PREEMPTION IN THE 21ST CENTURY: WHAT ARE THE LEGAL PARAMETERS?

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I. INTRODUCTION

In September 2002, President Bush and his national security team released the annual review of the United States' National Security Strategy. The review departed from earlier reviews in that it embraced the use of preemptive strikes against rogue states which possess or seek to possess weapons of mass destruction and which harbor or support terrorist organizations.[1]

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1. "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends." Press

On March 19, 2003, the United States, together with nearly thirty coalition partners, initiated a successful military campaign to liberate Iraq from the regime of Saddam Hussein. Many commentators view the liberation of Iraq as the first use of the doctrine of preemption against a state, which was perceived to possess the ability and the motive to either use weapons of mass destruction or transfer those weapons to terrorist organizations for use against the United States or its allies.

While there has been significant political discussion as to the utility and/or risks associated with the doctrine of preemption, the legal debate has to date been fairly limited. Legal commentators have either criticized the doctrine as illegal, or have sought to provide a legal justification for the doctrine. Few if any have sought to define the legal parameters of the doctrine.

The purpose of this article is to help define the appropriate legal parameters for use of the doctrine.[2] While the traditional *Caroline* criteria remain relevant for conventional preemption, it is necessary to develop a refined set of criteria for the use of preemptive force against rogue states, which possess weapons of mass destruction and harbor or support terrorist organizations.

When developing the parameters for the modern doctrine of preemption it is important to bear in mind that the doctrine, as set forth in the National Security Strategy, applies only to rogue states, which possess or seek to possess weapons of mass destruction, and which harbor or support terrorist organizations. To be subject to preemptive military action, a state must possess all three of these characteristics. It is important, however, to also note that once a doctrine is established, the requirements for its use may quickly become elastic, to the point that one or more of these characteristics may be deemed sufficient to invoke preemption. In this case, the criteria would of course need to be heightened, and thus it is important to develop criteria, which may be more stringently applied in the event the doctrine is more liberally applied then currently envisioned.

To accomplish the objective of defining parameters for the modern doctrine of preemption this article will first review the strategic rationale for preemption, and a detailed definition of the modern doctrine. This will be followed by a review of the United States' government's legal rationale and a review of the emerging legal debate before discussing the applicable parameters. The article will conclude with the argument that in order to guard against the unwarranted application of the doctrine a specific set of clearly defined criteria

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Release, President George W. Bush, *The National Security Strategy of the United States of America* (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Mar. 17, 2004) [hereinafter *National Security Strategy*].

2. This article is an expanded version of a presentation delivered as part of a panel discussion at the 2003 Annual Meeting of the American Branch of the International Law Association. The panel was organized and chaired by Professor Ved Nanda of Denver University's School of Law.

must be developed for its use. The article then proposes that in order to be consistent with the intent of the National Security Strategy and to comply with general norms of international law, a state must demonstrate before it undertakes the use of preemptive military force that its actions are necessary in light of *the certainty of attack*, the *opportunity for successful preemption*, and the failure *of peaceful multilateral efforts*. The use of force also must be *grounded in legitimacy*, be *collectively supported*, and be *proportionate*.

II. THE RATIONALE FOR A MODERN DOCTRINE OF PREEMPTION

As set forth in the National Security Strategy, the evolution of the doctrine of preemption arises from the radical transformation of the post cold-war security environment and the perceived need to counter the threat posed by terrorist organizations and rogue states who may possess or seek to possess weapons of mass destruction, or who may be able to inflict substantial harm through unconventional attacks such as those of September 11, 2001.

The necessity of preemption is heightened by 1) the nature of weapons of mass destruction, which can "be easily concealed, delivered covertly, and used without warning,"[3] and 2) the covert nature of terrorist's attacks and the resulting inability to predict when and where an attack may take place. As explained in the Security Strategy,

> Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.[4]

The necessity for the doctrine is also derived from the fact that the targets of terrorist attacks are primarily civilian populations. Moreover, given the nature of terrorist organizations and rogue states deterrence cannot be relied upon as an effective means of defense.[5]

Finally, the doctrine is a natural outgrowth of the increasing inability of international organizations to muster the political will among their member states to prevent crimes against humanity or to neutralize terrorist organizations.[6] Similarly, international law has been slow to adapt to changing

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3. *National Security Strategy*, *supra* note 1, at 15.

4. *Id.*

5. For more detail on the efforts of the United States to develop a strategy for confronting "un-deterrable enemies," *see* Ilan Berman, *The Bush Strategy at War*, 74 THE NAT'L INT., 51-57 (2003/04).

6. The most recent examples include the inability of both the United Nations and the European

international norms, such as humanitarian intervention,[7] and to the increased organizational and technical sophistication of terrorist organizations. In fact, even if international organizations were able to muster the political will to confront terrorism in a more aggressive manner, there is little indication that terrorist organizations or rogue states respond to the types of inducements or sanctions employed by international organizations.

The recent decision of Libya to cease its attempts to acquire nuclear weapons and other weapons of mass destruction, and to open its facilities to inspection by American and British, as well as international inspectors, is perceived as providing additional support for the utility of the modern doctrine of preemption.

III. DEFINING THE MODERN DOCTRINE OF PREEMPTION

The essence of the doctrine as set forth in the National Security Strategy is that because the United States can no longer solely rely on a reactive posture it may act preemptively to forestall or prevent hostile acts by rogue states which possess or seek to possess weapons of mass destruction, and harbor or support terrorist organizations.[8]

The doctrine also includes a commitment to undertake proactive counter-proliferation efforts such as detection, active and passive defenses, and counterforce capabilities, which are to be fully integrated into defense policy. This is to be coupled with strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction through diplomacy, arms control,

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Union member states to intervene to prevent the crimes against humanity in Rwanda or Bosnia, including the Srebrenica massacre in what was designated a United Nations safe area. In the case of Srebrenica, over 7,000 unarmed civilians were massacred in large part because the Japanese civilian United Nations official and the French United Nations military commander blocked air strikes requested by the Dutch peacekeepers in the city. The subsequent use of limited air strikes in Gorazde, forced through by the British government, prevented a similar massacre there. PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 48 (Rowman & Littlefield 2002). Similar examples include the unwillingness of the any international organization to take any meaningful action against the Taliban and Al Qaeda despite their gross violations of human rights and clear intent to sponsor terrorist activities abroad until after 9/11.

7. In the case of the humanitarian intervention in Kosovo, it was carried out without United Nations' approval, and with minimal actual political and military support from NATO member states other than Great Britain and the United States. Moreover, the international community largely responded to the humanitarian intervention with the argument that while the use of force to prevent crimes against humanity and genocide in this case was illegal, it was legitimate.

8. The National Security Strategy also identifies these states as frequently possessing the additional criteria of brutalizing their own people, displaying no regard for international law and rejecting basic human values. *National Security Strategy*, *supra* note 1, at 14.

multilateral export controls, and interdiction.[9] Finally, the National Security Strategy identifies the need to undertake effective consequence management to respond to the effects of WMD use in order to minimize the effects of their use and to dissuade terrorists from their use.[10]

Other chapters of the National Security Strategy set forth a plan for strengthening alliances, promoting human dignity, working to defuse regional conflicts, promoting global economic growth, and expanding and deepening the process of democratization. All of these initiatives are interrelated and to the degree they are successful they reduce the actual need to undertake preemptive action against rogue states possessing WMD.

Unfortunately, many critics of the modern doctrine of preemption fail to acknowledge that the doctrine is set forth within the broader approach of increasing efforts at counter-proliferation, strengthening alliances, and reducing the causes of conflict. Similarly, critics fail to acknowledge that the doctrine is applicable in only the most narrowly tailored circumstances involving rogue states, terrorists and weapons of mass destruction and thus invoke the slippery slope argument that the National Security Strategy will lead to the increased use of preemption between states with long running conflicts such as China/Taiwan, and North Korea/South Korea,[11] or "the renewed drug trade in Afghanistan infiltrating Iran, or the occupation of uninhabited nominally Spanish islets in the Strait of Gibraltar by Moroccan forces."[12]

There is, of course, a legitimate concern that once established the doctrine will be stretched to apply to cases such as India/Pakistan or the Arab states and Israel.[13] To guard against the unwarranted evolution of the doctrine it is necessary to articulate a precise legal rationale and legal criteria for determining when preemptive action is appropriate.

IV. LEGAL RATIONALE

While legal rationales are not customarily provided as part of the National Security Strategy, it is important when developing a new or evolved doctrine for

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9. To accomplish this objective since May 2003 the United States has led efforts to establish the Proliferation Security Initiative (PSI). The PSI is an alliance of like-minded states that have agreed to strengthen existing international security agreements, increase intelligence sharing and undertake coordinated interdiction efforts. For more on the PSI, *see* Berman, *supra* note 5.

10. *National Security Strategy*, *supra* note 1, at 14.

11. *See* Richard N. Gardner, *Neither Bush nor the "Jurisprudences,"* 97 AM. J. INT'L L. 585, 588 (2003).

12. Michael J. Kelly, *Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 37 (2003) (citing Kashmir, Lebanon, and China/Taiwan).

13. *See* Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628 (2003); *see also* Gardner, *supra* note 11.

the United States' government to subsequently issue a legal rationale. The role of a legal rationale is to provide some justification for the evolved doctrine, to provide parameters so that the doctrine is appropriately applied by the government, and so that an unreasonably expanded version of the doctrine is not used as a pretext for illegitimate acts by other governments.

The National Security Strategy does briefly articulate a foundation for the modern doctrine of preemption by noting that "for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."[14]

The National Security Strategy further notes that "Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat, most often visible mobilization of armies, navies, and air forces preparing to attack."[15] The Security Strategy then argues that the concept of imminent threat must be evolved to reflect the capabilities and objectives of rogue states and terrorists that seek to attack by unconventional means.[16]

Presumably, the Department of State should have followed up the National Security Strategy with a formal document defining the evolved concept of imminent threat and a set of legal criteria, which could be used to determine when a preemptive strike might be legally appropriate. Rather, the Legal Advisor for the Department of State has made publicly available a Memorandum of Law addressed to a joint roundtable of experts from the American Society of International Law and the Council on Foreign Relations.[17] The Legal Advisor and the Assistant Legal Advisor for Political/Military Affairs also published their views in the American Journal of International Law under the title, *Preemption, Iraq, and International Law*.[18]

The ASIL-CFR Memorandum seeks to lay the foundation for an articulation of the new parameters for the use of preemptive force. In the memorandum, the Legal Advisor argues that "in the era of weapons of mass destruction, definitions within the traditional framework of the use of force in self-defense and the concept of preemption must adapt to the nature and capabilities of today's threats."[19] The Legal Advisor defines the traditional framework as permitting the preemptive use of proportional force only when it is necessary,

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14. *National Security Strategy*, *supra* note 1, at 15.

15. *Id.*

16. *National Security Strategy*, *supra* note 1.

17. Memorandum from William H. Taft, IV, Legal Adviser, Dep't of State, to Members of the ASIL-CFR Roundtable, *The Legal Basis for Preemption* (Nov. 18, 2002), *available at* http://www.cfr.org/publication.php?id=5250 (last visited Feb. 25, 2004) [hereinafter Taft Memorandum].

18. *See* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

19. Taft Memorandum, *supra* note 17.

with the concept of necessity including "both a credible, imminent threat and the exhaustion of peaceful remedies."[20]

The Legal Advisor argues that imminence should be viewed in terms of urgency rather than timing of the response. The Legal Advisor argues further that the credibility of the threat must be based on the capacity of the state or terrorist organization to carry out the threat and upon an assessment of the intent of the state or terrorist to act. By example, the Legal Advisor argues that the use of force to change the governing regime in Afghanistan was a legitimate use of preemption to prevent and deter an imminent attack. Here the attack of September 11 was viewed as "establishing that the enemy intended to attack again."[21] So long as the enemy maintained its capacity to attack, the United States was entitled to take preemptive action.[22]

In sum, the Legal Advisor concludes that,

> The United States reserves the right to use force preemptively in self-defense when faced with an imminent threat. While the definition of imminent must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity. After the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.

The AJIL article asserts that the United States' action against Iraq was not illegal preemption as:

> 1) One of the primary objectives of the action was to preempt Iraq's possession and use of weapons of mass destruction;
> 2) There were substantial risks associated with "allowing the Iraqi regime to defy the international community by pursuing weapons of mass destruction;"
> 3) Past actions of Iraq over a protracted period of time indicated that it posed a threat;
> 4) The act of preemption represented an "episode in an ongoing broader conflict initiated – without question – by the opponent;" and
> 5) The use of force was consistent with previous resolutions of the Security Council.[23]

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20. *Id.*

21. *Id.* The Legal Advisor also cited the "record of past support for the rebels," which was relied upon by the British in justifying their attack on the Caroline. *Id.* at 2.

22. *Id.*

23. Taft IV & Buchwald, *supra* note 18, at 563.

While the article addresses the criteria of intent and capability, it does not clearly address the criteria of imminence/urgency as outlined in the ASIL-CFR memorandum.

V. RECENT COMMENTARY

As is to be expected recent scholarly commentary on the modern doctrine of preemption encompasses a range of diverse views. Some commentators argue that the doctrine is patently illegal and that it is the obligation of lawyers to denounce the doctrine as such.[24] Others assert the doctrine may be legal, but it is politically unwise and the White House should undertake a slow retrenchment from the doctrine,[25] or that it should devote its efforts to revitalizing the United Nations Security Council,[26] or to a reinterpretation of the United Nations Charter which will permit the use of force against states which fail to prevent terrorists from conducting operations from their territory.[27] Still others fear that the use of the doctrine will erode the integrity of the United Nations' system and its ability to prevent future conflicts,[28] or worse, that it will lead to a "period defined by the geopolitics of raw power and militaristic influence."[29] Finally, many commentators embrace the modern doctrine of preemption as a reasonable evolution of the *Caroline* doctrine and seek to refine the criteria by which it is applied.[30]

While many of the criticisms against the modern doctrine of preemption are well reasoned and must be taken into account as the doctrine is further refined, it is important to avoid an overly rigid interpretation of existing international law, which might prevent the reasonable development of a doctrine

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24. *See, e.g.*, Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003).

25. *See, e.g.*, Miriam Shapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599 (2003). Some foreign policy commentators have expressed a concern that the effect of elevating the status of preemptive self-defense to a doctrine will increase international resistance to United States foreign policy and make it very difficult to obtain support from allies when necessary. *See* Michael E. O'Hanlon, Susan E. Rice & James B. Steinberg, *The New National Strategy and Preemption*, BROOKINGS INSTITUTION POLICY BRIEF NO. 113, Dec. 2002, *available at* http://www.brook.edu/comm/policybriefs/pb113.pdf (last visited Mar. 17, 2004).

26. *See* Stromseth, *supra* note 13, at 638.

27. *See, e.g.*, Gardner, *supra* note 11.

28. *See, e.g.*, Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590 (2003); *See also* Tom Farer, *The Prospects for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621 (2003).

29. *See, e.g.*, Kelly, *supra* note 12, at 3.

30. *See, e.g.*, Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (2003); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

necessitated by the dramatic change in the ability and intent of rogue states and terrorists to use weapons of mass destruction.

Unfortunately, in the 1990's, while some commentators were welcoming the return to strict legal limits on the exercise of power by the United States and its European allies,[31] the overly ridged interpretation of certain fundamental principles of international law produced dire consequences. For instance, an overly aggressive application of article 2(4) of the United Nations Charter coupled with the collective passivity of Europe, and to a certain extent the United States, facilitated Slobodan Milosevic's genocide against the people of Bosnia, kept the international community at bay during the massacres of nearly 2 million people in Sudan, and allowed the Hutu to massacre nearly a million Tutsi in Rwanda. The strict adherence to article 2(4) also cooled the willingness of states to take action against the Taliban regime and Al Qaeda despite the gross human rights violations of the former, and the efforts of the latter to train nearly 35,000 terrorists.

In the case of Yugoslavia, the ridged adherence to 2(4) in the face of state sponsored genocide and crimes against humanity came to a close when the United States and its NATO allies, without United Nations Security Council approval, undertook a humanitarian intervention in Kosovo to prevent the genocide of Kosovo Albanians by Serbian forces.

The initial response by legal commentators was less than satisfactory. Many commentators simply declared the humanitarian intervention to be illegal. Others attempted to preserve the sanctity of an outdated legal regime by declaring that while the humanitarian intervention was illegal it was legitimate. If in fact the humanitarian intervention was illegal, then the fault lies with outdated international law and not with the effort to use force to prevent genocide. Such expedient attempts to find legitimacy where legality is denied in fact erode the force and effect of legal constraints.

In crafting a response to the modern doctrine of preemption, legal commentators should bear in mind the lessons from these earlier conflicts. First, an overly strict adherence to legal norms may produce highly dangerous consequences, and those norms may therefore be in need of modernization. For example, in the case of modern preemption, if it is illegal to use force to preempt a rogue state and/or terrorist organization from using weapons of mass destruction against civilian populations, then it is international law, which is in need of repair.

Second, just as national security doctrines must evolve to effectively confront new threats to national and international security, so to must international law evolve to constrain and guide the use of these new doctrines. In these circumstances, the role of lawyers is not merely to pronounce on legality and

31. *See* Franck, *supra* note 24, at 609-10.

illegality, but to develop parameters to ensure the application of new doctrines consistent with the fundamental objectives of international law and to guard against the erosion of legitimate limits on the new doctrine.

The remainder of this article is dedicated to developing a set of clear legal criteria by which to determine when it is legal to use force to preempt the use of weapons of mass destruction by rogue states and/or terrorist organizations.

VI. THE LEGAL PARAMETERS OF THE MODERN DOCTRINE OF PREEMPTION

President Bush, in the National Security Strategy appropriately recognized that while the United States must "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries . . . the United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression." In order to prevent the preemption from being used as a pretext for aggression it is necessary that the criteria be grounded in the basic principles of the *Caroline* doctrine and that they be clearly articulated.

As set forth in the now famous Webster letter, in order for a preemptive attack to be considered legitimate, the attacking state must demonstrate that its actions were necessary in light of the *imminence* of attack; it had *no other choice of means*; it had *no time to deliberate*; the extent of the attack was *not excessive or unreasonable*.[32]

The parameters for the modern doctrine of preemption must reflect that serious threats are now posed by entities other than another state's armed forces or an organized militia with a clear command structure. These threats are also directed not against a state's armed forces or state institutions, but instead involve the likelihood of purposeful attacks against civilians with no objective other than to cause massive casualties. These threats are compounded by advances in technology and the nature of the opposing forces, which have the effect of further eclipsing the traditional legal doctrines applicable to preemptive self-defense.

Guided by the *Caroline* precedent it is reasonable to consider that in order for a preemptive attack against rogue states, which possess weapons of mass destruction and which harbor or support terrorist organizations to be considered

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32. These elements are encapsulated in what has become known as the "Caroline incident," named after the now infamous Caroline dispute of 1837. The cause of the dispute was the British attack and destruction of an American steamer, which was being used to ferry supplies to a group of armed Canadian insurgents rebelling against the British Crown. The British claimed that their actions were preemptive and necessary under the traditional doctrine of self-defense. Secretary of State Daniel Webster stated that in order for the British to defend their actions as preemptive they were required to demonstrate that they met the criteria noted in the text above. *See* Letter from Daniel Webster, U.S. Secretary of State, to Henry S. Fox, Esq., Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (Apr. 24, 1841), *reprinted in* 29 BRITISH & FOREIGN STATE PAPERS, 1812-1934, at 1129, 1138 (British Foreign Office 1857).

legitimate, the attacking state must demonstrate that its actions were necessary in light of *the certainty of attack*, the *opportunity for successful preemption*, and the failure *of peaceful multilateral efforts*. The use of force also must be *grounded in legitimacy*, be *collectively supported*, and be *proportionate*.

A. Certainty of Attack

The central principle of *Caroline*, that of imminence—is no longer entirely applicable in the case of rogue states and terrorist organizations cooperating in the pursuit of weapons of mass destruction. Terrorist attacks, by their nature are inherently imminent as they may occur at anytime—without warning. A more feasible criterion may be certainty of attack based on past practice.

The practicality of the "imminence" criteria is substantially limited by the fact that terrorist attacks are not preceded by the traditional indicators such as the mobilization of forces or the fueling of missiles. Similarly, terrorists do not follow the traditional escalation timeline of peacetime to crisis situation to conflict. Compounding this development are radical changes in technology, which have enabled terrorist organizations to develop the capacity to inflict massive causalities without warning. Given that Al Qaeda has openly expressed its intent to continue to wage a war of terrorism against the United States and its allies, and the inherent ability of terrorist organizations to strike without warning, the criteria of imminence lack substantial utility. A more useful criterion would be that of "certainty of attack."

The certainty of attack may be determined by a combination of essential factors such as the global reach and capacity of the terrorist organization, the high probability of attack based upon past practice, a manifested intent to injure, the likely magnitude of harm and credible intelligence showing an escalating threat.[33] It may also be necessary to limit the determination of certainty to the foreseeable future.

B. Opportunity for Successful Preemption

A second criteria related to the original element of imminence would be the opportunity for successful preemption. Because of the nature of terrorist operations, a state may be unable to take legitimate preemptive action once the threat is imminent because it may have no means for locating or physically

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33. Michael Waltzer, in a Cold War context, defined when "first strikes" were legitimate by indicating that imminence of attack was less important than "sufficient threat." Sufficient threat was characterized by "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." *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 81 (3d. ed., Basic Books 2000) (1977).

preventing the attackers from carrying out an attack using weapons of mass destruction. In such cases, it is reasonable to allow a state to defend itself when the opportunity for successful preemption arises.[34]

The opportunity for successful preemption is influenced by the nature of the entity against which preemption is being used. Rogue states given their static nature tend to present a wide opportunity for preemptive action, thus increasing the importance of the certainty of attack and the failure of peaceful multilateral efforts. Terrorist organizations, which operate covertly, present a more narrow opportunity for successful preemption and thus preemptive action may be appropriate when a lower threshold is reached concerning the two other criteria.

C. Failure of Peaceful Multilateral Efforts

Whereas the *Caroline* doctrine requires a determination of no other choice of means for preventing an attack, the nature of a terrorist attack with weapons of mass destruction requires a more precise criteria such as a more long term failure of peaceful multilateral efforts. The failure of peaceful multilateral efforts may be judged by the extent to which the state relying upon preemptive action has undertaken to invoke multilateral mechanisms to prevent the proliferation of WMD and to resolve conflicts which give rise to the potential use of these weapons. Efforts at creating multilateral coalitions to impose economic and diplomatic sanctions are also relevant. It is important, however, to acknowledge the unfortunate prevalence of collective passivity in the face of grave international threats.[35] In the face of collective passivity, a state should not be barred from taking preemptive action.

D. Grounded in Legitimacy

The preemptive action must be grounded in legitimacy as evidenced by support in United Nations Security Council resolutions or in the resolutions of relevant regional bodies.[36] While direct and explicit authorization by the United Nations Security Council for preemptive force is the most clear basis for preemptive action, such authorization is seldom available due either to the circumspect manner in which the United Nations Security Council addresses issues, or to collective passivity as discussed above. It is however, necessary for the preempting state to have a solid legitimate claim to preemptive action other than its own unilateral determination of a threat.

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34. *See* Yoo, *supra* note 30, (proposing the criteria of "window of opportunity").

35. *See* Wedgwood, *supra* note 30.

36. *See* Taft IV & Buchwald, *supra* note 18.

E. Collective Support

Once peaceful measures are exhausted, there still remains the necessity of a multilateral component. Collective support requires the preempting state to find support among other states, either political or military support, before undertaking a preemptive action. While the condition of near universal multilateralism, such as through the United Nations or the Security Council, is ideal it is not the only option. Multilateral institutions are subject to political motivations even in the face of undeniable threats to civilian populations. The requirement of collective support establishes a threshold that requires widespread recognition of the necessity and acts against politically motivated unilateralism, without subjecting the determination to a formulaic process.[37]

F. Proportional Response

Proportionality remains a fundamental rule governing all legal use of force. While the traditional definition from the law of war does not directly apply when using force against terrorist organizations, the underlying principles still apply.[38] The preemptive use of force must entail the minimum force necessary to neutralize the threat.

VII. CONCLUSION

Through the end of the Cold War, threats were posed by state-to-state conflict with clear timelines for escalation and attack and guidelines for legitimate use of force. With the threat changing to non-state actors and states that support them, there is a change of circumstances and a shift in doctrine as evidenced by the 2002 National Security Strategy. To minimize the danger that the modern doctrine of preemption may be used as a pretext by some states for aggression, it is necessary to apply clearly specified criteria. These criteria require that in order for a preemptive attack against rogue states which possess or seek to possess weapons of mass destruction and which harbor or support terrorist organizations to be considered legitimate, the attacking state must demonstrate that its actions were necessary in light of *the certainty of attack*, the

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37. *See id.*

38. Proportionality measures governing the law of war are explicitly detailed in Protocol I to the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (entered into force Dec. 7, 1978). The principle of "proportionality" effectively requires that the anticipated loss of life and property damage resulting from the use of force not be excessive compared to the military objective. The "precautionary" principle requires that all possible precautions be taken to minimize civilian loss of life and damage to civilian objects. These principles are combined with the principle of "humanity" which prohibits unnecessary destruction of property or weapons that cause unnecessary suffering.

opportunity for successful preemption, and the *failure of peaceful multilateral efforts*. The use of force also must be *grounded in legitimacy*, be *collectively supported*, and be *proportionate*.