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LEGAL STANDARDS GOVERNING PRE-EMPTIVE STRIKES AND FORCIBLE MEASURES OF ANTICIPATORY SELF-DEFENSE UNDER THE U.N. CHARTER AND GENERAL INTERNATIONAL LAW

OLUMIDE K. OBAYEMI*

*When you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him. – Franklin D. Roosevelt ***

I. INTRODUCTION

Historically, the United States had never unilaterally attacked another nation militarily prior to its first having been attacked or prior to its citizens or interests first having been attacked. This posture has changed permanently. On September 20, 2001, President George W. Bush of the United States announced the expansive “Bush Doctrine,” when he declared:

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. Either you are with us or you are with the terrorists.¹

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In the same manner, Vice President Dick Cheney declared before the National Association of Home Builders on June 6, 2002 thus:

... we also realize that wars are not won on the defensive. We must take the battle to the enemy and, where necessary, preempt grave threats to our country before they materialize.²

On August 26, 2002, before the Veterans of Foreign Wars National Convention, Vice President Dick Cheney went on and declared as well that:

... containment is not possible when dictators obtain weapons of mass destruction, and are prepared to share them with terrorists who intend to inflict catastrophic casualties on the United States.³

Finally, on March 16, 2006, in the National Security Strategy released by President George Bush, he reiterated his undying commitment to the "Bush Doctrine." He stated that although America faces a choice between the path of fear and the path of confidence, the path of fear – isolationism and protectionism, retreat and retrenchment, Americans must always be on the offensive in the war against terror.⁴ America's resolve was restated thus:

America is at war. This is a wartime national security strategy required by the grave challenge we face – the rise of terrorism fueled by an aggressive ideology of hatred and murder, fully revealed to the American people on September 11, 2001. This strategy reflects our most solemn obligation: to protect the secu-

** Franklin D. Roosevelt, Fireside Chat of Sept. 11, 1941, quoted in *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 247 (1966).

1. See President George Bush's Seminal Speech on Sept. 20, 2001 to the Joint Session of Congress, discussed by Carol Devine-Molin in *The GOP's Magnificent Convention*, on September 2, 2004, available at <http://www.gopusa.com/commentary/cmolin/2004/cdm_0902p.shtml> (last visited on March 16, 2006) [hereinafter "Bush Doctrine"]. The same views were also advocated on other occasions: see speeches of President George W. Bush at West Point (June 1, 2002) <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>>; and the President's United Nations speech of Sept. 12, 2002 <<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>>; WASHINGTON POST, June 2, 2002, p. A1; WASHINGTON POST, Sept. 13, 2002, p.A1; see also, FRANCIS A. BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 75-167 (1985); FRANCIS A. BOYLE, *THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY* 79-112 (1989).

2. See the speeches of Vice President Dick Cheney before the National Association of Home Builders on June 6, 2002 found at <<http://www.whitehouse.gov/vicepresident/newsspeeches/speeches/vp20020606.html>>.

3. The Vice President's speech before the Veterans of Foreign Wars National Convention on August 26, 2002 found at <<http://www.whitehouse.gov/news/releases/20020826.html>>.

4. See George W. Bush, *The National Security Strategy*, dated March 16, 2006, available at <<http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>> (last visited March 17, 2006).

rity of the American people. America also has an unprecedented opportunity to lay the foundations for future peace. The ideals that have inspired our history – freedom, democracy, and human dignity – are increasingly inspiring individuals and nations throughout the world. And because free nations tend toward peace, the advance of liberty will make America more secure. These inseparable priorities – fighting and winning the war on terror and promoting freedom as the alternative to tyranny and despair – have now guided American policy for more than 4 years. We have kept on the offensive against terrorist networks, leaving our enemy weakened, but not yet defeated.⁵

The thesis of this article argues that while the use of preemptive military strikes, now adopted by the United States against non-state actors and rogue states, appears to be justified under international law, such a military exercise must be subject to well defined and clearly stated international legal rules.

“Preemptive” use of military force is the taking of military action by the United States against another nation so as to prevent or mitigate a presumed *military* attack or use of force by that nation against the United States.⁶ There is no doubt that preemptive military strike, also defined as the anticipatory use of force in the face of an imminent attack, has long been accepted as legitimate and appropriate under international law. The present concern is whether the rules governing self-defense and preemptive strike as formulated in the late Nineteenth century would still pass muster under the highly evolving rules of modern warfare. When these rules were initially formulated, most international conflicts were conducted by states utilizing large movements of military personnel and ammunitions.

The question, then, is *should* an archaic rule requiring that an actual armed attack must precede self-defense continue to govern in a computerized age where substantial and catastrophic atrocities can be achieved by non-state terrorists and rogue states via hidden and unconventional methods? This author’s position, using the events of the September 11, 2001 terrorist attacks in New York, Pennsylvania and Washington D.C., as background, argues for an extension and enlargement of the rule of

5. *Id.*

6. See Richard F. Grimmett, U.S. Use of Preemptive Military Force, Congressional Research Service (CRS) Report for Congress, Order Code RS21311 of Sept. 18, 2002, <http://www.monde-diplomatique.fr/cahier/irak/IMG/pdf/us_use_of_preemptive_force-2.pdf> (last visited March 16, 2006).

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preemptive and anticipatory military strike. The unconventional methods used by terrorists and their supporters are easily available⁷ and nations at the receiving end risk being exterminated or at least incapacitated by first strikes. All states deserve to exist and should be able to protect themselves against a clear and present danger posed by their enemies.

This is an era of concealed "basement bomb" programs.⁸ The present administration of the United States has indicated its readiness to depart from the strictures of outdated rules of international self-defense law that have no direct application or relevance to modern violent attacks or modern laws.⁹ While the Bush Doctrine covers nonproliferation efforts, missile defense, and other protective measures for thwarting enemies of the United States, its main preoccupation, and the most important element of the administration's overall approach to U.S. security in the post-September 11th environment, centers around fighting unconventional terrorists and rogue states that may be in possession of weapons of mass destruction (WMD).¹⁰ According to President Bush:

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 ... Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can easily be concealed, delivered covertly and used without warning. 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 anticipa-

7. We must note that the Sept. 11, 2001 terrorist attacks were carried out by men from affluent homes who went to aircraft pilot schools, and who hijacked aircraft and turned these aircraft into "improvised missiles" with which they struck at the hearts of American economic and political bases.

8. See Michael E. O'Hanlon, Susan E. Rice, and James B. Steinberg, *The New National Security Strategy and Preemption*, 113 THE BROOKINGS INSTITUTION POLICY BRIEF 1, 5 (2002).

9. Its position is that "...as a matter of common sense and self-defense, America will act against [such] emerging threats before they are fully formed." See Bush Doctrine *supra* note 1; see also, *The National Security Strategy of the United States of America*, found at <<http://www.whitehouse.gov/nsc/nss.html>>.

10. See Bush Doctrine, *supra* note 1.

tory action to defend ourselves, even if the 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, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.¹¹

The only problem is that the Bush Doctrine and the United States' version of preemptive strike is not limited to the traditional definition of "preemption" – striking an enemy as it prepares an attack – but also includes "prevention" – striking an enemy even in the absence of specific evidence of a coming attack.¹² In the opinion of O'Hanlon, Rice, and Steinberg, while commenting on the Bush Doctrine:

The idea principally appears to be directed at terrorist groups as well as extremist or "rogue" nation states; the two are linked, according to the strategy, by a combination of "radicalism and technology." The administration asserts that deterrence of the kind that prevailed during the cold war is unlikely to work with respect to rogue states and terrorists – which the administration claims are not risk-averse – and which view weapons of mass destruction not as weapons of last resort but as weapons of choice.¹³

While many states, statesmen, international law jurists, political scientists, commentators, and common citizenry have criticized the United States' adoption of an expansive preemptive, anticipatory, and/or preventive military strike in the global fight against terrorism, few appear to have a well-rounded grasp of the dangers posed by non-state actors and rogue nations to the United States, and as well, to the international community as a whole.¹⁴

In understanding the historical background of preventive military strike practice, we must note that in the past non-state actors (terrorists, guerril-

11. NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) available at <<http://www.whitehouse.gov/nsc/nss.pdf>> (last visited Feb. 11, 2002).

12. See O'Hanlon, et.al., *supra* note 8, at 3.

13. *Id.*

14. See generally, Leo Van den Hole, *Anticipatory Self-Defense under International Law*, 19 AM. U. INT'L L. REV. 69 (2003).

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las, drug traffickers, etc.) appeared less threatening to United States' national security than the well funded, well organized, and potent armed forces of an enemy nation-state.¹⁵ However, the terrorist attacks of September 11, 2001 now illustrate, very candidly, that small groups of non-state actors can exploit relatively inexpensive and commercially available technology to conduct very destructive attacks over great distances.¹⁶ Thus, the rationale for expansion of the preemption strike right is twofold: (a) to deal with actors who cannot be reliably deterred, and (b) to address the enormous threat posed by the spread of WMD.¹⁷

While supporting the expansion of international self-defense practice, the superpower invoking the right of self defense, anticipatory attacks, military incursions, and/or right of pre-emptive strike as a basis for military action against another sovereign nation must bear a very high burden of establishing the following elements:

1. That the nation against which military action is being considered poses an actual and/or *immediate* risk to:
 - (a) their neighbors,
 - (b) international peace, and
 - (c) the international community of states;
2. The nation arguing for military invasion of a failed state must have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is:
 - (a) concrete and particularized and
 - (b) actual or imminent, not conjectural or hypothetical;
3. There must be a *causal connection* between the actual or *imminent* injury and/or risk alleged and the fact that the second state has failed as a nation; and

15. See Christopher Bolcom and Kenneth Katzman, *Military Aviation: Issues and Options for Combating Terrorism and Counterinsurgency*, CRS Report for Congress, dated Jan. 24, 2005, received through the CRS Web, Order Code RL32737, available at <<http://www.fas.org/man/crs/RL32737.pdf>> (last visited March 15, 2006).

16. *Id.* at Summary page.

17. See O'Hanlon, et.al., *supra* note 8, at 4.

4. The actual or *immediate* risk of injury posed by failed states to (a) their neighbors, (b) international peace, and (c) the international community of states would be redressable through foreign intervention, either by the United Nations or through an international action authorized by the United Nations, before the extreme action of military invasion would be permitted.

On satisfaction of the above elements, through evidence satisfying the “beyond reasonable doubt” standard, the United Nations, or any other aggrieved state, may move to initiate military action against non-state terrorist fugitives and rogue states. The above additional strictures would enhance a cohesive and more inclusive international action against terrorists who threaten international peace. In fact, as Christopher Bolkcom and Kenneth Katzman noted:

Pursuing objectives against non-state actors while “winning the hearts and minds” of local populations, or at least not alienating them, appears to be a key consideration. Recent military action has killed or captured prominent terrorists, but it is unclear whether this action actually degraded the terrorist organization’s capabilities. In some cases, these actions may have even strengthened them.¹⁸

In this work, Part II discusses self-defense rules under customary international law, and the requirement of immanency and proportionality that must be met. Part III discusses self-defense rules under the United Nations (UN) Charter, arguing for an enlarged reading of the “armed attack” requirement and amendment of the Charter. Part IV carries out a historical account of self-defense military actions by the United States and shows that it has always acted justly and peaceably. Part V discusses the policy changes in the United States’ approach in modern times. Part VI discusses the advantage of using of preemptive military strikes. The paper concludes in strong support of the Bush Doctrine and argues for an expanded use of self-defense rights under customary international law and the UN Charter.

II. THE RIGHT OF SELF DEFENSE, INCLUDING PREEMPTIVE STRIKES AND FORCIBLE MEASURES OF SELF-DEFENSE UNDER CUSTOMARY INTERNATIONAL LAW

Clearly, every nation possesses the inherent right of self-defense under international law. As David Ackerman aptly stated, “customary interna-

18. See Christopher Bolkcom and Kenneth Katzman, *supra* note 15, at Summary page.

tional law deemed the right to use force and even to go to war to be an essential attribute of every state.”¹⁹ In the same vein, Charles Cheney Hyde²⁰ has declared every nation’s inherent right to defend itself against aggression as, “always l[y]ing within the power of a State to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.”²¹ In fact, Christianity and Roman Catholicism have always sanctioned the right of a nation to prosecute war to protect itself from aggression.²² According to St Augustine, “a sovereign could wage war only when such action was necessary to accomplish the previously mentioned objective of building peace through self-defense, punishment of evil, or recovery of wrongfully taken possessions.”²³ Thus, under customary international law, a nation faced with aggression from another nation may militarily move against the aggressor and face no international damnation because:

An act of self-defense is that form of self-protection which is directed against an aggressor or contemplated aggressor. No act can be so described which is not occasioned by attack or fear of attack. When acts of self-preservation on the part of a State are strictly acts of self-defense, they are permitted by the law of nations, and are justified on principle, even though they may conflict with the ... rights of other states.²⁴

Closely related to the natural right of self-defense is the natural right of preemptive strike (as narrowly distinguished from anticipatory self-defense) whereby a nation that perceives an imminent strike from another aggressor nation may move, *preemptively*, to strike at the aggressor nation before harm is done. This preemptive right is also clearly recognized under international law.

19. David M. Ackerman, *International Law and the Preemptive Use of Force Against Iraq*, CRS Report for Congress, Order Code RS21314, dated April 11, 2003, available at <www.usembassy.it/pdf/other/RS21314.pdf> (last visited March 17, 2006).

20. 3 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES*, 1686 (1945).

21. *Id.*

22. Joseph L. Falvey, Jr., *Our Cause is Just: An Analysis of Operation Iraqi Freedom Under International Law and the Just War Doctrine*, 2 AVE MARIA L. REV. 65, 67 (2004).

23. SAINT AUGUSTINE, 4 *Letters*, in *THE FATHERS OF THE CHURCH* 266, 269 (Wilfrid Parsons, S.N.D. trans., 1953).

24. See Hyde *supra* note 20, at 1-2.

To Hugo Grotius, the father of international law, it is “lawful to kill him who is preparing to kill.”²⁵ In the same vein, Emmerich de Vattel stated the customary preemptive right as:

The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force ... against the aggressor. It may even anticipate the other’s design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.²⁶

A nation’s right to take preemptive strike measures are also sanctioned by Christianity and Roman Catholicism since time immemorial, as evidenced by Saint Augustine’s statement that when motivations, such as hatred, bloodlust, vindictiveness, and ambition pose a threat to the common good, a just man, acting under the authority of law, could repel them by force, so long as he himself refrains from such motivations, because necessity requires that a legitimate authority wage war and only with a just cause.²⁷ Under Roman Catholicism, warfare is approved of to punish evil nations, and even to conquer them, thereby depriving an evil nation of its liberty.²⁸ Thus, a just sovereign could deprive that nation of its liberty to engage in evil.²⁹

However, there are important concerns raised by this formal doctrine of preemption.³⁰ First, it undervalues the still important role of deterrence, even against so-called rogue states such as Iraq and North Korea.³¹ Second, a sovereign could wage war only when such action was necessary to accomplish the previously mentioned objective of building peace through self-defense, punishment of evil, or recovery of wrongfully taken possessions.³² Third, it legitimatizes a wider scope for the use of force – preemption without a clear, imminent, and widely accepted threat – that in general the United States should discourage.³³ Fourth, the nation exerciz-

25. HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, 1625.

26. IV EMMERICH DE VATTEL, *THE LAW OF NATIONS* 3.

27. XXII SAINT AUGUSTINE, *CONTRA FAUSTEM MANICHAEM* 74-78; *see also*, XIX SAINT AUGUSTINE, *THE CITY OF GOD*, ch. 12 (Marcus Dods trans., Modern Library ed., Random House 1993).

28. SAINT AUGUSTINE, *3 Letters*, in *THE FATHERS OF THE CHURCH* 36, 46-47 (Wilfrid Parsons, S.N.D. trans., 1953); *see also*, XXII SAINT AUGUSTINE, *CONTRA FAUSTEM MANICHAEM* 74, “Any war executed by divine mandate is a just war.”

29. *See* Falvey, *supra* note 22, at 67.

30. *See* O’Hanlon, et.al., *supra* note 8, at 5.

31. *Id.* at 4.

32. SAINT AUGUSTINE, *4 Letters*, in *THE FATHERS OF THE CHURCH* 266, 269 (Wilfrid Parsons, S.N.D. trans., 1953).

33. *See* O’Hanlon, et.al., *supra* note 8, at 4.

ing preemptive measures must undertake an act of war only to promote a more just peace.³⁴

The most widely accepted view on the legitimate use of preemptive military force in accordance with international law was best articulated by then Secretary of State, Daniel Webster, between 1837 and 1842, in diplomatic correspondence with the British Government.³⁵ Sometime in 1837, after Canadian rebels had used the American ship *Caroline* to ship soldiers and military supplies from the American side of the border to rebels fighting the British rulers on the Canadian side, some British soldiers, under the cover of night attacked the American ship while berthed on American soil.³⁶ According to David Ackerman,

[T]he U.S. immediately protested this “extraordinary outrage” and demanded an apology and reparations. The dispute dragged on for several years before the British conceded that they ought to have immediately offered “some explanation and apology.”³⁷

First, the United States recognized that under international law, a nation facing imminent aggression from another state may preemptively act to protect itself. In the opinion of Secretary Webster, an act of self defense would permit an intrusion into the territory of another state only in exceptional cases.³⁸ Secretary Webster then went on to lay down two important legal standards that would regulate a nation’s right to undertake preemptive acts against its aggressors under customary international law and be justified only in “cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”³⁹ Secretary Webster had earlier on stated another legal requirement in 1841 thus:

It will be for [Her Majesty’s Government] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act,

34. See XIX SAINT AUGUSTINE, THE CITY OF GOD, ch. 12 (Marcus Dods trans., Modern Library ed., Random House 1993).

35. See letter from Secretary of State Daniel Webster to Lord Ashburton of August 6, 1842, reprinted in II JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906); see generally, David M. Ackerman, *International Law and the Preemptive Use of Force Against Iraq*, CRS Report RS21314.

36. *Id.*

37. See Ackerman, *supra* note 19, at 2.

38. *Id.*

39. *Id.*

justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.⁴⁰

From the above, the major requirements for a nation to undertake pre-emptive military strikes against another nation based upon perceived *imminent danger*, (as different from anticipatory military strike which is, on the other hand, based on *latent and remote danger*) are (a) “timeliness” and (b) “proportionality” of the threat.⁴¹ Although used intermittently, the concepts of “anticipatory self defense” and “preemptive strike” are two distinct and separate topics in international law. Under international law, preemptive military strike is best understood to describe military action against an imminent attack and such use of force is justified under traditional notions of self-defense.⁴² Similarly, O’Hanlon, Rice, and Steinberg defined “Preemptive Military Attack” as the anticipatory use of force in the face of an imminent attack, which has long been accepted as legitimate and appropriate under international law.⁴³ “Anticipatory” or “Preventive” self-defense, on the other hand, is used to describe the use of force against a more remote, yet significant threat.⁴⁴ In practical international law, and as known to political scientists, anticipatory or preventive self-defense may be overt or covert,⁴⁵ depending on the circumstances.

As stated earlier, the Bush Doctrine has broadened the meaning of “pre-emptive strike” to encompass “preventive war” as well. Under this definition, force may be used even without evidence of an imminent attack to ensure that a serious threat to the United States does not “gather” or grow over time.⁴⁶ We must note, however, that “preemptive war” or “anticipatory attack” is a far less accepted concept in international law. Even though the United States has threatened or utilized it in previous eras and in Iraq in 2003, and even though it may be a necessary tool at times,⁴⁷ the situations under which a preemptive attack may be carried out have no clearly marked definitions.

40. Letter from Mr. Webster to Mr. Fox of April 24, 1841, 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1857), quoted in DAMROSCH, LORI, INTERNATIONAL LAW: CASES AND MATERIALS (2001), at 923.

41. See Ackerman, *supra* note 19, at 2.

42. See Falvey, *supra* note 22, at 72.

43. See O’Hanlon, et.al., *supra* note 8, at 1.

44. See Christopher Greenwood, *International Law and Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L. J. 7, 9 (2003).

45. Covert actions include using monetary rewards, subtle force, espionage and other softer contacts to effect regime changes, policy shifts, aid to rebels, assistance and/or logistic supports to *coup d’ états*, and co-opting foreign leaders to accept and adopt United States’ political views/goals.

46. See O’Hanlon, et.al., *supra* note 8, at 4.

47. *Id.*

In conclusion, while “anticipatory strike” rules may not be subject to clear definition and acceptance under contemporary customary international law because the danger posed may not be imminent, it is clear that where a nation feels that it may be subject to recurring interference and terrorist attacks by another, it has an inherent right to carry out armed reprisals against the offending nations and/or culprits. This is in line with the position stated in the proceedings before the United Nations Security Council in the aftermath of military strikes on the Libyan cities of Tripoli and Benghazi in 1986:

[A] State whose territory or citizens are subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks.⁴⁸

The United States’ citizens and interests have been targeted by Osama bin Laden and/or Saddam Hussein over the last twenty years or so. From the United States’ interests in Kuwait, and the attempted assassination of former President George H.W. Bush, to the incessant attacks on its servicemen, embassies and diplomatic missions; the attempted Millennium terrorist attacks, and the September 11, 2001 terrorist attacks, these rogue states have shown an uncanny persistence to attack United States. Therefore the United States is justified in carrying out preemptive attacks against these states and terrorists under customary international law. A state whose territory or citizens are subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks.⁴⁹

III. THE RIGHT OF SELF DEFENSE, INCLUDING RESORT TO PREEMPTIVE AND ANTICIPATORY STRIKE UNDER THE UNITED NATIONS CHARTER

The United Nations Charter was adopted in 1945 and modeled after the Covenant of the League of Nations which itself was established in 1919, and which was based on the rules of military warfare existing in the latter part of the Nineteenth century. Then, international warfare occurred between nations, involving the movement of large armies and machinery close to the borders where they could be easily observed. Today, in the computerized Twenty-first century, warfare can be carried out by the mere touch of a button strapped to a minuscule “basement bomb,” unleashing destructive biological and/or chemical agents. In this age of

48. U.N. SCOR, 41st Sess., 265th mtg. at 112-13, U.N. Doc. S/PV.2655 (1986) (statement of Vernon Walters, U.S. Ambassador to the United Nations).

49. *Id.*

nuclear weapons, there is virtually no need for the mass movement of armies and weapons. Similarly, non-state actors have entered into the fray as WMDs have become more accessible.

Thus, this author takes the position that the narrow provisions of the United Nations Charter relating to self defense, preemptive strike and anticipatory self-defense *must* be amended so that impending nuclear catastrophes may be averted and so that nations like the United States have ample freedom to act decisively against catastrophic terrorist strikes. These new rules would be subject to the standards set out in the first chapter of this paper.

The central focus of the United Nations Charter is to ensure that disputes are resolved by peaceful means, along with its prohibition on acts of aggression, and its validation of self defense as a justifying principle.⁵⁰ Thus, we must note that the Preamble to the Charter provides that the United Nations was formed “to save succeeding generations from the scourge of war.”⁵¹ It is submitted that nothing more would protect the world and its citizens from nuclear weapons, terrorists and rogue states than a nation, like the United States, able and willing to act as a policeman of the world within all legal boundaries.

In this regard, we must take cognizance of United Nations General Assembly Resolution 3314 defining the aggression that forms the basis of self-defense as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of any other State, or in any other manner inconsistent with the Charter of the United Nations ...”⁵² Resolution 3314 goes on to indicate that the first use of armed force in contravention of the UN Charter is *prima facie* evidence of an act of aggression.⁵³ Clearly, the invasion of Kuwait, the attempted murder of former President George H.W. Bush, and the September 11, 2001 terrorist attacks constitute acts of first aggression.

In addition, it is to be noted that the substantive provision of the Charter, Article 2(3), obligates Member States of the UN to “settle their international disputes by peaceful means.”⁵⁴ Going on, Article 2(4), makes it mandatory that states refrain from the use of force. The Charter also

50. See Falvey, *supra* note 22, at 69.

51. See Preamble to the United Nations Charter, 1945; [1976] Y.B.U.N 1043, [hereinafter UN Charter].

52. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, at 143, U.N. Doc. A/9619/Corr. 1 (1974).

53. *Id.*

54. See Article 2(3) of the UN Charter.

provides that, "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This prohibition on the use of force under the Charter must be tested in light of other relevant provisions. For instance, in Article 39, the Security Council is authorized to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken ... to maintain international peace and security."⁵⁵ Also, Article 42 of the Charter authorizes the Security Council to take military enforcement measures in conformity with Chapter VII. Further, Article 51 clearly allows lawful use of force in the event of an armed attack:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

It has been noted that, as opposed to the traditional right of states under customary international law to use force, the UN Charter created a system of "collective security" in which the Security Council is authorized to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide what measures shall be taken to maintain international peace and security.⁵⁶

The next question, flowing from Article 51, pertains to what constitutes an "armed attack?" Under the UN Charter, a prerequisite to the exercise of the right of self-defense is an act that constitutes an "armed attack."⁵⁷ As stated above, Article 51 permits a nation to act in self-defense *only* in the face of perceived danger, i.e., *armed attack*.⁵⁸ This "armed attack" theory has found acceptance with the International Court of Justice (ICJ)

55. See Article 39 of the UN Charter.

56. See Ackerman, *supra* note 19, at 3.

57. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and National Defense*, 126 *MIL. L. REV.* 89, 96 (1989).

58. See Van den Hole, *supra* note 14, at 94 (2003); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 *I.C.J. Reports* at 347 (Schwebel, J., dissenting).

which held in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*,⁵⁹ holding that:

[F]or one State to use force against another... is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack... . In the view of the Court, under international law in force today –whether customary international law or that of the United Nations system – States do not have a right of “collective” armed response to acts which do not constitute an “armed attack.”⁶⁰

Credible threat and imminent pronouncements are enough, over and above armed attacks. The above ICJ decision notwithstanding, it is this author’s position that there would be increased danger in the world if a nation’s right to mount a self-defense is left to another body, particularly when that body may be incapacitated through veto power. As President George W. Bush has rightly declared, “the course of this nation does not depend on the decisions of others.”⁶¹ No nation must surrender its right to survival to another body outside its laws. President Bush rightly went on to declare the correct position of international law on a nation’s right to secure its citizens, territory, and interests thus:

There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few. America will never seek a permission slip to defend the security of our country.⁶²

The above position has the backing of eminent professors of international law. First, there is Professor Myres McDougal who has argued that Article 51 must *not* be taken so literally as to preclude a victim from using force in self-defense until it has actually been attacked⁶³ and that Article 51 should be interpreted to mean that a state might use military force when it “*regards itself as intolerably threatened by the activities of another.*”⁶⁴ In effect, where Osama bin Laden, Afghanistan, and Saddam Hussein continue to restate their desire to cause harm to the American

59. *Military and Paramilitary Activities (Nicar. v. U.S.)*, ICJ Reports (1986), 14, 392.

60. *Id.* para 211.

61. ‘The Course Of This Nation Does Not Depend On The Decisions Of Others’; President Bush State of the Union Address, Jan. 28, 2003, available at <http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext_012803.html> (last visited March 17, 2006).

62. President Bush’s State of the Union Address, Jan. 20, 2004, available at <<http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>> (last visited on March 17, 2006).

63. *Proceedings*, 57 AM. SOC’Y OF INT’L L. 165 (1963).

64. *Id.*

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nation and its citizens, such would be sufficient to mount an invasion under the standard enunciated by McDougal above.

Along the same line, Sir Humphrey Waldock asserts that, "it would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first, and perhaps fatal, blow... . To read Article 51 otherwise is to protect the aggressor's right to the first strike."⁶⁵ There is also the view of Ambassador Jean Kirkpatrick⁶⁶ that "[t]he prohibitions against the use of force in the Charter are contextual, not absolute... . The Charter does not require that people submit to terror, nor that their neighbors be indifferent to their terrorization."⁶⁷ Finally, Colonel Guy B. Roberts⁶⁸ also supports an unfettered state right to act preemptively in the face of open danger: "Whatever interpretation one may take, it is undisputed that the practice of most member states since the Charter was adopted has been to recognize acts of anticipatory self-defense as legitimate."⁶⁹

The United States has engaged in "preventive war" or "anticipatory attack" in the past. In 1983, the United States invaded Grenada to effect regime change. In 1961, during the "Bay of Pigs invasion," the United States attempted to sponsor Cuban dissidents to topple Fidel Castro. Similarly, covert operations aimed at limiting Soviet influences,⁷⁰ have been used to effect regime changes in Iran in 1953,⁷¹ and in the Congo in 1961 when Patrice Lumumba was removed for then Colonel Mobutu Sese Seko. The use of military force against Iraq in 2003, while controversial within the international community, was justified by the United States, the United Kingdom and others, as an action necessary to enforce existing U.N. Security Council resolutions that mandated Iraqi disarmament.⁷²

65. Sir Claude Humphrey Meredith Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 45, 498 (1952).

66. Former United States Ambassador to the United Nations.

67. Ved Nanda, *The United States Armed Intervention in Grenada - Impact on World Order*, 14 CAL. W. INT'L L. J. 395, 418 (1984).

68. Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 513 (1999).

69. *Id.* at 513, (citing MYRES MCDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 190 (1961); DEREK W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 188 (1958)).

70. See O'Hanlon, et. al., *supra* note 8, at 4.

71. Shah Reza Pahlavi was installed instead of Mossadegh.

72. See Richard F. Grimmett, *supra* note 6, at 2.

In conclusion, and in arguing for an amendment of the UN Charter, this author aligns with the opinion of Thomas Jefferson⁷³ that written laws, whether international treaties or domestic laws cannot override a nation's right to self-preservation:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.⁷⁴

If the UN Charter would create and/or permit lawlessness or prevarication in the face of open danger, the Charter must be amended to permit total and efficient prevention of harm from rogue states and terrorists who, themselves, have no respect for the law.

IV. HISTORICAL EXAMINATION OF THE EXERCISE OF THE RIGHT OF SELF DEFENSE BY THE UNITED STATES

History shows that the United States has never been an aggressor. The attacks on Pearl Harbor and of September 11, 2001 readily support this historical record. With the exception of the Spanish-American War of 1898, the November 2001 coalition attack on Afghanistan and the March 2003 Iraqi invasion, the United States has never engaged in a preemptive military attack against another nation, save for interventions carried out under the Monroe Doctrine.⁷⁵

In the latter part of the Nineteenth century extending into the beginning of the Twentieth century, the United States carried out several military interventions in various American and Caribbean nations in the western hemisphere.⁷⁶ These U.S. military interventions were grounded in the view that they would support the Monroe Doctrine, which opposed interference in the western hemisphere by outside nations.⁷⁷ The Monroe

73. THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 279 (Paul Ford ed., 1898).

74. *Id.*

75. See Richard F. Grimmett, *supra* note 6, at 2.

76. THE MONROE DOCTRINE, SPEECH OF HON. D. C. DEJARNETTE, OF VIRGINIA, IN THE CONFEDERATE HOUSE OF REPRESENTATIVES, JANUARY 30TH, 1865, PENDING NEGOTIATIONS FOR PEACE, available at <<http://docsouth.unc.edu/dejarnet/dejarnet.html>> (last visited March 16, 2006).

77. The doctrine was conceived by its authors, especially John Quincy Adams, as a proclamation by the United States of moral opposition to colonialism, but has subsequently been re-interpreted in a wide variety of ways, including by President Theodore Roosevelt as a license for the

Doctrine, as expressed in 1823, proclaimed the United States' opinion that European powers should no longer colonize the Americas or interfere with the affairs of sovereign nations located in the Americas, such as the United States, Mexico, and others. In return, the United States planned to stay neutral in wars between European powers and in wars between a European power and its colonies. If the latter wars were to occur in the Americas, the U.S. would view such action as hostile toward itself.⁷⁸ The doctrine was issued by President James Monroe during his seventh annual State of the Union address to Congress. It was a defining moment in U.S. foreign policy and remained relevant until the end of the Cold War.⁷⁹

The Monroe policy was driven by the belief that if stable governments existed in the Caribbean states and Central America, then it was less likely that foreign countries would attempt to protect their nationals or their economic interests through use of military force against one or more of these nations.⁸⁰ For instance, there was the 1983 invasion of Grenada by the military forces of the United States and several Caribbean nations.⁸¹ On October 25, 1983, six days after Prime Minister Maurice Bishop was executed by Bernard Coard's Stalinist Sect, the United States armed forces landed troops on the beaches of Grenada pursuant to the Monroe Doctrine.⁸² American troops withdrew in mid-December 1983, after a bloody battle and the appointment of a new government by the governor-general. In all, nineteen U.S. soldiers were killed and 106

U.S. to practice its own form of colonialism (known as the Roosevelt Corollary to the Monroe Doctrine).

78. In Monroe's Annual Message to Congress on December 2, 1823, he delivered what we have come to call the Monroe Doctrine. Essentially, the United States was informing the powers of the Old World that the Americas were no longer open to European colonization, and that any effort to extend European political influence into the New World would be considered by the United States "as dangerous to our peace and safety." The United States would not interfere in European wars or internal affairs, and expected Europe to stay out of the affairs of the New World.

79. See generally, SAMUEL FLAGG BEMIS, *JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY* (1949); DONALD DOZER, *THE MONROE DOCTRINE: ITS MODERN SIGNIFICANCE* (1965); ERNEST R. MAY, *THE MAKING OF THE MONROE DOCTRINE* (1975); FREDERICK MERK, *THE MONROE DOCTRINE AND AMERICAN EXPANSIONISM 1843-1849* (1966); GRETCHEN MURPHY, *HEMISPHERIC IMAGININGS: THE MONROE DOCTRINE AND NARRATIVES OF U.S. EMPIRE* (2005) (examining the cultural context of the doctrine); DEXTER PERKINS, 1-3 *THE MONROE DOCTRINE 1823-1826* (1927); JOEL S. POETKER, *THE MONROE DOCTRINE* (1967); GADDIS SMITH, *THE LAST YEARS OF THE MONROE DOCTRINE, 1945-1993* (1994) (arguing that the Monroe Doctrine became irrelevant after the end of the Cold War).

80. See Richard F. Grimmett, *supra* note 6, at 2.

81. This was also known to U.S. forces as "Operation Urgent Fury."

82. See RONALD REAGAN, *AN AMERICAN LIFE* 454 (1990); MARGARET THATCHER, *THE DOWNING STREET YEARS* 327-331 (1993); Ronald H. Cole, *Operation Urgent Fury: the planning and execution of joint operations in Grenada, 12 October-2 November 1983*, *JOINT ELECTRONIC LIBRARY* 62, retrieved Jan. 10, 2006.

were injured in the fighting. Cuban and Grenadian losses were reported to be approximately 100 dead and 350 wounded.⁸³

The United States military has always had an important role in peacekeeping operations throughout Haiti's history—as shown in the two cases of the military in peacekeeping operations in Haiti. The United States entered and occupied Haiti from 1915 to 1934 to restore order and to secure American national security interests. These interests consisted of protecting some American businesses and providing humanitarian relief. During this period, the military conducted a massive nation building effort that provided infrastructure for Haiti, re-established the economy and supported the Haitian Government.⁸⁴ In 1994, the U.S. military also conducted peacekeeping operations in Haiti, this time to promote democracy and again provide humanitarian relief.⁸⁵

The United States military intervened in the Dominican Republic from 1916 to 1924 to restore normalcy that threatened to affect neighboring states.⁸⁶ Also in 1912, President Adolfo Diaz of Nicaragua requested that the United States send its military to quell the political revolt.⁸⁷

83. See *Operation Urgent Fury*, available at <http://en.wikipedia.org/wiki/Operation_Urgent_Fury> (last visited March 16, 2006).

84. See *The Road to US Intervention in Haiti*, available at <<http://www.cdi.org/adm/Transcripts/802/>> (last visited March 16, 2006); see also, EMILY GREENE BALCH, *OCCUPIED HAITI* 20 (1969); FREDERICK S. CALHOUN, *USES OF FORCE AND WILSONIAN FOREIGN POLICY* 7 (1993); JEAN BAPTISTE DUROSELLE, *FROM WILSON TO ROOSEVELT; FOREIGN POLICY OF THE UNITED STATES, 1913-19*, 75 (1963); SMEDLEY D. BUTLER, *THE PAPERS OF GENERAL SMEDLEY DARLINGTON BUTLER USMC, 1915 – 1918*, 154 (1982).

85. See Major Brent P. Goddard, *Military Peacekeeping Operations in Haiti: Should the United States military have a role in peacekeeping operations in support of the national security strategy?*, CSC 1997, available at <<http://www.globalsecurity.org/military/library/report/1997/Goddard.htm>> (last visited March 16, 2006); see also, *That NATO Headache*, *ECONOMIST*, July 1, 1995, at 3; Sean D. Naylor, *Well Done, But Warlike it's Not*, *NAVY TIMES*, March 18, 1996, at 1; Eric A. Doerr, *Operation Vignette: Civil Affairs in Haiti*, *MILITARY REVIEW*, Mar./Apr. 1996, at 2; William Matthews, *Haiti Mission Succeeded, Leader Say*, *AIR FORCE TIMES*, March 11, 1996, at 1; *Public Lives*, *NEWSWEEK*, July 10, 1995, at 1; *Elections in Haiti*, *MACLEAN'S*, July 10, 1995, at 21; *Reuter, GOP Team Criticizes Haiti's Vote Turnout*, *THE WASHINGTON POST*, April 8, 1997, at A12; James F. Dobbins, *Assessing the Progress of Haitian Democracy*, *DISPATCH*, Sept. 25, 1995, at 5; Alexander F. Watson, *Support of Democracy and the Rule of Law in Haiti*, *DISPATCH*, April 1, 1996, at 3.

86. See Joseph E Mulligan, *Policing the Dominican Republic*, *FROM THE NATION*, March 01, 1975, available at <http://www.nationarchive.com/Summaries/v220i0008_07.htm> (last visited March 16, 2006); see also, LESTER D. LANGLEY, *THE UNITED STATES AND THE CARIBBEAN, 1900-1970* (1980); LESTER D. LANGLEY, *THE BANANA WARS: UNITED STATES INTERVENTION IN THE CARIBBEAN, 1898-1934*, 160-165 (1988); BRUCE CALDER, *THE IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924*, 115 (1984).

87. JOHN J. TIERNEY, JR., *SOMOZAS AND SANDINISTAS: THE U.S. AND NICARAGUA IN THE TWENTIETH CENTURY* (Councils for Inter-American Security and for Inter-American Security Educational Institute. Ed. 1982) (discussing the rise to power of the Sandinistas and current problems they pose to the U.S. and Central America); THOMAS W. WALKER, *NICARAGUA, THE LAND OF*

Similarly, covert operations were carried out at various times in the past by the para-military and administrative sectors of the United States Government in the face of impending threats. According to Richard F. Grimmett:

Although the use of preemptive force by the United States is generally associated with the overt use of U.S. military forces, it is important to note that the United States has also utilized "covert action" by U.S. government personnel in efforts to influence political and military outcomes in other nations. The public record indicates that the United States has used this form of intervention to prevent some groups or political figures from gaining or maintaining political power to the detriment of U.S. interests and those of friendly nations.⁸⁸

In this regard, these covert acts are recognized under the laws of the United States. For instance, Section 503(e) of the National Security Act of 1947, as amended, defines covert action as "[a]n activity or activities of the United States Government to influence political, economic or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly." In Iran in 1953, in Guatemala in 1954, and in the Congo in 1960, covert operations were used to change the governments of these countries. However, in the case of the attempted invasion of Cuba in 1961, whereby United States offered logistic, material, and military support to rebels that aimed to overthrow Fidel Castro, their efforts failed. The United States Government nonetheless received a golden chance to redeem its international reputation during the Cuban Missile crisis of October 1962.

In the fall of 1962, unconfirmed reports suggested that the Soviets were installing intermediate range nuclear missiles in Cuba. Using remote sensing imagery, mainly from high flying U-2 airplanes, the United States was able to provide incontrovertible proof that the rumors were true. The spy-plane photographs showed that the Soviet Union was secretly introducing nuclear-capable, intermediate-range ballistic missiles into Cuba, missiles that could threaten a large portion of the Eastern United States.⁸⁹ President John F. Kennedy was forced to determine if the prudent course of action was to use U.S. military air strikes in an effort to destroy the missile sites before they became operational, and

SANDINO (2nd ed. 1982) (chronicling the history of Nicaragua and rise of the FSLN. Profuse with leftist rhetoric but providing many useful facts).

88. See Richard F. Grimmett, *supra* note 6, at 2.

89. *Id.* at 4.

before the Soviets or the Cubans became aware that the U.S. knew they were being installed.⁹⁰

While the military “preemption” option was considered, after extensive debate among his advisors on the implications of such an action, President Kennedy undertook a measured but firm approach to the crisis that utilized a U.S. military “quarantine” of the island of Cuba to prevent further shipments from the Soviet Union of military supplies and material for the missile sites, while a diplomatic solution was aggressively pursued. United States demanded that the Soviets remove these missiles from Cuba. The resulting confrontation between Soviet Premier Khrushchev and US President John F. Kennedy in October 1962 brought the world to the brink of nuclear war. This approach was successful, and the crisis was peacefully resolved.⁹¹

Thus, during the Cold War, and in major military actions since the Second World War, the President has either obtained congressional authorization for use of military force against other nations, in advance of using it, or has directed military actions abroad on his own initiative in support of multinational operations such as those of the United Nations or of mutual security arrangements like the North Atlantic Treaty Organization (NATO).⁹² “Yet in all of these varied instances of the use of military force by the United States, such military action was a “response,” after the fact, and was not preemptive in nature, as traditionally defined.”⁹³

The above historical account would suffice to show that the United States has not always acted in haste nor has it been a warmonger. If faced with a credible threat, it has acted to protect itself, its citizens, its

90. *Id.*

91. *Id.* See also, John Fitzgerald Kennedy, *The Cuban Missile Crisis: President Kennedy's Address to the Nation*, October 22, 1962, (National Archives and Records Administration 1988); 3 JOHN FITZGERALD KENNEDY, JOHN F. KENNEDY: THE GREAT CRISES (Timothy Naftali, Ernest R. May and Philip Zelikow, eds. c2001); JOHN FITZGERALD KENNEDY, THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS, (Ernest R. May and Philip Zelikow eds. 1997); John Fitzgerald Kennedy and Nikita Sergeevich Khrushchev, *Kennedy-Khrushchev Correspondence During the Cuban Missile Crisis of October, 1962*, Department of State Bulletin of November 19, 1973; ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS (W.W. Norton, 1969); MONTAGUE KERN, PATRICIA W. LEVERING AND RALPH B. LEVERING, THE KENNEDY CRISES: THE PRESS, THE PRESIDENCY, AND FOREIGN POLICY (c1983); NIKITA SERGEEVICH KHRUSHCHEV, KRUSHCHEV REMEMBERS: THE LAST TESTAMENT (1974).

92. See Richard F. Grimmett, *supra* note 6, at 2. Examples of these actions include participation in the Korean War, the 1990-1991 Persian Gulf War, and the Bosnian and Kosovo operations in the 1990s.

93. *Id.* at 3.

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interests, and its territory. Warfare tactics have changed. The United States' foreign policy must change as well.

V. SIGNIFICANT CHANGE IN U. S. FOREIGN POLICY
IMMEDIATELY AFTER THE SEPTEMBER 11, 2001
TERRORISTS ATTACKS

Since September 20, 2001, the policy of the United States is now to hold responsible and subject to military strikes both the terrorists that attack United States interests and/or its citizens and the rogue states that harbor these terrorists.⁹⁴ The background to this policy change in favor of anticipatory strikes involves the fact that threats posed by terrorist and rogue states are more problematic because they encompass the phenomenon of concealed "basement bomb" programs that U.S. intelligence experts cannot easily locate.⁹⁵ This change in policy paved the way for the 2001 invasion of Afghanistan and "also sent a clear warning to other state sponsors of terrorism" that the United States would act whenever it felt threatened.⁹⁶

VI. ADVANTAGES TO THE USE OF PREEMPTIVE MILITARY
STRIKE THEORY

If the standards elaborated above were adopted by the United States, and every other state insisting on preemptive rights, it follows that a more clearly-defined and explicit policy of preemption would emerge under customary international law that would reinforce deterrence against aggression and terrorism by putting other countries on notice of the United States' seriousness in addressing threats such as the possession of WMDs by rogue regimes and non-state actors.⁹⁷ While there are misgivings about the March 2003 military invasion of Iraq, the preemption theory in support of this military action has allowed the United States to argue that its focus on Iraq is part of a broader security concept and does not represent preoccupation with a specific regime.⁹⁸

VII. CONCLUSION

As we have previously argued, nations have inherent rights to protect themselves. While a broad-based doctrine of preemption carries serious risks, the standards that we have elaborated above are enough to govern

94. See President George Bush's Seminal Speech on Sept. 20, 2001 to the Joint Session of Congress.

95. See O'Hanlon, et.al., *supra* note 8, at 5.

96. *Id.* at 1

97. *Id.* at 2.

98. *Id.*

the use of preemptive power by all states. To leave nations to use their individual *subjective* standards as a basis for carrying out armed countermeasures against other sovereign states would be a clear invitation to anarchy. Thus, O'Hanlon, Rice, and Steinberg have rightly suggested thus:

The Bush administration was right to take a strong stand against terrorists and extremist states, but it had already accomplished this goal with its early words in the period after the September 11 attacks and its actions in Afghanistan. It did not need a formal doctrine of preemption to drive the point home. Rather than enunciate a formal new doctrine, it would have been better to continue to reserve the preemptive military tool for a narrow, rare class of situations where inaction poses a credible risk of large scale, irreversible harm and where other policy tools offer a poor prospect of success. Given that the doctrine has now been promulgated, the Bush administration should clarify and limit the conditions under which it might be applied.⁹⁹

The United States must abide by the rigorous standards set out above that are meant to govern the use of preemptive strikes, because today's international system is characterized by a relative infrequency of interstate war. It has been noted that developing doctrines that lower the threshold for preemptive action could put that accomplishment at risk, and exacerbate regional crises already on the brink of open conflict.¹⁰⁰ This is important as O'Hanlon, Rice, and Steinberg have rightly noted:

...countries already on the brink of war, and leaning strongly towards war, might use the doctrine to justify an action they already wished to take, and the effect of the U.S. posture may make it harder for the international community in general, and the U.S. in particular, to counsel delay and diplomacy. Potential examples abound, ranging from Ethiopia and Eritrea, to China and Taiwan, to the Middle East. But perhaps the clearest case is the India-Pakistan crisis.¹⁰¹

The world must be a safe place to live in. We cannot be ruled by bandits and rogue states. There must be law and order not only in the books but in enforcement as well. No nation is better suited to enforce international law than the United States. The Bush Doctrine will stand the test

99. *Id.*

100. *Id.* at 7.

101. *Id.*

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of time and survive. Again, we submit that nothing more would protect the world and its citizens from nuclear weapons, terrorists and rogue states than an able and willing nation like the United States, acting as a policeman of the world within all legal boundaries. This is the essence of the preamble to the United Nations Charter.