Terence Taylor

The End of Imminence?

The laws of armed conflict have evolved historically to respond to scientific and technological weapons advances as well as changes in the nature of conflict resulting from political and societal developments. Examples of such watershed moments include the 1925 Geneva Protocol banning the use of chemical weapons, in the wake of their use during World War I; the 1949 Geneva Conventions designed to help protect civilian populations from the worst excesses of warfare after the devastation of cities by air-delivered weapons in the Second World War; and the 1977 Additional Protocols to the Geneva Conventions[1] redefining combatants and military targets, primarily recognizing guerrilla fighters as combatants in certain conditions[2] and placing the obligations of regular armed forces on them after the large-scale guerrilla campaigns such as those of southern Africa against the South African apartheid regime. Each of these developments, however, has changed international law governing the use of force during an armed conflict (*jus in bello*). The international legal framework for engaging in armed conflict in the first place (*jus ad bellum*) has understandably evolved more cautiously due to the potential for abuse.

Given the obvious differences among the world's governments and their citizens over the example of Iraq, some common understanding of what constitutes an imminent threat is necessary to maintain the rule of law and to protect the civilian population against the possibility of a devastating surprise attack. A failure to establish a wider consensus on what constitutes a contemporary imminent threat and on how to respond to such threats under international law could lead to more unilateral responses addressing major

Terence Taylor is president and executive director of the International Institute for Strategic Studies-US (IISS-US). The author would like to thank Matthew Goodwin of the University of California–Santa Barbara for his research, which made this article possible.

The Washington Quarterly • 27:4 pp. 57–72.

international security challenges and make democratic societies more vulnerable to catastrophic attacks by certain states and terrorist groups.

The Problem of Definitions: What's in a Name?

Simple semantics are clearly part of the problem. "Imminent" can be defined as an adjective used to describe something "ready to take place" or "hanging threateningly over one's head."[3] A "threat" can be defined as "an expression of intention to inflict evil, injury, or damage."[4] In the context of *jus ad bellum*, however, the notion of "imminent threat" becomes far more challenging to define concretely considering little legal precedent or analysis exists on what exactly constitutes such a threat to a state.

Similarly, international legal authorities—in governments, the International Court of Justice (ICJ), lawyers specializing in international law—disagree over the legality of a state using the perception of an imminent threat to that state as the basis for using military force in anticipatory self-defense—all military actions variously described as "preventive" or "preemptive"[5] or, more precisely, taken in anticipation of an expected attack. One reason for this disagreement is that such anticipatory action is rare, and consequently, very few legal judgments have been required, demonstrated by the fact that many contemporary analyses of the issue resort all the way back to a mid–nineteenth-century precedent for anticipatory self-defense.

The legal void on the question of imminence has much to do with the largely reactive nature of the law, international or otherwise. There are few cases where states have been willing to use anticipatory self-defense as a justification for using force. Even if it may have been the real reason behind a state's recourse to force in some instances, arguments presented to the international community rarely rely on this logic. In turn, authorities in international law, who must wait for cases to come to them, have lacked opportunities to develop a comprehensive framework elucidating the strategic factors that must characterize a threat for it to qualify as imminent and, therefore, as a legitimate justification for anticipatory self-defense.

Shifts in the global strategic landscape as well as military actions since September 11 lend urgency to the need to clarify the meaning of anticipatory self-defense as the world now faces a very new kind of threat, one in which states and nonstate actors may have the potential to inflict destruction on an even greater scale. The dissemination to otherwise weak states and to nonstate actors of technologies that can potentially cause large-scale destruction and casualties has increased the inclination of at least some states toward preemptive military action. The September 2002 U.S. *National Security Strategy*, for example, enunciated a doctrine of readiness to conduct

military action to forestall attacks likely to cause large-scale casualties.[6] Although Iraq was publicly portrayed as an imminent threat due to its presumed nuclear, biological, and chemical capabilities, neither the United States nor the United Kingdom legally portrayed the military operation as anticipatory self-defense in the United Nations. Their rationale, along with other members of the coalition, relied on the view that Iraq had failed to comply with its cease-fire obligations[7] following Iraq's invasion of Kuwait, thus claiming the military operation was merely a continuation of the 1990–1991 Gulf War. The controversy over whether Iraq presented an imminent threat, particularly whether and how the Iraqi regime may have been connected to Al Qaeda, has deepened further due to the failure to find substantial stockpiles of chemical or biological weapons. These debates have done little to clarify the meaning of what constitutes an imminent threat in legal or even in technical terms.

A legal void on the question of imminence currently exists.

Unlike international law on the conduct of war (*jus in bello*), which has been adapted repeatedly to new weapons technology and types of warfare throughout the twentieth century, *jus ad bellum*, the justification for going to war in the first place, now confronts such evolutionary pressure in an unprecedented way, with the rise of international terrorism in 2001 and the proliferation of state and nonstate capacities to develop and use nuclear, biological, and chemical weapons. International law, by its inherent reactive nature, risks evolving too slowly to define the proper response to this already apparent challenge. There is a danger that the increasing uncertainty and existing disagreement on the use of force in anticipatory self-defense could be exploited by states and nonstate actors alike to sharpen the divisions among liberal democracies and exploit the resulting vulnerability.

In the wake of the calamity of World War II, there was an understandable, near universal desire to strengthen the international legal constraints to prevent wars of aggression. The UN Charter was built upon the existing customary legal norm that states have a right to use military force, individually, in self-defense. Article 51 of the UN Charter codified this long-established right as a *jus ad bellum*, refining it in terms both of individual and collective self-defense. The article makes clear that the use of force in self-defense by an individual state does not have to await UN Security Council authorization to be legal. It states that "[n]othing in the present Charter shall impair the 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 the necessary measures to maintain international peace

and security."[8] For collective anticipatory action, however, the charter is silent on how to define an imminent threat when it refers to "*collective* measures for the *prevention* and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace" in Article 1.1.[9] Subsequently, what actions individual states are authorized to take under Article 51 depends on the interpretation of the scope of its basis: the customary principle of self-defense.

Although Article 51 addresses some of the questions about the use of force, it does not define exactly the circumstances when states can, individually or collectively, legitimately use force to counter an attack that they perceive to be imminent. Because of the nature of current and pending international security threats, more precision is urgently needed to establish a common understanding of legally justifiable action in the face of imminent threats, even though specific cases may vary in their technical details. Resolving this question would not only help reduce tension within the international community, but it would also help the Security Council establish guidelines to make collective decisions on security actions under Chapter VII ("Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression") of the charter, reasserting the Security Council's authority in the aftermath of the Iraq war.

Existing Legal Precedents

Anticipatory Self-Defense

Because it is not explicit in the UN Charter, the right of anticipatory self-defense relies on applying the precedent of customary law. The most important precedents for such law as well as the question of imminence are the *Caroline* and subsequent *McLeod* cases of 1837, following a Canadian insurgency against British rule. The *Caroline* case involved a U.S. merchant ship whose crew, against the wishes of the U.S. government, was trafficking munitions and supplies to Canadian rebels. British forces destroyed the *Caroline*. When a British officer named McLeod was later arrested in the United States for complicity in the event, the British argued that his imprisonment was unjust as their men had simply acted in self-defense. The reply given by then–U.S. secretary of state Daniel Webster has become the traditional framework for judging the legality of anticipatory self-defense. Webster accepted that there was a right of anticipatory self-defense, provided there was "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[10] Although the term "imminent" was not used, its sense was

embodied in the words "instant" and "no moment for deliberation." Webster's response also stated that the use of force in these circumstances is justified only when it is "necessary and proportional to the threat at hand," that is to say, self-defense must not be retributive or punitive.

Although the *Caroline* case is widely held to be a watershed event in the evolution of *jus ad bellum*, its criteria unfortunately leave many important questions unanswered and do little to clarify a modern definition of "imminent threat." How, for example, is one to define "necessity," and who will define it? In light of advances in technology and shifts in the nature of warfare, how is one to define "instant"? What constitutes a "moment for deliberation"? Furthermore, in the event of an imminent attack, the *Caroline* criteria do nothing to inform a state as to what a necessary and proportional response should be to a threat that is yet to materialize. Are these matters to be defined by individual governments according to their own interests, or should a set of criteria be developed collectively by the Security Council or possibly by some other body, such as the International Committee of the Red Cross (ICRC), which has played such a pivotal role in the development of the laws of armed conflict from the beginnings of its formal codification?

Self-defense debates have focused on *whether*, not *when*, to allow anticipatory attacks.

The most notable instances of an international body of law invoking the *Caroline* framework for a particular judgment occurred in the various war courts held after World War II. Both Axis and Allied powers alike claimed anticipatory self-defense in the face of an imminent threat as justification for the use of force. The Tokyo tribunal, for example, decided that the Dutch had been justified in declaring war on Japan in the absence of an actual armed attack because the Japanese had openly acknowledged the annexation of what was then Dutch territory as one of their war aims during their Imperial Conference of November 5, 1941.[11] Similarly, the defendants at the Nuremburg tribunal asserted that their attack on the Soviet Union had been legal, as they believed the Soviet Union was considering an attack on Germany, although here the tribunal called the argument "preposterous."[12] Although lawyers often cited the *Caroline* precedent during the cases and the proceedings are widely regarded as legitimate, the tribunals themselves did little to elucidate objectively what constitutes an imminent threat worthy of anticipatory military action because of the courts' heavy bias for the Allied side. As noted earlier, a lack of precision surrounding imminence pervades questions of self-defense in the UN Charter era that followed.

A leading scholar of international law, Christine Gray, argues that a desire for consensus among UN member states in international law has led to a lack of precision in the scope of the right of self-defense.[13] As examples of the effect of the pressure for consensus inhibiting the development of more explicit language, she cites the vague definitions of self-defense in such UN resolutions as "Declaration on Friendly Relations," "Definitions of Aggression," and "Declaration on Non-Use of Force." These are indications of the underlying disagreement over the appropriate bounds of self-defense and have affected the way that states justify their use of armed force. For example, during the Cuban missile crisis, the United States did not justify its embargo of Cuba backed by military force on the basis of self-defense[14] but instead claimed its actions were lawful under Chapter VIII (Regional Arrangements) of the charter as an act of regional peacekeeping.[15] It was clear, however, that the United States took action to defend itself against a strategic threat from nuclear weapons that were thought at the time would become operational within weeks.

A discussion and clarification of imminence must incorporate contemporary threats.

Two cases that involved Israeli military action, the Six-Day War in 1967 and the strike on Iraq's Osirak nuclear reactor in 1981, further illustrate states' historical reluctance to justify force as anticipatory self-defense. After the Six-Day War, Israel officially reported to the Security Council that it had attacked Egypt because a state of war officially still existed between the two countries after the 1956 conflict in the Sinai Peninsula (although a UN-brokered cease-fire was implemented on November 7, 1956, no formal peace settlement had ever been reached). Yet, many scholars and the international community in general assessed that Israel, even if only implicitly, had conducted the action in anticipatory self-defense. On May 15, 1967, Egypt had demanded the withdrawal of the UN Observer Force from the Sinai; Egyptian forces subsequently blockaded the Strait of Tiran and, by May 31, had substantially reinforced their ground forces along the border with Israel. Because of these demonstrable acts, Israel escaped formal condemnation for its military actions in this case. A Soviet attempt to condemn the Israeli action through a Security Council resolution only gained four votes in its favor.[16]

In contrast, when the Israelis claimed anticipatory self-defense to justify their recourse to force against Iraq in 1981, the international community roundly condemned them.[17] In this instance, Israel attacked an Iraqi nuclear reactor on the grounds that it was going to produce fissionable ma-

terial for a nuclear-weapon capability to be used against Israel at some point in the future. The International Atomic Energy Agency (IAEA) responded that Israel had no proof that the reactor would be used to create weapons, a position that the UN ultimately used as a basis to condemn Israel.[18] Both the United States and the United Kingdom supported the IAEA's and the UN's position at the time. Significantly, however, neither country chose to address the question of whether Israel had the right to anticipatory self-defense if the purpose of the reactor had in fact been to produce offensive weaponry to be used against Israel.[19] Ten years later, in subsequent investigations by the IAEA and the UN Special Commission on Iraq under UN Security Council Resolution 687 of 1991, it became clear that the reactor was actually being used in support of a nuclear weapons program. At the time, however, this case did not help clarify the law about imminence and anticipatory military action principally because the operational capability of the Iraqi nuclear program was not imminent, although there is no doubt that the Israeli action disrupted its progress.

Although both cases could be construed as self-defense, albeit very tenuously in the Osirak case, the lack of precision on the rules on anticipatory self-defense is an incentive for states to cite other rationales, such as unresolved hostilities, to justify their recourse to force. In part, this incentive also reinforces the general predisposition of states since the Second World War against initiating military action. When force has been used, however, not invoking self-defense also helps explain the absence of cases regarding imminence that come before international legal authorities and thus the lack of definitional clarity surrounding imminence. The debate on self-defense has historically focused not on when anticipatory attacks are allowable or justified but rather whether anticipatory attacks are allowable at all. This debate over the larger concept has tended to prevent legal scholars and policymakers from considering the particulars, namely the very difficult question of what constitutes imminence worthy of an anticipatory use of force in self-defense.

Individual v. Collective Responses

Legal scholars and experts who deny states' individual rights to anticipatory self-defense buttress their opinion with a variety of arguments. Gray, among the harshest critics, claims that "[r]eluctance expressly to invoke anticipatory self-defense is in itself a clear indication of the doubtful status of this justification for the use of force." Furthermore, she argues that writers who are proponents of anticipatory defense are consciously "going beyond what states themselves say in justification of their action in order to try to argue for a wide right of self-defence." She believes that states that claim the right

to anticipatory use of force are merely paying "lip-service" to the UN Charter's provisions on self-defense. By invoking Article 51, she believes states incorrectly assume a veneer of legality that commentators should not take seriously.[20] For Gray, self-defense is only legal when it responds to an attack that has already commenced.

The views of another prominent legal scholar, Ian Brownlie, largely parallel Gray's. Brownlie conducts an exhaustive explanation and interpretation of the relationship between Article 51 and Article 2.4, which states that "[a]ll 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." He notes that some states have justified anticipatory force through restrictive interpretations of the phrase "territorial integrity or political independence." For example, in 1956, after France and the United Kingdom used force against Egypt to seize the Suez Canal, the United Kingdom claimed anticipatory justification and argued that the charter implicitly allowed all such actions as long as the territorial integrity and political independence of the state subject to force remained intact.[21] The United Kingdom argued that their military action was limited to protecting the freedom of navigation through an international waterway and not to overthrow the Egyptian government.

Ruling out all unilateral anticipatory military action creates unacceptable vulnerability.

Brownlie claims, however, that the history of Article 2 reveals that its drafters intended anticipatory force to be lawful only in the face of an actual armed attack. For him, the British argument was one of semantics. He cites the work of a drafting committee at the Commission of Belaunde in Peru that claimed that Article 2 also prohibited the use of force, anticipatory or otherwise, against the "personality," or fundamental character, of a state.[22] Browline argued that this reinforced the restrictive character of Article 2.4.

The language of Article 2.4, however, along with its drafting history, deals with the question of militarily overthrowing the government of a state and its control over its territory. In a sense, this touches on the question of a proportional response. If linked to Article 51, the self-defense rules were developed in the context of conflicts between states, focusing on territorial integrity and political independence. One of the challenges facing many governments now is the threat to potentially many thousands of their citizens from an international terrorist group, not the state's political leadership. The charter language does little to help deal with such a situation,

particularly if an individual state might consider itself impelled to take military action on short notice to prevent an attack that was likely to cause large numbers of casualties.

The most vocal proponents of anticipatory self-defense, who are much fewer in number than opponents, argue that the word "if" in Article 51 does not mean "if and only if."[23] The relevant sentence in Article 51 in full is, "Nothing in the Charter shall impair the 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." (emphasis added) Here, proponents cite technological developments, most notably nuclear weapons, as the rationale behind their opinion. In a nuclear age, a state may not have time to present a case and convince the Security Council of an imminent attack, but it also cannot afford to wait until enemy warheads are detonating on its soil to try to repel the attack.

The cost of such a delay would be unacceptable. British High Court Judge and legal scholar Rosalyn Higgins has upheld this view, saying, "In a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state to passively accept its fate before it can defend itself."[24] Unfortunately for the quality of the legal debate, the second-strike capabilities of the United States and Soviet Union during the Cold War rendered much of their argument irrelevant in practice; to launch an anticipatory attack against an enemy with second-strike capability would likely do far more harm than good. Hence, the absence of doctrines of preemption during the Cold War.

Evolving to Meet Today's Challenges

The two sides of the debate on self-defense have dealt more with the purely legal issues of anticipatory self-defense than with the military-technical environment that could render anticipatory force legal. Legal expert Christopher Greenwood, an advocate (or at least not a staunch opponent) of anticipatory self-defense if certain conditions are met, has begun to shift the debate since the September 11 attacks and the wars in Afghanistan and Iraq by discussing traditionally subsidiary issues such as imminence and what types of threats might compel anticipatory action in this new security environment.

Greenwood has laid out a most useful approach for making decisions on anticipatory military action in self-defense in the face of a threat perceived to be imminent, providing a valuable starting point to address the issue concretely. Greenwood contends that, in the current international security con-

text, two factors are important in determining the degree of imminence: the gravity of the threat and the method by which the threat is delivered. The gravity of a threat posed by a nuclear or biological weapon could be catastrophic if used against a population center. The *Caroline* case and subsequent judgments have been predicated on threats from conventional military forces. Additionally complicating the value of existing legal precedents, nuclear and biological weapons technology have developed and disseminated to the point that nonstate actors could conceivably use these weapons.

With regard to the means of delivery, a key issue is not only one of technology (an attack could be launched suddenly by a missile far from its target) but of the possible degree of specific warning that might be available to a country under the threat of attack. A terrorist group may or may not give a general warning of the intent to attack a population of a country or a group of countries but not a specific warning because an attack's success relies on secrecy and surprise. Given an unequivocally stated general intention and the clandestine nature of terrorist preparation, it can be argued that even a general threat could qualify as imminent in international law.

Guidelines should counter contemporary threats and avoid resorting to force too quickly.

Thus, a third factor to consider in addition to the two that Greenwood identifies might be the explicit intent of those posing the threat. Al Qaeda's repeated public statements, for example, make clear that it would carry out more attacks on the scale of September 11, 2001, if the opportunity arose. This should influence significantly whether a threat should qualify as imminent in international law.

Such a threat to cause large numbers of casualties at some point over an indeterminate time frame creates a pervasive sort of imminent threat that could demand anticipatory military action (along with other measures) at a point in time when the opportunity arises to eliminate the threat. Would such action be justified under international law? Proponents of the right of anticipatory self-defense would argue that Article 51 does provide for such a right both to collective and individual self-defense against a threat that "has not yet materialized in the form of actual violence."[25] The type of threat posed by Al Qaeda fulfills both the gravity and means of delivery (clandestine methods) criteria set out by Greenwood in addition to declaring a general threat. A specific opportunity to use force against the threat may not allow for consultation with the Security Council; such discussion may risk

compromising the security of a possible military operation and/or may lose what might be a fleeting target of opportunity.

In his effort to advance the debate on evolving *jus ad bellum* to take account of nonstate actors capable of inflicting large numbers of casualties, Greenwood asserts that action in self-defense against threats and attacks by terrorist organizations should be regarded in the same light as threats from states under Article 51. Greenwood cites the 1986 case *Nicaragua v. United States*, in which the ICJ ruled that covert operations conducted by a state could be considered an attack if they reached a sufficient gravity. Had a state carried out the September 11 attacks, Greenwood states that they undoubtedly would have qualified as an armed attack under the charter's provisions. Further, Webster's formula on self-defense never discriminated between state and nonstate actors. In fact, because the *Caroline* case dealt with the actions of a non–state-sponsored band of rebels, the formula should be entirely applicable to terrorist groups.[26] Therefore, Al Qaeda, despite not being a state, could be the target of the legitimate use of force by a state.

Greenwood qualifies his endorsement of the use of force in self-defense by stating that the anticipatory use of force would not be justified because, "[i]n so far as talk of a doctrine of 'pre-emption' is intended to refer to a broader right of self-defense to respond to threats that might materialize at some time in the future, such a doctrine has no basis in law."[27] Each case still has to be specific to its circumstances and justified accordingly.

A discussion and greater clarification of the question of imminence is essential to take into account contemporary threats. An effort to achieve a broad-based understanding is as important to counter unjustified recourse to anticipatory military action as it is to provide protection to civilian populations against catastrophic attacks. Thus, policymakers need a framework to help them decide when anticipatory action is legal. This framework should include considerations of the gravity of a particular threat, the possible timing and means of delivery, and the proportionality and necessity of a military response. A position that rules out all anticipatory military action by individual countries creates a vulnerability that should be unacceptable to democratic governments accountable to its citizens for their security.

Building a Framework

Proposing a more flexible interpretation of the very restrictive rules relating to anticipatory self-defense is an imposing challenge. The *Caroline* case previously set the standard that the "necessity of self-defense" is only justified if the immediate prospect of a specific attack is "instant" and "overwhelming." In light of technological developments and the possibility of attacks by nonstate

groups that have the capacity to cause large-scale casualties, one can argue that the use of force may be necessary without the certainty that an attack is immediate but that it could occur at an undetermined point in time.[28] In other words, a potential attack may be overwhelming but not potentially "instant" and, given the more lethal threats today, justify the use of anticipatory self-defense.

Particularly in the case of the threat posed by transnational terrorism, the timing of a major attack might be unknown, but an opportunity to destroy the terrorists' known technical capability, either personnel or material or both, may arise temporarily and on short notice. A government considering action against a terrorist group in this hypothetical situation must consider many factors, in addition to legal considerations, that would likely constrain action, including the political implications of the geographic location of the target, the prospects of military success, likely collateral damage, and the chances that the anticipatory military action would prevent similar future attacks. Assuming the government has properly assessed all these factors, it must "presuppose a right to act while action is still possible" if anticipatory self-defense is to have any meaning. If imminence means "waiting until it is no longer possible to act effectively" and "the victim is left no alternative to suffering the first blow," the "right" would be illusory.[29]

A new legally binding convention or protocol is unrealistic, but other options exist.

This line of thinking clearly underlies the rationale behind the U.S. *National Security Strategy*, which candidly acknowledges that, "[f]or 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.... We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[30] The first part of this passage denies the skeptical and restrictive view on anticipatory military action widely held in the United States since World War II, and the second part calls for more progressive thinking to meet contemporary and future threats.

Much greater international legal latitude is currently granted for anticipatory military action taken collectively in self-defense rather than individually. The Security Council can authorize the use of military force against a threat to international security without waiting for the threat fully to materialize. The director general of the IAEA, Mohamed ElBaradei, has raised the issue of the necessity to plan for the special circumstances when antici-

patory action might be needed when he said, "The Security Council should under certain circumstances authorize pre-emptive measures, collective pre-emptive measures, to address extreme threats to international peace and security, such as to prevent genocide, or to counter an imminent threat to use weapons of mass destruction [WMD] in an act of aggression."[31] ElBaradei understandably stresses that his remarks refer to collective action. It is difficult to argue, however, in the context of Article 51, that similar considerations could not apply to an individual state, particularly given the technical advances in nuclear and biological capabilities and the challenge posed by international terrorism.

An urgent requirement exists for some international formulation of the key tests to guide the decisions of a single country or a group of countries on whether to use military force in anticipatory self-defense on short notice in the face of a prospective catastrophic attack. To build on the approach that Greenwood has proposed to help meet this challenge, criteria used to develop such a framework will have to include the following assessments:

- the nature of the threat in a technical sense (nuclear, biological, or other form of unconventional attack);
- the gravity of the consequences (taking into account national and international vulnerabilities) in the event of failure to prevent the attack;
- the intentions of the adversary (e.g., are other attacks likely to follow?);
- the time remaining for the country or countries to prevent the expected attack; and
- the quality of information on the threat.

Such guidelines should both be able to help counter contemporary threats and avoid the open-ended and ultimately anarchic resort to force too quickly.

U.S.-led military actions in Afghanistan and Iraq—whatever their merits—undoubtedly made it politically more difficult, at least in democracies, to carry out large-scale military actions, anticipatory or not. Yet, to think of developing a new legally binding convention or protocol through the UN or a specially convened international intergovernmental conference is unrealistic. In addition to the enormous amount of time and negotiation that such an effort would require, the chances of a successful negotiation would be slight, to say the least. Other options, not mutually exclusive, that might contribute to building common ground and clarify the scope of the right of self-defense in the current security situation include joint policy statements

by alliance groupings (e.g., NATO and the European Union); a summit declaration by the Security Council along the lines of its declaration in January 1992 calling WMD proliferation a threat to international peace and security;[32] or a declaration coming from a conference of internationally recognized experts organized by the ICRC that could serve as guidelines for national and collective decisionmaking in circumstances when anticipatory military action might be needed to thwart a catastrophic attack.

These options are deliberately not legally binding in character to avoid the difficulties that would inevitably accompany necessary negotiations, but agreement in any of these recommended venues would help clarify the full scope of the right of self-defense. If left unattended, existing constraints on the use of force could further erode under the pressure of contemporary threats that international law has not had to confront previously. A declaration arising from an ICRC-sponsored conference would be the best and most practicable way to help develop international law in a direction that would protect the fundamental legal precepts against unwarranted aggression and simultaneously take account of scientific, technical, and military progress and the rise of international terrorism to help protect populations against a devastating surprise attack.

If left unattended, existing constraints on the use of force could further erode.

A cautious approach to anticipatory military action is essential to avoid abuse. Whatever solution or guidance the international community undertakes to reach a common understanding of *jus ad bellum* on anticipatory military action taken collectively or individually, such "action can succeed only if it is firmly rooted in the international legal order, of which humanitarian law is, in a sense, the last bastion."[33] The U.S. response to contemporary and future threats, as set out in the *National Security Strategy*, challenges the widely held understanding of the limits on the rights of self-defense on the part of individual states. If it is generally accepted both for a collective group to take anticipatory military action in self-defense and that, as ElBaradei proposes, planning is necessary to deal with current and future threats that have the potential to cause large numbers of casualties, then it is unrealistic to expect individual governments to leave its citizens vulnerable if they possess credible information that such a grave threat is imminent or even if a catastrophic attack could occur at some unknown point in the future. The consequences for international order could be grave if the international furor over the U.S.-led invasion of Iraq obscured or even prevented the essential debate required to establish a common understanding

on the true limits of self-defense that would permit states both individually and collectively to protect their citizens within the bounds of international law against prevailing and future international security threats.

Notes

1. The full titles are the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II).
2. Article 1.4 specifically extends the coverage to guerrilla conflicts "in which peoples are fighting against colonial domination and alien occupation as enshrined in the Charter of the United Nations." Obligations are placed on all combatants alike in Article 43.3, for example, requiring all combatants to carry their arms openly when engaged in military operations.
3. *Webster's Ninth New Collegiate Dictionary* (Springfield, Mass.: Merriam-Webster, 1991), p. 602.
4. Ibid., pp. 1228–1229.
5. The terms "preemptive" or "preventive" are used in this article in quoted statements of governments and should be understood only in the context of the policies of the governments cited. For a further discussion on "preemptive" and "preventive," see Christopher Greenwood, "International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq," *San Diego International Law Journal* 4 (2003): 9; Walter B. Slocombe, "Force, Pre-emption, and Legitimacy," *Survival* 45, no. 7 (Spring 2003): 117–130; Lawrence Freedman, "Prevention, Not Preemption," *The Washington Quarterly* 26, no. 2 (Spring 2003): 105–114, http://www.twq.com/03spring/docs/03spring_freedman.pdf (accessed July 17, 2004).
6. *National Security Strategy of the United States*, September 2002, http://www.whitehouse.gov/nsc/nss.pdf (accessed July 17, 2004) (hereinafter *NSS*).
7. Its obligations were mandated under UN Security Council Resolutions 678 (1990) and 687 (1991) and reinforced by later resolutions, the last before the invasion being Resolution 1441 (2003).
8. "Charter of the United Nations," http://www.un.org/aboutun/charter/chapter7.htm (accessed July 17, 2004) ("Chapter VII: Actions With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression").
9. "Charter of the United Nations," http://www.un.org/aboutun/charter/chapter1.htm (accessed July 17, 2004) ("Chapter I: Purposes and Principles") (emphasis added). The reference is not only to military measures but also a range of other steps such as economic sanctions and blockades.
10. Greenwood, "International Law and the Pre-emptive Use of Force," pp. 12–13 (quoting letter from Daniel Webster to Henry S. Fox [British ambassador] of April 24, 1842).
11. Peter Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997), p. 314.
12. Ian Brownlie, *International Law and the Use of Force by States* (London: Oxford Clarendon Press, 1963), p. 258.

13. Christine Gray, *International Law and the Use of Force* (London: Oxford University Press, 2000), p. 5.
14. Malanczuk, *Akehurst's Modern Introduction to International Law*, pp. 312–313.
15. Gray, *International Law and the Use of Force*, p. 113.
16. Such a resolution was also defeated in the UN General Assembly. *UN Year Book 1967*, pp. 190, 209.
17. Gray, *International Law and the Use of Force*, p. 113; Greenwood, "International Law and the Pre-emptive Use of Force," p. 15.
18. Gray, *International Law and the Use of Force*, p. 115.
19. Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 313.
20. Gray, *International Law and the Use of Force*, pp. 112, 119.
21. Brownlie, *International Law and the Use of Force by States*, pp. 265–267.
22. Ibid., pp. 267–268.
23. Ibid.
24. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), p. 242.
25. Ibid., p. 11.
26. Greenwood, "International Law and the Pre-emptive Use of Force," p. 17.
27. Ibid., p. 15.
28. For further discussion of this point, see Slocombe, "Force, Pre-emption, and Legitimacy," p. 125.
29. Ibid.
30. *NSS*, p. 15.
31. Mohamed ElBaradei, "Nuclear Non-proliferation: Global Security in a Rapidly Changing World" (keynote address, Carnegie International Nonproliferation Conference, Washington D.C., June 21, 2004), http://www.nci.org/04nci/06/ElBaradei%20Carnegie%20speech%20062104.htm (accessed July 17, 2004).
32. British prime minister John Major, then the president of the UN Security Council, made the declaration following the Security Council summit meeting of January 1992.
33. François Bugnion, "Just Wars, Wars of Aggression and International Humanitarian Law," *International Review of the Red Cross* 84, no. 847 (September 2002): 546, http://www.helpcicr.org/Web/Eng/siteeng0.nsf/htmlall/5FLCT4/$File/bugnion%20ang%20.pdf (accessed July 17, 2004).