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Guy B. Roberts

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THE COUNTERPROLIFERATION SELF-HELP PARADIGM: A LEGAL REGIME FOR ENFORCING THE NORM PROHIBITING THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

COLONEL GUY B. ROBERTS*

Neither the United States of American nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small. We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.

— John F. Kennedy, 1962¹

I. INTRODUCTION: THE PROBLEM OF PROLIFERATION AND THE LACK OF AN EFFECTIVE LEGAL REGIME

The proliferation of weapons of mass destruction (WMD),² as well

* Colonel Roberts is currently the senior legal advisor for the United States Southern Command in Miami, Florida. He is a graduate of Arizona State University (B.A. 1972) and he received his J.D. from the University of Denver in 1975. He also holds masters degrees in international and comparative law from Georgetown University (1985), in international relations from the University of Southern California (1983), and in strategic studies from the Naval War College (1995). He is admitted to practice in Colorado, California, Arizona, the Tenth Circuit, the Court of Appeals for the Armed Forces, and the U.S. Supreme Court.

The opinions expressed in this article are those of the author and do not necessarily represent the views of the U.S. Government or any of its agencies.

1. The Soviet Threat to the Americans, Address by President Kennedy, 47 DEP'T ST. BULL. 716 (1962).

2. There is no universal and consistent use of this term to designate these weapons. For purposes of this article the term "weapons of mass destruction" refers to nuclear, biological and chemical weapons and their means of delivery. It will be abbreviated as WMD. The implication is that these weapons have a common ability to inflict far greater casualties than a comparable sized conventional explosive. Nonetheless considerable dif-

as missile delivery systems, is one of the most significant and protracted threats to international security and global stability ever faced by mankind. In a world where regional tensions may unpredictably erupt into war and terroristic acts of violence have become commonplace, these weapons have devastating consequences for world order. We continue to witness a steady and deadly increase in those countries determined to acquire a WMD capability. While the reasons are complex, and beyond our scope here, the fact remains that despite the creation of international nonproliferation norms and legally binding treaty commitments, a minority of states continues to pursue these weapons. No nation can absorb the devastating consequences of these weapons of terror. Yet, although the international community has condemned the proliferation of these weapons, the mechanisms for stopping or rolling back proliferation have been ineffective and the current legal regime authorizing nations to use force in response to this threat is moribund.

The use of force, under the most commonly accepted view of the current legal regime, may only be justified as an act in self-defense. The criteria for self-defense include an actual attack or a threat of attack so imminent that the perceived victim has no reasonable choice but to attack. All other uses of force, absent specific UN Security Council approval, are illegal and therefore prohibited. However, given the strategic realities created by proliferators armed with such weapons should such responses be condemned as illegal in the absence of an "imminent" threat?

Regrettably, the prevailing patterns of statecraft and the fundamental change of circumstances in the past fifty years have created a radically different world from the one of the Cold War, so that the current legal constructs so optimistically and idealistically enshrined in the 1945 UN Charter are unworkable. A new paradigm is essential if we are to successfully meet the challenge of the WMD threat. The main reason for a new juridical paradigm is that the old juridical paradigm of restraint as codified in the UN Charter simply no longer works. It is no longer responsive to the threat facing nations. We already see evolving events undermining the older paradigm's claim to deal adequately with the problems within its domain. Consequently, new paradigms which expand the permissible nature and role of the use of force are credibly

ferences exist between these weapons with respect to their effects, the potential military impact of their use, the technical difficulties involved in acquiring them, and thus the degree of proliferation concern that they engender. I will also use the abbreviation NBC to refer to specific categories (nuclear, biological, chemical) of weapons and CBW to refer only to chemical and biological weapons. Where necessary I will discuss them separately in order to take into account the different issues (and the nature of the threat) that they raise. Also, the term "nuclear weapons" is meant to include radiological weapons (i.e. weapons that disperse radiological materials by whatever means) as well as the more familiar large energy yield nuclear fission/fusion weapons.

challenging the old order. A new legal regime or paradigm is necessary to reflect the new political environment in which national survival, regional security and world peace can, dictate the preventive or preemptive³ use of force to either deter acquisition plans, eliminate acquisition programs or destroy illicit WMD sites at any stage in the proliferator's acquisition efforts.

This new counterproliferation self-help paradigm is not business-as-usual power politics validated by a legal construct but rather a common sense recognition that the law is not a suicide pact and that it is a process, more than just rules, that reflect and at the same time controls state behavior. This new "counterproliferation self-help" paradigm is fully consistent with the purposes of the Charter,⁴ since illicit WMD programs threaten international peace and security. The current legal paradigm is not responsive. So, if the law is to have any relevance, a paradigm shift is both necessary and possible.

The term "paradigm" is appropriate since what is proposed is the embodiment of a distinct and coherent explanation of a new legal norm for the use of force that explains and validates the use of that force which should guide future practitioners in responding to the extraordinary threat posed by WMD proliferators.⁵ The term is used as a conception of a specific legal regime, in this case a new legal regime to justify and rationalize state (or states) responses to the new threat of WMD proliferation. New modes of thought, new orientations are needed if the law is to adopt a dynamic, progressive—and therefore relevant—perspective. The old paradigm reflected a seemingly endless debate over the limits and scope of the UN Charter's Article 2(4) use-of-force prohibition and the right of self-defense enshrined in Article 51. As it currently stands we either provide tortuous and not-very-convincing legal justifications for our actions or we end up hobbling ourselves with legalistic restrictions against carrying the war—and indeed that is exactly what it is—to those that intend to do us and our way of life severe

3. A distinction should be drawn between the "preventive strike" and the "preemptive strike." A preventive strike is taken to eliminate the potential capability of a known enemy. A pre-emptive strike is one undertaken, based on clear and convincing evidence in the hands of decision-makers, in anticipation of an immediate enemy aggression. See CARL VON CLAUSEWITZ, *ON WAR* 370 (Michael Howard & Peter Paret trans. 1976). Until the moment that WMD or its delivery system(s) is deployable and ready for use, any counter-measure must be considered preventive. Once the weapon is deployable, the focus shifts to the prospective moment of its use, and self-defense becomes a preemptive act.

4. That fundamental purpose is the maintenance of international peace and security. U.N. CHARTER art. 1, para 1.

5. Dr. Thomas Kuhn first coined the term "paradigm." THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). A paradigm denotes "one sort of element in [a constellation of beliefs], the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science." *Id.* at 175.

harm, either now or in the not-to-distant future.

To be relevant and useful international law must be adaptable. As one legal scholar counseled: "International law, like all living law, is in a process of continuous growth and adaptation to the new needs and circumstances."⁶ Responding to the weapons of mass destruction proliferation threat necessitates examining the current legal regime in which these potential responses will be made. The very nature of the threat itself—WMD in the hands of unstable, despotic states that make no secret of their hegemonic designs or desire to threaten regional peace and security—is sufficient to justify the use of force, collectively or unilaterally if necessary. In cases involving the most fundamental of issues—the survival of the nation, regional security, global peace and order—the law should not be silent. A new paradigm will provide the world community with legally and politically supportable justifications for responding to and helping to eventually eliminate this ever-growing threat to world peace and security.

After a brief review of the magnitude of the threat, the nonproliferation and US counterproliferation efforts will be discussed, and the current legal regime will be reviewed, to include the on-going debate on the limits of self-defense. The criteria for the new paradigm will be set forth and four case studies will be examined under these criteria to demonstrate their efficacy and supportability without doing damage to the norm requiring states to "refrain" from using force in international relations. In the face of the demonstrably horrible threat of WMD, new legal parameters need to be established that support and justify collective or unilateral actions in response to the threat.

Preemptive or preventive acts are and, it is submitted, always will be controversial. In the current historical moment of world politics the United States—the world's only superpower—with unparalleled military power leads an international system in which most of the other states participate as willing partners. If the United States fails to use its power in ways that others will accept as just and legal, a terrible backlash could result. The consequences could be weakened cooperation, the de-legitimization of US leadership, and current international nonproliferation regimes could collapse, resulting in the acceleration of weapons of mass destruction proliferation both horizontally and vertically. The new proposed paradigm recognizes that certain state actors refuse to adopt the accepted practice of civilized nations and that stated response policies, supported by a coherent legal regime, are the only way to ensure national security, regional stability, and eventually a world free of this scourge on mankind.

6. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 91 (1980).

II. THE WMD THREAT: AN EXTRAORDINARY CHALLENGE TO CIVILIZATION AND WORLD ORDER

As the new millennium approaches, we face the very real and increasing prospect that regional aggressors, third-rate armies, terrorist groups and even religious cults will seek to wield disproportionate power by acquiring and using these weapons that can produce mass casualties. These are neither far-fetched nor far-off threats.

— Secretary of Defense William S. Cohen⁷

Since the end of the Cold War, a number of states have emerged into the public consciousness whose behavior is in contravention of agreed norms of state behavior; that have either used or threatened to use force to coerce those that thwart their ambitions, and that seek to acquire arsenals of nuclear, biological, or chemical (NBC) weapons to achieve their aspirations. Former national security advisor Anthony Lake identified these state actors as “rogue” or “backlash” states.⁸ At least 25 countries already have or are in the process of developing nuclear, biological or chemical weapons and the means to deliver them.⁹ Of these, many have ties to terrorists, to religious zealots or organized crime groups who are also seeking to use these weapons.¹⁰

Why are these weapons so unique? This is a threat qualitatively different from conventional weapons because of its potential to do extreme damage, physical and psychological, with a single strike.¹¹ Due to their availability, relative affordability, and easy use, weapons of mass destruction allow conventionally weak states and non-state actors to counter and possibly thwart the overwhelming conventional superiority possessed by the United States and other Western nations.¹² Because of their potentially far greater lethality, any threats of use against the civilian populations of regional allies or of Western inter-

7. TRANSFORMING DEFENSE: NATIONAL SECURITY IN THE 21ST CENTURY, REPORT OF THE NATIONAL DEFENSE PANEL 42 (1997).

8. Anthony Lake, *Confronting Backlash States*, 73 FOREIGN AFF. 45 (1994). The term “rogue” or “pariah” states will be used here to characterize those states that are illicitly seeking these weapons of mass destruction in contravention of established international normative behavior or in violation of solemn legal agreements.

9. CENTRAL INTELLIGENCE AGENCY NONPROLIFERATION CENTER, THE WEAPONS OF MASS DESTRUCTION 1 (1995).

10. PROLIFERATION: THREAT AND RESPONSE, DEP'T OF DEF. REPORT 49-51 (1997).

11. Mark, *Consequences of Nuclear War*, in THE DANGERS OF NUCLEAR WAR: A PUGWASH SYMPOSIUM 7, 7-16 (F. Griffiths & J. Polanyi eds. 1979); OFFICE OF TECHNOLOGICAL ASSESSMENT, THE EFFECTS OF NUCLEAR WAR (1979).

12. See Eric Arnett & Thomas Wander, *The Proliferation of Advanced Weaponry: Technology, Motivation and Responses* (1992); Scott Sagan, *Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb*, INT'L SECURITY, Winter 1996/97, at 56.

vening powers will have a much greater impact than similar ones of a conventional variety.¹³

The threat of holding civilian populations hostage to WMD use has a unique ability to deter regional allies from supporting a Western military intervention, as well as to affect the calculus of Western governments regarding the wisdom of the intervention itself.¹⁴ In strictly military terms, Western forces will hold conventional superiority over their adversaries in most regional confrontations in which they become involved.¹⁵ Regional powers that anticipate potential confrontation with the West are likely to seek asymmetrical strategies able to exploit areas of Western vulnerability. In this context, as former Secretary of Defense William Perry noted: "Rogue regimes may try to use these devastating weapons as blackmail, or as a relatively inexpensive way to sidestep the U.S. military's overwhelming conventional military superiority."¹⁶

The threat is well known and understood by our world leaders. In January 1992, the UN Security Council, meeting for the first time at the levels of Heads of State and Government, issued a declaration stating that "[t]he proliferation of weapons of mass destruction constitutes a threat to international peace and security."¹⁷ In 1995, NATO responded to the growing proliferation threat by declaring:

We attach the utmost importance to preventing the proliferation of weapons of mass destruction (WMD), and, where this has occurred, to reversing it through diplomatic means. . . As a defensive alliance, NATO is addressing the range of capabilities needed to discourage WMD proliferation and use. It must also be prepared, if necessary, to counter this risk and thereby protect NATO's populations, territory, and forces.¹⁸

President Clinton has declared weapons of mass destruction one of the "most significant threats that all of our people will face in the next whole generation. . . ." ¹⁹ In 1994, President Clinton, by Executive Order, declared that the proliferation of weapons of mass destruction "constitutes an unusual and extraordinary threat to the national security,

13. See OFFICE OF TECHNOLOGY ASSESSMENT, *PROLIFERATION OF WEAPONS OF MASS DESTRUCTION: ASSESSING THE RISK* (1993).

14. Sagan, *supra* note 12, at 57-74; John Supko, *The Changing Proliferation Threat*, FOR. POLICY, Winter 1996-97, at 5-6.

15. NATIONAL MILITARY STRATEGY, DEP'T OF DEFENSE 9 (1997).

16. PROLIFERATION: THREAT AND RESPONSE, DEP'T OF DEF. REPORT iii (1996).

17. *Maintenance of International Security and Strengthening of the International Security System*, 46 U.N. Y.B. 33 (1993).

18. *Final Communiqué*, Communiqué M-DPC/NPG-1 (95) 57, NATO Press Service, June 8, 1995.

19. THE PROLIFERATION PRIMER, A MAJORITY REPORT OF THE SUBCOMMITTEE ON INTERNATIONAL SECURITY, PROLIFERATION, AND FEDERAL SERVICES (1998).

foreign policy, and economy of the United States," and declared a national emergency to deal with that threat.²⁰ Secretary of State Albright called the proliferation of these weapons "the most overriding security interest of our time."²¹ The 1997 Department of Defense annual report on proliferation describes in graphic detail this wide-ranging and growing threat—a threat that was to have diminished with the establishment of comprehensive treaties banning such weapons.²² Unfortunately, as Secretary of Defense William Cohen describes:

As the new millennium approaches, the United States faces a heightened prospect that regional aggressors, third-rate armies, terrorist cells, and even religious cults will wield disproportionate power by using—or even threatening to use—nuclear, biological, or chemical weapons against our troops in the field and our people at home.²³

Notwithstanding extraordinary efforts by the United States and others to create incentives to not acquire these weapons, the trend toward further proliferation has accelerated, with a few notable exceptions.²⁴ Dictators both impress and intimidate their populations by acquiring WMD. In several regions, for example the Persian Gulf and Northeast Asia, there appear to be few, if any, limits on the ambitions of unstable actors to acquire the most advanced and deadly weapons available, either through internal or external sources.²⁵ Increasingly, the currency of power for these countries is a WMD capability.

Consequently, an increasing number of countries have or are seeking the capability to produce and deliver nuclear weapons, heightening security concerns and increasing tensions world-wide.²⁶ China, the

20. Exec. Order No. 12,938, 30 WKLY COMP. PRES. DOC. 2386 (Nov. 14, 1994). On November 12, 1997, he continued the declaration of national emergency by finding that the proliferation of these weapons continues "to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. . . ." 32 WKLY COMP. PRES. DOC. 2384 (Nov. 12, 1997).

21. William Drozdiak, *U.S. Pushes NATO on Arms Proliferation*, WASH. POST, Dec. 17, 1997, at A1.

22. OFFICE OF THE SECRETARY OF DEFENSE, *PROLIFERATION: THREAT AND RESPONSE* (1997).

23. *Id.* at iii.

24. Argentina and Brazil have resolved their security concerns and abandoned their nuclear programs with Brazil ratifying the Nuclear Nonproliferation Treaty (NPT) in 1998. John Rodick, et. al, *Nuclear Rapprochement: Argentina, Brazil, and the Nonproliferation Regime*, WASH. Q., Winter 1995, at 107. South Africa agreed to dismantle its nuclear weapons program (to include the six nuclear weapons it has assembled) and joined the NPT as a non-nuclear weapons state. Roger Molander & Peter Wilson, *On Dealing with the Prospect of Nuclear Chaos*, WASH. Q., Summer 1994, at 19, 30.

25. Attempts by rogue states such as North Korea, Iraq and Iran to acquire WMD is well known and voluminously documented. See e.g. OFFICE OF TECHNOLOGY ASSESSMENT REPORT, *supra*, note 13; *PROLIFERATION: THREAT AND RESPONSE*, DEP'T OF DEF. (1997).

26. See DEFENSE NUCLEAR AGENCY REPORT, *GLOBAL PROLIFERATION: DYNAMICS*,

world's most proliferant proliferator of WMD materials and technologies,²⁷ now has intercontinental ballistic missiles targeting the United States and others with nuclear annihilation.²⁸ India and Pakistan have now officially joined the nuclear club with the underground testing of nuclear weapons.²⁹ Pakistan's nuclear weapons program is particularly worrisome. With the detonation of the "Islamic Bomb" the danger of transferring weapons and technology to other states and potentially terrorist groups has dramatically increased. As one Pakistan leader was quoted: "We are going to sell our nuclear technology. . . . It will be up for grabs to the highest bidder."³⁰ The Iranian Foreign Minister, in congratulating Pakistan on its successful nuclear detonation, reportedly said that "all over the world, Muslims are happy that Pakistan has this capability," claiming it would help counter Israel's presumed nuclear weapons program.³¹ The lack of effective civilian control over its nuclear capability and the increasing political turmoil brought on by a shaky economy, turmoil in Afghanistan and extremist Islamic groups further exacerbates the situation.³²

Nuclear weapons have the greatest potential for catastrophic devastation, the disruption of world peace, and the destruction of nonproliferation norms. Small (weighing a few kilograms) nuclear devices smuggled into population centers could produce thousands of casualties.³³ Those we most worry about as potential if not actual threats con-

ACQUISITION STRATEGIES AND RESPONSES (1994), ERIC STANTON MILLER, THIRD WORLD NUCLEAR WEAPONS CAPABILITIES AND NOTIONAL ACQUISITION PATHS, CENTER FOR NAVAL ANALYSES (CRM 93-220, Mar. 1994).

27. See THE PROLIFERATION PRIMER, *supra* note 19.

28. Bill Gertz, *China Targets Nukes at U.S.*, WASH. TIMES, May 1, 1998, at A1 (quoting a CIA report on China's strategic missile and nuclear capability); Bill Gertz, *China's Nukes Could Reach Most of U.S.*, WASH. TIMES, Apr. 1, 1998, at A1 (citing concerns expressed by commander, U.S. Strategic Command, over China's growing capability).

29. John F. Burns, *India Sets 3 Nuclear Blasts, Defying a Worldwide Ban; Tests Bring Sharp Outcry*, N.Y. TIMES, May 12, 1998, at A1; John F. Burns, *India Detonates a Hydrogen Bomb, Experts Confirm*, N.Y. TIMES, May 18, 1998, at A1; Steven Komarow, *Test Indicate Devices Big and Small, India's Arsenal Seen as Equal to U.S. in '60's*, USA TODAY, May 14, 1998, at A10; Molly Moore & Kamran Kahn, *Pakistani A-Tests Seen as 'Triumph for Islam'*, WASH. POST, June 15, 1998, at A19 [hereinafter Moore & Kahn]. Interestingly, prior to Pakistan's nuclear detonation, a former prime minister of Pakistan called on the world community to launch a preemptive strike since "rogue nations that defy world opinion ought to be taught a lesson." Benazir Bhutto, *Punishment: Make it Swift, Severe*, L.A. TIMES, May 17, 1998, at M5.

30. Moore & Khan, *supra* note 29.

31. John Ward Anderson, *Pakistan Claims It Has New Missile*, WASH. POST, June 2, 1998, at A7.

32. Christopher Thomas, *Tottering Pakistan Alarms Neighbors*, LONDON TIMES, Sept. 17, 1998, at 1.

33. GRAHAM T. ALLISON, ET AL., AVOIDING NUCLEAR ANARCHY: CONTAINING THE THREAT OF LOOSE RUSSIAN NUCLEAR WEAPONS AND FISSILE MATERIAL chs. 1 & 2 (1996). A quantity of plutonium the size of a soda can (about 2.2 pounds or one kilogram) is

tinue along well-worn proliferation paths to acquire these weapons. For example, despite Herculean efforts by the United States to stop and roll back North Korea's nuclear weapons program,³⁴ U.S. intelligence officials have concluded that North Korea has resumed its efforts to acquire nuclear weapons,³⁵ and the recent firing of a long range missile capable of hitting Japan and possibly US territories demonstrated that it now has a delivery system to threaten the US and key US allies with WMD.³⁶

One of the greatest proliferation dangers is the huge quantity of fissile (nuclear) materials.³⁷ The danger of fissile materials cannot be overstated. Radioactive elements being removed from dismantled nuclear weapons and from nuclear power plant waste in the Former Soviet Union (FSU) are being stored in a country where physical security is compromised, where people in the military and scientific community are not paid well, if at all, and where organized crime operates aggressively and pays handsomely.³⁸ FBI Director, Louis Freeh, described the threat of Russian criminal organizations stealing and selling nuclear material to a rogue state or terrorist group as "extremely high."³⁹ Thousands of weapons and unknown quantities of weapons-quality nuclear materials are being inadequately stored and secured in a still highly unstable country.⁴⁰ Further, given the past and current economic crisis affecting

enough to create a nuclear explosion. See THOMAS COCHRAN & CHRISTOPHER PAINE, *THE AMOUNT OF PLUTONIUM AND HIGHLY ENRICHED URANIUM NEEDED FOR PURE FISSION NUCLEAR WEAPONS* 9 (1995).

34. William E. Berry, Jr., *North Korea's Nuclear Program: The Clinton Administration's Response*, Institute for National Security Studies Occasional Paper #3 (Mar. 1995); Walter B. Slocombe, *Resolution of the North Korean Nuclear Issue*, in *FIGHTING PROLIFERATION: NEW CONCERNS FOR THE NINETIES* (Henry Sokolski ed., 1996).

35. J.F.O. McAllister, *More Nukes, Is North Korea the Latest to Proliferate?*, *TIME*, Aug. 10, 1998, at 24.

36. Bill Gertz, *N. Korean Missile seen posing risk to U.S.*, *WASH. TIMES*, Sept. 16, 1998, at A1; Jim Lea, *NK Gives Japan Warning*, *PAC. STARS & STRIPES*, Sept. 18, 1998, at 4.

37. Guy B. Roberts, *Five Minutes Past Midnight: The Clear and Present Danger of Nuclear Weapons Grade Fissile Materials*, *INST. OR NAT'L SEC. STUDIES OCCASIONAL PAPER* #8, Feb. 1996.

38. See Barbara Slavin, *Nuclear Weapons Threat Lurks in Russia Poorly Paid Guards Are a Security Concern*, *USA TODAY*, Nov. 24, 1998, at A20 ("Recent U.S. visitors to Moscow's elite Kurchatov Institute of Atomic energy found no one guarding a building that holds 220 pounds of highly enriched uranium—enough for several bombs—because the cash-strapped institute could not afford to hire a single guard."); Judith Matloff, *In Poorer Russia, Risk Rises for Nuclear Sites*, *CHRISTIAN SCI. MONITOR*, Nov. 3, 1998, at 1 ("more than 15,000 tactical nuclear weapons. . . are at risk because no proper inventory exists.").

39. Mark Johnson, *Nukes and the Russian Mob*, *J. COM.*, Mar. 13, 1998, at 6. See also Martin Sieff, *Russian 'Kleptocracy' Risks Spread of Nuclear Weapons*, *WASH. TIMES*, Sept. 30, 1997, at A3.

40. Since 1991 hundreds of incidents of theft and illicit trafficking of nuclear materials have been reported, and, in a society rampant with social and economic hardship, po-

Russia there is a great potential for the unauthorized export of dangerous WMD materials.⁴¹ Troubling possibilities include the sale of materials or weapons and the recruitment of scientists, engineers or technicians by rogue states seeking to acquire a WMD capability.⁴² It is virtually certain that one or more of these states will try to exploit perceived opportunities in Russia or other states of the former Soviet Union to obtain a WMD capability at bargain-basement prices.

On December 1, 1997, the congressionally-mandated National Defense Panel warned that, "[t]he increasing capability to fabricate and introduce biotoxins and chemical agents into the United States means that rogue nations or transnational actors may be able to threaten our homeland."⁴³ Despite signing and ratifying international agreements banning the development, production and use of such weapons, many nations are clandestinely attempting to acquire such weapons.⁴⁴

While the consequences of chemical or biological weapons appear more uncertain, they nevertheless present the potential to inflict extraordinarily large casualties on civilian population centers and disrupt military operations. Iraq was able to use chemical weapons to good effect against poorly protected and trained Iranian forces as well as against Iraqi Kurds, and Iraq had (and may still have) the potential to launch Scud missiles with chemical agents against Israeli population centers.⁴⁵ Chemical and biological weapons, we know, are the poor man's atomic bomb—cheaper to buy, easier to build and extremely deadly, and it is extremely difficult to detect and eliminate such programs.⁴⁶ Witness for example, the seemingly never-ending efforts to

litical opportunism and highly organized criminal elements the risk of a catastrophic rupture, if it has not already occurred, remains distressingly high. See Guy B. Roberts, *Five Minutes Past Midnight: The Clear and Present Danger of Nuclear Weapons Grade Fissile Materials*, Institute for National Security Studies Occasional Paper #8, Feb. 1996; GRAHAM T. ALLISON ET AL., *AVOIDING NUCLEAR ANARCHY: CONTAINING THE THREAT OF LOOSE RUSSIAN NUCLEAR WEAPONS AND FISSILE MATERIAL* (1996); NATIONAL RESEARCH COUNCIL, *PROLIFERATION CONCERNS, ASSESSING U.S. EFFORTS TO HELP CONTAIN NUCLEAR AND OTHER DANGEROUS MATERIALS AND TECHNOLOGIES IN THE FORMER SOVIET UNION* (1997).

41. See, e.g. Lee Hockstader, *Rampages by Russian Troops Illustrate Army Erosion*, WASH. POST, June 4, 1997, at 27; Douglas Farah, *Freeh Says Russian Mafia Pose Growing Threat to U.S.*, WASH. POST, Oct. 2, 1997, at 18; Oleg Bukharin & William Potter, *Potatoes Were Guarded Better*, BULL. OF ATOMIC SCIENTISTS, May/June 1995, at 48.

42. See, e.g. Bill Richardson, *Russia's Recession: The Nuclear Fallout*, WASH. POST, Dec. 23, 1998, at 23.

43. TRANSFORMING DEFENSE: NATIONAL SECURITY IN THE 21ST CENTURY, REPORT OF THE NATIONAL DEFENSE PANEL 25 (1997).

44. See, e.g., Tim Weiner, *Soviet Defector Warns of Biological Weapons*, N.Y. TIMES, Feb. 25, 1998, at A1.

45. PROLIFERATION: THREAT AND RESPONSE, DEP'T OF DEF. 29-33 (1997).

46. See CENTRAL INTELLIGENCE AGENCY, *THE WEAPONS PROLIFERATION THREAT* (Brad Roberts ed., 1995); *TERRORISM WITH CHEMICAL AND BIOLOGICAL WEAPONS: CALIBRATING RISKS AND RESPONSE* (1997).

discover the depth and breadth of Iraq's chemical and biological weapons program eight years after the Persian Gulf War and the imposition of the most intrusive inspection regime ever. Iraq's biological warfare program was far more extensive than first believed, and much of the program and the weapons and delivery systems are thought to still exist.⁴⁷

So horrific and dangerous is the biological warfare threat it has been called "the weapon too terrible for the parade of horrors."⁴⁸ Any nation or non-state actor "that has even a rudimentary vaccine production capability also has the equipment and expertise necessary to produce biological agents. . . ."⁴⁹ For example, they could be readily introduced into mass transportation systems and quickly spread to thousands of people with devastating consequences. American cities are dangerously vulnerable to the sneak release of biological agents in subway systems or outside the unguarded vents of office buildings, and troops "remain inadequately equipped, poorly trained and insufficiently immunized to confront germ warfare."⁵⁰ Biological agents are a relatively cheap force multiplier. One expert estimated that biological weapons are the most cost effective for producing mass casualties.⁵¹ The continued progress of biotechnology could potentially lead to the

47. See, e.g., R. Jeffrey Smith, *Iraq's Drive for a Biological Arsenal*, WASH. POST, Nov. 21, 1997, at A1. Iraq admitted to making enough botulinum toxin to, in theory, wipe out the Earth's population several times over. During the 1980's, the Iraqis' produced many potential BW agents and studied ways to enhance the lethality and durability of several potential BW agents.

48. Roger Cohen, *The Weapon Too Terrible for the Parade of Horribles*, N.Y. TIMES, Feb. 8, 1998, at 4-1.

49. Randall Larsen & Robert P. Kadlec, *Biological Warfare: A Silent Threat to America's Defense Transportation System*, STRATEGIC REV., Spring 1998, at 7. For example, ten grams of anthrax spores could kill as many people as a tone of sarin nerve agent. The authors also cite the 1979 Sverdlovsk incident where less than one gram of anthrax spores were released causing the deaths of 66 people in a relatively sparsely populated area. See also Martin Arostegui, *Fidel Castro's Deadly Secret*, INSIGHT, July 20, 1998, at 1 (detailing Castro's biological and chemical warfare program and the possibility of providing terrorists with such weapons); Bill Gertz, *China has Biological Arsenal, Congress Told*, WASH. TIMES, July 15, 1995, at 2 (U.S. annual arms control report to Congress details China's noncompliance with its treaty obligations to not develop biological weapons).

50. Bradley Graham, *U.S. Gearing Up Against Germ War Threat*, WASH. POST, Dec. 14, 1997, at A1. A recent Pentagon Inspector General report found that the military is not adequately training forces to fight in the face of the likely chemical and/or biological attack. See John Donnelly, *IG: Chem/Bio Battle Training Falls Short*, DEF. WK., Aug. 3, 1998, at 1.

51. Estimated costs for producing mass casualties per square kilometer are:

\$1 for biological

\$600 for chemical (nerve agent)

\$800 for nuclear

\$2,000 for conventional

See RICHARD DANZIG, *BIOLOGICAL WARFARE: A NATION AT RISK—A TIME TO ACT* (1996).

development of new agents that are more lethal, easier to store, and have an even greater lethality against unprotected civilian populations than nuclear weapons.⁵²

Reports abound about various radical and fundamentalist groups attempting to acquire these weapons. For example, a group calling itself the "Jihad Islamic Front Against Jews and Crusaders," founded in February 1998 by the infamous and elusive Osama Bin Ladin, has threatened to unleash a terrorist offensive using chemical and biological weapons.⁵³ With money no object, fanatics are supposedly being trained to use these agents on Western populations.⁵⁴

Finally, the methods of delivering these weapons of terror increase the likelihood of deployment and use of such weapons after their acquisition. Many of the states in the process of acquiring a WMD capability are also developing a ballistic missile capability.⁵⁵ In July 1998, the Congressionally mandated Commission to Assess the Ballistic Missile Threat to the United States released its report whose unanimous conclusions bear repeating here:

a. Concerted efforts by a number of overtly or potentially hostile nations to acquire ballistic missiles with biological or nuclear payloads pose a growing threat to the United States, its deployed forces and its friends and allies. These newer, developing threats in North Korea, Iran and Iraq are in addition to those still posed by the existing ballistic missile arsenals of Russia and China, nations with which we are not now in conflict but which remain in uncertain transitions. The newer ballistic missile nations . . . would be able to inflict major destruction on the U.S. within about five years of a decision to acquire such a capability (10 years in the case of Iraq). During several of those years, the U.S. might not be aware that such a decision had been made.

b. The threat to the U.S. posed by these merging capabilities is broader, more mature and evolving more rapidly than has been re-

52. For an overview of this evolving BW threat see The Institute for Strategic Studies, *Biological Weapons: New Threats or Old News?*, STRATEGIC SURV. 31-41 (1996).

53. Guido Olimpio, *Islamic Cell Preparing Chemical Warfare, Toxins, Gases Against West*, MILAN CORRIERE DELLA SERA, July 8, 1998, at 9 (trans. by Foreign Broadcast and Information Service).

54. Recently, news reporters "posing as middlemen for a medical laboratory in North Africa, were offered samples of anthrax, plague and brucella by a laboratory in the Far East" for around \$1000 a sample. See *Need a Biological War? Labs Sell Anthrax Germs by Mail Order*, LONDON TIMES, Nov. 22, 1998, at 1.

55. See Barbara Slavin, *Nations See Missiles as Ticket to Power*, USA TODAY, Sept. 16, 1998, at 15; Walter Pincus, *Iran May Soon Gain Missile Capability*, WASH. POST, July 24, 1998, at 28.

ported in estimates and reports by the intelligence community.⁵⁶

c. *The warning times* the U.S. can expect of new, threatening ballistic missile deployments are being reduced. Under some plausible scenarios—including rebasing or transfer of operational missiles, sea- and air-launch options, shortened development programs that might include testing in a third country, or some combination of these—*the U.S. might well have little or no warning before operational deployment.*⁵⁷ (Emphasis added)

The post Cold War era has elevated WMD proliferation into one of the most important international security issues facing the world today. In the hands of states unwilling to adhere to the established norms of civilized nations, the likelihood of devastation and instability is great. As will be discussed, the international community has erected important legal and normative barriers to the proliferation of these types of weapons, and yet it has not been enough to stop proliferation. Those threatened with the potential of these weapons have recognized this and instituted a series of defensive and offensive measures designed to limit damage in case of attack and raise the costs in order to deter those who acquire such weapons from using them.

III. CURRENT NON-PROLIFERATION EFFORTS AND THE US COUNTERPROLIFERATION INITIATIVE

“Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and success of liberty. We will not waver in the face of aggression and tyranny.”

— John F. Kennedy⁵⁸

A. *Non-Proliferation and the Establishment of Legal Norms*

“For to win one hundred victories in one hundred battles is not the

56. After the embarrassing nuclear tests of India and Pakistan, U.S. intelligence Agencies publicly acknowledged serious intelligence shortfalls in its ability to detect WMD programs and ballistic missile development. Walter Pincus, *Buried Missile Labs Foil U.S. Satellites*, WASH. POST, July 29, 1998, at 1. *But see Pakistan, India Exaggerated Nuclear Tests, Study Finds*, BALT. SUN, Sept. 16, 1998, at A20 (tests by India and Pakistan were overstated both in terms of numbers and power).

57. NATIONAL SECURITY COMMITTEE, SUMMARY OF THE REPORT OF THE COMMISSION TO ASSESS THE BALLISTIC MISSILE THREAT TO THE UNITED STATES, <<http://www.nyu.globalbeat/usdefense/nsc071598.html>>.

58. President John F. Kennedy, Inaugural Address, January 20, 1961 in PUB. PAPERS (1961).

acme of skill. To subdue the enemy without fighting is the acme of skill."

— Sun Tzu⁵⁹

The United States, NATO and the world community at large have recognized that these weapons pose a "grave danger and urgent threat" to international peace and security,⁶⁰ and the United States has undertaken a multi-faceted approach to stop would-be proliferators. US non-proliferation policies are based on three main thrusts: buttress technical constraints; reduce proliferation incentives and enhance disincentives; and build nonproliferation institutions or norms.⁶¹ Nonproliferation efforts aim at preventing potential proliferators from gaining access to the relevant capabilities and technologies necessary to develop, field and maintain such weapons. Indeed, nonproliferation policy has achieved noteworthy successes in preventing and helping to reverse proliferation. Traditional instruments of nonproliferation policy have included detecting weapons programs (verification measures); reducing regional tensions through confidence building measures, security assurances and assistance, and military cooperation; strengthening multilateral export control regimes to curtail access to NBC technologies and material; reinforcing the international nonproliferation regimes; and bringing pressure to bear on proliferating nations through trade sanctions and public diplomacy.⁶²

Over the past three decades, multilateral export controls and suppliers restraints have been put in place to enhance technical constraints and make it more difficult for countries to acquire WMD weaponry.⁶³ These controls have not been expected to block proliferation outright. Instead their purpose has been to "buy time."⁶⁴ In some cases, buying time has allowed other diplomatic and political actions to be taken (for example, the use of US influence in the mid-1970s to persuade both

59. SUN TZU, *THE ART OF WAR* 77 (Samuel B. Griffith ed., 1963).

60. WHITE HOUSE PRESS RELEASE, EXEC. ORDER No. 12938 (Nov. 12, 1997) (declaring a national emergency over the extraordinary threat of WMD proliferation); *THE ALLIANCE'S STRATEGIC CONCEPT* paras. 12,50 (1991), (Recognition of the grave risks of WMD Proliferation); President of the UN Security Council Statement, S/23500, Jan. 31, 1992 (Proliferation of all WMD constitutes a threat to international peace and security).

61. The United States proliferation strategy is summarized in OFFICE OF TECHNOLOGY ASSESSMENT, *PROLIFERATION OF WEAPONS OF MASS DESTRUCTION: ASSESSING THE RISKS* (1993); *PROLIFERATION: THREAT AND RESPONSE*, *supra* note 10.

62. *PROLIFERATION: THREAT AND RESPONSE*, *supra* note 10, at 53-77.

63. See *PROLIFERATION AND EXPORT CONTROLS* (Cathleen Bailey & Robert Rudney eds., 1993).

64. "In the ninth century the King of France imposed the death sentence on anyone who sold a sword to a Viking. This did not prevent the Vikings from taking Normandy or, even worse, their children from conquering England." David Fisher, *The London Club and the Zangger Committee: How Effective?* in *PROLIFERATION AND EXPORT CONTROLS*, *supra* note 63.

South Korea and Taiwan to shutdown questionable nuclear activities).⁶⁵ Buying time, however, is also valuable in its own right. Regional security and domestic political changes can lead to unexpected decisions to renounce or rollback WMD programs. This is perhaps best typified by South Africa's decision in the early 1990s to dismantle its rudimentary nuclear arsenal and join the NPT, a decision made possible by the withdrawal of Soviet and Cuban forces from Angola in the late 1980s and made necessary in the eyes of the new government of President de Klerk by the inevitability of black majority rule.⁶⁶

Equally important, traditional prevention policies have sought to reduce proliferation incentives. Diplomatic persuasion and dissuasion, use of conventional arms sales to help buttress defense capabilities of US allies and friends, political support in crises, and efforts to encourage regional stability and confidence-building all have played a role. The threat of economic and other sanctions, for example, has been used to enhance disincentives to pursuing NBC weaponry.

In the past, deterrence of acquisition has also been a modest but not very successful element of past non-proliferation efforts. Almost exclusively, deterrent efforts have emphasized the threat of punishment. They have frequently foundered, however, on the reluctance either of the US or of other countries to carry out such threats.⁶⁷ And if such threats are carried out, most states are reluctant or unable to stay the course for usually a long, indefinite period before any results can be seen.

Nonetheless, the threat of preventive military action has proven a useful adjunct to other proliferation prevention initiatives. An implicit threat of recourse to military force could back-up political and diplomatic initiatives. Similarly, the risk that acquisition of NBC capabilities would prove a lightning rod and not a deterrent of US military strikes in the event of conflict could reinforce other ongoing efforts to buttress deterrence of acquisition by a strategy of denial of gains.

During the Persian Gulf War, for example, it has been argued that the threat of massive retribution by the United States deterred Iraq

65. Joseph Yager, *Prospects for Nuclear Proliferation Rollback*, DEP'T OF ENERGY OFFICE OF ARMS CONTROL AND NONPROLIFERATION, July 6, 1992.

66. Frank Pabian, *South Africa's Nuclear Weapons Program: Lessons for US Non-proliferation Policy*, NONPROLIFERATION REVIEW (Fall 1995).

67. Despite frequent statements by government officials that certain "rogue" states were engaged in developing an illicit WMD capability the United States and its allies have rarely used force or the threat of force to deter the continued development of these programs. See, e.g. James Woolsey (Director of Central Intelligence), World Threat Assessment Brief to the Senate Select Committee on Intelligence, S. Hrg. 103-630; CIA REPORT, *supra* note 46; and the discussion in footnotes 197-261 and accompanying text, *infra*.

from using its biological and chemical weapons.⁶⁸ The threat or retaliation apparently worked in this case. Ultimately, how, and how well, we cope with WMD proliferation will come down to what we know, how much we know, and when we know it. Despite the extraordinary threat these weapons present, the indiscriminate use of force could have the same devastating impact on the international norms we are defending.

In practical terms, it is very difficult to formulate an approach to post-Cold War deterrence that would systematically seek to deter regional powers, NBC armed or not, from initiating aggression that threatens Western security interests. Unlike during the Cold War, there is no clear consensus within or between Western states regarding the regional interest that need to be protected through deterrence threats. It may be impossible, for example, to provide a definition of "regional Western security interests," other than in quite general terms. Challenges to regional interests are very unlikely to be always identifiable prior to a crisis, as was the case for Iraq's invasion of Kuwait in 1990.

Consequently, it is quite likely that Cold War deterrence will have a diminished affect against regional local powers that are likely to have more at stake than Western powers, whose interests at risk may be the object of domestic political controversy and vary considerably depending on the specific case. Furthermore, undemocratic regional powers may have much greater interest in challenging the status quo that the defunct Soviet Union did during the Cold War, thus making them even more inclined to accept significant risks.⁶⁹ There are also indications that enhancing freedom of action vis-à-vis Western countries has become another acquisition incentive. Former Indian Army Chief of Staff General Sundarji has been widely quoted as stating that the primary lesson of the 1991 Gulf War is "[d]on't fight the United States unless you have nuclear weapons," and "the next conflict with the United States would involve weapons of mass destruction."⁷⁰ Shortly before the Gulf War, Muammar Qaddafi called for "a deterrent—missiles that could reach New York. . . . We should build this force so that they and others will no longer think about an attack."⁷¹

68. During the Gulf War President George Bush informed Saddam Hussein that "[t]he United States will not tolerate the use of chemical or biological weapons. . . . The American people would demand the strongest possible response. You and your country will pay a terrible price if you order unconscionable acts of this sort." Terry N. Mayer, *The Biological Weapon: A Poor Nation's Weapon of Mass Destruction*, in AIR WAR COLLEGE, STUDIES IN NATIONAL SECURITY 3 206 (1995).

69. See KENNETH WATMAN & DEAN WILKENING, U.S. REGIONAL DETERRENCE STRATEGIES (1995).

70. PATRICK GARRITY, WHY THE GULF WAR STILL MATTERS: FOREIGN PERSPECTIVES ON THE WAR AND THE FUTURE OF INTERNATIONAL SECURITY, Rpt. 16, July 1993, at xiv.

71. BRAD ROBERTS, WEAPONS PROLIFERATION AND WORLD ORDER AFTER THE COLD WAR 235 (1996).

Attempting to prevent acquisition, above all on the part of countries likely to threaten Western interests and in violation of treaty or other legal commitments, clearly constitutes a critical goal of post-Cold War security and defense policies.⁷² However, this objective also does not readily lend itself to the formulation of a deterrence doctrine and posture, since it is impossible systematically to threaten the use of military force in order to prevent NBC acquisition. It totally fails with respect to transnational terrorist groups.

Finally, there are important legal and normative barriers related to all three types of weapons, barriers that are in the interests of the entire international community. Beginning with the creation of the International Atomic Energy Agency in 1957, institution building has been the third major non-proliferation thrust.⁷³ In an incremental process, major institutional advances have been made over the ensuing decades. This process of institution building has helped to create and extend an overall norm of non-proliferation—one that is arguably *jus cogens*. That is, a pre-emptory norm of international law from which states may not abjure or contravene. The establishment of worldwide legal norms against the continuing proliferation of such weapons includes the following:

1. The Nuclear Non-Proliferation Treaty (NPT),⁷⁴ with its legally binding obligation not to acquire nuclear weapons as well as its provisions for international inspections and export controls, represents an almost universal commitment by the international community to stop, and condemn as illegal, the proliferation of nuclear weapons. The NPT was indefinitely extended in 1995 and has over 185 parties (only Israel, Pakistan, India and Cuba are non-signatories).⁷⁵
2. The Biological and Toxin Weapons Convention (BWC),⁷⁶ entered into force in 1972 and helped establish the norm, albeit unverifiable, banning the use of biological weapons by prohibiting the “development, production, stockpiling, acquisition or retention” of biological weaponry for offensive purposes.⁷⁷ The BWC cur-

72. Exec. Order No. 12938, *supra* note 60.

73. See SEC. OF DEF., REPORT ON NONPROLIFERATION AND COUNTERPROLIFERATION ACTIVITIES AND PROGRAMS 3-4 (1994).

74. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

75. See Barbara Crossette, *Treaty Aimed at Halting Spread of Nuclear Weapons Extended*, N.Y. TIMES, May 12, 1995, at A1.

76. April 10, 1972, 26 U.S.T. 583, T.I.A.S. 8062.

77. There is also a norm-creating 1925 Protocol banning the use of poisonous gases and biological weapons in war. Although signed and ratified by few parties (the US ratified in 1975) it does arguably create a legal norm against the first use of biological weapons in wartime. See *infra* note 121.

rently has 140 state parties and, with an additional 18 signatories, it also represents universal opprobrium for the use of such weapons.⁷⁸

3. The Chemical Weapons Convention (CWC),⁷⁹ signed by 169 nations (ratified by 118 as of October 1998) and entered into force in 1997 (the US ratified in 1997), contains one of the most intrusive verification regimes yet devised to ensure the destruction of CW stockpiles and limit diversion to illicit CW programs.⁸⁰ It prohibits the development, production and use of chemical weapons for any purpose and obligates the parties to destroy all existing stocks. It too is approaching universal adherence.
4. The creation of nuclear weapons free zones beginning with the Treaty of Tlatelcolo, creating a nuclear free zone in Latin America in 1967.⁸¹ Since then one other NWFZ (South Pacific) has been created,⁸² another has been agreed to for Africa,⁸³ and several others are proposed.⁸⁴ These initiatives further strengthen the international norm that eschews the position and development of these weapons.
5. The establishment of export control groups to limit and control nuclear materials, equipment and technology. To help stem the tide of nuclear weapon information and technology, the Zangger Committee was established in 1974 and periodically updates "trigger" lists of controlled exports that could support a clandestine nuclear weapons program, and the Nuclear Suppliers Group (established in 1978) whose goal is to obtain the agreement of all suppliers, including nations not members of the re-

78. NPT, BWC, and CWC treaties can be found at website <http://www.acda.gov/treaties>.

79. The Convention on the Prohibition, Production, Stockpiling, and Use of Chemical Weapons, *opened for signature*, Jan. 13, 1992, U.N. GAOR, 47th Sess., Supp. No. 27, U.N. Doc. A/47/27/Appendix 1 (1992), *reprinted in* 32 I.L.M. 800 (1993).

80. See Statement of the Honorable John D. Holum, Director, U.S. Arms Control and Disarmament Agency Before The Committee on Foreign Relations, U.S. Senate, March 22, 1994. Current status of CWC ratifications can be found at website <http://www.opcw.org/>.

81. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 6 I.L.M. 521.

82. See United States, France, and the United Kingdom to Sign Protocols of the South Pacific Nuclear-Free Zone Treaty [Treaty of Raratonga], 7 DEPT ST. DISPATCH 15, Apr. 8, 1996 (White House Statement of Mar. 22, 1996).

83. See Fact Sheet: African Nuclear Weapons-Free Zone Treaty, 7 DEPT ST. DISPATCH 16, Apr. 15, 1996; African Nuclear-Weapon-Free Zone Treaty (Pelindaba Text), 35 I.L.M. 698 (1996).

84. There already exist agreements prohibiting nuclear weapons in Antarctica, in outer space and on the seabed. Proposals for NWFZs exist in every region of the world. See UN website www.unog.ch/unidir/Rr-enwzf.htm.

gime to control nuclear and nuclear-related exports in accordance with established guidelines. A similar group was established in 1986 (called the Australia Group) to control BW and CW-related items and equipment.

6. The Missile Technology Control Regime (MTCR), created in 1987, restrains and limits the sales of missiles, missile components, and related technologies by key industrial countries.⁸⁵ The goal is to limit the spread of missile technologies to countries of proliferation concern.

These multi-lateral treaties and voluntary restraint regimes have been the primary engines for creating the current non-proliferation norms that serve as political and legal barriers to WMD development. The establishment of these norms has been effective in reversing WMD acquisition programs or facilitating the decision not to acquire such weapons. Many nations that currently have the wherewithal to develop and acquire these weapons have chosen not to do so or abandoned nascent programs based on their commitment to these norms.⁸⁶

However, the lack of credible and effective response to non-compliance with countries' obligations under the NPT, BWC and CWC stands out in any assessment of non-proliferation traditionalism. Recent experience has been decidedly mixed. The story of Iraqi resistance to inspections and its stonewalling in the UN's attempt to root out its NBC programs are well known.⁸⁷ North Korea's success in resisting international pressures to honor its NPT obligations also risks sending a signal that other aspiring proliferators may seek to emulate.⁸⁸ More generally, lack of effective international responses to non-compliance can only encourage countries contemplating treaty violations. Over time, if some countries are perceived to be able to violate with impunity their non-proliferation obligations, the credibility of the overall legal regime will erode. Still other countries are all but certain, as well, to rethink their own decision not to seek NBC weaponry. The establishment

85. Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles, 26 I.L.M. 599 (1987) (revised Jan. 7, 1993; annex revised July 1, 1993) (revisions reproduced at 32 I.L.M. 1298 (1993) and 32 I.L.M. 1300 (1993), respectively). The MTCR is not a treaty but a voluntary set of guidelines.

86. See LEONARD SPECTOR, *NUCLEAR AMBITIONS* (1990); DAVID FISCHER, *STOPPING THE SPREAD OF NUCLEAR WEAPONS: THE PAST AND THE PROSPECTS* (1992). Some states might be considered "virtual" nuclear weapons states since they have the fissile materials, technology and infrastructure to relatively quickly develop nuclear weapons. Japan and Germany are two examples. See Selig Harrison, *A Yen for the Bomb?* WASH. POST, Oct. 31, 1993, at C1; Michael Williams, *Japan Urged to Keep Potential for Nuclear Arms*, WALL STREET J., Aug. 2, 1994, at 10.

87. Ruth Wedgewood, *Truth Sleuth in Iraq*, WASH. POST, June 19, 1996, at 19; *Evidence Lacking that Iraq Destroyed Arms, Report Says*, BALTIMORE SUN, April 12, 1996, at 22.

88. William Berry, *supra* note 34.

of international nonproliferation norms does not and has not stopped the determined proliferator. Recognition of that fact has resulted in the United States developing a program to roll back or eliminate a rogue state's WMD capability, and defending against the illicit acquisition and use of such weapons to complement nonproliferation efforts. This relatively new program is known as the Counterproliferation Initiative.

B. The United States Counterproliferation Initiative

"Between two groups that want to make inconsistent kinds of worlds, I see no remedy except force."

— Oliver Wendell Holmes⁸⁹

The United States and others continue to enhance current nonproliferation norms and strive to establish others (the fissile material control regime currently being negotiated at the Conference on Disarmament being but one example). Unfortunately, as former Secretary of Defense Les Aspin noted "the policy of prevention through denial won't be enough to cope with the potential of tomorrow's proliferators."⁹⁰ The United States Senate Subcommittee on International Security, Proliferation, and Federal Services concluded that "even if U.S. nonproliferation efforts work reasonably well, they will only slow the spread of weapons of mass destruction and, in particular, ballistic missile technology. America must be prepared for failure—of diplomacy, of arms control, of export controls, and of deterrence—with something more than threats of retaliation."⁹¹

Recognizing that despite all our nonproliferation efforts and institutional and legal norm building there continues to be determined state and transnational actors pursuing these deadly weapons, the U.S. Department of Defense (DoD) in 1993 declared that the U.S. strategy for addressing the new dangers of proliferation should involve a multi-pronged approach, consisting firstly of "nonproliferation efforts to prevent the spread of weapons of mass destruction," and secondly of cooperative threat reduction with the former Soviet Union.⁹² It then stated that "[w]hile these first two efforts involve primarily diplomatic measures, DoD must also focus on counterproliferation efforts to deter, prevent, or defend against the use of WMD if our nonproliferation efforts

89. Letter from Oliver Wendell Holmes to Sir Frederick Pollack, *quoted in* Livingstone, *Proactive Responses to Terrorism*, in *FIGHTING BACK: WINNING THE WAR AGAINST TERRORISM* 130 (Livingstone & Arnold, eds. 1986).

90. Secretary of Defense Les Aspin, "The Defense Counterproliferation Initiative Created," 8 DEF. ISSUES 68, Dec. 7, 1993.

91. THE PROLIFERATION PRIMER, *supra* note 19, Summary.

92. Secretary of Defense, *The Defense Counter-Proliferation Initiative Created*, DEF. ISSUES, Vol 8, No. 68 (1993).

fail."⁹³

Consequently, in late 1993, the DoD unveiled its counterproliferation initiative designed to help embed these defense counterproliferation objectives as an integral feature of the planning, doctrine, training and equipment procurement decisions of the military services.⁹⁴ Counterproliferation involves preparing U.S. forces to fight and survive in a WMD environment.⁹⁵ It also includes, however, "maintaining a robust capability to find and destroy NBC weapon delivery forces and their supporting infrastructure elements with minimal collateral effects."⁹⁶ Another key element is developing the ability "to detect, characterize, and defeat NBC/M facilities with minimal effects."⁹⁷ U.S. forces must be able to interdict an adversary's biological and chemical capability during each stage of the agent's employment.⁹⁸ Counterforce operations include (but are not limited to) attacking agent production facilities, storage complexes, and deployed mobile weapon platforms."⁹⁹

So, on a multifaceted front, engaging all political, diplomatic and military tools, the U.S. strategy is to prevent further proliferation, roll back proliferation where it has occurred, and adapt U.S. forces and planning to conduct military operations despite or against proliferation threats. If proliferators cannot be stopped from obtaining these weapons, however, then the U.S. will consider whatever means necessary to eliminate that capability. However, while preventing the spread of WMD remains an objective that is shared by the overwhelming majority of states in the world, a goal that unites both North and South, the unilateral intentions of the U.S. to strike at all who would violate the "norms" prohibiting proliferation raises serious legal and policy issues.

Counterproliferation became, in the eyes of its critics, nothing more than a way of punishing those states that successfully defied the status quo by eluding the spider's web of controls imposed by a world under

93. Secretary of Defense Les Aspin, *supra* note 90.

94. The U.S. Counterproliferation Initiative (CPI) is summarized in the annual editions of several unclassified Defense Department publications: PROLIFERATION: THREAT AND RESPONSE; SEC. OF DEF. ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS; COUNTERPROLIFERATION REVIEW COMMITTEE, REPORT ON ACTIVITIES AND PROGRAMS FOR COUNTERING PROLIFERATION; AND DEFENSE TECHNICAL INFORMATION CENTER, NUCLEAR/BIOLOGICAL/CHEMICAL (NBC) DEFENSE ANNUAL REPORT TO CONGRESS.

95. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 7.

96. Department of Defense Counterproliferation Program Review Committee, *Report on Activities and Programs for Countering Proliferation and NBC Terrorism* (May 1998), at 1-3.

97. *Id.* The purpose of the CPI is to contribute to government-wide efforts to prevent parties from obtaining, manufacturing, or retaining these weapons by "equipping, training, and preparing U.S. forces, in coalition with the forces of friends and allies, to prevail over an adversary who threatens or uses these weapons and their associated delivery systems." PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at iii.

98. *Id.* at 71.

99. *Id.*

U.S. leadership.¹⁰⁰ On the contrary, the intent of the Counterproliferation Initiative was to ensure that potential adversaries recognize and legitimately fear that the United States is not only capable of striking them from outside their WMD range, but that it was also capable of operating within a contaminated environment. If weapons of mass destruction are employed against the territory of the United States or against our forward-deployed forces, this is a clear and unambiguous signal that the United States is prepared to respond decisively.

In sum, if prevention efforts fail, at a minimum, the United States will contemplate responding, as appropriate, to any proliferation scenario. This includes attacking designated WMD facilities *before* they pose a present threat to the United States, its forces or allied forces. However, absent an actual attack or threat to use these weapons would such a response be legitimate under the currently understood international legal regime regulating the use of force among nations?

IV. AN OVERVIEW OF THE CURRENT LEGAL REGIME: THE SELF-HELP PARADIGM

A. *Traditional Responses to Threat: The Customary International Law of Self-Help*

"It cannot be helped, it is as it should be, that the law is behind the times."

— Oliver Wendell Holmes¹⁰¹

The employment of coercive self-help measures by states is an anomaly since for the most part disputes are resolved peaceably. However, in an anarchical world where no central authority exists to assist states and other international actors in obtaining justice or a satisfaction of legitimate claims, states have historically resorted to self-help measures short of war to remedy the injustice or satisfy the claim. As discussed, *infra*, although the UN Charter condemns methods of self-help based on the use of force short of war, the fact remains that such methods are still in use, precisely because there is no Hobbesian "Leviathan" to render final justice in disputes. A former U.S. State Department legal advisor once noted that "the policeman is apt protection against individual criminals; but national self-defense is the only protection against the criminal state."¹⁰² In situations where force was deemed necessary it is an act of self-help, usually described as either a

100. See Harald Muller and Mitchel Reiss, *Counterproliferation: Putting New Wine in Old Bottles*, WASH. Q., Spring 1995, at 143.

101. SPEECHES BY OLIVER WENDELL HOLMES 101 (1934).

102. Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 922 (1986).

reprisal or self-defense.

The right of self-defense is generally limited, confined to responding to breaches of legal duty or wrongs committed against it by other nations.¹⁰³ But historically, the traditional right of self-defense never contemplated that one must wait until the first blow is struck. The father of international law, Hugo Grotius, in *The Law of War and Peace*,¹⁰⁴ recognized that a nation could legitimately respond to "present danger." Self-defense is permitted not only after an attack but also in anticipation of such an attack, or, in his words: "It be lawful to kill him who is preparing to kill. . . ."¹⁰⁵ Grotius' position was adopted and endorsed by later legal scholars such as Emmerich de Vattel, who posited in 1758 that:

The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force. . . against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.¹⁰⁶

American legal scholar Elihu Root argued in 1914 that international law did not require the aggrieved state to wait before using force in self-defense "until it is too late to protect itself."¹⁰⁷ His reasoning was posited on the self-defense criteria enunciated by Secretary of State Daniel Webster in his diplomatic note to the British in the context of the *Caroline* Case of 1842.¹⁰⁸ He stated, in a widely accepted dictum, that "anticipatory" self-defense must be restricted to those cases where the necessity "is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." He further argued that the act should involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept

103. Derek W. Bowett, *SELF-DEFENSE IN INTERNATIONAL LAW* 3-9 (1958).

104. Hugo Grotius, *The Law of War and Peace*, in *CLASSICS OF INTERNATIONAL LAW* Vol. 3, 1625 (James Brown Scott ed., 1925).

105. *Id.* at ch. 1. Elsewhere he wrote that "the first just cause of war. . . is an injury, which even though not actually committed, threatens our persons or our property." Bk 2, ch. 1, § 2.

106. E. de Vattel, *The Law of Nations IV*, in *CLASSICS OF INTERNATIONAL LAW* Vol. 3 (James Brown Scott ed., 1916).

107. Elihu Root, *The Real Monroe Doctrine*, 35 *AM. J. INT'L L.* 427 (1914).

108. The *Caroline* was an American steamboat, accused of running arms to Canadian rebels. A Canadian military force crossed over into the United States and set the ship ablaze, killing an American citizen in the process. A Canadian was arrested in New York for the murder, and the British government protested. While never admitting culpability, The British apologized to the United States for the incident. See Jennings, *The Caroline and McLeod Cases*, 32 *AM. J. INT'L L.* 82, 85-89 (1938); John Moore, 2 *DIG. INT'L L.* 409-14 (1906).

clearly within it."¹⁰⁹

Webster's *Caroline* criteria continue to this day to form the basis for analysis of the right of self-defense focusing on the "necessity" of the response and the "proportional" use of force in response.¹¹⁰ "Necessity" is the most important precondition to the legitimate use of military force in self-defense (or, one could argue, under any other condition requiring the use of force). The initial determination of necessity is made by the target state based on a number of facts. These include, but are not limited to, the nature of the coercion being applied, the relative size and power of the aggressor state, the nature of the aggressor's objectives, and the consequences if those objectives are achieved.¹¹¹ "Proportionality" is the "requirement that the use of force or coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."¹¹² Because the purpose of self-defense is to preserve the status quo, proportionality requires that military action cease once the danger has been eliminated.¹¹³ The requirements of necessity and proportionality "can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context."¹¹⁴

While this right of self defense is widely acknowledged as customary international law, it is not absolute.¹¹⁵ It must be balanced against similar rights enjoyed by other states and the maintenance of peace in the international community.¹¹⁶ However, when in the judgment of the injured state the necessity of acting in self-defense outweighs any harm such act imposes, it may lawfully resort to the use of force.¹¹⁷

Another form of self-help commonly resorted to in the pre-UN Charter era was reprisals. Reprisals are considered to be illegal acts undertaken by a state in retaliation or retribution to compel a state to agree to a satisfactory settlement of a dispute originating as a result of a prior illegal act done by the state or to compel the state to cease activi-

109. See also DANIEL PATRICK. O'CONNELL, *INTERNATIONAL LAW* 343 (1965).

110. DEREK BOWETT, *supra* note 90, at 188; Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States*, 37 *Brit. Y.B. Int'l L.*, 229-302 (1961).

111. Oscar Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis*, 37 *J. INT'L L.* 242 (1984).

112. MYERS S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 242 (1961).

113. GERHARD VON GLAHN, *LAW AMONG NATIONS* 496-97 (3d ed. 1976); J.E.S. Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, *RECUEIL DES COURS* 404-8 (1961); Oscar Schachter, *In Defense of the International Rules on the Use of Force*, 58 *U. CHI. L. REV.* 120 (1986).

114. *Id.* at 218. See also DEREK BOWETT, *supra* note 90, at 269-70.

115. DEREK BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 9 (1958).

116. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620 (1984).

117. *Id.*

ties that violate its legal obligations either to the state or the international community at large.¹¹⁸ As laid down by the *Naulilaa Incident Arbitration*¹¹⁹ Tribunal legitimate reprisals must fulfill three conditions:

1. The act of the offending state must have been illegal;
2. Retaliatory "illegal" action must have been preceded by a "request for redress which has been unavailing"; and
3. A reasonable degree of proportionality must be shown to exist between initial offense and retaliatory action.¹²⁰

The *Restatement of Foreign Relations Law of the United States* further states that in response to violations of international obligations the victim state "may resort to countermeasures that might otherwise be unlawful, if such measures

- (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and
- (b) are not out of proportion to the violation and the injury suffered."¹²¹

In defining the "necessity" of such actions the *Restatement* concludes that:

[C]ountermeasures in response to a violation of an international obligation are ordinarily justified only when the accused state wholly denies the violation or its responsibility for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiation or third-party resolution. Countermeasures are to be avoided as long as genuine negotiation or third-party settlement is available and offers some promise of resolving the matter. A showing of necessity is particularly important before any drastic self-help measures are taken.¹²²

118. HERSCH LAUTERPACHT, ED., *OPPENHEIM'S INTERNATIONAL LAW* 136-37 (1952).

119. Concerning the Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa, (Port.-F.R.G.), *Arbitral Decision of July 31, 1928*, 2 R.I.A.A. 1011 (1949).

120. See A.V. W. THOMAS & A. J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 136-38 (1956).

121. *RESTATEMENT (THIRD) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 905 (1987). ("The threat or use of force in response to violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter. . .).

122. *Id.* at 381. Regarding retaliation the Restatement states that "[t]he principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it." And, in response to a violation of international law: "[t]he use or threat of force in response to a violation of international law is subject both to the requirements of necessity and proportionality and to the

The prohibition of reprisals is deducible from the broad regulation of force in UN Charter Article 2(4), the obligation to settle disputes peacefully in Article 2(3), and the general limiting of permissible force by states to "self-defense" as delimited by Article 51. A total ban on reprisals, however, presupposes a degree of global cohesion that simply does not exist, and the circumstances may clearly arise wherein the resort to reprisal as a form of self-help would be distinctly law enforcing. This is especially the case in matters where reprisals are undertaken for prior acts of terrorism.¹²³

It is often difficult to distinguish between reprisals and acts of self-defense. Although reprisal and self-defense are both forms of the same generic remedy of self-help, an essential difference lies in their respective aim or purpose. Since they come after the harm has already been absorbed, reprisals are punitive in character and cannot be undertaken for protection.¹²⁴ Self-defense, on the other hand, is by its very nature intended to mitigate harm.¹²⁵

Often the rationale for use of force is based on a combination of facts and circumstances that justify it under either definition. In fact, notwithstanding the apparent prohibition, there have been numerous cases where states have claimed a right to reprisals or retribution,¹²⁶ and many publicists take a similar view.¹²⁷ As with most cases in which force is used in response to acts or threats of terrorism, the distinction between self-defense and retribution or reprisal for illegal acts is blurred. As the author has argued elsewhere,¹²⁸ slavish devotion to "self-defense" as the sole justification for the use of force to stop delictual activities by another state blurs the distinction between self-defense and reprisals. This is primarily because states are reluctant to recognize a right to reprisal under the Charter paradigm eschewing the

prohibitions of the United Nations Charter." *Id.* at 382.

123. See, e.g. R. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969). See also JULIUS STONE, *AGGRESSION AND WORLD ORDER* 94-8 (1958) (arguing that a permissible role for reprisals continues to exist under international law).

124. See Derek Bowett, *Reprisals Involving Recourse to Armed Force*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 394-410 (1985) (discusses the distinction between reprisals and self-defense).

125. *Id.*

126. *Id.*; William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421 (1990). On the legal status of reprisals, Professor Bowett noted that "there is a discrepancy between the formal principle and the actual practice." D. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 22 (1972).

127. See, e.g. Alberto R. Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of Its Best Friends*, 27 HARV. INT'L L. J. 599 (1986); O'Brien, *supra* note 142.

128. Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243 (1987).

use of force even though, in practice, many of the uses of force characterized as "self-defense" are, in fact, reprisals under the *Naulilaa* definition.¹²⁹ Obviously, there is a danger that accepting reprisals would be destabilizing and contrary to the internationally agreed preference of solving disputes by peaceful means. But, as Professor Arend succinctly observes:

[W]hile states are formally unwilling to depart from the Charter paradigm, in justifying their actions they have expanded the notion of self-defense to include deterrence and even punishment. Such a broadened notion of self-defense, while perhaps politically and even morally commendable, seems to be clearly at variance with the Charter's ideal of peace over justice.¹³⁰

Nevertheless, each use of force is currently judged by the international community on whether it meets minimally acceptable standards of self-help within the extended parameters of "self-defense."¹³¹

B. *The UN Charter Paradigm: Article 2(4) and Article 51*

The point is that international law is not higher law or better law; it is existing law. It is not a law that eschews force; such a view is alien to the very idea of law. Often as not it is the law of the victor; but it is law withal and does evolve.

— Daniel Patrick Moynihan¹³²

After the adoption of the UN Charter, particularly Article 2(4) prohibiting states from using force as an instrument of statecraft, and Article 51, giving back to the state the right of self-defense (discussed *infra*), the debate on use of force centered on whether the right to use force absent an "armed attack" continued to exist.¹³³ Despite widespread reference to the *Caroline* case, some contend that Article 2(4) limits its applicability to traditional threats of aggression where an enemy was massing on the border in preparation of an attack.¹³⁴ As I argue here, and as have others urged earlier, such a prerequisite today is unrealistic and conceivably fatal to state survival.¹³⁵

129. *Id.*

130. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 15 (1990).

131. See James McHugh, *Forcible Self-help in International Law*, 62 U.S. NAVAL WAR COLLEGE INT'L STUDIES 143 (1980).

132. DANIEL MOYNIHAN, ON THE LAW OF NATIONS 19 (1990).

133. Josef Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, AM. J. INT'L L. 41 (1947); Schachter, *supra* note 116.

134. DEPT OF ST., OFFICE OF THE LEGAL ADVISOR, 12 DIG. OF INT'L L. 49-50 (1971).

135. Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963). One author commented that "The formulation was probably unrealisti-

The original United Nations Charter paradigm for the use of force has essentially three components: 1) a legal obligation to refrain from the use of force and to resolve disputes by peaceful means; 2) institutions to enforce the obligation, primarily the Security Council; and 3) a value hierarchy that formed the philosophical basis of this obligation; specifically, a preference for change by peaceful processes rather than coercion.¹³⁶ The legal obligation was enshrined in Article 2(4) of the UN Charter that obliges nations to "refrain" from the use of force in their relations with each other.¹³⁷ Under Chapter VII of the UN Charter, the Security Council is empowered to investigate international conflicts and determine if there is a threat to the peace, a breach of the peace, or an act of aggression.¹³⁸ If it so determines, the Council is authorized to take collective action against the miscreant state. The final element is the preeminent goal of maintaining international peace and security. The goal of peace was to take priority over the other goal of justice; justice could be sought but not at the expense of peace.

Unfortunately, state practice since the adoption of the Charter has challenged the validity of this Charter paradigm.¹³⁹ States frequently assert self-defense as a justification for the use of force, often in circumstances where the assertion is palpably false.¹⁴⁰ The term "self-defense" has thus become so distorted that it now represents a rather curious category of the use of force. These distortions are representative of the failure of international institutions and the emergence of new values concerning the recourse to force. While almost all international legal scholars would agree that these post-WW II developments represent serious threats to the Charter paradigm, Professors Arend and Beck argue that, in fact, a new legal paradigm has emerged: a "post-Charter

cally restrictive when stated in 1841. In the contemporary era of nuclear and thermonuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in national suicide if it [was] actually applied instead of merely repeated." W.T. Mallison, *Limited Naval Blockade or Quarantine—Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 348 (1962).

136. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 177. See also JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* 170-71 (1972).

137. U.N. CHARTER art. 2., para. 4, stating that "[a]ll 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."

138. U.N. CHARTER art. 39.

139. A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* (1997) (Weisburd details hundreds of cases of the use of force that demonstrates the utility of such uses in pursuit of vital interests).

140. *Id.*; Kathryn S. Elliott, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT'L & COMP. L. REV. 67 (1991); Note, *Self-Defense or Presidential Pretext? The Constitutionality of Unilateral Preemptive Military Action*, 78 GEORGETOWN L. J. 415 (1989).

self-help" paradigm.¹⁴¹ That is, in the face of the current UN Charter paradigm being unresponsive to the needs of the community of nations, that paradigm has been ignored and is in the process of being replaced with a new "self-help" paradigm more attune to the legitimate needs of the world community and more in line with previous customary international law which recognized multiple justifications for using force in the face of articulable threats.¹⁴² The philosophical underpinning of the Charter, that peace was more important than justice, has been undermined since members of the international community have time and again demonstrated their belief that, at certain times and places, it is better to pursue justice than to accept an inequitable peace.¹⁴³

While several scholars have argued that the legal proscription of Article 2(4) is still good law,¹⁴⁴ that view is clearly inconsistent with the overwhelming realities of state practice and the international system; a system in which the norm eschewing the use of force is violated frequently and with impunity in some of the most important cases of state interaction.

A putative norm, however, is a rule of international law only if it is authoritative and controlling.¹⁴⁵ In numerous instances there are profound violations of the Article 2(4) norm; specifically, when a state judges foreign policy goals to be at stake, it will generally not allow itself to be circumscribed by the prohibition of Article 2(4).¹⁴⁶ In a decentralized system that exists today, international law can only be constituted through state practice followed as a matter of legal obligation.¹⁴⁷

141. AREND & BECK, *supra*, note 136, at 178.

142. Bowett, *supra* note 124, at 20.

143. The view that the sovereignty and integrity of the state, as enshrined by Article 2 of the UN Charter, is no longer sacrosanct is succinctly stated in the International Court of Justice's recent Appeal's Chamber opinion in *Prosecutor v. Tadic*:

"It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of law and as a protection for those who trample underfoot the most elementary rights of humanity." Further, "a [s]tate-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. . . ."

Prosecutor v. Tadic, IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32, 54 (1966). See also, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L. L. 238 (1996); Bowett, *supra* note 124, at 50.

144. Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L L. 183-268 (1961).

145. J.L. BRIERLY, *THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 60-61 (5th ed. 1955).

146. See generally Myres McDougal & F. Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER* 93-96 (1961). The propensity to obey international rules disappears when to do so could be tantamount to self-destruction.

147. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES,

If state practice does not coincide with a putative norm, even one enshrined in a treaty such as the UN Charter, then the practice, rather than the putative Charter rule becomes the norm. To again quote Arend and Beck:

In 1945, fifty-one states chose to enunciate a particular rule relating to the use of force by ratifying the United Nations Charter. Since then, these states and over one hundred additional ones have, through their actions, chosen to change the rule. Even though there have been no formal acts that have attempted to change the written words of Article 2(4), the behavior of these states has been sufficient to effect a change.¹⁴⁸

Indeed, some have argued that Article 2(4) is "dead." Professor Franck argued in 1970 that the practice of states "has so severely shattered the mutual confidence which would have been the sine qua non of an operative rule of law embodying the precepts of Article 2(4) that, as with Ozymandias, only the words remain."¹⁴⁹ Twenty years later, in his *The Power of Legitimacy Among Nations*, Franck, in acknowledging the egregious lack of control of putative rules dealing with the use of force, commented:

The extensive body of international 'law,' oft restated in solemn texts, which forbids direct or indirect intervention by one state in the domestic affairs of another, precludes the aggressive use of force by one state against another, and requires adherence to human rights standards simply, if sadly, is not predictive of the ways of the world.¹⁵⁰

Article 51 of the Charter recognizes a state's "inherent right of individual or collective self defense if an armed attack occurs. . . ."¹⁵¹ Many legal scholars have argued that the customary law of self-defense, as developed from the *Caroline* case did not survive the language of Article 51 since states parties to the Charter waived their rights to those aspects of self-defense not specifically permitted.¹⁵² A larger number have argued that the customary international law right of self-defense remains unimpaired and includes the right to act in anticipatory self-

§102(1)(c)(3) cmt. C (1987).

148. *Id.* at 182.

149. 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 (1970).

150. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 32 (1990).

151. U.N. CHARTER art. 51.

152. Representative views are included in PHILLIP C. JESSUP, *A MODERN LAW OF NATIONS*, vol. 1166 (1948). Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 560 (1963); American Bar Association, Section on International Law and practice, Committee on Grenada, *International Law and the United States Action in Grenada*, 18 INT'L L. 266-67 (1984); Kathryn S. Elliott, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT'L & COMP. L. REV. 67 (1991).

defense.¹⁵³

Professor Myres McDougal argues that Article 51 can not be taken so literally as to preclude a victim from using force in self-defense until it has actually been attacked.¹⁵⁴ He argues that Article 51 should be interpreted to mean that a state might use military force when it "regards itself as intolerably threatened by the activities of another."¹⁵⁵ Earlier, Sir Humphrey Waldock stated that "[i]t would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first, and perhaps fatal, blow. . . . To read Article 51 otherwise is to protect the aggressor's right to the first strike."¹⁵⁶ Whatever interpretation one may take, it is undisputed that the practice of most member states since the Charter was adopted has been to recognize acts of anticipatory self-defense as legitimate.¹⁵⁷

Former US Ambassador to the United Nations, Jean Kirkpatrick, explained it this way: "The prohibitions against the use of force in the Charter are contextual, not absolute. . . . The Charter does not require that people submit supinely to terror, nor that their neighbors be indifferent to their terrorization."¹⁵⁸ One should note that the language of self-defense is being invoked to cover military responses that really bear the characteristics of reprisals or retaliation.¹⁵⁹ Nevertheless, because the language of the Charter essentially prohibits all other acts of unilateral self-help,¹⁶⁰ all uses of force are characterized as legitimate acts of "self-defense." As one legal scholar lamented:

What the provisions of the Charter have done, in effect, is to deprive states of valuable tools of self-help and of enforcement of international rights without substituting a really workable method for achieving the same ends. It remains to be seen whether states will stand by the prohibition if and when interests or rights considered to be vital are affected and peaceful methods of settlement or sanction fail.¹⁶¹

153. See, e.g. BOWETT, *supra* note 124, at 188; Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, in 37 BRIT. Y.B. INT'L L. 299-302 (1961); W. Michael Reisman, *Coercion and Self-determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642-45 (1984); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620-26 (1984).

154. Proceedings, 57 AM. SOC'Y OF INT'L L. 165 (1963).

155. *Id.*

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

157. McDougal & Feliciano, *supra* note 146, at 190; Bowett, *supra* note 130, at 188; Higgins, *supra* note 110.

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

159. See Oscar Schachter, *Self Defense and the Rule of Law*, 83 AM. J. INT'L L. 259 (1989) (discussion of expanded claims of self-defense).

160. Arts. 2(4), 51. See Brownlie, *supra* note 144.

161. GERHARD VON GLAHN, *LAW AMONG NATIONS* 512 (3d ed. 1976).

Based on an analysis of state practice since the inception of the Charter,¹⁶² that practice simply does not support the proposition that the limits of use of force enshrined in the Charter are rules of customary international law. Indeed, this is hardly a novel observation; Professor Reisman has argued for some time that the Charter standard cannot be said to state the law when measured against the practice of states.¹⁶³ Professor Arend has taken a similar position¹⁶⁴ as have others.¹⁶⁵

It must be remembered that the Charter does indeed have its own procedures for dealing with international threats to peace. If the threat is one that could reasonably be contained or turned aside through calling an emergency meeting of the Security Council, then a unilateral anticipatory self-defense response probably will not be met. At the same time, in a nuclear age, common sense cannot require one to interpret a provision in a text in a way that requires a state passively to accept its fate before it can defend itself. Even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defense.¹⁶⁶ Of course, abusive claims may always be made by states claiming to act in anticipatory self-defense. But in a decentralized legal order that is always possible; there is no avoiding the judgment that third parties will have to make on claims of self-defense in the light of all the available facts.

V. A NEW COUNTERPROLIFERATION SELF-HELP PARADIGM: THE USE OF FORCE IN RESPONSE TO WEAPONS OF MASS DESTRUCTION PROLIFERATION

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

162. See MARK WEISBURD, *supra* note 156. Oscar Schacter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291-94 (1985).

163. W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 75 (1986).

164. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1 (1990).

165. See VON GLAHN, *supra* note 161, at 512.

166. *But see* Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 147 (1963).

— Thomas Jefferson¹⁶⁷

Those that view international law as rule-based are apt to see those rules as immutable and static rather than dynamic. Repeated violations of these rules are to them a reflection of the reality that at the end of the day international law is dependent upon power: and, if there is a divergence between the two, it is power politics that will prevail.¹⁶⁸ The perception that international law is rules-based—rules impartially applied and frequently ignored because of the absence of effective centralized compliance mechanisms—is, I believe, off the mark. True, there is no world government to enforce the law of nations and the rule of law, but, as Professor McDougal has described, international law as:

Not a mere static body of rules but . . . rather a whole decision-making process. . . . It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character. . . and in which other decision-makers, external to the demanding state. . . weight and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.¹⁶⁹

Rules play a part in law, but not the only and by no means predominant part. Rather, international law should be viewed as process delineated by established practices and norms. As Judge Rosalyn Higgins explained “international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions, which are, termed ‘rules’.”¹⁷⁰

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

168. See generally GEORG SCHWARZENBERGER, *THE MISERY AND GRANDEUR OF INTERNATIONAL LAW* (1963). Professor Schwarzenberger argues that if particular rules of international law are constantly breached, we cannot continue to call them law.

169. Myres McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356-57 (1955).

170. Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L COMP. L. Q. 58, 58-59 (1968). The contrary view is best expressed in Judges Fitzmaurice and Spender's opinion in the South West Africa Cases in 1962, when the wrote:

We are not unmindful or, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other. . . but these are matters for the political rather than for the legal arena. They cannot be

Consequently, if international law is to have any relevance in the eyes of the public and guide the practices of states it cannot distance itself from that practice or the social policies it reflects. Judge Higgins is persuasive on this point:

Policy considerations, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is *part of the legal process*, just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics.¹⁷¹

We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made. The role of norms should be the achievement of values for the common good. Whether a claim invoking any given norm is made in good faith or abusively will always require contextual analysis by appropriate decision makers—by the Security Council, the International Court of Justice, by various international bodies and public opinion.

Recently we have seen the emergence of new paradigms beyond the paradigm of self-defense. These include intervention to remove an "illegitimate regime" or one that denies the "right" to democratic self-determination.¹⁷² Another, is the growing consensus that states may act for humanitarian reasons to intervene in the affairs of another country.¹⁷³ Intervention is based on the principle that sovereignty is limited and that there are certain obligations states owe each other, and which

allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view.

South West Africa Cases, 1962 I.C.J. 466 (Joint diss. op.).

171. Rosalyn Higgins, *Integration of Authority and Control: Trends in the Literature of International Law and Relations*, in *TOWARDS WORLD ORDER AND HUMAN DIGNITY* (Burns Weston & Michael Reisman eds., 1976).

172. AREND & BECK, *supra*, note 153, at 192.

173. See, e.g., Glen T. Ware, *The Emerging Norm of Humanitarian Intervention and Presidential Decision Directive 25*, 44 *NAVAL L. REV.* 1 (1997); *EMERGING NORMS OF JUSTIFIED INTERVENTION* (Reed & Kaysen eds., 1993). However, many legal scholars argue against the lawfulness of humanitarian intervention. See, e.g. Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (John Moore ed., 1974); Richard Falk, *LEGAL ORDER IN A VIOLENT WORLD* 339 (1968); Louis Henkin, *General Course*, in *RECUEIL DES COURS* 154 (1989). See also Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res 2131, U.N. GAOR 1st Comm., 20th Sess., Annex 3, Agenda Item 107, at 10, U.N. Doc. A/6220 (1965).

no state is at liberty to violate.¹⁷⁴ The practice of intervention is, arguably, an admissible means for enforcing these higher claims. The intervention paradigm has been roundly criticized by advocates of the narrow interpretation of Article 2(4) and Article 51. For example, one publicist flatly denied any flexibility in the Charter language of Article 2(4):

Article 2(4) prohibits entirely any threat or use of armed force between independent States except in individual or collective self-defense under Article 51 or in execution of collective measures under the Charter for maintaining and restoring peace.¹⁷⁵

Such an interpretation, of course, would deny the right to use force even in the face of a threat to regional or global peace and security despite the failure of peaceful efforts or measures to reverse the WMD proliferation decision of the threatening state. So, when the traditional methods of securing compliance with the law of nations (that is, negotiations, mediation, countermeasures or, in rare cases, recourse to supranational judicial bodies such as the International Court of Justice) fail, there is no legal basis for responding to the threat. The state must wait figuratively and literally for the first blow to strike. The fundamental change of circumstance brought on by an aggressor's known possession of WMD can wreck more havoc on regional security than the actual use of such weapons but it certainly increases greatly the likelihood of a full-blown armed conflict. The proliferant state will directly or indirectly attempt to achieve its goals by the manipulation of other states based on the implied threat inherent in WMD possession. Aggression does not usually begin, and injury is not usually incurred when the first weapons are fired. The uses of force are usually but one phase of a competition of interest and power.¹⁷⁶ As Clausewitz observed, the aggressor is often peace-loving, and it is his resistant victim who causes war to erupt: "[a] conqueror is always a lover of peace (as Bonaparte always asserted of himself); he would like to make his entry into our state unopposed; in order to prevent this, we must choose war."¹⁷⁷

As the foregoing analysis has amply demonstrated, such a view of the law is impracticable and far off the mark as a reflection of state practice. Self-defense, expanded to include pre-emptive acts to eliminate "imminent" threats, is legally supportable, and most scholars make

174. EMERGING NORMS, *supra*.

175. Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, in RECUEIL DES COURS 544 (1952). See also Richard B. Lillich, *Forcible Self-Help Under International Law*, in U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 129-30 (1980): pp. 129-30.

176. War is merely the continuation of Policy by other means." CLAUSEWITZ, *supra* note 3, at 87.

177. *Id.* at 376.

a plausible case for pre-emption based on the concept of anticipatory self-defense.¹⁷⁸ However, in an age of uniquely destructive weaponry that has the potential to put a population at risk of annihilation, preemptive or anticipatory self-defense responses are also inadequate. The current self-defense paradigm does not go far enough in providing the legal justification for using whatever force is necessary to eliminate a rogue state's illicit WMD program. The new counterproliferation self-help paradigm proposed here will fill that lacunae and will relieve states of the burden of continually contorting the round peg of military response into the square hole of self-defense as interpreted under Article 51.

A. *The Counterproliferation Self-Help Paradigm: Use of Force Criteria*

"When you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him."

— Franklin D. Roosevelt¹⁷⁹

Based on the clear and present danger to international peace and security, in any case where it has been determined that nonproliferation efforts have failed and a state has embarked on a program to acquire a WMD capability, any nation, unilaterally or preferably in conjunction with others, has the right to use force, as a legitimate form of self-help, to prevent WMD acquisition or to pre-empt the development and use of such weapons. International law is always subject to the criteria that it is essentially political by nature and lacking in legal standards. Since it derives from political events and is often result-oriented, as this proposal is, care must be taken to formulate a framework and to derive generally accepted principles or criteria before analyzing actual events. Otherwise every statement of law will justify or condemn a particular incident, but no principle will ever emerge or acquire precedential value.

Recognizing that the use of force should always be limited to situations that detrimentally affect the international community and the nations that are a part of it, this new paradigm of self-help should only be applied under carefully crafted criteria upon which the application of force should be judged. It is proposed here that, in order to be legally supportable, the following six criteria should be the standard for the use of force in responding to the threat of WMD proliferation.

178. See footnotes 139-166 and accompanying text *supra*.

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

1. **Notice.** A declaratory statement by a regional security organization or an individual state that WMD acquisition programs or the possession of such weapons, in violation of treaty obligations or international nonproliferation norms, is a threat to the vital national security interests of the state, regional security, and international peace and security.

As already discussed *supra*, the United Nations, NATO and the United States have already declared the proliferation of such weapons a threat to international peace and security. The United States in both its *National Military Strategy*¹⁸⁰ and *A National Security Strategy for a New Century*¹⁸¹ have put rogue nations on notice that illicit acquisition of WMD is a threat to the vital national security interests of the United States.

President Clinton's National Security Advisor, Anthony Lake, identified seven categories in which the United States would use force, unilaterally if necessary, in furtherance of national interests. One of those categories included preventing "the dangerous proliferation of nuclear weapons and other weapons of mass destruction."¹⁸²

The United States' willingness to act unilaterally was made clear when then U.S. Ambassador to the United Nations, Madeleine Albright, stated to Congress:

When threats arise to us or to others, we will choose the course of action that best serves our interests. We may act through the UN, we may act through NATO, we may act through a coalition, we may sometimes mix these tools or we may act alone. But we will do what ever is necessary to defend the vital interests of the United States.¹⁸³ (Emphasis added)

Unilateral U.S. action firmly rests within a framework of vital national interests. If interests to the United States are vital and the UN is not capable of ensuring those interests, then the United States will look to other means of ensuring the protection and preservation of those interests. As the target of an anticipated illegal use of force, a state need not wait before defending itself until it is too late to do so.

Further, a rogue state's failure to conform to the legal norms of the

180. JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA i (1997).

181. WILLIAM CLINTON, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 6 (1997).

182. Anthony Lake, *American Power and American Diplomacy*, 5 U.S. DEPT OF DISPATCH 46 (1994).

183. Warren Christopher, *A New Consensus of the Americas*, 5 U.S. DEPT OF DISPATCH 20 (1994).

world community or their solemn treaty commitments clearly threaten global order, peace and security. If an NBC-armed rogue were able to challenge a major commitment or interest of one of the established nuclear powers, and thereby cause that power to back down and appease, others could draw the conclusion that the security guarantees of the great powers—especially the United States—and the already limited promise of collective security are paper tigers. Similarly, the acquisition of these weapons in contravention of existing legal undertakings, such as the Nuclear Non-Proliferation Treaty, could lead to an unraveling of the international effort to control the proliferation of such weapons, particularly since other measures such as sanctions have proven so ineffective. This could prove highly damaging to international security. Many states have the capability to build WMD weapons but for the moment are uninterested in doing so. The actions of an WMD-armed rogue could lead to the fire-like building of arsenals of mass destruction in regions in conflict and in regions now free of such weapons. Such far-reaching changes in the distribution of power and in the credibility of the major powers would likely erode sharply the international processes and institutions that are the current foundation of international order. These changes would eviscerate the norms and principles of the UN Charter, if not lead to their eclipse by new norms antithetical to the interests of justice and peace.

In the international system today, many small and medium-sized states depend upon international norms and collective mechanisms to compensate for their own modest capabilities to provide for their own security.¹⁸⁴ Therefore, defending the stability of the system is in the national interest of overwhelming majority of states. The world order argument thus creates an additional justification for preventive or preemptive action. Protecting the world from a WMD catastrophe is long-term self-defense.

2. Threat. The threat must be a concrete, persuasive threat rather than a speculative or unsubstantiated one. Attack with WMD need not be imminent but, by objective evidence, a state must reasonably determine (1) the existence of an illicit WMD program, and (2) that past behavior or declaratory statements indicate that acquired WMD will be used as an aggressive force against its vital national security interests, or regional peace and security.

Whether or not the WMD threat is "imminent" as required under

184. Literature about international regimes abounds. See e.g., Stephen Krasner, ed., *International Regimes*, special issue of *INTERNATIONAL ORGANIZATIONS*, vol. 36, no. 2, (1982); ROBERT KEOHANE, *AFTER HEGEMONY* (1984); VOLKER RITTBERGER/PETER MAYER, *REGIME THEORY AND INTERNATIONAL RELATIONS* (1993).

the current self-defense paradigm is irrelevant, and requiring such calculations prior to using force potentially has the affect of forcing a state or states to wait until it's too late. The rogue proliferator will have already deployed the weapon or, worse, used it. When the threat to a state's vital interests is predicted as the logical conclusion of a course of events, that state, in cases of WMD proliferation, must have the legal right to take preventive action rather than waiting until the threat becomes more immediate. While there is latitude for national decision makers to make independent determinations concerning what are a state's vital national interests, inevitably, once a decision is made and acted upon, it will be the community of nations that ultimately decide the correctness of the decision based on whether the nation's perceptions were reasonable, given the actual circumstances under which it acted and whether a reasonable nation with such perceptions would have acted the same way.

A nation's decision makers, under this condition, need to make it emphatically clear that illicit WMD acquisition is a threat of such magnitude that the perpetrator is on notice that if the traditional tools of statecraft or diplomacy fail, all other means, to include the use of force, are available. A nation that uses those "other means" will be legally justified. So, in addition to the political declaration the world community has made against WMD proliferation, states need to develop not only the military capability to act, but also provide the requisite domestic legal authority. For example, in 1966, Congress authorized the President to "use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens."¹⁸⁵ A similar authorization to target WMD "infrastructure" developed by rogue states would accomplish the dual purpose of raising the costs to a potential proliferator and reinforcing the legal basis for responding to the threat.

In determining intent, the relationship between the parties is critical. Past aggressive acts, disregard for sovereign integrity, support for terrorism and terroristic acts against the state or its allies, violations of the laws of war, and repetitive threats of future action may support a reasonable apprehension of attack. On the other hand, prior peaceful relationships would raise the standard to one requiring a direct and specific threat of the use of force to provide justification for the use of force; i.e. meeting the anticipatory self-defense standard. In sum, evaluation of the facts must lead a reasonable person to believe that a state, which historically has not complied with international norms or made declarations of its intent not to abide, has embarked on the path

185. U.S. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1255, § 324 (1996).

of WMD proliferation, and the threat is sufficiently concrete to require contemplation of the extraordinary application of the use of force.

3. Force Imperative. A finding that further delay in undertaking the preventive strike will compromise security and will unreasonably increase the possibility of harm to its civilian population or will exacerbate the threat to the region or international peace and security.

The threatened state must determine, in terms of time and degree, whether a use-of-force response is necessary. If so, this standard defines a clear course of action, and critically, provides the international community with a means with which to judge any action taken. Once a state has chosen to use force, the legality of the act is not determined by the depth of the state's explanation, but by how closely the act corresponds to the pattern of practice sanctioned by the international community. In how to determine the legitimacy of the response to the threat I would offer Professor Walzer's useful commentary:

The line between legitimate and illegitimate first strikes is not going to be drawn at the point of imminent attack but at the point of sufficient threat. That phrase is necessarily vague. I mean it to cover three things: a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk. . . . Instead of previous signs of rapacity and ambition, current and particular signs are required; instead of an "augmentation of power," actual preparation for war; instead of the refusal of future securities, the intensification of present dangers.¹⁸⁶

So, expanding on Professor Walzer's commentary, states that demonstrate hostile intentions, act in such a way as to abrogate specific legal undertakings or contravene accepted norms of international behavior and otherwise act in a way to adversely affect the peace and security of a region or neighboring state become a legitimate target for a military response to those illicit acts—a response that is legally justifiable and therefore legally appropriate. The acquisition of weapons of mass destruction fits nicely under this criterion. Such actions can confirm an intent to injure, create a positive danger, and raise the risks of waiting. Their dispersal in time of crisis would certainly signal preparation for war. Acquiring such weapons and a viable delivery system and preparing for their use would qualify as a "sufficient threat," particularly if done so by a "rogue" regime since such regimes have already demonstrated their propensity to act outside the bounds of normative behavior.

Obviously, there are risks in preventive/preemptive responses to

186. MICHAEL WALZER, *JUST AND UNJUST WARS* 81 (2d ed. 1992).

WMD threats as posited here. It has the potential for nuclear confrontation. If the strike is not successful in eliminating an aggressor's NBC weapons and he opts to use them in reply, the use of force would have unleashed a terrible chain of events. Wars such as this may or may not prove to be massively destructive, depending on the choices made by the aggressor and the character of the arsenals and delivery systems available to him. No rogue has the nuclear capacity to annihilate a major power, although each major power has the capacity to annihilate a rogue. The nuclear powers would have to consider whether or how to use nuclear weapons in meeting the aggression of such states, not simply in deterrence or for national survival, but for larger purposes of international order. Arguing here that it would be legal to do so does not make for an easy answer since any use of force will always have moral, geo-political and domestic ramifications to a state's decision-makers.

As the world's only superpower, the United States faces a real dilemma in cases where it might undertake preventive/preemptive strikes against rogue states that have not first made military attacks on it. If it arrogates to itself the right to determine when and how to strike at nations it considers outside the law, it may be judged as having put itself above the law. In this particular historical moment, the United States, as the world's dominant military, economic, and political power, has been cast in the role of primary defender of the global status quo—of the existing balance of global power and of the institutions it has labored to put in place to promote global stability, prosperity, and liberty.¹⁸⁷ As the defender of the status quo, it has a special stake in turning back the aggressions and deterring the potential aggressions of rogue nations. The concern that the United States not put itself above the law is particularly evident among its closest allies, for their partnership with the United States is based on a belief in its benign use of power and on the legitimacy it enjoys within their societies as a steward of common interests.¹⁸⁸ Both of these qualifications would be eroded by acts outside the law.

The United States, therefore, should always encourage, where possible, collective action against WMD proliferation as it has done with the NATO Alliance, and use the standards set forth here in these criteria to explain why the use of force was necessary, justifiable and legally supportable. Today, the vast majority of states side with the United States in its commitment to the preservation of hard fought nonproliferation norms, so long as this permits them the opportunity to make evolutionary changes in the ways that promote justice, peace and pros-

187. See WILLIAM CLINTON, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 5-6 (1998).

188. For example, NATO members have leveled criticism at the potential unilateral use of American military force to destroy WMD. See Natalie J. Goldring, *Skittish on Counterproliferation*, BULL. OF ATOMIC SCIENTISTS 12 (1994).

perity. The world community must declare that any state that embarks on an illicit WMD acquisition program or allows transnational terrorist groups to do so on their territory forfeits any of the protections and procedural guarantees currently in place and enshrined in the UN Charter. It is vitally important, therefore, for the United States, as currently the only power capable of responding worldwide to the proliferation threat, establish the concrete legal basis for the use of force in order that the world community will accept and embrace the standard supporting nonproliferation.

4. Discriminate Response. The use of force to eliminate the threat is proportional. That is, the least amount of force should be applied to resolve the threat. If destruction or elimination of the WMD program is required, the use of force will be limited to the facilities that relate directly to the threat.

Another essential requirement must be that only the minimum force necessary be used to eliminate the threat. Specifically, this principle of proportionality is enshrined in traditional *jus ad bellum* (when it is legally justified to use force) and *jus in bello* (the appropriateness of the type and use of weapon, and the duration and magnitude of weapon use in comparison to the object of attack and the potential for collateral damage) concepts of conducting war or using force in international relations.¹⁸⁹

With regard to *jus ad bellum*, the proportionality of prevention/preemption is clouded by a number of factors. Even if the use of force successfully prevents the aggressor's use of those weapons, the cost of that thwarted aggression cannot be known—certainly not publicly proven. Most WMD arsenals have been used not militarily but politically, to coerce a potential adversary to make an important concession (either to do or to refrain from doing something).¹⁹⁰ The costs of this "use" cannot readily be compared with the costs of the military attack upon them. However, the potential coercive use of WMD arsenals does provide a legitimate basis for a prevention/preemption response. As history has demonstrated dramatically and with regularity, appeasement or untimely inaction typically emboldens aggression and those acts of aggression are usually only reversed at an enormous cost.¹⁹¹

189. See, e.g. FRITS KALSHOVE, CONSTRAINTS ON THE WAGING OF WAR 29-32 (1987); ESBJORN ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 12-14 (1979); DEP'T OF THE ARMY, THE LAW OF LAND WARFARE (FM27-10) 3 (1956).

190. During the Cold War nuclear protagonists deterred each other through the threat of mutual annihilation. Likewise, non-nuclear states were coerced through threats, overt or implied, of the possibility of nuclear attack. See LAWRENCE FREEDMAN, THE EVOLUTION OF NUCLEAR STRATEGY 87-8, 192-3, 318-19 (1983).

191. *Id.* at 95; HENRY KISSINGER, DIPLOMACY 310—12, 531 (1994).

5. Positive Outcome. There is a reasonable chance that the proposed use of force will be successful. That is, it will eliminate the WMD program or site, or significantly, in terms of cost, time, and resource allocation, degrade the ability of the proliferator to resurrect the illicit program.

The military and technical risks of any use of force have to be carefully weighed and evaluated in terms of objective national criteria defining the "success" of the use of force. Usually military forces will be tailored to the target, backed by timely and accurate intelligence and with the right on-call technical experts.¹⁹² Depending on the specific situation, the political costs—both at home and overseas—also are likely to vary. They could range from intensely critical in the case of interception of questionable but legal dual-use transfers to widely welcoming in the event of use of military forces to block transfer of or recover stolen NBC weaponry or critical materials.

Whatever the scenario, it is vital that an appropriate assessment be made to determine if the attack will either eliminate the WMD program or so degrade its capabilities or resources that the proliferator can no longer carry on the program, at least for the near term. If information is insufficient to give the responding state high confidence that the program can be eliminated, then the use of force should be shelved in favor of using the other tools of statecraft or until sufficiently identifiable targets present themselves. So, for example, once a program has been underway for some time, the military requirements of successful military preventive action—from accurate intelligence on all facilities and sites to target destruction with a politically acceptable risk of collateral or environmental damage—are likely to be very high.

6. Last Resort. The potential victim state should continuously seek to resolve the threat by other means unless it would, based on the actions of the aggressor, reasonably be seen as futile.

To the extent practicable, a state must affirmatively pursue alternative modalities of resolution and remained engaged in the diplomatic process until the ultimate moment of action. Military action shall not be undertaken unless all other reasonable means have been tried and have failed. This does not mean all conceivable means, rather those that policy makers within a particular country have determined to be sufficiently exhausted as to reasonably leave the recourse to force as the

192. See CHAIRMAN OF THE JOINT CHIEFS, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (1997); DEPT OF THE ARMY, FM 100-5 OPERATIONS (1993).

reasonable course of action.¹⁹³ These decisions are never easy and there is no commonly acceptable standard of proof by which states make these decisions. While the evidence must be more than "some" it does not have to rise to a level beyond a reasonable doubt. Evidence sufficient to convince any prudent person that a threat to the national security or vital national interests of the state will warrant a military response. What that evidence is depends on the circumstances. Obviously, when a state is confronted with a rogue regime bent on acquiring WMD the last resort criterion will be subject to a quite narrow interpretation.

Of course, if the political climate supports it, a state should always attempt to secure UN Security Council action or, minimally, an endorsement for the use of force in response to WMD proliferation. There already exists a presumption of Security Council support given its condemnation of proliferation. This could help not only to fill non-compliance gaps, but also to build norms and lessen insecurities that could shape other countries' proliferation decisions. While a state could always seek endorsement by the Security Council for a decision to strike preemptively, there are, however, many practical reasons not to consider such a move, not least the warning likely to be given to the target state proliferator by such an action, which might induce it to disperse its weapons or to perhaps use them before losing them.

Also, preemptive use of force is an exceedingly unpopular measure usually generating strong negative reactions in key regions of the world.¹⁹⁴ In fact, even the characterization of certain states as "rogue" for violating established international norms by the United States, and its subsequent policies to isolate them and undertake counterproliferation preparations for possible military action against their WMD programs and facilities have been much criticized, not least by U.S. friends and allies who see such actions as an effort to put the United States above or outside the law.¹⁹⁵ In any case, it is extremely difficult to separate defense of national interests that one state but not others see as common, or to justify an attack as a defense of norms that it asserts but others do not support.

In sum, in order for use of force to be justified under this new paradigm all six interrelated conditions or criteria must be satisfied if the

193. "[T]aken literally. . . 'last resort' would make war morally impossible. For we can never reach lastness, or we can never know that we have reached it." *Id.* at xiv.

194. See, for example, responses to Israeli attack on Iraqi's nuclear reactor in 1981 and the United States raid on Libya in 1986 drew criticism from around the world. See United Nations, Security Council, Official Records: Resolutions and Decisions of the Security Council, 1981, Resolution 487 (1981) S/INF/37 (1981); Frederick Zilian, Jr., *The U.S. Raid on Libya—and NATO*, ORBIS, Fall 1986, at 499-524; CLYDE MARK, LIBYA: U.S. RELATIONS, CONGRESSIONAL RESEARCH SERVICE (1987).

195. See generally MICHAEL KLARE, ROGUE STATES AND NUCLEAR OUTLAWS: AMERICA'S SEARCH FOR A NEW FOREIGN POLICY (1995).

use-of-force response is to be legitimate and legally supportable. Obviously, in determining the propriety of the use of force in these cases certain ambiguities, problems of interpretation, difficulties of factual application, and standards of proof problems will arise. There will always be those that require more certainty and specificity than is factually or politically possible. However, as Professor Brownlie observed: "Those who demand the perfect definition present an attitude of mind more suited perhaps to the design of precision instruments than the making or formulation of legal rules."¹⁹⁶

Inevitably, the nature of the threat to peace and stability, the evidence presented establishing an illicit WMD program, the degree of limitation on the use of force in response to the threat, the achievement of the desired goal by the use of that force, and the degree of subsequent reaction to that action by the world community at large will determine the legal appropriateness of each instance in which force was the chosen in response. Four previous cases in which the acts in response to the threat were characterized as self-defense (or likely would have been so described in one case) have been chosen to apply the criteria to demonstrate how this new legal paradigm supports and validates the application of force in response to proliferation threats with clear, easy-to-understand guidelines for both decision makers and their publics.

B. Anticipatory Self-Defense in Responding to the WMD Threat: Four Case Studies

Neither the United States of American nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small. We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.

— John F. Kennedy¹⁹⁷

1. The Cuban Missile Crisis

One of the most useful examples for the application of these criteria is the Cuban Missile Crisis of 1962. President Kennedy, in response to photographic evidence that the Soviets were installing medium range ballistic missiles capable of hitting large portions of the United States,

196. Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. 183 (1961).

197. 47 DEP'T OF ST. BULL. 715, 716 (1962) (address by President Kennedy, *The Soviet Threat to the Americas*).

declared that United States military forces would interdict the delivery of offensive weapons and associated material going to Cuba.¹⁹⁸ Cuba was to be "quarantined" from receiving any "offensive" weapons.¹⁹⁹ This involved putting naval forces around the island and boarding and searching all vessels bound for Cuba, in effect a blockade.²⁰⁰ Further, it was announced that any continuation of "offensive" military preparations would justify "further action" on the part of the United States.²⁰¹ The State Department primarily defended the "quarantine" as a collective action against a threat to the region as a result of authorization of the Organization of American States and thus appropriate under the UN Charter.²⁰² Most commentators on the legality of the United States' activities sought to justify the naval "quarantine" used to stop missile parts from reaching Cuba as a legal exercise of self-defense.²⁰³ Otherwise, it would be a violation of the Article 2(4) prohibition against the use of force.²⁰⁴ However, under the counterproliferation self-help paradigm the quarantine would have been legally supportable as a legitimate response to a WMD proliferation threat.

The nonproliferation norms that exist today did not exist in 1962.²⁰⁵ If it had, this clearly would have been a violation of the NPT. Certainly, the United States was unambiguous in its response and made it emphatically clear that this deployment of nuclear-armed missiles was a grave threat to potentially the survival of the nation and to regional peace and security.²⁰⁶ Arguably, the presence of missile sites or nuclear weapons in Cuba did not per se constitute a threat against the United States and the Western Hemisphere. Their presence, only when considered together with other factors, created a real threat. The most important factor to consider is the purpose behind the introduction of the missiles and the intention for subsequent use.²⁰⁷ The aggressive inten-

198. See James S. Campbell, *The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position*, 16 STAN. L. REV. 160 (1963); C. G. Fenwick, *The Quarantine Against Cuba: Legal or Illegal?*, 57 AM. J. INT'L L. 588 (1963). Note that this volume has several articles on this issue debating the legal validity of the quarantine.

199. President John F. Kennedy, Proclamation No. 3504, 27 Fed. Reg. 10401 (1962), 47 DEP'T OF STATE BULL., *supra* note 197, at 717.

200. *Id.*

201. *Id.*

202. See Abe Chayes, *The Legal Case for US Action on Cuba*, 46 DEP'T ST. BULL. 763 (1962).

203. Myres McDougal, "The Soviet-Cuban Quarantine and Self Defense," 57 AM. J. INT'L L. 597 (1963); Carl Christol and Charles Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated material to Cuba, 1962*, 57 AM. J. INT'L L. 525; Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963).

204. Leonard Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963).

205. The Nuclear Non-proliferation Treaty was not signed until 1968. See footnotes 75-78 and accompanying text, *supra*.

206. 47 DEP'T OF ST. BULL., *supra* note 197.

207. McDougal, *supra* note 208.

tions, based on past acts, of Cuba and the Soviet Union were clear.²⁰⁸ The record of the Soviet Union in Hungary and East Berlin, and Castro's well known support for terrorism and "revolutionary" armies throughout central and South America demonstrated their aggressive intentions, and previous attempts at attacking or undermining regional peace and stability.²⁰⁹ The mere presence of these missiles in Cuba would have given Castro the opportunity for blackmail and other mischief in the region.

In customary self-defense terms, the question must also be asked as to whether or not the danger to the territorial integrity or political independence or vital national interest of the United States was imminent?²¹⁰ The answer would be affirmative if the mere deployment of nuclear missiles in Cuba was considered as the danger. If there was enough evidence to show that the other side was planning an attack using weapons of mass destruction, the right of self-defense may be invoked, even though the exact date of the expected attack is unknown.²¹¹ We can avoid this quandary under the new paradigm by the fact of WMD proliferation, and that the weapon of choice is a WMD in the hands of one whose intentions could easily be read from his past conduct.

The United States response was proportional and reasonable to the threat. Indeed, given the Cold War climate of the times, the response was constrained by the real concern that the overt use of military force could result in a nuclear Armageddon.²¹² Assessing Soviet and Cuban intentions, U.S. decision-makers felt that this limited measure had a reasonable chance of success in persuading the Soviets to remove the missiles without recourse to more violent measures.²¹³ Obviously, if this had not achieved the removal of the threat, other measures would have been required. Finally, the United States and the Soviet Union continuously sought to resolve the crisis through measures other than force.²¹⁴ Ultimately, it was a combination of force, threat of nuclear war, and willingness to compromise that led to a solution that avoided further uses of force. But, the quarantine and the ultimate resolution of the crisis met all the criteria of the new counterproliferation self-help paradigm.

208. Brian Crozier, *Soviet Support for International Terrorism*, in BENJAMIN NETANYAHU, ED., *INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE* 64-78 (1981).

209. Fenwick, *supra*, note 198, at 589-90.

210. See Martin Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOKLYN J. INT'L L. 493 (1990).

211. McDougal, *supra* note 208.

212. See GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 56-62 (1971).

213. *Id.*

214. *Id.* at 63-66.

2. The Israeli Attack on the Iraqi Nuclear Reactor at Osirik

In 1981 Israeli jets bombed an Iraqi nuclear reactor at Osirik. The international community roundly condemned Israel, and the UN Security Council passed a resolution strongly condemning "the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."²¹⁵ Few legal scholars argued in support of the Israeli attack.²¹⁶ Of course, subsequent events demonstrated the perspicacity of the Israelis, and some scholars have revisited that attack arguing that it was justified under anticipatory self-defense.²¹⁷

In 1981, as it continues today, there exists a state of war between Israel and Iraq.²¹⁸ Israel's actions and statements prior to the attack made it clear to the international community that it would not tolerate any threats to its national security.²¹⁹ Iraq was certainly on notice that any threat, whether it be WMD or conventional, would result in a response by Israel.²²⁰ Iraq is, by all accounts, a "rogue" state, flouting international norms, the will of the international community, as reflected in the numerous Security Council resolutions, and its acts of aggression against Kuwait and Iran.²²¹ It has never recognized Israel as a state and considers itself at war with Israel.²²² Iraq is also known for its support of terrorism, and has been implicated in terroristic acts such as the

215. U.N. SC Res. 487, 36 UN SCOR, 2288th mtg., UN Doc. S/RES/487 (1981). See also W.T. Mallison & Sally Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self Defense?*, 75 VAND. J. TRANSNAT'L L. 417 (1982).

216. See Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983).

217. See, e.g., Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMPLE INT'L & COMP. L.J. 437 (1995); Uri Shoham, *The Grenada Intervention: The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191 (1985).

218. U.S. Congress, Senate, Committee on Foreign Relations, *The Israeli Air Strike*, Hearings, at 1, 4 (1981) (statement of Walter J. Stoessel, Jr., Acting United States Secretary of State).

219. For a detailed account of Israeli decision making and subsequent justifications see DAN MCKINNON, *BULLSEYE IRAQ 1988* (especially chapters 13 and 18).

220. Given the state of hostilities between Israel and Iraq, as well as Israel's overt military actions against perceived threats it is reasonable to assume Iraq would have known that Israel would attack if evidence persuaded them it was a site for nuclear weapons programs. See Steve Levenfeld, *Israeli Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisals under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1 (1983). Also, the Iranians had tried to destroy the facility during its war with Iraq. See Frits Kalshoven, *Prohibitions or Restrictions in the Use of Methods and Means of Warfare*, IGE DEKKER AND HARRY POST, EDS., *THE GULF WAR OF 1980-1988: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE* 106 (1992).

221. Lake, *supra* note 8.

222. Iraq has never signed an armistice with the Israelis following their 1967 war. Moreover, Iraq has announced its commitment to the destruction of Israel. Hearings, *supra* note 218, at 76.

attempted assassination of former President Bush.²²³

There is compelling evidence that the nuclear reactor bombed by Israel would have been used to produce plutonium for weapons purposes even though Iraq had repeatedly denied it had a nuclear weapons program.²²⁴ Subsequent events have definitively established what Israel through its intelligence sources discovered; Iraq's intent to make nuclear weapons and to use them against Israel.²²⁵ Iraq continued to deny any attempts at manufacturing nuclear weapons and it is reasonable to assume that resorts to peaceful attempts at redress had little likelihood of success.²²⁶ International inspections continued to give the Iraqi program a clean bill of health.²²⁷ The proportionality requirement was met since the attack occurred prior to the reactor's activation, limiting any radioactive fallout, and attacking the facility on a weekend when there would be few workers about. There was certainly a good chance of success in terms of severely degrading Iraq's nuclear capability since this was the only known facility and the physical destruction of it would destroy years of effort.²²⁸ It would be exceedingly costly and time consuming to reconstitute the program.

Most legal scholars originally condemned the attack because it was argued that the danger was not so "imminent" as to require this use of force.²²⁹ If the threat is not imminent, it does not meet the anticipatory self-defense requirements and therefore "dangerous as they are, customary international law [does] not consider such displays of force illegal so long as they remained on . . . the state's own territory, unless there was evidence of an immediate intention to use them for attack."²³⁰ Under the counterproliferation self-help paradigm, however, given the horrific nature and potential for destruction and disruption of peace and international security, the mere acquisition of nuclear weapons (or any other weapon of mass destruction for that matter) by this state would be a threat to regional security. Any illicit acquisition of weapons of mass destruction and their attendant catastrophic consequences should logi-

223. PRESIDENT WILLIAM CLINTON, ADDRESS TO THE NATION, June 26, 1993, *reprinted in* 49 CONG. Q. ALMANAC 21-D (1993).

224. Marc Dean Millot, *Facing the Emerging Reality of Regional Nuclear Adversaries*, WASH. Q 41, 48 (1994).

225. Shoham, *supra* note 217, at 208.

226. *Israeli and Iraqi Statements on Raid on Nuclear Plant*, N.Y. TIMES, Jan. 16, 1986, at A1.

227. See W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?* 15 VANDERBILT J. TRANSN'L L. 420 (1982).

228. Beth Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 NEW YORK U. L. REV. 203, 226 (1984).

229. Mallison & Mallison, *supra* note 227, at 429; MARIAN NASH LEICH, U.S. DEP'T OF ST., CUMULATIVE DIG. OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 2933-35 (1995).

230. Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 549 (1963).

cally give a threatened state the right to respond. Illicit WMD acquisition is a clear and present danger requiring a response. The new paradigm accepts that shared values implicit in the current international legal order require the international community or member states to respond to threats to its survival and a unilateral response is appropriate when the international community cannot or will not respond.

3. The U.S. Secretary of Defense's threat to destroy Libya's Chemical Weapons Facility

In the 1980s, Libya produced over 100 tons of chemical weapons agents, and it is one of the few nations to have employed chemical weapons.²³¹ In 1987 it dropped chemical agents from a transport aircraft against Chadian troops.²³² Libya is not a party to the Chemical Weapons Convention, but it is a party to the 1925 Gas Protocol which bans the use, but not the possession, of chemical weapons in warfare.²³³ In response to intense media scrutiny, Libya supposedly shut down its facility in 1990 but re-opened it in 1995 as a "pharmaceutical" facility, and began constructing a large underground chemical facility near Tarhunah, a mountainous region southeast of Tripoli.²³⁴ The United States has accused Libya of continuing its chemical weapons program, which Libya denies.²³⁵ Libya has also embarked on a ballistic missile acquisition program.²³⁶ It is attempting to acquire the No Dong missile from North Korea with a reported range of up to 1000 kilometers.²³⁷ This would allow Libya to threaten all of Egypt, Israel, NATO countries in southern Europe and U.S. forces in the Mediterranean.²³⁸

Secretary of Defense William Perry condemned the Libyan chemical weapons program, in announcing it to the world, and when asked whether the United States was contemplating the use of force to destroy the plant, he replied, "I wouldn't rule anything out and I wouldn't rule anything in."²³⁹ He also stated that the United States would not allow

231. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 35.

232. OFFICE OF THE SEC. OF DEF., PROLIFERATION: THREAT AND RESPONSE 26 (1996); *Duel over Rabta*, ECONOMIST, Jan. 7, 1989, at 34. Also, in January 1989, a Sudanese rebel group alleged that Libya had used chemical weapons against it during the previous six months. John Pear, *Suddenese Rebels Say They are Victims of Poison Gas*, N.Y. TIMES, Jan. 10, 1989, at A12, col. 1.

233. Multilateral Bacteriological (Biological) and Toxin Weapons, 26 U.S.T. 583, T.I.A.S. 8062, available in 1975 WL 39791.

234. PROLIFERATION: THREAT AND RESPONSE, *supra* note 232, at 27.

235. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 35.

236. *Id.* at 37.

237. *Id.*

238. *Id.* at 36.

239. John Lancaster, *Perry Presses U.S. Charge Against Libya*, WASH. POST, Apr. 4, 1996, at 1.

Libya to open the plant.²⁴⁰ He later warned Libya and other nations that any use of chemical weapons against it would result in a “devastating response. In every situation that I have seen so far, nuclear weapons would not be required for response, that is, we could make a devastating response without the use of nuclear weapons, but we would not forswear that possibility.”²⁴¹ Under anticipatory self-defense analysis a use of force against Libya’s chemical warfare capability and its means of delivery without a demonstration of “imminent” use would fail and therefore be subject to condemnation as an illegal use of force. Under the counterproliferation self-help paradigm the use of force would, however, be legally supportable.

First, United States pronouncements were clear and unambiguous that it would view acquisition of this capability as an international threat to regional peace and security.²⁴² The acquisition efforts continued despite overwhelming world condemnation for chemical weapons. Libya has already demonstrated its contempt for its treaty obligations by using chemical weapons in violation of the 1925 Gas Protocol. It is a well-known sponsor of terrorism, and it is currently harboring at least two suspects in the Pan Am 103 bombing in 1988, in violation of Security Council Resolution 731.²⁴³ It is a state under UN sanctions, imposed by UN Security Council Resolution 748, for its refusal to comply with its international legal obligations.²⁴⁴ It is a rogue state.

Second, Libya has already demonstrated its willingness to use chemical weapons and its attempts at acquiring a long-range ballistic missile capability is further evidence of its offensive intentions.²⁴⁵ Libya’s well-documented terrorist affiliations and a report that it was training its air forces in mid-air refueling, a technique that could conceivably enable Libyan aircraft to reach Israel, increased the concern that Libya would use its chemical weapons.²⁴⁶ Third, based on past acts and future intentions, the United States could reasonably conclude that the best time to strike would be before the weapons are deployed.²⁴⁷ On

240. Secretary Perry declared that Libya “will not be allowed to begin production” and strongly intimated that the United States would use military force to enforce this promise. Philip Shenon, *Perry, in Egypt, Warns Libya to Halt Chemical Weapons Plant*, N.Y. TIMES, Apr. 4, 1996, at 4. No attempt was made to ground this declaration on any legal rationale for justifying the use of force against the site in Libya. Libya is not a party to the Chemical Weapons Convention and there does not exist any legal prohibition against possessing chemical weapons. Interviews, Office of Legal Advisor to the Chairman of the Joint Staff, Aug. 27 1998.

241. William J. Perry, Statement on Libyan Chemical Warfare Facility at Tarhunah Air War College Conference on Nuclear Proliferation Issues (Apr. 26, 1996).

242. *Id.*

243. See U.S. DEP’T OF ST., PATTERNS OF GLOBAL TERRORISM 24 (1997).

244. *Id.*

245. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 37.

246. *Duel over Rabta*, *supra* note 232, at 33.

247. Targeting of WMD is particularly onerous once deployed from production facili-

the other hand, as far as the facts are currently and publicly known, the United States could just as easily conclude that this is not the right time to respond. As already discussed, an evaluation of state use of force under this criterion will be heavily situational and fact dependent, subject to the responding or threatened state's evaluation of evidence.²⁴⁸ Fourth, an attack on the identified facilities will in all likelihood meet the proportionality test. They are located in an isolated area so damage and injury to civilians and civilian infrastructure would be minimal.²⁴⁹ Finally, Libya has already demonstrated its disregard for peaceful resolution of this issue and has denied that it has a chemical weapons program. By any reasonable standard further dialogue or Security Council resolution would have no effect on Libya's CW program. Under the counterproliferation self-help paradigm the use of force to eliminate this threat is legally supportable.

4. The United States Attack on the Sudan "Chemical Weapons" Facility

On August 20, 1998, the United States attacked with cruise missiles and destroyed a pharmaceutical plant near Khartoum, Sudan that U.S. intelligence sources had identified as a chemical weapons facility.²⁵⁰ This attack was part of a U.S. response to the bombings of two American embassies in East Africa two weeks earlier by a terrorist group led by Osama bin Laden, an exiled Saudi who had "declared war" on the United States and the West. The United States also attacked bin Laden's headquarters in Afghanistan. The legal justification for the U.S. attack was "as an act of self-defense." More specifically, because the bin Laden terrorist group was behind these and other terrorists attacks, he had declared his intention to conduct more attacks, and because "key terrorist leaders" were gathered at the headquarters compound the continuing threat was sufficient "imminent" to justify the attack. The Chairman of the Joint Chiefs of Staff explained that this was an act of "prevention," stating, "[t]his is not simply a response to some specific act, but a concerted effort to defend U.S. citizens and our interests around the globe against a very real and very deadly terrorist

ties because of their small size and a proliferator's ability to hide such weapons in populated areas. See Robert Chandler, *Counterforce: Locating and Destroying Weapons of Mass Destruction*, INSTIT. NAT'L SEC. STUDIES OCCASIONAL PAPER #21, August 1998.

248. See footnotes 147-196 and accompanying text, *supra*.

249. The Tarhunah facility is 60 kilometers southeast of Tripoli in an unpopulated mountainous region. PROLIFERATION:THREAT AND RESPONSE, *supra* note 218, at 26.

250. The facts as discussed here are derived from the Washington Post and New York Times reports of the U.S. attack. See James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, at A1; Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan*, WASH. POST, Aug. 21, 1998, at 1.

threat.”²⁵¹

As discussed earlier, the use of force in response to these attacks contained elements of both self-defense and reprisals.²⁵² And, as is always the case, such acts are always controversial even if popular. As one law professor complained: “The U.S. and Israel are the prime supporters of the notion of retaliation in the world, and they tend to make legal justifications that other people are uncomfortable with. I’m not convinced that punishment is useful as a deterrent.”²⁵³ Assuming the attack on bin Laden’s headquarters was a legally sustainable act of self-defense, the attack on the “chemical weapons” factory is more problematic. So far, the only evidence available supporting the attack is the U.S. claim it was a chemical weapons facility, that bin Laden was known to have made financial contributions for its construction, and that bin Laden was known to be seeking to acquire chemical weapons for use in terrorist attacks.²⁵⁴ Assuming for the moment that the facility was in fact a chemical weapons factory,²⁵⁵ the United States has not made a valid argument for use of force under anticipatory self-defense unless it can convincingly explain that acquisition and use by bin Laden was imminent. To date, no such claims have been made.

The United States response fares better under the counterproliferation self-help paradigm. First, as previously noted, a number of statements and pronouncements have condemned the proliferation of chemical weapons.²⁵⁶ The United States has made it clear that it would not tolerate the acquisition of such weapons and it would respond if it considered it a threat to its vital national security interests.²⁵⁷ Since the most recent use of chemical weapons involved a terrorist attack (i.e. the March 1995 Aum Shinrikyo attack on the Tokyo subway with cyanide), there was heightened concern for terrorist use of such weapons.²⁵⁸ Since at least 1996, Sudan has continued to serve as a refuge and training hub for a number of terrorist organizations. Sudan has failed to comply with the Security Council’s demand to cease supporting terrorists and turn over at least three terrorists wanted in the 1995 assas-

251. Bennet, *supra* note 250.

252. See footnotes 102-131 and accompanying text, *supra*.

253. Serge Schmemmann, *In the War Against Terrorism, Any Attack Has Pros and Cons*, N.Y. TIMES, Aug. 21, 1998, at A1, quoting Professor Roger Clark, Rutgers University Law School. Another professor from Wharton Business School is quoted as calling the attacks “a violation of international law.” *Id.*

254. *Supra* note 250.

255. See Steve Chapman, *Doubts Continue to Grow About Sudan Raid*, CHI. TRIB., Nov. 1, 1998, at 1.

256. See footnotes 73-78 and accompanying text, *supra*. See also ARMS CONTROL AND DISARMAMENT AGENCY, CHEMICAL AND BIOLOGICAL WEAPONS READER, Jan. 21, 1994.

257. Shenon, *supra* note 240.

258. PROLIFERATION THREAT AND RESPONSE, *supra* note 16, at 50.

sination attempt of President Mubarak.²⁵⁹ Assuming the facility was actually a chemical weapons facility, possession of such a clandestine facility violates the universal ban on such weapons. Currently 169 states have signed the Chemical Weapons Convention (CWC) and there are 125 state parties.²⁶⁰ Although Sudan has not signed the CWC, arguably the CWC is reflective of the will of the international community as a whole that states will not possess or use chemical weapons. Therefore, the prohibition against chemical weapons is arguably a preemptory norm of general international law from "which no derogation is permitted."²⁶¹

Second, while there is little evidence bin Laden was about to use chemical weapons against the United States, there is more than sufficient evidence for any reasonable observer to conclude he was well on the road to acquiring such a capability, and that once so obtained he would find a way to use it. The existence of chemical weapons and an expressed or implied intent to use it against vital national security interests would be sufficient. The use of force was discriminate and proportional. Precision weapons were used to attack the facility, and it was done in a manner to limit destruction. Given the use of these precision guided munitions there was a great probability of success. The facility was completely destroyed and, although the Sudanese have vowed to rebuild it, it is unlikely that it will be rebuilt for some time to come. Finally, it is quite obvious that there would have been little chance of resolving the threat peaceably given bin Laden's stated intentions and the Sudan's failure to comply with Security Council resolutions by continuing to harbor terrorists.

As all of these examples demonstrate, the new counterproliferation self-help paradigm is clear, predictable, credible and effective in establishing a new norm for the use of force. It is constraining in that it is only applicable in response to violations of the nonproliferation norms and the rogue state has already, by its actions, demonstrated it is not amenable to peaceably stopping and rolling back its WMD acquisition program. It augments but does not supplant the self-defense paradigm by authorizing states, unilaterally or collectively, to prevent WMD proliferation as well as pre-empting a WMD capability before it becomes an imminent threat. And finally, it allows states to respond to one of the greatest threats to the survival of civilization and international peace and security even though, at the moment, a particular state or region may not be in imminent danger of attack.

259. See PATTERNS OF GLOBAL TERRORISM, *supra*, note 243, at 25.

260 See Organization for the Prohibition of Chemical Weapons website <http://www.opcw.org/>.

261. Article 53, Vienna Convention on the Law of Treaties (1969) *in*, BASIC DOCUMENTS OF INTERNATIONAL LAW 233 (1972).

VI. CONCLUSION

"[A]ny startling developments in international law cannot be the work of international lawyers. . . [but] must be the outcome of a changed attitude of Governments prompted and supported in this matter by an enlightened public opinion."

—Hersch Lauterpacht²⁶²

Since the Charter's inception there has been numerous instances of armed intervention justified under the rubric of self-defense.²⁶³ They have been controversial due in large part to the expansive—oftentimes tortured and unconvincing—definition of self-defense offered by the intervening state.²⁶⁴ Many legal scholars have been reluctant to countenance an expansive self-defense rationale because there is "a widespread perception that widening the scope of self-defense will erode the basic rule against unilateral recourse to force."²⁶⁵ Yet leaving the law behind while states respond to the new dangers to civilized peoples is wholly unsatisfying. I reject the proposition that we should conclude that the law stops short of these problems, and leave it at that. Further, if the strict application of the rules on the use of force leads to results that seem absurd, as it certainly can, then those rules lose their credibility. In the face of these threats we need to facilitate the continued development of legal rules that enable states to deal effectively with new forms of aggression, such as the proliferation of weapons of mass destruction. These new dangers represent offenses against the international order itself and undermine the very fabric of international relations in an insidious way.

The law cannot be seen as irrelevant in situations where a nation's vital interests or survival is at stake. The United States has made it clear, particularly with its recent response to terrorist acts in Kenya and Tanzania, that it will use whatever means at its disposal to defend and respond to such threat, and it is ready to act unilaterally when circumstances require.²⁶⁶ As Secretary Cohen cautioned:

Any individual or group that seeks to deprive us of [the] ability to move about as members of the international community is an enemy of freedom-loving people everywhere, and will be treated as such. The

262. HERSH LAUTERPACHT, INTERNATIONAL LAW, COLLECTED PAPERS, Vol. 2 42 (1975).

263. See e.g. CONGRESSIONAL RESEARCH SERVICE, U.S. LOW INTENSITY CONFLICTS 1899-1990, Committee on Armed Services Rpt. No. 13, 1990 (detailing numerous instances of the use of force for self-defense and other purposes).

264. See Roberts, *supra* note 128.

265. Oscar Schacter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 272 (1989).

266. See footnote 183 and accompanying text.

American people cannot retreat and hide behind concrete bunkers and barriers and expect to be a force for good in the world—or even be secure in or own homes. . . . No government can permit others to attack its citizens with impunity if it hopes to retain the loyalty and confidence of those it is charged to protect. We can remain free only as long as we remain strong and brave. Those states that sponsor or support [such] acts. . . are not beyond the reach of American's military might.²⁶⁷

Like all law, international law is (or certainly ought to be) a living institution in a living world society. It is a reflection of the political will of the community it purports to govern.²⁶⁸ Consequently, it must be responsive to the needs of that society or it will be ignored. Customary international law represents the commingling of legal principle and policy.²⁶⁹ The breadth of this law is defined by the generally accepted and sanctioned practices of states, delimited first by policy. When legal "norms" present an unworkable solution, or mandate an illogical result, an imbalance in the law exists. In the face of a belligerent state that has acquired a WMD capability and a credible delivery system, the potential for mass destruction must be the critical factor in the justification and timing of the potential victim's response. The destructive nature of these weapons requires that the point of unacceptable danger move further in time from the actual moment of aggressive use. Policy, practice, and the law must move to resolve the imbalance.

In responding to the threats to international peace and security and national sovereignty in the modern age, we have seen states respond to the challenges while the law vainly tries to keep apace. As new legal obligations emerge in the areas of humanitarian intervention, pro-democracy self-determination, and self-help to correct injustices, the legal boundaries proscribing the use of force must change. Numerous categories of action (e.g. imminent attack and indirect aggression) give rise to the right of self-defense even if not explicitly accommodated in the original Charter language.²⁷⁰ So too then must the legal regime change to adapt to the new threat of weapons of mass destruction proliferation.

If, as seems obvious, sovereign states are involved in clandestinely developing and acquiring weapons of mass destruction and delivery systems (or using surrogates to deliver these weapons of terror), then the

267. William S. Cohen, *About Last Week. . . The Policy: We Are Ready to Act Again*, WASH. POST, Aug. 23, 1998, at C1.

268. Horace Robertson, Jr., *Contemporary International Law: Relevant to Today's World*, in JOHN NORTON MOORE & ROBERT TURNER, INTERNATIONAL LAW STUDIES 1995, READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978-1994 1 (1995).

269. *Id.*

270. See footnotes 139-166 and accompanying text, *supra*.

law must adapt and a new legal paradigm adopted to allow sovereign states to effectively respond without themselves being labeled international rogues. The response should not be judged on the basis of a popularity contest but on its legitimacy as a tool of statecraft in the war against chaos. Fighting terrorism and the proliferation of weapons with the potential to destroy us all is, unfortunately, the war of the future. If the law is to have any relevance in maintaining world order in the face of this threat it must either adapt or become an anachronistic curiosity. The highest national interest of all nations is a stable peace based on respect for the rule of law. Adoption of a legal paradigm that governs responses to the greatest threat to the new world order is the only way to return nonproliferation norms to their rightful place of respect and to prevent the world from sliding into anarchy.

Results in this continuing process will remain as incomplete and imperfect as nearly everything else in legal development. It will always remain difficult to make convincing assessments except in retrospect. Long-term effects often remain obscure, and anticipating objections which may arise at a later stage is risky by any standard. The law can not nor should it be discerned in a vacuum or cold sterile void. The law is but one factor in the human decision-making process; a process that requires an interdisciplinary approach, one that includes ethical, cultural, technological, economic, and operational considerations. It is not a fixed set of bright line rules that can be applied irrespective of the factual context. None of the problems that the use of force is supposed to solve can be satisfactorily resolved by confident invocation of a "correct rule."

The United Nations Charter enshrines principles of peace, order and prosperity and admonishes us to use force only as a last resort in the face of threats to that peace and order that are unlikely to be persuaded to use peaceful means. International law can and must set strict limitations on the use of force. But to interpret that law to flatly prohibit such uses in all cases that do not meet the classic paradigm—to tell a government confronted with the specter of weapons of mass destruction that it cannot under any circumstances respond with force because possession of such weapons, albeit illicitly, is not really an "armed attack"—is to undermine the legitimacy and credibility of the legal restraints on the use of force themselves. New challenges demand new responses. The manner in which those responses are framed can help determine whether the international legal restraints on the use of force will be perceived as a meaningful basis for efforts to uphold international law, or as merely an anachronistic and irrelevant obstacle. Instead of waiting for an unsatisfactory legal regime to respond to a world order threat, states should agree on a legal paradigm that is responsive to that threat. The proposed counterproliferation self-help paradigm will help to clarify the when and how of using force in response to this extraordinary threat, and when not to.

