The New Bush National Security Doctrine and the Rule of Law

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38R063
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[W]e must face the fact that the United States is neither omnipotent nor omniscient—that we are only 6 percent of the world's population—that we cannot impose our will upon the other 94 percent of mankind—that we cannot right every wrong or reverse each adversity—and that therefore there cannot be an American solution to every world problem.

— John F. Kennedy

tives. Three questions central to U.S. foreign relations are whether these interests are consistent with international law; whether the United States seeks to modify international law to secure its interests; or whether foreign policy makers see the need to significantly change international legal standards. The aftermath of the of the attacks of September 11, 2001 in the United States triggered an intuitive reaction that the normal rules of restraint embodied in international law might no longer be relevant to the safety and vital security interests of the United States. In short, the attacks of September 11 changed the international law landscape in such a way as to make credible the claim that many of the rules and institutions of international security are now obsolete. Some in the Bush administration saw a way to co-opt international collective security institutions to render them so weak that their prescriptive and operational force would simply become irrelevant.

The British government, however, sought to respond through international institutions. According to British Foreign Secretary Jack Straw, countries could respond to the threat of terrorism within the framework of international law, particularly within the overarching structure of international security codified in Article 51, the self-defense provision of the U.N. Charter. The Bush administration followed the British lead and soon indicated that, indeed, international law was not obsolete and that the United States could appropriately respond to international terrorism within the general framework of U.N. Charter principles, especially Article 51.

Immediately following the September 11 attacks, the United States needed to identify the terrorists responsible for the attacks on New York and Washing-

2. British Foreign Secretary Jack Straw spoke before the United Nations General Assembly on November 11, 2001 to make the case for war against Afghanistan within the framework of Article 51. He stated:

[W]e face a real and immediate danger. The murderous groups who plotted the terrible events of September 11 could strike again at any time. And our first duty, to our citizens and to each other, is to defend ourselves against that threat. When the nations of the world agreed the UN Charter, they recognized the right of self-defence in Article 51. It is in exercise of this right that the military coalition is now engaged in action against Al-Qa’ida and the Taliban regime which harbours them. Taking military action is always a tough decision. But here it truly was unavoidable.


ton. Next came the difficult task of determining what strategies were permissible to bring these terrorists to account. The U.S. government had long known that the terrorists maintained a territorial presence in the Taliban-ruled Afghanistan.\textsuperscript{4} Intense public diplomacy followed on the issue of whether or not the Taliban would cooperate in bringing the terrorist perpetrators to justice. Non-cooperation by the Taliban regime implied an undesirable option: An invasion of Afghanistan predicated on the principle that the regime collaborated with or protected al Qaeda and sought to use Afghan sovereignty to do so. This compromised Afghanistan's sovereignty; it effectively became a terrorist state, or a state within which terrorists had a disproportionate influence. The Taliban regime transformed Afghanistan into what the United States defines as a "rogue state," one that abuses its sovereignty.\textsuperscript{5} The Taliban regime's inevitable non-cooperation created for the United States the option of intervention, which brought issues of the material and human costs of an actual invasion to the fore.\textsuperscript{6} Historically, the USSR, which had previously maintained a strong military presence in Afghanistan, became so mired in the then-existing civil war that the cost of its presence significantly affected the stability of the Soviet regime. Would the United States become mired in an endless conflict in the region? So far, the answer is no.

The victory of U.S. and allied forces in Afghanistan suggested a significantly changed picture of the region. The war cost little in terms of human and material losses. Moreover, the strategic value of Afghanistan, with regard to the projected oil pipeline from Russia to the Arabian Sea, indicated that the United


States could maintain a strategic interest in the region with minimal political, economic and humanitarian cost. The Taliban regime had been a military paper tiger after all.

Is the Bush administration's success breeding ambition and dimming its clarity of vision, and if so, what are the implications for long-term domestic security interests? This article seeks to advance the discussion of national security in general, with specific regard to American foreign policy as outlined by President George W. Bush. In particular, we undertake a detailed examination of historically significant national security doctrines as well as the legal basis underlying the 2003 American attack on Iraq in order to explore the Bush administration's international policy determinations. Part I of this article discusses the character of national security in the United States following its war on terror in Afghanistan. Part II introduces threshold considerations as to how national security doctrines are created. Part III then discusses the national security doctrines of a series of developing nations, or "lesser powers." Part IV proceeds to discuss the national security doctrines of a series of developed nations, or the "hegemons." Part V explores President George W. Bush's new national security doctrine for the United States. Part VI scrutinizes the new Bush national security doctrine by assessing the legal basis of the 2003 Iraq war, followed by Part VII, which offers possible strategic justifications. In conclusion, Part VIII suggests some implications of the Iraq war for the United States from a strategic standpoint.

I.
NATIONAL SECURITY AFTER AFGHANISTAN

The war against the Taliban is not quite over. While there is still much to do in Afghanistan, the war provided a needed justification for officials who have long interpreted the U.N. Charter as a limited concept of self-defense to secure legitimate U.S. security interests. The Afghan intervention also served as a precedent for a different principle: intervention into the sovereign internal affairs of a state can be justified under the principle of defensive regime change. Modern

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9. Michael McFaul, Since Sept. 11, Nation-Building is Ascendant Again in the White House: Dueling Ideologies Make Justifications for War Unclear, San Jose Mercury News, Jan. 19, 2003, available at http://www.bayarea.com/mls/mercurynews/news/editorial/4983375.htm (stating that "Sept. 11, 2001... compelled... the president to rethink basic assumptions about the world we live in. Bush began, almost overnight, to believe that the United States had to go on the offensive and remake the world into a safer place, a mission that sounded more like Wilson's and less like his..."
international scholars must now grapple with two fundamental problems of international constitutional law. The first touches on matters of security, self-defense, and the strategic scope of defensive interventions to secure these claims if they are authentic. The second deals with the circumstances under which it is permissible to enlarge or constrain the constitutional system of state sovereigns.

The first problem of international constitutional law is that the stability of the international system depends on the stability and security of the state. The state, therefore, must be given a preferred position in the international constitutional system. The circumstances under which external interference in a state’s internal affairs might occur must be limited and specifically defined. In this sense, the U.N. Charter—with its endorsement of formal equality among states—protects the domestic jurisdiction of states and prohibits aggression against states large and small. The most explicit indicators of this constitutional principle are already in the U.N. Charter. The Charter also reflects that the international order is not static, so claims for self-determination and independence are tantamount to claims to change the composition of the sovereign entities in the international system. Accordingly, the international constitu-

10. See generally Oscar Schachter, State Succession—The Once and Future Law, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 322 (Charlotte Ku & Paul F. Diehl eds., 2nd ed. 2003) (stating that self-defense can be clarified through lex specialis, but that the relationship between national security and the Charter prohibition on the use of force is “inevitably complicated and fluid”).

11. The United States regularly promotes its domestic democracy by pursuing U.S. national interests and defending American sovereignty. Jeremy Rabkin writes that “America’s first duty must be to protect its own democracy and the rights and resources of its own people—by safeguarding its own sovereignty.” JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 101 (1998). However, the United States has consistently opposed any general rule permitting unilateral armed force to remove threatening or unfriendly regimes. See Michael J. Glennon, The New Interventionism: The Search for a Just International Law, FOREIGN AFF., May/June 1999, at 2 (stating that during the Kosovo crisis, it was proposed that the law should have been changed to allow NATO to act in place of the United Nations Security Council; the United States showed no interest in this move and later did not request authorization from NATO for the Iraqi invasion plan).

12. “A world where international obligations are kept within proper bounds may also be a world that offers more encouragement for accountable government and individual rights.” RABKIN, supra note 11, at 101.

13. See, e.g., U.N. CHARTER art. 1(2) (stating that “[the purpose of the U.N. is to] develop friendly relations among nations based on respect for the principle of equal rights...); id. art. 2(1) (stating that “[the U.N. is] based on the principle of the sovereign equality of all of its Members.”); see also id., Chapter II-Membership, Chapter VII-Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.


15. The “purposes” of the U.N. Charter have been (and still are) determined by the continuing evolution of international law since 1945. With regard to the self-determination of peoples, it is possible to apply the International Court of Justice’s (“ICJ”) test in the Namibia opinion, in which it referred to the developing concept of the “sacred trust” contained in Article 22 of the League Covenant. The Court concluded that this “sacred trust” created the contemporary right of self-determination of peoples. See Legal Consequences for States of the Continued Presence of South Africa in
tional system, like all law, must clarify the circumstances under which it will defend the status quo or instead allow lawful change.

The second problem of international constitutional law pertains to the permissibility of altering the constitutional system of state sovereigns. Prior to October 7, 2001—when the United States began bombing Afghanistan—the invasion of Afghanistan staked a claim to more than mere self-defense. In general terms, it was a claim to intervene and change a state’s composition in the international constitutional system. This claim required an expansive interpretation of the right to self-defense in situations where the enemy is not a state, but a significant group of terrorists within a state. American officials and decision-makers who sought to solve the Afghanistan problem inflated the principle of self-defense so that international law would not be constrained by matters of temporal limitation, such as the imminence of future attacks or the need for immediacy required to repel an actual attack. The inevitable corollary envisioned a regime change in Afghanistan to replace the Taliban, which was a surrogate for terrorist interests. This relies on a notion that conflates the Taliban regime and the terrorists’ interests, manifesting the concept of a “terrorist state” with only a patina of legitimate sovereignty. Thus, the Afghanistan intervention could be justified by the interesting principle that a regime sufficiently implicated in terrorism, in the protection of terrorist operatives, and unrepentant about the culture of terrorism within its borders may justify an invasion of the primary

Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 28-31 (June 21) [hereinafter Namibia case] (upholding Namibian people’s right to self-determination under international law). Accordingly, international instruments may be interpreted and applied within the framework of the legal system that exists at the time of such interpretation and application, so long as the concepts in the instrument in question are inherently evolutionary and that it was the intention of the parties to have them considered as such. Id. at 31. Much has been postulated over the last few hundred years with regard to the importance of self-determination; the birth of the sovereign state gave rise to ideas about liberty and freedom. Christian von Wolff, a philosopher and the author of a treatise on the law of nations, accepted the general principles of self-determination and nonintervention. He saw a world of sovereign, autonomous states that exist separately yet as equal parts of the whole global entity. See generally C. Wolff, Jus Gentium Methodo Scientifica Pertractatum, reprinted in 2 THE CLASSICS OF INTERNATIONAL LAW 9 (J. Drake trans., 1934). Wolff wrote in 1749 that “[r]elations are regarded as individual free persons living in a state of nature.” Id. at 9.

16. Some scholars argue that Article 2(4) of the U.N. Charter does not generally prohibit force, but rather it prohibits force designed to compromise the territorial integrity and political independence of another state. It also prohibits uses of force that are inconsistent with the purposes of the U.N. Mary Ellen O’Connell recounts Professor Anthony D’Amato’s position. See Mary Ellen O’Connell, The American Society of International Law Task Force on Terrorism: The Myth of Preemptive Self-Defense, The American Society of International Law 17 (2002), available at http://www.asil.org/taskforce/oconnell.pdf (citing Anthony D’Amato, Israel’s Air Strike Upon the Iraqi Nuclear Reactor, 77 Am J. Int’l L. 584 (1983)). According to O’Connell, D’Amato interprets Article 2(4) to justify Israel’s 1981 strike against the Osirik nuclear reactor in Iraq. Id. Israel apparently sought to maintain its long-term security by preventing Iraq from developing nuclear weapons. Id. According to D’Amato, Israel’s strike did not compromise Iraq’s territorial integrity or political independence and it was consistent with the purposes of the U.N.; thus, it did not violate the prohibition of force in Article 2(4). Id.

"terrorist state" by a primary "victim state" of terrorism. The specific purpose of the Afghanistan intervention was to remove all of its "terrorist state" characteristics and replace them with a new conception of statehood and sovereignty more consistent with these themes as defined by the U.N. Charter.

Unfortunately, in Afghanistan, violence, political and military consolidation, and the threat of terrorism continue to pose grave problems. The critical question, or at least, the interesting focus of inquiry apart from regime change is whether the strategic method of action and intervention is itself reconcilable with international law. This formulation of the question might concede too much, since it appears to defend the regime change principle under international law. On the other hand, regime change is more than a claim; it is a fact. Justifying the principle of regime change under international law is tricky because its relevance may be far-reaching. It is also technically and intellectually interesting and represents an important challenge to the international rule of law.

If regime change in Afghanistan is consistent with international law might there be other regime change targets of opportunity? Afghanistan made the regime change concept an important element in the emerging national security doctrine of President George W. Bush. The Bush administration apparently saw the regime change principle as relevant to its future policy in Iraq. The envisioned invasion would have to meet certain legal standards: it would have to be both consistent with U.S. domestic law, particularly constitutional law, and justifiable under international law. To effectively accomplish this, it must be justified by the new Bush Doctrine, the precepts of which must in turn be appraised by both domestic and international legal standards. In the next part of this article, we explore the relationship between national security doctrines and legal culture. Ultimately, this article explores the ambitious invocation of the regime replacement principle in the attack on Saddam Hussein's Iraq.

19. State sovereignty is expressly protected by the U.N. Charter. See U.N. CHARTER art. 1, para. 2 (regarding the "equal rights and self-determination" of peoples); id. art. 55 (regarding the "equal rights and self-determination" of peoples); id. art. 2, para. 7 (forbids the U.N. to "intervene in matters which are essentially within the domestic jurisdiction of any state.").
20. See generally Karon, supra note 8.
21. Regime change is sometimes seen as a strategic objective of humanitarian interventions; it comprises a claim to employ unilateral force that has apparently gained legitimacy since NATO bombed Serbia and Kosovo in 1999 and the variety of commissions established to review the lawfulness of the action eventually concluded that it was illegal but given the circumstances, it was the right thing to do. See generally HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE—FOURTH REPORT, Kosovo (May 23, 2000), available at http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/28/2813.htm. Thus, the United States keeps some historical company with regard to its regime change effort, which may be lawful under international law in the contextually appropriate mechanisms to accomplish an inherently lawful act. Id.
II.
LAW AND NATIONAL SECURITY: THRESHOLD CONSIDERATIONS

To better investigate the national security issue it would be useful to review an important, often underappreciated aspect of international law: national security doctrines. International relations experts carefully focus their concerns on the problems of national security and often serve as advisors and operative players in the formulation of corresponding doctrines. However, the technical basis of or justification for any national security doctrine should rest in part on international law and in part on municipal constitutional law.

The international law element of a national security doctrine is that it is essentially a claim by a state that certain interests are vital to its survival and security. In almost idiosyncratic manner, a state articulates these interests through its national security doctrine to advise potential adversaries of what it regards to be the limits of tolerable conduct, and signals that it is willing to defend its interests by force if necessary.22 This means that all national security doctrines contain at a minimum implicit claims that the doctrine is necessary for the survival of the state and clarify the circumstances under which the state might use its assets (such as the military, economic or diplomatic pressure, or propaganda) to defend itself from external threats. The broad legal basis for the defense of the state from external threats or aggression is the principle of self-defense,23 codified in Article 51 of the U.N. Charter and recognized as customary international law.24

22. An historic international doctrine traced to Hugo Grotius articulates that a state may respond to anticipated, as well as actual, harms under international law. "International law is not a suicide pact"; it should allow for such unilateral measures when they become absolutely necessary to protect the survival of a target state's population. See Louis Rene Beres, On International Law and Nuclear Terrorism, 24 GA. J. INT'L & COMP. L. 1, 31 (1994).

23. Article 51 of the U.N. Charter accords states an "inherent" right of self-defense in response to the threat or use of force as manifested by an "armed attack." See U.N. CHARTER art. 51. International law scholars continue to debate whether this right includes anticipatory or preventative strikes. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 272-78 (1963). The international obligation to refrain from use or threatened use of force has been recognized as a rule of customary international law. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 100. The ICJ has also narrowly construed "armed attack" to exclude instances of a state's supply of weapons or training to non-state actors. Id. Accordingly, detractors of anticipatory self-defense might argue that since the terrorists responsible for hijacking and crashing the four US airplanes into the World Trade Center, the Pentagon, and a field in Shanksville, Pennsylvania were not Afghan nationals, their support from the de facto rulers of Afghanistan did violate Afghanistan's international legal obligations under principles of state responsibility, but it did not create a right of self-defense for the United States. According to such scholars, absent a visibly high level of state support of terrorism, an anticipatory or preventative strike would find dubious justification under international law. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 72-74 (1993).

In municipal constitutional law, the question emerges more explicitly in terms of internal actions a state might take to defend national security interests. Broadly, the executive authority often seeks to circumvent domestic civil liberties to more effectively defend the state. In some circumstances, this concept is expressed through a "National Security State," which is ostensibly in a permanent state of concern over threats to its own safety and security.25

Any national security doctrine creates a classic problem for the rule of law as claims based on national security typically tend to be impatient with legal restraints. The principle of government under law often comes under pressure as the need to protect vital security interests presents the expediency of naked power. The danger posed by national security doctrines and the "National Security State" is, as Professor A.S. Matthews explains, that a temporary derogation from the rule of law has a tendency to become relatively permanent.26

Threats based on terrorism, particularly when supported by weapons of mass destruction (WMD), provide a powerful justification for the triumph of national security power over the rule of law in constitutional and international law terms.27 In other words, the classic problem presented by the claim to a national security doctrine presents a critical question of whether power can indeed be constrained by law or whether such power is so critical to the survival of the state that it cannot and must not be constrained by law.28

We might assume that matters of critical national security simply represent the limits of law, so when we cross over onto the terrain of national security, legal culture is abandoned.29 This approach suggests that the role for lawyers,

 breaches of peremptory norms by dissenting states under the consensual framework of the international system by imposing obligations on these states deemed fundamental by the international community. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Request for Provisional Measures, 1984 ICJ REP. 196 (Order of May 10) (Schwebel, J., dissenting) ("These fundamental rights of a State to live in peace, free of the threat or use of force... are rights of every State, era omnes."). Accordingly, the right to self-defense is a "strong candidate for acceptance as [a] peremptory [norm] of international law." Christine M. Chinkin, Third-Party Intervention Before the International Court of Justice, 80 AM. J. INT’L L. 495, 513 (1986).

25. See AREND & BECK, supra note 23, at 73.


27. For an interesting explanation of the relationship between the rule of law and national security, see Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16 (2002). Judge Barak concludes that "[j]udicial review of the legality of the war on terrorism may make this war harder in the short term, but it also fortifies and strengthens the people in the long term. The rule of law is a central element in national security." Id. at 158.

28. This contest between security and power is an historic one. In 1974, Chair of the Senate Subcommittee on Constitutional Rights Senator Sam Ervin stated that "with power comes the ability to do harm. The fundamentals of our constitutional system [and others] require us always to ensure that governmental power is sufficiently constrained by law so that as much as is humanly possible the power of government is used for good alone." STAFF OF SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS, Comm. of The Judiciary, 93d Cong., Preface to Federal Data Bases and Constitutional Rights: A Study of Data Systems on Individuals Maintained by Agencies of the United States Government, at III (Comm. Print 1974). However, some scholars believe that international law leaves open whatever international recourse is necessary to protect the survival of a state’s population. See, e.g., Beres supra note 22, at 31.

29. Some scholars argue that when matters of national security arise, international law regarding the use of force, particularly in the U.N. Charter, ceases to be viable. Professors Franck, Comba-
and the concept of legal accounting, must necessarily be limited. 30 On the other hand, we might view law as so critical to the values that make social organization worth defending that we cannot assume an abdication of the role of law and legal culture, even in the context of a strong claim to the use of power for national security. We would submit that lawyers in general are committed to a principle of realism. 31 This principle requires an abdication of the lawyer role only in absolutely extreme circumstances. We submit that the operative presumption should be that the lawyer's role is even more critical in the context of claims to national security because the stakes posed by the clash of law and power are so high. 32

Lawyers and concerned policymakers might improve the quality of decision making if careful self-appraisal were directed at national security doctrines. This approach would ensure that the invocation of the national security doctrines, as far as reason permits, would be consistent with the constitutional foundations of the state, as well as those of the international system. One of the central elements of the political theory and jurisprudence of the state is the assumption that it does not exist to secure its own destruction. 33 To service this objective, every state has an implicit—or, indeed, explicit—national security doctrine of some sort. It is possible, as the Romans saw it, that the safety of the state is indeed the most important objective of politics and law. 34


30. The normative aspect of the lawyer's role reflects upon the systems of cultural and professional identifications of lawyers. Professor Winston Nagan asks, "do they identify themselves as bureaucrats, as champions, as acolytes, as 'friends' or are they influenced by the basic law models of operational systems or the prescribed values of the UN Charter?" Winston Nagan, Lawyer Roles, Identity, and Professional Responsibility in an Age of Globalism, 13 Fla. J. Int'l L. 131, 133 (2001). The U.N. Charter emphasizes values including world peace, security, human rights, and development, which constitute the procedural and substantive foundations of the international rule of law. Id. at 133. It might follow that the role of the international lawyer changes in times of national security concern.

31. See generally Martti Koskenniemi, The International Library of Essays in Law & Legal Theory, Area 5: International Law xviii (Martti Koskenniemi ed., 1992) (suggesting that lawyer realism is important and that the ongoing argument between realists and idealists is an unproductive intellectual "cul-de-sac").

32. The role of the international lawyer encompasses principles "built around several critical 'keynote' concepts which seek to secure peace, security, basic human rights and responsible eco-social progress." Nagan supra note 30, at 153.

33. In other words, a state will notrationally be complicit in its own demise.

Neither the state nor the scope and content of national security concerns are static matters. For example, technological advances at once enhance security and insecurity. One state's security claim may be another state's concern for its own vulnerability. More than that, one state's claim to security may pose a threat to the security of the entire world community. Hence, the odd juxtaposition promoted by law is that both national security claims and collective security claims are—on their face—valid. The tragic events of September 11, 2001 resurrected the problem of a superpower gravitating not only to a particular kind of claim to national security, such as the informal declaration of an indefinite war against global terrorism made by President Bush, but also of the construction of a particular politico-juridical state for the future of the nation. In other words, the claim implies a "national security" or "garrison" state of indefinite duration. The claim implicit in the evolution of our current national security posture seems to be in the direction of Lasswell's famous "garrison state" hypothesis. 35

The central question that vexed lawyers at the height of the Cold War was how to secure civil liberties in a time of crisis over WMD. The internal legal culture and the position they articulated under domestic law were subject to pressures about the scope of executive power, with an emphasis on the needs of and fidelity to the values of the American republic. Since a central value of American law and politics is the idea of limited power, a claim promoting expansion or unlimited powers based on a national security crisis poses a serious threat to the principle that official power must be subject to law.

The U.S. attack on Iraq notably required the articulation of a very carefully structured national security doctrine. It required significant reevaluation of the boundaries of self-defense in an age in which terrorists may have access to and might be able to deploy WMD. Moreover, the question of regime replacement in light of the abuse of sovereignty typical of the "rogue state" requires us to carefully examine the notions of national sovereignty and the state in international law as they are currently understood. Such an approach might deepen our appreciation of the relationship between national security doctrines and actual practice in international law. This perspective may help us appreciate the challenge the new Bush Doctrine poses for the rule of law and its legal currency in the Iraq crisis. It should be noted that states large and small, particularly the planet's hegemons, have some sort of national security doctrine, and, in different ways, confront the problems of law and power. 36


36. With regard to national security doctrines, most states have two priorities: "[o]n one hand, protecting national security; on the other hand, protecting the dignity and freedom of every person." Further Hearing 7048/97, Anon. v. Minister of Defense, 54(1) F.D. 721, 740 (Isr.). This is because "there is no choice... in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the other... to create a balance... between the freedom and dignity of the individual and State and public security." Id. at 743; see also Baruk, supra note 27, at 155 ("[p]rotection of national security is a social interest that every State strives to satisfy.").
The challenges or responsibilities of the safety and security of the American people do come at a price. Law must pay for a part of the bill, but how much? Perhaps the eighteenth century ghosts of Marbury and Madison will continue to haunt us in thought as well as in deed. States may think in very different ways about how they might secure the survival of their vital interests. Some states effectively see any threat to their survival as a threat to the moral values implicit in their organization; in these cases, defending the state might prove difficult because these states' values may be threatened by an internal enemy. What about the extra-territorial international law aspects of our problem? Before we take a harder look at this issue, a comparative as well as a national overview of previously employed national security doctrines might better ground our discussion of how national security doctrines impact the rule of law.

III.
NATIONAL SECURITY DOCTRINES AND THE LESSER POWERS

Rather than begin this analysis with a review of national security doctrines of great powers such as the United States or the Russian Republic, we first embark on a perhaps counter-intuitive, but insightful analytical approach by briefly assaying national security doctrines of smaller states and non-governmental entities. This focus allows a greater appreciation of the ubiquitous problems and issues tied to the legal regulation of national security interests. The first example is Costa Rica. Costa Rica has a markedly different conception of how it protects itself as a state as compared to other states. Rather than craft a traditional national security doctrine, its security values are constructed around the fact that it does not want a professional army, air force, or navy. The implicit policy that sustains this judgment is the idea that the militarization of a society constitutes a greater threat to state security than not investing vast resources in military institutions. As a result, Costa Rica apparently relies on collective (regional or national) security principles and concludes that joining the arms race simply increases security threats. Thus, Costa Rica instead opts for disarmament, peace, human rights, and the rule of law to enhance its own prospects of peace and security.

The second example is a state with unique and exceptional qualities: the Vatican. Quixotically, one is reminded of Stalin's comment about the Vatican State's lack of a national security apparatus. The question he asked rhetorically was, "How many divisions has the Pope?" The Pope maintains a small Swiss Guard to maintain public order, but such a security concession appears to be largely symbolic and ceremonial. Of course, the Vatican managed to survive


38. Id.


without an army when Italy was a fascist state occupied by the Nazis, who were generally unsympathetic to Catholic values. The Vatican’s doctrines and practices during the war are still considered somewhat controversial, since ostensible neutrality in the face of the Nazi scourge led the Vatican to remain silent regarding the Christian values it championed. However, such a position might have been important to the Vatican’s survival in other ways.

Our third example comes from South Africa. Its approach to national security under the Nationalist Party was the crude “Total Onslaught” doctrine, which was based on three principles: 1) communist aggression and subversion was a major international threat to the South African state, 2) De swart gevaar (the threat of black internal resistance), and 3) Kragdadigherd (the use of brute force, both internally and externally to defend the state). Later, South Africa refined these doctrines to position itself as an integral cog in the global defense of “freedom” against communism. In effect, it sanctioned an unlimited “war” against the opponents of apartheid, which involved interventions abroad, state terrorism, and death squads at home. The international community subsequently determined apartheid was a crime against humanity.

Our fourth example, the former Socialist Federal Republic of Yugoslavia (SFRY), had a formulated military doctrine. The SFRY contemplated the threat posed by new Soviet policies (Perestroika and Glasnost) and feared the prospect of the Federation’s fragmentation. In response, it created the infamous “Operation Ramparts” doctrine, based ideologically on the equally infamous doctrine of the Serbian Academy, the “Serbian Memorandum.” The memorandum posited the idea of a greater Serbia, and the security doctrine to secure it was “Operation Ramparts.” The fundamental assumption made by the Serbian elite was that if the SFRY could not avoid disintegration, the army (the JNA) would milit-


42. In a private conversation with British Ambassador to the Vatican, Ivone Kirkpatrick, the Vatican’s Secretary of State under Pope Pius XI, Eugenio Pacelli (the future Pope Pius XII) expressed “disgust and abhorrence” of Hitler’s reign of terror, but stated on August 11, 1933 that “[he] had to choose between an agreement on their lines and the virtual elimination of the Catholic Church.” IVONE KIRKPATRICK (The Vatican) TO SIR ROBERT VANSITTART (Aug. 19, 1933) IN DOCUMENTS ON BRITISH FOREIGN POLICY 524 (1956); see also RALPH STEWART, POPE PIUS XII AND THE JEWISH (1999).

43. See House of Assembly Hansard, Mar. 21, 1980, Col. 3321 (remarks of P.W. Botha) (“South Africa finds itself the target of a three-pronged onslaught... calculated to bring about the downfall of this state... The main object of the onslaught on the Republic of South Africa, under the guidance of the planners in the Kremlin, is to overthrow this state and create chaos instead, so that the Kremlin can establish its hegemony here.”).


45. For a brief historical summary of events leading up to the drafting of the Serbian Memorandum, see Murat Somer, CASCADES OF ETHNIC POLARIZATION: LESSONS FROM YUGOSLAVIA, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 143 (2001). See generally VUK DRASKOVIC, KNIFE (2000).
tarily conquer as much of the SFRY as could be absorbed into a greater Serbia. The Serbs’ ethnic cleansing policy led to the creation of the International Criminal Tribunal of Yugoslavia (ICTY) and the principle of international military intervention.\(^4\)\(^6\)

Our fifth example centers on the conflict in the Middle East between the State of Israel and the Palestinian people, and the various institutions that compete for leadership among them. This conflict creates important insights into the nature of national security doctrines as well as the problem it poses for the international rule of law. In situations of extreme conflict, state and non-state participants are often fueled by informally constructed security doctrines generated by elites or counter-elites. For instance, elements in the Likud Party maintain that Israel cannot be made secure unless it has expanded secure boundaries that include territories historically identified as Sumeria and Judea.\(^4\)\(^7\) Thus, the idea exists that at the end of the day, Israel might only be secure if it can establish a “Greater Israel.” The doctrine—as advocated by these interests—is sometimes supported by the idea that it is historically just to claim territories that were originally part of the Hebrew heritage.\(^4\)\(^8\) The claim to security in these terms would be incompatible with not only the original resolution for the partition of Palestine, but other U.N. Resolutions which indicate that a final disposition of territorial claims must be implemented according to law rather than the unilateral claims to a zone of exclusive security. In short, such a claim would seriously challenge important aspects of international law.

From the Palestinian perspective, Palestinian State rights can never be achieved on the basis of a U.N. Resolution, which might be seen as dispossessioning Palestinians of their land, or the realism of Israel’s national security claims, which might involve the extinction of Palestinians’ rights. These elements also seem to see the future as requiring a “Greater Palestine” and an extinction of the State of Israel.\(^4\)\(^9\) These points of view do not represent the official positions of either the government of Israel or what is left of the Palestine authority. But there are powerful social forces at the controlling ends of both institutions that vigorously assert these kinds of national security doctrines and therefore significantly influence the prospects of peace under law. Moreover, the claims to the


\(^4\)\(^7\). Israel’s right wing national party, Likud, has consistently encouraged settlement in Palestinian occupied territories and plans on annexing the territories. Within the Israeli right there is the secular nationalist wing, embodied in the Likud, and the radical right, spearheaded by the settlers of the occupied territories. See Ehud Sprinzak, The Politics of Paralysis I: Netanyahu’s Safety Belt, FOREIGN AFF., Jul. 1, 1998, at 18; see also Divide and Multiply, THE ECONOMIST, Apr. 25, 1998, at 8.

\(^4\)\(^8\). See Sprinzak, supra note 47, at 18.

\(^4\)\(^9\). Some Palestinian authors argue that if Israel retains any measure of control or jurisdiction over the Palestinian settlements in the event of a lasting Israel-Palestine accord, such control would be tantamount to annexation and would in fact preempt the outcome of the final status negotiations. They argue that the continued existence of Palestinian-controlled territory is contingent on the total absence of Israeli control or involvement. See generally Geoffrey R. Watson, The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements (2000).
integrity and security of the state and the claims for self-determination and independence have generated strategic initiatives that, on their face, are violations of international law. For example, the use of homicide bombers to attack Israeli civilians seems to be a clear violation of various provisions of the Geneva Conventions. It remains unclear which forms of Israeli retaliation also meet the standards of the Geneva Conventions and whether, in fact, the rules of belligerent occupancy (which incorporate the Geneva Conventions) impose specific obligations on Israel.50

In truth, the claims to national security and patterns of retaliation and counter-retaliation seem to gravitate to a position in which the rule of law is seriously weakened. In the words of the poet Yeats, "the ceremony of innocence is drowned."51 What, however, is striking about the national security claims within the framework of the Arab-Israeli conflict is the fact that each side often sought to justify its position by bringing it closer to the national security doctrines of the planet's hegemons, thus giving distinctively global dimensions to a regional conflict.52 It may be that converting a regional conflict into a global test of ideologies makes the conflict worse for the parties directly involved in it. The Middle East is awash in conventional weaponry and, notwithstanding the difficulty of finding WMD in Iraq, common sense requires us to acknowledge the existence of some forms of such weapons or the capacity to produce them.53 This acknowledgement presents a threat from state and non-state actors alike.

50. Israel's position is that the fourth Geneva Convention is not applicable to the disputed territories; specifically, Israel argues that:

The fourth Geneva Convention, where it applied—and to our knowledge it has never formally been applied anywhere in the world—is intended for short-term military occupation and is not relevant to the sui generis situation in this area. Moreover, even were the laws of belligerent occupancy applicable, these rules, including the 1907 Hague Convention, contain no restriction on the freedom of persons to take up residence in the areas involved.


IV.
NATIONAL SECURITY DOCTRINES AND THE HEGEMONS

Great powers or hegemons are the key formulators of national security doctrines. The global salience of their "claims" to spheres of security interests has an influence on the conditions of world order, especially the system of power and legal relations upon which it is based. At first blush, it may seem somewhat oxymoronic to think about any national security doctrine as having to do with rule of law. In general, the historic invocation of the necessity of national security powers was meant to limit the role of law in the exercise of those powers. Invocation of most national security competences insulates political decision-makers from the restraints of conventional, constitutional, and even international law. Thus, national security powers are ostensibly political and not legal.54 They are justified by the claims that the state's survival or critical interests can only be secured by authorized political decision-makers who must be given the degree of political discretion to make effective strategic and tactical choices about the safety and security of the body politic. A viable national security doctrine is not merely a strategic option for the United States, it is a strategic, governmental imperative. American international lawyers might best deal with the accompanying clash between international law and international power by examining past American national security doctrines.

A. National Security and United States Executive Authority

Under the Oath of Office clause, the President, who exercises the constitutionally prescribed executive competence of the state, is obliged to "defend" the Constitution of the United States.55 Other officials may be required to support the Constitution, but the President alone has the textual obligation to defend it. This article is the prime source of the President's power over matters of national security. The President does not have the power to declare war; that authority is vested in the Congress.56 The President does, however, have the authority over the conduct of war and armed conflict. Although limitations are imposed on this power, its effect is vast and in the event a superpower President occupies the White House, the fate of humanity rests in his control.

The effect of a greater state's hegemonic ambitions can be tempered by the power-balancing effect of a lesser state's strong national security doctrine. Indeed, a strong national security doctrine is also a core component of a lesser state's realistic foreign policy decision-making. The proliferation of strong national security doctrines in states large and small may eventually establish a


55. U.S. CONST. art. II, § 1, cl. 7.

56. U.S. CONST. art. I, § 8, cl. 11.

https://scholarship.law.berkeley.edu/bjil/vol22/iss3/3
DOI: https://doi.org/10.15779/Z38R063
common security, an emergent concept of international relations, which seeks to interlink domestic national security doctrines with international human security.

In the United States, the President, his National Security Advisors, his intelligence advisors from the Pentagon and the CIA, and his political advisors from the Department of State as well as his informal but influential ties and connections to the private sector facilitate the formulation of the semi-official national security doctrine of the nation. The doctrine was an especially important part of the strategic positioning of the United States during the Cold War, although prior to the Cold War, the United States did formulate doctrines that incorporated national security values for the region. In searching for a rationale for the public exercise of articulating and disseminating a national security doctrine for a particular administration, several target audiences are implicated within the reach of the communication. These could be well known competitors for power in the global arena. During the Cold War, the major competitor scrutinized in the name of U.S. national interests was the power with the capacity to destroy the United States. That power was the Union of Soviet Socialist Republics (USSR). It became important for the President to articulate as clearly as possible how the United States perceived its vital interests and what it might do to defend them.

Nevertheless, the power positions of both the United States and the USSR maintained symmetry, as the USSR sought to articulate its own doctrines and the scope of its vital interests. An assumption implicit in the invocation of most national security competences is that the articulation of these doctrines lent a degree of predictability as well as stability to relations between the two power hegemons. But the question remains as to whether such doctrines have a juridical basis, and if not, should they? Further, if they should, what exactly is the relationship between the law, the definition, and the expectations incorporated in the assertion of national security interests via national security doctrines? To the extent that law can have something to do with national security interests—the most visible institutional and professional expression of which is found in the ABA section on National Security—as well as the development of executive instruments of self-limitation, congressional legislation, a potpourri of internal administrative regulations and controls for intelligence agencies, and the development of teaching materials and courses, we must assume that national security is indeed subject to national security law. The specific issue we want to examine is the extent to which the formulation of a national security doctrine (or expectation) is an indication of a state’s willingness to project power to defend its certain interests. The critical question is whether the rule of law constrains

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the formulation, projection, or application of such power. This essentially means that we confront the problem of national security powers in terms of legal restraints, if any, on those powers; in short, we confront the clash of law and power.

The practical Romans, although deeply committed to the culture of Roman law, seemed to accept the principle that during war the law is silent. The Roman maxim *inter arma silent leges* affirms this.58 This spirit is reflected in a President whose power to conduct war is rooted in his constitutional authority. In 1998, Chief Justice of the United States Supreme Court William Rehnquist provided the Roman idea with a modern constitutional gloss. His view is that during war, the government's authority to limit civil liberties is greater than such power exercised in times of peace.59 The Chief Justice believes that it is:

> neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime, but it is . . . likely that more attention will be paid by the courts to the basis of the governments' claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent during time of war, but they will speak with a somewhat different voice.60

A fair appraisal of the philosophy behind this conclusion may lead one to believe that the fundamental assumption about the role of law and the role of courts as protectors of civil liberties and human rights does not presumptively kick in during a national security crisis, such as war.61 On the other hand, this statement may also be charitably viewed as not incorporating a complete abdication of the role of law in the management of national security powers in conditions of crisis.

The object of this article is limited to national security law in the larger global environment and an exploration of its precise impacts on international legal order and international law. However, lines between what constitutes the domestic, the municipal, and the national, as well as the global or the international, are historically difficult to draw.62 In the aftermath of the September 11

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59. Chief Justice Rehnquist's wartime/peacetime dichotomy might not represent an evocative empirical distinction. There may never again be another war officially declared by Congress, as required by the Constitution. Of the more than two hundred active deployments of U.S. troops abroad in the history of the United States, Congress has only declared five wars, none of which have occurred since World War II. See Thomas Franck & Michael Glennon, *Foreign Relations and National Security Law: Cases, Materials, and Simulations* 649 (2nd ed. 1993).

60. See Rehnquist, supra note 58, at 224-25.

61. Chief Justice of the Israel Supreme Court, Aharon Barak, wrote that "one must recognize that the court will not solve the problem of terrorism. It is a problem to be addressed by the other branches of government. The role of the court is to ensure the constitutionality and legality of the fight against terrorism." See Chief Justice Aharon Barak, The Role of a Supreme Court in a Democracy and the Fight Against Terrorism, Cambridge Lectures (Jul. 18, 2003) (transcript available at http://www.embassyofisrael.dk/messageboard/TheRoleofaSupremeCourtinaDemocracyandtheFightAgainstTerrorism.pdf). He went on to write that the Court "must ensure that the war against terrorism is conducted within the framework of the law and not outside it. This is the court's contribution to the struggle of democracy to survive." Id.

62. "Globalization . . . is a multifaceted concept encompassing a wide range of seemingly disparate processes, activities, and conditions . . . connected together by one common theme: what is geographically meaningful now transcends national boundaries and is expanding to cover the entire

https://scholarship.law.berkeley.edu/bjid/vol22/iss3/3
DOI: https://doi.org/10.15779/Z38R063
attacks, Congress enacted the Uniting and Strengthening America Providing Appropriate Tools Required to Intercept or Obstruct Terrorism Act of 2001 (the "PATRIOT Act"). Among the high visibility issues under this and other legislation are the concerns regarding national security detentions of citizens and non-citizens, national security trials, and the procedure of military tribunals. These issues implicate both civil and political rights as well as international obligations under human rights law and, in particular, they implicate the standards of the Geneva Conventions for the conduct of war and activities analogous to war. The domestic lawyer must confront the effect of domestic legislation that seeks to control and regulate international terrorism under the auspices of U.S. domestic law, which is designed to have extra-territorial applications and circumvent the scope of both civil and political rights, and the protections of international humanitarian law. Congressional legislation and executive practice and initiatives have thus vastly expanded the scope of national security law and the challenge to the rule of law from both a domestic and an international point of view.

planet. Globalization has led to an awareness that international issues, not just domestic ones, matter." Alex Y. Seita, Globalization and the Convergence of Values, 30 CORNELL INT'L L.J. 429, 429 (1997); see also Alfred C. Aman, Jr., 1 IND. J. GLOBAL LEGAL STUD. 1, 1-2 (1993) ("globalization" refers to complex, dynamic legal and social processes. . . Today, the line between domestic and international is largely illusory.")


64. After September 11, 2001, the FBI rounded up and arrested more than one thousand Middle-Eastern men in the United States. See Peter Grier, Which Civil Liberties—and Whose—Can be Abridged to Create a Safer America?, CHRISTIAN SCI. MON., Dec. 13, 2001, available at http://www.csmonitor.com/2001/1213/pls2-usju.htm. In October 2001, rules were created to suspend attorney-client confidentiality privileges for certain categories of this group of detainees. Id. These rules are a part of a "multipiece package of legal changes which, taken together, represent a profound increase in federal policing powers." Id. To justify these new policies, the Bush administration reasoned, "[w]e're battling an enemy committed to an absolute unconditional destruction of our society." Id. The Bush administration apparently believes that terrorists prefer to attack "ordinary Americans, in their homes and places of work. That's a new threat, and guarding against it may require a new kind of domestic police work." Id; see also Dante Chinni, Wide FBI Dragnet Turns Up Leads, But Also Criticism, CHRISTIAN SCI. MON., Oct. 15, 2001, at 2 (stating that "[i]nvestigators' willingness to 'go out there and take in every single person that may have done something wrong' is troubling, says a former senior FBI official. Civil rights violations are not his only concern: several FBI agents working on the case have told him in the past week that the investigation may lack focus . . . [because] it is much more of a blanket approach than a laser approach.").

65. Scholars debate about the extent to which the Patriot Act affects American citizens' civil and political rights. Many authors are quite opposed to it. See Nancy Chang, How Does USA Patriot Act Affect Bill of Rights?, 226 N.Y.L.J. 109, at 1 (2001) (arguing that the PATRIOT Act has the "potential to diminish our privacy and political freedoms to an unprecedented degree by enhancing the executive's ability to conduct surveillance, placing new tools at the disposal of the prosecution, and granting the authority to detain immigrants suspected of terrorism for lengthy, and in some cases indefinite, periods of time."). Others argue that infringing on civil and political rights is justifiable in light of the importance of preventing future terrorist attacks. See William C. Banks & M. E. Bowman, Executive Authority for National Security Surveillance, 50 Am. U. L. Rev. 1, 4 (2000) (observing that "invasions of privacy [may be construed] as necessary evils in enforcing the criminal laws . . . [and in] seeking intelligence information.").

Published by Berkeley Law Scholarship Repository, 2004
B. National Security Challenges Faced by American International Lawyers

American lawyers who practice internationally confront a problem the moment they are conscious of the fact that they call themselves international lawyers. If the scope and character of a national security doctrine purports to trump law, these lawyers are not only irrelevant, but they become apologists for the triumph of power over law. Even Chief Justice Rehnquist to some degree stops short from that precise conclusion in the context of domestic law. This leaves American international lawyers with a more difficult task. In order to stress the idea that our constitution subjects a political authority to the restraints of law, our lawyers must consistently appraise specific applications of national security doctrines to ensure that they can be reconciled with international law. American lawyers are acting from a powerful domestic need to ensure that the projection of American power via a national security imperative can be rationalized as falling within the outlines of the U.N. Charter. This can lead to fairly self-serving constructions of what international law requires, but the central purpose here is less to influence the international community than to defend the principle that the U.S. government is not acting outside the law nationally or internationally.\footnote{66. The United States is party to various international conventions which articulate the signatories' pledge to abide by international law. This pledge is perhaps best articulated by the Preamble of the Charter of the United Nations, which states in part that signatories pledge "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and ... to unite our strength to maintain international peace and security, and ... to employ international machinery for the promotion of ... all peoples." U.N. CHARTER, pmbl. The United States has been a signatory to the U.N. Charter since it entered into force on October 24, 1945.}

The impression garnered by international lawyers outside of the United States is that American international lawyers are driven by U.S. interests and their constructions of international law are designed to serve narrow national interest of the United States.\footnote{67. It is a widely held belief among non-U.S. lawyers and government officials that the United States international or government lawyer serves the interests of "his supervisor in the department or agency, the agency itself, the statutory mission of the agency, [and] the entire government of which that agency is a part ..." Note, Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1413, 1414 (1981); see also Geoffrey P. Miller, Government Lawyers' Ethics in a System of Checks and Balances, 54 U. CHI. L. REV. 1293, 1298-99 (1987) (suggesting that the duties of the executive branch attorney generally serve the interests of the executive branch); Robert Lawry, Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question, 37 FED. BAR J. 61, 62 (1978) (observing that rather than ask "who is the client?", the U.S. government lawyer typically asks whose directions must be taken, whose confidences must be respected, and exactly how does his or her role determine what course of action must be taken with respect to everything else).} We suspect there is some truth in this position, but we are inclined to think that American lawyers are basically conservative and that they do not, under any circumstances, want to concede the principle that the government itself is not subject to law. In this sense, American international lawyers seek to preserve the rule of law even in national security conditions, where considerations of crisis management loom large. It is also the case that not many states articulate as explicitly their national security doctrines or interests upon a change of government, if they ever experience a change of govern-
ment. As a result, American lawyers and the legal culture they represent have significantly enriched discussions concerning the classical problem of the confrontation between law and power in the international law context.68

C. National Security Doctrines: Cold War to the Present

During the Cold War, the dominant doctrine of the United States was fed by the principle that Soviet imperialism had to be contained. This was a cardinal principle behind the so-called Truman Doctrine.69 In the defense of this doctrine, the United States was able to secure the support of the United Nations and, although the United States led the military operations in Korea, it was in effect a U.N. sanctioned operation. The intellectual roots of the Truman Doctrine were attributed to a famous article published anonymously by the diplomat, scholar, and historian, George Kennan.70 The doctrine was devised under the assumption that the USSR was an imperialist, revolutionary state and that it sought to subvert the international state system by supporting revolutionary activities designed to secure regime change of a socialist character. The fundamental principle was therefore the doctrine of containment.71 International activity by the hegemons to either contain revolutionary nationalism or to expand it posed a powerful threat to the constitutional foundations of international legal order based on the U.N. Charter. Scholars could conceptualize the problem of defining spheres of influence as an element of a national security doctrine, which essentially requires a weakening of the idea of sovereignty. Another possibility might be the concept of permeable sovereignty; sovereignty subject to superpower intervention as a disguised claim to change the constitutional foundations of world order to account for the distribution of real power in bi-polar terms.72 This clash of superpower spheres of interest and influence

68. "[International] law is neither a frozen cake of doctrine designed only to protect interests in status quo, nor an artificial judicial proceeding, isolated from power processes . . . [W]hen understood with all its commitments and procedures, law offers . . . a continuous formulation and reformulation of policies and constitutes an integral part of the world power process." Myres McDougal, Law and Power, 46 AM. J. INT’L L. 102, 111 (1952).

69. Of the doctrine that bears his name, President Truman officially asserted, "I believe that it must be the policy of the United States to support free peoples who resist attempted subjugation by armed minorities or by outside pressures." Jeanne J. Kirkpatrick & Allan Gerson, The Reagan Doctrine, Human Rights, and International Law, in LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 26 (2d ed. 1991). However, Truman articulated his personal beliefs regarding war in his memoirs: "[t]here is nothing more foolish than to think that war can be stopped by war. You don’t prevent anything by war except peace." HARRY S. TRUMAN, MEMOIRS, VOL. II: YEARS OF TRIAL AND HOPE 383 (1956).

70. See The Sources of Soviet Conduct, 25 FOREIGN AFF. 566 (1947) (authored by George Kennan during his tenure as Director of the Policy Planning Staff in the State Department; scholars widely believe the article represents an official policy statement of containment of Soviet power and international communism).

71. Id.

72. In other words, by permeable, we mean that the major powers claimed a right to intervene to secure and protect their virtual ideological, economic, military, and other interests. After the fall of the USSR, post-Communist brushfires swept the globe and fresh governmental, social, and economic powers rose in East Asia and the Middle East to challenge the United States. Author Samuel Huntington asserts that no final victory for Western-style democracy and capitalism is possible because of the emerging, unavoidable conflict between the great civilizations of the world, each with
would deepen considerably as the development of nuclear weapons and sophisticated methods of strategic deployment increased the stakes concerning the survival of civilization. This, of course, posed a vital threat to the constitutional order of the U.N. Charter and how it would ultimately evolve as an instrument of world order and progressive change.

When the USSR became a nuclear power, the assumption that it was an imperialist state with nuclear weapons provoked a modified version of the Truman Doctrine, the Dulles-Eisenhower Doctrine of massive retaliation, or Mutually Assured Destruction (MAD). 73 From a legal point of view, a doctrine which seemed to shortchange the principle of necessity, undermine the principle of proportionality, and completely ignore the principle of humanity raised the question of whether technology had not itself superceded the international law rules regulating the conduct of war. 74 In effect, the international community had to wait until 1996 for the International Court of Justice to provide a legal clarification of the circumstances under which nuclear weapons could be used and the scope of such use. 75

Recognizing that massive retaliation might overstate any security crisis and elevate it to a direct, superpower conflict (specifically, the Cuban missile crisis), 76 President Kennedy developed a nuanced version of the MAD doctrine. This was the doctrine of “Flexible Response.” 77 The Kennedy Doctrine of “Flexible Response” led the United States into the Vietnam conflict and raised important questions about the lawfulness of intervention in that country as well as the conduct of the war itself. The CIA’s policy of assassinating Viet Cong

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73. The defense strategy of MAD evolved from the principle that neither the United States nor its enemies would initiate a nuclear war because the opposing side would retaliate massively. See generally H.W. BRANDS, JR., COLD WARRIORS: EISENHOWER’S GENERATION AND AMERICAN FOREIGN POLICY 8-9 (1988).

74. Dulles is renowned for his risk-taking in Korea, Indochina, and the Formosa Straits conflicts, yet he was practical enough to refrain from painting the United States into a nuclear corner; in the Southeast Asian crises of 1953, 1954, and 1955, he repeatedly declared that he had deterred the Chinese from aggression by threatening them with punishing nuclear retaliation. Id. at 9-20. Interestingly, such risk-taking came to an abrupt halt in the Eisenhower Administration when it came to preventative warfare. On the issue of preemption, President Eisenhower asserted, “[a] preventative war, to my mind, is an impossibility . . . . I don’t believe there is such a thing and frankly I wouldn’t even listen to anyone seriously that came in and talked about such a thing.” JOHN F. STACKS, SCOTTY: JOHN B. RESTON AND THE RISE AND FALL OF AMERICAN JOURNALISM 133 (2003).


76. Interestingly, President Kennedy also dismissed the notion of preventatively attacking Cuban missile sites; Robert Kennedy called preemptive attacks “Pearl Harbor in reverse.” See ARTHUR SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 308 (1978).

77. Under the Kennedy Administration’s “Flexible Response” Doctrine, the United States military discontinued its procurement of heavy missiles and instead concentrated on developing significantly larger amounts of smaller missiles to better facilitate the complete elimination of enemy forces. See SENATE FOREIGN RELATIONS COMMITTEE, REPORT ON THE SALT II TREATY, S. Exec. Doc. No. 96-14, at 68-69, 167-73 (1979). For example, the government’s shift in munitions preference permitted the development of the Minuteman missile, a small, accurate, relatively inexpensive and solid-fueled missile that the United States could produce in high numbers and which eliminated the need for heavy payload missiles with counter-force capabilities. Id.
leaders was an issue that focused on the role of intelligence and conduct during armed conflict. It was claimed that some 20,000 Viet Cong leaders were assassinated by CIA and allied operatives in the Phoenix Program. These issues led to U.S. executive orders seeking to constrain the ability to assassinate foreign leaders under the umbrella of national security imperatives.

The Nixon administration sought to avoid the pitfalls of the Kennedy "Flexible Response" and formulated a doctrine that assumed a certain symmetrical disposition of power between the USSR and the United States. This led to détente between the United States and the USSR and, indirectly, the stability thus strengthened the rule of law in some ways and weakened it in others. To this was added a kind of quasi-juridical recognition of the respective spheres of hegemonic containment. This would result in rhetorical condemnation of superpower interventions in their own spheres of influence but no prospect of direct military confrontation. This doctrine did much to support superpower interventions.

The Carter Doctrine endeavored to dramatically expand the role of law as a stabilizing factor in the world community by seeking to provide solutions to regional problems and vigorously expanding concern for human rights. A central element of the Carter Doctrine was the idea that needless confrontations with other hegemonic powers ought to be avoided; the consequences of a failure to maintain stable expectations among superpowers could, indeed, be catastrophic. The idea of minimizing conflict with the USSR—unless it was absolutely required—was also a way of reinventing some of the basic constitutional values of the U.N. Charter.

The Reagan Doctrine was a significant change from all previous doctrines. The Reagan policymakers believed that the USSR was, in fact, vulnerable and could be militarily challenged in various parts of the world. The


80. For a general summary of the Nixon-Kissinger Doctrine, including its intention to modernize middle powers to enhance security against the Soviet Union and its subsequent toleration of internal repression within these regimes, especially within the Shah’s Iran, see ROBERT S. LITWAK, DETENTE AND THE NIXON DOCTRINE: AMERICAN FOREIGN POLICY AND THE PURSUIT OF STABILITY, 1969-76 (1984).

81. The Carter Doctrine emerged in January 1980 as an apparently lawful exercise of the critical zone practice. In response to aggression in Afghanistan on the part of the Soviet Union, President Carter declared: "An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force." 16 WEEKLY COMP. OF PRES. DOC. 197 (Jan. 23, 1980). The Carter Doctrine is not a disguised technique of intervention in the internal affairs of states; it justifies itself in that it derives its lawfulness from its articulated promised defense of governments from external aggression.

Reagan Doctrine was designed to move from containment, which was implicit in previous doctrines, to encroachment, which effectively attempted to roll back Soviet ideological and territorial influence.\(^83\) The Reagan Doctrine was fueled by his famous—or infamous—description of the "evil empire" associated with Soviet hegemony.\(^84\) Put simply, the theory was that the United States could spend the USSR into bankruptcy in the arms race and, indeed, it succeeded in doing so.\(^85\)

The Reagan Doctrine also had immense effects on other countries and regions, including a rapprochement-plus-constructive engagement approach to the problems in South Africa, engaging the Ayatollah Khomeini with a bible and a chocolate cake,\(^86\) and involving members of the Reagan administration in the Iran-Contra scandal. The encroachment inherent in the Reagan Doctrine was of great interest to international lawyers because Nicaragua sued the United States in the International Court of Justice and won.\(^87\) The United States argued that the ICJ did not have jurisdiction over the case, and that, in any event, the issue was a matter of national security and as a result, was not amenable to judicial settlement.\(^88\) It is possible to conclude that the Reagan Doctrine as applied to Nicaragua failed the test of basic lawfulness under international law.

The other controversial aspect of the Reagan Doctrine was the formulation of a policy of constructive engagement with the South African apartheid regime. It is hardly likely that the Congress would have promulgated the Comprehensive Anti-Apartheid Act of 1986\(^89\) but for the vigorous and controversial promotion of its endeavors to constructively engage racist South Africa as a part of the roll-back of communism worldwide. The Reagan Doctrine therefore inadvertently

\(^{83}\) Scholars and officials Kirkpatrick and Gerson wrote that the Reagan Doctrine functioned to restore self-government by subscribing to counter-intervention as opposed to intervention. See Kirkpatrick and Gerson, supra note 69, at 31. These scholars and officials further wrote that Reagan's was not a "roll-back" doctrine. Id. Based on the significant correlations between the Reagan Doctrine and its roll-back practices, however, we must disagree.

\(^{84}\) See Ronald Reagan, Remarks at the Annual Convention of the National Association of Evangelicals (Mar. 8, 1983), in PUB. PAPERS 359, 363 ("while they [in the Soviet Union] preach the supremacy of the state, declare its omnipotence over individual man, and predict its eventual domination of all peoples on the Earth, they are the focus of evil in the modern world.").

\(^{85}\) Eventually, after Nikita Khrushchev's bold threat, "Whether you like it or not, history is on our side. We will bury you," the arms race eventually ended with the "missile gap" favoring the United States. See Remarks following the signing of a Moscow-Warsaw joint declaration in Moscow, November 18, 1956, WASH. POST, Nov. 19, 1956, at 1; see also JAMES H. McBride, THE TEST BAN TREATY: MILITARY, TECHNOLOGICAL, AND POLITICAL IMPLICATIONS, 13-21 (1967).

\(^{86}\) In 1985, just after President Reagan's re-election, his administration embarked on an imprudent scheme to sell thousands of missiles and spare parts to secure the freedom of a small number of hostages from Iran, which was then ruled by the Ayatollah Khomeini. As part of the exchange, then National Security Adviser, Robert McFarlane and General Oliver North flew to Tehran bearing a Bible and a chocolate cake as apparent signs of good faith. See Mark Tran, Iran After Khomeini: White House Hopes for Better Times, GUARDIAN UNLIMITED, June 5, 1989, available at http://www.guardian.co.uk/print/0,3858,4613115-110875,00.html.


brought the United States not only into full compliance with international law, but made the United States an active promoter of change under international law. 90

The lesson of the congressional regime change initiative (South Africa) versus the Reagan Doctrine's effort at regime change (Nicaragua) indicates that Congress' approach, notwithstanding an attempted veto by the Reagan administration, was vastly more effective in promoting transition to democracy. The Reagan administration's effort to promote violence in Nicaragua proved very costly and provoked a constitutional crisis inside the United States. It should be noted that in the context of intervention, the Comprehensive Anti-Apartheid Act was a remarkable acceptance of the principle that either South Africa was a rogue state, or that its policies and practices of apartheid constituted an abuse of sovereignty under international law, which made U.S. intervention by the sanctions regime and its promotion of constructive initiatives of peaceful change a remarkable stratagem of action in modern international law. 91 Today, South Africa is a liberal democracy.

During the Cold War, the USSR also formulated its own national security doctrine. The Brezhnev Doctrine asserted the power to intervene in states within the Soviet sphere of influence to protect international socialist gains. 92 Both détente and the Brezhnev Doctrine accepted forms of intervention into the governance of nation states within the spheres of claimed hegemony. The fall of the USSR made national security claims based on the hegemons of a bipolar world seem obsolete. The new forms of conflict and threats to world order, particularly the new ethnic conflict threats to world order, did not fit into the existing definitions and perspectives of security specialists. When President George H. W. Bush came to power in the late 1980s his administration was confronted with a post-Cold War world, in which the United States was the only superpower.

The first Bush Doctrine confronted certain ethnic conflicts and acts of aggression, and in seeking the roll-back of Iraq after its invasion of Kuwait, positioned U.S. national security policy within the framework of the U.N. Charter.


Iraq’s invasion of Kuwait was severely rebuked in international circles where the U.N. Charter values, having survived the Cold War, were now under the direct threat of unilateral repudiation. The invasion was a direct violation of Article 2(4) and there was no pretense that Article 51 could cover the obviousness of the aggression. The great powers found the United Nations and rediscovered the U.N. Charter. The defense of the Charter was, admittedly, supported by the threat Iraq posed to vital energy interests in the region; but multilateralism became fashionable and the first President Bush saw an opportunity to construct a different doctrine based on what he thought would be a kinder and gentler world. However, the new world order rhetoric was short lived.

The non-ideological conflicts in the former Yugoslavia, Rwanda, Somalia, and elsewhere weakened the enthusiasm for multilateralism, which rekilled the latent U.S. interest in isolationism and stoked the general antipathy toward international responsibility. These forces have a long, dreary history of collectively and successfully blocking U.S. ratification of the principal human rights covenants. For example, they spearheaded the drive to prevent the United States from paying financial dues owed to the United Nations, they insisted on reforming the United Nations, and the rhetoric of the right-wing in the Senate was unrestrained to an extraordinary degree. The major casualty from such attacks was the Comprehensive Nuclear Test Ban Treaty. The Treaty was a vital complement to the Non-Proliferation Treaty and sent an international signal that the United States was not in favor of banning the proliferation of nuclear weapons.

As indicated earlier, most states have some sort of national security doctrine. The doctrine’s ostensible rationale is to defend the state’s national interests—or state’s perceived national interests. National security in general

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93. “President George Bush led the United States in the Gulf War coalition proclaiming, at the war’s end, a ‘new world order under the rule of law.’ The exemplary conduct of that coalition war reinvigorated the Charter rules and the role of the Security Council.” O’CONNELL, supra note 16, at 17.

94. For example, the Torture Convention was described by Senator Helms as “a skunk in a bag.” See Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations, 101st Cong. 2 (1990) (statement of Senator Jesse Helms). Senator Rod Grams of Minnesota described the International Criminal Court as a “monster” that had to be killed. See Jesse Helms, We Must Slay This Monster: Voting Against the International Criminal Court Is Not Enough. The US Should Try to Bring It Down, FIN. TIMES, July 31, 1998, at 18. Senator Gram wanted the U.S. government to “make sure the treaty is never ratified by the sixty nations necessary for it to go into force” and if the court should come into existence, against this out-and-out pressure by the United States on other countries, Gram urged a “firm policy of total non-cooperation: no funding, no acceptance of its jurisdiction, no acknowledgment of its rulings, and absolutely no referral of cases by the Security Council.” Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Congress, at 3 (1998). Right-wing Senators have additionally talked openly about their inspiration, which they garnered from the “defeat” of the League of Nations.


96. A national security doctrine is a series of concepts with no precise, analytic meaning. See generally Note, Developments in the Law: The National Security Interest and Civil Liberties, 85 HARV. L. REV. 1130 (1972). “At its core [a national security doctrine] refers to the government’s capacity to defend itself from violent overthrow by domestic subversion or external aggression... it also encompasses simply the ability of the government to function effectively so as to serve our...
targets the defense of basic values central to the integrity of the state. These values include the integrity of territorial security, the security of the population, security over basic resources, and defense of fundamental ideals. The strategies of national security tend to target military sufficiency, diplomatic efficacy, economic viability, as well as the management of the signs and symbols of communications propaganda. In international relations, the study of national security has stressed the role of these values in the global balance of power, in collective security, in the structural importance of federalist approaches to world order, and the development of integrated functionalist approaches to the field.97 The various doctrines would, in all probability, provide conceptual markers or guidelines to policymaking and might also be seen to trigger warning signs about the outline of perceived security interests and the extent to which the state might go to defend those interests.

V. THE NEW BUSH DOCTRINE98

When President George W. Bush came to power in 2000, his campaign stressed that U.S. interests would be viewed with more isolationism than before, with an inherent suspicion of multilateral ties, and with an even deeper suspicion of both the U.N. Charter and international human rights.99 This was not formulated as a doctrine, unless one assumes that the reinvention of isolationism is something novel in the American political landscape. The attacks of September 11 changed all of this. In the aftermath of the attacks, the outlines of a new national security doctrine began to emerge from the post-Cold War world in which the nature of perceived threats came from international terrorism directed both at U.S. global interests and at the heartland of the United States itself.100

It would be useful to give a brief overview of national security doctrine indicators in the current Bush administration prior to the events of September 11. First, there has always been a tendency to see the United States as having an exceptional position within the international legal system. This exceptionalism has often meant that the United States must carry a disproportionate burden

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97. Inis Claude, Jr., Theoretical Approaches to National Security and World Order, in NATIONAL SECURITY LAW 31, 36 (Moore et al. eds., 1990).
98. This section discusses the national security doctrine created by President George W. Bush and members of his administration.
100. See R.C. Longworth, 'Bush Doctrine' Arises From the Ashes of Sept. 11, CHI. TRIB., Mar. 7, 2002, at 4 (reporting that President Bush's post 9/11/01 foreign policy has become increasingly unilateral and isolationist); Emily Eakin, All Roads Lead to D.C., N.Y. TIMES, Mar. 31, 2002 at 4, (reporting the recent American scholastic development of branding the United States an "empire" with imperialist tendencies); Fred Hiatt, Our Rose-Colored Cold War, WASH. POST, Mar. 25, 2002, at A19 (criticizing the similarity between the United States' recent foreign policy anti-terror ambitions and twentieth-century Cold War-era policies).
when crises of great magnitude affect the planet. In more crude formulation, it is sometimes said that the United States is an important element in the process of policing the global environment. The fact that the United States is the strongest military power on earth seems to heighten the expectation of its role in interventions. Paradoxically, it also heightens the expectation that it can act unilaterally in these matters because it often pays the price for multilateral ineptitude, which may increase the prospect of retaliation. U.S. exceptionalism might be justified in different ways, including, but not exclusively, by U.S. commitment to democratic values and the rule of law, the U.S. track record of not being an imperialist occupying power, and U.S. economic power and military dominance.

Prior to the election of President George W. Bush there were indications that the grounds for American exceptionalism would serve as a justification for U.S. unilateralism. American unilateralism carries a political constituency long identified by the notion that U.S. exceptionalism justifies U.S. unilateralism. U.S. unilateralism, in turn, has a constituency that supports U.S. isolationism. Both isolationism and exceptionalism seem to be significant influences on the emerging foreign relations doctrine of the Bush administration. Prior to Bush’s electoral “victory,” he stated that the United States would retreat from its commitment to promote development, which would, correspondingly, suspend poverty alleviation around the world. In 1999, the Senatorial right-wing scored a major defeat against the Clinton administration when it became jurisdictionally seized of the Comprehensive Test-Ban Treaty and achieved its defeat. Although there was little public outcry about this shortsighted act, the opportunities for controlling and regulating nuclear WMD were seriously compromised.

Moreover, as earlier indicated, the right-wing contingent in the Senate was up in arms about the Rome Statute of the International Criminal Court (ICC), claiming that this treaty would compromise American sovereignty. So vehement was this antagonism to the ICC that many Senators suggested the United Nations was a candidate for extinction, much like the ill-fated League of Na-

101. Author Richard Haass argues that “the United States [must] act, whenever possible with others but alone if necessary and feasible, to shape the behavior and, in some cases, capabilities of governments and other actors so that they are less likely or able to act aggressively either beyond their borders or toward their own citizens and more likely to conduct trade and other economic relations according to agreed norms and procedures.” RICHARD HAASS, THE RELUCTANT SHERIFF: THE UNITED STATES AFTER THE COLD WAR, 4 (1997).

102. See JAMES C. HSIUNG, IS SOVEREIGNTY STILL RELEVANT? ANARCHY AND ORDER: THE INTERPLAY OF POLITICS AND LAW IN INTERNATIONAL RELATIONS IN GLOBAL LAW WITHOUT A STATE 18 (1997) (“[i]n the anarchic system, a specific violation of international law by one country—if it should stem from a unilateral action of self-help—is apt to invite reciprocal or competitive counter-violations by opponent states”). See generally Beth A. Simmons, Compliance with International Agreements, 1 ANN. REV. POL. SCI. 75 (1998).


104. Id.
tions. When President Bush came to power, he refused to sign the Kyoto Protocol on Global Warming even though the Protocol was revised to accommodate all articulated U.S. concerns. The Bush administration also developed a profoundly negative approach to the Anti-Ballistic Missile Treaty, the Nuclear Non-Proliferation Treaty, as well as the treaties governing biological

105. See Remarks by Senators Helms and Grams, supra note 94.


107. The Anti-Ballistic Missile Treaty between the United States and the Soviet Union was concluded in 1972. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, 944 U.N.T.S. 13; see also Note, Contemporary Practice of the United States Relating to International Law, 93 AM. J. INT’L L. 879, 910 (1999) (stating that Anti-Ballistic Missile Treaty functioned to stem nuclear warfare between the United States and the Soviet Union, so that "neither the United States nor the Soviet Union would initiate a nuclear attack if it were unable to defend itself against the retaliation that almost certainly would ensue."). Each party undertook not to deploy anti-ballistic missile (ABM) systems for the defense of the territory of its country, not to provide a base for such defense, and not to deploy ABM systems for individual regions. Id. In May 2001, President Bush withdrew the United States from the Treaty, stating that:

[W]e must move beyond the constraints of the 30-year-old ABM Treaty. This Treaty . . . enshrines the past. No treaty that prevents us from addressing today’s threats, that prohibits us from pursuing promising technology to defend ourselves, our friends and our allies is in our interests or in the interests of world peace. . . . When ready, and working with Congress, we will deploy missile defenses to strengthen global security and stability. . . . We are not presenting our friends and allies with unilateral decisions already made. We look forward to hearing their views. . . . We’ll also need to reach out to other interested states, including China and Russia. . . . We should leave behind the constraints of an ABM Treaty that perpetuates a [U.S.-Russia] relationship based on distrust and mutual vulnerability.

See President George W. Bush, Remarks at the National Defense University, 37 WEEKLY COMP. PRES. DOC. 685, 687-88 (May 1, 2001).

108. Defense Secretary Rumsfeld has observed that the Non-Proliferation Treaty and others like it do not require the destruction of the United States’ nuclear warheads. See Defense Secretary Donald H. Rumsfeld, Prepared Testimony for the Senate Foreign Relations Committee regarding the Moscow Treaty (July 17, 2002), available at http://usinfo.state.gov/topical/pol/arms/02071802.htm. Specifically, he has argued that “[t]his charge is based on a flawed premise – that irreversible reductions in nuclear weapons are possible. In point of fact, there is no such thing as an irreversible reduction in nuclear weapons. The knowledge of how to build nuclear weapons exists . . . Every reduction is reversible, given enough time and money.” Id. President Bush was no more reassuring than Secretary Rumsfeld in his response to a question as to why the United States still needed 1,700 nuclear warheads when he stated, “[y]ou know, friends really don’t need weapons pointed at each other. . . But it’s a realistic assessment of where we’ve been. And who knows what will happen 10 years from now? Who knows what future Presidents will say and how they react?” The President’s News Conference with President Vladimir V. Putin of Russia in Moscow, 38 WEEKLY COMP. PRES.
and chemical warfare.\textsuperscript{109} The administration’s policy on small arms and land mines was particularly unpopular in international circles.\textsuperscript{110} Individuals wielding small arms are responsible for almost 500,000 deaths each year.\textsuperscript{111} John Bolton, President Bush’s Representative for Arms Control and Security, told the United Nations that the Second Amendment to the U.S. Constitution protected an individuals’ right to keep and bear arms; the United States, therefore, would not support limiting trade in small arms or limiting civilian access to small arms.\textsuperscript{112}

The attacks of September 11 provided fuel for those who feel that unilateralism is the only effective way to protect vital national security interests. This has provoked a major discussion and significant conflict within the Bush administration. This conflict reflects the claim that there are few limits to the deployment and invocation of the use of force in the war against terrorism, as well as

\textsuperscript{109} The Bush administration persists in chemical weapons research. The Department of Defense (DoD) argues that such research is necessary to protect soldiers against such chemical or biological weapons use and the DoD research has produced two drugs that could potentially provide soldiers with an internal defense against chemical and biological weapons, however, they are as yet unapproved by the Food and Drug Administration (FDA). See \textit{A Staff Report Prepared for the Comm. on Veterans’ Affairs, 103rd Cong, Is Military Research Hazardous to Veterans’ Health?: Lessons Spanning Half a Century}. (1994); see also Jill C. Keeler et al., \textit{Pyridostigmine Used as a Nerve Agent Pretreatment Under Wartime Conditions}, 266 J.A.M.A. 693, 693 (1991) (reporting on the pretreatment effects of pyridostigmine bromide for nerve agent exposure during wartime). The DoD petitioned the FDA to waive the “informed consent” requirement, which would allow the DoD to administer these two new drugs to U.S. troops without first obtaining their informed consent. See \textit{Informed Consent for Human Drugs and Biologics; Determination that Informed Consent is Not Feasible}, 55 Fed. Reg. 52,814 (1991) (codified at 21 C.F.R. pt. 50). The waiver was approved on a temporary basis, and permitted the DoD to issue pyridostigmine bromide vaccine and anti-biotulism vaccine to troops without obtaining their informed consent. See \textit{George J. Annas & Michael A. Grodin, Guinea Pigs in the Gulf, N.Y. Times}, Jan. 8, 1991, at A21. Recently, however, the Bush administration has acted on an initiative to eliminate some of the dangerous chemicals in the United States’ chemical weapons stockpile. Specifically, the Bush Administration has ordered the Department of the Army to neutralize 1,269 tons of the United States’ stockpile of VX, an extremely deadly nerve agent. See \textit{Associated Press, Army To Destroy Deadly Nerve Gas}, CNN ONLINE (Jun. 9, 2004), available at http://www.cnn.com/2004/US/Midwest/06/09/nerve.gas.ap/index.html; see also \textit{Associated Press, Top Stories—VX}, FOXNEWS ONLINE (Jan. 28, 2003), available at http://www.foxnews.com/story/0,2933,76872,00.html (reporting that VX agent “is the deadliest nerve agent ever created” and that even trace amounts, as little as a “fraction of a drop of VX when absorbed through the skin, can kill by severely disrupting the nervous system.” It is also reported that “Some experts and Iraqi defectors say that Saddam Hussein used VX against Iranian forces in both the 1980-1988 Iran-Iraq War and the 1988 chemical attack on Iraqi Kurds in Halabja.”).


\textsuperscript{111} The Small Arms Survey, an independent research project at the Graduate Institute of International Studies in Geneva, Switzerland is an important source of information regarding small arms. In 2001, it conducted a survey that completed a study that implicated small arms in 1,300 deaths each day. See \textit{Small Arms Survey 2001: Profiling the Problem}, available at http://www.smallarmsurvey.org/Yearbook2001/Chapter_2.pdf (last visited Apr. 5, 2004).

the argument that to be effective in that war, much more than force is required—
and in any event, any effective war requires multilateralism and international
cooperation including an important role for the United Nations. When President
Bush spoke to the United Nations last year, he specifically stressed his adminis-
tration’s impatience with the U.N. process and argued that the United States
reserved the right to unilaterally attack Iraq.113 Those who follow the current
state of the debate face a radical polarization of both the American body politic
and the larger global community. To some, the war and its aftermath are disas-
ters; the strategic plan in the region lacks focus, consumes vast amounts of
money, and produces little in the way of an effective post-conflict scenario.114
President Bush, in a series of speeches, articulated the New Bush Doctrine for
the post-September 11 world. Although the volume of the document is modest,
it raises the question of how much unilateralism, cooperation, and central gui-
dance might be developed through the organs of national security, collective
security, and the United Nations. In this section of the article, we examine these
issues more carefully.

A. National Security Strategy: the Documents

The Bush Doctrine is the current national security strategy of the United
States. The primary document, essentially a collection of several speeches that
have been reorganized on thematic rather than chronological links, was released
by the executive. It provides an overview of U.S. international strategies: the
nation as a champion of human dignity, strengthening the alliance against terror,
and cooperation renewed by defusing regional conflict. Part V, entitled, “Pre-
vent Our Enemies From Threatening Us, Our Allies, and Our Friends, with
WMD,”115 is of particular concern because of its possible justification for a war
against Iraq. The other chapters stress the need to enhance global economic
growth by enhancing free market and free trade principles, expanding the reach
of development policies and tying these to democratic values, developing agen-
das for future corporate action, and a transformation of U.S. national security
institutions to meet challenges of the twenty-first century.116

113. This is a pervasive sentiment among members of the Bush administration. For example,
shortly before President George W. Bush took office, Undersecretary of State John Bolton argued
that the United States had the right to act unilaterally to protect its sovereignty and reject multilater-
alisn in its many forms. He wrote that “[i]f the American citadel can be breached, advocates of
binding international law will be well on the way toward the ultimate elimination of the ‘nation
State.’” John R. Bolton, The Risks and Weaknesses of the International Criminal Court from

114. Florida Senator and former Presidential Candidate Bob Graham asserted that he “voted
against the resolution to go to war in Iraq . . . because [he] thought it was the wrong war against the
wrong enemy, which represented the lesser threat to the people of the U.S. . . . [and he goes on to
remark that] [t]oday, the question is . . . how do we extricate ourselves from Iraq . . . ?” Senator Bob
Bob_Graham_War_+_Peace.htm.

115. See generally NATIONAL SECURITY STRATEGY, supra note 5, at 13.

116. Id.
Part V also focuses on what the Bush administration refers to as "Axis of Evil" regimes because they possess or desire WMD. The administration's approach was refined and expanded in December 2002 in a separate document entitled "National Strategy to Combat Weapons of Mass Destruction," the details of which were delivered by President Bush at his 2002 West Point commencement speech. The West Point speech discussed the containment doctrine ("MAD") and noted that since the collapse of the USSR, the global security environment had changed. New threats to security interests were those of rogue states and terrorists (apparently in that order). According to President Bush, "rogue states" are those that brutalize their own people, squander national resources for personal gain, give no regard to international law, threaten neighboring states, violate treaty obligations, acquire (or are determined to acquire) WMD (or similar advanced technology), are aggressive, sponsor terrorism, reject human rights, hate the United States, and hate the values of the United States.

President Bush proposed a doctrine designed to meet these challenges, calling for pro-active counter-proliferation efforts, such as detection, diffusion, and the use of counterforce. He also proposed strengthening the efforts of non-proliferation regimes. The intended consequences are effective management and response to the effects of any use of WMD, whether by terrorists or rogue states, and determination to "be prepared to respond" and "[not] let our enemies strike first."

During the Cold War, the threat to the United States was characterized by a risk-averse enemy and the existing doctrine was one of containment and deterrence. Use of WMD was considered to be the last possible resort. Now, WMD are the weapons of choice as tools of intimidation, blackmail, and aggress-

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119. Id.

120. See NATIONAL SECURITY STRATEGY, supra note 5, at 18.

121. Id.

122. Id.

123. See Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J 226, reprinted in 35 I.L.M. 809 & 1343 (1996) (separate Opinion by Judge Fleischhauer, at para. 5) (stating that recourse to nuclear weapons "could remain a justified legal option in an extreme situation of individual or collective self-defense in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized State.").
sion. Practicing containment and deterrence will not work on rogue states or on non-risk-averse opponents. Indeed, as in the case of al Qaeda, statelessness is itself a weapon.

During his first term, President Bush has introduced a new category of self-defense—preemptive self-defense—that he claims is legally justified in the new post-September 11 world. President Bush first planted the seeds of the argument for pre-emptive self-defense in his address to the United Nations General Assembly on Sept. 12, 2002, when he said, "The first time we may be completely certain [Saddam Hussein] has a nuclear weapons is when, God forbids [sic], he uses one. We owe it to all our citizens to do everything in our power to prevent that day from coming." Five days later, he spelled out the case for preemptive self-defense more fully and forcefully in his National Security Strategy, now known as the "Bush Doctrine." Some excerpts from his National Security Strategy follow:

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 WMD—weapons that can be easily concealed, delivered covertly, and used without warning. The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used WMD. The United States 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 remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats...

124. The future of terrorist attacks will assume a massive scope as terrorists adopt the use of biological and nuclear WMD to their strategy of "activated hatred." See generally Philip B. Heymann, Terrorism and America: A Common Sense Strategy for A Democratic Society (1998).

125. See President George W. Bush, Address to the United Nations General Assembly in New York City, 38 WEEKLY COMP. PRES. DOC. 1529, 1531-32 (Sept. 12, 2002); see also Legal Authority for the Use of Force Against Iraq, 92 AM. SOC’Y INT’L L. PROC. 137 (1998) (remarks of then-Deputy Legal Adviser Michael J. Matheson).

126. NATIONAL SECURITY STRATEGY, supra note 5, at 15 (emphasis added). The Bush administration's apparent departure from Nixonesque realism—the supporters of which argue the United States should not neglect its own interests in the service of others—and journey into the realm of idealism—the supporters of which urge continued dedication to benevolence—with regard to the interventionary and self-defense practices of the United States is somewhat reminiscent of the Wilsonian doctrine of global meliorism. After Woodrow Wilson's election in 1912, he strove to depict the foreign policy of the United States as one guided both by its moral imperative that peoples oppressed by foreign despots must be liberated and its lasting dedication to the continuing better-
President Bush categorically asserted in his 2002 State of the Union Address that “The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.” These concepts were expanded upon in the September 2002 document, which indicates that the new concept of deterrence is a fundamental change from the past. According to President Bush, there are three principles of counter-proliferation: deterrence according to these new rules, defense, and mitigation. Defense and mitigation are activated when deterrence fails. The special threat posed by WMD makes this exception reasonable, which activates three additional doctrinal steps: preemption, detection, and destruction of WMD before they can be used.

The new Bush Doctrine is linked to a broadened concept of self-defense based on threats posed by non-state terrorist groups and their rogue state sponsors. A central sanction built into the doctrine is the concept of regime replacement. As we have seen, these ideas test the limits of permissible behaviors based upon conventional international law doctrines. However, if state behavior is significantly influenced by these principles, they may become more firmly grounded as the new rules of the international legal system, even if vigorously contested. The central point, however, is that if a regime is a candidate for rogue state status and that regime is implicated in detectable weapons of mass destruction development, that regime may be at risk. This means that the princi-

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127. See State of the Union Address, supra note 117.

128. The Bush administration plans to be ready to respond to conventional and nuclear threats with defense capabilities by bringing to bear effective intelligence, surveillance, interdiction, and domestic law enforcement to detect and deter any threat from the use of WMD. President Bush’s strategy blends a reliance on enhanced counterproliferation measures, increased nonproliferation efforts to combat WMD proliferation, and consequence management to respond in the event that WMD are deployed against the United States. See generally NATIONAL SECURITY STRATEGY, supra note 5.

129. Id. However, Henry Kissinger noted, “It is not in the American national interest to establish preemption as a universal principle available to every nation.” See Henry Kissinger, Our Intervention in Iraq, WASH. POST, Aug. 12, 2002, at A15.
B. The Libyan Example

This brings us to the recent development regarding Libya, the United States, and the United Kingdom. According to reports in the media, Colonel Qaddafi, the Libyan Head of State, has agreed to completely eliminate his program for the development for WMDs and allow the United Nations as well as the United States and the United Kingdom, complete access to its facilities. The timing of this public announcement might certainly be seen as a justification for the far-reaching implications of the Bush Doctrine. It will be recalled that among the shifting justifications for the war and replacement of the Baathist regime in Iraq was the apparent reluctance of the Hussein regime to completely divest itself of WMDs. The fact that evidence so far does not sustain this does not make irrelevant the point that the United States and its allies will not hesitate to use force if a rogue state develops WMDs because that rogue state may constitute a threat to its vital security interests. The easy answer to the question of whether the Bush Doctrine is the cause of the Libyan change in policy on WMD is that it clearly has influenced Qaddafi’s switch. The more interesting and complex question is what other factors might have coalesced around the timing of the Bush Doctrine to influence the decision. These other factors may indeed compete with the currency of the Bush Doctrine in facilitating the Libyan decision. In short, there could be an ideological question about whether the Bush Doctrine was a success in this matter or whether patient diplomacy over a long period of time was the key to the Libyan decision.

Libya was severely punished by the sanctions imposed on it as a result of the destruction of Pan Am 103. The investigation of this incident generated evidence pointing ineluctably to the government of Libya. Libya’s resistance to international accountability weakened when South Africa became a leading player in Africa and a new version of African unity implied an opportunity for Libyan leadership in Africa. This, in effect, led to the informal South African intervention by President Mandela and Dr. Jakes Gerwel. Mandela was able to persuade Libya that it was within its own interest to gravitate to a condition of normalcy in the international system and to permit a Scottish court, sitting in Holland, to try the Libyan defendants. Meanwhile, Libya’s own economic

134. See Allen Nacheman, Tripoli Distances Itself From Lockerbie Verdict as Libyan Convicted, AGENCE FRANCE PRESSE, Jan. 31, 2001 (remarking on former South African President Nelson
resources remained vastly underdeveloped because of the sanctions and the lack of advantage from its African initiatives. It should be noted that the Treaty of Pelindaba makes Africa a nuclear free zone.\textsuperscript{135} It should also be noted that South Africa itself was the only nuclear power to voluntarily give up nuclear weapons and allow full access to international inspectors. Mandela, therefore, spoke with particular authority. The Libyans also perhaps felt is was in their own self-interest to gravitate to a situation of international normalcy that might also serve to remove the sanctions and permit freer trade with the more prosperous parts of the world.

British diplomacy remained open to contact with Libya and after the September 11 attacks there was some urgency for Libya to distance itself from international terrorism. The Bush Doctrine added an important dimension to Libyan decision-making.\textsuperscript{136} The idea that strong action would be taken against a state with so called "rogue state" status and with an ongoing program developing WMDs was itself a threat to Libyan sovereignty and independence. In short, the action in Iraq and Afghanistan suggested as a practical matter, that sovereignty is more permeable than in the past and that regime replacement may have an operational reality. We may add to this the fact that Pakistan itself was already beginning to disclose the recipients of its nuclear largesse.\textsuperscript{137} Thus, there are several factors that conspired to make Libya accelerate the disclosure and international accountability for its WMD program. The example of the Libyan policy to relieve itself of WMD seems now to be influencing another rogue state: North Korea.

The technical question that an international lawyer would have to confront about national security doctrines is the claim that the sovereignty of certain smaller states or powers is in fact permeable.\textsuperscript{138} In effect, if the United States has a right to intervene in Santa Domingo,\textsuperscript{139} Panama,\textsuperscript{140} Granada,\textsuperscript{141} Guate-

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\textsuperscript{137} See Alison Caldwell, Atomic Energy Agency Concerned over Pakistan Nuclear Leaks, ABC ONLINE, Feb. 6, 2004, available at http://www.abc.net.au/worldtoday/content/2004/s1039770.htm (reporting that Pakistan President, General Pervez Musharraf, discussed the fact that Pakistani nuclear scientist, Doctor Abdul Qadeer Khan, passed on Pakistan’s nuclear secrets to Libya, North Korea and Iran throughout a period of ten years).

\textsuperscript{138} See HUNTINGTON, supra note 72, at 28.


\textsuperscript{140} The United States intervened in Panama In 1989 to safeguard the lives of American nationals in the country and to protect U.S. interests in the Panama Canal. See Marian Nash Leich,
Hungary to allow Soviet troops to remain there. See


See generally Ved P. Nanda, The Validity of United States Intervention in Panama under International Law, 84 AM J. INT'L L. 494 (1990). The United States previously assisted in the overthrow of the elected President of Panama in 1941.


The United States lightly intervened in the South African power exchange after the fall of apartheid in 1991. The South African example is "exceptional in that the parties completely renegotiated their political system with only a minimum of outside intervention." See WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT 237 (Melanie Greenberg et al. eds., 2003).

In 1964, the United States and Belgium cooperatively intervened in the Congo to safeguard the lives of foreign nationals during a heightened period of civil unrest. See S.C. Res. 199, U.N. SCOR, 19th Sess., 1189th mtg. at 328-29, U.N.Doc. S/6129 (1964) ("Reaffirming the sovereignty... of the Democratic Republic of the Congo..."

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The United States backed a coup in Cambodia in 1970 to install pro-American General Lon Nol. See THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 13-23 (1979) (briefly discussing the U.S. incursion into Cambodia).

The United States intervened in the Dominican Republic in 1965, supported by the OAS, to safeguard the lives of U.S. and foreign nationals, as well as to halt a fomenting communist revolution. See 52 DEP'T BULL. 744, 745-46 (1965) (statement by President Lyndon B. Johnson of May 2, 1965, explaining and offering justifications for the United States' unilateral intervention).

The Soviet Union occupied Hungary in the 1950's and imposed on it a treaty requiring Hungary to allow Soviet troops to remain there. See Agreement on the Legal Status of the Soviet
Angola, and Latin America (including Cuba) suggest that the power to intervene limits an individual state's territorial integrity or political independence. We might say that claims for hegemonic power to intervene are, in effect, a call to reinterpret the sovereignty provisions in the U.N. Charter to conform to new world conditions, new weapons systems, and the overriding concerns that the superpowers need to intervene in their spheres of influence, which must be tolerated because the greater good it secures prevents the world from drifting toward Armageddon and merits its high price. On the other hand, these claims could be characterized as violations of international law that represent a weakness in the international system and leave victims without an international remedy. The International Court of Justice in *Nicaragua v. United States* determined that the Reagan administration's attack in Nicaragua violated international law and could not be justified by self-defense. It further required the United States to pay damages to Nicaragua. In a repudiation of the rule of law in this context, the Reagan administration refused to pay the bill and even withdrew U.S. consent to jurisdiction from the International Court of Justice.

Cold War military strategy did not rest exclusively on the vision of MAD, but rather was based on an expanded version of the right of a state to defend itself. Given the conditions of self-defense with WMD and advanced systems for deploying them, such as nuclear submarines, these doctrines—

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154. Italy invaded Ethiopia in 1937. For an examination of the events leading up to the Italian invasion of Ethiopia, see George Padmore, *Abbyssinia - The Last of Free Africa, Crisis*, May 1937, at 134.


156. Amid the many interventions and assisted insurgencies in Latin America, perhaps President Theodore Roosevelt's adherence to the Drago Principle, which prohibited armed intervention in or occupation of American territories by European powers, left the most indelible impression on the future of American foreign policy. Roosevelt's support of the Drago Principle led to the Roosevelt Corollary to the Monroe Doctrine, which justified continuing U.S. intervention in Latin America. See CLIFFORD DAMMERS, *A Brief History of Sovereign Defaults and Rescheduling, in Default and Rescheduling: Corporate and Sovereign Borrowers* 80 (David Suratgar ed., 1984).


158. See ICJ Withdrawal Statement, supra note 88.

159. Fear of nuclear destruction prevented military conflict between the United States and the Soviet Union during the Cold War. The deterrence value of these weapons may have been a reason why the International Court of Justice did not declare them illegal. See THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 214, 217 (Michael Howard et. al. eds., 1994).
when they provided restrictions on the sovereignty of some states—were critically important to define the appropriate sphere of self-defense utilizable by the major powers. By defining that sphere, humanity potentially avoids the terrible consequences of war between hegemons. Of course, if the superpowers did not act to stabilize their expectations by intervention the only available option would be direct confrontation, limited only by an official declaration of war.

Even interventionists have sought to constrain themselves and legitimize their actions in ways that could make these acts more reconcilable with different versions of international law and the appropriate rules and proscriptions. For example, in Nicaragua, Reagan argued that the Contras represented a movement of liberation asserting the right to self-determination. The Brezhnev Doctrine sought to rationalize the protection of socialist political order on the basis that it was more representative of the right to self-determination. Thus, even if these excuses are transparent in that they seek to limit the power of law, they nonetheless also attempt to use the law to provide a degree of legitimacy. Even at the height of the Cold War, the constraints of law were in the forefront of asserted justifications to exercise certain powers of intervention. On the other hand, the U.N. Charter stipulates that sovereign equality and independence do not trump international obligations, which include issues relating to peace, human rights, and the development of the rule of law. Both national security and international law seek to limit sovereignty, but in different ways with different objectives. The principle that sovereignty is not unlimited implies, at a minimum, the existence of a legal expectation that sovereignty not be abused.

VI.
JUSTIFICATIONS FOR THE IRAQ WAR

The technical justification under international law for the 2003 Iraq war is that the 1991 Persian Gulf War had not yet ended, although some might see this justification as weak and transparent. A condition for the formal ending of the 1991 war seems to be the complete disarmament of Iraq, with special regard to

160. See ICJ Withdrawal Statement, supra note 88.
161. See generally Reisman, supra note 82.
accounting for all WMD. However, reliance on Security Council resolutions is controvertible and while mere semantic constructions and interpretations may provide a patina of legitimacy, the legality of actions of this magnitude cannot often stand on a weak imprimatur of legal validity. Critics want stronger legal reasons to justify the expanded scope of Article 51.\textsuperscript{163} Valid security doctrines may strengthen or weaken these claims.

The technical justifications for the attack on Iraq were based on Iraq's failure to honor its international obligations to disarm, including its pledge to divest itself of WMD. The basis of the claim is as follows: the Security Council authorized the use of force under Chapter VII to repel Iraq's aggression against Kuwait.\textsuperscript{164} So long as Iraq did not comply with the U.N.-mandated condition for a final peace settlement, the authorization for the further use of force continued, and Iraq—under the Hussein regime—still constituted a threat to international peace and security. The asserted legal basis for the Bush administration’s invasion and regime replacement policy, without further Security Council authorization, is based on preexisting Security Council resolutions. For the sake of brevity, the relevant provisions and interpretive issues of the Security Council resolutions are summarized as follows.

Resolution 678 authorized the use of "all necessary means to uphold" Security Council Resolution 660, as well as resolutions passed after 660.\textsuperscript{165} These resolutions served to restore international peace and security in the Gulf. Resolution 678 therefore served as the technical legal basis for the 1991 Persian Gulf War. Resolution 687 stipulated a cease-fire, but imposed conditions relating to the disarmament of Iraq, in particular conditions relating to the identification and destruction of WMD.\textsuperscript{166} Since the cease-fire was subject to certain disarmament conditions, including inspections conducted by the U.N., a material breach of these cease-fire conditions terminated the grounds on which the cease-fire was created under Resolution 687.\textsuperscript{167} The material breach provides a con-

\textsuperscript{163}. The present approach to self-defense is that “Art. 51 clearly licenses at least one kind of resort to force by an individual member State: namely, the use of armed force to repel an armed attack.” Bert V.A. Röling, The Ban on the Use of Force and the U.N. Charter, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 3 (A. Cassese ed., 1986).

\textsuperscript{164}. Chapter VII of the U.N. Charter gives the Security Council the power to act. Article 39 of this chapter grants the Security Council power to determine if a state's actions constitute a "threat to peace, breach of the peace, or act of aggression." U.N. CHARTER art. 39. If a state's actions threaten to or breach the peace, or constitute an act of aggression, the Security Council decides what steps are necessary to "restore international peace and security." Id. Among the actions it may authorize is the use of force under Article 42. Id. art. 42. The Security Council can authorize various kinds of force, such as employing U.N. troops (Blue Helmets) or empowering member states to act individually or collectively. Id.


\textsuperscript{167}. The United States' position is best articulated in the letter sent by the Permanent Representative of the United States of America to the United Nations to the President of the Security Council, dated March 20, 2003:

The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of
continuing justification for invocation of armed force against Iraq. The specific interpretive issues involve the question of whether the words "all necessary means" found in Resolution 678 (1990) cover Resolution 687 (1991). It is argued that since Resolution 678 was decided prior to 687, it cannot, without more support, be read to cover the later Resolution 687. The critical paragraph of Resolution 678 reads as follows:

[Resolution 678] Authorizes Member States cooperating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1...the foregoing resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.

The critical paragraph of Resolution 687 reads as follows:

The final operative paragraph of resolution 687 reads that the Security Council Decides to remain seized of the matter and to take such further steps as may be

obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990). [For the Secretary-Generals' public announcement, see Statement Made by the Secretary-General of the United Nations in Paris (Jan. 14, 1993), reprinted in IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH 741 (M. Weller ed., 1993.).]

Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002). Acting under the authority of Chapter VII of the Charter of the United Nations, the Council unanimously decided that Iraq has been and remained in material breach of its obligations and recalled its repeated warnings to Iraq that it will face serious consequences as a result of its continued violations of its obligations. The resolution then provided Iraq a "final opportunity" to comply, but stated specifically that violations by Iraq of its obligations under resolution 1441 (2002) to present a currently accurate, full and complete declaration of all aspects of its WMD programmes and to comply with and cooperate fully in the implementation of the resolution would constitute a further material breach. The Government of Iraq decided not to avail itself of its final opportunity under resolution 1441 (2002) and has clearly committed additional violations. In view of Iraq's material breaches, the basis of the ceasefire has been removed and use of force is authorized under resolution 678 (1990).


168. Specifically, in Resolution 678, the United Nations Security Council authorized states even outside the provisions of Chapter VIII of the Charter (that is, member states cooperating with the government of Kuwait) "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." See Resolution 678, supra note 165, at para. 2.


170. See Resolution 678, supra note 165, at 1565.
required for the implementation of the present resolution and to secure peace and security in the area. 171

It is possible to read these two resolutions together, but one is stretching syntactic interpretation to secure authorization for the 2003 Gulf War from this base of authority. Resolution 687 specifies in categorical terms that the Security Council decided to remain seized of the events that led to the creation of Resolution 687. One can therefore read Resolution 687—by necessary implication—as terminating the authorization of Resolution 678 because the matter was effectively before the Security Council. If the Council is seized of the matter, so the argument would go, it would be obliged to conclude whether a material breach of the conditions of the cease-fire exists. If it found such a breach, the Council would have to authorize the use of force. The critical resolution, in addition to those already discussed, for justifying the 2003 Gulf War, is United Nations Security Council Resolution 1441. According to Resolution 1441 (2002):

[The United Nations Security Council] Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);

[The United Nations Security Council] Decides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;

Recalls... that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;

[The United Nations Security Council] Decides to remain seized of the matter. 172

The phrase, “serious consequences” in Security Council Resolution 1441 did not textually authorize the use of force. 173 Indeed, the plausible construction of its language is that if the Council seriously contemplated the use of force, it could have done so specifically, since the authorization of the use of force comprises one of the major decisions that the Council can undertake. 174 Accordingly, the Council would not leave the question of the use of force to an implication in textual language supplemented by tenuous strands drawn from preceding resolutions. To some, therefore, an analytical interpretation of whether the use of force in Iraq was authorized by the Security Council is an argument that cannot be sustained on the basis of the language used in the relevant texts and the interrelationships thereof. 175

171. See Resolution 687, supra note 166, at 854.


173. Id. at para. 13.

174. See U.N. CHARTER arts. 39, 42.

Broader interpretive standards might justify the use of force under relevant resolutions, but these justifications may sound highly technical and may not carry a justification that clearly sustains the object and purpose of the interpretation. Here, in effect, the concept of preemptive action seems not to be justifiable under United Nations Security Council resolutions and processes. The text alone seems to provide no justification for the attack, and a purposive and teleological interpretation of the text would provide only weak legal support. A central element in the American and British claims, in contrast with those states that favor the primacy of Security Council decision-making, is that the American and British perspectives undermine the institutional competence of the United Nations, particularly the Security Council, by overriding the principle that the Security Council has primary jurisdiction over matters of collective security. To assert security values outside the principle of institutionally regulated collective action reverts to the almost completely decentralized authority manifested by the League of Nations, which opened the door to unilateralism and weakened the force of international peace keeping institutions. Unilateralism may be a quick-fix solution that earns immediate popular approval, but it is no substitute for sustained collaborative action in making lasting peace.

The United Nations is best suited for turning swords into ploughshares. In the age of globalism and interdependence, its institutions of collective security are absolutely indispensable to world order. Despite this institutional competence, it does not necessarily follow that a state may not take unilateral preemptive action. New types of threats might require a more careful appraisal of the primacy of the Security Council’s institutional reach and the scope of certain unilateral actions under color of Article 51 or self-defense under customary international law. The central question is what institutional innovations within the Council as a whole, particularly with regard to the P-5, might be developed to respond effectively and collectively to new global security threats.

www.whitehouse.gov/news/releases/2003/03/20030313-13.html. See generally Resolution 678, supra note 165; Resolution 687, supra note 166. Some scholars have argued that the United States’ creation of a formal legal basis for the attack on Iraq by relying on Resolution 678 (1990), rather than the later Resolution 687 (1991) is misleading, since Resolution 687 does not address WMD, it only addresses Iraq’s invasion of Kuwait.


177. Florida Senator Bob Graham remarked that the true purpose of the Iraq invasion cannot be justified by the Bush administration’s asserted legal basis. Rather, he concludes that the only viable purpose of the invasion was to liberate the Iraqi people. Senator Graham stated that “we have a chance to show the world that we were in fact in Iraq for the right reasons ... and we were there for the purpose of liberating the Iraqi people ... not about the expansion of American power ... not about oil ... We ought to lay this marker down.” See Graham, supra note 114. Massachusetts Senator Ted Kennedy also questioned the Bush administration’s motives and legal basis for the United States’ invasion of Iraq. In an interview with the Associated Press in September 2003, Kennedy declared, “There was no imminent threat [to justify the United States’ invasion of Iraq]. This [threat] was made up in Texas, announced in January to the Republican leadership that war was going to take place and was going to be good politically. This whole thing was a fraud.” Kennedy Labels Iraq War a ‘Fraud’, WASH. TIMES, Sept. 19, 2003 [hereinafter Kennedy Remarks].
The strongest credible reason for unilateral armed intervention by the United States and the United Kingdom is to counterterrorism. Access to WMD by terrorists constitutes such an important security threat that reasons exist beyond the letter of international law that must be canvassed in order to ultimately determine the lawfulness of the U.S./U.K. position. As earlier indicated, whether one uses a textual or contextual method of construing these provisions, the weight of interpretive logic does not support the construction given by either the Bush administration or the Attorney General of the United Kingdom. Such a construction must assure the perspective of a neutral third party. Because of the nature of the international constitutional system, the power to interpret and decide is vested in the Security Council. However, the Security Council cannot repudiate the construction given to these provisions by the United States and the United Kingdom; both nations have the power to prevent this from happening. This effectively leaves the question of the lawfulness of the attack based on a construction of these resolutions partly in the perspectives of the critical state actors themselves, a model of the principle of international law-making realism, which Georges Scelle called the dedoublement fonctionnel—the double law-making character of a sovereign state as both a claimant and a decider of the meaning, reach, and justification of an international law claim.

A reasonable claim of this character might strengthen the juridical basis of a claim to lawfulness if the position is objectively compelling and gains widespread acceptance. In the context of high stakes issues, it might be that states

178. The evidence relating to WMD amassed by the British Government to justify the United Kingdom’s involvement in the 2003 Iraq War has been questioned. Prime Minister Tony Blair has since been a focus of the Hutton inquiry, which was developed to investigate the circumstances surrounding the death of the British weapons expert Dr. David Kelly, who was responsible for the dossier to justify the British involvement in the war. See generally Lord Brian Hutton, Investigation Into the Circumstances Surrounding the Death of Dr. David Kelly, Aug. 11, 2003, available at http://www.the-hutton-inquiry.org. The Hutton Inquiry suggests that the evidence was inflated or “sexed up.” See Julia Day, Kelly Said Government Sexed Up Iraq Dossier, GUARDIAN UNLIMITED, Aug. 12, 2003, available at http://www.guardian.co.uk/Iraq/Story/0,2763,1017078,00.html. Similarly, President Bush stated that the war against Iraq was mandated by the fact that it had WMD and was ready to use them, yet after several months of searching, the American inspection team led by David Kaye has been unable to find them. See generally Report: No WMD Found In Iraq, Sept. 25, 2003, available at http://www.cbsnews.com/stories/2003/09/25/iraq/main575078.shtml; Paul Reynolds, Banned Weapons: Where Are They?, BBC NEWS, available at http://news.bbc.co.uk/2h/ middle_east/2949441.stm (last visited Mar. 25, 2004); see also Associated Press, Top U.S. Commander Surprised at Not Finding WMD, USA TODAY ONLINE, May 30, 2004, available at http://www.usatoday.com/news/world/iraq/2003-05-30-iraq-wmd_x.htm (reporting that Lt. Gen. James Conway, the top commander of U.S. Marine forces in Iraq stated that he is surprised that searches for WMD in Iraq have failed so far, despite the existence of American intelligence that indicated such weapons were supplied to frontline Iraqi forces at the outbreak of the 2003 Iraq war. Specifically, Lt. Gen. Conway stated that “It was a surprise to [him] . . . that we have not uncovered weapons . . . in some of the forward dispersal sites.” The Lt. General went on to say that “We’ve been to virtually every ammunition supply point between the Kuwaiti border and Baghdad, but [the WMD are] simply not there.”).

179. U.N. CHARTER art. 24(2).


181. For example, in a departure from what has become the Bush administration’s typically unilateral international posture, Department of Defense officials feared the weakening POW regime and urged President Bush to recognize the applicability of the Geneva Conventions to the special
are ill-advised to act in the international arena if the fundamental basis of their actions rests on a highly technical legal justification that lends itself to other permissible constructions which undermine it and, in any event, would require more compelling justifications because the legal predicate, although plausible, is a weak one. When a state goes to war with an utterly "formal" legal basis to justify it, international public opinion and common morality will likely require its position to be supplemented with stronger, justifiable principles prior to taking action.

It is perhaps precisely with this consideration in mind that the United States and the United Kingdom shifted their technical justifications for the invasion of Iraq away from sole reliance on the prior relevant Security Council resolutions. If Saddam Hussein were, in fact, secretly developing nuclear, biological, or chemical WMD, the possibility of a terrorist delivery system would pose a future threat to the United States and the United Kingdom. In the aftermath of the attacks of September 11, this is a strong and legitimate national security and self-defense concern. It not only comprises a powerful justification, but

conditions in Afghanistan. See Thom Shanker & Katharine Q. Seelye, Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions, N.Y. TIMES, Feb. 22, 2002, at A12. Shanker and Seelye additionally refer to the Department of State’s support for applying international conventions, a position that stems as much from concern over adverse precedent as from a bureaucratic design in favor of conformity to treaties. Id.

182. Professors W. Michael Reisman and Chris T. Antoniou explain that in modern democracies "even a limited armed conflict requires a substantial base of popular support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way." See THE LAWS OF WAR xxiv (W. Michael Reisman & Chris T. Antoniou eds., 1994).


184. See generally Goldsmith, supra note 169.


186. Some point to Saddam Hussein’s April 2003 pledge to award $25,000 to families of Palestinian homicide bombers. See Mohammed Daraghmeh, Iraq Raises Suicide Bombers’ Payments, ASSOC. PRESS, Apr. 4, 2002, at A20 (Saddam Hussein has pledged to pay $25,000 to the families of suicide bombers). The Hussein pledge articulated for rewarding homicide bombers were strict; he insisted that only individuals who blew themselves up with a belt laden with explosives would receive the full amount; “payments [were to be] made on a strict scale, with different amounts for wounds, disablement, death as a ‘martyr’ and $25,000 for a suicide bomber.” President George W. Bush, Saddam Hussein’s Support for International Terrorism, The White House, Nov. 4, 2002, available at http://usinfo.state.gov/regional/nea/iraq/text/0912wshbkgd.htm. Additionally, some rely on information gleaned from former Iraqi military officers, who have described highly secret training facilities in Iraq where Iraqis and non-Iraqi Arabs were trained in plane and train hijacking, sabotage, assassinations, and explosives. See id.
also strengthens the weight given to the technical construction of the relevant Security Council resolutions. It may be that the United States and the United Kingdom understood this and made the issue of WMD a major part of the justification for the attack on Iraq. This, in turn, generated national and international concerns about the reliability and interpretations of intelligence regarding WMD.\footnote{187}

Certainly, WMD coupled with the threat of an apocalyptic form of terrorism provided compelling justifications to take the kind of action the states saw as permissible and lawful, but we must enter this analysis cautiously. Threats alone may not justify the specific strategic form of intervention undertaken. In short, even if Saddam Hussein's alleged WMD posed a threat to the security of the United States and the United Kingdom, it is not certain that an armed attack was the most reasonable defense of the American and British national security interests, or that such attack could not have been effectively pursued in the Security Council.\footnote{188} The American and British claims become particularly vulnerable in light of a more critical examination of the principle of self-defense under international law. It is precisely in this area where the Bush Doctrine is most challenging. The Bush Doctrine recognizes that the proliferation of WMD during the Cold War could be limited by policies that might rationally influence an adversary. The American adversary during the Cold War was one committed to a balance of global power and committed to a rational policy of being risk-averse.\footnote{189} In this context, deterrence stabilized international security and permitted international cooperation in areas of arms control and non-proliferation. However, the days of the Cold War—when WMD were generally regarded as weapons of last resort—are over.\footnote{190} Contemporary security theorists surmise that the enemies of the West now view WMD as an effective instrument of destruction.\footnote{191} Within this context, the concept of deterrence as conventionally understood is weak if not obsolete. According to President Bush:

\footnote{187. Arthur Schlesinger Jr., the "lion of liberalism," often points to former British Foreign Secretary Robin Cook's infamous March 2003 indictment of the entire Iraq war when he asserted, "instead of using intelligence as evidence on which to base a decision about policy, we used intelligence as the basis on which to justify a policy on which we had already settled." See Arthur Schlesinger Jr., The Imperial Presidency Redux, Wash. Post., June 28, 2003, at A25 (quoting Cook and stating that he "formulated the charge [against the war] with precision."); see also Arthur Schlesinger, Jr., Eyeless in Iraq, N.Y. TIMES REV. OF BOOKS, Oct. 23, 2003, at 26 (again quoting Secretary Cook and stating that "we note now...the greedy zeal with which Bush and his allies seized upon crumbs of intelligence.").}

\footnote{188. Recall that former President George H. W. Bush's use of military force in the Persian Gulf War was guided by limitations in the 1991 Iraq Resolution. See Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (outlining the restrictions on use of military force). According to the Iraq Resolution, the President was required to prove to Congress that all diplomatic avenues for resolving the conflict were exhausted before war before fighting began and that the scope of military activity was limited to achieving the goals set out by United Nations Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, 676, and 678. Id.}


\footnote{190. Id.}

\footnote{191. See HEYMANN, supra note 124.
https://scholarship.law.berkeley.edu/bjil/vol22/iss3/3
DOI: https://doi.org/10.15779/Z38R063}
[t]raditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action.192

We contend that the new Bush Doctrine makes a narrow but reasonable claim that Article 51 of the U.N. Charter—relating to self-defense—simply cannot be read literally. Article 51 provides a state with a right of self-defense in international law, "if an armed attack occurs." The Bush Doctrine explicitly claims that a state may lawfully take action to defend itself if there is an imminent danger of attack; the Bush administration holds that anticipatory self-defense is conditioned by the factual imminence of an attack.193 As a technical matter of interpretation, if this broader construction of Article 51 is accepted, it must also have a technical justification to validate the form of such an interpretation.194

Two principle justifications may, in theory, be presented to support the new Bush Doctrine of preemption. First, one must assume that self-defense in international law holds its place of prominence in the U.N. Charter and in customary international law, because of the importance of the term "self."195 This effectively means that even though institutions of collective security for collective action are currently highly developed, when viewed from a historical perspective, a significant element of security management must ultimately be left to the principle of the "self" included in the concept of international self-defense. Notwithstanding the constitutional development of efforts to institutionalize collective security through the Security Council and through regional security associations, it is still the case that an important competence over national security lies with the individual nation state. If this assumption is correct, then the critical question is whether there are standards that might guide a rational invocation of the right to self-defense if the conditions in a given situation make preemptive action reasonable. This leads us to the second element of justification. If we accept the fact that the word "self" in "self-defense" simply recognizes important imperfections in the system of collective security, then the structure of a state's claim to self-defense comes close to the principle of the dedoublement fonctionnel.196 The state is a claimant, claiming the right to preemptive self-defense. Since the state may have acted on that claim, the state has an international obligation to justify it as an exercise of a national security competence that is reasonable within the framework of the major purposes and poli-

193. Id.
194. See Walter Gary Sharp, Sr., Cyberspace and the Use of Force 7, 95, 226 (1999) (discussing the U.S. military's definitions of hostile intent and hostile act and arguing that at some point a threat to use force that is short of actual use can demonstrate hostile intent and trigger a nation's right to anticipatory self-defense).
196. See generally Scelle, supra note 180.
cies of the international constitutional system. This principle was well expressed by Professor H.A. Smith, writing in another context:

The law of nations, which is neither enacted nor interpreted by any visible authority universally recognized, professes to be the application of reason to international conduct. From this it follows that any claim which is admitted reasonable may fairly be presumed to be in accord with law, and the burden of proving that it is contrary to the law should lie on the State which opposes the claim.197

What the doctrine seeks to do, however, in light of the September 11 attacks, is to suggest that states "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."198 Since terrorists and rogue states seek to use unconventional means to attack the security of their perceived adversaries,199 they will seek to inflict the highest amount of damage upon their victim states by operating covertly and potentially unleashing WMD on innocent civilian populations without warning.200

In the war against terrorism, the Bush Doctrine unambiguously states that the United States reserves the option to use force in preemptive action to protect its national security. According to President Bush, "[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."201 The Bush Doctrine notes that "rogue states" might have the resources to develop WMD and may disseminate or deploy them because they "display no regard for international law... and callously violate international treaties to which they are a party."202 This is a far-reaching stretch for contemporary international law. Let us further examine this.

A. Formulating the Doctrine: WMD and Non-WMD Threats

There are two separate issues that must be distinguished in the formulation of the doctrine and its relationship to international law. The first is simply the threat of terrorism absent the threat of WMD.203 The restraints international law

198. See NATIONAL SECURITY STRATEGY, supra note 5, at 15.
199. September 11, 2001 brought aircraft hijacking—a particularly horrific form of terrorism—to the forefront of concern for American travelers and metropolitan workers. Lately, the government has been dealing with the problem of allowing general aviation to fly under visual rules and "permitting light aircraft and helicopters over cities, requiring a reconsideration of the damage these aircraft could do as prepared suicide vehicles against 'soft targets' such as concentrations of people at sports stadiums, concerts, or political events." See Phillip A. Karber, Re-Constructing Global Aviation in an Era of the Civil Aircraft as a Weapon of Destruction, 25 HARV. J.L. & PUB. POL'y 781, 805 (2002). Another disastrous form of terrorism is that perpetrated over the Internet, which threatens soft targets associated with day-to-day business, economic, and social communications and transactions. See William Gravell, Briefing to the Worldwide Antiterrorism Conference, Information Warfare and Terrorism: Changing the Rules, San Antonio, TX (Aug. 19, 1997).
200. The United States has known for over a decade that increased security at hard targets has shifted terrorists' attention to soft targets. In 1990, 75% of all terrorist attacks worldwide were perpetrated against tourist spots, businesses, and other nonofficial targets. UNITED STATES DEPARTMENT OF STATE, PATRONS OF GLOBAL TERRORISM: 1990, 37 (1991).
201. See NATIONAL SECURITY STRATEGY, supra note 5, at 15.
202. Id. at 14.
203. On September 17, 2002, President Bush expanded his administration's approach to the dangers posed by all terrorists, including those with and those without access to WMD. Specifically,
imposes on the Bush Doctrine regarding such a threat would be, at a minimum, whether preemptive action—which cannot meet an objective criterion of imminence because of the nature of the terrorist threat—can still meet an objective standard of reasonableness reconcilable with the fundamental right to self-defense under Article 51 of the Charter, or evolving customary international law. Such action runs the risk of attempting to justify standardless interventions, unguided by principles of international law and the trade-off between the war against terror and unilateral action might be seen as an especially dangerous strategy of action. It is therefore imperative that international lawyers carefully articulate the standards that might justify a preemptive intervention; it is additionally essential that the procedures for reporting interventions to the Security Council be fully employed so that such standards of justification may be clearly established within the framework of the Security Council’s mandate of primary responsibility over matters of international peace and security. Even if a terrorist organization such as al Qaeda poses a threat to the security of another state, that threat must be based on credible intelligence that can subsequently be made available to the Security Council subject to the reporting requirements of Article 51.

Situations involving possible access to or deployment of WMD by terrorist groups seem to change considerably the legal calculus. It is therefore vitally important that when the Bush administration acted on the rogue state principle in attacking Iraq, it based its strategic analysis and self-defense justifications on Iraq’s control of WMD, as well as on the possibility that Iraq might distribute those WMD to terrorist groups with the capacity to attack the United States, the United Kingdom, and other possible targets of opportunity. It is also possible

President Bush declared that “[h]is immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use WMD or their precursors.” National Security Strategy, supra note 5, at 6.

204. See Albrecht Randelzhofer, Article 51 in The Charter of the United Nations, A Commentary 675 (1995) (stating that “[t]here is no consensus in international legal doctrine over the point in time from which measures of self-defense against an armed attack may be taken.”).

205. Following his 2002 commencement speech at West Point, President Bush was met with international criticism for the tone of his address, in which he implied that the United States has the unique ability to make and enforce decisions, which—he implied—is a power unavailable to other states. However, it is well established under international law that the United States is equal with all other sovereign states before the law. Article 2(1) of the U.N. Charter states that “[t]he Organization is based on the principle of the sovereign equality of all its Members.” See U.N. Charter art. 2, para. 1. Consider also Helmut Steinberger, Sovereignty, in 4 Encyclopedia of Public International Law 500, 515 (Rudolf Bernhardt ed., 1984), who states that States enjoy an equal juridical status under general international law . . . [T]he basic structure of international law [is] as a legal order of co-ordinated juxtaposed political entities, as distinguished from a civitas maxima or a world State order . . . General international law does not accord hegemonic powers a privileged legal authority over their spheres of political influence, whether in the form of a ‘police power’ or an adjudicative authority.

206. States are obligated to inform the Security Council of whatever measures of self-defense that state intends to exercise under Article 51. See U.N. Charter art. 51.

207. Id.

208. This approach manifests a departure from the traditional approach to armed conflict, which turns on exactly when an armed attack begins, as articulated by the Caroline case. The Caroline case permits the use of defensive force when the “[n]ecessity of that self-defense is instant, over-
that a threat posed by the combined existence of terrorism and WMD may require decision-making innovations on the part of the Security Council, if the principle of collective responsibility is to be preserved.209 Perhaps the Security Council could create an institutional mechanism of intelligence cooperation, at least among the five permanent members, with full participation by a representative of the Secretary General.210 Other States Parties might also have roles in this process, as appropriate to their specific security concerns.211 Additionally, the Security Council might want to examine the development of enhanced intelligence capabilities, so that the U.N. may more effectively protect its own personnel.

209. According to the Charter, the Security Council is explicitly responsible for rectifying international threats to the peace in the interest of maintaining collective security. See U.N. CHARTER art. 39.

210. Although the Security Council has primary responsibility for collective security in the international system, its powers and efficacy are not unproblematic. The practical strength of the institution of the Security Council is that the five permanent members wield important factual powers in the international system, and thus, wield important influence over security matters on a worldwide basis. When the P-5 has a consensus, collective security initiatives will maximize the efficacy of intervention. The practical problem of the Security Council is that each permanent member has a veto. This means that a single permanent member can block effective Security Council collective action by the threat of a veto or the actual exercise of it. This problem was partly resolved when the General Assembly adopted the Uniting for Peace Resolution. This resolution was most unusual and could, with hindsight, be understood as an organic modification or change in the U.N. Charter mandated by the principle of necessity. Action taken under these powers was heavily controverted, although the ICJ in an Advisory Opinion, The Expenses Case, upheld the constitutional validity of the Uniting for Peace Resolution. Since the composition of the General Assembly does not provide majoritarian support for any particular member of the Security Council’s permanent block, there is obviously a reluctance to use the General Assembly process as a super-Security Council in emergency situations when the Council’s action is terminated by a veto. The veto by permanent members is a power that was more universally institutionalized in the League of Nations, and in particular, in the principle that League decisions required unanimity; by voting no, any sovereign party could exercise veto power. This was, of course, a central reason that the League was a failure in matters of international peace and security. The issue arose indirectly in the context of the conflict in the former Yugoslavia. In effect, the new states victimized by Serbian aggression were also limited in their capacity to defend themselves by U.N. arms embargo. Thus, states could not effectively defend themselves against ethnic cleansing and genocide, partly because a lifting of the arms embargo would have to be done only if assurance could be had that no permanent member of the Security Council would exercise the veto. This put the U.N. in an extremely difficult situation. In some degree, the issues of the murkiness of the landscape regarding the scope of possible war crimes, including crimes against the peace, remains problematic. See generally Winston P. Nagan, Rethinking Bosnia and Herzegovina’s Right of Self-Defence: A Comment, 52 INT’L COMM. JUR. 34 (1994); see also Henkin, supra note 69, at 69 (stating, “it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be clear, sharp, and comprehensive.”).

211. The events of September 11 therefore require us to be sensitive to the problem of the veto, the downside of which may provide a spur and justification for the unilateral use of force and for a possible abuse of the doctrine of preemption, unconstrained by any objective standards of reasonableness. It is possible that the nature of the new threats to international peace and security will require important constitutional changes in the structure and the processes of the Security Council. For a review of some arguments regarding the possible reformulation of the Security Council and P-5 veto power, see generally Craig Hammer, Reforming the U.N. Security Council: Open Letter to U.N. Secretary General Kofi Annan, 15 FLA. J. INT’L L. 261 (2002).
Facts implicating WMD would significantly change the criteria of what might count as a reasonable invocation of preemptive self-defense, which could theoretically stretch the meaning of "imminence" to suggest possible extinction.\textsuperscript{212} One might look at the rules governing the regime of nuclear weapons and conclude, as Judge Weeramantry did, that they should be declared unlawful per se.\textsuperscript{213} Paradoxically, this argument might provide the strongest justification for the Bush Doctrine's rising policy of preemptive strikes against rogue states that have or might have the capacity to make, disseminate, and possibly use WMD. If, for example, nuclear weapons are per se unlawful, then the possible development and use of them by a state may well strengthen the characterization that such a state is both a rogue state and a candidate for preemptive action.\textsuperscript{214} Of course, this line of argument glosses over the fact that many states that have WMD are not rogue states, and seemingly fall under the protection of rules that prohibit intervention into their internal affairs. The rogue state argument might then suggest that such a state must meet some criterion of "rogueness" that carries an international law justification, which must have existed without regard to its status as a state posing a WMD threat.\textsuperscript{215} It is possible that Iraq was a prime candidate for this kind of analysis in the sense that its "rogueness" was tied to its aggression against Kuwait and the Iraqi regime's reluctant tolerance or, perhaps its uncooperative attitude toward the U.N. inspection regime. We should note, however, that in the shifting justifications for the attack against Iraq, it was the concern for the threat of WMD that seemed to be the strongest.\textsuperscript{216} To date, the invading forces have not found these weapons.\textsuperscript{217} It is possible that they are simply looking for the wrong things. With the almost decade-long inspections regime, it is hardly likely that the Iraqi regime would have kept the recipe for producing WMD inside Iraq in some logical place accessible to inspectors or to invading forces. There can be no doubt that the Hussein regime clearly had an incentive and a policy to produce WMD.\textsuperscript{218} Israel had them; this posed a re-

\textsuperscript{212} Sir Humphrey Waldock asserted that "[w]here there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier." \textit{See} Humphrey M. Waldock, \textit{The Regulation of the Use of Force by Individual States in International Law}, 81 \textit{Recueil Des Cours} 451, 498 (1952).

\textsuperscript{213} \textit{See} Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J 226. As Judge Weeramantry found, "humanitarian law reveals . . . an abundance of rules which both individually and collectively render the use or threat of use of nuclear weapons illegal." \textit{Id.} at 496.

\textsuperscript{214} \textit{See} Waldock, supra note 212, at 498.

\textsuperscript{215} \textit{See} Winston P. Nagan & Craig Hammer, \textit{The Changing Character of Sovereignty in International Law and International Relations} (forthcoming 2004, \textit{Columbia J. Trans. L.}). Professor Nagan delineates a typology of approximately thirteen forms of state. The categories are somewhat overlapping, but they are meant to be descriptive rather than juristic. These typologies are: failed states, anarchic states, genocidal states, homicidal states, thug controlled states, drug controlled states, crime controlled states, terrorist states, authoritarian states, garrison or national security states, totalitarian states, democratic rule of law states, and rogue states [this latter category is recognized in the new Bush Doctrine].


\textsuperscript{217} \textit{See generally} Reynolds, supra note 178.

\textsuperscript{218} \textit{See}, e.g., \textit{Is Preemption Necessary?}, \textit{WASH. Q.}, Spring 2003, at 115.
gional threat to most Arab states, which is why Egypt's position after 1973 was to move ahead with a peace treaty with Israel.219

Although this is not officially acknowledged in the Camp David Accords, Egypt’s position on the prospect of peace in the Middle East was influenced by the fact that Israel had WMD. Indeed, Egypt has had a long-standing policy of promoting the idea that the Middle East should be a nuclear-free zone.220 It was one of the prime movers in the promulgation of the Treaty of Pelindaba, which made Africa a nuclear-free zone.221 The Hussein regime took an alternative course, namely, to seek to match Israeli WMD developments with its own. The Iraq regime then became Israel’s critical state security threat in the region.222

Indeed, a symmetrical balance of WMD in the Middle East runs into the political problem that the checks and balances in a totalitarian state are not the same as those in a democratic state and thus, the symmetry and deterrence value of the threat of mutual destruction is largely illusory. Israel’s bombing of Iraqi nuclear reactors was an example of a stretched version of anticipatory self-defense, based on an expanded reading of the concept of an imminent threat. Israel’s idea of imminence was redefined by the nature of the threat, namely, Iraq’s scientific progress in the direction of the possible production of WMD.223

Consequently, so long as the Hussein regime had the desire, resources, and technical capability to produce and possibly deploy WMD, that regime would pose a serious threat to the security of the Israeli state. Strategic planners would also have to consider the possibility that WMD could be deployed outside the boundaries of conventional state defensive or offensive posture; they could be passed on to terrorist groups, thus allowing rogue states to avoid detection and responsibility for the possible use of such weapons. In short, a rogue-type regime could disseminate WMD to terrorist groups on an anonymous basis, and thus insulate itself both from responsibility and the prospect of retaliation. Introducing the

219. The world reached the brink of nuclear war approximately thirty years ago. The Yom Kippur war quietly commenced when Egypt and Syria perpetrated a surprise attack against Israel; the Egyptian Army crossed the Suez Canal and scores of Syrian tanks deeply infiltrated the Golan Heights. Israel was caught entirely unprepared, and launched confused, unsuccessful counterattacks until the early hours of October 9, 1973, when senior Israeli military leaders suggested that Israel deploy nuclear weapons. Then Prime Minister Golda Meir rejected this course of action and instead lobbied the United States for support. Soon thereafter, Henry Kissinger arranged air supply to Israel, which turned the tide of the conflict. The Israelis crossed the Suez Canal, were within 20 miles of Damascus, and encircled the Egyptian Army by October 21. Days later, the countries established a permanent cease-fire. See Avner Cohen, The Last Nuclear Moment, N.Y. TIMES, Oct. 6, 2003, at A17. For a comprehensive review of the political history of Israel’s nuclear program, see generally AVNER COHEN, ISRAEL AND THE BOMB (1998).


222. In 1981 Israel claimed it acted in self-defense when it bombed an inactive Iraqi nuclear reactor, arguing that Iraq was going to use the reactor to make nuclear weapons to threaten Israel. See STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 159 (1996).

223. Id.
terrorism element into such strategic and operational concerns tests the foundations of the self-defense principle as it is traditionally understood.\textsuperscript{224}

If a regime is not reluctant to use WMD, it will be perceived as a greater and more realistic threat than a state that has them, but has never used them. The use of chemical weapons in Hallabja, a Kurdish populated city in Kurdistan, signaled to the world community the possibility that the Hussein regime might be unrestrained about its willingness to use chemical weapons in circumstances that cannot be justified by international law.\textsuperscript{225} Most human rights groups would have characterized the use of chemical weapons to exterminate the Kurdish population of Hallabja as a human rights atrocity\textsuperscript{226} and, at least, as an international crime under the Genocide Convention, since the manifest targeting of a specific group carried the Hussein regime's intent to destroy it in whole or in part.\textsuperscript{227}

International lawyers must work more carefully through the specific problem posed by the Bush administration concerning the conditions now linked to the major forms of armed conflict, which threaten individual and collective security. We would submit that a central principle implicit in the Bush Doctrine is that when the reasons for a rule change, the rule must accordingly change.\textsuperscript{228}

\begin{enumerate}
\item \textsuperscript{224} "[I]t is the attack that provides the decisive test" as to when self-defense can be exercised. \textit{Id.} at 165.
\item \textsuperscript{225} Under Saddam Hussein's Iraqi regime, northern-dwelling Kurds constituted 23 to 27% of population of Iraq. \textit{See} Howard Adelman, \textit{Humanitarian Intervention: The Case of the Kurds}, 4 INT'L REFUGEE L. 4, 5-7 (1992). Conflict between Iraqi Arabs and Iraqi Kurds has been ongoing for decades. For example, a Kurdish revolt against Saddam Hussein's Baa' th regime transpired in 1974 after a 1970 autonomy agreement between Iraqi Kurds and the Baa' th regime fell apart. Saddam Hussein crushed this rebellion in 1975 when his forces killed 50,000 Kurds. \textit{Id.} Later, after the Iran-Iraq war ended in 1988, the Iraqi army killed thousands of Kurdish nationalists and used chemical weapons against the civilian population of the Kurdish village of Hallabja. \textit{Id.}
\item \textsuperscript{227} According to Article II of the Genocide Convention of 1948, acts of genocide are certain acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." \textit{See} Convention on the Prevention and Punishment of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.
\item \textsuperscript{228} For example, President Bush intimated in his March 2002 speech in O'Fallon, Missouri that international terrorism has changed the reasons underlying the rules level of armed conflict. Specifically, with regard to fighting the war on terrorist acts perpetrated by al Qaeda operatives under the protection of the Taliban regime during the war in Afghanistan, President Bush declared: \textit{[Y]ou've got to know that we're fighting against Taliban determined group of killers. These are people who would rather die than surrender. These are people who hate America. They hate our freedom. They hate our freedom to worship. They hate our freedom to vote. They hate our freedom of the press. They hate our freedom to say what you want to say. They can't stand what we stand for. And, therefore, we have no choice but to hunt 'em down one by one to defend the very freedom we hold dear in America.}
\end{enumerate}

This principle works on the assumption that rules are responses to problems in society generated by certain conditions. When the conditions change, it might be possible to salvage the general basis of the rule, which might continue to serve a purpose; it would thus be necessary for interpreters to decipher new meanings that might be ascribed to the rules, but they must be developed with far greater exactitude than the formulations as they currently appear in the new Bush Doctrine. The idea that terrorists are non-risk-averse, have access to significant resources, and could have access to WMD provides a small margin for error on the part of both states and the Security Council in seeking to maintain international peace and security. If a mistake is made, the consequences of the use of WMD would be catastrophic, and one suspects that the freedoms we now enjoy would be even more significantly diminished as a political matter. This means that we must ever more carefully scrutinize background facts and intelligence communiqués, as they become available, and cautiously monitor conflict situations in ways that have not yet been done to ensure that the balance between security and liberty is not destroyed. This balance is crucial to the foundations of the rule of law as we currently understand it.

B. Rogue States

Against this background we come to precise issues implicit in the claims asserted by the new Bush Doctrine. Two important principles merit analysis. First, the doctrine observes the concept and expectation of what constitutes a rogue state; second, the doctrine acknowledges that regime change may be justified by international law when states meet the "rogueness" criterion. According to the Bush Doctrine, there are five characteristics which determine rogue state status. They are states that:

- brutalize their own people and squander their national resources for the personal gain of the rulers;
- display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
- sponsor terrorism around the globe; and
- reject basic human values and hate the United States and everything for which its stands.  

The drafters of the rogue state definition might, of course, have had a specific regime in mind when drafting these criteria. However, it seems that these drafters stumbled upon one of the most important, but nonetheless difficult,

2001 was extreme enough to change the face of the Caroline doctrine's established meaning of self-defense under Article 51 of the U.N. Charter.

229. In the aftermath of September 11, there was some concern that attempts to preempt future attacks may trump democratic freedoms and liberties. See 148 Cong. Rec. S8646 (2002) (expressing understanding for the desire to curb terrorism but fearing that the Bush administration, or any other administration, "might become so zealous and so focused on that mission that important freedoms could be trampled.").

questions of when a state is subject to international jurisdiction based on interna-
tional concern. What, in short, is the scope of an international obligation under
the U.N. Charter to limit the concept of sovereignty? The distinction made
by the Charter is that certain matters are reserved to the domestic jurisdiction of
a state. The implication is that sovereignty is divisible; some facets of sover-
eignty cannot trump the concept of international obligation and some preserve
sovereign autonomy over matters essentially within the domestic jurisdiction of
a state. The five criteria listed by the Bush Doctrine involve factors that are
clarly within the purview of international jurisdiction because they are specifi-
cally, individually, and collectively matters of international concern. Generally,
this outlook might be surprising since the Bush administration’s approach to
matters of international obligation has been littered with claims to U.S. excep-
tionalism, or what others have called U.S. unilateralism. If the Bush Doc-
trine seeks to hold sovereign regimes in the international community to its
emerging standard of adherence to international obligations, soon, the United
States may not be able to pick and choose which rogue states to coddle and
which to destroy.

If one eliminates the “rogue state” language of the Bush Doctrine and sim-
ply examines criteria indicative of unacceptable international behavior under the
U.N. Charter, the concept of a “rogue state” is not normatively exceptional. In-
deed, it gravitates to a position long held by liberals and progressives in the
international community that U.N. Charter values must infuse the authority
foundations of the state. In short, the rogue state criteria are essentially the same
criteria normatively unacceptable for admission to U.N. membership. Liberal

231. The Security Council has lately taken a far more interactive approach to the existence of
threats to international peace, which suggests that once they are generally notified, member states
have an obligation to rectify these threats under the auspices of the Charter. Between 1990 and
1996, the Security Council declared the existence of a formal threat to international peace and security
sixty-one times, as opposed to the six times it did so in the preceding forty-five years. Jessica T.

232. Historically, “exceptionalism” has been a staple of American foreign policy since Alexis
de Tocqueville published his observations of American society over one hundred-fifty years ago,
which has since evolved into American unilateralism. “Tocqueville is the first to refer to the United
States as exceptional—that is, qualitatively different from all other countries.” SEYMOUR MARTIN
LIPSET, AMERICAN EXCEPTIONALISM; A DOUBLE-EDGED SWORD 18 (1996). Among the various as-
pects of American culture with which Tocqueville was fascinated, he was particularly struck by the
individualistic nature associated with America’s international relationships. See id. at 33 for Sey-
mour Martin Lipset’s views, which are representative of a contemporary proponent of the “America
as unique” thesis.

233. See Michael J. Glennon, There’s a Point to Going it Alone: Unilateralism Has Often
Served Us Well, WASH. POST., Aug. 12, 2001, at B2 (explaining the phenomenon of U.S.
unilateralism).

234. From a historical standpoint, liberals have long had a deep-seated mistrust of antide-
mocratic processes, which stemmed largely from scores of eighteenth-century liberals skeptical
of the prevailing covert diplomacy and clandestine alliance politics, which they felt compelled states
to go to war. See FELIX GILBERT, THE BEGINNINGS OF AMERICAN FOREIGN POLICY 45-47, 60-62
(1961). World War I confirmed the fears of the successive generation of liberals, which paved the
way for President Woodrow Wilson to call for “open covenants of peace openly arrived at” and the
development of the League of Nations. See President Woodrow Wilson, Address to Congress, Point
1 of the Fourteen Points (Jan. 8, 1918), reprinted in RUTH CRANSTON, THE STORY OF WOODROW
WILSON 461 (1945). The liberal solution to international enmity has hence been collective security
international lawyers have long supported humanitarian intervention when threats to international peace and security—based on the same criteria indicated by President Bush—are threatened. The rogue state principle has other interesting ramifications. It perhaps highlights the lacuna in the international system which, traditionally, bases the recognition of a state on such practical criteria as control over territory, population, internal governance, and the capacity to manage foreign relations. Modern international law has sought to base the recognition of a state as a member of the U.N. on its ability and willingness to uphold the values of the U.N. Charter, in particular the values related to peace and security. The rogue state principle seems to dramatically move the conception of what comprises an acceptable sovereign state in the direction of the explicit standards, policies, and purposes behind the U.N. Charter. If the United States sought to define the concept of a rogue state in unilateral terms, the unilateral invocation of critical U.N. Charter standards is an endorsement rather than a depreciation of the Charter as an organizing principle of sovereignty and world order. We do not believe that this is what the Bush Doctrine intended, but this may be an unintended consequence.

There is a further insight that we might draw from the new Bush Doctrine. We have mentioned that international law contains traditional criteria for the identification of a state as well as those additional normative criteria discernable from the U.N. Charter. Additionally, the recognition of the new states in the Balkans has imposed even more strenuous criteria on the recognition of sovereignty by demanding that these new states' constitutions must be democratic, safeguard human rights, and secure the protection of minorities. Where, then, does the Bush Doctrine lead us? We would suggest that the rogue state concept implies that decision-makers must now take a far more discriminating look at

by targeting the act of aggression itself, as opposed to a particular aggressor, thus subordinating national interests to the interests of the global community. See Michael Smith, Realist Thought From Weber to Kissinger 54-59 (1986) (discussing liberal theories and ideas underlying the concept of the League of Nations). The iteration of liberal ideology which followed emerged during and after World War II; the belief in a new order based not on “exclusive alliances” but on “an all-embracing vision of One World at peace” was heralded by the growing liberal societal base in America. See M. Donelan, The Ideas of American Foreign Policy 23-24 (1963). Contemporarily, these liberal views are entirely comprised by the chief instrument of international peace, the United Nations, the Charter of which specifies that only defensive wars are legitimate. See U.N. Charter, art. 1, para. 1 (stating that the primary purpose of the United Nations is to suppress “acts of aggression or other breaches of the peace”); id. art. 2, para. 4 (“All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state.”); id. art. 42 (permitting the Security Council to employ force “to maintain or restore international peace and security”); id. arts. 43, 45 (obligating member states to provide forces to the Security Council); id. art. 51 (preserving the right of individual or collective self-defense).

235. According to the Third Restatement of Foreign Relations section 201, “a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” Restatement (Third) Of Foreign Relations Law Of The United States, § 201 (1987).

236. See U.N. Charter arts. 55, 56.

the nature of a state and the trimmings of sovereignty within which it is clothed. There are more discriminating criteria to distinguish states than simply size.\textsuperscript{238}

There is a third and final element in this aspect of the analysis. In 1998, Congress enacted legislation that encouraged the United States to work toward the replacement of the Hussein regime in Iraq.\textsuperscript{239} A group of neo-conservative politicians led by such figures as Richard Perle and Paul Wolfowitz produced a study that suggested that the then-existing circumstances in Iraq compelled the United States to embark on a policy of regime change.\textsuperscript{240} This policy was submitted to the Clinton administration, although to our knowledge the Clinton administration did not act on it. Several of the same neo-conservative intellectuals were also in the business of advising Benjamin Netanyahu concerning Israel’s security interests and the future.\textsuperscript{241} The document they produced implied a quite valid criticism of U.S. government policy in the Middle East.\textsuperscript{242} If it was

\textsuperscript{238} See Nagan, supra note 210. For example, there are entities which meet the requirements of traditional international law but which may still be regarded as essentially failed states (including drug-controlled states, kleptocratic states, thug-controlled states, and terrorist states) as well as authoritarian states, totalitarian states, garrison states, and the related national security states in addition to democratic states. It thus would seem that the Bush administration is claiming that the international community must be more discriminating about what the content of state and sovereignty really are. This, of course, means that the formal theory of sovereignty may now be more carefully scrutinized to determine whether, from the Bush Doctrine point of view, sovereignty serves a as mask for a rogue state or, from an international point of view, whether sovereignty obscures certain realities which are clearly matters of international jurisdiction.


\textsuperscript{241} In 1996, Richard Perle, Douglas Feith and David Wurmser, collaborated on a report to the newly elected Likud government in Israel. In this report, they called for “a clean break” with the Israeli policy of negotiating with Palestinians and trading land for peace. They wrote that “Israel can shape its strategic environment . . . by weakening, containing and even rolling back Syria. This effort can focus on removing Saddam Hussein from power in Iraq . . . Iraq’s future could affect the strategic balance in the Middle East profoundly.” Institute for Advanced Strategic and Political Studies, \textit{A Clean Break: A New Strategy for Securing the Realm}, at http://www.why-war.com/resources/files/cleanbreak.pdf (last visited Oct. 11, 2003). The report additionally called for “reestablishing the principle of preemption.” Id.

\textsuperscript{242} Several of the drafters of this document served as advisors to the Foreign Minister of the Israeli government, Benjamin Netanyahu of the Likud Party. Their charge was to freshly reexamine
the U.S. policy to preserve the status quo, then U.S. policy would fail because the status quo was committed to armed conflict and, from the Arab side, dedicated to the possible extinction of Israel. Since most of these Arab states are undemocratic and unaccountable, creating peace with them would essentially be a tactical or strategic expedient to postpone conflicts indefinitely, not end them. Theorists then realized the potential of a regime change in Iraq, which could be the lever to completely shift the paradigm of Middle East conflicts. The strategic implications were essentially these: if Iraq's Hussein regime could be overthrown and a democratic regime could be instituted with a strong American military and intelligence presence, this presence could influence regime change in Iran, where the Ayatollahs are known to be unpopular, in Syria, which runs on undemocratic Baa'thist lines, and it could exert tremendous pressure on Saudi Arabia to adapt.

The assumption made by the neo-conservatives was that the promotion of democracy and the empowerment of civil society would dramatically shift the paradigm of conflict in the Middle East. We suspect that these assumptions were based on the notion that certain kinds of states are most reluctant to wage war; these kinds of states often have vested interests in making peace and developing their societies by progressive means. This builds on the oft-cited dictum that democracies tend not to make war on each other. This suggests a further principle, which implies a claim that the preferred form of sovereign independence is tied to democratic values, and that democratic values are themselves critical for the establishment of enduring peace. It is not altogether clear in the aftermath of the invasion and occupation of Iraq that this indeed is the scenario that is being played out. In our judgment, if this is an accurate estimation of the strategic objectives of the current administration, then one must admit that it was a vastly ambitious and incredibly risky exercise. The critical question is: Can war be justified simply to promote democracy?

The new Bush Doctrine must not be read simplistically; its creators might have thought they were erecting a narrow construct to justify unilateral intervention. The Bush Doctrine has also established an ostensible, yet elementary, framework with regard to international relations and practice, which over time may generate expectations about the permissible limits of what is and is not the situation in the Middle East and to devise new strategies to possibly implement a new paradigm. The document they produced was a highly sophisticated interpretation of the crisis in the Middle East. Effectively, they collectively indicate that U.S. policy in general seeks stability in the Middle East by developing short-term understandings with regimes which are largely undemocratic, unaccountable, ruthless with regard to their own people, and unyielding in their covert support for international terrorism. Implicit in this formulation is the empirical assumption that in general, democracies are not aggressive and do not coddle terrorism. Therefore, bold thinking required the unthinkable; Arab states would have to contemplate regime change in a democratic direction and, if that proved possible, the foundations for long-term peace in the Middle East would be assured. Implicit in this approach is the idea that real sovereignty must be based on democratic principles and that sovereignty based on absolutism can often mean a threat to international peace and security. This approach seems to contain the incipient seeds of the Bush Doctrine with regard to rogue states, abuse of sovereignty, and the stratagem of regime change.
lawful. 243 The Bush Doctrine, in fact, seems to promote the ideas of aggressive international obligation, rethinking of state responsibility, and virtually and implicitly asserts that democracy is a critical normative standard for maintaining peace and security in the world community. 244 These values have not always been characteristic of U.S. foreign relations. Statements of principle do not exhaust the analysis of the lawfulness of certain conduct under international law. The methods, techniques, strategies, and tactics to secure a state’s objectives must still be subject to the most rigorous scrutiny to determine if they meet at least a standard of reasonableness; if these doctrines do manifest reasonable restraint in their assertion of claims in the international system, they must additionally justify them.

VII. STRATEGIC JUSTIFICATIONS FOR THE IRAQ WAR

Let us backtrack a bit. Israel basically has a monopoly on WMD in the Middle East. It developed nuclear capability because it apparently felt that ultimately, nuclear deterrence was and is the only way to guarantee its continued existence. There is evidence that during the 1973 war, the Israeli Cabinet considered using nuclear weapons to defend itself if it became necessary. 245 Clearly, Egypt would have been one of the target states for a nuclear attack. It is therefore not surprising that the Egyptians seriously examined the nuclear threat; Egypt soon opted to become a nuclear-free state, committed to abolish nuclear weapons in both the Middle East and Africa. 246 We suspect that this Egyptian policy was induced by the facts that Israel had nuclear weapons and a territorial rearrangement could not be achieved through the use of force. The Egyptians had an incentive at Camp David to make peace. The Israelis also had an incentive to make peace, particularly with an Arab state working so aggressively to rid the Middle East and Africa of nuclear weapons. Iraq, however, had a different point of view. Clearly, Israeli nuclear weapons constituted a threat to Iraq and from Iraq’s point of view, there needed to be a symmetrical rather than an asymmetrical balance of power in the Middle East. Thus, Iraq’s effort to develop WMD enhanced the security threat in the region, and partly explains why Israel attacked the Iraqi nuclear reactor near Baghdad on the morning of June 7, 1981. 247


244. Peacebuilding is a problematic element in the new Bush Doctrine because of the confusion surrounding the concept itself. The Bush administration argues that the only way to secure a lasting peace in Iraq (with implications for the rest of the Middle East) is to establish democratic institutions. For a review of this long-standing idea, see Pauline H. Baker, Conflict Resolution Versus Democratic Governance: Divergent Paths to Peace, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 563-72 (1996).

245. See COHEN, supra note 219.

246. See generally Resolution 3263, supra note 220.

Legal justifications do not exhaust a rational inquiry into whether the use of force is permissible. Broader contextual factors might serve to enhance or lighten the weight of proffered justifications. Indeed, strategic justifications may have an influence on what is and is not permissible or reasonable in the context of states' international relations. Strategic justifications may undermine the claim that certain forms of conduct are lawful, while they might support other claims to lawfulness. The critical question, then, is what strategic calculations animated the Bush administration to press for an attack on Iraq in the face of Security Council opposition, which itself created a global crisis of confidence in either the prudence of U.S. foreign policy or in the relevance of the U.N. as an institution for moderating conflicts and developing peaceful structures of global importance? We recall that the central argument articulated by the Bush administration was that Iraq was in breach of its obligation to disarm.248 If this were all, the justification for going to war—upholding the U.N.'s inspection regime—seems weak if the inspection regime itself had not completed its work and if the U.N. reposed faith in the fact that the regime could complete its work. This left the administration to offer a second justification, that Iraq was a rogue state with WMD and was therefore a threat to international peace and security. A preemptive attack with regime replacement to follow would be justified. As we have seen, the latter is a more serious claim that must be examined from a strategic point of view.249

A single nuclear power in the Middle East—or a state with other WMD capabilities—constitutes a major security threat for all states and peoples in the region and two WMD powers immeasurably enhance the instability of the region. From the Israeli point of view, WMD in the hands of a contiguous dictator is a long-term and vital security threat. Under such circumstances, the Israeli authorities would have a vital interest in seeing preemptive action in Iraq and possibly even regime change. Likewise, the U.S. Congress also saw the threat posed by Iraq and enacted legislation calling for the replacement of the Saddam Hussein regime.250

VIII. WHETHER THE STRATEGIC IMPLICATIONS FOR IRAQ UNDERMINE THE NEW BUSH DOCTRINE

These strategic implications must still meet the test of whether the methods used to secure regime change can be justified under international law. This recalls the standards that govern the imperative to intervene under whatever con-

249. For example, if there were a reason to believe that the Hussein regime had WMD, then the enemies of this regime might be justified in feeling vulnerable if the regime could deploy these weapons to terrorist groups bent on mass murder.

https://scholarship.law.berkeley.edu/bjil/vol22/iss3/3
DOI: https://doi.org/10.15779/Z38R063
struction we give to the principle of self-defense in international law. Here, the asserted strategic justifications for regime change, which suggest a course of action to replace a dictator with a regime of democratic aspiration on the grounds of humanitarian intervention or based on this dictator's potential to produce WMD in the future, must confront additional facts which suggest other motives for intervention. These other motives might include the possibility that a war in Iraq would be popular in the United States through the lens of U.S. domestic politics. The actual invasion of Iraq also coincided with the Enron scandal. Enron, with its major Texas connections, was a corporation close to the President's political pocketbook. An invasion of Iraq would also be relatively low cost, but its enormous oil resources would constitute a win-win scenario for American corporate interests, as well as the Iraqi exiles who would replace Saddam's elite ruling autocracy. The oil interest scenario implicated Afghanistan as well, since Unocal, an operation with ties to the Republican Party, pressed the U.S. government to negotiate with the Taliban on the oil pipeline through Afghanistan. What is clear is that economic interests tied to big oil represent self-interested pressure, and such pressure would seem to undermine the case that self-defense, preemptive self-defense, and regime change were matters mandated by reasonable standards in international law.

One further point might be made with regard to these contextual factors; the invasion of Iraq would also subject the United Nations to the dictates of the United States, or perhaps demonstrate that the United Nations is, in fact, irrelevant. These factors might detract from the idea that the Hussein regime represented the kind of threat which mandated an armed intervention. In the context of Iraq's reconstruction, the Bush administration seems to have a continuing policy of unilateralism. The administration has expressed evident reluctance to expand the U.N. role in nation-building, and reluctance to bring other nation-

251. Note that Saddam Hussein ran what we describe as a homicidal state. See Nagan & Hammer, supra note 215.

252. Among the U.S. domestic interests that might be protected by the war in Iraq include continuing the war on terror, especially against Al Qaeda, and continuing the search for weapons of mass destruction in Iraq. See Dana Milbank, Bush's Oratory Helps Maintain Support for War: Skillful Rhetoric Keeps Public on Board Despite Mounting Casualties, MSNBC News, at http://msnbc.msn.com/id/4825552/ (last visited Apr. 26, 2004).

253. During the 107th congressional session, Congress was preoccupied with the Enron Scandal and with the terrorist attacks of September 11, 2001; accordingly, a series of congressional resolutions were sponsored, which dealt with homeland security, corporate accountability, and, perhaps most importantly, the authorization of force against Iraq (just prior to bankruptcy reform). See Session Headed For Another Week; Endgame In Doubt, CONGRESS DAILY, Oct. 10, 2002.

254. See Kurt Eichenwald, Audacious Climb to Success Ended in a Dizzying Plunge, N.Y. TIMES, Jan. 13, 2002, at 1 (stating that "[b]y the time Mr. Bush was inaugurated in January 2001, Enron and a number of its executives, including Mr. Lay, had contributed more money to Mr. Bush over his political career than anyone else, an amount exceeding $550,000. Enron then wrote a check for $100,000 for Mr. Bush's inaugural committee, and Mr. Lay added another $100,000."); Joseph Kahn & Jeff Gerth, Collapse May Reshape the Battlefield of Deregulation, N.Y. TIMES, Dec. 4, 2001, at C1 (reporting that Kenneth Lay met with Vice-President Cheney for thirty minutes to discuss the Bush administration's new national energy policy, which included Enron's long-standing goal of breaking up monopoly control of electricity transmission networks, and that "Enron also had an unusual opportunity to influence Mr. Bush's choices" for appointments to the Federal Energy Regulatory Commission (FERC)).
states under the umbrella of the U.N., even though this could ease the burden on Americans in human lives and the economic cost of the occupation. The presence of private industry, such as Halliburton, which has received billions in payment for reconstructing Iraq, also seems to suggest a level of self-interestedness that undermines the ostensible goals and objectives indicated in the Bush Doctrine.  

Overthrowing the Hussein regime in Iraq was only the second pillar to fall in the plan to redesign the entire region. However, strategically, it is a crucial pillar. The Hussein regime was an international delinquent that institutionalized brutalization and torture and even used WMD on its own inhabitants. It was also a regime rich in human and material resources. Disposing of Hussein would give the U.S. interests control over Iraq's oil, which would essentially permit Iraq to pay for the replacement of its own regime. As indicated earlier, a critical U.S. presence in Iraq could then be effectively used to destabilize Iran, Saudi Arabia, and Syria since all of these regimes are widely acknowledged to be unpopular, corrupt, and thoroughly undemocratic. The Iraq War was a bold strategic design; had the original plan worked, it is likely that some Middle-eastern nations would have praised President Bush's efforts. However, the Bush administration stalled on Saudi Arabia, apparently because of the extensive ties between the Bushes and the royal family. With Saudi Arabia off

255. Iraq, apparently, is officially for sale; in September 2003, the U.S.-appointed administration in Iraq announced it was opening up nearly all segments of the Iraqi economy to foreign investors. By this time, the U.S./Iraqi Administration and the Iraqi Governing Council, which was hand-picked by U.S. occupying forces, already awarded reconstruction contracts to U.S. firms, including Bechtel and Halliburton, but offered their competitors no opportunity to bid on these projects and recently announced actions to allow foreign ownership of “any of Iraq's assets, apart from its oil.” See Charles Hodson, Iraq Opens up to Global Investors, CNN NEWS, Sept. 22, 2003, available at http://edition.cnn.com/2003/ WORLD/meast/09/21/iraq.dubai/. This includes everything from pharmaceuticals and engineering to electricity and telecommunications, which could mean that hundreds of previously state-owned companies would be sold off at fire-sale prices. Id.


257. Richard Murphy, a former Assistant Secretary of State to the Reagan administration, contends that Iran's longstanding problems stem from its inherently corrupt and mismanaged government. See Richard W. Murphy, It's Time to Reconsider the Shunning of Iran, WASH. POST, July 20, 1997, at C1. With regard to Saudi Arabian corruption and anti-democratic governance, see generally Kathy Evans, Fundamental Difficulties, GUARDIAN, May 15, 1993, at 27.

258. See Lally Weymouth, How Bush Went to War, WASH. POST, Mar. 31, 1991, at B1. At the advent of the Persian Gulf War, under President H.W. Bush, Secretary Dick Cheney was sent to discuss the U.S.-Saudi relationship with Prince Fahd of the Saudi royal family; A Bush administration official said, “there was a conclusion that we needed to put a defensive posture into Saudi Arabia to let Saddam know that an attack against Saudi Arabia was an attack against the U.S.” Professor Michael Glennon has written that President H.W. Bush's pledge to Saudi Arabia was "made as a sole executive agreement ... more sweeping in its terms than any of the seven mutual security treaties to which the United States is party, for none of those contains an ironclad commitment to go to war." See Michael J. Glennon, The Gulf War and the Constitution, 70 FOREIGN AFF.
the radar screen and the problems of consolidating the victory in Iraq looming large, the metaphor that the United States hooked the big Iraqi fish, forcing others to quickly fall into the net, was reversed. Now, the United States appears to be on the hook and terrorist operatives in the region have not ceased.

Meanwhile, the cost of U.S. unilateralism under the Bush Doctrine has increased exponentially in terms of the human cost as well as the material price.\textsuperscript{259} Most recently, President Bush addressed the United Nations, issuing a call for U.N. support in the peacekeeping and reconstruction efforts in Iraq.\textsuperscript{260} Bush's call was mandated by the problematic situation of security on the ground and the difficulty of reconstructing the basic infrastructure of Iraq. The human costs have become a serious political problem for the President; the economic costs are such that it is imperative that outside states be willing to make important contributions to Iraqi reconstruction.

Unfortunately, in light of his September 23, 2003 speech to the United Nations, it is now evident that the President does not concede the relevance of the United Nations in these matters.\textsuperscript{261} Neither has the President actually seen how

\textsuperscript{84, 85 (1991); see also Bush: No Appeasement: U.S. Role in Saudi Arabia is 'Wholly Defensive, America Will Stand by Her Friends,' President Declares, L.A. TIMES, Aug. 8, 1990 at P1.  
\textsuperscript{259} Speaking on the war in Iraq, Senator Ted Kennedy said the Bush administration has failed to account for nearly half of the $4 billion the war is costing each month. He said he believes much of the unaccounted-for money "is being used to bribe foreign leaders to send in troops." Kennedy Remarks, supra note 177.  
\textsuperscript{260} Specifically, President Bush stated that  
[T]he United Nations can contribute greatly to the cause of Iraq self-government. America is working with friends and allies. . .[to] expand the U.N.'s role in Iraq. . .[and] the United Nations should assist in developing a constitution, in training civil servants, and conducting free and fair elections [in Iraq]. . .The United States is [also] using sanctions against governments to discourage human trafficking. The victims of [the human trafficking] industry also need help from members of the United Nations. . .[These challenges] require urgent attention and moral clarity. Helping Afghanistan and Iraq to succeed as free nations in a transformed region, cutting off the avenues of proliferation, abolishing modern forms of slavery—these are the kinds of great tasks for which the United Nations was founded.  
\textsuperscript{261} In his September 23, 2003 speech to the United Nations General Assembly, President Bush admonished the Assembly that "careful discussion . . . and also decisive action [is needed regarding Iraq]." See id. His subsequent remarks insinuated that the United States has assumed the responsibility of following through on the principles of the U.N. Charter; accordingly, he seems to suggest that if the United Nations does not take action in situations that—in the estimation of U.S. government officials—demand action, then the United States shall act instead. Specifically, President Bush stated that  
[The United States was] an original signer of the U.N. Charter . . . [a]nd we show that commitment by working to fulfill the U.N.'s stated purposes, and give meaning to its ideals. The founding documents of the United Nations and the founding documents of America stand in the same tradition. Both assert that human beings should never be reduced to objects of power or commerce, because their dignity is inherent. Both require—both recognize—a moral law that stands above men and nations, which must be defended and enforced by men and nations.  
These remarks seem to harmonize with the President's earlier remarks to the United Nations General Assembly of September 12, 2002, in which he questioned the relevance of the United Nations. Specifically, President Bush stated that "the United Nations [faces] a difficult and defining moment.
important it is to secure United Nations approval as a means to collaborate with other states. It is also possible that the credibility of the United States, in seeking to deal unilaterally with global terrorism, has compromised the delicate structures of the diplomatic process for forging complex alliances under international law. U.S. exceptionalism, and the trend toward unilateralism, will require a sea change in the administration's perspectives on multilateralism and its support for the integrity of U.N. institutions and processes. The ultimate challenge is not simply a challenge to the viability of the United Nations or to conventional international law principles, the challenge is fundamentally to the vital importance of the international rule of law itself.

Are Security Council resolutions to be honored and enforced or cast aside without consequence? Will the United Nations serve the purpose of its founding or will it be irrelevant?” See President George W. Bush, Address to the United Nations General Assembly (Sept. 12, 2002), available at http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html. This position has been reiterated by various members of President Bush's administration. See Statement by U.S. Ambassador John Negroponte, U.N. Press Release SC/7564 (Nov. 8, 2002) (stating that if the United Nations Security Council “failed to act decisively in the event of further Iraqi violation, [Resolution 1441] did not constrain any Member State from acting to defend itself against the threat posed by that country, or to ... protect world peace and security.”).