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International Law and the Preemptive Use of Military Force

In the wake of the tragic events of September 11, 2001, and a perceived threat from Iraq, the Bush administration promulgated a new national security strategy.[1] One critical element of this strategy is the concept of preemption—the use of military force in advance of a first use of force by the enemy. Long a contentious doctrine under international law, the claim to use preemptive force has been taken to an even more controversial level by the administration. Although traditional international law required there to be "an imminent danger of attack" before preemption would be permissible, the administration argues in its 2002 National Security Strategy (NSS) that the United States "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[2] It contends that "[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[3]

Is this more permissive approach to preemption acceptable under current international law? The answer to this question depends on how one understands the contours of contemporary international law. Under the United Nations Charter paradigm for the use of force, unilateral preemptive force without an imminent threat is clearly unlawful. But if the charter framework no longer accurately reflects existing international law, then the Bush doctrine of preemption may, in fact, be lawful—even if it is politically unwise. This article will assess the lawfulness of the Bush doctrine and then seek to make several policy recommendations in light of international law.

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Before the UN Charter: Necessity and Proportionality

International law is created through the consent of states. States express this consent by two basic methods: treaties and custom. Treaties are written agreements between states; in effect, they are the international equivalent of contracts. Bilateral treaties are concluded between two states, such as the Strategic Arms Reduction Treaty between the United States and Russia; and multilateral treaties are negotiated among many states, such as the UN Charter.

Customary international law is different. Unlike treaties, customary international law is not created by what states put down in writing but, rather, by what states do in practice. In order for there to be a rule of customary international law, there must be an authoritative state practice. In order words, states must engage in a particular activity and believe that such activity is required by law. Diplomatic immunity, for example, began as a rule of customary international law before it was ultimately codified in a treaty. Centuries ago, states began the practice of granting diplomats immunity from local jurisdiction for a variety of pragmatic reasons: they did not wish to cut off a channel of communication; they feared that, if they arrested diplomats of a foreign state, the foreign state would do the same to their diplomats; and so on. As time passed, more and more states began to grant immunity until virtually all states in the international system were giving diplomats immunity. Gradually, these states that had originally begun granting immunity for largely practical reasons came to believe that granting such immunity was required by law. At that point, there was a rule of customary international law—when there was both a near-universal practice and a belief that the practice was required by law.

Under the regime of customary international law that developed long before the UN Charter was adopted, it was generally accepted that preemptive force was permissible in self-defense. There was, in other words, an accepted doctrine of anticipatory self-defense. The classic case that articulated this doctrine is the oft-cited *Caroline* incident.

During the first part of the nineteenth century, an anti-British insurrection was taking place in Canada. At the time, Canada was under British rule while the United States and Great Britain were in a state of peace. There was, however, a ship owned by U.S. nationals, the *Caroline*, that was allegedly providing assistance to the rebels in Canada. On the night of December 29, 1837, while the ship was moored on the U.S. side of the Niagara River, British troops crossed the river, boarded the ship, killed several U.S. nationals, set the ship on fire, and sent the vessel over Niagara Falls. The British claimed that they were acting in self-defense, but after some heated exchanges with Secretary of State Daniel Webster, the British government ultimately apologized. Nonetheless, over the course of diplomatic communications

between the Americans and the British, two criteria for permissible self-defense—including preemptive self-defense—were articulated: necessity and proportionality.

First, the state seeking to exercise force in self-defense would need to demonstrate necessity. As Webster explained in a letter to Lord Ashburton, a special British representative to Washington, the state would have to demonstrate that the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[4] In other words, the state would need to show that the use of force by the other state was imminent and that there was essentially nothing but forcible action that would forestall such attack.

The Bush doctrine of preemption may, in fact, be lawful—even if it is politically unwise.

Second, the state using force in self-defense would be obliged to respond in a manner proportionate to the threat. In making the argument to the British, Webster explained that, in order for Canada's action to be permissible, it would be necessary to prove that "the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[5]

Throughout the pre–UN Charter period, scholars generally held that these two criteria set the standard for permissible preemptive action. If a state could demonstrate necessity—that another state was about to engage in an armed attack—and act proportionately, preemptive self-defense would be legal.

The Effect of the UN Charter

As the Second World War was coming to an end, the delegates from 51 states assembled in San Francisco in the spring of 1945 to draft the charter of the new global organization. Pledging to "save succeeding generations from the scourge of war,"[6] the framers of the UN Charter sought to establish a normative order that would severely restrict the resort to force. Under Article 2(4) of the charter, states were to "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." In the charter, there were only two explicit exceptions to this prohibition: force authorized by the Security Council and force in self-defense. Under Article 39, the council is empow-

ered to determine if there is a "threat to the peace, breach of the peace, or act of aggression." If the Security Council so determines, it can authorize the use of force against the offending state under Article 42.

The critical provision relating to the other exception, self-defense, is Article 51, which provides in part:

> Nothing 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Although the basic contours of Article 51 seem straightforward, its effect on the customary right of anticipatory self-defense is unclear. If one reviews the scholarly literature on this provision, writers seem to be divided into two camps. On one hand, some commentators—"restrictionists" we might call them—claim that the intent of Article 51 was explicitly to limit the use of force in self-defense to those circumstances in which an armed attack has actually occurred. Under this logic, it would be unlawful to engage in any kind of preemptive actions. A would-be victim would first have to become an actual victim before it would be able to use military force in self-defense. Even though Article 51 refers to an "inherent right" of self-defense, restrictionists would argue that, under the charter, that inherent right could now be exercised only following a clear, armed attack.

The criteria for permissible self-defense has been necessity and proportionality.

Other scholars, however, would reject this interpretation. These "counter-restrictionists" would claim that the intent of the charter was not to restrict the preexisting customary right of anticipatory self-defense. Although the arguments of specific counter-restrictionists vary, a typical counter-restrictionist claim would be that the reference in Article 51 to an "inherent right" indicates that the charter's framers intended for a continuation of the broad pre–UN Charter customary right of anticipatory self-defense. The occurrence of an "armed attack" was just one circumstance that would empower the aggrieved state to act in self-defense. As the U.S. judge on the International Court of Justice (ICJ), Stephen Schwebel, noted in his dissent in *Nicaragua v. U.S.*, Article 51 does not say "if, and only if, an armed attack

occurs."[7] It does not explicitly limit the exercise of self-defense to only the circumstance in which an armed attack has occurred.

Unfortunately, despite Schwebel's willingness to express his views on anticipatory self-defense, neither the ICJ nor the UN Security Council has authoritatively determined the precise meaning of Article 51. Indeed, in the *Nicaragua* case, the ICJ made a point of noting that, because "the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised … the Court expresses no view on the issue."[8] As a consequence, the language of the charter clearly admits of two interpretations about the permissibility of preemptive force. Given this state of affairs, it is logical to explore the practice of states in the period after the charter was adopted to determine if recent customary international law has either helped supply meaning to the ambiguous language of Article 51 or given rise to a new rule of customary international law in its own right that would allow for preemptive action.

Post–UN Charter State Practice

As noted earlier, international law is created through the consent of states. Behind this understanding is the assumption that states are sovereign and, accordingly, can be bound by no higher law without their consent. As a consequence, states can lawfully do as they please unless they have consented to a specific rule that restricts their behavior. As the Permanent Court of International Justice, the predecessor of the current ICJ, noted in the *Lotus* case:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[9]

This consent-based conception of international law, or positivism, as it is called, has critical significance for an examination of post–UN Charter practice regarding the preemptive use of force. Given that the charter is sufficiently ambiguous on this question and that there was a preexisting rule of customary international law allowing for anticipatory self-defense, it is not necessary to establish that a customary rule has emerged to permit states to use force preemptively in order for such use of force to be lawful. On the contrary, it is necessary rather to establish that there is no rule prohibiting states from using force preemptively. If states are sovereign, under the logic of the *Lotus* case, they can do as they choose unless they have consented to a rule restricting their behavior.

Although there are undoubtedly many ways to explore state practice relating to preemption in the post–UN Charter world, perhaps one of the most useful is to examine debates in the Security Council in cases where questions of preemptive force were raised. Since the charter was adopted, debate has ensued about the efficacy of preemption in three major cases: the 1962 Cuban missile crisis, the 1967 Six-Day War, and the 1981 Israeli attack on the Osirak reactor in Iraq.[10]

The Cuban Missile Crisis (1962)

During the Cuban missile crisis, the United States made a number of formal legal arguments in support of the institution of a "defensive quarantine" in advance of any actual Soviet or Cuban use of force. Most of these official arguments revolved around the role of regional organizations and their ability to authorize force absent a Security Council authorization. Nonetheless, during the course of council discussion of the quarantine, a number of Security Council representatives spoke about preemption. Although there was no clear consensus in support of such a doctrine, there was also no clear consensus opposing it. Indeed, even several states that argued against the U.S. position seemed not so much to reject a doctrine of preemption as to question whether the criteria established under customary law were met in this case. The delegate from Ghana, for example, asked, "Are there grounds for the argument that such action is justified in exercise of the inherent right of self-defense? Can it be contended that there was, in the words of a former American Secretary of State whose reputation as a jurist in this field is widely accepted, 'a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation'?"[11] Then, he responded to these questions: "My delegation does not think so, for as I have said earlier, incontrovertible proof is not yet available as to the offensive character of military developments in Cuba. Nor can it be argued that the threat was of such a nature as to warrant action on the scale so far taken, prior to a reference to this Council."[12] In essence, the delegate was accepting the notion that anticipatory self-defense would be permissible if the criterion of necessity were met. In this case, he concluded that that requirement was not met.

> It is difficult to conclude that preemptive force in self-defense is prohibited.

The Six-Day War (1967)

On June 5, 1967, Israel launched military action against the United Arab Republic and quickly won what came to be called the Six-Day War. During

the course of the Security Council debates, Israel ultimately argued that it was acting in anticipation of what it believed would be an imminent attack by Arab states. Not surprisingly, support for Israel tended to fall along predictable political lines. The Soviet Union, Syria, and Morocco all spoke against Israel. Interestingly enough, those states arguing against Israel tended to claim that the first use of force was decisive, seemingly rejecting any doctrine of anticipatory self-defense. Supporters of Israel, such as the United States and the United Kingdom, on the other hand, tended to refrain from asserting a doctrine of preemption. Unlike the Cuban missile crisis debates, there seemed to be more speakers who were negatively disposed to anticipatory self-defense; but again, there was no clear consensus opposed to the doctrine.

The Attack on the Osirak Reactor (1981)

Israel was once again the object of criticism in 1981, when it used force to destroy an Iraqi reactor that Israel claimed would be producing nuclear weapons–grade material for the purpose of constructing nuclear weapons that would be used against Israel. As in 1967, Israel claimed that it was acting in anticipatory self-defense. Israeli ambassador Yehuda Blum asserted that "Israel was exercising its inherent and natural right of self-defense, as understood in general international law and well within the meaning of Article 51 of the [UN] Charter."[13] A number of delegations spoke against Israel, with several taking a restrictionist approach to Article 51, including Syria, Guyana, Pakistan, Spain, and Yugoslavia.

Yet, other states that argued against Israel's action took a counter-restrictionist approach. They supported the lawfulness of anticipatory self-defense but believed that Israel had failed to meet the necessity requirement. The Sierra Leonean delegate, for example, claimed that "the plea of self-defence is untenable where no armed attack has taken place *or is imminent*."[14] Quoting from Webster's letter in the *Caroline* case, he explained that "[a]s for the principle of self-defence, it has long been accepted that, for it to be invoked or justified, the necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation."[15] "The Israeli action," he continued, "was carried out in pursuance of policies long considered and prepared and was plainly an act of aggression."[16] Similarly, the British representative to the Security Council, Sir Anthony Parsons, explained, "It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq. There was no instant or overwhelming necessity for self-defence. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and

which violated the sovereignty of Iraq."[17] Delegates from Uganda, Niger, and Malaysia tended to take a similar approach. Interestingly enough, the U.S. ambassador to the UN, Jeane Kirkpatrick, while speaking against the Israeli action, did not explicitly rely upon the doctrine of anticipatory self-defense.

Although the Security Council ended up censuring Israel for its action, the most notable aspect of this debate was the willingness to engage in a discussion of the concept of preemptive self-defense. Even though there was no clear consensus in support of the doctrine, there did seem to be greater support than in previous cases—provided that the *Caroline* criteria are met.

Evaluation of Post–UN Charter Practice

Given this brief examination of some important indicators of state practice in the post–UN Charter period, it would be difficult to conclude that there is an established rule of customary international law prohibiting the preemptive use of force when undertaken in anticipatory self-defense. If anything, there seems to have been greater support for the doctrine in the most recent case. In all the discussions, however, those who supported the doctrine of anticipatory self-defense continued to claim that the right is limited by the requirements of necessity and proportionality set out in the *Caroline* case.

The Bush Doctrine and the Law

In light of this examination of international law, it is fairly unremarkable for a U.S. administration to assert a doctrine of preemption. What makes the Bush doctrine different is that it seeks to relax the traditional requirement of necessity. As noted earlier, the 2002 NSS specifically claims that "[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." It argues that "[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack." In other words, the administration is contending that, because of the new threat posed by weapons of mass destruction (WMD) and terrorists, the old requirement of necessity may not always make sense. By the time imminent WMD use has been established, it may be too late to take any kind of successful preemptive action. Although traditional international law would not require certainty regarding time and place, it would suggest near certainty. If an attack is imminent, it is nearly certain that the attack will occur. Given this conclusion, many scholars would be tempted to say that the Bush doctrine is clearly at variance with international law, but is this necessarily the case?

The preceding discussion presupposes two things about the nature of international law. First, it assumes that the threat posed by WMD and terrorism are similar to the threats to use force that existed as the law relating to anticipatory self-defense was developing historically. Second, the discussion assumes that the UN Charter framework for the recourse to force constitutes the existing legal paradigm. I would argue that both these assumptions are not correct.

The Changed Nature of the Threat: WMD and Terrorism

As international law relating to the recourse to force developed over the centuries and culminated in the UN Charter, the main purpose of the law was to address conventional threats posed by conventional actors: states. Both WMD and terrorism pose threats unanticipated by traditional international law. When the charter was adopted in 1945, its framers sought to prevent the types of conflict that had precipitated World War II—circumstances in which regular armies engaged in clear, overt acts of aggression against other states. As a consequence, Article 2(4) prohibits the threat and use of force by states against states, and Article 51 acknowledges a state's inherent right of self-defense if an armed attack occurs. Even if UN Charter provisions are understood in light of customary international law allowing anticipatory self-defense, the charter's focus is still on states using force the conventional way.

What makes the Bush doctrine different is that it seeks to relax the standard for necessity.

Neither WMD nor terrorist actors were envisioned in this framework. The three main WMD types—chemical, biological, and nuclear—could not have seriously been on the mind of the delegates while they were drafting the UN Charter. Even though chemical weapons had been used during World War I, they had not proven to be particularly militarily useful and, in any case, were not used in any significant way as an instrument of war in World War II. The very idea of nuclear weapons was a carefully guarded secret until August 1945 and thus could not have figured into the deliberations on the charter in the spring of 1945. Indeed, as John Foster Dulles would later observe, the UN Charter was a "pre-atomic" document.[18] Terrorism, although certainly not a recent phenomenon, was not addressed in traditional international law relating to the recourse to force. Prior to the twentieth century, customary international law dealt with state actors. Even major multilateral treaties that related to use-of-force issues, such as the

League of Nations Covenant, the Kellogg-Briand Pact of 1928, as well as the UN Charter, addressed their provisions only to states.

It is precisely in this lacuna in international law that the problem lies. WMD and terrorism can strike at states in ways that customary international law did not address. Underlying international law dealing with the recourse to force is the principle that states have a right to use force to defend themselves effectively. When conventional troops prepare to commit an act of aggression, the basic criteria of *Caroline* would seem to make sense. The soon-to-be victim would still be able to mount an effective defense if it were required to wait for an armed attack to be imminent. The soon-to-be aggressor would be taking enough overt actions, and the attack itself would require mobilization, which would give the victim enough lead time.

Both WMD and terrorism pose threats unanticipated by traditional international law.

Both WMD and terrorism, however, are different. It can be very difficult to determine whether a state possesses WMD, and by the time its use is imminent, it could be extremely difficult for a state to mount an effective defense. Similarly, terrorists use tactics that may make it all but impossible to detect an action until it is well underway or even finished. As a consequence, it could be argued that it would make more sense to target known WMD facilities or known terrorist camps or training areas long in advance of an imminent attack if the goal is to preserve the state's right to effective self-defense.

From a legal perspective, there is great difficulty with this relaxation of the *Caroline* criterion of necessity. Where does one draw the line? If imminence is no longer going to be a prerequisite for preemptive force, what is? With respect to WMD, would it be simple possession of such weapons? Such an approach is especially problematic. Given the current realities in the international system, India would be able to use force against Pakistan, and vice versa; Iraq could target Israel; and many states could target the United States, Great Britain, France, China, and Russia.

What about hostile intent as a criterion? Perhaps it could be argued that, if the state that possessed these weapons had hostile intent toward other states, this would justify preemption. But, a hostile-intent approach could be even more permissive. It could be claimed that preemptive force would be justified if a state were in the early stages of developing a nuclear weapons program—long before actual possession.[19] In a sense, Israel was making this kind of claim when it struck the Osirak reactor in 1981, but this extremely permissive approach was clearly rejected by the Security Council.

What would be the standard for terrorism? If there is a group such as Al Qaeda that has been committing a series of attacks against the United States, preemption is not really at issue. Rather, the United States and its allies are simply engaging in standard self-defense against an ongoing, armed attack. The problem would present itself if there were a group that had not yet committed an action but seemed likely to act at some point in the future. Short of an imminent attack, when would a state lawfully be able to preempt that group?

So, here is the difficulty. Although it is true that contemporary international law dealing with the recourse to force in self-defense does not adequately address the problem of WMD and terrorism, no clear legal standard has yet emerged to determine when preemptive force would be permissible in such cases. Some scholars have suggested standards, but it does not seem that either treaty law or custom has yet come to endorse one.

The Failure of the Charter Framework

The lack of a new standard for preemptive force may not be the greatest challenge facing international law dealing with the recourse to force. As indicated above, most scholars addressing the current status of international law dealing with the preemptive use of force would argue that the law can be understood as being embodied in the UN Charter paradigm as modified slightly by customary international law. Hence, most scholars would conclude that the use of force is prohibited unless it has been authorized by the Security Council or is undertaken in self-defense. Typically, scholars would claim that Articles 2(4) and 51 have to be read to allow for anticipatory self-defense as defined in *Caroline*, and many would argue that certain other uses of force such as force to rescue nationals and humanitarian intervention would be lawful. Generally, however, these scholars would claim that the core of Article 2(4) is still existing international law and that the charter paradigm describes contemporary international law. Is this correct?

As noted above, international law is created through the consent of states expressed through treaties and custom. Because both treaties and custom are equally the source of international law, if a conflict arises between the two, such a conflict is resolved by determining the rules to which states consent at the present time. This can be determined by ascertaining which rules currently possess two elements: authority and control. First, to have authority, the would-be rule must be perceived by states to be the law; in the traditional language of the law, the rule must have *opinio juris*. Second, the putative rule must be controlling of state behavior. It must be reflected in the actual practice of states.

When the UN Charter was adopted as a treaty in 1945, that was a clear indication that states perceived the norms embodied in that agreement to

be law. In the more than 50 years that have transpired since the conclusion of the charter, however, the customary practice of states seems to be wildly at variance with the charter's language. If the charter framework intended to prohibit the threat and use of force by states against the territorial integrity or political independence of states or in any other manner inconsistent with the purposes of the UN, such prohibition does not seem to be realized in practice. Almost since the moment that the charter was adopted, states have used force in circumstances that simply cannot be squared with the charter paradigm.

If imminence is no longer going to be a prerequisite for preemptive force, what is?

Although commentators may differ on the precise uses of force that have violated the UN Charter framework, the following list would seem to represent the kinds of force that have been used against the political independence and territorial integrity of states, have not been authorized by the Security Council, and cannot be placed within any reasonable conception of self-defense: the Soviet action in Czechoslovakia (1948); the North Korean invasion of South Korea (1950); U.S. actions in Guatemala (1954); the Israeli, French, and British invasion of Egypt (1956); the Soviet invasion of Hungary (1956); the U.S.-sponsored Bay of Pigs invasion (1961); the Indian invasion of Goa (1961); the U.S. invasion of the Dominican Republic (1965); the Warsaw Pact invasion of Czechoslovakia (1968); the Arab action in the 1973 Six-Day War; North Vietnamese actions against South Vietnam (1960–1975); the Vietnamese invasion of Kampuchea (1979); the Soviet invasion of Afghanistan (1979); the Tanzanian invasion of Uganda (1979); the Argentine invasion of the Falklands (1982); the U.S. invasion of Grenada (1983); the U.S. invasion of Panama (1989); the Iraqi attack on Kuwait (1990); and the NATO/U.S. actions against Yugoslavia in the Kosovo situation (1999).[20] One could add to this list numerous acts of intervention in domestic conflict, covert actions, and other uses of force that tend to fall below the radar screen of the international community. In short, states—including the most powerful states—have used force in violation of the basic UN Charter paradigm.

Given this historical record of violations, it seems very difficult to conclude that the charter framework is truly controlling of state practice, and if it is not controlling, it cannot be considered to reflect existing international law. As Professor Mark Weisburd has noted, "[S]tate practice simply does not support the proposition that the rule of the UN Charter can be said to be a rule of customary international law."[21] "So many states have used force with such regularity in so wide a variety of situations," Professor Michael

Glennon echoes, "that it can no longer be said that any customary norm of state practice constrains the use of force."[22] Although I would argue that there is customary prohibition on the use of force for pure territorial annexation, as witnessed by the international community's reaction to the Iraqi invasion of Kuwait in 1990, such minimal prohibition is a far way from the broad language of the charter prohibition contained in Article 2(4). For all practical purposes, the UN Charter framework is dead. If this is indeed the case, then the Bush doctrine of preemption does not violate international law because the charter framework is no longer reflected in state practice.

Options for Policy

Given the preceding legal discussion, what are the options for U.S. policymakers? At first blush, there seem to be three ways to proceed. First, U.S. decisionmakers could opt to accept the traditional understanding of international law. They could recognize that preemptive force is permissible in the exercise of anticipatory self-defense, but only if the imminence criterion of *Caroline* were met. This approach would have the advantage of being the least controversial approach to the law, but it would require policymakers to make the case that the use of force by an enemy state is indeed imminent before preemption would be permissible. Based on the language of the 2002 NSS, this would require the administration to back away from policy that has already been articulated.

Second, policymakers could claim that, because WMD and terrorism pose a threat that was completely unanticipated in traditional international law, the law must be reinterpreted to allow for a relaxing of the imminence criterion. This tack would be consistent with the administration's public statements. Here, the difficulty would be in establishing a new standard for preemption that would not legitimate a host of preemptive actions from a variety of other states in the international system.

Third, policymakers could declare the UN Charter framework dead. They could admit that charter law is no longer authoritative and controlling. This would be the most intellectually honest approach. It would recognize the current, unfortunate state of international law and create clean ground to build anew. The disadvantages to this approach, however, are legion. If the United States were to proclaim the charter dead, many states would rejoice at the funeral and take advantage of such a lawless regime. U.S. allies, on the other hand, would be likely to condemn such a seemingly brazen rejection of multilateralism and conceivably refuse to give the United States the kind of support it may need to continue the war against terrorism and promote order in the international system.

So, what is to be done? Although I believe that the charter paradigm does not describe contemporary international law relating to the recourse to force, I would recommend the following approach: First, the administration should accept as a matter of policy the notion that preemptive force in self-defense should only be undertaken unilaterally if the *Caroline* criterion of imminence was met. Irrespective of the current status of international law on this question, such a policy would be less destabilizing, and it could contribute to a return to a more rule-based legal regime. Second, the administration should indicate that, as a matter of policy, the use of preemptive force should be undertaken in the absence of imminence only with the approval of the Security Council. Such a policy would ensure multilateral support for such action and would likely prevent the opening of the flood gates to unilateral preemptive action by other states. Third, the United States should acknowledge that existing international law relating to the use of force is highly problematic and seek, through the Security Council, to move toward the development of a legal regime that would be truly authoritative and controlling of state behavior. This may be a daunting task, and the United States might prefer that the law be left "in a fog," as Glennon has said. Nevertheless, if the legal regime for the recourse to force is to return to something more closely resembling a stable order, the United States—as the superpower in the international system—needs to take the lead both in acknowledging the deficiency in the current legal structure and in pointing the way to its improvement.

For all practical purposes, the UN Charter framework is dead.

Notes

1. The National Security Strategy of the United States, September 2002, www.whitehouse.gov/nsc/nss.html.
2. Ibid.
3. Ibid.
4. Letter from Mr. Webster to Lord Ashburton, August 6, 1842, cited in Lori F. Damrosch et al., *International Law: Cases and Materials* (2001), p. 923.
5. Letter from Mr. Webster to Mr. Fox, April 24, 1841, cited in Damrosch et al., *International Law: Cases and Materials* (2001).
6. UN Charter, preamble.
7. *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.*), Merits, International Court of Justice (judgment of June 27, 1986), (dissent of Judge Schwebel).

8. Ibid., (opinion of the Court) para. 194.
9. *The S.S.* Lotus, Permanent Court of International Justice (1927), P.C.I.J. Ser. A, no. 10, reprinted in Damrosch et al., *International Law: Cases and Materials* (2001), pp. 68–69.
10. See Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, 1993), pp. 71–79.
11. Mr. Quaison-Sackey, UN Doc. no. S/PV.1024:51 (1962).
12. Ibid.
13. Yehuda Blum, UN Doc. no. S/PV.2280, June 12, 1981, p. 16.
14. Mr. Koroma, UN Doc. no. S/PV.2283:56 (1981) (emphasis added).
15. Ibid.
16. Ibid.
17. Statement of Sir Anthony Parsons, UN Doc. no. S/PV.2282:42 (1981).
18. John Foster Dulles, "The Challenge of Our Time: Peace with Justice," *American Bar Association Journal* 38 (1953): 1066.
19. I want to thank my colleague Robert E. Cumby for suggesting this approach to me.
20. See Arend and Beck, *International Law and the Use of Force*, pp. 182–183.
21. A. Mark Weisburd, *Use of Force: The Practice of States since World War II* (Pennsylvania State Univ. Press, 1997), p. 315.
22. Michael Glennon, "The Fog of Law: Self Defense, Inherence and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law and Public Policy* 25 (2002): 539, 554.