ETHICAL AND LEGAL DIMENSIONS OF THE BUSH "PREEMPTION" STRATEGY

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> We will cooperate with other nations to deny, contain, and curtail our enemies' efforts to acquire dangerous technologies. And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.[1]

The *National Security Strategy of the United States of America* (NSS), required from each administration by the Congress of the United States, is the single most authoritative statement of any administration's view of the world from the perspective of national security. At least notionally, it provides the conceptual framework by means of which decisions are made regarding the force structure and size of the U.S. military, the types of weapons systems to be acquired by them, and the types of military units maintained in the force.

It is, therefore, a document (in any administration) well worth careful study and analysis. This particular NSS is more than routinely important, however, for a number of reasons. First, and most obviously, it is the first official articulation of the comprehensive view taken by the U.S. security policy in response to the al Qaeda attacks of September 11, 2001. It is, therefore, an official and doctrinal articulation of how the administration understands the security landscape to have been changed by those attacks. Second, in articulating a strategy of preemption of the acquisition of capabilities

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1. George W. Bush, *Introduction* to WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf.

on the part of potential adversaries (or, perhaps even more strongly, of preventive use of U.S. military force around the world in advance of clear response to aggression), the NSS at very least appears to challenge much of the existing understanding of legitimate use of military force in the international system.[2] And third, coupled with various other moves this administration has made (e.g., non-participation in the Kyoto treaty process and the International Criminal Court, to name only two of the most visible), the NSS appears to indicate a marked departure from the robust internationalism of President Clinton's National Security Strategy[3] framework of attempting to shape the international environment, responding to threats, challenges, and opportunities, and preparing for a more desirable future by integrated and regional programs of promoting democracy, free trade, etc. while also transforming the U.S. security sector.

Whereas the Clinton NSS conceives of a complex and multi-centered world and imagines U.S. action to function within a web of interconnected forces and causes, the tone of President Bush's NSS clearly puts greater emphasis on the need for U.S. action. For example, President Bush's NSS states:

> In the new world we have entered, the only path to peace and security is the path of action.
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> As we defend the peace, we will also ... preserve the peace. Today, the international community has the best chance since the rise of the nation-state ... to build a world in which great powers compete in peace instead of continually prepare for war. Today, the world's great powers find ourselves on the same side—united by common dangers . . . [and] increasingly ... by common values.[4]

This passage is particularly revealing because, while it certainly acknowledges the common international interest in dealing with the challenges of terrorism it identifies, the overriding emphasis rhetorically is on the need to act—such that, should the rest of the international community not share a common sense of urgency

2. *But see* Colin L. Powell, *A Strategy of Partnerships*, FOREIGN AFF., Jan.-Feb. 2004, at 22. Secretary of State Colin Powell argues strenuously against any too extreme emphasis on pre-emption in the NSS. He argues that part of the tone of the document is deliberately rhetorical "to convey to our adversaries that they were in big trouble." *Id.* at 24. He also asserts that preemption "applies only to the undeterrable threats that come from nonstate actors such as terrorist group." *Id.*

3. WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1999), *available at* http://clinton4.nara.gov/media/pdf/nssr-1299.pdf.

4. Bush, *supra* note 1.

regarding a specific case (as in the decision to proceed with the invasion of Iraq, for example), clearly the felt urgency to act is dominant over the careful tending of international common cause.[5]

This essay will assess the implications of this shift in U.S. strategy from a legal and ethical perspective. If one views existing international law as a kind of stop-motion photograph of a much older and varied ethical tradition of reflection on the justifications for the use of military force, it may well be (as this essay will argue) that the resources of that older ethical tradition provide useful insights and fundamental principles to guide the development of our thinking in times of change in which, as may indeed be the case in the current environment, the fundamental shape of the international order is shifting.

If one thinks of the international system in terms of an analogy to plate tectonics in geology, there are indeed historical moments in which the apparent stability of that system shifts rather dramatically and, in world-historical terms, rather quickly. A major shift of this kind occurred between the Reformation and the Peace of Westphalia, which created the current international system of sovereign independent states.[6] If, upon reflection, we conclude we are indeed in the midst of another such shift, it should not be surprising that the black-letter law designed to provide normative guidance to the old order fits poorly if at all in the post-shift environment.

If indeed we are experiencing such a transition, it is important to continue to find normative legal and ethical justifications for the use of force. But if we are to do so, we will need to be able to reach back for conceptual resources and frames of the whole of our ethical tradition to provide touchstones for reframing a new structure that preserves core values and conceptual insights. To some degree, this necessarily will require reframing the specific understanding that had taken form in current international law. The thesis of this essay is that

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5. *But see* Powell, *supra* note 2, at 24-25 ("[T]he distortion of U.S. foreign policy strategy requires repair. This distortion does a disservice to honest observers trying to understand U.S. policy, and it contributes to irrational partisanship."). In light of the commonly acknowledged tension between the State Department and other administration officials, especially from the Defense Department, one may be excused for not knowing whether to take Secretary Powell's interpretation at face value as representing ground truth regarding Administration policy. Instead, one might view his article as one more salvo in that conflict, attempting to stake out the most internationalist interpretation of that policy possible in hopes of bending Administration conduct in that direction.

6. For the historical background of the Thirty Years War and the Peace of Westphalia, see generally RONALD G. ASCH, THE THIRTY YEARS WAR: THE HOLY ROMAN EMPIRE AND EUROPE, 1618-1648 (1997).

we may very well, indeed, be at such a world-historical moment. In light of that possibility, this essay will tentatively explore how those older ethical resources might help guide our bearings after the earthquake shift has upset our formerly familiar terrain.

I. THE CURRENT LEGAL AND ETHICAL FRAMEWORK FOR ASSESSING USE OF MILITARY FORCE

As is commonly known, the current legal and moral framework within which we think about international affairs generally and the use of military force in particular is the product of a specific set of historical circumstances, brought about by the Peace of Westphalia in Europe in 1648.[7] Prior to that, at least for Europe, one can barely speak of an "international order." Rather, there was a notional Christendom that provided a cultural, religious, and moral overlay to all European powers. Grounded in a common commitment to the beliefs and structures of the Roman Catholic Church, that superstructure claimed (and to a large degree was granted) the authority to adjudicate between princes and to determine the moral and legal status of their conflicts.[8]

The wars of religion that followed the Reformation, therefore, are best seen as an effort to restore that lost religious unity to Europe—except now with several versions of Christianity asserting their supremacy and making their claim to be the new unifying force. The Peace established at Westphalia was less a triumph of the ideals and fondest hopes of any of the contenders than an exhausted recognition of the futility of the hope of any such restoration.[9]

It did not so much resolve the fundamental religious conflicts as make a grudging peace with the religious diversity of Europe—at least between the new Westphalian states, if not in their internal policies of toleration for religious minorities.[10] The new hermetic sovereignty Westphalia created formed an impenetrable shield behind which individual states could continue to pursue policies of religious uniformity and intolerance, up to and including persecution and execution of citizens who refused to conform to the established religion, whether Catholic or Protestant.[11] It was, to use modern

7. *See* ASCH, *supra* note 6, at 134-49.
8. *See id.* at 34-46.
9. *See id.* at 134-149.
10. *See id.*
11. *See id.*

parlance, peace at an international level, purchased by deliberate neglect of individual human rights such as freedom of religious opinion and practice.

The core of the moral and legal framework created by that Westphalian settlement is perhaps best captured by the philosophical literature in Michael Walzer's legalist paradigm in his now-classic *Just and Unjust Wars*:

> There exists an international society of independent states
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> This international society has a law that establishes the rights of its members—above all, the rights of territorial integrity and political sovereignty
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> Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
>
> Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society
>
> Nothing but aggression can justify war.
>
> Once the aggressor state has been militarily repulsed, it can also be punished.[12]

Walzer's paradigm is, of course, only the core of the model—a kind of "regular verb" paradigm for the language of international law. Following the statement of this clear paradigm, he pens chapters that attempt to conjugate the "irregular verbs" of the language to accommodate justified counterinterventions, preemption, humanitarian interventions, and so forth.[13] But the concept of "peace" that drives the Westphalian international system focuses exclusively on state-to-state interactions. It defines peace as liberty and security that can only exist in the absence of aggression among those states.[14] Consequently, any compromises of the sanctity of the core Westphalian principles of political sovereignty and territorial integrity of those states is necessarily going to be granted grudgingly, hesitantly, and with a strongly felt sense of the destabilizing risks to the system if and when they are overridden. In other words, normative

12. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 61-62 (3rd ed. 1977).

13. *See id.* at 74-137 (encompassing chapters 5-8).

14. *Id.* at 51.

legal and ethical thought has needed to accommodate exceptions to the paradigm to capture our considered moral intuitions about justified use of force precisely because some cases that do not fit the paradigm are clearly necessary and justified. Still, the tendency of theory is to do so only with great reluctance, much hedging, and a desire on the part of both theorists and states themselves to return to the comfortable territory of "black box" Westphalian sovereignty as quickly as possible.

From a normative ethical perspective, however—as distinct from the legal perspective—there was always something deeply dissatisfying about the Westphalian compromise. From the perspective of philosophical ethics, only actual human individuals are genuine possessors of rights, and it is the life and welfare of human individuals that are the locus of moral concern.[15] States, from this perspective, possess only a conditional value: they are to be esteemed insofar as they serve as the protectors and defenders of the lives and rights of their citizens.[16] But a perspective such as this threatens to undermine conceptually the core commitments at the root of Westphalian concept of peace: a willingness to sustain the fiction of the sovereign equality of states and to turn a blind eye to the internal affairs of other sovereign states.

The tension between an international system built on sovereign and equal states and their rights on the one hand, and the rights of actual human beings on the other, was always present in the Westphalian system.[17] But for most of its history, the "peace" bought by respect for the principles of political sovereignty and territorial integrity seemed clearly worth the price paid in terms of those states' treatment

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15. Some philosophers also argue that animals are able to possess rights, both moral and legal. *See, e.g.*, STEPHEN R. L. CLARK, ANIMALS AND THEIR MORAL STANDING 16-30 (1997) (arguing that animals, as well has humans, possess rights against humans who are capable of acknowledging those rights); BERNARD E. ROLLIN, ANIMAL RIGHTS & HUMAN MORALITY 118-19 (1992) (concluding that utilitarian arguments against granting animals rights are faulty because rights are meant to insulate individuals against utilitarian arguments, and animals are legitimate candidates for moral concern).

16. *See* WALZER, *supra* note 12, at 54.

> The moral standing of any particular state depends on the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile. If no common life exists, or if the state just doesn't defend the common life that does exist, its own defense may have no moral justification.

Id.

17. *See* JOHN STUART MILL, *A Few Words on Non-Intervention*, *in* ESSAYS ON EQUALITY, LAW, AND EDUCATION 111 (John M. Robson ed., 1984).

of their citizens.[18] As long as they refrained from aggression against other sovereign states, peace at the international level was maintained.

The sharp dichotomy between international society, whose members are only states, and domestic society, with actual human individuals as bearers of rights, has of course always been recognized to some degree and, in the past century, efforts have emerged to attempt to bridge the division. The Hague and Geneva movements were at least to some degree attempts to recognize the value and rights of human persons not subsumed into their identity as members of the state.[19] World War II and the Holocaust greatly accelerated moves in this direction. Rallied by the slogan "Never Again!", individual states and the newly created United Nations began generation of an entire body of international humanitarian law, beginning with The Universal Declaration of Human Rights and the Genocide Convention, which cumulatively restricted (at least on paper) the absolute scope of state sovereignty.[20] Indeed, the Preamble to the Charter of the United Nations captures the dual foci of these two bodies of law perfectly:

> We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the *equal rights of men and women and* of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. . .[21]

Increasingly, those bodies of law specified actions and policies that states were expected to take to protect the lives and welfare of their citizens and spelled out rights human individuals could claim, even against the government of their states.[22]

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18. *See* R. J. VINCENT, NONINTERVENTION AND INTERNATIONAL ORDER 340-49 (1974).

19. For an overview of these movements, see generally GEOFFREY BEST, WAR AND LAW SINCE 1945 (1994), and for a detailed account of the evolution of these parallel bodies of law in the post-World War II period, see generally INTERNATIONAL HUMANITARIAN LAW: ORIGINS (John Carey et al. eds., 2003).

20. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Part I, at 71, U.N. Doc. A/810 (1948); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

21. U.N. CHARTER pmbl. (emphasis added).

22. *See* BEST, *supra* note 19, at 79.

Needless to say, many of those statements, treaties and resolutions have the ring of high idealism. Further, since sovereign states remain the actors in the "international community," all states to some degree remain jealous of their sovereign independence and do not sincerely intend to create permission for other states or international organizations to interfere in any vital way in their internal affairs. Lastly, the vast majority of the period between the creation of the U.N. and the present saw a world dominated by the bipolar Cold War split. Consequently, the broader political interests and conflicts among the Cold War adversaries overpowered almost any issue that might have fallen under the purview of humanitarian law. The Helsinki Accords of 1975, by acknowledging human rights of individuals, created a lever far beyond the signers' imagining for monitoring, criticizing, and (in the case of the Soviet Union) destabilizing states which failed to respect them.[23]

The collapse of the Soviet Union, and with it the Cold War, seemed to some a golden moment when a "new world order" might actually emerge in which political and military might, wedded to genuine international commitment to common principle, might begin to make real the moral and legal commitments of the newer humanitarian law.[24] If that were to occur, what would emerge from that process would be a considerably modified understanding of sovereignty in which states that fail to meet a fairly wide array of commitments to their own citizens and their rights would be subject more consistently and routinely to scrutiny, sanction, and perhaps even united action, from "the international community."[25]

The First Gulf War appeared to demonstrate a capability of the United Nations to exercise the kind of collective security enforcement action in response to aggression that had inspired the founding of the organization. The general point is that the concept of overriding state

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23. Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292.

24. *See* George Bush, *Preface* to WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES: 1991-1992, at xiii, xiii (1991).

25. *See* Powell, *supra* note 2, at 26. Powell states:

> The president's strategy is rooted, above all, in the promotion of freedom and dignity worldwide. "America must stand firmly," the president wrote, "for the non-negotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property." We stand by these values now and always. They are the values served by the partnership that we must build and nurture.

Id.

sovereignty in the name of broader international standards of conduct has, at least in principle, been one the world community has been moving toward for more than half a century. Viewed solely in that light, therefore, the Bush doctrine's suggestion that sovereignty will not be a cloak beneath which terrorism and the development of Weapons of Mass Destruction can be developed is not in itself a dramatic departure. Indeed, Secretary of State Powell offers precisely this interpretation of Administration strategy: "Not least among the policy priorities laid out in the NSS is our determination to develop cooperative relations among the world's major powers. It is here, above all, that the key to a successful conclusion to the war against terrorism lies."[26]

Of course, there were many conceptual and practical questions unresolved by this suggestion. The Cold War stalemate gave few opportunities for precedents to be set that would define the limits in practice of justified and unjustified interventions. The mechanisms of legitimate authority and the practical organization to make them possible were not clearly specified. Further, despite rhetorical commitment to such universal ideals, at bottom all states cling to their sovereignty. Nevertheless, the conceptual framework for overriding state sovereignty in the name of internationally agreed goals has been in place for half a century. Similarly, the legal mechanism to override a state's sovereignty has been clearly laid out in law in the form of a Security Council determination under Chapter VII of the Charter that a given situation constitutes a "threat to peace, breach of the peace, or act of aggression" justifying collective action.[27] But here too, the intent of Chapter VII was much more focused on the stability of the interstate system itself than of intervening in the internal affairs of member states in the name of human rights and humanitarian considerations.

Despite that framework, however, the absence of many precedents to establish a pattern of acceptable practice, the inherently political character of Security Council deliberations and actions, and the somewhat imprecise specification of the precise kinds of unacceptable state actions cumulatively rendered humanitarian law more hortatory than actionable.

Nevertheless, the conceptual point remains important: that in fits and starts, for over fifty years, states, non-governmental

26. *Id.* at 28.
27. U.N. CHARTER art. 39.

organizations, and ordinary people have recognized the moral and political deficiencies of an international system focused exclusively on states and their sovereignty. Time and again, the international community has witnessed situations that cried out for intervention into states in the name of the rights of oppressed citizens as in Rwanda, the Balkans, and Cambodia, to name only a few of the more egregious cases. But the absence of real international commitment to act with some consistency on these principles was laid bare most painfully in the NATO decision to bomb Serbia over its handling of Kosovo. Since the Russians were determined to veto any Security Council resolution to authorize the action, the best that could be said about the intervention was, in the words of a British Parliamentary committee report, that it was "illegal, but necessary."[28]

The fundamental ethical issue this raises—and a place where existing black letter law at least strains, if it does not break—has to do with the disconnect between what for lack of a better word one might call the universalist ethical ends of humanitarian and human rights considerations and the particularist means of military and political power available to support and enforce them. The inherent disconnection between the ostensibly universal values articulated and the constraints of national interest of individual states and their fiduciary responsibility to their own citizens not to expend national blood and treasure for purposes not visibly connected to national interests place an inherent limitation on consistent action on principle.[29]

The U.N. Charter recognized the problem, of course, by requiring that a Military Staff Committee be established and that member states provide military forces for the enforcement of Security Council resolutions.[30] Clearly, these provisions of the Charter have never been implemented, since the Council lacks the unanimity to agree with much frequency on action, even in principle—let alone in being prepared to train and equip a truly integrated and effective international military force.

The core issue, therefore, is that existing law recognizes only the Security Council as the legitimate authority to authorize use of force

28. Patrick Wintour, *MPs say Kosovo bombing was illegal but necessary,* GUARDIAN (Manchester), June 7, 2000, http://www.guardian.co.uk/print/0,3858,4026548-103685,00.html.

29. *See* Martin L. Cook, *"Immaculate War": Constraints on Humanitarian Intervention, in* JUST INTERVENTION 145 (Anthony F. Lang, Jr. ed., 2003).

30. U.N. CHARTER arts. 42-47.

against threats to peace and security or violations of human rights (unless, of course, a state has a clear self-defense justification to use its forces). But all the coercive means to take effective action remain in the hands on individual states—and overwhelmingly, in the hands of a single state, the United States of America.[31] It is important to recall that, before the attacks of September 11, 2001, much public discourse focused on the extent to which the U.S. was prepared to use its power for humanitarian purposes throughout the world in places not directly tied to American vital national interest. Leaving aside the political problem of gaining consistent authorization from the Security Council to act on principle in such cases, there remained the domestic U.S. dispute about the proper role of the U.S. military and whether devoting it to humanitarian and human rights tasks was not a misuse of forces designed to "fight and win America's wars" rather than to serve global purposes disconnected from the realpolitik of American interest.

In summary, the central point is as follows. Prior to September 11, 2001, the international legal and ethical discussion was in flux. Because of its four century tradition, the baseline of international law and practice clearly understood the international community to be a system of sovereign states, and tended to understand justified use of force on the model of Walzer's legalist paradigm. Yet that system was under pressure from numerous directions to evolve by incorporating an ever-expanding list of human rights and humanitarian concerns, non-governmental organizations and advocacy groups, international authorities and organizations, etc. The unresolved tension between those two poles was made manifest frequently, but perhaps most graphically in the "illegal but necessary" action against Serbia regarding Kosovo—probably the closest example one can find of a military action conducted for purely humanitarian motives (at least on the part of the U.S.; the European case is, of course, more complex). The next section of the essay will argue that, in many respects, the legal, ethical and operational questions raised by the attacks of September 11, 2001 are more continuous with this evolving debate than they are wholly novel. Furthermore, it will argue that the most prudent course of action for the U.S. at this juncture would be to rejoin the stream of that evolution in progress rather than to damage

31. For a discussion of the strategic implications of this disparity, see Martin L. Cook, *On Being a Sole Remaining Superpower: Lessons from History,* 1(2) J. MIL. ETHICS 77 (2002).

emergent effective internationalism in the pursuit of short-term unilateral gains.

II. THE POST-SEPTEMBER 11, 2001 PROBLEM

The justifications offered for the NSS are almost entirely derived from the changes to the security situation of the U.S. and the world made evident by al Qaeda's successful attacks on September 11, 2001 (capping, of course, the attacks on American embassies in Africa, the U.S.S. Cole in Yemen, etc.). It is critical, therefore, to be precise about what fundamental shifts are genuinely warranted in light of those events.

The most obvious is raised by the fact that our major adversary, al Qaeda, is not a state, does not exist within the borders of any single state, and (with qualification) is not state-sponsored in the conventional sense of the term. Furthermore, normal deterrence of undesirable action by individuals or groups or *post facto* criminal apprehension and prosecution are obviously not possible with suicidal actors.

Insofar as the Westphalian international system has difficulty countenancing actors within the system that are not states, there is inevitably some difficulty thinking about necessary responses to al Qaeda-like actors who dramatically appear as major actors within that system.

But since even non-state actors must exist somewhere, they are inevitably to be found within the borders of sovereign states. An interesting and ethically important typology can be generated as one reflects on how they exist in relation to those states. Some states may be actively sponsoring and encouraging their activities. States in that kind of relationship to terrorist groups are relatively simple to understand in terms of existing law: insofar as their associations are close enough to make the distinction between the state and the terrorist group essentially meaningless, they assimilate themselves ethically and legally to terrorist activity and approach conventional legal categories of "aggressor" and invite responses appropriately characterized as "self-defense" by the victim state.

But other, less clear cut, relationships are also possible between states and terrorist groups. States may knowingly harbor terrorist groups, but not especially support them. They may unknowingly harbor terror groups—a hallmark of al Qaeda's operations is obviously extremely effective covertness and, if they are indeed present in over sixty countries, many of those countries (especially

before September 11) probably had little if any awareness of their activities. And in both of these scenarios, it is possible that the state in question is too weak to be effectively able to suppress terrorist groups on its territory, even if it had the will to do so or, even worse, the state in question may be a state in name only, lacking truly effective control over its territory.

Obviously, in any of these scenarios, those states that agree to cooperate with U.S. and international efforts to repress terrorism pose no challenge to the existing legal and ethical framework. Even if their cooperation is a result of considerable pressure, the appearance of sovereignty and sovereign equality of states is maintained. Such cooperation might range from acting on information and intelligence provided to them regarding the location and activity of terrorist organizations in their territory all the way to inviting U.S. and other foreign forces to act on their territory to root out terrorist cells and individuals. This would include the weaponized Predator attack on al Qaeda operatives in Yemen in November 2002, which, after the fact, the government of Yemen said (whether truthfully or not hardly matters for the sake of maintaining the formalities of international law) they had authorized in advance.[32]

But it is clearly possible that some states will not be willing to cooperate in U.S. and international anti-terrorism efforts or may be reasonably believed to be pursuing WMD capability with the suspicion that they might transfer that capability to terrorist organizations or use them in ways that would be difficult to attribute to a state actor, thereby clouding considerably the options for retaliation. In the face of this threat, the Bush administration has declared in its *National Strategy to Combat Weapons of Mass Destruction*, "We will not permit the world's most dangerous regimes and terrorists to threaten us with the world's most destructive weapons."[33]

There is, of course, the already reasonably well-established legal and ethical justification for first use of military power in legitimate preemption or anticipatory self-defense. This traditional justification is essentially a three part test: (1) an adversary possesses, or is imminently about to come to possess, a capability to do one great

32. Walter Pincus, *U.S. Strike Kills Six in Al Qaeda; Missile Fired by Predator Drone; Key Figure in Yemen Among Dead*, WASH. POST, Nov. 5, 2002, at A1.

33. WHITE HOUSE, THE NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 1 (2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.

harm (the "means" test); (2) the adversary is known (by declaration, overt action, or reliable intelligence) to have the intent to use that means against one (the "intent" test); and (3) the attack is so imminent and the consequences foreseen to be so devastating that one cannot afford to wait to absorb the first blow (the "imminence" test). The *locus classicus* for discussion of this point in the U.S. is United States Secretary of State Daniel Webster's famous formulation in the *Caroline* case of 1842: "necessity of . . . self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[34] The NSS attempts to align itself with these criteria: ". . . as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed."[35] But of course this is to stretch "self-defense" far beyond the well-established conceptual bounds of response to aggression and anticipatory self-defense justified by the three criteria listed above. Instead of three, the current NSS reduces the justification to a single test: capability. In that regard, it goes well beyond the justifications of preemption, and enters the traditionally discredited territory of preventive war that had its heyday in balance of power warfare. Such preventive war is now commonly viewed as a recipe for continual conflict because of the inherent uncertainties in predicting with any precision what the strategic meaning of capabilities might be, in the absence of the other conditions of intent and imminence.

Of course it is possible to construct a scenario in which, regardless of international law, it would be absolutely imperative that national leaders interrupt the acquisition of capability. If one were convinced to a moral certainty that, should a given nation acquire Weapons of Mass Destruction capability, it would indeed transfer it to a terrorist group which would indeed use it at its earliest opportunity against one's nation, few who clearly understand the problem would argue against action or allow concerns with legality to hamper decisive action.

But this scenario is clearly the extreme and exceptional case. For any single nation to claim the right to make its own judgment about other nations' capabilities and to act upon those judgments without feeling an obligation to submit its reasons convincingly to the court of international opinion—or, better still, to present them with sufficient

34. Letter from Secretary of State Daniel Webster to Lord Ashburton (Aug. 6, 1842), *in* 2 A DIGEST OF INTERNATIONAL LAW 412 (John Bassett Moore ed., 1906).

35. Bush, *supra* note 1.

persuasive power to evoke Security Council authorization for action—is to destabilize the entire structure of restraint for use of force and respect for national sovereignty that lies at the foundation of the modern international system.

The root issue at stake in the new security environment is not, this writer would argue, the undermining of sovereignty involved in justifying intervention into non-cooperative states in the name of counter-terrorism and international security. As we saw earlier, the limits of an international system that values sovereignty above all else have been palpable for decades, and legal evolution (and to a lesser degree, state practice) have increasingly been creating a legal and moral basis for overriding the sovereign choices of states when they fall below an internationally acceptable threshold in areas of human rights and the treatment of their own subjects.[36] There is great nervousness among states, perhaps especially major powers, about the implications of these trends for their own abilities to act according to their understanding of national interest without second-guessing—let alone interference—from other states. Nevertheless, the weight of the ethical pressures to limit sovereignty for the sake of the lives and rights of individual human beings is too great to be ignored. While "never again" may have been in many respects honored in the breach more than in the observance in the intervening years since its first utterance, the compelling ethical reasons for it as a matter of principle have, if anything, only grown. In the same way, there can be no question of the compelling ethical (or, for that matter, state self-interest) reasons for international agreement to prevent terrorist groups of international reach like al Qaeda from finding sanctuary anywhere on the globe. The ultimate goal of al Qaeda is not merely an attack on individual sovereign states or the achievement of specifiable goals within the present international system. Rather, it is the destruction of the entire system of globalized trade, secular and democratic government, individual human rights, etc. that define the modern world—a world in which all major powers have an enormous stake. To reiterate a passage quoted above from the NSS, "Today, the world's great powers find ourselves on the same side—united by

36. See George R. Lucas, *The Role of the 'International Community' in Just War Tradition—Confronting the Challenges of Humanitarian Intervention and Preemptive War*, 2(2) J. MIL. ETHICS 122 (2003), for an excellent discussion of the emerging "imperative" for humanitarian intervention and the moral justifications for it in qualification of the Legalist Paradigm.

common dangers ... [and] increasingly ... by common values."[37] Or, as Secretary Powell put it, "terrorism threatens the world order itself—and thus creates a common interest among all powers that value peace, prosperity, and the rule of law."[38]

III. THE EMERGENT INTERNATIONAL ORDER: PTOLEMY OR COPERNICUS?

We noted at the beginning of the essay the importance of both the established black letter of international law and also of the older ethical tradition of just war. It is at this juncture of the discussion that one is tempted to draw on the ethical tradition as a possible corrective to the law. By analogy, while it was possible in the 16th century to continue to add epicycles to Ptolemaic astronomy to incorporate increasingly accurate observations of the planets, real conceptual breakthroughs only occur when the perspective is shifted more fundamentally and a Copernican perspective is adopted. Famously, Thomas Kuhn's *Structure of Scientific Revolutions* chronicles this process—including the emotional and institutional investments in the older system of astronomy that made a shifting of the paradigm painful, the resistance to shifting on the part of those trained and invested in the Ptolemaic system, and the fact that at the time of the shift it is by no means clear that the Copernican system actually explains the data better than the older system.[39]

Might it be the case that, in a similar way, the fundamental paradigm of the international system is experiencing the strains and tensions of an imminent shift? The system of international relations defined in existing international law, with its central focus on the sovereign state, emerged as a solution to a specific set of problems and issues that culminated in the Peace of Westphalia. From the initially simple model of black-box state sovereignty, that model has acquired the kinds of epicycles the Ptolemaic system required in ever increasing numbers to save the appearances of planetary motion (precisely the kinds of qualifications to the legalist paradigm Walzer introduces in Chapters 5 and 6 of *Just and Unjust Wars).*

But as we have seen, the strains on the core paradigm have been steadily increasing as layer upon layer of human rights law, concern

37. Bush, *supra* note 1.

38. Powell, *supra* note 2, at 29.

39. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996).

for humanitarian intervention, and the absolute requirement of a global response to the threat of international terrorism continue to accumulate.

One way to address those challenges is, of course, to continue to add epicycles to the core paradigm. So the international system of sovereign states remains the bedrock of the system, and qualifications are introduced in ever-increasing numbers to try to capture our moral and legal intuitions about the qualifications to sovereignty required by those concerns.

But another possibility also arises. It is possible that, like the shift that occurred at Westphalia, the international system is undergoing a real and fundamental realignment in which the universalizing concerns with human rights and liberties, combined with the exigencies of the Global War on Terrorism, point to the need of a more fundamental shift of framework. That shift, rather than starting with state sovereignty as the bedrock, would instead start with the shared values and concerns of (for lack of a better word) the "civilized" world. Instead of privileging the sovereign state, and then adding reluctant qualifiers allowing intervention and overriding of that sovereignty, the new model might diminish sovereignty to at best a provisional and contingent value—contingent on a state's willingness and ability to protect and preserve the lives and rights of its citizens and to participate meaningful in the struggle for the maintenance of global order against fundamental threats against it such as the aspirations of al Qaeda.

It is reflections such as this that cause one to think back to the pre-Westphalian origins of the fundamental ethical values of just war. At least for the root of the Christian just war tradition, one looks to St. Augustine—whose ethical challenge was hardly the defense of a sovereign state.[40] For him, the first clear articulation of the moral justification for Christians taking up the sword was to defend the civilized order of Rome against threats to the fundamental survival of that order. In the barbarian attacks, he (correctly) saw an assault on the underpinnings of civilization itself. The destruction of Rome, even though it was not the destruction of the Kingdom of God, was indeed a prospect of incalculable human cost. Christians (and to generalize the argument, all right thinking people) would recognize the defense of Roman civilization as an imperative—not because it is not deeply flawed, but because it provides a political and moral space in which

40. 2 THE WORKS OF AURELIUS AUGUSTINE 319-21 (Marcus Dods ed., 1934).

human flourishing is possible. Whatever its many flaws and injustices, Augustine saw clearly that the Empire provided a "tranquility of order" (to use his phrase) within which civilized life was possible.[41] A victory by the barbarians, in contrast, did not—and indeed, it was a matter of centuries in the Western Empire before the first flickers of anything the Romans would recognize as civilization kindled again after the fall of Rome.

In that respect, at least if one measures the contemporary situation by al Qaeda's aspirations, the contemporary Global War against Terrorism bears much more striking resemblance to Augustine's circumstance than it does to Westphalian states responding to aggression committed against them by other Westphalian states. At least in aspiration, al Qaeda looks forward to the collapse of existing global civilization and its replacement with a theocratic and pre-Enlightenment civilization, grounded in revealed religious law.

In many ways, the choices before the world community in the face of the al Qaeda threat are similar. The shift required is not well captured in near-unilateral actions by one or a few members of that community, while attempting to stretch the Westphalian concept of "self-defense" to justify it. What is really required is to engage with vigor the long-standing issue of how to move the conceptual frame of international relations to privilege the common concerns of global civilization—human rights, human dignity, and preservation of the global tranquility of order within which that life is possible. Both the growth of human rights and humanitarian concerns and the protracted struggle against global terrorism that lie ahead are fundamental and shared concerns of the world. They are not epicycles to Westphalian sovereignty, but rather core issues calling to be placed at the center of world civilization. They are the common cause shared by all states committed to the values and the common practical interests that create and sustain that emergent global order.

As the "sole remaining superpower," clearly a great deal of responsibility for defense of that order falls on the United States—both to rally the diplomatic unity required for the struggle and, when necessary, to provide and lead the military forces necessary to defend that order.[42] But to say, correctly, that the responsibility falls overwhelmingly on the U.S. is not to say the values at the center of that struggle are those of the U.S., or that it would be prudent or

41. *Id.*

42. Michael Ignatieff, *The Burden*, N.Y. TIMES, Jan. 5, 2003, Magazine, at 22.

desirable for the U.S. to go it alone in executing it. Indeed, it is precisely because this struggle is to defend broadly shared values and concerns of global civilization that its defense transcends conventional issues of national interest of sovereign states. The sooner and more effectively the U.S. can lead the way in rethinking fundamental conceptual paradigms and international structures for effective action in that defense, the sooner the U.S. will lay groundwork for long term emergence into the "new world order" envisioned by the first President Bush.[43]

Obviously, there may be occasions of extreme exigency when, in the absence of effective international agreement to act, unilateral action on the part of individual states may be necessary. But if a new and stable international order is to succeed Westphalia and integrate the common defense of global civilization and due respect for the rights of human individuals, it is ultimately a question of forging a new, commonly understood, and generally embraced set of normative principles for the action of states in the international arena. Whatever short-term gains unilateralism may provide will be undermined decisively if they are not matched with skilled use of diplomacy to force that new order. As Secretary Powell expressed the goal (correctly, in this author's view):

> Our enlightened self-interest puts us at odds with terrorists, tyrants, and others who wish us ill. From them we seek no advice or comity, and to them we will give no quarter. But our enlightened self-interest makes us partners with all those who cherish freedom, human dignity, and peace. We know the side on which the human spirit truly abides, and we take encouragement from this as our strategy unfolds. In the end, it is the only encouragement we need.[44]

43. Bush, *supra* note 24, at xiii.

44. Powell, *supra* note 2, at 34.