of September 11, particularly the thousands of innocents who perished. Moreover, repeated U.S. and U.N. warnings to the Taliban made attacking them more acceptable, as did their record of widespread and egregious human rights abuses. That said, Operation Enduring Freedom certainly represents a watershed event in the law governing State sponsorship of terrorism.

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116. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), *supra* note 99.

117. *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 248 (2002) (edited by Sean D. Murphy).

118. *Id.* The European Union "confirm[ed] its staunchest support for the military operations ... which are legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security Council." Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, Oct. 19, 2001, at 1, SN 4296/2/01 Rev. 2, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/ACF7BE.pdf.

119. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 41, 49 (2002).

CONCLUSIONS

There is no question that the United States views the global security environment as violent, dangerous, and unpredictable. In response, it has crafted aggressive security strategies to meet the looming threats it perceives. However, allegations that the strategies ignore international law are simplistic and unfair.[120]

Clearly, in the twenty-first century, the international community deems it appropriate to use military force against non-State actors pursuant to the right to self-defense so long as the conditions precedent to such use, particularly that of necessity, are present. States need not secure the authorization of the Security Council before acting in self-defense, whether against terrorists, WMD, or any combination thereof. They may even act preemptively, despite the crescendo of protestations to the contrary, during the last window of opportunity to prevent becoming the victim of an armed attack. Under certain circumstances, it is appropriate to cross into another State to mount counterterrorist operations without that State's consent. Finally, States that provide support to terrorists do so at great risk in light of the shifting balance between the rights of territorial inviolability and self-defense.

Simply put, there is no aspect of U.S. security strategy that is objectively illegal under international law. At the same time, it is certainly possible to pursue the strategies in an unlawful manner, for instance by acting forcefully in self-defense when non-forceful alternatives remain viable. Therefore, actual instances of the use of force must always be normatively evaluated on a case-by-case basis. Most importantly, any interpretation of the applicable legal regime must account for the constantly evolving security environment if international law is to continue to command the respect of the international community.

120. For instance, Professor Thomas Franck has suggested that the NSS "stand[s] the Charter on its head." Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT'L L. 607, 619 (2003).