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## The Bush Doctrine and the Use of Force: Reflections on Rule Construction and Application

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# THE BUSH DOCTRINE AND THE USE OF FORCE: REFLECTIONS ON RULE CONSTRUCTION AND APPLICATION

Paul F. Diehl, Shyam Kulkarni, and Adam Irish<sup>†</sup>

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## Abstract

The Bush Doctrine is a suggested modification of international law that would allow states to launch preventive military action in order to preclude terrorist attacks or enemy strikes involving weapons of mass destruction. At present, however, the Bush Doctrine is little more than a prescriptive notion as opposed to a fully developed set of proposed legal rules. This article considers a series of different rule explications and ancillary rules that would be necessary to give the Bush Doctrine effect in law. Specifically, we consider: (1) What is the Threat Threshold that Triggers the Doctrine?; (2) Who is Allowed to Authorize Action?; (3) Must This Be a Last Resort Option?; (4) Must the Right be Exercised Multilaterally or is Unilateral Action Permitted?; (5) How Do the Laws of War Constrain Doctrine Actions?; and (6) What Mechanisms Exist for Ensuring Compliance/Enforcement and to Punish Violations? The viability and implications of different answers to these questions are examined.

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## I. Introduction

The common refrain, “there ought to be a law,” signals a preference for some new proscription or prescription in the international or other legal systems. Yet changing legal rules involves more than broadly specifying allowed or prohibited behavior. There must also be a series of ancillary rules that establish qualifications about the behavior. Furthermore, additional rules must specify the processes that provide for the orderly implementation and enforcement of the central normative rule. Rules that provide issue-specific requirements about behavioral conduct can be referred to as part of the “normative system” of international law. Working in tandem with normative requirements, the “operating system” provides the framework for establishing rules and norms, outlines the parameters of interaction, and provides the procedures and forums for resolving disputes involving the norms.<sup>1</sup> It is the configuration of these supplemental rules that determine the conditions under which a rule can be exercised, which actors can exercise the rights or are constrained by the obligations of the new rule, and how the new rule will be enforced and violations of the rule addressed.

In this article, we examine the so-called Bush Doctrine, or the “claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that is not yet operational and hence is not yet *directly* threatening, but which, if permitted to mature, could be neutralized only at a high, possibly unacceptable, cost.”<sup>2</sup> An example of such an action is the 1981 Israeli attack on the Osirek nuclear reactor in Iraq. Much of the debate over the Bush Doctrine concerns whether it should or should not be (and in a few cases whether it is or is not) international law.<sup>3</sup> The Doctrine is better understood as a yet to be clearly defined right to use military force, rather than a set of clear rules on its application. The rules chosen to constrain or channel this right have substantial implications for how the Bush Doctrine would be exercised, its frequency of use, and its effectiveness. Thus, a full evaluation of its implications cannot be made without specifying and analyzing the ancillary rules that might accompany a new rule for the use of military force.<sup>4</sup>

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<sup>1</sup> See PAUL F. DIEHL & CHARLOTTE KU, *THE DYNAMICS OF INTERNATIONAL LAW* 74-102 (2010).

<sup>2</sup> W. Michael Reisman, *Self Defense in an Age of Terrorism*, 97 *AM. SOC'Y INT'L. L. PROC.* 141, 143 (2003) (emphasis in original).

<sup>3</sup> See Donna M. Davis, *Preemptive War and the Legal Limits of National Security Policy*, 10 *IUS GENTIUM* 11, 50-52 (2004); see also Robert J. Delahunty & John Yoo, *The “Bush Doctrine”: Can Preventive War be Justified?*, 32 *HARV. J.L. & PUB. POL'Y* 843, 865 (2009); see also Thomas R. Anderson, *Legitimizing the Gap Between the Just War and the Bush Doctrine*, 8 *GEO. J.L. & PUB. POL'Y* 261, 265-67 (2010).

<sup>4</sup> Another criterion for evaluating new rules is the degree to which they empirically fulfill their purposes, that is their effectiveness. With respect to the Bush Doctrine, we use this standard in Paul F. Diehl & Shyam Kulkarni, *Worth a Pound of Cure?: An Empirical Assessment of the Bush Doctrine and Preventive Military Action*, *U.MIAMI INT'L & COMP. L.REV.* (forthcoming). Our general conclusion is that using military force in a preventive fashion provides very limited, if any value, to states that employ this strategy. At best, there is less than an even chance of victory in such circumstances and this requires a full-scale war. The utility of preventive strikes diminishes tremendously in attacks short of war, and indeed the minimal success rate (around 10%) is no better than using coercive diplomacy by merely threatening force rather than actually using it. The success rate improves somewhat for major power

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Accordingly, we consider a series of rules that would be necessary to give the Bush Doctrine effect in law. Specifically, we consider (1) What is the Threat Threshold that Triggers the Doctrine?; (2) Who is Allowed to Authorize Action?; (3) Must This Be a Last Resort Option?; (4) Must the Right be Exercised Multilaterally or is Unilateral Action Permitted?; (5) How Do the Laws of War Constrain Doctrine Actions?; and (6) What Mechanisms Exist for Ensuring Compliance/Enforcement and to Punish Violations? We begin with a brief elaboration of the Bush Doctrine and describe the analytical framework that guides our address of the six questions noted above.

### II. The Basic Elements of the Bush Doctrine

The purported right of states to take preventive action is labeled with the name of President George W. Bush, but his immediate predecessors each presented policies that were consistent with the Bush Doctrine.<sup>5</sup> Such justifications took place in the context of specific threats against the U.S., but the resulting assertions took the form of general American policy.

In light of the September 11, 2001 (9/11) attacks, the U.S. developed a policy in its September 2002 National Security Strategy that stated, “our best defense is a good offense.”<sup>6</sup> The strategy further asserted that the U.S. would act prior to any attack by stating, “we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.”<sup>7</sup>

Less than six months later, U.S. President George W. Bush expanded the potential targets of preventive actions to include enemy regimes that were pursuing weapons of mass destruction, specifically Iraq:

Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.<sup>8</sup>

Bush Doctrine strikes are designed to take place before an attack occurs, but there is no explicit benchmark on how likely the military attack would have to be

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states, but not enough to justify the use of force or perhaps to overcome the establishment of a right that only a limited set of actors can exercise.

<sup>5</sup> Zhiyuan Cui, *The Bush Doctrine and Neoconservatism: A Chinese Perspective*, 46 HARV. INT’L L.J. 403, 403 (2005).

<sup>6</sup> NAT’L SECURITY COUNCIL, *The Nat’l Sec. Strategy of the United States of America* (Sept. 2002), pt. III, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>. The idea of preventive military actions or “anticipatory self-defense” predates Bush Administration policy and action, although its prominence is more recent. See ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 1-55 (2006) (for a brief history in chapter 1). Note also that anticipatory self-defense is not necessarily the only law based justification with respect to the invasion of Iraq. The United States and others might have cited the Iraqi violation of the cease-fire agreement part of UN Resolution 687. See DINSTEN, *infra* note 77, at 215 for an elaboration of this argument.

<sup>7</sup> NAT’L SECURITY COUNCIL, *supra* note 6, pt. III.

<sup>8</sup> President George W. Bush, State of the Union Address (Jan. 28, 2003).

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before a preventive action is justified – it could be weeks or years before a prospective attack (these elements are discussed below). The purpose of Bush Doctrine actions is to foreclose an attack, and, therefore, negate the need for self-defensive actions later on.

The legal rationale underlying the Bush Doctrine arises from the changing character of warfare over time and the inadequacy of United Nations (U.N.) Charter-based law to deal with these circumstances. Provisions in the U.N. Charter dealing with the use of force, specifically Article 51,<sup>9</sup> permit self-defense actions, but only after an attack has occurred. They are predicated on the assumption that the attack arises from another state; individuals and groups are relevant only as subjects of legal protection during the use of military force. Yet, in the last several decades, non-state actors such as armed militias and terrorist groups have undertaken military operations, and they are increasingly well armed and capable of launching widespread and destructive attacks.

Identifying responsible actors and their use of force is different than conventional military attacks, and the standard rules do not seem to apply. Terrorist attacks tend to be singular events such that conventional self-defense responses are not feasible; there is no ongoing invasion or attack against which one can respond. In such circumstances, laws of state responsibility dictate that the victim-state file a claim against the state where the attack originated or file against secondary-state supporters of those perpetrating the acts.<sup>10</sup> Yet states are not responsible for actions of terrorist groups unless the former exercises “effective control” over the latter. Most often, however, states do not support or have control over the groups operating within its borders. In the case of failed states, there might be no legitimate authority against which a claim might be directed. This presumes that the geographic origin of the terrorist attack can even be determined; in fact, the planning, financial support, and execution might involve multiple states and may not be transparent. Furthermore, terrorist groups do not have legal status to have a claim made against them directly, even in the unlikely event that they would honor such legal responsibilities. The deterrent effect from traditional self-defense may not be applicable or credible against non-state actors and, therefore, the non-state actors are not likely to be restrained in their actions. As such, preventive action is necessary where deterrence will not work.

In addition, Charter-based self-defense provisions are inadequate in cases of attack involving weapons of mass destruction. A nuclear attack could conceivably wipe out a victim state’s military forces or government structures, such that the ability to launch self-defense actions is precluded. As W. Michael Reisman explains:

The introduction of vastly more destructive and rapidly delivered weapons began to undercut the cogency of that [UN Charter] legal regime. The reason was simple: a meaningful self-defense could be irretrievably

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<sup>9</sup> U.N. Charter art. 51, para 1.

<sup>10</sup> CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 121-24 (3rd ed. 2008); *see also* Richard N. Gardner, *Neither Bush nor the “Jurisprudes”*, 97 AM. J. INT’L L. 585, 590 (2003).

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lost if an adversary with much more destructive weapons and poised to attack had to initiate (in effect, accomplish) its attack before a right of self-defense came into operation.<sup>11</sup>

In the case of geographically small states such as Israel, a large portion of its society would be destroyed following a nuclear attack. The magnitude of the harm is so great that waiting for attack is unreasonable. Most analogous, however, is the precautionary principle, which is notably applied in environmental and other areas of law.<sup>12</sup> According to this principle, the mere prospect of significant harm, especially of great magnitude and irreversible effects, is sufficient justification for government action.<sup>13</sup> Uncertainty, or the probability of an event occurring, must be weighed in comparison to the magnitude of the harm. When catastrophic harm is possible (e.g., effects of global warming), the presumption is tilted in favor of action rather than inaction. Such logic has even been directly applied to the Bush Doctrine where political figures have used rhetoric consistent with the precautionary principle in justifying preventive strikes and scholars have looked at terrorism and nuclear war in the context of catastrophic risk.<sup>14</sup>

Various arguments in support of the Bush Doctrine as accepted international law involve rationales based on instant custom,<sup>15</sup> *jus cogens*,<sup>16</sup> and *opinion necessitates*.<sup>17</sup> Nevertheless, there is little indication that the Bush Doctrine is presently accepted law or practice. State practice with respect to anticipatory self-defense has been so rare, indicating that traditional custom has not been established, nor have the conditions that would make established international law been fulfilled.<sup>18</sup>

In the absence of established law, as specified in a treaty or customary practice, there is little guide to the precise elements of what any international rule might encompass. With respect to the Bush Doctrine, the central prescription is that military force could be exercised in a preventive fashion, but there is little beyond that. For the Bush Doctrine to function as law, a series of additional rules are required that provide the parameters of the allowed behavior – i.e., the preventive use of military force – and how those behaviors will be managed in

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<sup>11</sup> Reisman, *supra* note 2, at 142-43.

<sup>12</sup> James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 3 (1991). See generally CASS SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

<sup>13</sup> See generally Cameron & Abouchar, *supra* note 12; SUNSTEIN, *supra* note 12.

<sup>14</sup> See Jessica Stern & Jonathan Wiener, *Precaution Against Terrorism*, 1-58 (Harvard Univ. Faculty Research, Working Paper No. 019, 2006).

<sup>15</sup> Benjamin Langille, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 156 (2003); see also Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self Defense*, 72 UMKC L. REV., 123, 190 (2003).

<sup>16</sup> David B. Rivkin, Jr., Lee A. Casey & Mark Wendell DeLaquil, *War, International Law, and Sovereignty: Reevaluating the New Century Preemption and Law in the Twenty First Century*, 5 CHI. J. INT'L L. 467 (2005).

<sup>17</sup> Christian M. Henderson, *The 2006 National Security Strategy of the United States: The Pre-Empive Use of Force and the Persistent Advocate*, 15 TULSA J. COMP. & INT'L L. 1, 28 (2007).

<sup>18</sup> David A. Sadoff, *Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 423, 583 (2009).

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the international legal system. Following Paul Diehl and Charlotte Ku, we refer to these as normative and operating systems rules respectively.<sup>19</sup>

### III. Normative System v. Operating System Rules

Transforming the Bush Doctrine from a vague policy proposal to a more precise rule of international law will require a series of decisions that provide greater specificity about the conditions under which preventive military action is allowed. This is part of what is referred to as the normative system of international law. International law as a normative system provides direction for international relations by identifying the substantive values and goals to be pursued. The Bush Doctrine will also require operational elements that outline the parameters of interaction and provide the procedures and forums for resolving disputes among those taking part in these interactions. Any rule of law must be properly specified normatively, but must also be compatible with the operating system structures and processes that give it effect. We discuss the normative and operating system elements in more detail below as a prelude to covering the key elements that are required for the Bush Doctrine.

In defining the normative system, the participants in the international legal process engage in a political and legislative exercise that defines the substance and scope of the law. Normative change may occur slowly with evolution of customary practices, a traditional source of international law. Yet, in recent historical periods, normative change has been precipitated by new treaties (*e.g.*, the Nuclear Non-Proliferation Treaty) or by a series of actions by international organizations (*e.g.*, the activities of the first team of U.N. weapons inspectors in Iraq). The Bush Doctrine could logically come to fruition under either process, but one might expect that evolutionary practice, especially one defined by more rapid customary practice,<sup>20</sup> is more likely than codification of the rule in a multilateral treaty. In any case, the establishment of international legal norms is still less precise and structured than in domestic legal systems where formal deliberative bodies enact legislation.

The topics of the normative system are issue-specific, and many components of the system refer to subtopics within issue areas (*e.g.*, the status of women within the broader topic area of human rights).<sup>21</sup> Many of these issues have long been on the agenda of international law. In fact, proscriptions on the use of military force have their roots in natural law and early Christian teachings on just war.<sup>22</sup> Many normative rules concerning the law of the sea (*e.g.*, seizure of commercial vessels during wartime) also have long pedigrees in customary prac-

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<sup>19</sup> DEIHL & KU, *supra* note 1, at 74-102 (elaborating on the normative and operating systems).

<sup>20</sup> Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 759 (2001).

<sup>21</sup> See Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 788-90 (2006); see also Christopher C. Joyner, *The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 708-09 (2007) (contending the U.N. Charter establishes international obligations to protect not only people but sub-groups such as women and children).

<sup>22</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 22-24 (6th ed. 2008).

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tice.<sup>23</sup> Yet, recent trends in the evolution of the normative system represent expansions in its scope and depth. Some current issue areas of international legal concern, most notably with respect to human rights and the environment, have developed almost exclusively during the latter half of the twentieth century. Furthermore, within issue areas, legal norms have sought to regulate a wider range of behaviors. For example, international law on the environment has evolved beyond simple concerns of riparian states to include concerns with ozone depletion, water pollution, and other problems.<sup>24</sup>

With respect to the Bush Doctrine, specifying the normative element means not only allowing preventive military action as a norm or value of the international community, but also providing clarity and detail on what kinds of military actions are permitted, the conditions that must be present for the actions to be legal, and how the actions relate to other rules of international law. Below, we address the different options available to answer these concerns.

The operating system deals with a different series of concerns or questions. Who, for example, are the authorized decision-makers in international law? Whose actions can bind not only the parties involved but also others? How do we know that an authoritative decision has taken place? When does the resolution of a conflict or a dispute give rise to new law? The operating system may be associated with formal structures, but not all operating system elements are institutional. For example, the Vienna Convention on Treaties entails no institutional mechanisms, but it does specify various operational rules about treaties and therefore the parameters of lawmaking.<sup>25</sup>

The operating system has a number of dimensions or components that are typically covered in international law textbooks but largely unconnected to one another.<sup>26</sup> Some of the primary components include: (1) the sources of law, (2) actors, (3) jurisdiction, and (4) courts or institutions.<sup>27</sup> The operating system then is a set of rules that govern how international law is made, which actors have rights and obligations, how legal processes are managed, and which structures are assigned tasks with respect to dispute resolution and compliance. If there are not suitable operating system procedures available, then norms in the legal system are likely to be ineffective in promoting the desired behaviors. New

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<sup>23</sup> *The Paquete Habana, The Lola*, 175 U.S. 677, 708-09 (1900).

<sup>24</sup> PETER M. HAAS, ROBERT O. KEOHANE & MARC A. LEVY, *INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION* 27-29, (1993); DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* 13-15 (2004); Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48(3) INT'L ORG. 425, 430-33, 458 (1994).

<sup>25</sup> See United Nations Vienna Convention on the Law of Treaties art. 3-5, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>26</sup> Shaw, *supra* note 22 at, 62-64.

<sup>27</sup> Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) INT'L ORG., 421, 424-26; see generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001); see also Jose Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 218-32 (2002) (discussing the emergence and role of international organizations); see also Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 359-62 (2006) (discussing the impact of Non-Governmental Organizations on international law).



norms, such as the Bush Doctrine, can rely on extant processes created for general purposes – like, for example, the role that the International Court of Justice plays for any question of international law, regardless of issue area, which constitutes a dispute between state parties. States might also create norm or issue area specific institutions or processes, such as the WTO dispute resolution mechanism that exists for trade conflicts.<sup>28</sup>

With respect to the Bush Doctrine, concerns with defining what constitutes law or not, as well as jurisdictional elements (*e.g.*, national vs. universal jurisdiction in criminal matters), are largely irrelevant. Yet, which actors can exercise the right to preventive military action and which actors can decide (with which legal processes) is fundamental to the operation of a new Bush Doctrine precept. In addition, the Bush Doctrine must include provisions for how disputes over its usage are settled, how violators are punished, and what remedies are available to those that are victims of abuse of the new rights granted by the Bush Doctrine. Below, we address these vital elements.

In the following section, we present and analyze different options or variations for key elements of normative and operating system components of the Bush Doctrine. We cover these not by system category, but rather by the sequence in which they would be carried out in practice, namely authorization, execution, and enforcement.

#### **IV. Key Elements of a Prospective Bush Doctrine**

Any Doctrine or legal right must be constrained or channeled through rules on its application. In order to analyze the rules that could apply to the Bush Doctrine, we divide the process of applying the Bush Doctrine into three analytical phases: authorization, execution and enforcement. In analyzing the authorization phase, we examine the threshold that might trigger the right, the actors that might hold authority over the right, and the right's status relative to other legal remedies. Considering the execution phase, we investigate the actors that might actually conduct a preventive act and how those acts are constrained by the laws of war. Finally, we question what mechanisms exist to ensure compliance/enforcement and to punish violations.

##### **A. Authorization**

###### *1. What is the Threat Threshold That Triggers the Doctrine?*

The first step for any rule of law permitting a given behavior is to specify the conditions under which the action is applicable and when the right can be exercised. This is a part of the normative system in that the prescribed behavior is conditioned by additional rules that define not only what actions are permitted, but also the context in which they are permitted. For example, the right to withdraw from treaties can only be exercised according to the provisions specified in

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<sup>28</sup> See *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited April 16, 2011) (explaining the WTO's dispute resolution process).

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the treaty itself or those noted in applicable articles of the Vienna Convention on Treaties.<sup>29</sup> With respect to the Bush Doctrine, this involves detailing when preventive military action might be allowed, as even the most liberal interpretations of the doctrine do not regard unconditional military action as allowable. Because Bush Doctrine action is designed to address a future threat, international legal rules should ideally address two dimensions of that threat in delimiting its usage: severity and timing.

In terms of the severity dimension, ideal international legal rules would designate the seriousness of the threat necessary before preventive action might be permitted. Threats to national security range from the most extreme existential threats to those that would involve limited damage or costs to the state. The U.N. Charter and its rules on self-defense do not differentiate between different levels of severity providing that an actual attack has occurred (more on the timing element below). Article 51 of the U.N. Charter states, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>30</sup>

An armed attack might involve a wide range of activities, from those that are minor threats to the state and its material well being, such as a border incursion involving a limited number of troops, to those that are far more serious, such as a full-scale invasion designed to conquer territory. According to the Charter standard, any act of aggression justifies the use of force in response. The U.N. definition of aggression, adopted by the United Nations General Assembly in a 1975 resolution, sought to provide a list of unacceptable uses of military force.<sup>31</sup> These include not merely threats of force, but the actual uses of force to include invasions, aerial bombardments, blockades, and allowing irregular forces to use one’s territory to launch attacks against another state.

The U.N. Charter standard sets a relatively low bar as any kind of military attack can trigger a self-defense response. It is also one that is relatively easy to assess in practice given that the attack has already occurred and that such military action will be transparent. Setting a severity standard for the Bush Doctrine is not as simple, given that an assessment of the threat is prospective.

At one extreme, one could adopt a rule that permits anticipatory self-defense via the Bush Doctrine on the same grounds as the U.N. Charter. That is, *any* prospective military attack would allow the potential victim to take preventive action. Adopting the Charter standard, however, encounters a number of risks and potential disadvantages for the international community. How does one know that an armed attack is likely from an opponent? States regularly undertake military planning and deployment of troops based on various contingencies,

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<sup>29</sup> Vienna Convention, *supra* note 25, art. 54, 56; Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1588-91 (2005).

<sup>30</sup> U.N. Charter art. 51, para. 1.

<sup>31</sup> G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp No. 19, U.N. Doc A/9619, at 142-144 (Dec. 14, 1974).

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such as the occurrence of a civil war in a neighboring state. For example, U.S. and NATO plans for attacking Libyan air defenses existed for many years prior to the outbreak of civil war in Libya in 2011. States make such plans regularly against their rivals, and indeed possibly against allies who might undergo regime change or alter their foreign policy orientations. Allowing preventive military action in such cases would open the door for frequent and numerous military actions in the global community, potentially turning every rivalry into armed hostilities, which is precisely what the U.N. Charter and the Bush Doctrine desire to preclude. In the post-cold war period, there have been approximately 290 serious rivalries in which enemies repeatedly threaten one another.<sup>32</sup> Thus, the risk of escalation to full-scale war would be great, as victims of Bush Doctrine actions could cite Charter rules for self-defense to respond in kind. States would be given license to use military force rather than be required to seek peaceful resolution to resolve disputes, an outcome in direct contradiction to Article 2, Section 4 of the Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>33</sup>

Might these problems be addressed by requiring a specific verbal threat to use force before the Bush Doctrine could be operative? This eliminates the misinterpretation or exploitation of regularized and purely defensive actions by an opponent, but it is far from an ideal solution itself. Threats to use military force are quite frequent,<sup>34</sup> and indeed are often a bargaining strategy for actors who seek to have opponents back down in a dispute.<sup>35</sup> It is also the case that such threats are frequently bluffs or “cheap talk,” and there is no intention to actualize them.<sup>36</sup> For example, North Korea has regularly threatened to go to war with South Korea and other countries in the region over a wide range of slights (e.g. economic sanctions, withholding of food aid), and such threats have never been brought to fruition. Encouraging preventive military actions in the face of verbal threats is likely to produce many instances of military action that are not actually necessary.

Because of the problems attendant to encouraging preventive military actions for any potential threats, some analysts have argued that the Bush Doctrine should be applicable only to those threats that cross a threshold at the other end of the continuum – existential threats and other catastrophic risks.<sup>37</sup> This would

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<sup>32</sup> Paul F. Diehl, Gary Goertz & James P. Klein, *The New Rivalry Dataset: Procedures and Patterns*, 43 J. PEACE RESEARCH 331, 340 (2006).

<sup>33</sup> U.N. Charter art. 2, para. 4.

<sup>34</sup> Stuart Bremer, Faten Ghosn & Glenn Palmer, *The MID3 Data Set, 1993-2001: Procedures, Coding Rules and Description*, 21 CONFLICT MGMT. AND PEACE SCI. 133, 135-36 (2004).

<sup>35</sup> See generally James Fearon, *Rationalist Explanation for War*, 49(3) INT'L ORG. 379 (1995).

<sup>36</sup> *Id.*; Robert F. Trager, *Diplomatic Calculus in Anarchy: How Communication Matters*, 104 AM. POL. SCI. REV. 347 (2010).

<sup>37</sup> Gary Ackerman & William Potter, *Catastrophic Nuclear Terrorism: A Preventable Risk in GLOBAL CATASTROPHIC RISK* 441 (Nick Bostrom, Milan M. Ćirković eds., 2008); see also RICHARD POSNER, *CATASTROPHE: RISK AND RESPONSE* 89-91 (Oxford University Press 2004); Matthew C. Wax-

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significantly restrict the range of cases in which preventive military action might be used, generally consistent with international community values that attempt to make military force the exception, rather than the norm, for international interaction.

Unlike an armed attack, which has clear and observable elements, detecting future threats is complex and requires accurate intelligence and assessment. Such estimations must be made of both an opponent's capabilities and its intent to use those capabilities. If we restrict the scope of the threats to those involving massive destruction, at present there are only nine states that have nuclear weapons capability.<sup>38</sup> Most of these are unlikely candidates for "first use" of such weapons. One could expand the permissiveness range of the Bush Doctrine to include those states that are in the process of acquiring nuclear weapons, perhaps in contravention to international treaty obligations. This was one of the bases for Israeli strikes against Iraqi and Syrian nuclear facilities in 1981 and 2007 respectively, actions consistent with the Bush Doctrine. The detection of chemical weapons capability is more complex, given (a) that many dangerous compounds (e.g., VX gas) can be hidden in small places, and (b) chemical weapons can be created quickly from the combination of two or more benign and permitted compounds. Nuclear and chemical capabilities of terrorist groups are even more problematic to determine, given the absence of specific target locations (e.g., nuclear processing facility) associated with those groups and the shadowy character of such groups relative to states.

Determining intent to use weapons is even more problematic than assessing capabilities. The U.N. Charter standard avoids this problem by requiring an actual attack. States and terrorist groups do not publicly announce their intent to use weapons at a specific time or place, because even if such intent exists, there are clear tactical and strategic advantages not to signal actions in advance. Thus, intelligence analysts would need to make a probability estimate of whether a state or group will use its weapons capability and against which targets. Again, there is room for error, most seriously on the side of overestimation of the threat as Bush Doctrine rules are created. Rules permitting preventive military action cannot solve the problem of "false negatives" (not taking action when the threat was real), but might encourage "false positives" (taking military action when none was necessary).<sup>39</sup> Of course, as the 2003 invasion of Iraq indicated, accurate intelligence about the existence of weapons of mass destruction and the intent to use them is not always present, and there is a great risk of mistakes, the consequences of which can be quite severe. Nevertheless, it seems best that the Bush

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man, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1, 6-15 (2009); see also MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 25-30 (Stephen Macedo ed., 2008).

<sup>38</sup> United States, France, United Kingdom, China, Russia, Pakistan, India, Israel, and North Korea (not including states engaged in nuclear weapons sharing via NATO).

<sup>39</sup> The ideas behind the statistical principles of false positives and false negatives are explained in RICHARD BINGHAM & CLAIRE FELBINGER, EVALUATION IN PRACTICE 11 (2002) and ROBERT P. ABELSON, STATISTICS AS A PRINCIPLED ARGUMENT 104-30 (1995). Ideas of false positives and false negatives are also commonly referred to as Type I and Type II errors, respectively. With respect to the Iraq invasion, the point was made in HANS BLIX, DISARMING IRAQ 55-274 (2004).

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Doctrine be limited to a narrow set of threat levels – those in which the consequences of the threat being carried out are significant.

A second element of the threat threshold is timing of the threat. There are different standards available for the timing of permitted military action in international law, depending on whether the threat has been actualized in the form of an attack, is imminent but not yet actually carried out, or might be actualized at some specified time in the future. As noted above, the U.N. Charter provisions allow military actions only after an actual attack has occurred. Another set of timing rules, specific to anticipatory self-defense, was laid out in the *Caroline* affair. This dates back to 1837 and involved British forces that seized and burned a vessel in American waters that was preparing to transport men and material to rebellious forces in Canada. The United States protested these actions and U.S. Secretary of State Daniel Webster laid out a famous set of conditions before preemptory military actions were permitted, specifically, the “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation.”<sup>40</sup> This declaration has been widely cited and repeated over the last two centuries, but it is not clear that customary practice has given it weight as international law. The *Caroline* criteria permit military action only immediately before an attack occurs, as soon as indications are such that an attack is imminent. Although an exact point cannot be determined, one might presume that the window is again quite narrow – it could be as little as hours and no longer than days or a week.

Timing issues are more complex with respect to the Bush Doctrine. Defensive strikes occur before an attack occurs, but this could be weeks or years before a prospective attack and there is no explicit benchmark on how likely the military attack would have to be before a preventive action is justified. Power transition theorists project that China will surpass the U.S. in material capabilities sometime in the middle 21st century and such a transition point has been associated with major power war in the past, initiated by the rising state.<sup>41</sup> Taking this as a cue, preventive action could extend back 40 years from the possible attack as well as any time up to the actual attack.

Allowing preventive military action well in advance of a threat being actualized carries with it a number of risks. First, there is the strong potential for states to mistakenly identify threats. By allowing action only in close temporal proximity to the threat, the Charter and *Caroline* standards offer much less prospect for “false positives” in terms of future attacks. Intelligence estimates (as with any kind of forecasting) become less accurate as the time between the assessment and the prospective event increases. One only has to look at the best-selling book from early 1990s about a then purported threat to the U.S. – *The Coming War*

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<sup>40</sup> William C. Fray & Lisa A. Spar, *British-American Diplomacy The Caroline Case*, THE AVALON PROJECT, [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp) (last visited Sept. 13, 2011).

<sup>41</sup> Douglas Lemke & Ronald L. Tammen, *Power Transition Theory and the Rise of China*, 29 INT’L INTERACTIONS 269, 270 (2003); Ronald Tammen & Jacek Kugler, *Power Transition and China-US Conflicts*, 1 CHINESE J. INT’L POL. 35, 45 (2006); see also STEVE CHAN, CHINA, THE U.S., AND POWER TRANSITION THEORY: A CRITIQUE 2 (2008).

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with Japan<sup>42</sup> – to see that many such claims look ridiculous in retrospect. Any long-term forecast is subject to error because of the presence of subsequent intervening factors that might mitigate the threat. These include changes in regime and, therefore, the policies of potential opponents, or the rise of new international norms and institutions that prevent threats from being carried out.

Long-term forecasts are also open to substantial abuse given that any state in a rivalry can argue that it will be subject to future attack at sometime from its opponent. In actuality, many interstate rivalries never involve full-scale war or advanced military confrontations;<sup>43</sup> nonetheless, states actively plan as if such confrontations were commonplace. It is easy to envision various states using a variety of excuses to justify the launching of military attacks against an opponent in the absence of manifest indicators. Creating liberal rules on timing might create more incidences of military attacks than it would prevent.

The creation of international rules on the timing element also must be consistent with rules on other dimensions. For example, a provision that preventive military actions could only be used as a last resort (see below) might be incompatible with one that permits action far in advance of the actualized threat. With an extended time period available for peaceful solutions, it might be all but impossible to conclude that diplomacy has irrevocably failed. A few failures early in the conflict resolution process do not signal that the outlook is hopeless. We know that mediation and other efforts often fail repeatedly before some progress is made or a resolution is reached.<sup>44</sup> Thus, states might wrongly conclude that some initial failures at diplomacy are suitable justification for moving ahead with preventive military action.

In sum, there are significant problems with allowing preventive military actions far in advance of when an opponent might attack. However, the optimal time point for preventive military actions is not clear. It must be somewhat earlier than what is allowed by the *Caroline* criteria or the necessity for Bush Doctrine would be moot. Yet, more than a year in advance seems unduly lenient. Greater clarity in terms of rule formation is apparent when deciding on the severity standard. There, it appears that normative rules would confine Bush Doctrine actions to threats involving mass or extensive destruction, including catastrophic risks.

### 2. *Who is Allowed to Authorize Action?*

A second consideration in rule construction focuses on who decides when the conditions like those outlined above are manifest and, therefore, preventive military action is justified. Who can make decisions concerning when rights can be

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<sup>42</sup> GEORGE FRIEDMAN & MEREDITH LEBARD, *THE COMING WAR WITH JAPAN* xiii-xiv (1992).

<sup>43</sup> Diehl et. al., *supra* note 32, at 335. For example, the US-USSR rivalry never experienced direct war.

<sup>44</sup> Jacob Bercovitch & Paul F. Diehl, *Conflict Management of Enduring Rivalries: The Frequency, Timing, and Short-term Impact of Mediation*, 22 *INT'L INTERACTIONS* 299, 317 (1997); James A. Wall, Jr., et. al., *Mediation: A Current Review and Theory Development*, 45 *J. CONFLICT RESOL.* 370, 385 (2001).

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exercised is fundamental to the legal operating system; a *priori*, who decides whether a preventive military action meets the specified normative conditions, whatever those standards might be? Operating system rules could allow the decision to rest solely in the hands of individual state actors at the one extreme or there could be a requirement for approval by some quasi-judicial or political entity at the international level.

Among scholars who have discussed the potential application of a Bush Doctrine, there have been many different potential authorizing agents. States may be allowed to authorize themselves when they feel a sufficient threat,<sup>45</sup> or the United Nations Security Council (UNSC) could authorize action. There is also the possibility for the creation of a new structure within the international operating system. Thomas R. Anderson suggested the creation of a new international tribunal called the International Court of Threat Assessment.<sup>46</sup>

If the goal is to create a rule in which the Bush Doctrine will be used frequently, it would be easiest to allow states to invoke the Bush Doctrine any time that they perceive a threat. This is consistent with many extant operating system procedures that give primacy to state sovereignty and decision-making. For example, the Charter provisions for self-defense allow states to launch necessary military actions, although unilateral execution of defensive military action is permitted only until the Security Council takes appropriate action.<sup>47</sup> Scholars like Robert J. Delahunty and John Yoo have argued that the U.S. should be allowed to use force legally for both preventive self-defense and humanitarian missions;<sup>48</sup> this suggests a rule that international law should afford states such discretion. This might be a realistic position given that states are the ones who write the rules for themselves and there is always the expectation that the operating system will provide for *post hoc* judgments on the legality of decisions (see below).

Allowing states discretion to act when they perceive a threat would allow them to invoke the principle any time it might be needed, but also renders considerable potential to increase the amount of global conflict. If states are allowed to be their own arbiters, they may invoke the Bush Doctrine in situations when the perceived threat does not warrant preventive action. Indeed, the philosopher John Locke aptly noted "it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and on the other side that ill-nature, passion, and revenge will carry them too far in punishing others."<sup>49</sup> States have historically misused current self-defense permissions, so it is unlikely that they would be any more judicious with the Bush Doctrine.<sup>50</sup> As Thomas Franck has observed, "wars continue to occur, as they

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<sup>45</sup> Delahunty & Yoo, *supra* note 3, at 849.

<sup>46</sup> Anderson, *supra* note 3, at 285.

<sup>47</sup> U.N. Charter art. 51.

<sup>48</sup> Delahunty & Yoo, *supra* note 3, at 848.

<sup>49</sup> THE LOCKE READER 282 (John W. Yolton ed., 1977).

<sup>50</sup> For instance, Adolf Hitler justified the German invasion of Poland in 1939 using the principle of self-defense. In fact, German soldiers staged an attack on a German radio outpost to provide the pretext of self-defense.

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have since time immemorial, with parties both of which are using force allegedly in ‘self-defense.’”<sup>51</sup> Even if states did not abuse the right to invoke the Bush Doctrine, states may have very different perceptions of threat, creating another potential source of concern. Additionally, states that previously experienced hostilities may be more likely to invoke the Bush Doctrine in the future.<sup>52</sup>

If states cannot be trusted as authorizing agents for their own Bush Doctrine actions, some sort of international authorization process must be specified. Doing so would also confer additional legitimacy upon the Bush Doctrine,<sup>53</sup> especially should the procedural requirements for using the Bush Doctrine be exceptionally stringent. The United Nations Security Council (UNSC), already an established part of the operating system, has been suggested as a logical body for approving preventive military actions.<sup>54</sup>

The UNSC is already permitted to authorize action in collective self-defense. Although a codification of the Bush Doctrine may make the UNSC more willing to consider it explicitly, political, not legal, considerations have made the authorization by the Security Council extremely rare. Each of the five permanent members of the Security Council — the U.S., Russia, China, France and the United Kingdom — can exercise a veto on an authorization of force. Therefore, unless there is consensus among these five states (and an affirmative vote of nine Council members), it is impossible for the UNSC to act.

Since its inception, the UNSC has only authorized collective self-defense twice. In the first case, the Korean War, the Nationalists represented China and the Soviet Union boycotted the authorizing vote; neither is likely to be repeated. The second case involved the first Gulf War in the early 1990s, which occurred after a brief moment of great power consensus following the end of the Cold War. Perhaps more relevant is the willingness of the UNSC to approve the use of military action by member states to redress a range of different problems. Famously, the Council did not approve U.S. and British action in Iraq prior to the second Gulf War, but it did give its stamp of approval to take military action in Haiti and Libya respectively, using the euphemism “all necessary means/measures” to give states the green light to take military action.<sup>55</sup> Yet, these latter circumstances were far from those envisioned by the Bush Doctrine. The presence of repressive regimes and humanitarian concerns motivated the UNSC members to allow military force. Still, there is no right or obligation for the

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<sup>51</sup> Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 811 (1970).

<sup>52</sup> Michael Skopets, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 780 (2006) (explaining justification for preventative force); Onder Bakircioglu, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 IND. INT’L & COMP. L. REV. 1, 31 (2009).

<sup>53</sup> Anderson, *supra* note 3, at 263.

<sup>54</sup> Martinez, *supra* note 15, at 191; Matthew C. Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT’L L. 1, 30 (2009).

<sup>55</sup> See S.C. Res. 940, ¶ 14, U.N. Doc. S/RES/940 (July 31, 1994) (approving action in Haiti); see also Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (March 17, 2011).



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international community to intervene for humanitarian concerns (“responsibility to protect”),<sup>56</sup> and in other instances of humanitarian emergencies, the UNSC chose not to grant authorization for military action (*e.g.*, Darfur). Thus, the Council would be less willing to approve preventive action against uncertain and future threats. Whereas allowing individual states to decide actions might lead to an excess of military actions, placing that authority in the hands of the UNSC would likely produce the opposite outcome: few actions and some missed opportunities.

If existing operating system structures are flawed, an alternative is the creation of a new institution tailored to the needs of the Bush Doctrine. Anderson’s International Court of Threat Assessment (ICTA) is such a body.<sup>57</sup> In his conception, the ICTA would:

- (1) be non-adversarial, (2) be non-public in its proceedings, (3) have a large pool of impartial judges from which petitioning states may choose, (4) possess special competencies in strategic intelligence assessment, (5) offer only advisory opinions, (6) possess a widely-accepted set of criteria for authorizing prophylactic self-defense, and (7) be a court of last resort.<sup>58</sup>

By creating a court that could operate apolitically and in secret, hearing only the appeals of threatened states, the ICTA has the potential to constrain the most egregious abuses and, potentially, promote efficient uses of the Bush Doctrine for the public good. Moreover, by centralizing the analysis of sensitive intelligence and creating a large pool of judges, advocates for ICTA contend that states can more securely outline actions they are considering taking under the Bush Doctrine.<sup>59</sup> Despite these aspirations, twin tensions bind the ICTA and, in our assessment, make it unlikely that an ICTA would be able to accomplish its purported goals without sacrificing either the legitimacy or the caseload of the court.

On the one hand, to function efficiently and with the trust of plaintiff states the ICTA would necessarily need to be secret.<sup>60</sup> Judges and their staff would deal with sensitive intelligence on developing threats – information that states jealously guard. Additionally, given the severity of the threats and potential responses that plaintiff states might propose, it would be impossible to have the target states or other actors represented before the court. To do so would tip the targets off to the intelligence gathered, as well as the security concerns and potential responses of the plaintiff states.<sup>61</sup>

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<sup>56</sup> See Joyner, *supra* note 21, at 696; Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT’L AFF. 615, 615 (2008).

<sup>57</sup> Anderson, *supra* note 3, at 263.

<sup>58</sup> *Id.* at 285-90.

<sup>59</sup> *Id.* at 287.

<sup>60</sup> *Id.* at 286-87.

<sup>61</sup> An analogy in municipal law can be made to the Foreign Intelligence Surveillance Court (FISC), which authorizes surveillance of potential spies in accordance with the Foreign Intelligence Surveillance Act (FISA). FISC operates in secrecy, with the subjects of investigations only being notified after the fact. Were the government to notify potential spies in advance, that would cause them to flee, conceal

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On the other hand, for the ICTA to function as intended, it must garner broad recognition and approval within the international community. In order for plaintiff states to take the step of case referral (as opposed to deciding on action unilaterally), they would need some assurance that a favorable ICTA ruling will help them make their case in the public domain. The ability of the ICTA to attain such reputational capital is complicated by the secret, one-sided character of cases that would be considered. One way to remedy this problem might be to include judges from a diversity of states and to limit the ability of the plaintiffs to choose their judges. This may persuade the international community that, even if they are not privy to the cases, they can reasonably assume that garnering approval of the court will require winning over at least some skeptical judges.

Unfortunately, these requirements for secrecy and legitimacy work against one another, and any movement one way or the other is likely to exacerbate the problems of legitimacy or case referral. If a plaintiff state is allowed to pick its panel of judges, then the ICTA is unlikely to ever gain legitimacy in the international community. Given plaintiff state concerns of privacy and maintaining the military advantage of surprise, solutions such as including a judge from the target state or a target state ally are unavailable in this context because they would effectively discourage plaintiff states from appealing to the ICTA. The problem of driving plaintiff states away reappears if those states are not allowed to pick their judges. From a purely logistical perspective, no state is going to turn over valuable intelligence without knowing who will be privy to it. Once plaintiff states are notified of their draw from the judicial pool and are unsatisfied with it, what is to stop a plaintiff state from refusing to proceed in turning over their intelligence or even naming the target state?

For the sake of argument, let us assume that this problem of judge selection is somehow overcome. Even if an ICTA existed that could credibly commit to both plaintiff and target states that rulings would be impartial and secret, a filtering effect would still exist on the cases that they would likely receive. All threats might presumably meet the high severity threshold specified above, but cases could vary according to the uncertainty surrounding the likelihood the threat would be carried out as well as the probability that the plaintiff's preventive action would be successful.

The cases about which ICTA advocates are most concerned – high uncertainty, low probability of winning – might never make it to the ICTA because of

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their actions, or otherwise move ahead with their criminal activities. Thus, the secrecy is justified, despite the lack of democratic accountability associated with it. There are a few differences between FISA and a potential court assessing the Bush Doctrine. States in the international system are not given the same right to privacy that individuals enjoy, nor would an international court likely have as much ability to acquire information on potential rogue states. Regardless, the general logic requiring secrecy applies to both the FISA situation and a potential court evaluating the Bush Doctrine. For articles discussing the tension, see generally Americo R. Cinquegrana, *The Walls (And Wires) Have Ears: The Background and First Ten Years of the Foreign Surveillance Act of 1978*, 137 U. PA. L. REV. 793 (1988-1989); see also Robert A. Dawson, *Shifting the Balance: The D.C. Circuit and The Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380 (1992) (discussing the tension between secrecy and notification); see also Nola K. Breglio, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance* 113 YALE L.J. 179 (2003) (reappraising the context of FISA after the passing of the USA PATRIOT act).

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a plaintiff state's fear of the reputational damage from losing. This is a desirable outcome if the effect is also to deter the plaintiff state from launching the preventive attack. Unfortunately, cases at the other extreme – low uncertainty and high probability of winning – are also unlikely to appear before the ICTA either because states might not want to risk an unfavorable ruling in the face of a near-certain threat that could be eliminated. As the severity of the threat increases, the risk and the tendency to bypass the court will also increase. It is exactly these cases that could most bolster an ICTA's reputation by affording the body the opportunity to support a justified case.

The cases most likely to make it to our imagined impartial and secret ICTA would be murkier cases in which the evidence of the threat is less compelling or the case for effective preventive action is less convincing. In either event, the ICTA would likely risk its own reputation. Rejecting a proposed action that is then undertaken by the plaintiff anyway carries the risk of making the court seem irrelevant. Meanwhile, supporting a proposed action that is carried out without successfully undermining the purported threat carries a risk to the broader ICTA legitimacy. Had the U.S. referred its plans for an invasion of Iraq to an ICTA and received approval, the failure to find weapons of mass destruction would have destroyed any credibility that the body had.

The ICTA and the UNSC could also involve lengthy deliberation processes. In the interim and assuming such deliberations were known by the target – almost assured in the UNSC and quite possibly with leaks in the ICTA – that actor could undertake strategic counter-measures to lower the probability of a successful attack. Nearly all practitioners and a majority of analysts can agree that when contemplating an attack a state must be wary of issuing a signal to potential targets.<sup>62</sup> A nuclear weapons state might attempt to harden the sites of the weapons, including placing defenses around a nuclear facility. A terrorist group might quickly dismantle its training bases, making an approval of a preventive action moot. Consider the 2007 preventive action taken against a Syrian nuclear reactor by Israel. Had Israel taken its case before an authorizing body that signal might have – at a minimum – tipped off Syria to the impending strike. More troubling however is that the signal issued by Israel would be vague – remember the actual petition and proceedings would be kept secret. Such a signal might provoke a cascade of uncertainty and tension in the region. Syria is not alone in posing a potential threat to the Israeli state.

Ultimately, there is no perfect operating system rule for authorizing Bush Doctrine action. Allowing states to be the sole arbiter would allow for widespread use without delay, but would do little to offset the potential for abuse. Giving authority to the U.N. Security Council would prevent abuse but limit use. An international court specifically charged with assessing threat might be shunned by states in key circumstances.

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<sup>62</sup> See Anderson, *supra* note 3, at 284 (noting “surprise” is a fundamental tenet of successful military operations); see also UNITED STATES ARMY, FIELD MANUAL 3-0: OPERATIONS, 4-12 (2001).

3. *Must This Be a Last Resort Option?*

Even with clear standards and proper authorization, there is the option of putting additional normative requirements on the Bush Doctrine before preventive military action could be employed. Conditioning rights on prior behaviors is common in legal systems — requirements that other solutions or actions must first be taken before the right in question can be exercised. For example, there usually needs to be an exhaustion of local remedies before a state can file an international claim on behalf of one of its citizens or corporations.<sup>63</sup> With respect to the Bush Doctrine, the most commonly mentioned condition is that preventive military action be exercised only as a “last resort.”<sup>64</sup>

The requirement that military force be employed as a last resort is rooted in the logic that rules of international law should minimize the use of military force to the greatest extent possible. Hence, U.N. Charter provisions lay out a strict and general prohibition against the use of force,<sup>65</sup> and allowances for self-defense are then only a limited exception to that general prohibition. Restricting military force to a last resort option also promotes the peaceful resolution of disputes, as actors are required to try alternative means to deal with disagreements first. This is no accident because in a system where violent action by a state carries costs far beyond the battlefield casualties (*e.g.* economic and societal disruption; creation of new enmities, etc.), it is in the interest of all states to see if other actions might first resolve the situation. International legal rules do not specify precisely what those alternate means might be, but presumably, many of those mentioned in the U.N. Charter, Chapter VI – mediation, conciliation, adjudication – would be applicable.<sup>66</sup> Nevertheless, such alternatives might be impractical or inadequate in the context of terrorist threats from non-state actors. Adjudication is not an option, given that no legal issues might be involved and non-state actors lack standing in most international venues. Negotiations are often politically unlikely, as well as practically impossible given that such groups often lack clear organizational structures and leadership.

At first glance, a requirement that other peaceful alternatives be tried before military action is allowed seems like a viable option. By definition, the time until a threat might be operational necessarily affords the threatened state the opportunity to pursue alternative methods of threat prevention. Yet, there are two problems unique to imposing last resort requirements on the Bush Doctrine – those relating to determining when alternatives have been exhausted and bargaining advantages.

If rules require that other alternatives must be pursued before a given action is permitted, there is the inherent problem of determining when those alternatives

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<sup>63</sup> See generally Sylvia D’Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection* (EUI Working Paper No. EUI WP LAW 2007/02), available at [http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW\\_2007\\_02.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf?sequence=1).

<sup>64</sup> See Anderson, *supra* note 3, at 272; see also Delahunty & Yoo, *supra* note 3, at 863.

<sup>65</sup> U.N. Charter art. 2, para. 4.

<sup>66</sup> *Id.* art. 33-38.

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have been exhausted and, therefore, when the last resort option is in order. The exhaustion of local remedies for international claims can be determined by examining whether all legal avenues and appeals have been pursued.<sup>67</sup> As for the use of force, the Charter and *Caroline* standards provide a clear basis for assessing when peaceful resolution is no longer possible: an armed attack has either occurred or is imminent. Unfortunately, the Bush Doctrine presents special challenges in this regard. First, unlike exclusively legal options, there are a variety of peaceful alternatives such as mediation and negotiation that have no identifiable concluding points. Even if mediation and negotiations fail initially, this does not preclude their further use to resolve conflict, unlike most legal proceedings; some conflict management attempts fail, but lay the groundwork for better relations and ultimate success in the future.<sup>68</sup> Thus, it might be impossible to assess when military action is truly the last resort, which provides an opening for a state to declare an impasse in order to justify military action. Second, and complicating this problem, is the timing element referenced above in the discussion of threat thresholds. As the threat might be months or years before the threat is actualized, there is ample time for additional peaceful overtures. Even with initial failure, in most cases there would still be substantial time to pursue further alternatives. As long as time remains and attack is not imminent, one could argue that alternatives have not been exhausted and therefore preventive military action is not justified.

The second problem involves the bargaining incentives. Bargaining incentives are relevant if international law accepts the view that the Bush Doctrine authorizes the use of force only as a last resort. If the target actor is negotiating with its potential attacker, the shadow of a future Bush Doctrine action might lead to two undesirable consequences. First, the target of a Bush Doctrine action would likely offer greater concessions to its enemy than might otherwise be the case. If the target expects costly military action from its opponent, it will settle for less in present deliberations. This is a bargaining advantage that the potential attacker can exploit, even if the outcome is not just or the likelihood of preventive military action is low. Indeed, if this theory is correct, powerful states are more likely to invoke the Bush Doctrine in order to benefit from such bargaining advantages. Second, Bush Doctrine actions are likely to be carried out disproportionately, or primarily, by more powerful states.<sup>69</sup> Thus, giving effect to the Bush Doctrine but mandating attempts at peaceful remedies secures a bargaining advantage for the strong versus the weak. Recognizing this, the weaker side might choose to launch its own attack (assuming it has the capability at that time), under "better now than never" logic because its best chance to achieve its

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<sup>67</sup> *Interhandel* (Switz. v. U.S.), Judgment, 1959 I.C.J. 34 (March 21).

<sup>68</sup> JACOB BERCOVITCH & RICHARD JACKSON, *CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY* 46 (2009).

<sup>69</sup> See DIEHL & KULKARNI, *supra* note 4; see also *State System Membership List, v2008.1, CORRELATES OF WAR*, <http://www.correlatesofwar.org/> (last visited Nov. 30, 2010) (list of major powers varies by historical era and includes as few as five (US, Soviet Union, China, UK, and France in the 1950s) and as many as nine (before World War I) states since 1816); see generally Fearon, *supra* note 35; see also Trager, *supra* note 36, at 347.

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goals might be to carry out its threat rather than wait for either a sub-optimal negotiated outcome or a military strike by its opponent.

Requiring peaceful alternatives to precede preventive military actions is consistent with the other normative values in the international legal system. The absence of such a requirement would have pernicious effects in encouraging states to carry out military actions frequently and perhaps with impunity. Yet, a last resort requirement is not without some problems when applied to the Bush Doctrine, as determining whether the standard has been met is inherently difficult, and it might confer bargaining advantages on stronger states leading to unintended and undesirable consequences.

### B. Execution

#### 1. *Must the Act Be Exercised Multilaterally or Is Unilateral Action Permitted?*

Normative and operating system rules condition not only the authorization of certain behaviors, but might also dictate the execution of those behaviors. Assuming that Bush Doctrine actions are justified and properly authorized, the next step is to consider what limits might be placed on the actual use of preventive military actions. Operationally, one key consideration is which actors can exercise the rights granted under a new rule of law. Although this is a legal specification, there is also a practical effect of whether the rule privileges certain actors' abilities to exercise those rights over others. In theory, the Bush Doctrine applies to all states. Nevertheless, consideration must be given to whether the right to launch preventive action is limited to unilateral state actions or whether collective action in response to a common threat or to aid a state that is particularly threatened is allowed (or even required).

Rules for traditional self-defense embedded in the U.N. Charter allow individual states to both take defensive actions independently of their allies as well as take actions assisted by collectives of allies.<sup>70</sup> Incorporating the Bush Doctrine within the extant operating system would provide for greater continuity in the legal system. Yet, the question arises whether some modifications should be made to these arrangements. The first is whether the right might be restricted to unilateral actions by states, with the exclusion that other states may not participate in the action unless, of course, they too are directly threatened by potential aggression from target actors.

By restricting the Bush Doctrine to unilateral actions, the frequency of its use would be limited to instances in which powerful states have the need and will to act. *De facto*, most states lack the necessary intelligence to detect long-term

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<sup>70</sup> U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-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.").

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threats accurately and lack the capacity to project military power across significant geographic distances.<sup>71</sup> This is not to argue that many states cannot take action at or near their national borders, but rather that regional and global powers (e.g., U.S., France) are better able to take advantage of a rule. This has the benefit of reducing overall violence in the international system – a worthy goal – but as referenced earlier, introduces a problem of legitimacy. It is unlikely that multilateral treaty negotiations would produce a rule from which only a limited numbers of states could benefit, and allowing only unilateral action would be perceived both as institutionalizing hegemonic influence in global affairs and as incompatible with the principle of the sovereign equality of states.<sup>72</sup>

Expanding the Bush Doctrine to permit collective action in response to either a common threat or aid to a threatened state necessarily broadens the range of instances in which the Bush Doctrine might be invoked. As a result, weaker states might now call upon allies to assist it in meeting prospective external threats, just as they may call upon allies when responding to actual attacks. Permitting collective action might also enhance the likelihood of successful execution of preventive military action as threatened states can call upon the resources and expertise of others.<sup>73</sup> Operating system rules should always facilitate the implementation of norms, not undermine their success. Otherwise, the values favored by the international community will not be maximized.

On the other end of the continuum, if it makes good legal and practical sense to permit collective response for the Bush Doctrine, should individual preventive military action be banned and collective action be a requirement? This could effectively modify any authorization rule on the Bush Doctrine such that even if individual states could determine when preventive action is justified, they would still need to persuade others about the validity and utility of that judgment. This could confer additional legitimacy on the action. The world witnessed this requirement's haphazard use in the 2003 U.S. invasion of Iraq. It was no accident that the U.S. wanted to engage the largest possible coalition of partners.<sup>74</sup> Even though many of the coalition partners were minimally involved, the time and effort needed to persuade forty heads of state to lay their reputations on the line and support the U.S. decision to invade was a significant accomplishment.

As a practical matter, requiring that any state wishing to invoke the Bush Doctrine also garner the support of some minimum number of states may serve as a possible solution to the privacy concerns evoked by negotiations and the strategic evasion possible with the ICTA; coalition building would apply to any and all states. At the same time, it would allow a threatened state considering the Bush Doctrine to secretly discuss its concerns with potential coalition partners – al-

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<sup>71</sup> See generally DOUGLAS LEMKE, *REGIONS OF WAR AND PEACE* 67-80 (2002).

<sup>72</sup> Richard Steinberg, *Who is Sovereign*, 40 *STAN. J INT'L L.* 329, 340 (2004).

<sup>73</sup> See DIEHL & KULKARNI, *supra* note 4 (Multilateral actions are not necessarily more likely to be successful. An empirical analysis of this point with specific regards to its relevance to the Bush Doctrine suggest that fewer multilateral actions end in stalemate, but the increased chances of victory are offset by increased chances of losses).

<sup>74</sup> JAMES BAKER & LEE HAMILTON, *IRAQ WAR STUDY GROUP REPORT: THE WAY FORWARD – A NEW APPROACH* 310 (2006).

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ready a part of current diplomatic practice. The additional imposition of commitment gathering could act as a screening agent for unreasonable strikes as opposed to strikes that a reasonably large segment of the international community might support.

Nevertheless, requiring collective action does not necessarily solve the problem of privileging powerful states, as these states are still the ones that will necessarily be the part of many coalitions that form in order to carry out military attacks. Major power states are also the centerpieces of existing alliances, such as NATO, that are most likely the agents to carry out collective military actions under the Bush Doctrine.<sup>75</sup> Many small states do not have ready access to such groupings. In addition, many threats will be highly specific to certain countries, and other states might be unwilling to take action or endorse it because the future attack does not affect their national interests, leaving individual states bound under a coalition requirement without any options even if the threat is real and the prospective damage great.

Given the above discussion, it seems most desirable to have execution rules for the Bush Doctrine mirror those already in place for traditional self-defense, namely allowing both individual *and* collective military action. Restricting the practice to only individual states or only to coalitions undesirably favors the most powerful states in the international system and creates other problems, while yielding minimal advantages over current operating system arrangements.

### 2. *How Do the Laws of War Constrain Doctrine Actions?*

When certain actions are sanctioned, rarely (if ever) does this include an unlimited exercise of rights as limitations on the extent of action or other constraints are often already written into the rules. For example, the Law of the Sea treaty limits the right of “hot pursuit” according to the location of where the chase began and where it might end as well as how the chase is conducted.<sup>76</sup> Thus, another consideration is how the normative precepts of the Bush Doctrine map with other normative restrictions on the conduct of war and the use of military force generally. There are a variety of international rules on the conduct of war, generally labeled under *jus in bello* or international humanitarian law.<sup>77</sup> Does the Bush Doctrine fit well within those rules or must modifications be made?

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<sup>75</sup> NATO carried out actions in Libya and Kosovo. Even as weaker states took the lead on specific military operations, the major powers within NATO offered the operational support necessary for successful completion of particular military actions and a sustained presence in the region.

<sup>76</sup> United Nations Convention on the Law of the Sea, § VII, art. 111, Dec. 10, 1982, 1833 U.N.T.S. 3 (“The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.”); *see also* G. Bruce Knecht, *Hooked: Pirates, Poaching, and the Perfect Fish* 1-4 (2006).

<sup>77</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-52 (2d ed. 2010) (explaining and listing applicable rules).



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For the most part, the Bush Doctrine can accommodate existing rules on the conduct of war. International rules on the treatment of the wounded, sick, and prisoners of war<sup>78</sup> seem no less applicable to preventive military action than when military force is employed in other contexts. Similarly, the protection of civilians from harm has no unique meaning in the context of Bush Doctrine actions. Preventive action will presumably be designed to degrade or destroy military capabilities and civilian targets will not be part of that equation. We recognize that terrorist bases, weapons stockpiles, or nuclear plants might be located near or in civilian populated areas, but these are already concerns for conventional uses of military force and the Bush Doctrine presents no special case.<sup>79</sup> Finally, limitations on the kind of weapons (e.g., chemical weapons) work well when preventive military action is envisioned so there is no need to loosen or modify such restrictions.

The one possible exception to the compatibility of the laws of war and the Bush Doctrine is with respect to proportionality. Conventional rules on proportionality dictate that a state's response or action be roughly equal in terms of severity to that of the original offense.<sup>80</sup> In the context of an armed attack, a state can only use military means to the extent necessary to defend itself. With respect to the old customary law of retaliation, the aggrieved party must only respond with military force roughly equivalent to what was done to it, reflecting the biblical standard of "an eye for an eye."<sup>81</sup> It has been suggested that the Bush Doctrine be similarly constrained.<sup>82</sup> Nevertheless, the concept of proportionality is strained when applied to a future attack rather than an actual attack.

It is not clear how one would calculate proportionality given that no attack has occurred and any estimate of what damage an attack might precipitate could be highly speculative.<sup>83</sup> States would be tempted to adopt a risk-adverse posture, and therefore use what might be considered excess force in retrospect in order to insure that any threat is eliminated. However, if the Bush Doctrine is confined to

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<sup>78</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; Convention [No. 1] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention [No. 2] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention [No. 3] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention [No. 4] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>79</sup> *Human Rights in Palestine and Other Occupied Arab Territories*, HUMAN RIGHTS COUNCIL OF THE U.N. (April 7, 2011), [http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf) (Goldstone report issued by the United Nations Human Rights Council found that in order to disincentivize strikes by Israel, members of Hamas would intentionally stockpile weapons in schools, hospitals and other areas of heavy population).

<sup>80</sup> JUDITH GARDHAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE 8-28, 59 (2004).

<sup>81</sup> See Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L., 49-81 (1990).

<sup>82</sup> Delahunty & Yoo, *supra* note 3, at 861-62.

<sup>83</sup> MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE "GLOBAL WAR ON TERROR" 39 (2007).

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situations involving weapons of mass destruction and other catastrophic risks, the proportionality requirement for use of force is more easily determined and satisfied. Any military action to destroy weapons of mass destruction would presumably have fewer negative consequences (e.g., less destruction, fewer lives lost) than an attack using those weapons. Thus, preventive strikes would not produce a disproportionate action, but indeed lead to more limited uses of military force than would otherwise be the case.

Overall, the Bush Doctrine does not appear to necessitate new normative rules for the conduct of military action, and with the possible exception of proportionality standards, is easily accommodated within the existing framework of international law.

### C. Enforcement – What Mechanisms Exist for Ensuring Compliance/ Enforcement and to Punish Violations?

Provisions designed to enhance compliance with the rules, monitor the practice of those rules, and provide mechanisms for redressing violations of those rules must accompany all legal rules. Do existing operating system mechanisms, such as the U. N. Security Council and various international courts, suitably play these roles with respect to the Bush Doctrine? If not, what new operating system structures might be necessary?

Although there are benefits to adherence to international law for its own sake, this is not always a sufficient incentive for states.<sup>84</sup> In the cases in which states might not adhere to laws without added incentives, compliance mechanisms are necessary. In the case of the Bush Doctrine, there would be incentives to use military force to achieve policy goals, and a new rule could provide political and legal cover for such unintended consequences. There are two potential hurdles to enforcing any rule successfully: detecting violations (monitoring) and then punishing them.<sup>85</sup> Various types of compliance mechanisms exist. Various sanctions commonly used in international politics give states that have been victims of non-compliance the option of retorsion (or the adoption of an “unfriendly and harmful act” that is still legal but is in retaliation against injurious acts of other parties).<sup>86</sup> In addition, legal rules could require violators to pay punitive damages. In the absence of any direct action, there is always the loss of reputation faced by states that violate law. However, each potential mechanism to enforce proper use of the Bush Doctrine has its own set of challenges.

Should the Bush Doctrine become law, the primary source of abuse would be in states engaging in wars for reasons other than self-defense. Depending on the authorization standards created, going to war before it was cleared by the relevant international body would also be a type of non-compliance. Although states

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<sup>84</sup> See generally A. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002).

<sup>85</sup> See Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L. STUD. Q. 109, 122 (1998) (discussing information supply); see also Xinyuan Dai, *Information Systems in Treaty Regimes*, 54 WORLD POL. 405, 412 (2002) (discussing noncompliance).

<sup>86</sup> SHAW, *supra* note 22, at 1101.

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have obligations not to threaten others,<sup>87</sup> the Bush Doctrine itself is the solution to providing punishment to those states. Additionally, the Bush Doctrine does not create a legal obligation to intervene, and therefore states cannot be held responsible for failing to act. Thus, the only way a state could violate the Bush Doctrine would be to engage in a conflict that did not meet the standards for anticipatory self-defense.<sup>88</sup>

Monitoring military action itself is unlikely to be a major problem in enforcing the Bush Doctrine. Military action tends to be highly transparent, and in most cases, the source of the action is not difficult to identify. Nevertheless, should states engage in more clandestine actions, such as the alleged cyber-attacks on Iran's nuclear facilities by the U.S. and Israel,<sup>89</sup> monitoring might become a greater problem. Additionally, consideration must be given to the fact that if the punishment for violating the Bush Doctrine were to increase, states would then possess greater incentives to engage in even more clandestine actions (e.g. cyber hacking, special operations raids) than they currently do. Increasing the punishment of violating the Bush Doctrine will likely increase the propensity of states to violate it as well. In an environment of increased punishment for Bush Doctrine violations, the attractiveness of victims claiming violations would also increase. Of course, this line of thought presumes that suitable mechanisms exist for managing disputes over Bush Doctrine actions and rendering appropriate decisions on their legality.

International courts would be the logical forums for determining the legality of purported Bush Doctrine actions. In many ways, courts assessing violations would make many of the same judgments as the ICTA, but in a *post hoc* fashion. The tallest hurdle for international court action is state consent. The court most likely to hear such cases, the International Court of Justice (ICJ) lacks jurisdiction in many cases because of limits imposed by state consent. Few states (approximately 66 out of 191) have agreed to accept the optional clause authorizing the ICJ to hear cases automatically without reservations.<sup>90</sup> As a result of requiring state consent for a majority of states, the number of cases that the ICJ could hear would be limited. In general, any state expecting a decision rendered against their interest would likely refuse to submit the case to ICJ jurisdiction or accept jurisdiction if action was brought against it. Although states could voluntarily submit their cases to the ICJ, it is exceedingly unlikely that states would submit matters involving national security to the ICJ or any other international court. This unwillingness is further evidenced by the U.S.'s withdrawal from the

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<sup>87</sup> U.N. Charter art. 2, para. 4.

<sup>88</sup> In a previous section on authorization, the potential means by which non-compliance would be determined have already been discussed, but the key aspect of this section is the punishment that would be given to these violators.

<sup>89</sup> No government has officially acknowledged responsibility for the cyberworm Stuxnet, a worm specifically designed to target Iran's nuclear facilities. See Ed Barnes, *Mystery Surrounds Cyber Missile That Crippled Iran's Nuclear Weapons Ambitions*, Fox News, April 11, 2011, <http://www.foxnews.com/scitech/2010/11/26/secret-agent-crippled-irans-nuclear-ambitions/> (explaining the cyberworm).

<sup>90</sup> *Jurisdiction: Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L COURT OF JUSTICE (April 7, 2011), <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

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optional clause following the ICJ's 1984 ruling in *The Republic of Nicaragua v. The United States of America*.<sup>91</sup> Given that the U.S. is the originator of the Bush Doctrine, it is likely that the U.S. would be a state that would commonly want to invoke it. Many other major powers that might invoke the Bush Doctrine, such as China, France and Russia, similarly have not accepted the ICJ's optional clause without reservation. Many potential rogue states, ones that, according to Delahunty and Yoo are the likely targets of the Bush Doctrine, have also not accepted the optional clause.<sup>92</sup> As has been demonstrated by the *Case of Certain Norwegian Loans*,<sup>93</sup> the reciprocity clause in state acceptance of ICJ jurisdiction allows accused states to use the reservations of other states.

Even as the ICJ is the primary court dealing with states, the International Criminal Court (ICC) also represents a potential venue for punishing individuals who commit international crimes in the course of Bush Doctrine actions. Yet, the ICC is unlikely to be a frequent venue for dealing with violations of the Bush Doctrine. First, its jurisdiction is limited to a narrow set of war crimes,<sup>94</sup> most of which are not frequent occurrences in interstate conflict. Most ICC investigations thus far have focused on civil wars, not military strikes across state borders. Of course, there is potential for this to change if the ICC adds aggression to its list of crimes as has been proposed.<sup>95</sup> Second, and beyond jurisdictional limitations imposed by its statute,<sup>96</sup> the ICC suffers consent problems similar to those of the ICJ. In contrast to the ICJ, the ICC lacks an optional clause and does not offer reservations to the acceptance of the ICC and has yet to win universal acceptance. Despite 114 states having joined the body,<sup>97</sup> most major powers, including the U.S., China and Russia, have not acceded to the ICC nor have the

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<sup>91</sup> Case concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 160 (June 27).

<sup>92</sup> Delahunty & Yoo, *supra* note 3, at 862-63.

<sup>93</sup> Case of Certain Norwegian Loans (France v. Norway), 1957 I.C.J. 57, 16 (July 6).

<sup>94</sup> Crimes covered by the international court include genocide, war crimes, crimes against humanity and crimes against United Nations and associated personnel. Adding the crime of aggression has been considerably controversial and strongly opposed by the United States and Russia, among other great powers (many of which have showed their opposition despite not being members of the ICC).

<sup>95</sup> See Anja Seibert-Forch, *The Crime of Aggression: Adding a Definition to the Rome Statute of the ICC*, 12 ASIL INSIGHTS 24, para. 3-5 (2008), available at <http://www.asil.org/insights081118.cfm> (for more on the debate over the issue of adding aggression to the list of crimes covered by the ICC); since the publication of the article, there has been some progress, but it is still unlikely to see any prosecution for the crime of aggression until 2017 at the earliest, and even then, there are likely to be considerable limitations; see also Karen Allen, *The International Criminal Court Needs More Than Time*, BBC NEWS, June 4, 2010, <http://www.bbc.co.uk/news/10241421>, for a more recent, but non-scholarly source.

<sup>96</sup> The ICC has complementary jurisdiction over cases, meaning that the ICC will not act in cases where a municipal or other court is already trying the case. Additionally, the ICC can only prosecute cases committed by a national of a state that has accepted the court's jurisdiction, cases that were committed on the territory of a member, or a case that has been referred to the ICC by the Security Council. Additionally, while not particularly problematic for the prosecution of crimes into the future, the ICC cannot prosecute crimes that occurred before July 1, 2002.

<sup>97</sup> As of September 22, 2011, there were 139 signatories and 118 members. Full list of members is available at *Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION (Sept. 10, 2011, 7:02:55 EST PM), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en); Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

majority of Middle Eastern states (Jordan being the only exception). Finally, there are issues of institutional capacity that limit the ICC's ability to be effective. Given the size of the ICC prosecutor's office,<sup>98</sup> the ICC can only afford to go after the most egregious violators of international law.

If there is some determination that a violation has occurred, the final phase of enforcement is punishing the violator. The absence of a punishment phase could render much of the previous enforcement elements useless as states could exceed Bush Doctrine limitations with impunity. Three potential considerations must be taken into account when considering potential mechanisms for punishment. First, how feasible is it that a punishment could be delivered successfully? Second, if a punishment could be issued, would issuing that punishment do more good than harm? Finally, could the punishment serve as an effective deterrent to other violations? Four types of compliance mechanisms in particular are discussed below: sanctions, reprisals, punitive damages, and reputational costs.

Economic sanctions are a common form of punishment in the international system and could potentially be imposed on states that violate Bush Doctrine conditions.<sup>99</sup> States that fail to gain clearance before taking action under the Bush Doctrine could be sanctioned, and states that go to war without following Bush Doctrine criteria might be similarly punished. A key problem with sanctions, however, is securing the approval of other states to comply with them. At the very least, it seems unlikely that a violator's allies would agree to sanction the state.<sup>100</sup> Other states with important trade ties will also be reluctant to engage in sanctions,<sup>101</sup> and such trade ties are particularly likely among the types of major powers that are most likely to abuse the Bush Doctrine. As a result, sanctions have generally not been effective as a means of coercion, especially when used to dissuade states in security matters.

Additionally, the issue of whether sanctions would achieve their entire goal could also damage the willingness of states to support using sanctions. For ex-

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<sup>98</sup> As of January 2009, the entire staff at the ICC is 587, not all of who work in the Prosecutor's Office. *Frequently Asked Questions: How Many People Work for the ICC?*, INT'L CRIM. COURT (Oct. 19, 2011, 4:25:34 EST PM), [http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID=%7bD788E44D-E29246A1-89CC-D03637A52766%7d&NRORIGINALURL+Menus/ICC/About+the+Court/Frequently+asked+Questions/&NRCACHEHINT=Guest#id\\_12](http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID=%7bD788E44D-E29246A1-89CC-D03637A52766%7d&NRORIGINALURL+Menus/ICC/About+the+Court/Frequently+asked+Questions/&NRCACHEHINT=Guest#id_12).

<sup>99</sup> See Jon Hovi, Robert Huseby & Detlef F. Sprinz, *When Do (Imposed) Economic Sanctions Work?*, 57 WORLD POL. 479, 499 (2005) (on the use of sanctions and their effectiveness); see also Adrian U-Jin Ang & Dursun Peksen, *When Do Economic Sanctions Work? Asymmetric Perceptions, Issue Salience, and Outcomes*, 60 POL. RES. Q. 135, 143 (2007); see also INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM (Peter Wallensteen & Carina Staibano eds., 2005).

<sup>100</sup> See Dan G. Cox & A. Cooper Drury, *Democratic Sanctions: Connecting the Democratic Peace and Economic Sanctions*, 43 J. OF PEACE RES. 709, 719 (2006) (analyzing data from 1978 to 2000, finding that states tend not to sanction allies, though the United States is an exception to this rule); see also Bryan R. Early, *Sleeping with Your Friends' Enemies: An Explanation of Sanctions-Busting Trade*, 53 INT'L STUD. Q. 49, 67-68 (2009) (analysis of 77 instances of sanctions from 1950 to 1990 also finds that allies will undermine the sanctions placed by their partners).

<sup>101</sup> David Lektzian & Mark Souva, *An Institutional Theory of Sanctions Onset and Success*, 51 J. OF CONFLICT RESOL. 848, 854-56 (2007). Nevertheless, trade is only likely to discourage sanctions when both states are equally dependent on it, as is the case with many of the trade relations among the great powers.

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ample, consider that the Iraq War started in 2003. After the initial attack on Iraq by the U.S., the U.S. engaged in a lengthy process to build a democratic regime within the country. Placing sanctions on the U.S. would have hurt its ability to engage in regime building, thereby hurting the victim of the violation as much or more than the perpetrator. Additionally, many opponents of the Iraq War, once the war had begun, preferred that democracy building efforts were successful. Notably, many states that did not support the initial war such as the Netherlands and Denmark were later willing to support reconstruction efforts in Iraq.<sup>102</sup> Research on the subject of sanctions generally shows that they are of limited effectiveness. Even one of the more optimistic empirical analyses on the effectiveness of sanctions examined all the sanctions cases between 1914 and 1990 and found that they generally had to be used in accompaniment with other tools of statecraft in order to be successful.<sup>103</sup> Nevertheless, Robert Pape examined 40 of the 115 cases of sanctions that were deemed successful and argued that only five of these cases were unqualified successes.<sup>104</sup> Other research has qualified the effectiveness of sanctions based on regime type, suggesting only democracies would be responsive to sanctions.<sup>105</sup> Finally, it has been suggested that if sanctions are going to be effective it will only be as threats because any actualization of sanctions means that their “threat” has already failed.<sup>106</sup>

Retorsion represents another potential means of sanction for violations. Retorsion is a proportionate military action taken by a state in response to an illegal military action.<sup>107</sup> This is similar to remedies offered by the World Trade Organization in which states that are victims of trade treaty violations are authorized to take punitive action against violating states in proportion to the original offense.<sup>108</sup> The likelihood that retorsion could be undertaken is stronger than sanctions because a reprisal only requires action from the victim of a violation, not the international community at large. Nevertheless, a retorsion by a weaker state may not be possible if it is not allowed to draw upon the resources of allies. Indeed, the preventive military action might have destroyed a capacity to respond. In addition, allowing retorsion seems to make little sense if terrorist groups were the targets of Bush Doctrine actions. One would not want to permit such groups to carry out retorsion, and the state on whose territory the preventive action occurred might be unwilling or unable (in the case of a failed state) to launch a retaliatory strike. In any case, retorsion runs counter to the international community’s preference for minimizing the use of military force.

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<sup>102</sup> Some states also helped the United States indirectly by helping in Afghanistan. States such as Canada and France opposed the Iraq war but continued to support US efforts in Afghanistan, allowing the United States greater flexibility.

<sup>103</sup> GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOT, *ECONOMIC SANCTIONS RECONSIDERED* 91-93 (2nd ed. rev. 1990).

<sup>104</sup> Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT’L SEC. 90, 105 (1997).

<sup>105</sup> Lektzian & Souva, *supra* at note 101, at 849.

<sup>106</sup> Dean Lacy & Emerson M.S. Niou, *A Theory of Economic Sanctions and Issue Linkage: The Roles of Preferences, Information and Threats*, 66 J. OF POL. 25, 38 (2004).

<sup>107</sup> SHAW, *supra* note 22, at 1128.

<sup>108</sup> World Trade Org., *supra* note 28, para. 3-4.

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Punitive damages are equally hard to apply and could be difficult to enforce. Given that the state engaging in the violation is likely to consider its actions justified, further compliance mechanisms would need to be put in place to insure the state actually paid the damages. Punitive damages are unlikely to deter a state on an issue that the state perceives to be one of key national security. According to economists Joe Stiglitz and Linda Bilmes, the Iraq War would cost the U.S. three trillion dollars.<sup>109</sup> If punitive damages were commensurate to the U.S.'s initial action (excluding any damages that occurred after the U.S. were invited by the new Iraqi government), it is unlikely that amount would be nearly as significant as what the U.S. was willing to spend on the war. In such cases, it is difficult to see how punitive damages would effectively dissuade a state, even if they could be assessed successfully.

Finally, there are reputational costs suffered by states that violate international law. Reputational costs are the losses that a state suffers in its global reputation as a result of violating international law.<sup>110</sup> Reputational costs are not difficult to enforce, as they occur immediately once a state violates international law. There are no costs to international peace by a state losing reputation. Under previous rules regarding the use of force, however, the reputational losses have not been a sufficient deterrent to prevent states from engaging in illegal acts of aggression,<sup>111</sup> so it is unlikely that reputational losses would be a sufficient deterrent under a Bush Doctrine.

### V. Conclusion

The Bush Doctrine is a much-debated proposal to give legal standing for states to use military force in a preventive fashion against future threats. Heretofore, most of the discussion has been over its effectiveness, morality, and other concerns. Yet, the Bush Doctrine at this stage is little more than a series of general precepts and political statements. To become part of the international legal system, there needs to be much greater specification of the Doctrine, including what we have termed operating and normative system rules. The former deals with the

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<sup>109</sup> See JOSEPH E. STIGLITZ & LINDA J. BLIMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT* 24-31 (2008) for a description of the costs of the Iraq war. As of 2007, the Congressional Budget Office (CBO) listed lower estimates of the costs of the Iraq war as \$604 billion and projected that depending on different scenarios, it would cost an additional 570 to 1,055 billion dollars. See *Estimated Costs of U.S. Operations in Iraq and Afghanistan and of Other Activities Related to the War on Terrorism: Statement before the Comm. on the Budget, U.S. House of Representatives*, 110th Cong. (2007) (statement of Peter Orszag, Director, Office of Mgmt. and Budget), available at <http://usgovinfo.about.com/gi/dynamic/offsite.htm?site=http://www.cbo.gov/>.

<sup>110</sup> See Mark J.C. Crescenzi, *Reputation and Interstate Conflict*, 51 AM. J. OF POL. SCI. 382, 394 (2007) (on how damaged reputations can lead to more conflict for the states who have suffered them); see MICHAEL TOMZ, *REPUTATION AND INT'L COOPERATION* 239-41 (2007) (reputation also applies to other areas of international relations, such as international finance).

<sup>111</sup> Vietnam's invasion of Cambodia in 1979 is an example of a case where a state willingly sacrificed reputation for an issue of national security. Vietnam invaded Cambodia and as a result ended the genocidal reign of Pol Pot. However, knowing that ending the conflict under said justification would be legally insufficient, Vietnam did not offer that argument in their defense and was sanctioned by the United Nations. See Martha Finnemore, *Constructing Norms of Humanitarian Intervention in THE CULTURE OF NATIONAL SECURITY* 179-80 (Peter J. Katzenstein, ed., 1996).

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application and management of international law whereas the latter provide details on the acceptable behaviors. This article examined the various legal choices available with respect to the authorization, execution, and enforcement of preventive military action under the Bush Doctrine.

Various aspects of the Bush Doctrine fit easily within extant international legal system rules, but in several cases, there are various tradeoffs present in defining Bush Doctrine rules, always resulting in various costs no matter what options are selected. The fewest costs would seem to accrue if Bush Doctrine actions were limited to threats involving mass or extensive destruction, including catastrophic risks. Yet, the problem of specifying how far in advance preventive military action should be permitted seems insoluble. Allowing attacks well in advance of prospective threats would encourage frequent mistakes and escalating conflict when other, peaceful means might have been pursued. Permitting actions when threats are imminent obviates the utility of a Bush Doctrine and might be handled under some standard applications of the international law of self-defense.

Making states exhaust peaceful means of conflict resolution before launching an attack (“last resort”) appears superior to alternatives that would promote more violence, but the problems of determining when other means are no longer viable and granting bargaining advantages to stronger states remains. Leaving decisions to launch Bush Doctrine actions to state authority will promote widespread and improper use, but avoid delays in execution that might undermine effectiveness. The reverse is encountered with giving authority to the U.N. Security Council – abuse is less likely, but at the cost of significant and potentially crippling delay. An international court specifically charged with assessing threats raises problems with secrecy and legitimacy that do not make it a viable alternative.

The execution of Bush Doctrine actions seems to be accommodated well by existing international legal rules. Permitting unilateral and collective actions provides maximum flexibility for threatened states and does not handicap smaller states from exercising new legal rights to use military force. Similarly, current international laws on armed conflict involving protection of civilians and use of certain weapons are not inherently compromised. Any problems in specifying a proportionality standard can be redressed by only allowing Bush Doctrine actions to respond to threats involving high levels of prospective destruction such as those from the use of weapons of mass destruction. More problematic are constructing rules for detecting Bush Doctrine violations and punishing those responsible. The records of the U.N. Security Council and international courts are not encouraging in this regard, but there does not seem to be superior alternatives that would overcome the political and other difficulties associated with those institutions.

The changing character of security threats (terrorism, weapons of mass destruction) raises important questions about the suitability of current international rules to address them. Incorporating the Bush Doctrine into international law has been suggested as one solution. Yet, our analysis reveals that its utility varies according to a series of rule choices about preventive military action, but in no case is the Bush Doctrine a panacea to solve all problems nor, even at its best, is the Bush Doctrine without significant problems in application.