

NEITHER THE 'CAROLINE FORMULA' NOR THE 'BUSH DOCTRINE' – AN ALTERNATIVE FRAMEWORK TO ASSESS THE LEGALITY OF PREEMPTIVE STRIKES

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ABSTRACT

This article argues that both the current regime governing the use of force in self-defence and the Bush doctrine of preemptive strikes are inadequate to deal effectively with the emerging threats of the new millennium – international terrorism and weapons of mass destruction. What is needed instead, is a more nuanced and objective approach that takes into account the dramatic changes in the nature of warfare. This article therefore develops an alternative legal framework which could guide the decisions of states on whether to use force in self-defence in the face of a prospective catastrophic attack.

I. INTRODUCTION

The international law governing the use of force has recently been the subject of intense public debate. In particular the claim by some states that *jus ad bellum*¹, the international legal

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¹ International law governing the use of force consists of (a) *jus ad bellum*, i.e. the law on the recourse to force and (b) *jus in bello*, the law on the conduct of hostilities. This distinction dates back to the very beginnings of just war theory, see James Turner Johnson, *Just War Tradition and the Restraint of War* (1981), XXIII. In contrast to *jus in bello*, which has been adapted continuously to new types of warfare over the past decades, *jus ad bellum* only now faces such evolutionary pressure with the emergence of international terrorism.

framework for engaging in armed conflict, must be amended to allow for 'preemptive' self-defence sparked controversy. Yet, given the rise of international terrorism and the increasing proliferation of weapons of mass destruction, it is hardly surprising that some states now advocate an adaptation of *jus ad bellum* to these changes. For instance, the National Security Strategy of the US (2002)² argues that 'we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and potentially, the use of weapons of mass destruction – weapons that can easily be concealed, delivered covertly and used without warning'.³ The National Security Strategy, therefore, proclaims a doctrine of readiness to conduct military action to forestall such attacks: 'If we wait for threats to fully materialize, we will have waited too long [...]. Our security requires all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary [...]'.⁴

Yet is there really a need to modify traditional *jus ad bellum*? And if so, is the Bush Doctrine of preemptive strikes a step in the right direction?

In order to answer these complex questions, this article will first (I) briefly analyse the evolution of *jus ad bellum*. It will then (II) examine the weaknesses of the current regime governing the use of force in self-defence. Part III will then evaluate alternative approaches, such as the 'Bush doctrine of preemptive strikes'. Having concluded that neither the current regime nor the 'Bush doctrine' provides an adequate legal framework that can cope with the emerging threats of the 21st century, I will then (IV) develop a new normative framework. The writer's conclusions are summarised in Part V.

² *National Security Strategy of the United States*, September 2002 <<http://www.whitehouse.gov/nsc/nss.pdf>> at 5 May 2006 (hereafter referred to as 'The Bush doctrine').

³ Ibid 15.

⁴ President George W. Bush, *Remarks by the President at 2002 Graduation Exercise of the United States Military Academy at West Point* <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>> at 5 May 2006.

II. THE EVOLUTION OF JUS AD BELLUM

Western ideas about justifications for resorting to war are ancient, often implicit in texts which have survived the centuries. For instance, the Old Testament contains implicit recognitions of punishment, self-defence, and conquest as just causes for war.⁵ The great philosophical works of Plato, Aristotle and Cicero also include scattered remarks identifying as just causes for war the recovery of lost goods, self-defence, and punishment of an enemy's misdeeds.⁶ Yet, the first systematic analysis of just war principles was conducted by Christian scholars. This may seem surprising given that the New Testament says very little about war and early Christian thinking was largely pacifistic in nature.⁷ However, after Christianity had become the official religion of the Roman Empire in the fourth century AD, the Church was compelled to change its view on war. From that point on, Christians were expected to fight for the Empire. The Church thus had to find a theological justification for such a radical transformation of its traditional concept of Christian pacifism. This task was left to St. Augustine, Bishop of Hippo. Writing in the early fifth century, St. Augustine set out the justification for when Christians could go to war and kill other human beings without committing a sin. According to St. Augustine, 'fighting was permissible if the war was just'.⁸ Just, he argued, are those wars, which are waged to redress a wrong suffered.⁹ Thus war must always be preceded by an injury; the injury may consist either in the failure of a state to suppress crimes committed by its subjects, or in attacks upon the rights of others. On the other hand, wars that are waged for personal motives, such the 'lust of power or the cruel thirst for vengeance'¹⁰ are not just. Interestingly, on the matter of individual self-defence, St. Augustine contended that a threat to one's *own* life could never

⁵ See for example *Deuteronomy* 23:9–15; 24:5.

⁶ See for example Aristotle, *Politika*, Book VII (revised ed, 1998) 10; Marcus Tullius Cicero, *De Re Publica*, Book II (revised ed, 1979) 34–35; Plato, *Politeia*, Book V (revised ed, 2003) 471.

⁷ See Paul Christopher, *The Ethics of War and Peace* (2004) 17–20.

⁸ St. Augustine, *Quaestionum in Heptateuchum*, (revised ed, 1895) VI 10.

⁹ *Ibid* 10.

¹⁰ *Ibid* 10.

justify killing one's neighbour.¹¹ In his view, individual self-defence is a selfish act motivated by self-love, whereas the defence of others is an altruistic act:

As to the killing of others in order to defend one's *own* life, I do not approve of this, [...] unless one happens to be a soldier acting in defence of *others* [...]¹²

The principles developed by St. Augustine were further refined by Thomas Aquinas in the thirteenth century. According to Aquinas, in order for a war to be just, it must satisfy the principles of just cause, right intention and sovereign authority.¹³ Influenced by the doctrine of double effect, he rejected St. Augustine's views upon the prohibition of individual self-defence. According to the doctrine of double effect, acts which have both a positive and a negative effect are permissible provided that the negative effect is an unintended side-effect, that it is proportional to the positive effect, and that there is no alternative way of achieving the positive effect.¹⁴ Hence, a person can kill an attacker in self-defence, if he does not intend the attacker's death, but simply tries to save his own life:

Therefore, this act, since one's intention is to save one's own life, is not unlawful [...] though an act may be rendered unlawful if it is out of proportion to the end.¹⁵

Within a few centuries of Aquinas' publication of *jus ad bellum* principles, the world and the nature of war had changed dramatically.¹⁶ Christendom was fragmented by the Reformation and destructive religious conflicts. European expeditions to the 'New World' brought brutal conquests and dominations of native peoples.¹⁷ These events deeply affected thinking about war and

¹¹ See St Augustine, "Letters of St Augustine", in *Ethics of Warfare* (New York: WH Russell, 1961), 293.

¹² Ibid.

¹³ See Thomas Aquinas, *Summa Theologica* (revised ed, 2001) II-II, Q 40, A 1.

¹⁴ See Joseph Mangan, 'A Historical Analysis of the Principle of Double Effect' (1949) 10 *Theological Studies* 41-45.

¹⁵ Thomas Aquinas, above n 13, II-II, Q 64, A 7.

¹⁶ Robert Hoag, 'The Recourse to War as Punishment: A Historical Theme in Just War Theory' (2006) 2 *Studies in the History of Ethics* 11.

¹⁷ Ibid 11; see also Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999) 1-67.

its justification as just war theory accommodated new questions about conquest, the authority over discovered continents, and states' reasons for waging war.¹⁸ For instance, the Spanish theologian Vitoria wrestled with the subject of his country's war against the Indians in the 'New World', arguing eventually that converting pagans is not a just cause for war.¹⁹ Hugo Grotius, on the other hand, was so appalled by the catastrophic lawlessness of the wars of religion that he decided to develop a detailed set of criteria regulating the recourse to war. In his masterpiece *The Law of War and Peace* he therefore developed six criteria that must all be met in order for a war to be formally just. These include: a declaration of war, right authority, probability of success, proportionality, last resort, and defence in case of actual or *imminent* injury to the state.²⁰ Grotius was thus among the first to formally acknowledge a right of self-defence absent an ongoing attack: 'War in defence of life is permissible', he argued, 'when the danger is immediate and certain [...]'²¹

Another major turning point in the history of *jus ad bellum* was the Peace of Westphalia (1648). It marked the beginning of the modern nation state. With the rise of the sovereign nation state, the importance of just war theory declined as secular rulers considered it unrealistic. Machiavellian realism now dominated international relations.²² Justice no longer played a significant role, as 'arguments in favour of it were treated as a kind of moralizing, inappropriate to the anarchic conditions of international society'.²³ Rather it was state interests, such the quest for power and survival, which now defined *jus ad bellum*.²⁴

¹⁸ Ibid 11.

¹⁹ See Francisco de Vitoria, 'On the American Indians' in Anthony Pagden and Jeremy Lawrance (eds) *Political Writings* (1991) 274–288.

²⁰ See Hugo Grotius, *The Law of War and Peace* (Louise Loomis trans, 1949 ed) Book I, 40; Book III, 289.

²¹ Ibid 73, 77.

²² See Robert Jackson and Georg Sorensen, *International Relations* (2003) 72–74.

²³ Michael Walzer, 'The Triumph of Just War Theory and the Dangers of Success' (2002) 69 *Social Research* 927.

²⁴ See Brian Crisher, 'Altering Jus ad Bellum: Just War Theory in the 21st Century and the 2002 National Security Strategy of the United States' (2005) 4 *Critique* 5.

With the rise of the sovereign 'nation state also came the rise of international law. Legal jurisprudence now became the guide for how states interacted to fill the power void left from the fall of the Church. Moral positions were no longer important; rather it was legal positions that mattered'.²⁵ The generally accepted interpretation of international law was: 'Sovereign states have an unqualified right to resort to war'.²⁶ In his masterpiece, *The Elements of International Law* (1866), Henry Wheaton provided the justification for this view:

The independent societies of men, called states, acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each state is also entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress.²⁷

The view that the use of military force by states is a necessary and appropriate instrument of international politics remained unchallenged until the beginning of the twentieth century. Indeed, it was not until the unprecedented destruction and human suffering during the First World War that morality and just war principles again entered into international politics:

'This is an age', US President Wilson stated in 1919, 'which rejects the standards of national selfishness that once governed the counsels of nations and demands that they shall give way to a new order of things in which the only question will be: Is it right? Is it just?'²⁸

In order to avoid the dilemma created by rival claims to morally just action, just war theory in the twentieth century shifted from a

²⁵ Ibid 4.

²⁶ Inus Claude, 'Just Wars: Doctrines and Institutions' (1980) 95 *Political Science Quarterly* 88.

²⁷ Henry Wheaton, *Elements of International Law* (1866) § 290.

²⁸ Woodrow Wilson, 'Remarks at Suresnes Cemetery on Memorial Day, May 30, 1919' quoted in Henry Kissinger, *Diplomacy* (1994) 51.

moralist paradigm to a legalist paradigm.²⁹ Whether a state's action was just or not, could now be determined through legal principles rather than moral standards.³⁰ Hence, just war theory re-emerged through international law, in particular through international treaties such as the Covenant of the League of Nations.

Although the Covenant of the League of Nations imposed some limitations upon the resort to war³¹, it was not until the General Treaty for the Renunciation of War ('*Kellogg-Briand Pact*') in 1928 that a comprehensive prohibition of war as an instrument of national policy was achieved. According to Article 1 of this Treaty, the contracting parties 'condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another'. However, like the League Covenant, the Kellogg-Briand Pact³² lacked an enforcement mechanism and therefore only had little practical effect.³³ Such a mechanism would only be provided by the next noteworthy attempt to limit the resort to force, the United Nations Charter, whose provisions will be discussed in detail in the next chapter.

In conclusion, it can be argued that *jus ad bellum* is not a static concept. Since the days of St. Augustine it has been continuously modified in line with the *Zeitgeist* and adapted to changes in the nature of warfare. However, the last major adaptation took place

²⁹ See Brian Crisher, above n 24.

³⁰ Ibid 5.

³¹ The Covenant of the League of Nations (1919) did not abolish the right of states to resort to force altogether. War was still lawful, if the procedural safeguards laid down in Articles 10 to 16 were observed. Moreover, as treaty law, the Kellogg-Briand Pact was neither binding upon non-parties nor on parties who found themselves in a dispute with a non-party. Despite these evident weaknesses, the Covenant had positive effects, too. For instance, the right of self-defence began to emerge more clearly as a genuine legal exception to the procedural restraints on the right to resort to war.

³² The Kellogg-Briand Pact provided the legal basis for many bilateral and multilateral non-aggression pacts, for example the non-aggression pact between Germany and the Soviet Union, see William Keylor, *The Twentieth Century World – An International History* (2001) 120–123.

³³ It was, however, referred to when hostilities arose, for instance between China and the Soviet Union and between Columbia and Peru, see John Wheeler-Bennett, *Documents on International Affairs* (1929) 274.

more than sixty years ago, when the UN Charter came into force. Since then new threats have emerged and the nature of warfare has changed dramatically. Hence it seems appropriate to inquire whether or not it is time for another major modification. This issue will be examined in the next section.

III. THE CURRENT REGIME GOVERNING THE USE OF FORCE AND WHY IT IS INADEQUATE

Drafted in 1945, the UN Charter imposed an almost absolute prohibition on the use of force. Article 2(4) of the Charter provides that

all member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the UN.³⁴

This prohibition is qualified by Article 51 of the UN Charter. It states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the

³⁴ Article 2(4) prohibits the use of force against the ‘*territorial integrity*’ or ‘*political independence*’ of a state. This ‘elliptical phraseology has led to the argument that Article 2(4) prohibits *only* that use of force which is, in fact, directed against ‘territorial integrity’ or ‘political independence’, Martin Dixon, *International Law* (2004); Ian Brownlie, *International Law and the Use of Force by States* (1963). Provided that the use of force does not result in the loss or permanent occupation of territory and does not compromise the target state’s ability to take independent decisions, it is not unlawful. Hence, it is contended, that a *preemptive ‘surgical’ strike* against a chemical weapons plant is lawful, since it does not result in territorial conquest or political subjugation, see Anthony D’Amato, ‘Israel’s Air Strike Upon the Iraqi Nuclear Reactor’ (1983) 77 *American Journal of International Law* 584. This permissive view, however, is not persuasive for the following reason: The *travaux préparatoires* of the Charter reveal that the phrase under discussion – ‘political independence and territorial integrity’ – was inserted at the behest of several smaller States that merely wanted to emphasise these conditions; at not time was it intended as a limitation on the prohibition of the use of force. In sum, Article 2(4) is not to be interpreted in the way claimed by protagonists of the permissive view. *Preemptive ‘surgical’ strikes* thus constitute a use of force for the purpose of Article 2(4) and are therefore prohibited, unless a specific Charter provision, such as Article 51, says otherwise.

Security Council has taken measures necessary to maintain international peace and security. Measures taken by the Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

While Article 51 of the UN Charter only allows for self-defence 'if an armed attack *occurs*', customary international law recognised a wider right to anticipatory self-defence.³⁵ The most often cited articulation of those customary standards is found in the words of former US Secretary of State Daniel Webster from the *Caroline case* (1837).³⁶ Webster argued that the use of force in self-defence is justified when the need for action 'is instant, overwhelming, leaving no choice of means, and no moment for deliberation'.³⁷ Although the term 'imminent' was not explicitly used, its sense was embodied in the words 'instant' and 'no moment for deliberation'. This standard – generally referred to as the *Caroline formula* - has been recognised as setting out the

³⁵ See for example Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (1961) 232–241; Derek Bowett, *Self-Defence in International Law* (1958) 188–192.

³⁶ The *Caroline Case* arose out of the Canadian Rebellion of 1837. In December 1837 the rebel leaders, managed to enlist at Buffalo (USA) the support of a large number of American nationals. The resulting force established itself on Navy Island in Canadian waters. From there it raided the Canadian shore and attacked British vessels. The force was supplied from the United States by an American steamer, the *Caroline*. On 29 December, at night, a British force attacked the *Caroline*, which was then in the American port of Fort Schlossberg, killed at least one American, dragged the *Caroline* into the river's current and sent her drifting over Niagara Falls. During the subsequent British attempts to secure the release of Alexander MacLeod – a British national involved in the action – the US Secretary of State indicated that Great Britain had to show 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation', Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington (27.4.1841), reprinted in 29 *British & Foreign States Papers 1840–1841*, 1129, 1138. Moreover, it had to be established that, after entering the United States, the armed forces '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', *ibid* 1129, 1138.

³⁷ *Ibid* 1129, 1138.

traditional method of assessing claims of self-defence when an armed attack has not yet occurred.³⁸

Though it is evident that the right of anticipatory self-defence existed prior to 1945, the question becomes what effect the UN Charter, and in particular Article 51, had on this right. Although the basic contours of Article 51 UN Charter seem straightforward, its effect on the customary right of anticipatory self-defence is unclear because Article 51 permits self-defence ‘if an armed attack *occurs*’.³⁹ Article 51 has thus stirred much debate over the continuing validity of anticipatory self-defence. Two separate schools of thought have emerged: the restrictionists⁴⁰ and the counter-restrictionists⁴¹.

From the literal perspective (‘*occurs*’) of the restrictionist school, Article 51’s formulation of the right of self-defence seems to preclude the preemptive use of force by individual states or groupings of states and to reserve such use of force exclusively to the Security Council.⁴² Measures taken in self-defence, based on this argument, are legitimate only *after* an armed attack has already occurred. The right of self-defence, it is argued, is an exception to the prohibition of the use of force in Article 2(4) and therefore should be narrowly construed. Moreover, the limits imposed on self-defence in Article 51 would be meaningless if the broad pre-UN Charter right survives unfettered by these restrictions.⁴³

On the other hand, the ‘counter-restrictionists’ claim that the intent of the Charter was not to restrict the preexisting customary right of anticipatory self-defence.⁴⁴ They argue that the reference in Article 51 to an ‘*inherent right*’ indicates that the Charter’s

³⁸ See John Yoo, ‘International Law and the War in Iraq’ (2003) 97 *American Journal of International Law* 572.

³⁹ Anthony Arend, ‘International Law and the Preemptive Use of Military Force’ (2003) 26 *The Washington Quarterly* 92.

⁴⁰ See for example Ian Brownlie, above n 34.

⁴¹ See for example Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (1961).

⁴² See Ahmed Rifaat, *International Aggression: A Study of the Legal Concept, its Development and Definition in International Law* (1979).

⁴³ Christine Gray, *International Law and the Use of Force* (2004) 98.

⁴⁴ See for example Myres McDougal and Florentino Feliciano, above n 41; Anthony Arend, above n 39.

framers intended for a continuation of the broad pre-UN Charter right. Moreover, it is rightly pointed out that Article 51 does not say that self-defence is available *only* if an armed attack occurs, a point also emphasised by Judge Schwebel in his dissent in the *Nicaragua case*⁴⁵. The occurrence of an 'armed attack' is merely one circumstance among many that would empower the 'victim' state to act in self-defence.⁴⁶

In light of these arguments the better view appears to be that Article 51 was never intended to narrow the broad pre-Charter right of anticipatory self-defence.⁴⁷ The Caroline formula is therefore still applicable when assessing claims of anticipatory self-defence. For anticipatory self-defence to be lawful then, an attack must be imminent, in the words of Secretary of State Webster: '*instant, overwhelming, leaving no choice of means and no moment for deliberation*'.⁴⁸

Unfortunately, however, the criteria developed in the *Caroline* case leave many important questions unanswered. For example, what constitutes 'a moment for deliberation'? In light of technological advances and shifts in the nature of warfare, how is one to define 'instant'? While the restrictive *Caroline* formula may have made sense in the nineteenth century, the nature of warfare has evolved dramatically since then. In modern warfare, a single blow can occur instantaneously and can have devastating

⁴⁵ *Military and Paramilitary Activities (Nicaragua v. US)* (Merits) [1986] ICJ Reports 14, 347.

⁴⁶ Anthony Arend, above n 39.

⁴⁷ The drafting history of Article 51 supports this view. Article 51 was only inserted in the Charter to clarify the the relationship of regional organisations to the Security Council. The official British Government commentary on the Charter reads: 'It was considered at the Dumbarton Oaks Conference that the right of self-defence was *inherent* in the proposals and *did not need explicit mention* in the Charter. But self-defence may be undertaken by more than one State at a time, and the existence of regional organizations made this right of special importance to some States, while special treaties of defence made its explicit recognition important to others. Accordingly, the right is given to individual States or to combinations of States to act until the Security Council itself has taken the necessary measures', quoted in Robert Mclean (ed), *Public International Law* (1997) 294. In sum, Article 51 was never intended to narrow the preexisting right of anticipatory self-defence: It was only inserted in the Charter to clarify the position with respect to collective understandings for mutual self-defence.

⁴⁸ Letter from Daniel Webster, U.S. Secretary of State, above n 36, 1129, 1138.

effects. Moreover, despite the advances of surveillance technology, the emergence of international terrorist groups operating from diverse locations has actually thickened the ‘fog of war’.⁴⁹ This makes it almost impossible to detect a terrorist attack until it has taken place. In view of the new threats arising from international terrorism and weapons of mass destruction, it may be necessary for a state to conduct defensive operations long before an attack is imminent to defend its citizens effectively.

IV. WHY THE BUSH DOCTRINE IS INADEQUATE

The National Security Strategy of the US 2002 – commonly referred to as the ‘Bush doctrine’ – recognises the need for a change and therefore argues that

[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and potentially, the use of weapons of mass destruction – weapons that can easily be concealed, delivered covertly and used without warning.⁵⁰

The National Security Strategy then sets out the standard by which the US will act:

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*. To forestall or prevent such hostile acts by our adversaries, the US will, if necessary, act preemptively.⁵¹

Although the Bush doctrine responds to the need to adapt the Charter’s rules on self-defence to new threats posed by terrorist networks and weapons of mass destruction, it is not the right way of dealing with this complex issue either. In particular, its policy implications are far-reaching and could be potentially de-stabilising. Already Emmerich De Vattel warned that

⁴⁹ The term ‘fog of war’ is attributed to the Prussian military strategist von Clausewitz, see Eugenia Kiesling, ‘On War without the Fog’ (2001) 81 *Military Review* 85.

⁵⁰ *National Security Strategy of the United States*, above n 2, 15.

⁵¹ *Ibid.*

'... a nation may anticipate the other's design, being careful, however, *not to act upon vague and doubtful suspicions*, lest it should run the risk of becoming the aggressor itself'.⁵² If 'preemptive' self-defence⁵³ is to become a recognised tenet of international law, its scope must be clearly defined in order to avoid unwarranted aggression.

The Bush doctrine, however, fails to clearly define the conditions under which preemptive force should be legitimate. Indeed, such ambiguity seems to be deliberate, as comments by the State Department's Legal Advisor suggest:

[E]ach use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.⁵⁴

The dangers inherent in such an open-ended notion of preemptive self-defence are obvious. First, the lack of clear and objective legal standards could result in increasing global instability and insecurity. If other states act on the same rationale that the US has proposed, and accept such military action as a legitimate response to potential threats, then a 'messy world would become a lot messier'.⁵⁵ Once the US invokes this broad concept of preemptive self-defence to justify prophylactic military policies, nothing will stop other countries from doing the same. Doctrines that lower the threshold for preemptive action thus exacerbate regional crises already on the brink of open conflict. For instance, states such as Ethiopia and Eritrea might use the doctrine to justify a first strike, and the effect of the US

⁵² Emmerich De Vattel, *The Law of Nations* (Joseph Chitty trans, 1849 ed) 291.

⁵³ As envisioned by the Bush doctrine.

⁵⁴ Memorandum from William H. Taft IV, Legal Adviser, US State Department, to the American Society of International Law – Council on Foreign Relations Roundtable in *Old Rules, New Threats, Policy Implications of the Bush Doctrine of Preemption*, 18 November 2002 <<http://www.cfr.org/publication.php?id=5250>> at 5 May 2006.

⁵⁵ Bill Keller, 'Preemption', *The New York Times Magazine* (New York) 15 December 2002, 115.

posture may make it very difficult for international organisations to counsel delay and diplomacy.⁵⁶

Second, the Bush doctrine may also adversely affect long-standing *jus in bello* restrictions on the conduct of warfare. A broad interpretation of preemption would not only weaken restraints on *when* states might use force, but also on *how* they may use force.⁵⁷ For example, following the traditional legal principle of proportionality would be difficult in a preemptive war: There is no measure that can be used to assess proportionality against a future attack. Any state contemplating preemptive military action must make a *subjective* determination about *future* events and about how much force will be needed for successful preemption.⁵⁸ Confronted with such uncertainties, states are likely to rely upon worst-case analysis leading often to a disproportionate use of force.

Last but not least, doctrines that lower the threshold for preemptive action may also create a perverse incentive: They may accelerate the WMD arms race insofar as it can become rational for states actually to acquire WMD if they are going to face military action simply based on the fact that they are suspected of possessing such weapons. If a state, for example Iran, becomes convinced that it will be the 'next candidate for regime change', it is likely that it might accelerate its WMD programme. Indeed, one of the lessons which the North Korean example holds for other rogue states is that possession of a nuclear deterrent keeps the US from seriously considering military action.⁵⁹ Iraq – so the argument goes – was attacked precisely because it lacked an existent nuclear deterrent, whereas North Korea remains fairly safe because of its nuclear weapons arsenal.

In conclusion, it can be argued that neither the Caroline formula nor the Bush doctrine provides an adequate legal framework. While the Caroline formula's interpretation of imminence is too restrictive to cope with the emerging threats of the 21st century, the problem with the Bush doctrine is that lacks clear and

⁵⁶ Other examples include India and Pakistan as well as China and Taiwan.

⁵⁷ See Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense* (2002) 19.

⁵⁸ *Ibid.*

⁵⁹ North Korea's February 2005 announcement might be interpreted as an explicit attempt to reinforce the deterrent effect of its nuclear arsenal.

objective criteria. Thus, policymakers need a new framework to help them decide when military action is legal. This article will therefore develop a new legal framework which could guide the decisions of states on whether to use military force in self-defence in the face of a prospective catastrophic attack.

V. DEVELOPING A NEW LEGAL FRAMEWORK

Developing a new legal framework is a difficult task. While such a new framework must allow for a more flexible interpretation of imminence than the restrictive 'Caroline formula', it must also lay down more objective criteria than the vague 'Bush formula'. Hence this article will develop four criteria which could guide the decisions of states on whether to use military force in self-defence in the face of a prospective catastrophic attack.

A. 'Imminence' – a 21st century interpretation

As outlined earlier, the key issue raised by preemptive strikes is 'imminence', a concept discussed as early as 1625 by Hugo Grotius⁶⁰ and later elaborated by Secretary of State Daniel Webster with respect to the *Caroline* incident.⁶¹ The *Caroline* case set the standard that 'the necessity of self-defence' is only justified if the prospect of a specific attack is 'instant' and 'overwhelming'.⁶² Traditionally, 'imminence' was thus viewed in terms of temporal proximity; i.e., self-defence was only possible when an armed attack was about to be launched.

This restrictive temporal interpretation is, however, flawed. The problem with this kind of interpretation is that it elevates the plain words of the rule ('no moment for deliberation') above the fundamental objective the rule attempts to achieve – namely, restricting the use of defensive force to situations in which there is little likelihood of it being used mistakenly (e.g. in response to

⁶⁰ As early as 1625 Hugo Grotius, the father of international law, argued in his classic work 'The Law of War and Peace' that war in defence of life is permissible '*when the danger is immediate*', Hugo Grotius, above n 20, 73, 77.

⁶¹ Webster argued that Great Britain had to show 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation', Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, above n 36, 1129, 1138.

⁶² Ibid.

a false perception of a threat).⁶³ Even though the traditional formulation might be interpreted to require a temporally proximate threat, there appears to be no reason why it also cannot be understood to encompass threats that lack such proximity, but are *certain* to arise. For example, in cases where the *certainty* of the future attack is as great as it is with a temporally proximate threat of attack, the risk of a mistaken use of military force is sharply minimised, too. The traditional formula thus seems 'capable of being read as satisfied by a threat of attack so clearly extant that the use of force is not likely to be resorted to mistakenly'.⁶⁴

Hence the determinative question when assessing claims to preemptive self-defence is: When is a threat of attack so clearly extant that the use of force is not likely to be resorted to erroneously?

If one moves away from the need for temporal proximity, and permits defensive action far in advance of an armed attack, then the possibility increases that military action may be taken when none had been necessary. Such a mistaken perception of a future attack could result from the inability to accurately assess (a) the *commitment* and (b) the *capacity* of a potential adversary to mount an attack. Hence both criteria need to be analysed.

Irrevocable commitment to attack. The longer the time span between the planned terrorist attack and the defensive action carried out to prevent that attack, the more important becomes the first element outlined above: The state invoking self-defence must prove that the terrorist group had definite plans to conduct an attack and was *irrevocably committed to an attack*. This criterion is necessary because it acts as a safeguard against abuse of the still rather broad formula of 'a threat of attack so clearly extant that the use of force is unlikely to be resorted to mistakenly'.

Whether the potential aggressor is irrevocably committed to attack is, of course, difficult to determine. An important factor to consider in determining 'the commitment to attack' is the *explicit intent* of those posing the threat. For example, Al

⁶³ See Rex Zedalis, 'Circumstances justifying preemptive self-defence: Thoughts prompted by the military action against Iraq' (2005) 74 *Nordic Journal of International Law* 214.

⁶⁴ *Ibid.*

Qaeda's repeated public statements indicate that it would carry out more large-scale attacks, if the opportunity arose.⁶⁵ Such statements should influence significantly whether a threat of attack should qualify as sufficiently certain to justify preemptive military action.

Capacity. As regards the capacity to mount an attack, the situation has changed dramatically since the end of the Cold War. The disintegration of the Soviet Union, with the accompanying political and economic tribulations, created a market for weapons of mass destruction.⁶⁶ This era also witnessed an increase in the number of 'rogue states', many of which seek to develop or buy weapons of mass destruction. Whether or not they have already done so, is difficult to determine. Factors that have to be taken into account when assessing the capacity of a potential adversary include: the existence of state of the art research facilities, the technical skills of the country's scientists, the degree of cooperation with countries already possessing such weapons and the access to natural resources necessary to build such weapons.

Making matters even more complicated, many of these states have close ties to non-state actors, such as international terrorist groups who are also seeking to use these weapons. Their capacity is even more difficult to determine due to the lack of reliable information.

In short, assessing the capacity of a potential aggressor – be it a state or a non-state actor – will be a difficult task based mainly on intelligence, the reliability of which is sometimes more than doubtful. Hence attention must be paid to the criterion developed in the next paragraph.

B. Clear and compelling evidence

An additional safeguard against abuse of the concept of 'a threat so clearly extant that the use of defensive force is not likely to be

⁶⁵ See for example 'US facing defeat, says Al-Qaeda', *BBC Online News*, 9 September 2004 <http://news.bbc.co.uk/2/hi/middle_east/3642910.stm> at 5 May 2006.

⁶⁶ See Barbara Slavin, 'Nuclear Weapons Threat Lurks in Russia: Poorly Paid Guards are a Security Concern', *USA Today* (McLean, Virginia) 24 November 1998, A 20; Martin Sieff, Russian 'Kleptocracy' risks Spread of Nuclear Weapons, *Washington Times* (Washington) 30 September 1997, A 3.

resorted to erroneously' is the high standard of proof required. States intending to use force preemptively against terrorist networks or states that support such networks should not proceed unless they have ascertained through compelling evidence that a given state is actually developing weapons of mass destruction or supporting terrorists who have definite plans to conduct an attack.

Even though no express standard of proof exists in public international law, 'clear and compelling' seems to be an acceptable standard.⁶⁷ This standard was articulated by the US several times in the aftermath of the 9/11 attacks.⁶⁸ For example, the US ambassador to the UN cited this standard in his notification to the Security Council that the US was acting in self-defence when attacking the Taliban.⁶⁹ Yet instead of criticising the subsequent military operations, the UN Security Council endorsed them, thereby signalling its acceptance of the 'clear and compelling' standard.⁷⁰

Last but not least, the evidence must be presented to the international community so that states may not make empty claims based on mere suspicion.

⁶⁷ See for example the Statement made by Nato Secretary General Lord Robertson on 2 October 2001 <<http://www.nato.int/docu/speech/2001/s011002a.htm>> at 5 May 2006. See also Mary Ellen O'Connell, 'Evidence of Terror' (2002) 19 *Journal of Conflict and Security* 22-28; Michael Schmitt, 'Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations', in Gian Luca Beruto and Michael Schmitt (eds), *Terrorism and International Law* (2002) 39, 47.

⁶⁸ For example when it presented evidence to NATO, which implicitly endorsed this standard: See statement by Nato Secretary General Lord Robertson, above n 67.

⁶⁹ Letter from John Negroponte, Permanent Representative of the United States of America to the United Nations, 7 October 2001 <<http://www.un.int/usa/s-2001-946.htm>> at 5 May 2006.

⁷⁰ See for example *On Efforts To Establish a New and Transitional Administration Leading to the Formation of a Government in Afghanistan*, UN SC Res 1378, 56th sess, UN Doc S/Res/1378 (2001); *Endorsing The Agreement On Provisional Arrangements In Afghanistan Pending The Re-establishment of Permanent Government Institutions*, UN SC Res 1383, 56th sess, UN Doc S/Res/1383 (2001); and *On Authorizing The Establishment Of An International Security Assistance Force in Afghanistan*, UN SC Res 1386, 56th sess, UN Doc S/Res/1386 (2001); see also Schmitt, above n 67, 39, 47.

C. Proportionality

Moreover, any preemptive use of force must be proportional.⁷¹ This criterion can be traced back to the *Caroline* incident.⁷² As early as 1842 Secretary of State Daniel Webster argued that defensive military action must not be 'unreasonable or excessive'.⁷³ That is, only the minimum force necessary may be used to eliminate the threat. The proportionality requirement thus comprises two main conditions.

First, the amount of force used must be proportional in terms of *intensity*. The intervening state must plan and carry out the military action carefully so as not to inflict more damage and deaths than necessary. To be sure, assessing this condition is difficult when the terrorist attack has not yet taken place. Any state contemplating preemptive military action must make a *subjective* determination about *future* events and about how much force will be needed for successful preemption.⁷⁴ Faced with such uncertainties, states should rely on a thorough analysis of the *scale of past terrorist attacks*.⁷⁵ Such an analysis could provide invaluable clues, reducing significantly the risk of a disproportionate response.

Second, the *duration* of the military strike must be limited to the elimination of the threat. Preemptive self-defence must not serve as a pretext for less legitimate ambitions such as territorial annexation.

D. Positive outcome or probability of success

As outlined above⁷⁶, this criterion is derived from classical just war theory.⁷⁷ It requires that there must be a reasonable chance

⁷¹ This criterion – derived from customary international law, see the *Caroline* case discussed above (Chapter III) – needs to be specified in the context of preemptive strikes, because assessing proportionality against a *future* attack, creates new and complex problems.

⁷² For details see above, n 36.

⁷³ Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, above n 36, 1137.

⁷⁴ See Mary Ellen O'Connell, above n 57.

⁷⁵ Sometimes the modus operandi of past terrorist attacks could provide valuable clues as well.

⁷⁶ For details see Chapter II.

⁷⁷ See James Childress, 'Just-War-Theories: The Bases, Interrelations, Priorities and Functions of their Criteria' (1978) 39 *Theological Studies* 427–445.

that the proposed use of force will be successful. That is, the use of force must either eliminate the WMD programme or significantly degrade the ability of the proliferator to resurrect the programme. If a state fails to establish such a reasonable chance of success, then it must not act. Yet military success cannot be the sole measure of reasonableness. Other factors have to be taken into account as well. For instance, if the consequences of a military strike will be worse than the consequences of inaction⁷⁸, states must desist from preemptive military action. This criterion would, for example, rule out the destruction of a WMD plant likely to cause environmental damage on an unprecedented scale (e.g. nuclear contamination of a large and densely populated area).

In sum, the criteria outlined above effectively limit a doctrine of preemptive self-defence. These criteria, if adhered to, will eliminate the ability of states to use preemptive self-defence as a pretext for regime change or territorial annexation. On the other hand, they will place the world on notice that the international community is willing to deal effectively with the new threats of the 21st century – international terrorism and weapons of mass destruction.

VI. CONCLUSION

Neither the traditional rules governing the use of force ('Caroline formula') nor the Bush doctrine of September 2002 provides an adequate legal framework that can cope with the emerging threats of the 21st century – international terrorism and weapons of mass destruction.

While the *Caroline formula* may have made sense in the nineteenth century, its interpretation of imminence is too restrictive to cope with the threats of the 21st century.

The *Bush doctrine* on the other hand fails to clearly define the conditions under which preemptive force should be legitimate. Indeed, such ambiguity seems to be deliberate, as comments by the State Department's Legal Advisor suggest.⁷⁹ The dangers

⁷⁸ Ibid. 427–445.

⁷⁹ 'In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should

inherent in such an open-ended notion of preemptive self-defence are obvious. First, the lack of clear and objective legal standards could result in increasing global instability and insecurity. Second, it may also adversely affect long-standing *jus in bello* restrictions on the conduct of warfare. Last but not least, it may provide an incentive for other states to acquire weapons of mass destruction, thereby increasing the risks of escalation and retaliation with even greater violence.

What is needed instead, is a more nuanced and objective approach. While such a new framework must allow for a more flexible interpretation of imminence than the restrictive 'Caroline formula' it must also lay down more objective criteria than the vague 'Bush formula'. This article has sought to develop four criteria which could guide the decisions of states on whether to use military force in self-defence in the face of a prospective catastrophic attack. These include: (1) Irrevocable commitment to attack and capacity; (2) Clear and compelling evidence; (3) Proportionality and (4) Positive outcome.

These criteria should both be able to help counter contemporary threats (WMD, international terrorism) and at same time avoid the open-ended and ultimately anarchic resort to force too quickly. They could also form the basis of a new normative framework that could gain international consensus.⁸⁰

be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not', Memorandum from William H. Taft IV, above n 54.

⁸⁰ The criteria developed are merely a starting point for a new framework. While they are certainly imperfect, they represent the main components that should be included in such a new framework.