
On the Necessity of Pre-emption

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Abstract

The attacks of September 11, 2001 led President Bush to declare a 'war' on terrorism. Terrorists are capable of inflicting grave damage, and are not susceptible to the deterrent pressures felt by states. Pre-emption and prevention of attacks have become part of the US national security strategy to deal with this danger. International lawyers claim that pre-emption must be limited to actions in response to an attack that is imminent and unavoidable by any other means. This paper examines the background of the requirement that pre-emption is restricted to imminent attacks, and argues that the narrow standard properly applies only when a potential victim state can rely on the police powers of the state from which a prospective attack is anticipated. A more flexible standard for determining necessity is appropriate for situations in which the state from which attacks are anticipated is either unwilling or unable to prevent the attacks, or may even be responsible for them. The situation posed by Al Qaeda, operating from Afghanistan, was one in which the Taliban explicitly refused to prevent attacks on the US by that terrorist organization. The question of the applicability of the rule regarding necessity to Saddam Hussein's Iraq is more complicated, but a strong case can be made for the necessity of pre-emptive action.

President George W. Bush responded to the attacks of September 11, 2001 with dramatic actions and even more dramatic rhetoric. He promised to stop known terrorists from harming Americans. To this end, he declared 'war' on terrorism,¹ thereby refocusing the nation's strategic posture from one that targeted terrorists as criminals to one that treats terrorists and supporting states capable of threatening the US and its allies, as threats to national security.

This shift in perspective stems from important strategic realities. The civilized world faces a grave threat from terrorism, especially from groups supported by states. The current threat goes beyond conventional threats from terrorist groups. Globalization has facilitated the capacities of terrorists to travel, move money, and communicate. Technology has enhanced their ability to inflict damage with powerful explosives, modern weapons, and potentially through the use of weapons of mass destruction.

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¹ See, e.g., Address to a Joint Session of Congress and the American People (20 Sept. 2001) and Presidential Address (7 Oct. 2001), available at www.whitehouse.gov.

Typical criminal law enforcement is insufficient to reach and stop terrorists located in states that allow them to operate; prosecutions of low-level operatives, willing to die, cannot be expected to deter attacks. Indeed, deterrence is far less effective in dealing with modern terror (individuals or groups) than it has been with regard to conventional threats from state conduct.

States can attempt to avoid responsibility for attacks by using terrorists to carry them out. States can also enable terrorists to attack other states by refusing to prevent such attacks, as the Taliban did. In either situation, establishing responsibility for attacks is a formidable problem, greatly complicating national defence. Terrorist groups avoid detection by dispersing their members in highly decentralized cells; many are prepared to face death in pursuing their objectives. Success or victory for such people has a meaning alien to rational thought. Finally, no amount of preparation and technological sophistication will enable the US and other target states to prevent all serious terrorist attacks, or even to limit such attacks to a tolerable level. Technology should increasingly enhance security at key locations and for critical infrastructures. But the US remains target rich, and extremely vulnerable, because it is a large, thriving, open society unwilling to compromise its fundamental freedoms for security.

For these reasons, the US has advanced, more forcefully than ever, the need for pre-emptive actions.² In a speech on 1 June 2002, at West Point, President Bush explained that the ‘gravest danger to freedom lies at the crossroads of radicalism and technology’.³ He promised to oppose ‘with all our power’ efforts by terrorists and states to use modern weapons to advance radical aims by attacking the US or its allies. Where necessary, he would resort to pre-emptive actions, rather than permit the

² The need to act pre-emptively was clearly set out by former Secretary of State George P. Shultz in several speeches during the early 1980s. His advocacy of an ‘active defense’ was strongly opposed at that time, but it is now, once again, national policy. See generally the discussion in his *Turmoil and Triumph* (1993), at 645–653. He specifically states: ‘We cannot allow ourselves to become the Hamlet of Nations, worrying endlessly over whether and how to respond. A great nation with global responsibilities cannot afford to be hamstrung by confusion and indecisiveness. Fighting terrorism will not be a clean or pleasant contest, but we have no choice . . . We must reach a consensus in this country that our responses should go beyond passive defense to consider means of active prevention, preemption, and retaliation. Our goal must be to prevent and deter future terrorist acts . . . The public must understand before the fact that occasions will come when their government must act before each and every fact is known — and the decisions cannot be tied to polls.’ 648–649.

³ Remarks by the President at 2002 Graduation Exercise of the United States Military Academy, West Point, New York. This explanation echoed statements of Secretary of Defense Donald Rumsfeld, who said on 31 January 2002 that when terrorists have weapons capable of inflicting grave damage, ‘we have no choice’:

[D]efending the U.S. requires prevention, self-defense and sometimes preemption. It is not possible to defend against every conceivable kind of attack in every conceivable location at every minute of the day or night. Defending against terrorism and other emerging 21st century threats may well require that we take the war to the enemy. The best, and in some cases, the only defense is a good offense. See ‘Secretary Rumsfeld Speaks on “21st Century Transformation” of U.S. Armed Forces’ (remarks delivered at the National Defense University, Fort McNair, Washington D.C. on 31 Jan. 2002), available at www.defenselink.mil/speeches/2002/s20020131-secdef.html.

devastating consequences that can flow from attacks such as occurred on September 11, 2001.

On 17 September 2002, this approach became part of the National Security Strategy for the nation's defence. The Strategy states the general goal of preventing 'our enemies from threatening us, our allies, and our friends, with weapons of mass destruction'⁴ In Part V of the Strategy, this objective is explained as 'proactive counterproliferation' of weapons of mass destruction: 'We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.' The Strategy states that the US 'will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression'. But it asserts that the US

has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The 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 exists as to the time and place of the enemy's attack.⁵

US policy therefore appears at this point to reserve the option of pre-emption where a grave threat is posed to it or its allies, especially by the threat or use of weapons of mass destruction in the hands of states or terrorists, that cannot be stopped or deterred through means short of the use of force.

The Strategy explicitly addresses the legality of pre-empting attacks. It notes that international law has long recognized the right to defend against 'imminent danger', and it argues that the concept of what constitutes an imminent threat must be adapted to reflect the capabilities and aims of terrorist groups and rogue states:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat — most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction — weapons that can be easily concealed, delivered covertly, and used without warning.⁶

Can the Administration's policy of pre-emption be justified under international law? May the US properly cite current, unprecedented strategic necessities as a basis for satisfying international legal requirements? If not, can and should the doctrine of pre-emption be expanded to reflect new technological and strategic realities? Can the concept of self-defence accommodate a role for pre-emption that satisfies the need of leaders to protect their people, without providing a ready basis for states to use pre-emption as an excuse for aggression?

⁴ National Security Strategy (USG 2002), Part I [hereinafter 'Strategy'], available at www.usinfo.state.gov.

⁵ *Ibid.*

⁶ *Ibid.*, at Part V.

Answering these questions requires examination of the legal and political precedents relevant to the use of pre-emptive force. These precedents establish that the rigid and limited view of the propriety of pre-emptive action has no valid historical basis, and is unsound, artificial and futile in attempting to restrict resort to the use of force. The current and proper standard remains necessity, but what is necessary must be determined on the basis of all the relevant circumstances, in light of the purposes of the UN Charter.

1 The Use of Force in International Law and Practice

The United Nations Charter governs the legality of the use of force under international law. Most international lawyers construe the Charter to limit the situations in which force is permissible. Professor Michael Bothe's contribution to this Symposium is representative of this approach.⁷ They read the Charter, Article 2(4), as prohibiting all uses of force, regardless of purpose, except for two narrow categories: (1) specific authorization by the Security Council under Chapter VII, Article 42, or (2) actions of self defence under Article 51 in response to attacks on the territory of a member state. They then apply each of these grounds independently, requiring — with limited exceptions for minor uses of force — that at least one ground is satisfied. If not, the use of force is considered illegal, however strong the moral and practical case for using force might be under the circumstances.

This reasoning led most international lawyers to consider illegal NATO's action to stop the mass deportations and murders of ethnic Kosovars by the Serbs, even though virtually all conceded the action was both morally justified and politically necessary.⁸ Many international lawyers who considered the action illegal nonetheless supported the use of force against the Serbs, declaring that it was a 'special case' that should not be regarded as a precedent.⁹

Some proposed that such uses of force could be justified as humanitarian intervention, and called for a Charter amendment to make this clear.¹⁰ Some, recognizing that the conventional categories for justifying the use of force are far too limited, dramatically announced the proposition that international law is no longer capable of governing use-of-force decisions in a world of terrorism and rogue leaders.¹¹

These issues are hardly new. Myres McDougal and Florentino Feliciano addressed them in 1961. They rejected as unwarranted and artificially narrow the mechanical

⁷ 'Terrorism and the Legality of Pre-emptive Force,' 14 *EJIL* (2003) 227.

⁸ See, e.g., 2 *TRANSLEX* (Transnational Law Exchange) 5 (Special Supp. May 1999) (report of law professors' opinions).

⁹ This appears to be the official view of the European Union, and of many scholars. E.g., Simma, 'NATO, the UN and the Use of Force: Legal Aspects: Kosovo: A Thin Red Line' www.ejil.org/journal/Vol10/No1/ab1-2.html.

¹⁰ See, e.g., Bettina Clark, *NATO, the UN, and the Use of Force — Policy Roundtables* <http://www.unausa.org/issues/sc/nyrapporteur.html>

¹¹ See Glennon, 'The New Interventionism: The Search for a Just International Law', *Foreign Affairs* (May–June 1999) 2, at 4.

reading of the Charter's use-of-force provisions; and they condemned as dangerous the notion — already by then advanced by scholars and statesmen — that international law has no proper role in governing the use of force by states.¹² They rejected the proposition that the Charter is a value-free document that prohibits all uses of force, regardless of purpose. The very language of Article 2(4) makes this obvious,¹³ as do the history and purposes of the United Nations.¹⁴ They considered as historically baseless, and logically unwarranted, the construction of Article 51 limiting the 'inherent' right of self-defence.¹⁵ Most significantly, they rejected an approach toward use-of-force issues that artificially limits the relevant categories and considerations that may be weighed. They joined Julius Stone in rejecting this 'push button' approach to legal analysis, stating (over-optimistically): 'There is, however, increasing recognition that the requirements of necessity and proportionality . . . can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context.'¹⁶

While scholars in general have refused to accept this view, the US Government, including every State Department Legal Adviser on record, has done so. Abram Chayes, for example, specifically relied on McDougal and Feliciano in calling for a 'common lawyer' approach to use-of-force issues, that takes into account all relevant factors, rather than applying narrow and rigidly separate categories.¹⁷ This view has repeatedly and consistently been followed by the US, among other states, in evaluating the propriety of using force under the Charter.¹⁸

Those committed to the narrow and mechanical construction of the Charter invariably claim that applying a reasonableness standard is subjective and therefore lawless. This argument, too, is old hat. Of course governments will strain to justify their uses of force. But a reasonableness standard will not cause any greater abuse than now occurs in the application of accepted categories. As McDougal and Feliciano

¹² M. S. McDougal and F. P. Feliciano, *Law and Minimum Public Order: The Legal Regulation of International Coercion* (1961), at 238 note 263, criticizing the view that policy-makers must choose between the standards of the UN Charter and protecting American security and preserving Western interests.

¹³ Article 2(4) provides that Members shall refrain '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'.

¹⁴ The Charter was adopted by states that had used force to defeat the Axis powers, which were able to gain power in part because the League of Nations had failed to use force to stop their aggressions. President Truman, who presided over the Charter's birth, was prepared to use force if necessary without Security Council approval in assisting South Korea against the North's aggression.

¹⁵ The best treatment is McDougal, 'The Soviet-Cuban Quarantine and Self-Defense', 57 *ASILJ* (1963) 597. It is clear that Art. 51 was intended to safeguard the right to collective self-defence, but the drive to limit all uses of force led scholars, astonishingly, to claim that the language of Art. 51 so clearly limited the use of force in self-defence to armed attacks against a member state that the purposes of its language and legislative history should be disregarded. E.g. Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations', 41 *ASILJ* (1947) 872, at 873.

¹⁶ McDougal and Feliciano, *supra* note 12, at 217. In their book, McDougal and Feliciano develop a set of criteria by which to evaluate the legitimacy of self-defence.

¹⁷ 'A Common Lawyer Looks at International Law,' 78 *Harvard Law Review* (1965) 1396. Chayes later changed his position on this and on other issues.

¹⁸ See generally Sofaer, 'International Law and the Use of Force,' *The National Interest* (1988).

wrote: '[R]easonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion.'¹⁹

The narrow, mechanical approach to use-of-force issues is perhaps nowhere applied more strictly than in connection with the concept of pre-emption. Despite the long acceptance as a legitimate aspect of self-defence in all legal systems, international lawyers widely assert that, after the UN Charter, no use of pre-emptive force (also called 'anticipatory self-defence') is allowed until after an 'attack' under Article 51, which some claim must be on the territory of the state seeking to defend itself.²⁰ The only possible, very narrow exception to this rule, they contend, is Secretary of State Daniel Webster's statement in 1842, arguing that the need to exercise self-defence within the territory of another state must be 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.

The standard articulated by Secretary Webster deals with pre-emptive attacks on the territory of a state that is both willing and able to use its police powers to prevent the attack sought to be pre-empted. It is inapposite to situations such as the threat posed by Saddam Hussein's regime, which has refused to comply with Security Council resolutions aimed at preventing a new chapter in its repeated history of aggression, and in particular yet another violation of humanitarian law through the use of weapons of mass destruction. Webster's words have been torn from their context and applied to all uses of force. In any event, Webster's artificially narrow, nineteenth-century standard has never been treated as restrictively in practice as international lawyers generally claim.

It cannot rationally be claimed to apply *in haec verba* to the possibility of an attack with modern technology and advanced weapons of mass destruction, launched by terrorists acting secretly with state support.

2 *The Caroline* and International Law

The key facts in *The Caroline* incident are these. A rebellion by Canadians against their government was underway in 1837; many Americans openly supported the rebels with supplies and by enlisting as fighters for an invasion of Canada. Neither the US Government nor the state governments that bordered Canada acted effectively to stop Americans from supporting the rebels; the federal government claimed it lacked legislative authority to enforce neutrality.

On 13 December 1837, a group of rebels, led by an American, took control of Navy

¹⁹ *Ibid.*, at 218.

²⁰ According to some commentators, moreover, the right to act only exists until the Security Council takes action, even if the Council's action is insufficient to assure the state's safety from further attacks. See the arguments raised by scholars at the symposium 'The United States and International Law — The Effects of U.S. Predominance on the Foundations of International Law', Göttingen, Germany, 25–27 October 2001, and cogently rejected by Professor Thomas M. Franck in 'Terrorism and the Right of Self-Defense,' 95 *AJIL* (2001) 839.

Island, located in Canadian territory in the Niagara River, and began using it as a place from which to attack Canadian boats and facilities. The rebel base on Navy Island began to receive supplies from *The Caroline*, operating as a ferry from the US shore. On 29 December, at night, a British force crossed the river in boats with the specific objective of destroying *The Caroline*. The British commander found that the American vessel had moved from Navy Island to Fort Schlossberg, in US territory. Later that night, the British attacked the vessel, killed at least one American, dragged the boat into the river's current, set it on fire; its remains were carried over Niagara Falls.

The Van Buren Administration was aware that many Americans supported the so-called Patriots who were attempting to foment rebellion in Canada. In December 1837, before the attack on *The Caroline*, both Secretary of State John Forsyth and Treasury Secretary Levi Woodbury wrote letters to federal officials near the US/Canadian border instructing them to prevent Americans from meddling in Canadian disputes. Officials in the Buffalo area wrote, however, that 'only an armed force along the Niagara border could stop the supply of Patriots on Navy Island'.²¹ Not until *The Caroline* incident did the federal government send General Winfield Scott to the area, and even then without any forces. Americans continued to assist the rebels in their cross-border activities.

The debate over the legality of the British action began with a note dated 5 January 1838, from Secretary Forsyth to the British Minister in Washington, D.C., Henry S. Fox, calling the attack on *The Caroline* 'an extraordinary outrage', requesting a full explanation, predicting a future request for 'redress', and calling for the aggressors to be punished. Forsyth demanded redress on 19 January, enclosing affidavits. Fox responded promptly. His affidavits and arguments were based squarely on the failure of the US to enforce its own laws on the frontier, which he said forced the British subjects involved to 'consult their own security'. A 'necessity of self defence and self preservation', he argued, gave them the right to destroy the 'piratical' vessel within US territory. Forsyth responded on 13 February, challenging the assertion that the US had failed to prevent American interference in the Canadian insurrection.²²

When word of *The Caroline* incident reached London, the facts were submitted to the law officers of the Crown, who concluded that the action was justified. The vessel had acted as a belligerent, and was not therefore 'entitled to the privileges of a neutral territory'. British forces were justified as a matter of 'self preservation' in attacking the vessel wherever it was found. Stevenson sent a complaint to Foreign Secretary Palmerston on 22 May, rejecting the notion that the vessel was 'piratical' as lacking support in international law. He agreed that Americans involved in the rebellion could be punished in Canada, but argued that Britain had no right to enter another 'sovereign and independent state' to arrest them. He acknowledged that a nation could justify entering another state's territory on grounds of necessity, but the standard for allowing such action in international law required that 'the necessity

²¹ K. R. Stevens, *Border Diplomacy* (1989), at 12–13.

²² *Ibid.*, at 24–25

must be imminent, and extreme, and involving impending destruction'.²³ These arguments, later repeated by Webster, were based on the writings of Grotius,²⁴ Pufendorf²⁵ and Vattel,²⁶ among others, all of whom supported a right to pre-empt attacks, but only when the circumstances made such action necessary.

Both, in short, agreed on the existence of a right to pre-empt attacks, when necessary in the circumstances. The principal difference between them was the claim by the British that the US was either unable or unwilling to stop the rebels within its

²³ *Ibid.*, at 35.

²⁴ Grotius regarded as the 'first cause' of a just war 'an injury not yet done which menaces body or goods'. H. Grotius, *De Jure Belli: et Pacis* (1853), at 206. If a person is 'menaced by present force with danger of life not otherwise evitable, war is lawful, even to the slaying of the aggressor . . . as a matter of "self-protection". This right of self-defence exists only when necessary; where the danger can be avoided, delay is proper to allow recourse to other remedies.' *Ibid.*, at 2101. It is lawful, Grotius opined, for those whose duty is to protect others from force, to 'kill him who is preparing to kill . . .', even if it may be more laudable to forbear and be killed. Other issues he examined reflect the importance he (and the authorities he cites) gave to the particular facts of each situation, such as whether a robber enters a home at day or night, and whether one may be killed who appears merely to be preparing to strike but not kill, as opposed to one who has already struck a non-lethal blow. Grotius commented on whether a state is entitled to use force to avoid the 'possibility' of suffering an attack. He regarded as 'an intolerable doctrine' the notion that a state 'may rightly take arms against a power which is increasing, and may increase, so as to be dangerous'. Such a circumstance may be taken into account as a practical matter where the right to use force properly exists, but it is otherwise 'contrary to all notion of equity'. *Ibid.*, at 224–225.

²⁵ Pufendorf wrote that a 'discerning judge' should have no problem determining the propriety of acts in self-defence based on 'the circumstances of each case'. S. Pufendorf, *De Jure Naturae et Gentium* (1688, reprinted 1964), at 264–294. As a general rule, he concluded, a man may, without fear of punishment, kill another in self-defence, once 'the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the space [within which self-defence is permitted] being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him'. Pufendorf, like Grotius, adds other observations that reflect the need to weigh a variety of relevant circumstances, including whether the danger could be avoided in any other way (which 'should be interpreted not too strictly'); whether the defender is obliged to attempt to escape when an attack is anticipated; or whether the defender may respond with lethal force to attacks that are intended only to 'mutilate' rather than kill.

²⁶ Vattel comments directly on the power of states to act when threatened by other states, supporting in general the right to defend against a threat of force, when its use is necessary. His comments on pre-emptive (and preventive) uses of force are especially significant. An increase of power by one state, he wrote, is not grounds for using force to avoid the possibility of a future attack. We must 'have good grounds to think ourselves threatened by him [a leader who is arming for war], before we can lawfully have recourse to arms'. Monsieur de Vattel, *The Law of Nations* (1852) 308. Power alone does not 'threaten an injury', he concludes, but taken together with other evidence of improper intent or inclination, power can justify demands by another state for reassurance and ultimately the use of force to avoid injury:

When once a state has given proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of suspicion to her neighbours, whose duty it is to stand on their guard against her. . . . [O]n occasions where it is impossible or too dangerous to wait for an absolute certainty, we may justly act on a reasonable presumption. If a stranger levels a musket at me in the middle of a forest, I am not yet certain that he intends to kill me: but shall I, in order to be convinced of his design, allow him time to fire? But presumption becomes nearly equivalent to certainty, if the prince who is on the point of rising to an enormous power has already given proofs of imperious pride and insatiable ambition. . . . [Would not requiring restraint in such situations deprive] mankind of the right to regulate their conduct by the dictates of prudence, and to act on the ground of probability?

territory from attacking Canada. The US, on the other hand, insisted that it was adequately fulfilling its obligation to prevent the rebels from attacking Canada from US territory.

The evidence established that US actions against the rebels were inadequate. President Tyler openly complained that he lacked adequate authority to move against the rebels. He asked Congress to increase his power by allowing the seizure of any vessel violating neutrality, not just privateers and warships, and by permitting arrests on 'probable cause' even before any improper action occurred. Congress did so on 10 March 1838, two months after *The Caroline* incident. Furthermore, additional attacks by rebels operating from within the US took place throughout 1838, undermining Forsyth's claim that the US was preventing all significant rebel activities. Finally, domestic politics began by 1839 to interfere with the US Government's incentive to cooperate with Canada. Van Buren, faced with the need to secure re-election, ordered a Canadian rebel released from US custody after being warned that he would lose states if he failed to do so. The British concluded that the US could not be trusted to act effectively, and specifically warned the US that it could not tolerate 'ruffians and brigands . . . again and again, to issue forth from within the jurisdiction of the United States, for the ruin of Her Majesty's subjects'.²⁷ Fox complained that the US refused to extradite rebels for punishment in Canada, and at one point informed his government that the US continued an 'unreasonable, unjust and inadmissible position' by insisting on the sanctity of its territory.²⁸

Matters came to a head after November 1840, when New York officials arrested a Canadian deputy sheriff from Niagara named Alexander McLeod, and charged him with arson and murder in connection with *The Caroline*. The British protested, but Secretary Forsyth responded that the federal government could not intervene in a state criminal prosecution. The British insisted that McLeod was innocent, and that in any event he could not be prosecuted as a private individual, since what he had done was officially sanctioned. After William Harrison took office as President, Daniel Webster became Secretary of State. In March 1841, he invited the British to avow *The Caroline* incident and on that basis to request McLeod's release. The British Minister Fox obliged immediately, and Webster set about securing McLeod's release, with the approval of President Tyler, who assumed power upon Harrison's death.

It was at this point, 24 April 1841, that Webster wrote the letter to Fox containing his famous words concerning self-defence. Webster began the letter by assuring the British that, now that they had avowed the incident, McLeod would be released either by habeas corpus, or by the courts in due course. Turning to self-defence, Webster confirmed that it is available to states, not only to individuals, 'and is equally

On the other hand, he wrote, the mere fact that a neighbouring state prepares extensively for war is not enough to justify defensive action. 'The answer [in such situations] greatly depends on the manners and character of that neighbour.' If that state's leader has given no evidence of baseness or perfidy, then his word must be taken as sufficient, and the risk must be dealt with through preparations rather than action in self-defence. *Ibid.*, at 308–309.

²⁷ Stevens, *supra* note 21, at 52.

²⁸ *Ibid.*, at 62.

necessary for the preservation of both'. But, he wrote, 'the extent of this right is a question to be judged of by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts, within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground for justification'.²⁹

The circumstance upon which the British relied to justify destroying *The Caroline*, he noted, was 'defending the British Territory from the unprovoked attack of a bank of British rebels and American pirates, who, have been "permitted" to arm and organize themselves within the territory of the United States, [and] had actually invaded a portion of the territory of Her Majesty'. Webster rejected this claim, stating that the President would not assume that Britain meant by using the word 'permitted' to suggest that "those acts, violating the laws of the United States, and disturbing peace of the British territories, were done under any degree of countenance from this Government, or were regarded by it with indifference; or, that under the circumstances of the case, they could have been prevented, by the ordinary course of proceeding.' He argued that the US had shown exemplary leadership by adopting neutrality laws and enforcing them along a long border. Unlike other states, the US was averse to maintaining a large, standing force, he wrote. 'All that can be expected, from either government, in these cases, is good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention, and, that if offences cannot, nevertheless, be always prevented, the offenders shall still be justly punished. In all these respects, this Government acknowledges no delinquency in the performance of its duties.' It was Britain, not the US, that owed a justification, not just for attacking, but for doing so in the manner, place, and time chosen, without exhausting other potential avenues. He returned, in concluding, to the basic point of the dispute: the US 'cannot admit, that its Government has not both the will, and the power to preserve its own neutrality, and to enforce the observance of its own laws upon its own citizens.'³⁰

The British rejected Webster's position, because they believed the actual circumstances differed from those claimed to exist by the US. They viewed the US as either unable or unwilling to prevent the rebels and their American allies from attacking

²⁹ Webster, 'Letter to Henry Stephen Fox', in K. E. Shewmaker (ed.), *The Papers of Daniel Webster: Diplomatic Papers, vol. I, 1841–1843* (1983) 62.

³⁰ Webster's analysis of the issues related to establishing the necessity for sinking *The Caroline* is far more relevant to today's issues than his sweeping generalities: Even supposing the need to enter the territory of the US, he wrote, Britain must show it 'did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrances to the persons on board the "Caroline" was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wound[ing] others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror. A necessity for all this the Government of the United States cannot believe to have existed.' *Ibid.*, at 67–68.

Canada. Palmerston recounted the many hostile acts that had taken place on Canadian territory that originated in New York and included Americans. Either New York 'knowingly and intentionally permitted' the rebels and Americans to arm and make war against British territory, or the State Government 'had lost its authority over the Border Districts' which were in open defiance. Either way, the British had the right to enter US territory, since the area entered 'had ceased at that time to preserve that Neutral and Peaceful character, which every part of the United States was bound to maintain . . .'.³¹

Webster and Secretary Ashburton settled *The Caroline* issue about a year later, in an exchange of notes. Webster described the incident as an offence for which no apology had been given. Ashburton replied that the attack had in fact been required by 'overwhelming necessity', and that the circumstances satisfied Webster's test. After unexpectedly discovering *The Caroline* on the US side of the river, the British expedition had 'no moment for deliberation', and so went ahead with the attack. Ashburton wished to bring the matter to a close, however, since McLeod had been released and the US had dropped any claim for compensation. So, he regretted that 'some explanation and apology for this occurrence was not immediately made: this with a frank explanation of the necessity of the case might and probably would have prevented much of the exasperation and subsequent complaints and recriminations to which it gave rise'. Webster replied that the issue was closed, without challenging Ashburton's analysis.³²

The historical setting of *The Caroline* incident makes clear that Webster's formulation for determining the legality of self-defence was based on his assumption that the attack was unnecessary, because the US was both willing and able to satisfy its obligation to prevent and punish attacks from within its borders. On that assumption, Webster reasonably claimed the British could use force within the US if the need to act was 'instant, overwhelming, leaving no choice of means and no moment for deliberation'. The British, Webster in effect argued, should have relied on the US to stop Americans and *The Caroline* in particular from violating its neutrality laws. On the assumption that the US could and would act appropriately to prevent attacks on Canada, the threat posed by a small supply vessel was not so imminent that it required the British to violate US territory.

The British rejected Webster's premise, contending (with good cause) that they could not rely on the US to neutralize the threat posed by the rebels and by *The Caroline* in particular, so that a delay would have served no purpose. The British position was therefore in principle consistent with prior US conduct in analogous situations, where the US claimed it was entitled to use force to defend itself on the territory of a state that failed to prevent attacks on US targets. Webster (like Forsyth before him) no doubt was aware that the US regarded itself as justified in using force in foreign territory to

³¹ Stevens, *supra* note 21, Webster, 'Lord Palmerston to Andrew Stevenson, September 18, 1941 (enclosure in Andrew Stevenson to Webster, August 27, 1841.)' in Shewmaker, *supra* note 30, at 133–134.

³² Stevens, *supra* note 21, at 165.

prevent attacks on US ships and nationals by pirates, Indians or others, where the state involved was either unable or unwilling to prevent such attacks.³³

A The Standard for Pre-emptive Self-defence

Given this background, by what standard is a pre-emptive attack justifiable? The standard of necessity proposed by Webster is ‘so abstractly restrictive as almost, if read literally, to impose paralysis’.³⁴ In the context Webster intended — where the state from which attacks are anticipated is not responsible for the threat, and is both able and willing to suppress them — a strict standard is appropriate. For example, the US, although attacked several times by Al Qaeda from its sanctuary in Afghanistan, at first demanded that the Taliban Government arrest and extradite Al Qaeda leaders. Only when the Taliban refused to fulfil their obligation to stop attacks by Al Qaeda, did the US use force within Afghanistan to end Al Qaeda’s sanctuary there.

Webster’s language should not, however, be applied as a general rule for all pre-emptive actions. *The Caroline* incident, in full context, makes clear that Webster’s stated rule was meant to apply to situations in which the state on whose territory pre-emptive action is contemplated is not responsible for the threat involved, and is both able and willing to act appropriately to prevent the threat from being realized. The standard generally applicable to pre-emptive self-defence is, rather, the same general rule applicable to all uses of force: necessity to act under the relevant circumstances, together with the requirement that any action be proportionate to the threat addressed. This was in fact explicitly recognized in the arguments made by both Webster and his British interlocutors, as well as by the legal writers upon whom they relied.

Under such an approach, necessity cannot properly be established through an arbitrary assertion that a threat exists requiring pre-emption in the view of the party being threatened. Nor is a state free to attack another merely because the latter develops the capacity to inflict even grave damage in a military encounter. Rather, necessity must be established on the basis of factors and circumstances related to establishing the legitimacy of using force under international law principles and UN Charter values, including: (1) the nature and magnitude of the threat involved; (2) the likelihood that the threat will be realized unless pre-emptive action is taken; (3) the availability and exhaustion of alternatives to using force; and (4) whether using pre-emptive force is consistent with the terms and purposes of the UN Charter and other applicable international agreements.

Applying these criteria to the current crisis concerning Iraq demonstrates their utility in ensuring that those required to consider such matters have rigorously addressed the relevant concerns.

³³ The US had, for example, relied on Spain’s incapacity or unwillingness to protect US territory from attacks emanating from islands in the West Indies during the very first years of the Republic, and from Spanish Florida in 1818 and 1819 by Seminole Indians, Stevens, *supra* note 21, at 26; A. D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins* (1976), at 276–278, 349–350, 370–373.

³⁴ McDougal and Feliciano, *supra* note 12, at 217.

1 *The Threat*

Threats vary according to their nature and magnitude. The types of weapons likely to be used in an attack is an aspect of the nature of a threat, as well as whether the weapons would be delivered by conventional forces or terrorist groups. Iraq has developed chemical and biological weapons. They are difficult to detect and their use could inflict massive casualties. Iraq also has a history of supporting terrorists, particularly Abu Nidal and his organization, and it used terrorists in an attempt to assassinate the first President Bush. The potential use of terrorists by Iraq makes it especially difficult to know when and where an attack will occur.

Iraq also poses a continuing threat to use conventional forces or weapons of mass destruction in light of its prior conduct and avowed motives. It has twice attacked states in the Gulf area in pursuit of its avowed aim of 'reestablishing' an 'Arab Nation' with its capital in Baghdad. If allowed to continue to develop weapons of mass destruction, including nuclear arms, Iraq could use or threaten to use those arms to disrupt or disrail international efforts to prevent Iraq from achieving its geopolitical objectives.

The magnitude of the threat posed by Iraq is potentially very great, both physically and economically. Its forces and weapons programmes could inflict massive casualties and cause grave disruption. The effects of a major attack on Iraq's most likely targets, Kuwait and Israel, are potentially horrendous, given their vulnerability and relatively limited, geographically concentrated populations. Iraq could also jeopardize the world's energy supply, not only by withholding its own oil, but by attacking and disrupting other sources of supply.³⁵

2 *Likelihood of Threat being Realized*

A threat may be very great but unlikely to occur. While military preparations may be probative of intent to use force aggressively, for example, it is an insufficient basis in itself for inferring an intent to attack. A state may not attack a second state or a group within it merely to prevent the possibility of a future attack. For example, the US could not lawfully attack China merely because China is certain to become strong enough to threaten the US or even to challenge the US for strategic superiority. Pre-emption requires proof of an anticipated attack.

Any doctrine that allowed states to use force to prevent the potential development of a threat would wreak havoc in international security. It would allow a state to attempt to ensure its own security by attacking other states without proof that those other states have planned or would even consider an attack. The stand-off between the US and the Soviet Union for some 50 years was premised on the notion that neither state should or could lawfully attack the other in the absence of satisfactory proof that the attack was necessary to respond to an attack by the other state that was underway and unavoidable through diplomacy or other means short of force.

On the other hand, a potential attack may be treated as very likely to occur, even though it is not imminent. Israel's June 1981 attack on the Osirik nuclear reactor near

³⁵ See generally Government of Britain, 'Iraq's Weapons of Mass Destruction', www.pm.gov.uk

Baghdad was condemned in a Security Council resolution as failing to meet the test of necessity.³⁶ Ambassador Jeanne Kirkpatrick has since repudiated the arguments she made in voting to condemn the attack. While Iraq's use of the plant to create material for a nuclear device had not begun, and any attack was therefore not 'imminent', Israel believed that a nuclear attack on its population by Iraq was eventually highly likely if Iraq were allowed to put the reactor into service and develop nuclear weapons. Israel justified this conclusion on the grounds that Iraq had refused to accept a disengagement with Israel at the end of the 1948 War; that Iraq had twice before attacked Israel in other wars; that Iraq had repeatedly expressed the view (in violation of the Charter) that Israel has no right to exist; that Iraq had no need for nuclear-fuelled power plants; and that Iraq's high degree of animosity for Israel created a real possibility of an attack with nuclear weapons that a small and geographically concentrated population could not survive. Iraq's missile attacks on Israel during the Persian Gulf War of 1991, in which Israel did not participate, and its aggression against others, tends to justify Israel's unwillingness to face the high degree of risk Iraq's prior conduct and positions created.

Considerable evidence supports the likelihood of another Iraqi aggression if it is allowed to continue to develop weapons of mass destruction. Iraq's leader, Saddam Hussein, has attacked both Iran and Kuwait with the aim of conquering them and assuming control over their resources. His goals have long been known to include consolidating under his control the vast areas parcelled out by the Western powers after the First World War. Iraq should in principle be averse to confronting superior forces, but Saddam's policies have not been based on rational calculation. Ambassador Joseph Wilson, for example, a former US diplomat who had extensive contact with Saddam Hussein and Iraq, reports that he 'learned firsthand . . . what the CIA psychiatrists have said for years: Saddam is an egomaniacal sociopath whose penchant for high-risk gambles is exceeded only by a propensity for miscalculation'.³⁷ In recent statements, Saddam acknowledges that he cannot win a war with the US, but he asserts that Iraq must nonetheless resist being forced to submit to US or UN pressure. He equates his situation to that of a Muslim hero, being tested along with the Iraqi people by God to demonstrate their willingness to confront evil. All this from one of the most determined and demented aggressors in modern history.

The likelihood of the threat posed by Iraq someday becoming real is also based on Saddam's perversity, as reflected in his willingness to inflict wanton destruction having no rational purpose. His egregious violations of human rights are well known. He used chemical weapons against Kurdish Iraqis, killing thousands of civilians, and against Iranian troops. He deliberately spilled tens of millions of barrels of oil into the Kuwaiti desert and into the Gulf, and set fire to 720 Kuwaiti oil wells, when he realized

³⁶ See UN SC Res. 487, 36 UN SCOR, 2288th mtg., UN Doc. S/RES/487 (1981). An excellent description of this issue, by a scholar who defended the attack from the start, is Anthony D'Amato, 'Israel's Air Strike against the Osiraq Reactor: A Retrospective', *10 Temple Int'l Comp. L.J.* (1996) 259.

³⁷ 'How Saddam Thinks', *San Jose Mercury News*, 13 Oct. 2002, Sec. P, at 1. See generally US White House Background Paper, 'A Decade of Deception and Defiance', <http://usinfo.state.gov/regional/nea/iraq>.

he had been defeated in the Gulf War. It is true that he appears to have been deterred from using unconventional weapons in that war. But he may simply have been unable to use such weapons at that time, or been unprepared to do so directly rather than through surrogates, or he may have refrained from attempting to do so because he was left in power. President Bush has reasonably concluded on this record that the future threat from Saddam is both grave and highly likely to be realized, even though it is not imminent.

3 Exhaustion of Alternatives

To prove necessity requires exhaustion of all reasonable means of avoiding the threat involved without recourse to the use of force. This is a continuing duty, based on the realization that force is rarely unaccompanied by collateral damage to non-combatants and property. The Security Council imposed economic sanctions on Iraq and other penalties for over ten years, in some 16 Resolutions. It gave Iraq a 'last' opportunity in Resolution 1441 to comply with outstanding Security Council resolutions, including those related to the development of weapons of mass destruction. It is difficult to claim the US failed to exhaust all reasonable, alternative means for securing compliance short of force. Even if some states genuinely believed that Iraq's disarmament could be achieved through inspections and pressure, this view was based on very little evidence and on the impractical assumption that the US and its allies could afford indefinitely to position their armed forces in preparation for an attack.

4 Consistency with Charter Purposes

Article 2(4) of the UN Charter calls on Members to refrain 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'. This principle has generally been claimed to apply to all uses of force, whatever their purpose. But that position has never made sense in light of the need to achieve the Charter's purposes. Pressure has repeatedly arisen for treating as legitimate uses of force that advance those purposes, without compromising the territorial integrity or political independence of the states involved. The increasing recognition being given to the legitimacy and need for humanitarian intervention is one reflection of the fact that actions that advance the Charter's purposes are necessarily more justifiable than those inconsistent with its purposes.

The use of force to disarm an established aggressor, without altering the territory of that member state, or depriving it of its sovereign status, is an end that is consistent with the 'Purposes' of the United Nations.

Another factor that should be taken into account in evaluating the consistency with the Charter of disarming Iraq by force is the many Security Council resolutions adopted on the subject. International lawyers agree that force can lawfully be used under the Charter if the Security Council, acting under Chapter VII, explicitly authorizes it. Many contend, moreover, that if authority is not clearly conferred by the

Council on Member States to use force, the Council's other actions, findings and conclusions cannot be relied upon to justify or even support a use of force.

In fact, however, while explicit grants of authority to use force are always effective, the Council can and has implicitly recognized the propriety of using force.³⁸ Anyway, it is unreasonable to refuse to give weight to Security Council actions in evaluating the need (and hence the legality) for using force, merely because the Council may not have granted explicit authority. In the case of Kosovo, for example, it was significant that the Council had found Serbia to have acted illegally in several respects, in ways that were a threat to international peace and security under Chapter VII; that Serbia had failed to comply with the Council's orders to stop such actions; that the Council had imposed economic and other sanctions on Serbia for its violations of Council resolutions and international law; and that it had set up a tribunal to try cases against leaders who violated important humanitarian prohibitions. All these findings and conclusions supported the propriety of NATO's resort to force.³⁹

If the Council fails to grant Members explicit authority to use force against Iraq, the findings, conclusions, and other actions of the Council should nevertheless be given proper weight in evaluating the propriety of enforcement actions. Resolutions adopted by the Council to end the Gulf War were explicitly conditioned on Iraq's agreeing to give up its weapons programmes and to comply with other demands. Arguably, the breach by Iraq of those resolutions restores in full force the original authorization by the Council for the use of force in 1990.⁴⁰ In addition, numerous findings in resolutions, including Resolution 1441, condemn Iraq for violating Council resolutions and for egregious breaches of international law, including fundamental principles of human rights. Iraq has also violated other international agreements, including those prohibiting the development of chemical and biological weapons. When these considerations are taken into account, the case for disarming Iraq without further UN authorization is strong under the approach espoused by McDougal and Feliciano, and widely supported by government lawyers and statesmen.

5 Parchment Barriers and the Use of Force

The determined support of the international-law community for Webster's formulation as the basis for using force in self-defence rests, ultimately, not on its historic validity or cogency, but on the view that a very narrow, rigid rule is needed to prevent states from using force too liberally. Their concern is that allowing states to rely on a general rule that permits them to take into account the many relevant circumstances

³⁸ In dealing with the Taliban Government, the Council condemned its failure to arrest and punish or extradite Al Qaeda members responsible for attacks on the US, and at the same time recognized that such attacks triggered the right of self-defence. The international community has treated this formula as conferring Council approval for the military action that destroyed Al Qaeda's sanctuary and removed the Taliban from power.

³⁹ See the discussion in Sofaer, 'Kosovo and International Law', 36 *Stanford Journal of International Law* (2000) 1, at 12–15.

⁴⁰ See Shultz, 'Act Now', *Wash. Post*, 6 Sept. 2002, at A25.

and considerations that underlie uses of force will result in subjective, self-serving, lawless decisions.

This concern is perfectly legitimate. States are hardly models of objectivity in seeking to advance and protect their interests. It is illusory, though, to expect Webster's formulation to achieve any greater objectivity in international legal analysis than a more general but more coherent rule. States prepared to use force in bad faith are undeterred by restrictive legal rules. Japan, for example, claimed its occupation of Manchuria in 1931 satisfied the 'standard principle laid down in the *Caroline* case'. German leaders on trial at Nuremberg claimed their invasion of Norway in 1940 was an act of self-defence.⁴¹ Conversely, an approach that requires a thorough analysis of necessity and proportionality, on the basis of considerations rationally and morally related to the reasonableness of using force, is unlikely to encourage uses of force that would not otherwise occur. Statesmen acting in good faith to protect their nations do not take artificial rules seriously; if anything, as McDougal and Feliciano noted long ago, they are more likely to respect standards rationally related to concerns they recognize as appropriate.

It is no less true today than it was when McDougal and Feliciano wrote, that artificial rules cannot bear the burden of the real world pressures that underlie use-of-force issues. Today, moreover, the need to enforce rules to advance human rights and to limit the power of tyrants and terrorists is greater than ever. To deprive the international community of a reasoned basis for using force threatens Charter interests and values, rather than supporting and advancing them.⁴²

3 Conclusion

The use of force to pre-empt threats is a matter of considerable complexity, and requires a more nuanced evaluation than that implied by Webster's pronouncement in *The Caroline* case. Properly applied, pre-emption is an aspect of a state's legitimate self-defence authority. The power to act in self-defence after an attack is based on the need to prevent further attacks, not on any right to exact revenge. Therefore, just as pre-emption was to Grotius the first ground for the 'just' war, it is the key justification for using force in the post-Charter era.

Looking at the 'war' on terrorism thus far, the concept of pre-emption is being applied in a responsible manner, though some statements made by the current Administration might have suggested a broader application. Osama bin Laden and Al Qaeda had, prior to September 11, 2001, attacked the US and killed many Americans several times. They had also announced their intention to attack US nationals and targets until the US withdrew its forces from Saudi Arabia. Bin Laden issued a *fatwa* purporting to authorize (or even to mandate) the killing of Americans. It was certainly reasonable under the circumstances for the US to assume that further attacks were being planned. President Bush attempted to convince the Taliban Government in

⁴¹ See discussion in Stevens, *supra* note 21, at 166–168.

⁴² See generally the discussion in Sofaer, *supra* note 39, at 16–20.

Afghanistan to turn over Bin Laden and other Al Qaeda leaders, on the express promise that force would in that event not be used in Afghan territory. This warning was disregarded, and the Taliban made clear in numerous public statements that they regarded Bin Laden as a hero and supported his objectives.⁴³ It is, if anything, astonishing that the US allowed such a record to develop before acting forcefully to stop Al Qaeda from further implementing their destructive plans.

The President's 'axis of evil' phrase in his January 2002 State of the Union speech generated widespread comment, allegedly on the ground that he might be claiming the right to attack North Korea, Iran and Iraq. The speech makes no such claim, and President Bush has made clear that he has no plan based on present circumstances to attack either North Korea or Iran. Iraq is another matter entirely.⁴⁴

Pre-emption must be considered responsibly, on a case-by-case basis, but it remains one aspect of every government's duty to protect its people. Weapons of mass destruction (the very possession of which may be illegal) can now be fashioned by many states, and delivered in many ways. When such weapons are likely to be used by a state, and all reasonable means short of force have been exhausted, it is reasonable to expect target states to consider pre-emption. Where such circumstances exist, pre-emption is necessary, and should therefore properly be regarded as part of the 'inherent right' of self-defence.

⁴³ For instance, on 28 September 2001, Taliban leader Mohammed Omar strongly rejected the overtures of Pakistani religious leaders seeking extradition of Bin Laden to the US. Omar 'rebuffed . . . any negotiated settlement . . . between the United States and Afghanistan over bin Laden', saying that 'the Taliban was willing to fight to the death to protect bin Laden from U.S. military forces', and remarking on the virtues of going to war with the infidels because it was 'imposed upon us. . .'. See Chandrasekaran and Khan, 'Taliban Denies Clerics' Call for Bin Laden; Pakistani Visitors Hear Vow to "Fight Until the End"', *Wash. Post*, 29 Sept. 2001, at A01, available at 2001 WL 28360679.

⁴⁴ For a summary case for the legality of enforcing Resolution 1441 by force see Sofaer, 'Iraq and International Law', *Wall St. J.*, 31 Jan. 2003, at A10.