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In the last five years, the United States has fought three wars against other sovereign nations. In 1999, the United States and its NATO allies conducted an air war against Serbia to end repression in the province of Kosovo. In response to the September 11, 2001 attacks on the World Trade Center and the Pentagon, the United States invaded Afghanistan and deposed its ruling Taliban militia for harboring the al Qaeda terrorist organization. And of course, in the spring of 2003, the United States and a small group of allies—most prominently Great Britain—invaded Iraq and removed Saddam Hussein from power. In all three of these conflicts, the United States or its allies have justified their use of force under international law.

For the most part, however, international lawyers have been highly critical of the United States' intervention in Iraq, less so of those in Afghanistan and Kosovo. They see in Iraq the application of a new doctrine of preventive self-defense at odds with traditional international law doctrines restricting the use of force. Indeed, leading international law professors view the war in Iraq as part of an effort to undermine international law and institutions generally. According to Professor Thomas Franck, for example, the United Nations (UN) Charter system for restraining the use of force “has died again, and, this time, perhaps for good.”¹ Iraq does not just represent a dispute over the use of force, but “a much broader plan to disable all supranational institutions and the constraints of international law on national sovereignty.”² Even the editors of the *American Journal of International Law* can barely contain their pessimism. For them, the war in Iraq “is one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century.”³ All appear to agree that the war in Iraq signaled the transformation of the international rules governing the use of force, whether for good or ill.

This Article explores the international law governing self-defense. Developments since the conclusion of World War II, such as the emergence of international terrorism and rogue states and the easier availability of weapons of mass destruction, have placed enormous strain on the bright line rules of the UN Charter system. I argue that a more flexible standard should govern the use of force in self-defense, one that focuses less on temporal imminence and more on the magnitude of the potential harm and the probability of an attack. This Article further argues that the consensus academic view on self-defense—that force is justified only as a necessary response to an imminent attack—which was largely borrowed from the criminal law, makes little sense when transplanted to the international context. It concludes by questioning whether self-defense, grounded as it is in a vision of individual rights and liberties in relation to state action, is the proper lens through which to view the use of force in international politics. Instead, an approach that weighs costs and benefits to the stability of the international system, which could be

seen as an international public good currently provided by the United States and its allies, might better explain recent conduct and provide a guide for future action.

This Article seeks to shift the focus of the debate over the use of force toward instrumental considerations. Much of the work by international legal scholars concerning the use of force centers on the UN Charter and, as a result, tends strongly toward the doctrinal.⁴ Each war provokes a discussion driven towards either finding the armed conflict illegal, or fitting it within existing doctrine.⁵ These scholars, perhaps best represented by Louis Henkin and Thomas Franck, rarely question the central features of the doctrine: that the use of force is illegal except when authorized by the Security Council or when used in self-defense. Rather than cases, these scholars attempt to fold armed conflicts into an evolving system of law that begins with the UN Charter but attempts to incorporate new norms through the practice of states.

A second perspective, following the realist strain of American foreign policy most closely associated with George Kennan and Hans Morgenthau, rejects the notion that international law can govern the use of force because security is too dear an interest to states.⁶ Kennan famously said, for example, that a “legalistic-moralistic approach to international problems” could not work because of the “chaotic and dangerous aspirations” of other nations.⁷ Legal scholars, such as Michael Glennon or Judge Robert Bork, adopt this perspective in concluding that international law is only an obstacle to the use of force for desirable American interests. Judge Bork has written, for example, that “international law about the use of force is not even a piety; it is a net loss for Western democracies.”⁸

A third body of work is that conducted or inspired by political philosophers. Political philosophers such as Martha Nussbaum, John Rawls, and Michael Walzer have turned their attention to the use of force as part of a general examination of the moral rules that should govern in the international system.⁹ Through different approaches, they have all accepted, in varying degrees, the idea of humanitarian intervention—that public morality either compels or allows the use of force to prevent the systematic abuse of a population’s human rights by its own state. Taken at face value, the UN Charter does not permit humanitarian intervention, which leads legal scholars who accept such intervention to argue that we should dispense with or seriously modify the Charter system—to maintain the rules but allow enormous exceptions.¹⁰

Rather than pursuing these doctrinal or moral approaches, this Article addresses the rules governing the use of force from an instrumental perspective. It asks what goals the international system, and its most currently powerful actor—the United States—should seek to achieve with the use of force, and whether the current rules permit their pursuit. Part I reviews the UN Charter system’s regulation of the use of force and describes challenges that have emerged during the postwar period. Part II criticizes current self-defense doctrine and argues that it must take into account threats that go beyond the great power conflicts that worried the creators of the UN Charter system. Working within the existing legal structure, it develops an approach that expands the concept of imminence to include the magnitude and probability of an attack. Part III considers a different

framework for the use of force that is external to the existing international regime. It argues that rules derived from the criminal law are ill-suited for interactions between nation-states in an international system characterized by anarchy. It concludes by suggesting a different model for the use of force that does not borrow from the criminal law that governs individuals, but rather uses a cost-benefit analysis that maximizes the stability of the international system.

I.

A.

The end of the Cold War did not signal an end to international armed conflict, or to American military interventions. In the last decade, the United States has sent troops abroad into hostile environments in places ranging from Somalia, Haiti, and the former Yugoslavia to Colombia, the Philippines, and Yemen. It has launched missiles in search of terrorists in Sudan and Afghanistan. In the last five years, the United States has launched major wars against sovereign nations, Serbia, Afghanistan and Iraq, with troops remaining in all three locations and conflict continuing in the last two. This followed other significant American military conflicts during the Cold War in places such as Korea, Vietnam, Grenada, and Panama.¹¹

While the pace of wars may not have changed, their purposes seem to have shifted. During the Cold War, the United States used force as part of a strategy of containment to prevent the spread of Soviet power.¹² Wars occurred, sometimes through proxies, at points where the United States believed the Soviet Union and its allies sought to expand their sphere of influence, as in Korea and Vietnam, or to prevent destabilization within its own sphere, as in Grenada, Panama, and the Persian Gulf. Since the Cold War, American foreign policy seems to have moved its focus away from spheres of influence—which ought not be surprising, given the disappearance of the Soviet Union—to new types of international problems and threats. American intervention in Kosovo, for example, appeared designed to stop a human rights disaster along the border of NATO. The war in Afghanistan was not an effort to displace the ruling Taliban militia because Afghanistan itself posed a direct threat to the United States, but rather because it had allowed its territory to be used by the al Qaeda terrorist organization, which itself had carried out an attack on the United States. In Iraq, the United States argued that it was enforcing United Nations Security Council resolutions that ordered Saddam Hussein to destroy Iraq's weapons of mass destruction, which it argued posed a threat to the United States and nations in the region.

The shifting objectives of these different interventions have also produced different legal justifications. In Kosovo, the United States refused to provide any legal justification for the attack on Serbia, although some NATO allies such as Great Britain claimed that the operation fell within a right of humanitarian intervention.¹³ In Afghanistan, the United States argued that a right to self-defense justified the intervention, although that right was against the al Qaeda terrorist organization, not Afghanistan itself. Any right to use force against Afghanistan derives from its fault in allowing its territory to be used as a safe haven by al Qaeda. In Iraq, the United States claimed that its use of force was justified by

UN Security Council resolutions, some from as long ago as the 1991 Persian Gulf War, although it had no explicit authorization contemporaneous with the March 2003 invasion itself.¹⁴

American national security plans may result in even more vigorous and far-reaching uses of force in the future. In The National Security Strategy of the United States of America, released in September, 2002, the administration identified several sources of future threats to US national security. Threats no longer arise from the competition of the great powers for advantage and influence; the National Security Strategy in fact sees the prospect of great power wars replaced by a common interest in fighting extremism. Future threats to the United States come from international terrorism, rogue states, regional conflicts, and the proliferation of weapons of mass destruction.

In addressing these threats, the administration relies heavily on the option of using force. Unsurprisingly, the strategy identifies the ongoing war against international terrorism as the primary challenge to national security. While not armed with the destructive power of the Soviet Union, terrorist groups seek to acquire weapons of mass destruction, are likely to have less reluctance to use them, and are motivated by extreme religious or political beliefs that render them immune to diplomacy or deterrence. They seek protection in statelessness and target innocent civilians. In order to combat international terrorist groups, and their state sponsors, the United States has declared that it will “identify[] and destroy[] the threat before it reaches our borders.”¹⁵ While preferring to act with partners, the administration “will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists.”¹⁶

Similar concerns arise from the emergence of “rogue nations.” The Bush administration’s National Security Strategy defines rogue nations as regimes that brutalize their citizens and exploit natural resources for the personal gains of their rulers, that threaten their neighbors and disregard international law, that seek to develop or possess weapons of mass destruction, that sponsor terrorism, and that “reject basic human values and hate the United States and everything for which it stands.”¹⁷ According to the administration, these nations seem willing to take more risks, are less amenable to deterrence, and threaten to use weapons of mass destruction as a means of blackmailing the United States and its allies. These facts, particularly the threat posed by weapons of mass destruction, require that the United States have the option to use force, even before an attack might be temporally imminent. “The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”¹⁸ Again, the National Security Strategy considers this “preemptive” action.

The administration virtually admits that this approach is at odds with conventional international legal notions of self-defense. It takes some comfort in the concept of anticipatory self-defense, but also acknowledges that the doctrine “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.”¹⁹ The administration

argues that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”²⁰ The National Security Strategy, however, provides no hints about how to modify imminence—a temporal concept—to address a future of rogue nations, hostile international terrorist organizations, and the potential destructiveness of weapons of mass destruction. It simply notes that the “United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security.”²¹ It does not define when a threat might become “sufficient” to justify the use of force.

The consensus view among most international legal scholars is that the recent American interventions in Kosovo and Iraq, and the Bush administration’s announced plans to use force preemptively against rogue nations and international terrorist organizations, violate core principles of international law.²² They argue that international rules on the use of force parallel those for individuals. Nations generally do not have a right to use force against the political independence or territorial integrity of other nations. Under the United Nations Charter, it is the prerogative of the government to control the use of force. Without government sanction, force can be used only in self-defense. While most international law scholars admit that the law includes the right to use force in anticipation of a coming attack, they argue that this justification is available only if an attack is imminent.

Under this approach, the last three major interventions waged by the United States and its allies are of questionable legality. The use of force in Kosovo never received the authorization of the United Nations Security Council and the United States never claimed self-defense; thus it violated international law. While the war in Afghanistan did not receive explicit UN authorization, most seem to agree that it fell within the bounds of self-defense in response to the September 11 attacks. Some argue, however, that the use of force in Afghanistan remains controversial because preventing the threat from the al Qaeda terrorist network did not include the right to change Afghanistan’s regime. Most international legal scholars believe or assume that the invasion of Iraq flatly violated the UN Charter.²³ They argue that the Security Council had not authorized the invasion and that any threat to the United States posed by Iraq was speculative at best. They draw a distinction between preemptive war in anticipation of an imminent attack, which might be legal, and preventative war, which aims to strike at a nation whose growing capabilities might pose a threat farther off into the future. As a harbinger of things to come, these critics argue, the Iraq war and the administration’s national security strategy demonstrate the use of American power un-tethered to any justification in international law.

B.

In order to assess these claims, it is necessary to understand the current international legal regime governing the use of force. Quite literally, the drafters of the UN Charter designed their system to win the last war, not the next. Written in the wake of World War II, the UN Charter sought to establish a regime to prevent the large inter-state conflicts that had plagued the first half of the twentieth century. It attempts to eliminate war in two ways. First, the Charter renders nation-states physically inviolate in their sovereignty.

Article 2(4) requires member states to refrain 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.”²⁴ No exceptions were granted, such as for preventing humanitarian disasters or rooting out terrorist organizations.²⁵ Second, the Charter established a Security Council that can authorize the use of force “as may be necessary to maintain or restore international peace and security.”²⁶ The Council is composed of five permanent members (the United States, Russia, China, Great Britain, and France) that have an absolute veto on action, and a larger number of rotating members. Initially, the Charter envisioned that member states would place military forces at the disposal of a sort of UN armed force, which would enforce the dictates of the Security Council. No nations ever contributed any forces.

The UN Charter adopted a law enforcement model toward the regulation of violence between states. States were not to use force in their relations with each other. The law sought to bring the level of interstate violence in the international system to zero. This ideal, however, was just that, an ideal. As a safeguard against future international violence, self-help would not be the order of the day, as it had been before the United Nations. If a state posed a threat to another, collective self-defense would provide the response. When authorized by the Security Council, states would respond to interstate violence by beginning with non-violent sanctions leading up to armed force to restore international peace and security. Nonetheless, the Charter recognizes that Security Council action cannot immediately prevent aggression, and so it recognizes a nation’s right to self-help in its self-defense. Article 51 affirms this “inherent” right:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.²⁷

The UN Charter establishes a regime for the use of force that draws on obvious domestic criminal law parallels. Generally, the use of force is prohibited as a choice of conduct toward another state, just as domestically the criminal law forbids individuals from violence toward one another. A monopoly on legal uses of force rests with a supranational organization, the United Nations, not individual states, just as domestically the government controls the legitimate use of force. The system recognizes, however, that the “government” cannot defend its “citizens” in all circumstances, so it gives a nod to an “inherent” right of self-defense. Article 51 thus copies the domestic system’s rule of self-defense in cases in which the government cannot bring its power to bear to prevent illegal violence. The UN Charter system classifies all uses of force into three categories: legal use of force authorized by the Security Council; legal use of force in self-defense; and illegal use of force, which includes everything else.

Some have drawn from this pattern of rules the conclusion that a nation's right to use force in self-defense is even narrower in international affairs than it is domestically. They read Article 51 as limiting the right of self-defense to permit only a response to an actual "armed attack."²⁸ Prominent international legal authorities, such as Professor Ian Brownlie, even argue that Article 51 limits the right to self-defense only after a transborder attack has taken place.²⁹ Article 51, after all, declares that the inherent right of self-defense is triggered only "if an armed attack occurs," suggesting that the attack must either be in motion or have already taken place before force can be used. These scholars argue that if the Charter's restrictions on the use of force were loosened, it would be impossible to determine whether states honestly had resorted to their right to self-defense, or were merely invoking Article 51 to conceal their aggressive intentions toward their neighbors.³⁰ A more liberal approach to the use of force, these scholars argue, would destabilize the international system by creating a loophole in the Charter's prohibition on war as a means for resolving disputes among nations.³¹

Such an interpretation, however, would mean that the UN Charter extinguished the pre-existing right under customary international law to take reasonable anticipatory action in self-defense. There is no indication that the drafters of the UN Charter intended to limit the customary law in this way.³² In fact, the right to use force in self-defense has often been thought of as one of the core rights of a nation that cannot be regulated by any treaty and is subject only to that nation's judgment. Secretary of State Frank Kellogg, for example—the same Secretary of State who negotiated the Kellogg-Briand Pact's effort to outlaw war—also famously declared that the right of self-defense "is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense."³³ Scholars of different persuasions and attitudes toward international law have agreed that Article 51 of the UN Charter must be read as recognizing, but not regulating, the right of self-defense and that its meaning is to be derived from customary international law.³⁴ This was also the approach of the International Court of Justice in the famous Nicaragua case, which addressed the legality of American intervention in Nicaragua as a violation of customary international law.³⁵

Under customary international law, the right to use force in anticipation of an attack that has not yet occurred has constituted an important aspect of the "inherent right" of self-defense. Under international law every state has, in the words of then-Secretary of State Elihu Root, "the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself."³⁶ The classic formulation of the right of anticipatory self-defense arose from the Caroline incident. In 1837, the steamer Caroline had been supplying men and materials from the United States to armed insurgents against British rule in Canada. A British force entered US territory, seized the Caroline, set the ship on fire, and launched it down Niagara Falls, killing two US citizens in the process. In response to British claims of self-defense, Secretary of State Daniel Webster demanded that the British show that the:

necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . even supposing the necessity of the moment

authorized [British forces] to enter the territories of the United States at all, [they] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.³⁷

Lord Ashburton, who had been sent by the British as a special minister to resolve the dispute, implicitly accepted this test by justifying Britain's actions in these terms.³⁸ Secretary Webster argued that the burning of the ship was an unnecessary and disproportionate response to the threat, but he agreed to accept Great Britain's apology.³⁹ Webster's formulation was reaffirmed a century later by the International Military Tribunal at Nuremberg when it ruled that the German invasion of Norway in 1940 was not defensive because it was unnecessary to prevent an "imminent" Allied invasion.⁴⁰ Most writers on international law consider the Caroline test the leading definition of the use of force in anticipation of an attack.⁴¹ As Professor Christine Gray has observed, the Caroline incident "has attained a mythical authority," not just for its definition of imminence, but also its requirement that the use of force be necessary and proportional to a coming attack.⁴²

Combining the UN Charter rules with the doctrine of anticipatory self-defense produces the following international legal regime governing the use of force. In general, all use of force against the political independence and territorial integrity of a nation is prohibited. Only the United Nations Security Council may authorize the use of force against a nation, and it can do so only if that nation poses a threat to international peace and security. In the absence of explicit authorization, a nation may use force only in its self-defense. Read most broadly, self-defense includes the right to use force in anticipation of an attack, so long as that attack is imminent and the nature of the response is proportional and necessary to defeat the attack.

C.

While relatively clear and simple, these rules on the use of force have never effectively restrained the use of force between nations. If one were to look at the experience of the United States alone, for example, during the Cold War it used force in places like Korea, Cuba, the Dominican Republic, Vietnam, Grenada, Panama, Libya, the Sudan, Lebanon, the Persian Gulf, and now Yugoslavia, Afghanistan, and Iraq. Only Korea was authorized by the United Nations Security Council, and certainly many if not most of these uses of force would not have amounted to self-defense under the Caroline test. To be sure, since the end of the Cold War, the Security Council has authorized the use of force against Iraq's invasion of Kuwait, and to stop humanitarian crises in Haiti, Somalia, Bosnia, and East Timor. Nonetheless, aside from the 1991 war in Iraq, the United Nations has not played a significant role in preventing or ending interstate conflicts, and its authorizations have been noticeably absent from the wars in Kosovo, Afghanistan, and Iraq.

Several challenges to the international system developed in the postwar period that may explain the UN Charter's lack of success. First, the UN Charter procedures for authorizing the use of force collapsed almost immediately upon their birth. Due to their permanent seats on the Security Council, the Soviet Union and the United States could

threaten to veto any effort to authorize force that ran counter to their interests. Even when the superpowers did not hold vital interests, the Security Council was unable to authorize action where the three smaller “great” powers, Britain, France, and China, were involved. While some international legal scholars praised the 1991 authorization of the Persian Gulf War and subsequent Security Council-blessed uses of force as ushering in a new era of relevance for the United Nations, those instances may very well have been the anomaly, rather than the future practice. We appear to be returning to an era of Security Council paralysis, as demonstrated by the threatened vetoes of authorizations for the Kosovo intervention by Russia and the Iraq war by France and Russia. In the absence of any meaningful role for the Security Council in controlling international violence, national self-defense has become the only legal means for states to justify the use of force. Not surprisingly, most nations customarily claim a right to self-defense whenever they use force.

A second development has undercut the notion that a nation must rely on the United Nations to protect it from attack, or that it must wait for an armed attack to occur before responding with force in its self-defense. Anticipatory self-defense may have been more limited, and its use closer in time to the launching of an actual attack may have been more effective, at a time like the nineteenth century, when the harm that a surprise attack could achieve was limited. Modern warfare, however, has changed that calculus. Innovations in technology, including weapons of mass destruction, air power, and missiles allow for attacks that are more devastating and occur with less warning. As Michael Walzer has pointed out, modern weaponry allows an opponent to acquire an overwhelming and even decisive advantage if allowed to strike first.⁴³ He argues that it would be unreasonable and unrealistic to require a nation to await a potentially catastrophic assault before beginning to take actions necessary to its defense. Nations threatened by attack with modern weapons may not have the luxury of time to appeal to the United Nations and instead may be forced to use force preemptively to prevent another side from gaining a decisive military advantage.

A third challenge to the basic use-of-force rules has come from those in favor of humanitarian intervention, which can be defined as the use of force in the internal affairs of a country to prevent massive deprivation of human rights. The UN Charter generally forbids the UN from “interven[tion] in matters which are essentially within the domestic jurisdiction of any state.”⁴⁴ It is also difficult to read Article 2(4) and Article 51 as anything but a prohibition on the use of force by states for any reason other than self-defense.⁴⁵ Although arguably in tension with these provisions, the Security Council occasionally has authorized various interventions, ranging from economic sanctions on the apartheid regime in South Africa to armed attacks in Bosnia, to respond to humanitarian crises on the basis that humanitarian crises can themselves present threats to international peace and security. Henkin and others have accepted this approach by essentially allowing any use of force, for whatever reason, if the Security Council has approved. “[T]he law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council.”⁴⁶

Nonetheless, nations also have intervened in the affairs of other countries for humanitarian reasons without Security Council approval. NATO's attacks on Serbia to stop ethnic cleansing in Kosovo are only the most recent, notable example, of intervention on humanitarian grounds. Other occasions include India's 1971 intervention in Bangladesh; Tanzania's 1978 ouster of Idi Amin in Uganda; France's 1979 intervention in the Central African Empire; American, British, and French use of force in Northern Iraq to protect the Kurds in 1991; intervention by African states in Liberia and Sierra Leone in the 1990s. No doubt some of these interventions also involved strategic or security concerns, but some of them well might not have occurred but for the presence of independent humanitarian goals. The practice of humanitarian intervention is problematic, as such uses of force are neither taken in self-defense nor receive Security Council authorization.

International legal scholars have struggled mightily to reconcile humanitarian intervention with the plain text of the UN Charter. Some acknowledge that armed intervention into the internal affairs of a state is illegal, but hope for retroactive "pardon" for the action from the Security Council.⁴⁷ Some argue that humanitarian intervention is consistent with the overall purposes of the UN Charter, which they claim protects universal human rights, or that the use of force in such circumstances does not seek to infringe the political independence of the oppressing nation, because its intent is to stop a humanitarian disaster, not conquest or a change in borders.⁴⁸ Prominent American academics have sought to identify a new norm of international law that permits a right to pro-democratic interventions.⁴⁹ Nonetheless, states generally have refused to adopt humanitarian intervention as a legal justification for the use of force, as reflected most notably in the United States' refusal to cite it to defend the legality of its interventions in Kosovo, Afghanistan, or Iraq. Some human rights disasters, most notably Rwanda, have gone unstoppable when a relatively minor intervention by the great powers might have prevented them.

II.

Changes in the international system since 1945 suggest that modifications to the current regime governing the use of force are in order. The legal system should respond to the decline of warfare between the great powers and the rise of new types of challenges for the international system. This Part develops an approach that more directly addresses the threats of rogue nations, weapons of mass destruction, and international terrorism of the kind witnessed in the September 11 attacks. This approach seeks to work within the basic conceptual framework of imminence as articulated by Webster and as approved by nations and scholars since. Part II.A explains that the UN Charter's rules address the wrong type of international armed conflict, and that warfare in the postwar world has become more sporadic, less defined, and less formal than the great power wars of the first half of the twentieth century. Part II.B develops an approach to the use of force, internal to the traditional focus on imminence, which incorporates into the equation the probability of attack, the magnitude of harm, and the reduced cost to civilians. Part II.C argues that state practice supports this change in the rules of self-defense, and Part II.D applies it to current cases on the use of force.

A.

An important reason to alter the current approach to self-defense is that it is over-inclusive. Drafted at the end of the most destructive war between nation-states in recorded history, the UN Charter's rules on the use of force seek to prevent aggressive war by one nation against another, as Germany had invaded Poland and then France and Russia, in the interests of territorial conquest. Those who have studied the legislative history of the drafting of the Charter have found that as a result the "framers" of the treaty sought to eliminate virtually all uses of force between states.⁵⁰ War between nation-states, however, has not been the problem threatening the stability of the international system since the end of World War II. Rather, deaths and destruction in international affairs have been caused by civil wars, humanitarian disasters, rogue states, and the recent emergence of international terrorism. This mismatch between the current threats to international peace and security and international legal rules underscores the need to reformulate the regime governing the use of force.

International legal scholars generally have long felt pessimism about the ability of the use of force rules to prevent international armed conflict. Professor Franck, for example penned a well-known essay entitled Who Killed Article 2(4)?, arguing that many nations—including the United States, the Soviet Union, Great Britain, France, and India—had illegally used force in their international relations, and thus had shown that the UN Charter-based system had failed.⁵¹ He wrote that speculative essay in 1970. Inspired by the 1991 Persian Gulf War and the UN authorized interventions that followed, however, Franck changed his tune and had even written a book seeking to justify the NATO intervention in Kosovo as legitimate under, if not wholly consistent with, international law.⁵² As we have seen, however, the Iraq war has caused him to return to his earlier despair.⁵³ Professor Richard Falk has strongly argued that interventions in Kosovo and Iraq have represented a circumvention of the UN Charter rules.⁵⁴ Professor Michael Glennon seized on the Kosovo war to argue that the prohibition on the use of force in international relations, without the Security Council's approval, had utterly collapsed—if, indeed, it had ever worked at all. According to Glennon, the Kosovo war signaled the "death" of the Charter and the "grand attempt to subject the use of force to the rule of law."⁵⁵ While Professor Henkin believes the United States has regularly used force in violation of the UN Charter, he has at least drawn comfort from the practice of the United States to claim publicly that it has acted consistent with the Charter. He once said that at least "the United States did not preach what it may have practiced; it did not seek to reinterpret the law of the Charter so as to weaken its restraints."⁵⁶ It is fair to say that virtually all international legal scholars think that the Kosovo, Afghanistan, or Iraq wars have left the UN Charter system in tatters, while governments have devoted their efforts to developing creative, strained readings of the Charter to find legal support for their actions.

Such discussions mistake the positive developments in the international system by focusing narrowly on the wrong question. As is natural for international legal scholars, they have focused on whether current state practice has complied with the UN Charter, which they consider to be a constitutive document for the world legal order on a par with the US Constitution in the domestic order. Such a perspective, naturally, will view most

uses of force by one sovereign nation against another as violations of international law. But if they were to examine the function of the rules on force against the perspective of the more immediate purpose of the UN Charter, that of reducing the death and destruction from massive international armed conflict, they would be more optimistic.

On first glance, there seem to have been more classical international armed conflicts during the post-World War II period than in previous historical periods. During the 1945-1995 period there have been 38 interstate wars (that figure would be 41 now, after the addition of Kosovo, Afghanistan, and Iraq), while the comparable figures are 36 from 1715-1814, 29 from 1815-1914, and 25 from 1918-1941. But this judges the success of the UN Charter system in relation to its purpose of eliminating all uses of force, except in self-defense. This may well be an unfair comparison, because it would be akin to saying that the domestic self-defense rules have failed because 5.3 million violent crimes occurred in the United States last year.⁵⁷ If a different comparison is used, which controls for the number of nation-states in the world, the post-1945 period appears to represent a significant improvement. From 1715-1814, the number of interstate wars per state per year is .019; from 1815-1914, it is .014; from 1918 to 1941, it is .036; from 1945 to 1995, it is .005—a statistically significant difference.⁵⁸

The overall number of deaths, both civilian and military, for all conflicts between 1945-2000, is estimated to be roughly 40 million people.⁵⁹ (Note that this does not take into account casualties from the Afghanistan and Iraq conflicts.) In comparison, the number of deaths in World War I was between 13 and 15 million, and in World War II between 50 and 60 million people.⁶⁰ As students of armed conflict have observed, however, most of these casualties occurred in internal conflicts, such as civil wars. During the 1946-1999 period, the Correlates of War project, which maintains a database of all armed conflicts, finds 261 armed conflicts, of which 180 were purely intrastate and 81 interstate in various ways.⁶¹ Another study finds that internal armed conflict within a state composes 77 percent of the conflicts between 1945 and 1995.⁶² It appears that during this period, roughly 80 percent of overall casualties from war resulted from intrastate wars, and that 90 percent of those casualties were civilian.⁶³

Armed conflict also appears to have become localized during the post war period. Since 1945, there have been no international armed conflicts in Western Europe or North America, and only one conflict—the Falklands war between Argentina and Great Britain—in South America.⁶⁴ Africa has experienced the highest incident of wars of all kinds, both interstate and purely intrastate. Most importantly, perhaps, since 1945 there have been no “great power” wars, if one is to consider the great powers to include the permanent members of the Security Council, plus Japan, India, and Germany. This is not to say that the great powers, which have been viewed by the international relations literature as both the sources of war and the authors of international stability,⁶⁵ have not themselves been at war—the major conflicts in Kosovo, Afghanistan, and Iraq alone belie that—but only that they have not been at war with each other.

One additional change in the nature of warfare during the post-World War II is worthy of note. In addition to the disappearance of significant multistate wars,

characterized by total warfare between alliances of nations, the object of war has changed. War in pursuit of territorial gain has diminished sharply since the end of World War II.⁶⁶ There may be many reasons that explain the decline in territorial conflicts, such as the more intangible nature of a nation's resources, the growth in international trade, and the higher cost of occupying a resisting population. Nonetheless, a reduction in large-scale conflict for territorial gain – which characterized both World Wars I and II – is a core object of the UN Charter system.

A supporter of the UN Charter system might take solace from these numbers, in that they might be read to suggest that the prohibition on the use of force between nations has succeeded in producing the decline in interstate wars during the postwar period. International legal scholars, however, have not demonstrated that the use-of-force rules have had anything to do with this reduction. Only a case-by-case analysis of the manner in which international legal rules had affected governmental decisionmaking could determine whether such rules have had such an effect, and the few that exist to date do not indicate that the international legal rules on self-defense, for example, have constrained the United States.⁶⁷ In fact, as noted, many if not most scholars believe that the rules on the use of force have been widely flouted. Instead, leading political scientists and diplomatic historians attribute the reduced number of interstate wars and the stability of the international system generally during the Cold War period to the bipolar balance of power between the United States and the Soviet Union. Professor John Lewis Gaddis, for example, argues that the 1945-1991 period should not be thought of as a cold war but as a “long peace,” in which nuclear deterrence and American and Soviet studiousness in avoiding direct conflict led to a period of general peace.⁶⁸ Kenneth Waltz, the founder of neorealism in international relations theory, argues that in an international system characterized by anarchy and self-interested states, a bipolar distribution of power between two superpowers will lead to greater international stability and relative peace.⁶⁹ I am not aware of any scholars who believe that the UN Charter rules on the use of force are themselves responsible for the reduction in interstate wars between the great powers.

A second reason to modify the use-of-force rules is that they do not address the recent changes in technology and political organization that pose threats to nations. The easier availability of weapons technology, the emergence of rogue states, and the rise of international terrorism have presented more immediate threats to national security than that presented by attack by other nation-states. As articulated by the Bush administration's national security strategy, these different developments mean that an attack can occur without warning, because its preparation has been covert and it can be launched by terrorists hiding within the civilian population. This renders the imminence standard virtually meaningless, because there is no ready means to detect whether a terrorist attack is about to occur. Terrorist groups, which have no territory or population to defend, may not be deterrable and may not be swayed by non-violent pressure to cease hostile activities. Rogue nations pose similar problems. States that have withdrawn from the international system, have few ties to the international economy, and which repress their civilian populations to maintain dictatorships may also prove substantially undeterrable through methods short of force. Both terrorists and rogue nations, moreover, do not demonstrate much desire to follow international legal rules—indeed, by attacking

civilians, terrorist organizations violate the core principle of the laws of war—and hence there is little reciprocal value for nations to obey the restraints on the use of force. Nations would only be placing themselves at a permanent disadvantage in following the limitations on the use of force against an enemy that itself refused to be bound by them.

At the same time, the possible magnitude of destruction that terrorists or rogue states can inflict upon the United States has increased. While terrorism and rogue states have existed in the past, the ability of terrorists to launch surprise attacks, or the hostile intentions of isolated, paranoid regimes, might not have posed such a threat to national security when they could mount only limited conventional attacks. This allowed nations to address these problems through a variety of means short of armed attack. The possibility, however, that terrorist groups might acquire weapons of mass destruction, either on their own or from rogue states, places renewed pressure on the limitations imposed on the use of force by the UN Charter system. Terrorists attack without warning, and the possibility that they might acquire weapons of mass destruction increases the harm that might occur from a sudden attack. This only decreases the time to respond and reduces the effectiveness of non-violent measures, and encourages states to try to intervene well before weapons of mass destruction are acquired. Developed in the age of sailing ships and the Concert of Europe, the UN Charter and Caroline approach do not seem likely to control non-state actors or states that disavow participation in the international system, and hence also may not prove an obstacle to nations that feel threatened by them.

B.

In responding to these threats, nations are limited under formal international law to the right to self-defense. Attacks by terrorists or rogue nations may not leave time for resort to the United Nations, and other great powers may have reason to veto resolutions to address the dangers posed by rogue nations. Yet, the current approach to self-defense under international law leaves nations ill-equipped to handle these new types of threats. Waiting until an attack is in progress, or an attack is temporally imminent, may allow the risk of a successful attack to become far too high, a risk that is compounded by the potentially destructive effect of weapons of mass destruction. This part proposes that we reconceptualize the imminence requirement of self-defense to take into account the magnitude of the harm of a possible attack and the probability that it will occur, rather than focusing myopically on temporal imminence.

International law does not supply a precise definition of when a threat is sufficiently “imminent” to justify the use of force in self-defense. Even outside the use-of-force context, although the term “imminent” is used in a variety of international agreements, it is rarely defined. The dictionary definition of “imminent” focuses on the temporal,⁷⁰ but we can reconfigure the concept of imminence under international law to go beyond the temporal proximity of the threat. Temporal imminence has the effect of setting the bar too high on how probable an attack may be. Thus, under the Caroline test, a blow is imminent when it is just about to land—the probability of the attack is virtually 100 percent. It ignores the magnitude of destruction of the attack, so that the minor, and temporary border incursion that gave rise to the Webster-Ashburton correspondence

receives the same treatment as a possible nuclear attack. In either case, under doctrine and conventional academic wisdom, a nation would be restricted from using force in self-defense in both circumstances until just before the attack would occur. Imminence also does not take into account windows of opportunity and the reduced harm that could be caused by more limited attacks. Imminence doctrine would prevent a nation from using force against an enemy, such as a terrorist operative, who comes into clear view at a time when his attack is not temporally imminent, but who could then disappear or disguise his future attack within a civilian population. Using force at an earlier time might reduce civilian casualties and the costs of the attack.

It seems unrealistic to limit the cases that satisfy the imminence requirement to those circumstances in which an attack is about to occur. One example that should allow the right to use force, but is not temporally imminent, may arise when an attack is certain or almost certain to occur even if it is still some time off. Even the International Court of Justice (ICJ), for example, has attempted to expand the understanding of imminence, in the context of determining whether sufficient necessity exists to relieve a state of its international obligations. Some international law authorities would permit a state to invoke necessity as a ground for failing to comply with an international obligation if “the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril.”⁷¹

In 1997 the ICJ addressed whether Hungary was justified in suspending work on a dam, which Hungary was required to construct by treaty with Slovakia, because of Hungary’s fears regarding the environmental consequences of such work on the Danube.⁷² The court considered whether Hungary’s suspension of work was justified by a “state of necessity.”⁷³ The ICJ declared that:

“Imminence” is synonymous with “immediacy” or “proximity” and goes far beyond the concept of “possibility.” As the International Law Commission [has] emphasized . . . , the “extremely grave and imminent” peril must “have been a threat to the interest at the actual time.” That does not exclude, in the view of the Court, that a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.⁷⁴

The court thereby acknowledged that evaluating imminence requires an analysis of not just the timing, but also the probability of the threat. Although the ICJ also equated the concept of imminence with immediacy, in international law, as in domestic law, legal terms like “imminence” have different meanings in different contexts.

Focusing solely on temporal imminence requires states to apply exactly the same policy to situations with widely different probabilities of harm. Under current international law standards, neither situations in which a hostile nation appears 25 percent likely to launch an attack nor situations in which it appears 85 percent likely to attack satisfy the test for imminence sufficient to justify a preemptive attack. A more sensible approach, it seems, would allow states greater flexibility to use force as the likelihood of an attack increases, particularly in light of modern weapon technologies, such as missiles,

which may allow a potential adversary to move rapidly from a state of mere readiness for hostilities to an attack. Probability also bears on responses to terrorist groups. A nation may locate hostile terrorist operatives at a moment in time when their plans are not sufficiently developed to qualify as temporally “imminent.” Nonetheless, it may be impossible for the victim nation to be certain that it will be able to detect the terrorists when they are about to attack, meaning that it will have a limited window of opportunity to use force at all, and only to prevent a less probable attack.

While I will argue in Part III that international and individual rights of self-defense need not parallel each other, a domestic analogy might serve as an additional illustration of the pressure that is being placed on the concept of temporal imminence. Many states require that, in order for force to be justified as self-defense, the threat of harm must be “imminent.” That does not mean, however, that the victim must wait until the final moment before a threatened harm materializes. If the harm cannot necessarily be avoided by waiting for the last moment, force may be used as early as is required for the victim to defend himself effectively. Some scholars use the example of a person who is chained to a wall, and is told by his captor that he will be killed in a week. The use of force in self-defense, even before that week ends and the attack is not temporally imminent, would seem justified.⁷⁵ A similar argument is made by those who favor a defense for battered women. Battered women who have suffered severe and repeated physical abuse by their spouses may have turned to the police with no effect, and the frequency and severity of past attacks may lead them to predict that their abusive spouses will engage in future life-threatening attacks.⁷⁶ While debate over allowing battered women to claim self-defense when they use force before an attack is temporally imminent has focused on whether the reasonable person standard should be “objective” or “subjective,” another way to understand the issue is that the battered woman’s defense seeks to redefine imminence. Rather than temporal imminence, the battered woman’s defense seeks to use past conduct—particularly escalating violence—to assess the probability that future harm is likely to occur. While the appropriate scope of a battered woman’s defense is a complex and difficult issue, at a minimum it shows that even domestic criminal law is considering modifying the imminence requirement away from pure temporality.⁷⁷

Another domestic analogy comes from free speech law, which allows regulation of speech that poses a threat of imminent harm. In Justice Holmes’ terms, the government may restrict speech that presents “a clear and present danger,” or threatens to incite violence or harm such as by crying out “fire” in a crowded theater.⁷⁸ As Judge Richard Posner has argued, these cases analyze imminence according to a cost-benefit approach,⁷⁹ much along the lines suggested here. “Holmes’s ‘clear and present danger’ test requires that the probability be high (though not necessarily as high as in the fire case) and the harm imminent; stated differently, the danger of harm must be great.”⁸⁰ In other words, “discount (multiply) the harm if it occurs by the probability of its occurrence. The greater that probability, the greater is the expected harm and therefore the greater the justification for preventing or punishing the speech that creates the danger.”⁸¹ To be sure, this approach has not met with broad academic or judicial acceptance.⁸² This reluctance, however, may be attributed in large part to a difficulty in evaluating the long-term benefits of free expression and the costs of its restriction.⁸³ Censors rarely are able to

estimate the value of speech, nor is it easy to determine whether, in the long run, restrictions on speech will undermine political stability, market transactions, or scientific research. This problem, however, may not exist with such acuteness concerning the use of force in self-defense, nor does it undermine the argument in favor of expanding the concept of imminence from one purely of temporal proximity to one of probability.

In addition to probability of attack, international law should take into account the potential magnitude of harm. Over time, the advent of nuclear and other sophisticated weapons has dramatically increased the degree of potential harm from an attack. Weapons of mass destruction threaten devastating and indiscriminate long-term damage to large segments of the civilian population and environment. As the ICJ recognized in a 1996 advisory opinion, nuclear weapons possess unique characteristics, “in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.”⁸⁴ In addition, the danger posed by the existence of weapons of mass destruction is exacerbated by the possibility that the means of delivery may be relatively unsophisticated—for example a “dirty bomb” driven into a building by a suicide bomber, or the spread of a biological agent with an ordinary crop duster. Development of advanced missile technology also has vastly improved the capability for stealth, rendering the threat of the weapons they deliver more imminent because there is less time to prevent their launch.

With these developments in offensive arms and their means of delivery, the calculus of whether a threat is sufficiently imminent to render the use of force necessary should evolve. As the magnitude of harm threatened by modern weapons has expanded and the time necessary for their launch has decreased, the temporal restriction on self-defense should diminish. The Caroline test of the Nineteenth Century, if applied literally to a world of modern weapons, would be a suicide pact. As Professor Myres McDougal argued in 1963, “the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists.”⁸⁵ As military lawyers have observed, Webster’s requirement of immediacy is “too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, or no warning.”⁸⁶ Modern technology has pressed the boundaries of imminence because by the time a nation knows that another country is about to launch an attack, the speed and destructive magnitude of the attack may be too great to permit an effective counterattack.

Nor does the Caroline test take into account the modern realities of international terrorism. International terrorist organizations do not deploy large military forces, whose mobilization can be detected days if not weeks in advance by satellites. They do not seek to achieve their military objectives by crossing national boundaries in force so as to seize territory or coerce a foreign government. Rather, they seek to infiltrate covertly into a country, camouflage themselves by blending into the peaceful domestic society, and then launch their attacks—often on purely civilian targets—by stealth and surprise. Imminence loses its meaning if there is no way for a nation to detect the onset or even the preparations for an attack. The sign of a coming terrorist attack often will be only the

attack itself. The declining cost and growing availability of weapons of mass destruction may only compound the difficulties presented by international terrorism. Groups such as al Qaeda have the financial resources to acquire chemical, biological, or even radiological weapons capable of killing thousands indiscriminately. Thus, imminence as a limiting rule suffers not only because non-state enemies can launch attacks with greater speed and surprise than nation-states, but because they also have at their disposal far more destructive weapons than in the past.⁸⁷

Whether a threat is sufficiently imminent to render the use of force in self-defense necessary is not solely a question of time. Rather, imminence should take into account several factors: (1) the probability of an attack; (2) the likelihood that the probability of an attack will increase, given the practicality, or impracticality of diplomatic alternatives, and therefore the need to take advantage of a window of opportunity; and (3) the magnitude of the harm.⁸⁸ This bears obvious similarities to the Learned Hand formula for negligence in torts, whether the cost of preventing the accident outweighs the probability of the accident multiplied by the magnitude of the potential injury.⁸⁹ International law should allow states to use force in their self-defense, rather than pursuing diplomatic means or waiting for the UN to solve the problem, when the expected harm of a potential attack reaches a certain level. Admittedly, the Hand formula does not inform us where that line should be, but it does allow us to see that use of force should move away from pure temporal imminence—which was just a proxy for a high level of probability—to include probability and magnitude of harm.

Such an approach also accounts for the other significant element of the international law of self-defense: proportionality. International legal scholars have failed to provide a satisfactory account of proportionality in the decision to use force in self-defense (as opposed to the work on proportionality in the use of force in tactical decisions). Under this approach, proportionality in international law may be understood as similar to the cost of preventing the harm that might arise from the attack. Proportionality asks whether the costs of the preemptive use of force are outweighed by the probability of the attack and its magnitude of harm. It may be the case, for example, that a nation can use less force and harm fewer civilians by striking earlier at terrorist groups, such as before terrorist groups can infiltrate a civilian population. If a nation can use force to prevent an attack that is farther from fruition, it may well be able to use force more precisely or less destructively.

Viewing the use of force in this manner raises several questions. For example, does this approach justify attacking any country for any reason? Of course not, not every nation in the world that has a military would be a justifiable target under this rule. Rather, the probability of an attack would be a function of two factors: capability and intention. Some nations may have the capability to launch a devastating attack on the United States, but do not have any manifest intent. Thus, Great Britain and France have nuclear arsenals and the means to deliver them, but their intentions toward the United States have been friendly for almost a century. Does this approach to the use of force allow the United States to attack any nation with a perceived hostile intent? Other nations might have the hostile intent, such as, Iran, North Korea, or Iraq before the March 2003 invasion, but

may not have the ability to reach the United States and its forces with their militaries. Taking into account the magnitude of potential harm restrains the use of force against countries that, even if they could attack the United States, could not do so to much effect. Cuba, for example, certainly bears strong hostility toward the United States, but does not have military capacity to carry out a significant offensive attack against US territory. This calculus explains why nineteenth century uses of force of the type in the Caroline case would not justify a broad right of preemptive self-defense, as the harm from border incursions in an age before mechanized warfare would not be that great.

A third question that arises is whether the expansion of the imminence doctrine to include probability of attack and magnitude of harm is more likely to permit erroneous uses of force. It might be the case that loosening the restrictions on the use of force will produce preemptive attacks against nations that had no real intentions or abilities to launch an attack. It might also be the case that the existing set of rules will yield errors in the other direction, in failing to allow preemptive attacks that should have been undertaken to prevent an aggressive assault. One way of thinking about this problem is to conceive of the use of force regime as a choice between rules and standards, about which a huge literature exists.⁹⁰ A typical example of a rule is the speed limit, a prohibition on driving more than 55 miles per hour. The speed limit could also be promulgated as a standard: it is unlawful to drive unreasonably fast. Rules reduce decision costs because they are clear and easy to apply, they create legal certainty because of greater predictability, and they require less information to implement. Rules, however, do not allow a careful application of law to all relevant facts, and so they are inevitably over-inclusive or under-inclusive.⁹¹ Standards, which allow for consideration of more factors and facts, increase decision costs, but reduce error costs. Consideration of a greater variety of factors will reduce the under-inclusiveness or over-inclusiveness of the law, but it will require more information to apply and lead to less predictability and more uncertainty *ex ante*.

An additional difference between rules and standards is that they are better applied by different decisionmakers at different times.⁹² Thus, rules may be superior to standards in situations where mediocre decisionmakers do not have access to good information. A rule, in essence, gives more authority to those who create the rule before the conduct occurs by narrowing the discretion of future decisionmakers. A standard is usually superior to a rule when the decisionmaker is of higher competence and has access to superior information. Standards vest more authority in those who apply the law to a given case, rather than those who wrote the law in the first place. Thus, choice of a rule should occur when those who write the law have more information and competence than those who apply it, and standards should be used when the law appliers have those advantages. Rules and standards, in short, will outperform each other depending on the facets of the particular legal problem.

Taking rules and standards into account, the conventional account of imminence in self-defense is closer to a rule than a standard. It prohibits the use of force until an attack is temporally imminent, and by setting the norm narrowly it reduces decision costs. A national decisionmaker need only know whether an attack is about to happen, regardless

of the intentions behind the attack or the estimated magnitude of destruction. Temporal imminence, however, increases error costs, if an error is defined as not permitting a defending nation from using force so as to prevent an attack from occurring. Waiting until the last moment may not give a defending nation sufficient time to identify and launch a preemptive attack. To be sure, a defending nation will eventually use force when an attack occurs, and in that sense perhaps the imminence rule will never be under-inclusive. It would be a mistake to conceive of the rule in this way, however, because its purpose is to allow the use of force before an attack occurs. Imminence, therefore, leads to errors because it may allow aggressive attacks to hit home, when a preemptive use of force might have prevented the attack in the first place. Finally, the imminence rule gives more authority to those who developed the rule, because it reduces the discretion of the decisionmaker in the here and now in favor of the decision at the time of the rule's development to limit the use of force only to temporally imminent attacks.

The modification proposed in this paper moves the law closer to a standard. It permits more information to be brought to the decision through the analysis of probability and magnitude of harm. This increases the decision costs, because—as we have seen with the disputes over intelligence leading up to the Iraq war—it will require significant resources to obtain reliable information to accurately judge the intentions and capabilities of potential foreign opponents. Error costs, however, should be reduced by this approach, because it will allow the preemptive use of force earlier, before an enemy attack becomes unstoppable or more difficult to blunt, and it allows the consideration of more facts that bear on the issue. Finally, taking into account the probability and magnitude of harm transfers more decisionmaking authority to the nation using force, international institutions, or the international community. If one believes that there are few real institutional or legal checks on the actions of nations in international affairs, then the decisionmaker at the time of application of the rule will be the nation that uses force. If there is more real power in the hands of international institutions, such as the Security Council, or other nations to sanction violators of the use of force standards, then they will receive more decisionmaking authority when they apply law to the facts *ex post*.

Examining the choice between the conventional imminence rule and the modifications offered here highlights some superiorities of a standards-based approach. The error costs of the conventional rule can be extremely high—a successful attack by a terrorist group or an enemy nation. In the past, the cost of the narrow rule throughout the international system may not have been as great, because attacks were easier to detect and conventional weaponry limited the harm that more covert attacks could inflict. To launch a destructive conventional attack, nations used to require weeks to mobilize and deploy their large, mechanized armed forces.⁹³ Since the emergence of easily available weapons of mass destruction and missile technology, and rogue nations and terrorist groups, however, attacks may prove harder to detect and the harm that they can inflict has been multiplied by orders of magnitude. As a result, the standards of probability and magnitude should allow more attacks to be stopped earlier.

At the same time, decision costs under this standard-based system should increase, but not in a way that is likely to outweigh the reduction in error costs. In order to make

reliable assessments of probability and magnitude of harm, before an attack occurs, governments will require investments in gathering intelligence. In order to accurately assess intentions and capabilities, a nation would need to have both technical intelligence about the abilities and deployment of enemy forces, and also human or signals intelligence about their intentions.⁹⁴ Gathering such information would no doubt be more costly than the simple border reconnaissance that would be necessary to detect a temporally imminent attack. It is unlikely, however, that the costs of gathering such intelligence and thwarting preventable attacks would outweigh the costs of a successful attack in an age of terrorism and weapons of mass destruction..

One other type of cost should be noted. Because this approach relies on probabilities, rather than temporal imminence, it is possible that a preemptive use of force could occur when the opponent did not truly intend a hostile attack. If a defending nation waits longer to launch a preemptive attack, it is likely to learn more about the intentions of the other side, resulting in a higher level of certainty. On the other hand, acting at an earlier time when the probability is lower, under the new imminence standard proposed here, would require that the use of force be less destructive and more narrowly focused. This should reduce the costs of mistaken uses of force, and ought to be balanced against the reduction in error costs running the other way by the prevention of more attacks before they occur. While the existing rule requires proportionality between the use of force and the threat, this factor does not appear to have much bite.

C.

State practice indicates that the concept of imminence has quietly changed since the development of nuclear weapons and sophisticated delivery systems. Such practice is relevant because it is the primary, if not only, source of customary international law.⁹⁵ Because the UN Charter permits the use of force in self-defense but leaves the term undefined, customary international law, which represents how states themselves have given meaning to the phrase in practice, may identify the limits of the use of force in the international legal system. Some scholars even believe that a strong history of state practice can give rise to customary international law that supercedes treaty provisions. Apologists for the intervention in Kosovo, for example, have suggested that state practice can amend the UN Charter procedures for authorizing the use of force for humanitarian purposes.⁹⁶ Finally, examining state practice is important because it shows that a more flexible approach to imminence has greater explanatory power in describing how states have applied the use-of-force rules in the past. This Part has selected well-known cases, most of them involving the United States, because they have been the focus of analysis by American international legal scholars in applying standard self-defense doctrine under the UN Charter system.

Cuban Missile Crisis. During the Cuban Missile Crisis, the United States adopted a more elastic concept of imminence and necessity than that articulated in the Caroline test. The secret establishment of medium-range nuclear missile bases in Cuba by the Soviet Union was no doubt a threat to American national security. Those missiles placed much of the United States, for the first time, within range of Soviet nuclear missiles. In response, the Kennedy administration imposed a blockade on the shipment of military

equipment to Cuba,⁹⁷ a use of force that would usually constitute an act of war.⁹⁸ The presence of nuclear weapons in the Cuban Missile Crisis shows how the magnitude of potential destruction changes the conception of the right to self-defense. The sudden and secret preparation of the missile bases undoubtedly, in the words of President Kennedy, “add[ed] to an already clear and present danger.”⁹⁹ Nonetheless, their positioning in Cuba constituted a less immediate temporal threat of armed attack on the United States than that contemplated by previous applications of the Caroline test. There was no indication, for example, that the Soviet Union was planning to use them either immediately, or even in the near term. The United States did not claim, further, that the missiles had been completed or that nuclear warheads had yet been married to the missiles.¹⁰⁰ Certainly there was no showing that the missiles were operational and ready for possible launch. Nonetheless, President Kennedy justified the blockade on a more elastic concept of imminence, due to the possible threat of nuclear weapons:

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 . . . may well be regarded as a definite threat to peace.¹⁰¹

President Kennedy was using the more flexible approach to imminence outlined here. As the magnitude of the possible harm from an attack increased, the needed probability of an attack to justify an exercise of the right to anticipatory self-defense was reduced.¹⁰²

There has been substantial disagreement over the legality of the United States’ actions during the Cuban Missile Crisis. At the time of the blockade, the United States claimed that it had authority to use force because of the authorization of the Organization for American States. Under the UN Charter, however, a regional security organization does not have any greater authority to use force than its individual members. While the United States made a dramatic presentation before the Security Council about the Soviet deployment, the Security Council itself did not authorize the blockade. Within the US government, the Justice Department concluded that the United States could respond militarily as an exercise of anticipatory self-defense, but this rationale was not made public at the time.¹⁰³ Nonetheless, it is difficult to understand the use of force against Cuba as anything else but self-defense, justified by the presence of nuclear weapons. The use of force would not have been seen as self-defense if it had come in response to conventionally-armed bombers or cruise missiles, for example. The Cuban Missile Crisis demonstrates that as early as 1962, nations were modifying their understanding of self-defense to include consideration of the possible magnitude of harm that could be caused by a nuclear attack.

Israel’s 1981 Attack on Iraq. The analysis becomes more complicated when the threat of attack comes not from deployable nuclear weapons, but from facilities potentially engaged in the production of weapons of mass destruction. An example is Israel’s 1981 air strike on the Osirak nuclear reactor in Iraq. Israel attacked the reactor, claiming that the strike was justified as anticipatory self-defense because the reactor was intended to

manufacture nuclear weapons. The reactor was not yet complete, but it was close to operational. In addition, Iraq had not recently attacked Israel, but it had maintained its opposition to the existence of the Israeli state. Israel emphasized the limited window of opportunity in which to strike—once the reactor became operational, an attack would have been impossible because it could have exposed the inhabitants of Baghdad to lethal radioactive fallout.¹⁰⁴ The potential harm that would be caused by an Iraqi nuclear attack was high, but the probability that it would have occurred was more remote than in the Cuban Missile Crisis.

In response, the United Nations Security Council condemned the Israeli attack. Two weeks after the raid, the Security Council unanimously adopted a resolution “strongly condemn[ing]” the Israeli strike as a “clear violation of the Charter of the United Nations and the norms of international conduct.”¹⁰⁵ Several members of the Security Council quoted the Caroline test and argued that the attack did not meet the requirement of necessity, noting in particular that Israel had spent several months planning for the attack.¹⁰⁶ Disagreeing, the Israeli Ambassador claimed that “[t]o assert the applicability of the Caroline principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State’s inherent and natural right of self-defence.”¹⁰⁷ Acknowledging that Israel may have had a right to self-defense, the Reagan administration nonetheless approved the resolution because of Israel’s failure to consider other options.¹⁰⁸ The United States stated that its vote was “based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute.”¹⁰⁹

Applying our reconceived imminence test to the Israeli air strike highlights the relevance of important factors that may be uncertain at the time of an attack. In hindsight, we may believe that the Israeli air strikes made sense in light of Saddam Hussein’s subsequent use of chemical weapons against Iran and his own civilian population, his invasion of Kuwait, his launching of missiles against Israel during the Gulf War, and the evidence discovered during the 1991–98 UN inspections regime indicating that Iraq had come close to secretly constructing a nuclear weapon. If the Israelis had not destroyed the Osirak reactor, Iraq might have developed a nuclear weapon before its 1990 invasion of Kuwait, making the 1991 effort to expel it from Kuwait impossible. In 1981, however, Iraq appeared to be in compliance with international treaties governing civilian nuclear technology and had not made any efforts, yet, to invade its neighbors. Despite its hostility toward Israel, there was no indication at the time that Iraq planned to attack Israel in the near future. The probability that an attack would occur, given that development of a nuclear weapons would still have required several years, depended critically upon the hostile intentions of Saddam Hussein.

US Attack on Libya. An example of the application of a new imminence test to state-sponsored terrorism may be found in the United States attack on Libya in 1986. The strikes were prompted in part by the terrorist bombing of the La Belle discotheque in Berlin on April 5, which was frequented by US military personnel. The blast killed two people, including an American soldier, and injured over two hundred others, fifty of whom were Americans. President Reagan cited evidence that Libya had planned and

executed the Berlin bombing, which was only the most recent in a long line of terrorist attacks supported and directed by Libya against US installations, diplomats, and citizens.¹¹⁰ Several of these attacks had been planned to occur in the weeks immediately preceding the La Belle bombing. In addition, the United States claimed that it had clear evidence that Libya was planning a “multitude” of future attacks.¹¹¹

The United States explained that the strikes on Libya were undertaken in anticipatory self-defense and were fully consistent with Article 51.¹¹² President Reagan argued that the primary objective of the strikes was to forestall future terrorist attacks. “This necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan-ordered bombing of a discotheque in West Berlin on April 5 [1986].”¹¹³ In addition to the threat of future Libyan-sponsored terrorist attacks, the United States pointed to the exhaustion of nonmilitary remedies as meeting the customary international law standard of necessity.¹¹⁴ Moreover, President Reagan emphasized that the strikes were proportional—the targets “were carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians.”¹¹⁵ Although several countries criticized the US strikes and supported a UN Security Council resolution condemning the attack as a violation of the UN Charter, Australia, Denmark, France and Britain joined the United States in vetoing the resolution.¹¹⁶

Retaliation against Libya for a previous act of terrorism against the United States would not fall within the right to self-defense. Libya’s previous attacks, however, had established the high probability of future attacks by demonstrating Libya’s overt hostility and its capability to carry off assaults on Americans abroad. Intelligence about future plans for attack is important in judging the legality of the United States’ attacks. Because the magnitude of Libya’s attacks did not involve a direct attack on the United States or the potential for large casualties, the probability that attacks would occur would have to rise fairly high before the United States could use force legally. The United States did not engage in broad based air strikes, but instead narrowly struck specific targets in Libya’s command-and-control structure. Acting before an attack may have been temporally imminent required that the use of force be lower in proportion to the reduced certainty of an attack.

Panama Invasion. The United States claimed self-defense in response to an imminent threat to US lives when it took military action in Panama in December 1989. Shortly before the US military action, Panama’s National Assembly of Representatives had declared that a state of war existed between Panama and the United States, and General Noriega had delivered an inflammatory anti-American speech. A few days earlier, Panamanian armed forces had killed an unarmed US Marine officer, beat an unarmed US Naval officer, and physically abused and threatened the Navy officer’s wife. The combination of “General Noriega’s reckless threats and attacks upon Americans in Panama [had] created an imminent danger to the 35,000 American citizens in Panama.”¹¹⁷ As President Bush explained: “The deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter and

was necessary to protect American lives in imminent danger.”¹¹⁸ According to the State Department spokesperson, the “right of self-defense entitles the United States to take necessary measures to defend U.S. military personnel, U.S. nationals, and U.S. installations.”¹¹⁹ The United States noted that it had “exhausted every available diplomatic means to resolve peacefully disputes with Mr. Noriega, who has rejected all such efforts.”¹²⁰ The United States assured the Security Council that the use of force would be proportionate, and President Bush chose removing Noriega from power as the only way to protect US citizens in Panama.¹²¹ In the midst of the fighting, the Security Council considered a draft resolution that would have labeled the invasion as “a flagrant violation of international law,” but Great Britain and France joined the United States in vetoing the resolution.¹²²

Panama again demonstrates how considerations of probability and magnitude of harm can be taken into account in determining the legality of the use of force. Panama’s actions, particularly its murder of an American serviceman, signaled a hostile intention toward the large base of American troops and civilians in Panama. Noriega’s hostile activities may have signaled the intention to launch further attacks. On the other hand, the magnitude of any harm would not have been great, and Panama did not have the military resources to carry out an effective assault on the United States armed forces located there. It is difficult to conclude that Panama was a legitimate exercise of self-defense, even under the reformulated approach to imminence developed here. Reasons rooted more in the stability of the international system may explain the use of force in Panama, a consideration we will discuss in more detail in Part III.

Post–Gulf War Iraq. The United States’ use of force against Iraq during the 1991–2003 period also demonstrates that the concept of imminence has declined as a limitation on the use of force. The United States justified the June 1993 strike on Iraqi intelligence service headquarters, which was undertaken in response to “compelling evidence” that Iraq had attempted to assassinate President George H.W. Bush two months earlier, as an exercise of the inherent right of self-defense as recognized in Article 51 of the United Nations Charter.¹²³ President Clinton explained the necessity for US action:

The evidence of the Government of Iraq’s violence and terrorism demonstrates that Iraq poses a continuing threat to United States nationals and shows utter disregard for the will of the international community as expressed in Security Council Resolutions and the United Nations Charter. Based on the Government of Iraq’s pattern of disregard for international law, I concluded that there was no reasonable prospect that new diplomatic initiatives or economic measures could influence the current Government of Iraq to cease planning future attacks against the United States.¹²⁴

The objective of the strikes was to diminish Iraq’s capability to support violence against the United States and others, and to deter Saddam Hussein from supporting such outlaw behavior in the future.¹²⁵ President Clinton described the strikes as “limited and proportionate.” The reaction of the Security Council was largely favorable, and its members rejected the plea of the Iraqi ambassador that the Council condemn the US action as an act of aggression against Iraq.¹²⁶

Sudan and Afghanistan. Attacks in response to attacks by the al Qaeda terrorist network indicate how a reformulated test for imminence might apply to non-state terrorist organizations. On August 7, 1998, terrorists bombed the US embassies in Kenya and Tanzania, killing over 250 people, including twelve Americans. Two weeks later, based on “convincing information from a variety of reliable sources” that the Osama bin Laden organization was responsible for these bombings, the United States launched cruise missile attacks against terrorist training camps and installations in Afghanistan used by that organization and against a facility in Sudan being used to produce materials for chemical weapons. President Clinton explained the international law justification for the strikes:

The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.¹²⁷

Professor Ruth Wedgwood has argued with regard to these strikes that “[e]ven by the demanding test of the Caroline . . . the danger of renewed assault [by bin Laden’s network] justified immediate action.”¹²⁸ In its report to the Security Council after the strikes, the United States emphasized that the attacks were undertaken only after repeated warnings to Afghanistan and Sudan that they must stop harboring and supporting terrorist groups.¹²⁹ The response of the international community to the attacks was mixed, but the Security Council took no formal action.¹³⁰

In sum, recent practice demonstrates that the United States has used force in response to a threat of aggression that is less imminent in the temporal sense than described by Secretary Webster over 150 years ago. Rapid advances in weapons technology have changed the calculus, in large part because a state cannot defend itself if it waits until such weapons are launched. The new threat of nuclear weapons apparently is not, however, sufficient to erase completely any requirement of temporality. For example, the international community did not consider the threat posed by an Iraqi nuclear reactor before it had become operational to be sufficient to justify its destruction by Israel in 1981. Nonetheless, the backdrop against which the threat to Israel was evaluated has changed significantly in the past twenty years. Even at the time of the Osirak attack, if Israel’s argument that it acted in the last window of opportunity were true and its assessment of Hussein’s motives held up, the attack might have qualified as lawful self-defense, even if the materialization of the threat—the development of a nuclear bomb by Iraq—were as much as five years away.

The rise of international terrorism, characterized by unpredictable, sporadic, quick strikes against civilians, similarly has expanded the elasticity of the imminence requirement. Advances in transportation and communications, and the proliferation of weapons technology, have allowed terrorists to wield destructive power that was once only in the hands of nation-states. Terrorists are also difficult to locate and track. They seek to escape detection by concealing themselves and their activities among an innocent civilian population. If a state waits until a terrorist attack is on the verge of being

launched, it likely will be unable to protect the civilians who are being targeted, especially in light of the mentality of suicide bombers, who are immune to traditional methods of deterrence. As terrorists burrow more deeply into this population, defensive options may become more limited. Due to these considerations, a state may need to act when it has a window of opportunity to prevent a terrorist attack and simultaneously minimize civilian casualties.¹³¹ Thus, the United States acted in self-defense to prevent future terrorist strikes in 1986, 1993, and 1998, even though the attacks it sought to prevent were in the planning rather than the implementation stage. As Secretary of State Shultz explained in the context of the conflict with Libya in the mid-1980s:

A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the rights of states to use force in exercise of their right of individual or collective self-defense. The UN Charter is not a suicide pact.¹³²

D.

The advantages of viewing self-defense in the manner proposed here may become clearer when current and possibly future cases are considered. Considering the probability and magnitude of harm provides a means of analysis that allows us to more accurately judge when nations should use force in their self-defense. It will also become apparent that such an approach provides a superior framework for using force against terrorist organizations or hostile nations seeking to develop weapons of mass destruction.

It seems apparent that even under our modified approach to imminence, the war in Kosovo could not have been justified as self-defense. Serbia posed no threat to the United States; it had neither the capability to attack the United States or its forces, nor the manifest hostility to do so. The probability of an attack on the United States was almost non-existent, and the magnitude of an attack would have been small. Nonetheless, the United States and its NATO allies attacked Serbia, without a UN Security Council resolution, to halt its ethnic cleansing campaign in Kosovo, and have occupied the breakaway province since. Any legal explanation for the Kosovo conflict must derive from a system outside the self-defense rules, a topic we will take up in Part III.

Afghanistan, on the other hand, provides an example of the benefits of a modified self-defense doctrine. The September 11 attacks on the World Trade Center and the Pentagon dramatically demonstrated the magnitude of harm that could be caused by Afghanistan's harboring of the al Qaeda terrorist network. Before September 11, al Qaeda had succeeded in bombing American embassies in Africa and damaging a US warship in a foreign port, but had not been able to carry out such a devastating attack within the continental United States. While no further attack may have been temporally imminent in September 2001, the probability that al Qaeda would launch attacks in the future remained high, given its past history and the public *fatwa* against the United States. Current self-defense law would have required the United States to wait until another al Qaeda attack, launched from Afghanistan, was just about to occur before invading Afghanistan and forcing the terrorist organization from its bases.

Iraq presents a case that is closer to the line between the justifiable use of force and the obligation to resort to non-violent or diplomatic measures. As expressed in Security Council Resolution 1441, enacted unanimously on November 8, 2002, the United States and members of the UN Security Council believed that Iraq was continuing to develop, if not stockpile, weapons of mass destruction and that it was concealing these efforts.¹³³ Iraq also maintained links to international terrorist groups. It had continued a policy of hostility toward the United States ever since the 1991 Gulf War, and was in material breach of the cease-fire that had suspended those hostilities by continuing its weapon of mass destruction programs. Resolution 1441, for example addressed “the threat Iraq’s non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security,” and warned that “serious consequences” would result if Iraq did not fulfill its disarmament obligations.¹³⁴ Under the modified self-defense analysis, Iraq’s continuing development of a weapons of mass destruction program threatened a high magnitude of potential harm to the United States. Iraq sits close to the line, however, because of difficulties in judging the probability of an attack. Iraq certainly had sufficient hostile designs, but its ballistic missiles had no ability to reach the United States. Any determination of probability would have to rest on the prospect that Iraq was likely to transfer weapons of mass destruction to terrorists or other nations hostile to the United States and willing to use such weapons. Such information would be gathered by intelligence agencies and there is currently no way—outside of those in government—to judge the amount and credibility of such information due to its sensitivity.

The virtues of a more flexible standard in the use of force become clearer in the context of terrorism. Groups such as the al Qaeda terrorist organization have a demonstrated hostility toward the United States and have shown their ability to launch devastating attacks on American targets both at home and abroad. Further, as shown by the case of Jose Padilla, the group seeks to use weapons of mass destruction against American domestic targets.¹³⁵ Given the clear intention and the magnitude of potential harm, the primary factor governing the use of force against al Qaeda terrorists will be how close to completion their attacks are. If their efforts are less well developed, then surgical, less destructive attacks would be permissible; if they are further along, more force might be used. A defending state could use force to specifically target known terrorist leaders who are planning attacks, even if the exact nature of those attacks are unknown, so long as the strikes are limited. This could come close violating the presidential ban on assassination, but as Abraham Sofaer and Hays Parks have explained, assassination only prohibits murder and not killings undertaken in legitimate self-defense from attack.¹³⁶

Contrast this result to the one that would obtain under a traditional imminence approach. States could not use force until just before a terrorist attack was about to land, regardless of whether the attack was a conventional bombing of a bank or an effort to use a radioactive dirty bomb. States could not take advantage of a window of opportunity, in which they locate a terrorist operative who is engaged in terrorism but whose attack is not temporally imminent. They might be forced to wait in the hopes that the terrorist will reappear closer to the time of attack, even though he might be surrounded by civilians. The

more flexible approach would allow states to target terrorists when (and wherever) they appear, even if their attack might be days, weeks, or months off. Given that terrorists operate by receding into the civilian population and launching an attack by surprise, an earlier sighting may be the only window in which a state could use force preemptively. Under this approach, unlike the current view, the potential terrorist use of weapons of mass destructive would allow force to be used earlier and with greater destructiveness.

To summarize, it is possible to reconceptualize current doctrine governing the use of force to take into account technological and political developments that have made attacks swifter, harder to detect, and more deadly. The use of force in anticipatory self-defense must be necessary and proportional to an imminent attack. As state practice suggests, however, the emergence of weapons of mass destruction, swift modern weapons, and international terrorism demand that a more nuanced test than Webster's nineteenth-century formulation for determining whether a threat is sufficiently "imminent" to justify the use of force. The factors to be considered include: (1) the probability of an attack; (2) the likelihood that this probability will increase, given the practicality or impracticality of diplomatic alternatives, and therefore the need to take advantage of a window of opportunity; and (3) the magnitude of the harm that could result from the threat. If a state instead were obligated to wait until a threat was temporally imminent, it could miss a limited window of opportunity to prevent the attack and to avoid harm to civilians.

III.

Part II argued that the international legal system could adapt to the new threats of modern technology and the rise of terrorism by substantially modifying the current doctrine of self-defense. Exercise of self-defense by nations, however, may not result in the optimal use of force in international affairs. This Part argues that the legal regime governing the use of force in international affairs does not, and ought not, mimic the criminal law. Once freed of the notion that nations are subject to the same self-defense rules that apply to individuals, we can begin consider what rules ought to regulate the use of force by nations and by the United States.

This Part then seeks to develop a framework for applying force in international relations, one that focuses on the maintenance of international stability rather than rules that derive from notions of individual right and criminal law-based norms of liability. It argues that the rules governing individuals under the criminal law have no obvious application to nation-states interacting in a system of anarchy. It becomes important then to focus not just on self-defensive uses of force, but on how to align the incentives of the great powers to address threats to the international system the costs of which may not be fully internalized by most nations.

A.

Difficulty with applying the current doctrine of self-defense to international affairs arises from its reliance upon a criminal law-based approach to liability. There are many reasons to think that rules created to curb violence between individuals within the same domestic community would not apply to relations between nations in an international

system characterized by anarchy. This Part examines several differences between the international system and domestic societies that suggest that the analogy between the two should be broken. Once we cease thinking about the international regime concerning the use of force within the intellectual framework of the individual right to self-defense, we can begin to consider an alternative approach.

There are obvious parallels between the doctrines of self-defense in criminal and international law, as they are conventionally conceived. In criminal law, self-defense is a defense against a charge of murder or assault that can provide a full acquittal. Many scholars agree that self-defense serves as a justification, rather than an excuse, because the use of force itself is not wrongful even though the elements of the offense of murder might be satisfied.¹³⁷ While there are differences across jurisdictions, the justification of self-defense appears to have three common elements: imminence, necessity, and proportionality.¹³⁸ Imminence is temporal: force can be used only when it cannot wait any longer, it does not occur after the fact, and it is based on the visible manifestation of an attack that makes clear that the use of force is “neither too soon nor too late.”¹³⁹ Although the Model Penal Code describes imminence slightly differently, as whether the defender “believes that such force is immediately necessary for the purpose of protecting himself,”¹⁴⁰ Professor Fletcher argues that the Model Penal Code provision and imminence express the same standard. If the attacker is sleeping or looking for a weapon, the use of force is neither immediately necessary nor is an attack imminent.¹⁴¹

Necessity demands that the use of force be the only option left to prevent the attack. If a victim can undertake a less harmful action that would achieve the same result as deadly force, then deadly force is not necessary. Many believe that necessity imposes a duty to retreat, if possible, to seek protection from the police from an attacker, or both. If resort to police protection is feasible, then the use of force in self-defense is not necessary because the government may bring force to bear to protect the potential victim. Proportionality asks that the use of force in resistance not be excessive or disproportionate to the harm threatened by the attack. It requires the balancing of the interests of the defender against those of the aggressor.¹⁴²

Self-defense in international law is conceptualized in virtually the same manner—in terms of imminence, necessity, and proportionality. The analogy between self-defense in criminal and international law has taken such hold that domestic criminal law scholars sometimes illustrate the doctrine with examples from international law. Fletcher, for example, explains imminence by distinguishing self-defense from a preemptive strike, in which “the defender calculates that the enemy is planning an attack or surely is likely to attack in the future, and therefore it is wiser to strike first than to wait until the actual aggression.”¹⁴³ Such preemptive strikes, Fletcher observes, are illegal under international law because “they are not based on a visible manifestation of aggression; they are grounded in a prediction of how the feared enemy is likely to behave in the future.”¹⁴⁴ Scholars have traced the origins of self-defense doctrine in international law to the efforts of international legal writers to apply the law of self-defense in criminal law to world affairs.¹⁴⁵ There are several reasons, however, to question whether the analogy between criminal and international law makes sense.

First, it should be observed that analogizing states to people may be an example of what Cass Sunstein calls a “moral heuristic.”¹⁴⁶ It is probably a common, but mistaken, heuristic to think of nations as individuals. Henry Kissinger’s quip that “nations do not have friends, only interests” sought to puncture this easy way of thinking. Yet, the origins of the heuristic may be understandable. At the time of the birth of the modern international system with the Peace of Westphalia in 1648, and its establishment of the nation-state as the basic actor in world affairs, modern international law was just beginning. Grotius, the father of modern international law, clearly borrowed notions of self-defense from criminal law concepts. In The Law of War and Peace, Grotius discusses individual self-defense and national self-defense in the same chapter. He argues that the right to kill an aggressor in self-defense “derives its origin from the principle of self-preservation, which nature has given to every living creature, and not from the injustice or misconduct of the aggressor.”¹⁴⁷ He then observes that “[w]hat has already been said of the right of defending our persons and property, though regarding chiefly private war [between persons], may nevertheless be applied to public hostilities, allowing for the difference of circumstances.”¹⁴⁸ Vattel had the same view: “every nation, as well as every man, has, therefore, a right to prevent other nations from obstructing her preservation, her perfection, and happiness,—that is, to preserve herself from all injuries.”¹⁴⁹ This borrowing from the criminal law came at a time when the sovereign government of nations was often a person, in the form of a king or queen. Nation-states could be thought of as having rights in international affairs that are analogous to individual rights, because national sovereigns were individuals. As Vattel wrote, “the sovereign is he to whom the nation has entrusted the empire and the care of the government: she has invested him with her rights.”¹⁵⁰

As the basic governing structure of almost all nations has since abandoned monarchy, this view of states no longer makes sense, if it ever did. Thinking of the rights of states as naturally paralleling those of individuals should fall by the wayside as well. One might argue that even if modern nation-states no longer have hereditary monarchs who possess the state as personal property, nations still have a right of self-defense that represents the collective aggregation of their citizens’ individual rights to self-defense. As David Luban argues, “[w]ars are not fought by states, but by men and women.”¹⁵¹ Under this conception, an independent right of the state to self-defense would not exist, only that of individuals to defend themselves and others. The right of a soldier to use force is no different than that of an individual to defend himself, and war is simply a contest between hostile persons. The state and its armed forces merely represent the collective rights of self-defense held by all of the individuals in a society.

This individual rights-based conception of the right to self-defense in international law cannot explain contemporary understandings of armed conflict, especially its distinction between jus in bello and jus ad bellum. Under the laws of war, for example, those who fight on either side of a conflict, regardless of which nation started it, receive combat immunity and may legally attack and kill members of the opposing military. If national self-defense were based on the individual rights of soldiers, soldiers who fight on behalf of a nation that illegally began a conflict would have no right to use force against the soldiers of the defending nation. Just as an individual who seeks to murder a victim

has no legal right to use force, the aggressive use of force by soldiers in an invading army would be identically illegal. Under the laws of war, however, once a conflict has begun—and regardless of the reasons for its commencement—the soldiers on either side do not commit a crime when they kill the enemy.¹⁵²

This point receives further support when more particularized uses of force within war are considered. Under the laws of war, for example, soldiers may target not just enemy soldiers on the battlefield, but also supporting units, such as supply lines and reinforcements, noncombatant members of the armed force, such as clerks and cooks, and other members of the armed forces that are not currently fighting on the battlefield. Soldiers may attack targets well behind the front lines, including bases, munitions factories, and command-and-control facilities. A defending army may even pursue and destroy a broken and retreating invading force, as occurred when the United States and its allies attacked retreating elements of the Iraqi military in the 1991 Persian Gulf War. These examples illustrate that soldiers may target members of the enemy military during wartime even when they pose no immediate threat to their lives.¹⁵³

An individual rights approach to self-defense also fails to take account of the contemporary laws and practice of war as they relate to the purposes and objectives of war. Under the criminal law, for example, necessity continues as a requirement for the use of force throughout an encounter. Thus, if in responding to an attack a defender disables the attacker, in such a way that he can no longer injure the defender, then his right to use deadly force ends. That is not the case in international affairs. A defending nation does not have an obligation to cease hostilities once it ejects an invader from its territory, but rather can continue on to attack and occupy the territory of the invader. Thus, in the Second World War, the United States, Great Britain, and the Soviet Union not only repelled Axis invasions, but also demanded the unconditional surrender of Germany and Japan, invaded their homelands, and occupied both nations for years. While the possibility of renewed, future aggression cannot serve as a ground for the use of force in criminal law, it can provide a valid reason for continued hostilities under international law, as the case of World War II suggests.¹⁵⁴ A related point involves the use of force in self-defense in response to a crossing of a border or the seizure of territory that does not involve the loss of life. Even if the border is a poorly drawn one, the United Nations Charter recognizes that nations may use force to resist aggression that crosses a border or that seizes territory, even if it is uninhabited.¹⁵⁵ Such aggression would not seem to trigger an individual right to self-defense, as no lives would be in danger, unless we were to give a broad reading to the “castle” right to self-defense in one’s home to include an entire nation’s territory.

A third, and most directly important, difference between the criminal law and international law comes from the differences between the domestic and international systems. Under domestic law, necessity requires withdrawal if possible without the use of deadly force. If the police and the criminal justice system can provide subsequent protection from an attacker, then the use of force is not necessary. The twentieth century explanation for the duty to retreat, which traces its origins to Blackstone, is that “the private use of force is tolerated only because the state fails in its task of providing

protection against aggression.”¹⁵⁶ The ability to use force, therefore, depends upon the effectiveness of government in preventing harmful attacks. According to Fletcher, under this view:

[i]f the privilege of necessary defense is derivative of the state’s monopoly of force, then the regulation of the defense invariably reflects the interests of both of the aggressor and the defender. If the latter can save the life of the former by retreating from the conflict, the greater social good requires him to withdraw.¹⁵⁷

In the international system, by contrast, there is no central, supranational government that effectively can protect nations from attack. While the United Nations has the legal authority to intervene against threats to international peace and security, primarily military aggression, the United Nations itself has no military forces with which to implement this sweeping authority. At best, it can authorize member states to come to the aid of a victim nation—a request for third-party assistance in self-defense—and it has a poor track record of even doing that. Between the Korean and Persian Gulf Wars, the United Nations Security Council issued no authorizations to use force, and since the 1991 conflict resolutions authorizing military intervention have still been rare. Self-defense may require that nations seek non-violent means to solve disputes, such as diplomatic pressure or even economic sanctions, but it is difficult to see how necessity could require nations to defer to a central government for protection when supranational authority in the security area remains so weak. While the criminal law seeks the “legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts,”¹⁵⁸ self-help is the prevailing rule in international affairs.

Fourth, and finally, there is a significant difference between the criminal justice and international systems with regard to the desired level of violence. In the domestic sphere, the rules of self-defense are so strict because society seeks to achieve a zero level of homicide. The use of force is only legitimate when an attack is imminent, when it has openly manifested itself, to ensure that use of force that results in a loss of life was not pretextual. Such an approach limits the use of force almost entirely to those cases where, even without the use of force in self-defense, death or serious bodily harm will occur anyway. Strict self-defense rules, in other words, do not allow conduct that would add to the overall use of force that would have occurred.

International legal scholars commonly make similar arguments with regard to the doctrine of self-defense in international law. They argue that without strict standards to govern the use of force in self-defense, states will use the doctrine as a pretext to resort to force whenever they seek to advance their own self-interests. As Professor Franck argues, “a general relaxation of Article 51’s prohibitions on unilateral war-making to permit unilateral recourse to force whenever a state feels potentially threatened could lead to a[] reductio ad absurdum.”¹⁵⁹ International law, according to Franck, must require more than serious threats before self-defense may be triggered. “The law cannot have intended to leave every state free to resort to military force whenever it perceived itself grievously endangered by actions of another, for that would negate any role for law.”¹⁶⁰

It is not obvious, however, that the desirable level of force, apart from examples of self-defense, in the international system is in fact zero. States have used force to achieve goals that have benefited the international system, whether it be ending the slave trade or stopping the spread of fascism or communism, which arguably went beyond pure self-defense. In the last two decades, for example, the arguments and cases in favor of humanitarian intervention have increased. Unfortunately, the post World War II period contains many examples of humanitarian disasters, including those caused by the intentional repression of citizens by their own government, those caused by the collapse of centralized government authority, and those that are the product of religious, ethnic, or nationalistic fighting between different groups within a society. Although the Charter forbids infringement on the territorial sovereignty and political independence of member nations, the United Nations Security Council has responded to the problem of humanitarian crises, in part, by authorizing limited interventions in places such as Somalia, Haiti, Bosnia, and East Timor. A healthy academic debate continues over whether the Security Council may authorize the use of force against governments that repress their own people, but the practice seems to have become firmly established.

Humanitarian disasters may not be the only example where the optimal amount of force in international affairs is more than zero. There may be certain types of regimes whose spread, either through conquest or through coercive establishment of a political or economic governing system, could be seen as harmful not just to the United States, but to the stability of the international system or to the world's peoples. Fascism might serve as an obvious instance in which nations might wish to use force not just to stop humanitarian abuses against ethnic minorities such as Jews, but also to remove an evil regime possessed of expansionist goals and an ideology that threatens to destabilize the international system. Or take, for example, the rivalry between the United States and the Soviet Union during the Cold War. While international stability might have been served by respecting the Soviet Union's gains in Eastern Europe and China, it also may have benefited global welfare to prevent the spread of totalitarian communism to new countries. Thus, we may want the United States to assist South Korea against invasion by North Korea, or to prevent the spread of Soviet influence immediately after World War II in places like Italy, Greece, and Germany.¹⁶¹ A combination of the preceding two characteristics—human rights abuses and dangerous ideological regimes—define what the United States calls “rogue” nations such as North Korea and the former regime of Saddam Hussein in Iraq.

A third instance where the use of force beyond self-defense may be desirable is presented by cases in which centralized authority has collapsed, or where it has been hijacked by violent non-state actors. States without an effective central government may provide terrorist organizations or others a safe haven where they can recruit and instruct fighters, organize their weapons and finances, or serve as trans-shipment points for illegal money, weapons, or people. Somalia, for example, not only gave rise to warlords who abused the human rights of the inhabitants, but also became a haven for terrorists who then attacked other African nations. States such as Afghanistan allowed al Qaeda to operate terrorist training camps and to organize attacks against various American and other western targets, and generally served as a base where the organization could operate

freely. Without an effective central government, these states cannot respond to demands from others that they apprehend terrorists or stop harmful activities by those operating within their borders. The activities that occur within those borders may present a threat to the international system, as they may constitute a central operating position from which a terrorist network may project power into multiple nations, which may in turn destabilize the governments and societies of those nations. The international system may benefit from allowing the use of force in such circumstances not only because of the restoration of order in a state with a weak or non-existent government, but because of the elimination of a base that supports destabilizing terrorist attacks in several nations.

B.

If international law need not impose the same rules for use of force on states that the criminal law imposes on individuals, then we should ask what goals the international legal order should be seeking to advance. In the fields of international politics and economics, scholarship has turned recently to the study of international public goods.¹⁶² When markets function, the uncoordinated actions of self-interested actors will result in the optimal production of goods and services. Public goods, however, are goods that benefit society but because of market failures are not produced at the optimal rate.¹⁶³ Public goods have two salient characteristics: they are non-rivalrous, in that one actor's consumption of a public good does not leave less for other consumers, and they are non-exclusive, in that it is not feasible to prevent people who have not paid from consuming the good, so that the costs of excluding nonpaying beneficiaries are so high that private firms will not supply the good.¹⁶⁴ In the domestic arena, some examples of public goods would include clean air and national defense, which benefit all members of a community, regardless of whether they pay for it or not. In addition to providing public goods, collective government action may also produce similar results by counter-acting other types of market failures, such as negative externalities or undefined property rights. Domestic examples would include restrictions on industrial air pollution and the management of fisheries stocks. Students of international affairs have applied analysis of collective action problems for the production of public goods to areas such as financial stability, environmental pollution, health, biodiversity, and trade.¹⁶⁵

Public goods and collective action problems are familiar concepts to domestic legal scholars.¹⁶⁶ International legal academics have also employed the tools of political science and economics to understand international regimes that supply international public goods or reduce market failures.¹⁶⁷ Much of this work has focused on the environment or public health. International legal scholars, however, have mostly ignored the very example of a public good most often cited by theorists: national security.¹⁶⁸

Transplanted to the international area, national security's analogue would be international stability or security.¹⁶⁹ We can view international stability as a public good because its provision benefits all nations in the international system, but at the same time it is non-exclusive and non-rivalrous. If one nation or a group of nations maintains international peace, then all nations—regardless of whether they have contributed to stabilization efforts—will benefit. Stability reduces the need for defensive military expenditures, reduces the costs incurred by mass refugee migrations, enables easier trade

and cross-border investment, and provides certainty for global markets. Enforcing peace in different regions of the world will produce these benefits regardless of whether nations in the region financially contribute or not. Indeed, one of the early theorists of public goods and collective action problems, Mancur Olson, applied this approach to the question of national alliances such as NATO and argued that defensive security alliances could produce just such an international public good.¹⁷⁰ Recently, political scientist Joseph Nye also has recognized that international stability is a global public good and, as a result, has argued in favor of using American power to maintain regional balances of power.¹⁷¹ In fact, one would think that international stability would be the public good that precedes all others in importance, for without relative global peace the international system is unlikely to achieve much progress in solving collective action problems involving the environment, monetary policy, or public health.

As a nonrivalrous and non-exclusive public good, international stability will be under-produced by rational nation-states pursuing their own national interest. If anything, therefore, the international legal system should promote conduct that encourages stability-enhancing uses of force, rather than seeking to reach a zero level of violence, as current rules do. To be sure, the benefits of stability will not accrue to all nations in the same proportion,¹⁷² but then nations will have different capabilities in promoting stability as well. Thus, for example, it is often observed that the British navy in the nineteenth century used force to protect the freedom of the seas.¹⁷³ That freedom certainly benefited Great Britain, with its island geography, large navy and maritime fleet, and extensive but dispersed global empire, more than most. Freedom of the seas, however, also benefited other seafaring nations, most notably the United States, which was shielded from other European powers during the nineteenth century while its economy developed and its territory expanded. Given the benefits of stability on the high seas, which allowed maritime transportation and commerce to flourish in the nineteenth century (and which the British navy unilaterally used to end the slave trade), the international legal regime should allow the use of force in such situations, even though the benefits and costs of maintaining that stability are asymmetric.

No doubt these values are impossible to measure with any precision, in part because of the number of variables and in part because of the difficulty in measuring them. Nonetheless, there may be cases that are clearer than others, and I will attempt to show below why the Kosovo, Afghanistan, and Iraq wars can be justified on these terms. In each of these cases, it could be argued, the threat of attack on the United States—as measured by the probability of a future attack times the magnitude of harm—might have been low in comparison to the costs of the war. Yet, the use of force ended a harm to the international system, either because intervention prevented a humanitarian disaster or it brought an end to a situation that was destabilizing the international system by threatening multiple nations. Rather than control the use of force with a criminal law model that places a high bar on initiating armed conflict, these situations might be better addressed through a cost-benefit analysis that takes into account the benefits of maintaining international stability, and of preserving lives, balanced against the predicted costs of a war to both the attacked nation and the attacker.

An additional cost should also be considered. The use of force might itself have a destabilizing effect to the international system. Such effects might arise simply from excessive use of force by the great powers, which could cause uncertainty and opposition from weaker nations worried about their own political independence and territorial integrity. Such costs also might accrue from the wider impact of an intervention in a nation that would fiercely and effectively resist an attack. Thus, human rights abuses and cross-border tensions in India and Pakistan no doubt add to the instability in Central and South Asia, but any military intervention by the great powers would create only more loss of life and instability given the military strength of the contending states. Intervention to prevent human rights abuses might save many lives, but it also might breed instability by causing nations to fear whether the great powers will intrude into their internal affairs, and cause them to build up their forces and engage in hostile military conduct.

Another way of viewing this cost is to understand it as a principal-agent problem. In domestic affairs, nations turn to institutions and the state to foster cooperation that overcomes collective action problems. Nonetheless, public goods may still be imperfectly provided due to self-interested actions by government officials, capture of bureaucracies, or gridlock due to political competition between interest groups.¹⁷⁴ Agents, in other words, may misuse the power delegated to them by their principals. At the international level, similar problems may arise if nations (the principals) fear that the United States (the agent) will use its power for rent-seeking, rather than to provide the global public good of stability. Seeking to restore international stability and then removing its forces, rather than maintaining a permanent imperialist presence, might demonstrate that the United States or other great power remains faithful to the goals of the system.

This concern may also affect the decision whether to adopt a rule or standard, as discussed in Part II. The greater the distrust of the great powers, the more the legal approach to the use of force should resemble a rule. Recall that a rule will place more decisionmaking power in the hands of those who, *ex ante*, draft the rule. An anarchical international system only compounds the problems of abuse of delegated powers because those who use force will often also be the interpreter and applier of the norm. If there is less concern over abuse by the powerful nations, or the problem to be cured through the provision of the public good is serious enough, then a standard may be more appropriate, because it shifts authority to the *ex post* decisionmaker, which can more effectively tailor the use of force to the precise situation. In light of the decline in vast interstate wars for territorial gain, and the rise in the costs to the international system from rogue nations, intrastate conflicts, terrorism, and the proliferation of weapons of mass destruction, gains in international stability through the use of force seem to outweigh potential principal-agent costs. This calculus could change, however, if the identity and goals of the stabilizing great power or powers were to change.

Approaching the use of force in this manner may provide a more convincing explanation of why, despite the criticisms of the international legal academy, these recent uses of force have not been condemned or rejected by the other nations in the system.

Kosovo, for example, is difficult to understand as self-defense, even under the more flexible standard of imminence outlined in Part II. Although some nations protested, most notably Russia and China,¹⁷⁵ after the conflict ended the Russians participated in the occupation of Kosovo and the Security Council enacted a resolution authorizing the entry of NATO troops and the withdrawal of Serbian forces from Kosovo.¹⁷⁶ While some international lawyers have struggled to argue that the intervention was “legitimate” but not “legal,” it seems that the major actors in the international system have acquiesced in the intervention. While *ex post* authorization for the reconstruction of Kosovo is not the same as *ex ante* approval to use force, the Security Council’s cooperation with NATO after the war suggests that the other major players in the international system were willing to accept this use of force.

The perspective developed in this part may explain why nations have not challenged the legality of the conflict in Kosovo. Although the treatment of the ethnic Albanian minority in Kosovo had been an internal matter of the former Yugoslavia, it threatened to become regional in effect. In reaction to military operations by the Serbian military in 1998 and 1999, roughly 600,000 Kosovars had fled to neighboring states and an additional 850,000—out of a total population of 2 million—had been displaced internally. When NATO air strikes began in March 1999, Serbian troops immediately implemented a plan to force the rest of the Kosovars out of the country. The outflow of the population had a destabilizing effect on the nations around them, by forcing them to bear the large economic costs of housing refugees and by potentially serving as havens for rebels interested in attacking Serbia. While the immediate recipients of refugees were the other former provinces of Yugoslavia, the flow continued into adjoining nations as well, including Italy, Austria, Hungary, and Greece. The Balkans had been the tinderbox for one European wide war, and NATO leaders were concerned that instability there might draw into the conflict Russia, which had been Serbia’s defender in the United Nations, and NATO. Intervening in Kosovo not only ended a humanitarian crisis, but it restored stability in an important region of the world. While ending the Kosovo conflict and terminating the wider fighting within the former Yugoslavia no doubt primarily benefited the United States and its European allies, the end of war in that region also benefited the international system as a whole by reducing the chance of a wider conflict.

Afghanistan provides another example of a system-stabilizing use of force. To be sure, the United States had a self-defense interest in attacking the al Qaeda terrorist organization that had based itself there. Although the September 11 attacks were not strictly launched from Afghanistan, they were planned and financed from within the country by al Qaeda. It is less clear, however, whether the proportional use of force included removing the Taliban militia and replacing it with a friendly regime. International legal scholars maintain that whether force can be used against a state that harbors terrorists remains “controversial.”¹⁷⁷ After September 11, the Security Council condemned the terrorist attacks as “a threat to international peace and security” and “recognize[d] the inherent right of individual or collective self-defense in accordance with the Charter,” but did not authorize the use of force against Afghanistan.¹⁷⁸ Nonetheless, after the end of the Afghanistan conflict, in which several European and Asian nations participated, the United Nations gave its *ex post* approval to the

arrangements for the reconstruction of Afghanistan—a sign, perhaps, that most nations seemed to accept the outcome.

As with Kosovo, the intervention in Afghanistan may have benefited the United States more so than other nations, but it also provided a public good of international stability that benefited others. Afghanistan had become a lawless zone where terrorists groups could operate without being pursued by national police or military forces. This safe haven gave al Qaeda a secure location at which to gather and train its forces, base its infrastructure and support structure, and from which to send out cells of terrorists to launch attacks. In addition to hitting American targets, al Qaeda aimed to destabilize different regimes in the Middle East and Asia, such as Saudi Arabia and Indonesia, and operated a terrorist network that reached into Europe and Africa. As non-state actors, terrorist groups are difficult to deter and perhaps impossible to negotiate with, and therefore are freer in their use of force against their enemies. Further, in al Qaeda, we saw the emergence of an international non-state terrorist organization that had the resources to engage in a level of destruction that, in the past, could only have been produced by nation-states. Preventing the use of Afghanistan as a free base of operations eliminated the negative external costs imposed on the nations that al Qaeda threatened to attack.

Our last example is Iraq. Arguments continue over whether Iraq constituted a direct threat of attack on the United States. Whether Iraq had weapons of mass destruction bears directly on the question of whether the United States could use force in its self-defense. Saddam Hussein certainly had the hostile intent to attack the United States and its forces, and Bush Administration claims about Iraqi links to terrorism were arguments that Hussein could effectively attack the United States by transferring weapons to groups hostile to the United States. While this may have seemed highly unlikely before, September 11 demonstrated that a hostile state could project power, of an unconventional kind, to US shores without possessing the normal methods of missiles, fleets, or aircraft. Nonetheless, self-defense as a justification proved extremely controversial, and as a result the United States argued that it was primarily enforcing previous Security Council resolutions designed to contain Saddam Hussein. Several nations, included three of the five permanent members of the Security Council, opposed this justification and argued that an invasion of Iraq would be illegal. While the dispute over the war's legality continues, with almost the entire international legal academy against it, after the conflict the Security Council has enacted three resolutions recognizing the occupation of Iraq.¹⁷⁹

Assuming that Iraq did not present a case of direct attack on the United States, the international stability argument provides the grounds for a legal rule that might find the invasion justified, depending on the facts. Iraq had been a continuing destabilizing factor in the Middle East region. It had sought to construct a nuclear weapon, it had invaded Iran in a bloody eight-year conflict, and it had invaded Kuwait in a war of conquest. It had attacked Israel during the Gulf War in an effort to spark an Israeli-Arab conflict. It had repressed its own population and had used chemical weapons against both its own people and Iran. It had supported terrorist groups in the past. The United States and its allies had spent billions annually since the end of the Gulf war to contain Iraq and prevent it from restoring its weapons of mass destruction programs. Iraq had imposed significant

costs on the international system, and stability in the region was maintained only by the continuing use of countervailing force. Whether Iraq posed an even greater danger to international stability depends, in part, on whether its weapons of mass destruction research and production was ongoing. Another factor that will determine whether the war was justified is whether the conflict itself produces its own destabilizing effects, either by undermining the steadiness of nearby regimes or ushering in the prospect of a continuing conflict that produces more violence.¹⁸⁰

Several questions will arise about this approach to the use of force. First, it is worth asking whether a legal regime that allowed the use of force to prevent system destabilizing conduct still will produce the optimal amount of force. Because there is no effective central government with a monopoly on force in the international system, few if any nations will fully internalize the costs and benefits of using force in situations that go beyond self-defense. Nations have shown great reluctance to use force to stop purely humanitarian disasters, as occurred with the hundreds of thousands killed in Rwanda, even when the commitment of troops required is relatively low. Even when the United States sent troops to Somalia in 1993 to solve a humanitarian crisis, the deaths of eighteen soldiers in a firefight led it to remove its forces. In addition, it may not rest within the capabilities of any individual nation to use force in all of the situations that might be required. If only powerful nations can stop destabilizing international problems, they soon might experience exhaustion of resources and political will. Unlike the 1991 Persian Gulf War, other nations may prove unwilling to contribute to the cost of military action. The surprising thing, then, about the wars in Kosovo or Iraq is that they happened at all, because it is not clear whether the United States itself captured sufficient benefits in terms of international stability to justify the costs of intervention. If one believes that the use of force in Kosovo and Iraq benefited global welfare, the grounds for pessimism are that the international system has no mechanism in place for compensating nations to engage in such conflicts. As with the British navy in the nineteenth century, we can expect to see interventions only where the benefits from international stability will accrue in a greater proportion to the United States or other great powers that undertake them, and that these individually—captured benefits outweigh the costs of intervention.

The analysis on this point draws upon hegemonic stability theory. As developed by some international economics and international relations scholars, the theory maintains that international public goods will be provided by a single great power or small group of powers – the hegemon – which can overcome the collective action problem presented by large numbers of states in an anarchical international system.¹⁸¹ From a utility maximizing standpoint, the benefits and control that accrue to the hegemon are justified because the provision of the public good itself would not occur without the hegemon due to free riding problems. A hegemonic power, however, will not provide the public goods unless it is able to capture benefits that either approximate or exceed the costs of maintaining the international regime that provides those goods. International relations theorists have questioned whether the existence of a hegemon is a necessary precondition for the maintenance of international rules and stability,¹⁸² or whether nations can overcome collective action problems through institutions and regimes that do not need a single power nation to enforce them. For purposes of this Article, it is not critical

whether an international regime supported by weaker powers can supply an international public goods in place of a hegemon. Rather, all that is needed from the theory is the conclusion that a hegemonic power *could* supply international peace and stability, if it chooses to do so and under what conditions that is likely to happen. Given that non-hegemonic powers and alliances have proven unable to directly address the problems posed by Kosovo, Afghanistan, or Iraq, international legal rules may be better re-conceived to encourage hegemonic powers to intervene to maintain international peace and security, rather than to discourage them.

A second question that arises is about the place of purely humanitarian intervention. While the wars in Kosovo, Afghanistan, and Iraq no doubt ended terrible oppression, it does not appear that the United States and its allies engaged in any of these conflicts solely for that reason. Somalia and Rwanda demonstrated that the great powers were willing to risk little, if anything, to stop humanitarian abuses that also did not benefit international stability or other strategic goals. Whether the international legal system ultimately will accept humanitarian intervention, under the analysis suggested here, will depend on several factors. One is whether gross human rights violations create a negative externality that itself imposes harms on others.¹⁸³ A second factor is whether intervention to stop human rights abuses, if widely used, would prove destabilizing to the international system because of the fears of nation-states that they would no longer control their internal affairs. A third consideration would be the additional systemic benefits of ending regimes that oppress their citizens. It may be the case that nations that systematically abuse their own citizens also engage in other destabilizing activities that threaten the international system, such as Iraq, Afghanistan, and the former Yugoslavia. It also might be the case that nations where systematic human rights abuses occur because of a loss of a central authority also will prove fertile ground for the operation of international terrorist organizations. Somalia provides a good example of this last linkage. Nonetheless, there is clear tension between a framework that allows the use of force to stabilize the international system, founded as it is on nation-state sovereignty, and the needs of humanitarian intervention. This paper does not seek to resolve that tension, but instead makes the more modest claim that, putting humanitarian intervention to one side, international law should still permit the use force to address threats that destabilize the international order.

A third question that could arise concerns the nations that are on the receiving end of the use of force. If the United States or other great powers use military coercion to end a threat to international stability, a nation likely would resist on the basis of self-defense. Serbia, for example, opposed NATO's intervention in Kosovo, and Iraq of course mounted a resistance to the United States' invasion in 2003. If the international system operated according to the current doctrine on use of force, both Serbia and Iraq would be justified in using force in their self-defense. This would mean that both sides in the conflict would be acting lawfully, which seems paradoxical. It is even possible that the state producing the initial instability would have the superior claim. If we moved to a legal order, however, that sought to stabilize the international system, states should not have a right of self-defense to resist—especially to protect conduct such as illicitly producing weapons of mass destruction, driving local populations into nearby nations, or

threatening neighboring countries, that undermine the international order. Allowing a right to self-defense would only increase the costs of maintaining international stability. Although if a nation is sufficiently powerful to successfully resist intervention, it would be a sign that international stability would not be enhanced by the use of force. Intervening to stop hostilities between India and Pakistan, for example, would likely not be militarily successful, and the intervention itself might increase instability in the region by expanding a conflict, increasing its destructiveness, or drawing in new powers. Comparing the costs of military intervention and its secondary destabilizing effects, however, is the better way to judge the legality of use of force, rather than analyzing temporal imminence and competing, and conflicting, claims of self-defense.

CONCLUSION

Regardless of the international law rules of self-defense, nations well may continue to act as they see fit. Because of the lack of any enforcement mechanism, international law can place no restraint on the United States or other countries that make decisions concerning the use of force. Constraints, if any, come only from the costs of undertaking military action and the countervailing power of other nations. This has long been the realist view of American foreign policy, as articulated famously by George Kennan and Hans Morgenthau after the end of World War II.

Nonetheless, there are at least three reasons to think that the international rules governing the use of force are more than just talk. First, the rules are embedded in the United Nations Charter, and as a result are provisions of a treaty that has been approved by the Senate and made by the President. They are federal law under the Supremacy Clause, and as such may well fall within the President's constitutional obligation to see that the laws are faithfully executed. If that is the case, then presidential actions that violate the UN Charter's rules on self-defense amount to a violation of the law, a suspension of the Charter, or are tantamount to a declaration that the Charter is a non-binding political obligation. Based on this line of reasoning, scholars have argued in the past that the use of force by the United States in places where no obvious self-defense rationale existed violated both the UN Charter and the Constitution.¹⁸⁴ The United States, it seems, would want to avoid either outcome, and it is therefore important to develop a doctrine for the use of force that can claim some consistency with international law and the UN Charter.

A second constraint may arise from the decisions of private actors and the international marketplace. Non-state organizations, such as corporations or international institutions, that do business with the United States and whose participation in armed conflicts may benefit the United States, could be less willing to cooperate if they are uncertain about the legal authority of the use of force. Iraq may provide a case in point. Private corporations are critical to the reconstruction of Iraq; they are rebuilding roads and infrastructure, operating oil fields, selling needed products, and buying oil. Oil companies may be reluctant to purchase Iraqi oil while uncertainty remains over the legality of the war in Iraq and the subsequent occupation by the United States and the

United Kingdom. If the war were illegal under international law, then Iraqi oil exported by the coalition provisional authority might be of dubious title. Similarly, companies may be slow to participate in rebuilding Iraq, if their actions were too closely coordinated with the wartime activities of the United States and its allies and could potentially subject them to lawsuits. This is not to say that international law would be able to wholly prevent oil sales or contracting work in Iraq, but it could cause the United States to have to pay a premium, incurring an additional cost on the use of force.

This raises another, related point about compliance with international law, over which there has been much debate in the international law literature.¹⁸⁵ If a nation violates what are seen as the international rules on the use of force, it might cause it a reputational harm, independent of any more direct military, economic, or diplomatic sanctions.¹⁸⁶ Such reputational harm may decrease the ability of a nation to credibly enter into international agreements in the future, as other nations may view a nation's willingness to violate international law as a signal of its untrustworthiness. Nations that violate international law may not be as reliable treaty partners as nations that rarely violate international law. Of course, the value of this reputation is difficult to measure, and may well be outweighed by the potential harm of threats to a nation's security or to international peace and stability.

Third, the international legal system is beginning to develop its own enforcement mechanisms. Although the Security Council has not shown itself to be much of an *ex ante* restraint on the use of force by the great powers, a new international institution, the International Criminal Court (ICC), has recently appeared to prosecute violations of the laws of war. It can currently try individuals for violations of the *jus in bello* rules, such as the Geneva Conventions, and in a few years it will add the *jus ad bellum* crime of "aggression." Some argue that the Statute of Rome will allow the ICC, which is not subject to the veto of the five permanent members of the Security Council, to effectively judge *ex post* whether an armed conflict has violated international law rules on the use of force.¹⁸⁷ As Madeline Morris has observed, "[i]n ICC cases in which a state's national is prosecuted for an official act that the state maintains was lawful or that the state maintains did not occur, the lawfulness or the occurrence of that official state act . . . would form the very subject matter of the dispute."¹⁸⁸ Because of these concerns, the United States not only has withdrawn its signature from the Statute of Rome, but it has launched an aggressive diplomatic campaign to immunize its officials and men and women in the Armed Forces from the Statute's reach. Nonetheless, some argue that the ICC can exercise jurisdiction over the nationals of non-state-parties to the agreement who come within the jurisdiction of a state party. This would allow the ICC to exercise jurisdiction over American leaders who allegedly launch an illegal war, as well as members of the armed services who commit alleged crimes during the conduct of the war.

Even if one continued to believe that international law had little, if any, impact on the outcome of the decisions of the great powers, it still would make sense to develop a new doctrine concerning the use of force. In the wake of the wars in Kosovo, Afghanistan, and Iraq, other nations may fear that the United States has embarked on a

campaign to increase its hegemonic power in the world. It seems clear that recent American uses of force do not fall cleanly within the conventional rules governing the use of force, dependent as they are on the approval of the UN Security Council. If the United States has no viable intellectual framework with which to modify or replace the old rules, nations may fear that it only intends to expend force purely for its own gain. Developing a new approach to the use of force may help alleviate concerns about the unrestricted exercise of power. An approach such as the one developed in this Article could signal that the use of force still would be limited to self-defense, modified to take into account developments in weapons and the rise of terrorism and rogue nations, or to stabilize the existing international order.

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¹ Thomas M. Franck, What Happens Now? The United Nations After Iraq, 97 Am J Intl L 607, 610 (2003).

² Id. While this may be true or not, I think Franck goes too far in attributing the US position to a desire to carry out revenge on the United Nations for its alleged hostility toward Israel and the United States. According to Franck, “At the cutting edge of U.S. policymaking today are persons who have never forgiven the United Nations for the General Assembly’s 1975 resolution equating Zionism with racism and who, despite its subsequent repeal, see the Organization as the implacable foe of Israel and the United States.” Id.

³ Lori Fisler Damrosch and Bernard H. Oxman, Editors’ Introduction, Agora: Future Implications of the Iraq Conflict, 97 Am J Intl L 553, 553 (2003).

⁴ See, for example, Thomas M. Franck, Recourse to Force: State Action against Threats and Armed Attacks (Cambridge 2002); Christine Gray, International Law and the Use of Force (Oxford 2000); Stanimir A. Alexandrov, Self-Defense against the Use of Force in International Law (Kluwer 1996); Louis Henkin, The Use of Force: Law and US Policy, in Louis Henkin, et al, Right v Might: International Law and the Use of Force 37 (Council on Foreign Relations 2d ed 1991); Ian Brownlie, International Law and the Use of Force by States (Oxford 1963); D.W. Bowett, Self-Defence in International Law (Manchester 1958).

⁵ This is exemplified by the American Journal of International Law’s practice of soliciting comments from leading scholars almost every time the United States has recently used force. See, for example, Agora: Future Implications of the Iraq Conflict, 97

Am J Intl L 553 (2003); Editorial Comments: NATO's Kosovo Intervention, 93 Am J Intl L 824 (1999); Agora: The Gulf Crisis in International and Foreign Relations Law, 85 Am J Intl L 63 (1991); Agora: US Forces in Panama: Defenders, Aggressors or Human Rights Activists?, 84 Am J Intl L 494 (1990).

⁶ See generally George Kennan, American Diplomacy (Chicago 1984) [SNC: recalled 1.13]; Hans J. Morgenthau, Politics among Nations: The Struggle for Power and Peace (Knopf 1948); Edward Hallett Carr, The Twenty Years' Crisis: 1919-1939: An Introduction to the Study of International Relations (MacMillan 2d ed 1962). For more recent elaborations of realism, see Kenneth Waltz, A Theory of International Politics (Addison-Wesley 1979) [SNC: recalled 1.13] [PUB: please propose pin and parenthetical if possible. Thanks, Bill]; John J. Mearsheimer, The Tragedy of Great Power Politics 48–51 (Norton 2001) (arguing that what appears to be peace is little more than an unintended byproduct of states pursuing their self-interest and is, as such, unstable).

⁷ Kennan, American Diplomacy at 95 (cited in note 6) [SNC: recalled 1.13].

⁸ Robert H. Bork, The Limits of "International Law", Natl Interest 3, 10 (Winter 1989/90).

⁹ See Martha C. Nussbaum, [TITLE OF ESSAY], in Joshua Cohen, ed, For Love of Country: Debating the Limits of Patriotism [START PAGE] (Beacon 1996); John Rawls, The Law of Peoples (Harvard 1999) [SNC: search initiated 1.14]; Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (Basic 1977). See also Thomas W. Pogge, An Egalitarian Law of Peoples, 23 Phil & Pub Aff 195 (1994) [PUB: please propose parenthetical for Pogge. Thanks, Bill].

¹⁰ See, for example, Fernando R. Teson, Humanitarian Intervention: An Inquiry into Law and Morality 149 (Transnational 2d ed 1997) (arguing that the ordinary tools of treaty interpretation, including an examination of the text and state practice, are ambiguous, but the UN Charter should be interpreted to allow humanitarian intervention in light of moral-political values); Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order 389-91 (Penn 1996) (asserting that the UN Charter fails to specifically permit the use of force for humanitarian purposes) .

¹¹ See generally John C. Yoo, Kosovo, War Powers, and the Multilateral Future, 148 U Pa L Rev 1673 (2000).

¹² See generally John L. Gaddis, Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy (Oxford 1982) [SNC: recalled 1.13]; John Lewis Gaddis, We Now Know: Rethinking Cold War History (Oxford 1997).

¹³ UN SCOR, 3989th mtg, UN Doc S/PV.3989 6 (1999) (remarks of the British representative to the United Nations).

¹⁴ See William H. Taft IV and Todd F. Buchwald, Preemption, Iraq, and International Law, 97 Am J Intl L 557, 562-63 (2003) (arguing that the latest Iraqi conflict should be seen as part of a protracted conflict dating back more than a decade and that US action was lawful).

¹⁵ The National Security Strategy of the United States of America 6 (September 2002), online at <http://www.whitehouse.gov/nsc/nss.pdf> (visited Jan 13, 2004).

¹⁶ Id (emphasis added).

¹⁷ Id at 13-14.

¹⁸ Id at 15.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² See generally 97 Am J Intl L 553 (cited in note 5) (addressing legal issues pertaining to the use of force in Iraq); 93 Am J Intl L 824 (cited in note 5) (addressing legal issues pertaining to the use of force in Kosovo).

²³ See, for example, Franck, 97 Am J Intl L 607, 610-14 (cited in note 1) (arguing that the Iraqi invasion is not legal under the UN Charter and can only be thought of as revising or undermining the Charter); Richard A. Falk, What Future for the UN Charter System of War Prevention?, 97 Am J Intl L 590, 593 (2003) (calling US action a circumvention of the Charter system); Tom J. Farer, The Prospect for International Law and Order in the Wake of Iraq, 97 Am J Intl L 621, 626 (2003) (noting an American attitude of open defiance for the UN rather than a strong desire to make the international legal regime work); Jane E. Stromseth, Law and Force after Iraq: A Transitional Moment, 97 Am J Intl L 628, 629-31 (2003) (asserting that the legal authority for the Iraq invasion is a close case in light of Resolution 1441); Michael J. Glennon, Why the Security Council Failed, 82 Foreign Aff 16, 24 (May/June 2003) (observing that in the wake of Kosovo, the US no longer felt obligated to receive prior Security Council authorization for the use of force and that it no longer felt bound by the Charter's terms of what uses of force were lawful and unlawful); Anthony Clark Arend, International Law and the Preemptive Use of Military Force, 26 Wash Q 89, 101 (Spring 2003) (pointing out that the language of the 2002 National Security Strategy is in violation of international law's imminence requirement as it is conventionally understood). But see Ruth Wedgwood, The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense, 97 Am J Intl L 576, 578-82 (2003) (arguing that the US action in Iraq was legal under the resolutions of the UN).

²⁴ UN Charter Art 2(4).

²⁵ Some have argued about the exact breadth of Article 2(4). Some see it as a complete prohibition on the use of force against a state except to prevent aggression. Others believe it should be narrowly construed to allow for uses of force, so long as nations did not engage in territorial conquest or regime change and promoted the principles of the UN. See, for example, Bowett, Self-Defence in International Law at 152 (cited in note 4) (arguing that the plain meaning of Article 2(4) does not prohibit the "invasion of territory necessitated by the imminence of an attack from that territory"); Brownlie, International Law and the Use of Force by States at 265-68 (cited in note 4) (rejecting a plain meaning approach to interpretation of Article 2(4)).

²⁶ UN Charter Art 42.

²⁷ UN Charter Art 51.

²⁸ See, for example, Yoram Dinstein, War, Aggression, and Self-Defence 167-68 (Cambridge 3d ed 2001).

²⁹ See Brownlie, International Law and the Use of Force by States at 275-80 (cited in note 4) (reading Article 51 to require a trespass).

³⁰ See, for example, Antonio Cassese, Return to Westphalia? Considerations on the Gradual Erosion of the Charter System, in Antonio Cassese, ed, The Current Legal Regulation of the Use of Force 505, 515-16 (Nijhoff 1986) (concluding that Article 51 permits anticipatory self-defense, but arguing for strict scrutiny of such claims because of the risk of pretext).

³¹ See, for example, Brownlie, International Law and the Use of Force by States at 272-75 (cited in note 4) (arguing that Article 51 fully displaces the pre-Charter international system with its more expansive grounds for the use of force).

³² See Myres S. McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am J Intl L 597, 599 (1963) (“There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations on the traditional right of states.”). See also Abraham D. Sofaer, International Law and Kosovo, 36 Stan J Intl L 1, 16 (2000) (advocating the abandonment of rigid and often dishonest rule based evaluations of use of force decisions in favor a more flexible standard that might elicit honest reason-giving by international actors); Bowett, Self-Defence in International Law at 182 (cited in note 4) (asserting that Article 51 is a mere explicit codification of the pre-Charter, unimpaired right of self-defense).

³³ Frank B. Kellogg, Address before the American Society of International Law, 22 Proc Am Socy Intl L 141, 143 (Apr 28 1928). See also Michael J. Glennon, The Fog of Law: Self-defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 Harv J L & Pub Pol 539, 558 (2002) (noting that states will come to their own conclusions, irrespective of the UN Charter, as to the use of force for self-defense because “defense is necessary for survival and survival is intrinsic in the very fact of statehood”).

³⁴ See, for example, Oscar Schachter, The Right of States to Use Armed Force, 82 Mich L Rev 1620, 1634 (1984) (“In my view it is not clear article 51 was intended to eliminate the customary law right of self-defense and it should not be given that effect. But we should avoid interpreting the customary law as if it broadly authorized preemptive strikes and anticipatory defense in response to threats.”). See also Sofaer, 36 Stan J Intl L at 16 (cited in note 32).

³⁵ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), 1986 ICJ 14 (finding US action in breach of international customary law).

³⁶ Memorandum for the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Re: Legality under International Law of Remedial Action against Use of Cuba as a Missile Base by the Soviet Union 2 (Aug 30, 1962), reprinted in 6 Green Bag 2d 195, 196 (2003).

³⁷ Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (Apr 24, 1841), reprinted in Kenneth Bourne, ed, 1 Brit Documents on Foreign Aff: Reports and Papers from the Foreign Office Confidential Print, Part I, Series C 153, 159 (University 1986)

³⁸ See Letter from Lord Ashburton to Daniel Webster, US Secretary of State (July 28, 1842), reprinted in Bourne, ed, 1 Brit Documents on Foreign Aff 332 (cited in note 37).

³⁹ See Letter from Daniel Webster, US Secretary of State, to Lord Ashburton (Aug 6, 1842), reprinted in Bourne, ed, 1 Brit Documents on Foreign Aff 346 (cited in note 37).

⁴⁰ See International Military Tribunal (Nuremberg), 41 Am J Intl L 172, 205 (1947), quoting John Bassett Moore, 2 International Law Digest § 2.17, at 412 (GPO 1906) (“[P]reventive action in foreign territory is justified only in case of ‘an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment for deliberation.’”).

⁴¹ See, for example, Bowett, Self-Defence in International Law at 58 (cited in note 4) (calling the case the locus classicus); Dinstein, War, Aggression, and Self-Defence at 218-19 (cited in note 28) (observing that Webster’s formulation has transcended “the specific legal contours of extra-territorial law enforcement, and has markedly influenced the general material of self-defence”).

⁴² Gray, International Law and the Use of Force at 105 (cited in note 4).

⁴³ Walzer, Just and Unjust Wars (cited in note 9).

⁴⁴ UN Charter Art 2(7).

⁴⁵ See Franck, Recourse to Force at 136 (cited in note 4) (suggesting that because even egregious human rights violations by a government against its own citizens do not rise to the level of an armed attack upon the putative intervening nation, Articles 2(4) and 51 prohibit the use of force in humanitarian interventions).

⁴⁶ Louis Henkin, Kosovo and the Law of “Humanitarian Intervention”, 93 Am J Intl L 824, 826 (1999).

⁴⁷ See, for example, Oscar Schachter, International Law in Theory and Practice 126 (1991) [SNC: Ill request 1.14].

⁴⁸ See, for example, Teson, Humanitarian Intervention 119-20 (cited in note 10) (arguing that, insofar as states are without autonomous rights and a state’s right to self-defense is merely derivative of its citizens’ human rights, any state may use force to defend the human rights of any individuals); Michael Reisman, Humanitarian Intervention to Protect the Ibos, in Richard B. Lillich, ed, Humanitarian Intervention and the United Nations 167, 177 (Virginia 1973) (arguing that the protection of human rights is a purpose of the United Nations, and thus the use of force in humanitarian interventions is not prohibited by Article 2(4)).

⁴⁹ See, for example, Brad R. Roth, Governmental Illegitimacy in International Law (Oxford 1999) [SNC: search initiated 1.14]; W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 Am J Intl L 866, 869-70 (1990) (arguing for a conceptual shift from an international legal system that protects the sovereign’s sovereignty to one that protects the people’s sovereignty); Anthony D’Amato, The Invasion of Panama Was a Lawful Response to Tyranny, 84 Am J Intl L 516, 516-19 (1990) (arguing that such a conceptual shift would not only legally justify, but morally require the US intervention in Panama to address Noriega’s tyranny against the Panamanian people); Thomas M. Franck, The Emerging Right to Democratic Governance, 86 Am J Intl L 46, 90-91 (1992) (suggesting that democracy is on its way to becoming a global entitlement and that the international system of law must adjust in such a way as to ensure that right to all).

⁵⁰ See, for example, Brownlie, International Law and the Use of Force by States at 264-80 (cited in note 4).

⁵¹ Thomas M. Franck, Who Killed Article 2(4)?: Or: Changing Norms Governing the Use of Force by States, 64 Am J Intl L 809, 836 (1970).

⁵² See Franck, Recourse to Force at 174-91 (cited in note 4) (arguing that the legitimacy of international law is itself undermined where it produces absurd results that do not comport with moral intuitions).

⁵³ See Franck, 97 Am J Intl L 607, 610 (cited in note 1) (observing that the UN Charter system for restraining the use of force “has died again, and, this time, perhaps for good”).

⁵⁴ Falk, 97 Am J Intl L at 593 (cited in note 23); Richard A. Falk, Kosovo, World Order, and the Future of International Law, 93 Am J Intl L 847, 854-856 (1999).

⁵⁵ Glennon, 82 Foreign Aff at 24 (cited in note 23) (“As Powell said on October 20, ‘the president believes he now has the authority [to intervene in Iraq] . . . just as we did in Kosovo.’ There was, of course, no Security Council authorization for the use of force by NATO against Yugoslavia. That action blatantly violated the UN Charter[.]”) (emphasis in original); Michael Glennon, Limits of Law, Prerogatives of Power (2001) [SNC].

⁵⁶ Henkin, Use of Force: Law and US Policy at 53 (cited in note 4).

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⁵⁸ K.J. Holsti, The State, War, and the State of War 24 (Cambridge 1996). Interstate wars include armed intervention involving significant loss of life, but exclude imperial wars, war among or against non-members of the central state system, and wars of national liberation.

⁵⁹ Milton Leitenberg, Deaths in Wars and Conflicts between 1945 and 2000, Working Paper 9 (July 2003), online at http://www.puaf.umd.edu/CISSM/People/milton_files/deaths%20wars%20conflicts.pdf (visited Jan 18, 2004).

⁶⁰ Id.

⁶¹ Nils Petter Gleditsch, et al, Armed Conflict 1946-99: A New Dataset (unpublished ms, May 2001).

⁶² Holsti, The State, War, and the State of War at 21 (cited in note 58) (defining internal as armed conflict not with another state, but between armed factions within the same state).

⁶³ Leitenberg, Working Paper at (cited in note 59).

⁶⁴ Holsti, The State, War, and the State of War at 23 (cited in note 58).

⁶⁵ See, for example, Waltz, A Theory of International Politics (cited in note 6) [SNC: recalled 1.13]; Hedley Bull, The Anarchical Society 199-221 (Columbia 2d ed 1995) (suggesting that the United States and the Soviet Union promoted international order by preserving the balance of power, avoiding or containing conflict between one another, controlling their own sphere of influence and respecting that of the other’s, and engaging in order enhancing joint actions).

⁶⁶ See John A. Vasquez, What Do We Know About War (Rowman 2000); John A. Vasquez, The War Puzzle (Cambridge 1993).

⁶⁷ The Cuban Missile Crisis serves as a good example. See generally Abram Chayes, The Cuban Missile Crisis: International Crisis and the Role of Law (Oxford 1974) (discussing the interaction between the UN/OAS and actions taken by the Kennedy administration during the Cuban Missile Crisis); Memorandum for the Attorney General, reprinted in 6 Green Bag 2d 195 (cited in note 36) (analyzing international law to conclude that it permits the Kennedy administration to take relatively extreme measures in response to the installation of missile bases in Cuba).

⁶⁸ John Lewis Gaddis, The Long Peace: Inquiries into the History of the Cold War 219-37 (Oxford 1987) (crediting both structural and behavioral factors for the stability of the Cold War international regime).

⁶⁹ Waltz, A Theory of International Politics (cited in note 6) [SNC: recalled 1.13]. This was not the view, however, of an earlier realist, Hans Morgenthau, who believed that a multipolar distribution of power more akin to the Concert of Europe in the Nineteenth Century would create international stability. See Morgenthau, Politics among Nations at 440 (cited in note 6) (contending that “[t]he two-bloc system . . . is more unsafe from the point of view of peace than any other”).

⁷⁰ See Webster’s Third New International Dictionary: Unabridged 1130 (Meriam-Webster 1986) (defining “imminent” as “ready to take place: near at hand: IMPENDING <our ~ departure>; usu: hanging threateningly over one’s head: menacingly near”).

⁷¹ International Law Commission, Draft Articles on the International Responsibility of States Art 33.

⁷² Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), 1997 ICJ 7, ¶¶ 15-22.

⁷³ Id at ¶ 52.

⁷⁴ Id at ¶ 54 (internal citations omitted). The ICJ found that, because the dangers cited by Hungary were uncertain, the alleged peril was not “imminent.” Id at ¶¶ 55-56.

⁷⁵ See Paul H. Robinson, 2 Criminal Law Defenses § 131(c)(1) (West 1984).

⁷⁶ See sources collected in Clare Dalton and Elizabeth M. Schneider, Battered Women and the Law 716-93 (Foundation 2001).

⁷⁷ The criminal law of self-defense, for example, has changed its conception of necessity from using force to defend one’s honor to self-defense as a mechanistic, unwilling response to attack. See Dan M. Kahan and Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum L Rev 269, 327-32 (1996) (suggesting that the mechanistic, fear-of-death driven view of self-defense is incomplete and must be supplemented by an understanding that the law occasionally acknowledges the validity of other emotional states such as indignation); Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv L Rev 413, 431-35 (1999) (discussing Justice Holmes’s reconceptualization of the “true man” doctrine from one in which the law condoned the use of force to protect an interest in honor to one in which the use of force was thought of as a reflexive act of necessity).

Criminal law has also changed its conception of what can be defended with deadly force. In New York, an individual could use deadly force not just for self-preservation, but also to prevent kidnapping, forcible rape, forcible sodomy or robbery. NY Penal Law § 35.15 (McKinney 1998); People v Goetz, 68 NY2d 96, 497 NE2d 41 (1986). This is

consistent with John Locke, who also believed that force could be used to kill thieves as well as to engage in self-preservation. Locke believed that allowing a thief to steal property was akin to allowing him to place a person within his total control, and that this deprivation of freedom was enough to trigger a right of self-defense. See John Locke, Two Treatises of Government §§ 16-18 (1690) [SNC: recalled 1.13]; see also the helpful discussion in Jeremy Waldron, Self-Defense: Agent-Neutral and Agent-Relative Accounts, 88 Cal L Rev 711, 733-45 (2000) (exploring Locke's position on self-defense).

⁷⁸ See Schenck v United States, 249 US 47, 52 (1919) (Holmes); Abrams v United States, (Holmes dissenting). The modern test for incitement, set forth in Brandenburg v Ohio, 395 US 444 (1969), permits government regulation of speech that is directed at inciting or producing imminent lawless action and is likely to succeed.

⁷⁹ Richard A. Posner, Frontiers of Legal Theory 62-71 (Harvard 2001) (taking an instrumental view of the First Amendment in which free speech is valued only insofar as it leads to other valued outcomes). See also Daniel A. Farber, Free Speech without Romance: Public Choice and the First Amendment, 105 Harv L Rev 554 (1991) (taking an economic approach to First Amendment issues).

⁸⁰ Posner, Frontiers of Legal Theory at 64 (cited in note 79) (emphasis in original).

⁸¹ *Id.* at 64-65.

⁸² Compare Jed Rubenfeld, The First Amendment's Purpose, 53 Stan L Rev 767, 829 (2001) (arguing that the Brandenburg test does not allow speech to be banned based on its high probability of leading to a harmful act, but rather requires such proximity between the speech and the harmful act that they are in fact indistinguishable), with Richard A. Posner, Pragmatism versus Purposivism in First Amendment Analysis, 54 Stan L Rev 737 (2002) (providing a pragmatic criticism of Rubenfeld's position).

⁸³ Posner recognizes this problem. See Posner, Frontiers of Legal Theory at 73-76 (cited in note 79) (suggesting that part of the difficulty can be overcome by assigning individual speech acts to pre-set speech categories rather than attempting case-by-case cost-benefit analysis).

⁸⁴ Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, 1996 ICJ 226, 244 at ¶ 36 (advisory opinion) (applying UN Charter law to the question "Is the threat or use of nuclear weapons in any circumstances permitted under international law?").

⁸⁵ McDougal, 57 Am J Intl L at 598 (cited in note 32). See also W.T. Mallison, Jr., Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo Wash L Rev 335, 348 (1962-63) ("In the contemporary era of nuclear and thermo-nuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in suicide if it actually were applied.").

⁸⁶ US Department of the Navy, The Commander's Handbook on the Law of Naval Operations (NWP 1-14M), 4-13, ¶ 4.3.2.1, n 32 (Oct 1995).

⁸⁷ See Gregory M. Travalio, Terrorism, International Law, and the Use of Military Force, 18 Wis Intl LJ 145, 155 (2000) (suggesting that some terrorist organizations are capable of posing a much greater threat than the militaries of many nations).

⁸⁸ But see Myres S. McDougal and Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 231 (1960) (stating that the degree of imminence must be “so high . . . as to preclude effective resort by the intended victim to non-violent modalities of response”) [SNC: search initiated 1.14]; Bowett, Self-Defence in International Law at 53 (cited in note 4) (arguing that force may be used in self-defense only when no alternate means of protection are available).

⁸⁹ See United States v Carroll Towing Co., 159 F2d 169, 173 (2d Cir 1947).

⁹⁰ See, for example, Adrian Vermeule, Interpretive Choice, 75 NYU L Rev 74, 91 n 68 (2000) (collecting sources); Cass R. Sunstein, Problems with Rules, 83 Cal L Rev 953 (1995); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke LJ 557 (1992); Richard A. Epstein, Simple Rules for a Complex World 30-36 (Harvard 1995).

⁹¹ Vermeule, 75 NYU L Rev at 91 (cited in note 90) (considering whether courts should adopt rules or standards in their approach to statutory interpretation).

⁹² See generally *id* at 92–93 (considering the scope of the rule and the trustworthiness of the decision applier, in addition to the comparative competence of the decisionmaker, as factors in deciding who should have the decisionmaking authority).

⁹³ See Barbara W. Tuchman, The Guns of August 17-68 (MacMillan 1962) (providing a vivid historical account of the timetables for mobilizing the large armies that began the First World War).

⁹⁴ American intelligence agencies collect and analyze both human intelligence (HUMINT) and technical intelligence (TECHINT) about foreign threats and opportunities. See Loch K. Johnson, Secret Agencies: US Intelligence in a Hostile World 31-36 (Yale 1996) (observing an increasing emphasis on TECHINT vis-à-vis HUMINT over the course of the last half century); H. Bradford Westerfield, ed, Inside CIA's Private World: Declassified Articles from the Agency's Internal Journal, 1955-1992 29-96 (Yale 1995) (detailed exposition on various sources of HUMINT).

⁹⁵ For discussion and criticism of this point, see Jack Goldsmith and Eric Posner, A Theory of Customary International Law, 66 U Chi L Rev 1113 (1999).

⁹⁶ Franck, Recourse to Force at 5–9, 171–72 (cited in note 4) (discussing how the Kosovo intervention might be a precursor to a reinterpretation of the UN Charter).

⁹⁷ See John F. Kennedy, Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba (DATE), reprinted in Public Papers of the Presidents of the United States: President John F. Kennedy: Containing the Public Messages, Speeches, and Statements of the President: January 1 to December 31, 1962 809, 810 (GPO 1963) (ordering US Armed Forces to interdict offensive weapons and associated materiel en route to Cuba “to defend the security of the United States”); John F. Kennedy, White House Statement on Soviet Proposals Relating to International Security (DATE), reprinted in *id* at 813 (describing threat as “immediate”).

⁹⁸ Compare McDougal, Soviet-Cuban Quarantine, 57 Am J Intl L at 601–03 (cited at note 32) (concluding that the President's actions were in accord with notions of self-defense), with The Legal Case for US Action on Cuba, 47 Dept State Bull 763, 764–65 (Nov 19, 1962) (“The quarantine action was designed to deal with an imminent threat to our security. But the President . . . did not invoke article 51 or the right of self-defense.”). [ILL] [SNC]

⁹⁹ John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba (Date), in Public Papers of President Kennedy 806, 806–07 (cited in note 97) (discussing how the nuclear missiles in Cuba upset the balance of power).

¹⁰⁰ Some argue that in 1962 a direct Soviet attack would have been “inconceivable” because the nuclear balance of power so highly favored the United States. See Stanimir A. Alexandrov, Self-Defense Against the Use of Force in International Law 158–59 (Kluwer 1996).

¹⁰¹ Kennedy, Report to the American People at 807 (cited in note 99).

¹⁰² For a discussion of the legality of the US blockade, compare McDougal, Soviet-Cuban Quarantine, 57 Am J Intl L at 603 (arguing that the quarantine was justified as self-defense), with Quincy Wright, The Cuban Quarantine, 57 Am J Intl L 546, 563–64 (1963) (arguing that the quarantine was not a lawful act of self defense due to lack of an armed attack).

¹⁰³ Memorandum for the Attorney General, reprinted in 6 Green Bag 2d at 195–96 (cited in note 36) (concluding that the United States would be justified in taking measures against the establishment of missile bases in Cuba).

¹⁰⁴ See Timothy L.H. McCormack, Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor 297–302 (St. Martin’s 1996) (concluding that the Israeli attack was justified as anticipatory self-defense); Anthony D’Amato, Israel’s Air Strike Against the Osiraq Reactor: A Retrospective, 10 Temple Intl & Comp L J 259, 262–63 (1996) (arguing that the attack was justified because Israel was acting as a proxy for the international community); Mallison and Mallison, The Israeli Aerial Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?, 15 Vand J Transnatl L 417, 431–33, 444 (1982).

¹⁰⁵ SC Res 487, UN Doc S/RES/487 (1981) (italics omitted).

¹⁰⁶ See Martin A. Rogoff and Edward Collins, Jr., The Caroline Incident and the Development of International Law, 16 Brooklyn J Intl L 493, 508–09 (1990).

¹⁰⁷ UN SCOR, 36th Sess, 2288th mtg, at para 80, UN Doc S/PV.2288 (1981).

¹⁰⁸ See Ronald Reagan, The President’s News Conference (DATE), in Public Papers of the Presidents of the United States: Ronald Reagan: 1981 519, 520 (GPO 1982); Statement and Remarks by the Department of State Spokesman (Fischer) at the Daily Press Briefing, June 8, 1981, 1:09 p.m. (Extracts), in Department of State, American Foreign Policy Current Documents 1981 684, 684 (GPO 1984).

¹⁰⁹ Statement by the Representative at the United Nations (Kirkpatrick) Before the UN Security Council, June 19, 1981, in American Foreign Policy Current Documents 1981 689, 690 (GPO 1984).

¹¹⁰ One of these attacks involved the firing by Libya of surface-to-air missiles at US aircraft flying over international waters in the Gulf of Sidra. US Armed Forces responded by taking “limited measures of self-defense necessary to protect themselves from continued attack.” Ronald Reagan, Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the Gulf of Sidra Incident (DATE), in 1 Public Papers of the Presidents of the United States: Ronald Reagan: 1986 406 (GPO

1988). See also Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (DATE), in id 468, 468–69.

¹¹¹ UN Doc S/PV.2674 at 17 (Apr 15, 1986) (statement of US Permanent Representative to the United Nations). [ILL] [SNC]

¹¹² See Ronald Reagan, Address on Air Strike Against Libya at 469 (cited in note 110) (“Self-defense is not only our right, it is our duty.”); Ronald Reagan, Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike Against Libya (DATE), in 1 Public Papers of President Reagan: 1986 478 (cited in note 110) (“These strikes were conducted in the exercise of our right to self-defense under Article 51 of the United Nations Charter.”). See also UN Doc S/17990 (Apr 14, 1986) (statement of ---) (“The Libyan policy of threats and use of force is in clear violation of Article 2, paragraph 4, of the Charter. It has given rise to the entirely justifiable response by the United States.”) [ILL] [SNC]. The United States also justified the strikes as a response to what amounted to an armed attack by Libya on US citizens. See Ronald Reagan, Address on the Air Strike Against Libya at 469. Even before the La Belle bombing, President Reagan had argued that Libya’s provision of material support to terrorist groups that attack US citizens amounted to armed aggression under established principles of international law. Ronald Reagan, The Present’s News Conference (DATE), in 1 Public Papers of President Reagan: 1986 17 (cited in note 110) (discussing Libyan support of terrorist groups). See also Low-Intensity Warfare: the Challenge of Ambiguity, 86 Dept State Bull 15, 17 (Mar 1986). [ILL] [SNC] For a discussion of the legality of the strikes, compare Abraham D. Sofaer, Terrorism, the Law and the National Defense, 126 Mil L Rev 89, 104–05 (1989) (justifying the strikes as self-defense); Wallace F. Warriner, The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986, 37 Naval L Rev 49, 90–95 (1988) (same); Gregory F. Intoccia, American Bombing of Libya: An International Legal Analysis, 19 Case W Res J Intl L 177, 212–13 (1987) (same), with Major Michael Lacey, Self-defense or Self-denial: the Proliferation of Weapons of Mass Destruction, 10 Ind Intl & Comp L Rev 293 (2000) (attacks not justified as self-defense) [SNC]; Christopher Greenwood, International Law and the United States Air Operation Against Libya, 89 W Va L Rev 933, 946–48 (1986-87) (attacks probably not justified as self-defense).

¹¹³ Ronald Reagan, Letter on the United States Air Strike Against Libya at 478 (cited in note 112).

¹¹⁴ See Ronald Reagan, Address on Air Strike against Libya at 469 (cited in note 110) (indicating “peaceful avenues” were sought before the air strike).

¹¹⁵ Ronald Reagan, Letter on the United States Air Strike against Libya at 478 (cited in note 112).

¹¹⁶ U.N. Doc. S/PV 2682 (1986).

¹¹⁷ George Bush, Address to the Nation Announcing United States Military Action in Panama (DATE), in 2 Public Papers of the Presidents of the United States: George Bush: 1989 1722, 1723 (GPO 1990).

¹¹⁸ George Bush, Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama (DATE), in 2 Public Papers of President Bush: 1989 1734, 1734 (cited in note 117).

¹¹⁹ Marian Nash Leich, Contemporary Practice of the United States Relating to International Law: Use of Force, 84 Am J Int'l L 545, 548 (1990). The United States also justified its actions as self-defense resulting from the armed attacks against US citizens. See Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/21035 (Dec 20, 1989) ("1989 UN Letter") [ILL] [SNC]. In addition to protecting US citizens, the invasion had three other objectives: (1) helping to restore democracy in Panama, (2) protecting the integrity of the Panama Canal Treaties, and (3) bringing Noriega to justice. See Ved P. Nanda, The Validity of United States Intervention in Panama Under International Law, 84 Am J Intl L 494, 494 (1990) (quoting a statement by President Bush on January 3, 1990).

¹²⁰ Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama, 2 Pub Papers of George Bush 1734 (1989)

¹²¹ Compare Abraham D. Sofaer, The Legality of the United States Action in Panama, 29 Colum J Transnatl L 281, 290 (1991).

¹²² For a discussion of the legality of the US military action, see Louis Henkin, The Invasion of Panama Under International Law: A Gross Violation, 29 Colum J Transnatl L 293, 295 (1991) (arguing that the Panama intervention violated international law); Nanda, 84 Am J Intl L at 496–97 (cited in note 119) (arguing that the US intervention in Panama violated international law because it failed to show necessity); Tom J. Farer, Panama: Beyond the Charter Paradigm, 84 Am J Intl L 503, 514 (1990) (concluding that Noriega was not Panama's legitimate leader, and that US invasion was probably justified); Sofaer, 29 Colum J Transnatl L at 291 (cited in note 121) (concluding that the invasion was justified and valid under international law).

¹²³ See William J. Clinton, Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters (DATE), in 1 Public Papers of the Presidents of the United States: William J. Clinton: 1993 940 (GPO 1994).

¹²⁴ Id. The strikes were also justified as a response to an attack against the United States. See William J. Clinton, Address to Nation on the Strike on Iraqi Intelligence Headquarters (DATE), in 1 Public Papers of President Clinton: 1993 938 (cited in note 123) ("[T]he Iraqi attack against President Bush was an attack against our country and against all Americans.").

¹²⁵ Id. (indicating the cruise missile attack would deter future malfeasance). Similarly, the January 17, 1993 strike on a nuclear facility in Baghdad, while primarily designed to encourage Iraq to comply with its obligations, was undertaken in part to prevent the facility from being used again to support Iraq's nuclear weapons program. See George Bush, Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions (DATE), in 2 Public Papers of the Presidents of the United States: George Bush: 1992–93 2269, 2269–70 (GPO 1993) (stating that the strike was designed to advance the goals of several UN resolutions).

¹²⁶ For a discussion of the legality of the US strikes, see Robert F. Teplitz, Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?, 28 Cornell Intl L J 569, 606–07 (1995) (stating that the UN accepted the US explanation and evidence for the attack without condemnation); Ryan C. Hendrickson, Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter, 19 BU Intl L J 207, 214 (2001) (arguing that the 1993 strikes did not satisfy requirements of anticipatory self-defense); John Quigley, Missiles with a Message: The Legality of the United States Raid on Iraq’s Intelligence Headquarters, 17 Hastings Intl & Comp L Rev 241, 260–61 (1994) (same); Dino Kritsiotis, The Legality of the 1993 US Missile Strikes on Iraq and the Right of Self-Defence in International Law, 45 Intl & Comp L Q 162, 174–77 (1996) (stating that it was impossible to determine the legality of the strikes).

¹²⁷ William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, in 2 Public Papers of the Presidents of the United States: William J. Clinton: 1998 1464 (GPO 2000). See also William J. Clinton, Remarks in Martha’s Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan (DATE), in id 1460 (noting the existence of “compelling information” that additional terrorist attacks against US citizens were being planned, and that the groups affiliated with bin Laden were seeking to acquire chemical and other dangerous weapons).

¹²⁸ Ruth Wedgwood, Responding to Terrorism: the Strikes against Bin Laden, 24 Yale J Intl L 559, 565 (1999).

¹²⁹ See Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/1998/780 (Aug 20, 1998) [ILL] [SNC]. The United States also justified the strikes as a response in self-defense to the embassy attacks. See id. [SNC]

¹³⁰ For a discussion of the legality of the US strikes, compare Wedgwood, 24 Yale J Intl L at 564 (cited in note 128) (concluding that the attacks were justified), with Jules Lobel, The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan, 24 Yale J Intl L 537, 557 (1999) (concluding that the attacks “represent the assertion of imperial might and arrogance in opposition to international law”).

¹³¹ See Michael N. Schmitt, State-Sponsored Assassination in International and Domestic Law, 17 Yale J Intl L 609, 648 (1992) (noting that a state that fails to act against a terrorist may lose the chance to act at all).

¹³² Low-Intensity Warfare: the Challenge of Ambiguity, 86 Dept State Bull at 17 (cited in note 112). [ILL] [SNC]

¹³³ For a description of the political and legal events leading up to the Iraq war, see John Yoo, International Law and the War in Iraq, 97 Am J Intl L 563, 564–71 (2003) (describing the political and legal events preceding the Iraq war).

¹³⁴ SC Res 1441, UN Doc S/Res/1441 1, para 13 (2002).

¹³⁵ See Padilla v Bush, 233 F Supp 2d 564, 572–73 (SDNY 2002).

¹³⁶ See Sofaer, 126 Milit L Rev at 116–21 (cited in note 112) (discussing the limits of the term “assassination”); W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, Army Lawyer 4, 7–8 (Dec 1989) (discussing various protective

military operations which should not be understood as attempted assassinations). The ban on assassination was first established by President Ford in Executive Order 11905 and continues today under Executive Order 12333. Sofaer, 126 Milit L Rev at 116. According to Sofaer and Parks, the assassination ban applies only to murder and not to killings for which there is a legal justification, such as self-defense, or which take place in wartime. See *id* at 119 (suggesting that the term ‘assassination’ should be limited to “illegal killings”); Parks, Army Lawyer at 1–2.

¹³⁷ An excuse, by contrast, concedes that the act was wrongful but that it is not morally attributable to the actor. George P. Fletcher, Rethinking Criminal Law 811 (Oxford 2000).

¹³⁸ George P. Fletcher, Basic Concepts of Criminal Law 133 (Oxford 1998) (discussing the common characteristics of self-defense across jurisdictions); George Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 19 (Free Press 1988). [RECALL] [SNC]

¹³⁹ Fletcher, Basic Concepts at 134 (cited in note 138).

¹⁴⁰ Model Penal Code § 3.04 (ALI 1985).

¹⁴¹ Fletcher, Basic Concepts at 134 (cited in note 138).

¹⁴² *Id* at 135 (discussing the requirement of “proportionality”).

¹⁴³ *Id* at 134.

¹⁴⁴ *Id*.

¹⁴⁵ See, for example, Dinstein, War, Aggression, and Self-Defence at 160 (cited in note 28) (discussing the application of criminal law concepts of self-defense to international law by early writers); M.A. Weightman, Self-Defense in International Law, 37 Va L Rev 1095, 1099–102 (1951) (discussing early conceptions of war and self-defense). See also David Rodin, War and Self-Defense 118 (Oxford 2002) (describing similarities of the two doctrines) [RECALLED] [SNC]. International legal rules concerning self-defense can also trace some of their origins to the Just War theory as developed by the Romans and Christian thinkers, who heavily influenced the seventeenth and eighteenth century writers on international law. See *Id* at 104.

¹⁴⁶ Cass Sunstein, Moral Heuristics, 180 John M. Olin Law & Economics Working Paper (2d series) 2 (2003), online at <http://www.law.uchicago.edu/Lawecon/index.html>.

¹⁴⁷ Hugo Grotius, Law of War and Peace, book II, ch I, para III. [SNC]

¹⁴⁸ *Id* para. XVI. [SNC]

¹⁴⁹ Emmerich de Vattel, Law of Nations, book II, ch. IV. [SNC]

¹⁵⁰ *Id*. [SNC]

¹⁵¹ David Luban, Just War and Human Rights, 9 Phil & Pub Aff 160, 166 (1980). See also Thomas Nagel, Mortal Questions 64 (Cambridge 1979) (noting that “war, conflict, and aggression are relations between persons”).

¹⁵² See generally Ingrid Detter, The Law of War (Cambridge 2d ed 2000) (discussing difference between *jus in bello* and *jus ad bellum* rules); L.C. Green, The Contemporary Law of Armed Conflict (Manchester 2d ed. 2000) (same).

¹⁵³ See generally Detter, Laws of War (cited in note).

¹⁵⁴ David Rodin, War and Self-Defense at 112 (cited in note 145) [RECALL] [SNC]. See also Walzer, Just and Unjust Wars at 111-17 (cited in note 9) (discussing reasons for the demand of unconditional surrender in World War II).

¹⁵⁵ Compare Walzer, Just and Unjust Wars at 55-58, 62 (cited in note 9) (suggesting that it is justifiable under the Charter to defend poorly drawn borders even if they contain thinly inhabited land).

¹⁵⁶ Fletcher, Rethinking Criminal Law at 867 (cited in note 138).

¹⁵⁷ *Id.*

¹⁵⁸ United States v Peterson, 483 F2d 1222, 1229 (DC Cir 1973).

¹⁵⁹ Thomas Franck, Recourse to Force at 98 (cited in note 4).

¹⁶⁰ *Id.* Franck and others assume, however, that there is a correlation between the strictness of a legal rule and the ability of nations to use the rule as a pretext to conceal the true motives for a use of force. Nations have often claimed self-defense to justify attacks, both before and after the UN Charter, and there is no indication that the rate of these claims has declined as a result of a more restrictive set of rules. Cassese, Return to Westphalia? at 515–16 (cited in 30). Similarly, there may well be no correlation between a more flexible rule in the future and whether states will continue to claim pretextual justifications. It may be true as a matter of domestic law that using a formal rule, as in statutory interpretation, may reduce the amount of pretextual action by judges, but there is no evidence that this occurs in the use of force area in international law, in part perhaps because judges are subject to thicker institutional constraints, including appellate review and override by Congress, that do not restrain nations.

¹⁶¹ Michael Walzer's view, however, is that nations should not intervene in civil wars unless another outside power has done so first. He argues that intervention in civil wars interferes with the right of a people to choose their own form of government. See Michael Walzer, The Moral Standing of States: A Response to Four Critics, 9 *Phil & Pub Aff* 209, 217 (1980) (claiming that foreign governments must treat tyrannical governments as if they were legitimate). He has been criticized for ignoring the harm to human rights by allowing a tyrannical regime to remain in place. See, for example, Charles Beitz, Bounded Morality: Justice and the State in World Politics, 33 *Intl Org* 405 [ILL] [SNC]; Gerald Doppelt, Walzer's Theory of Morality in International Relations, 8 *Phil & Pub Aff* 1, 6–8 (1978); Luban, Just War and Human Rights, 9 *Phil & Pub Aff* at 168–70 (discussing Walzer's "confusion" with respect to justified war; Richard Wasserstrom, Book Review, Just and Unjust Wars, 92 *Harv L Rev* 536 (1978). John Rawls argues that liberal societies have a right to intervene to prevent "egregious" human rights violations, which presumably would include civil wars against oppressive regimes. John Rawls, Law of Peoples at 93-94 n 6 (cited in note 9).

¹⁶² See generally Joseph S. Nye, The Paradox of American Power 137–71 (Oxford 2002) [SNC]; Inge Kaul, et al, eds, Global Public Goods: International Cooperation in the 21st Century (Oxford 1999) [SNC]; Todd Sandler, Global Challenges: An Approach to Environmental, Political, and Economic Problems (Cambridge 1997); Charles P. Kindleberger, International Public Goods without International Government, 76 *Am Econ Rev* 1 (1986); Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 49–64, 107–08 (Princeton 1984).

¹⁶³ A classic explanation can be found in Mancur Olson, The Logic of Collective Action (Harvard 1965). [SNC]

¹⁶⁴ See Robert Cooter and Thomas Ulen, Law and Economics 42 (Addison Wesley 3d ed 2000) (defining “public goods”).

¹⁶⁵ See Sandler, Global Challenges at 84-141 (cited in note 162) (surveying different areas that suffer from international collective action problems).

¹⁶⁶ See, for example, Daniel A. Farber and Philip P. Frickey, Law and Public Choice: A Critical Introduction 23–24 (Chicago 1991) (discussing collective action problems); Cooter and Ulen, Law and Economics at 42 (cited in note 164) (discussing public goods and free riders).

¹⁶⁷ See, for example, Kal Raustiala, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 Va J Intl L 1, 27 (2002) (discussing causes of the concentration of regulatory power); David P. Fidler, A Globalized Theory of Public Health, 30 J L Med & Ethics 150, 156 (2002) (discussing public health); Jonathan B. Weiner, Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law, 27 Ecol L Q 1295, 1298 (2001) (concluding that careful imports of other legal concepts into international law “will be crucial to the future success of global environmental law”); Jonathan Baert Weiner, On the Political Economy of Global Environmental Regulation, 87 Georgetown L J 749, 763 (1999) (discussing the difficulty of unilateral regulation of a globalized economy).

¹⁶⁸ See, for example, Farber and Frickey, Public Choice at 23 (cited in note 166) (illustrating the problem of collective action in the context of national security); Cooter and Ulen, Law and Economics at 42 (cited in note 164) (using national defense as an example of a public good).

¹⁶⁹ Stability as used here can be defined as a lower probability of war or conflict. See, e.g., Robert Powell, Stability and the Distribution of Power, 48 World Politics 239 (1996); Mearsheimer, Tragedy of Great Power Politics (cited in note).

¹⁷⁰ See Mancur Olson, Jr. and Richard Zeckhauser, An Economic Theory of Alliances, 48 Rev of Econ & Stats 266, 278 (1966) (describing NATO as a collective good).

¹⁷¹ See Joseph S. Nye, Jr., The American National Interest and Global Public Goods, 78 Intl Aff 233, 243 (2002).

¹⁷² Compare Olson and Zeckhauser, Alliances at 269 (cited in note 170) (illustrating a defense expenditure equilibrium between two countries who place differing values on security). Olson and Zeckhauser’s theory suggests that expenditures on defense will be shared disproportionately even after accounting for differences in benefits. Id.

¹⁷³ See, for example, Nye, 78 Intl Aff at 241 (cited in note 171).

¹⁷⁴ Olson, Logic of Collective Action (cited in note); Cooter, Strategic Constitution (cited in note).

¹⁷⁵ The Russian ambassador to the United Nations, for example, argued that [a]ttempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of

international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences.

Franck, Recourse to Force at 167–68 (cited at note 4) (quoting Ambassador).

¹⁷⁶ SC Res 1244, UN Doc S/Res/1244 at para 7 (June 10, 1999).

¹⁷⁷ Franck, Recourse to Force at 54 (cited at note 4).

¹⁷⁸ U.N. Security Council Resolution 1368, S/RES/1368 (Sept. 12, 2001).

¹⁷⁹ U.N. Security Council Resolution 1483 (2003) (recognizing authority under international law of occupation of United States and the United Kingdom); United Nations Security Council Resolution 1500 (2003) (establishing United Nations Assistance Mission for Iraq); United Nations Security Council Resolution 1511 (2003) (recognizing authority of Iraqi Governing Council).

¹⁸⁰ Determining the long-term effects for the region of the invasion of Iraq will prove difficult in the near future. Some positive effects include the withdrawal of the large American military presence in Saudi Arabia, an apparent reduction in tensions with Syria, Libya's recent decision to give up its weapons of mass destruction programs, and perhaps Iran's recent willingness to submit to international inspections of its nuclear activities. Negative effects could include an increase in terrorist activities in Iraq and the region and a flare up in the Israeli-Palestinian problems.

¹⁸¹ See Charles P. Kindleberger, The World in Depression, 1929-1939, at 11, 289 (Berkeley revd ed. 1986); Charles P. Kindleberger, Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides, 25 *Int'l Stud. Q.* 242 (1981); see also Robert Gilpin, War and Change in World Politics (Cambridge 1983).

¹⁸² See, e.g., Keohane, After Hegemony, 31-46 (cited in note); Duncan Snidal, The Limits of Hegemonic Stability Theory, 39 *Intl Org* 579 (1985).

¹⁸³ See Pogge, 23 *Phil & Pub Aff* at 223 (cited in note 9) (suggesting that those in developed nations do care about the victims of tragedy in developing countries); Amartya Sen, Humanity and Citizenship, in Cohen, ed, For Love of Country 111, 117 (cited in note 9) (suggesting that harming someone for whom one has affection is equivalent to harming the person who holds that affection); Charles Jones, Patriotism, Morality, and Global Justice, in Shapiro and Brilmayer, eds, Nomos XLI: Global Justice 125, 142 (NYU 1999) (suggesting that there is a “duty to concern [one]self with the safety and rights of [] victims, even when those victims were noncompatriots”).

¹⁸⁴ See, for example, Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 *Va L Rev* 1071, 1075, 1179–80 (1985) (asserting that it is unconstitutional for the President and Congress to supercede customary international law). See also Agora: May the President Violate Customary International Law, 80 *Am J Intl L* 913–37 (1986), which includes the following articles: Jonathan I. Charney, The Power of the Executive Branch of the United States Government to Violate Customary International Law, 80 *Am J Intl L* 913, 921 (1986) (suggesting that the President has the power to violate international law); Michael J. Glennon, Can the President Do No Wrong?, 80 *Am J Intl L* 923, 923 (1986) (suggesting violations require Congressional approval); Louis Henkin, The President and International Law, 80 *Am J Intl L* 930, 936 (1986) (“The President cannot disregard international law.”).

¹⁸⁵ See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *Yale LJ* 1935 (2002); Andrew Guzman, *A Compliance Based Theory of International Law*, 90 *Cal L Rev* 1823, 1846 (2002); Goldsmith & Posner, *A Theory of Customary International Law*, 66 *U Chi L Rev* 1113 (1999); Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard 1995).

¹⁸⁶ See, e.g., Andrew Guzman, *A Compliance Based Theory of International Law*, 90 *Cal L Rev* 1823, 1846 (2002); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 *Harv J Int'l L* 487, 496-99 (1997).

¹⁸⁷ Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 *U Chi L Rev* 89, 91 (2003) (noting that the ICC will have “decisionmaking power over many of the same peace and security issues typically governed by the Security Council alone”).

¹⁸⁸ Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *L & Contemp Probs* 13, 21 (2001) (quotation mark omitted).