Denver Journal of International Law & Policy

Volume 33
Number 1 *Winter*
2004 Sutton Colloquium

Article 11

January 2004

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Recommended Citation

Mark L. Rockefeller, The Imminent Threat Requirement for the Use of Preemptive Military Force: Is It Time for a Non-Temporal Standard, 33 Denv. J. Int'l L. & Pol'y 131 (2004).

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Keywords

United Nations, International Law: History, Military, War and Peace, Self-Defense, Military Law, Terrorism, Violence

This comment is available in Denver Journal of International Law & Policy: https://digitalcommons.du.edu/djilp/vol33/iss1/11

THE "IMMINENT THREAT" REQUIREMENT FOR THE USE OF PREEMPTIVE MILITARY FORCE: IS IT TIME FOR A NON-TEMPORAL STANDARD?

*Mark L. Rockefeller**

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves . . . scholars and international jurists often conditioned the legitimacy of preemption on the existence of an *imminent* threat – *most often a visible mobilization of armies, navies, and air forces preparing to attack.*[1]

Under customary international law, a state may use preemptive military force only if faced with an imminent threat.[2] The concept of imminence is traditionally understood in a temporal sense—that is, imminent is nearly synonymous with immediate. Thus, a preemptive strike may generally only take place immediately prior to the attack it is intended to thwart. Put another way, the *nearness* of the impending attack determines the *appropriateness* of a preemptive strike.

We now live in an age of terrorism and "uniquely destructive weaponry,"[3] such as Weapons of Mass Destruction (WMDs).[4] The capabilities of the Al-Qaeda[5] network and the willingness of terrorist organizations to cause calamitous

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1. NAT'L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, at 15 (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (emphasis added).

2. *See generally* Michael N. Schmitt, *The Sixteenth Waldemar A. Solf Lecture in International Law*, 176 MIL. L. REV. 364, 378 (2003).

3. Louis R. Beres, *The Newly Expanded American Doctrine of Preemption: Can it Include Assassination?*, 31 DENV. J. INT'L. L. & POL'Y 157, 165 (2002).

4. Weapons of Mass Destruction (WMD) is the general term given for a class of weapons to include: nuclear, biological, chemical, and radiation weapons.

5. Al-Qaeda, "the base" in Arabic, was founded by Osama bin Laden in 1989, eventually merging with Egypt's Jihad, the organization behind the assassination of Egyptian President Anwar Sadat in 1981. Al-Qaeda claimed responsibility for the deaths of U.S. soldiers in Somalia in 1993, the World Trade Center bombing in 1993, the bombing of U.S. embassies in Kenya and Tanzania in 1998, the bombing of the U.S.S. Cole in 2000, and the September 11, 2001 attacks in New York City and Washington, D.C. *See generally* PETER L. BERGEN, JR., HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN (2002).

harm are as clear as the images seared into the minds of television viewers around the globe on September 11, 2001.

The issue therefore arises: Do modern technologies make waiting for a visible "mobilization of armies" unrealistic? Do terrorist tactics necessitate a broader interpretation of imminence by the international community? Could a non-temporal standard adequately assure the necessity of the use of preemptive force and that other, non-forceful options have been exhausted?

This article explores whether the traditional temporal interpretation of imminence should be changed. The article argues for an improved standard—one that retains the requirement for necessity, while eliminating the outmoded requirement for immediacy. It argues that modern weaponry and terrorist tactics countermand the current time-based standard. Part I gives background information, a history of the current understanding of imminence in international law, the evolution in weaponry, and an overview of current state behavior relative to the existing standard. Part II analyzes why a temporal interpretation of imminence may be outdated, reviews current scholarship in the field, and notes other areas of law in which the concept of imminence is understood non-temporally. Part III suggests an alternative approach, describes the components of such an approach, and discusses its relative strengths and weaknesses. Finally, Part IV summarizes and gives recommendations for the implementation of this new standard.

I. BACKGROUND

While Articles 2(3) and 2(4) of U.N. Charter broadly prohibit the use of unilateral military force, Article 51 provides an exception for instances of self-defense.[6] Considered an "inherent right"[7] for states, self-defense is the only justifiable rationale for the use of armed force without U.N. Security Council approval.[8] Self-defense is an established doctrine. However, the legality of the use of force in self-defense to thwart an attack *before* the attacker fires the first shot (i.e. preemptive military force) is hotly debated. Scholars disagree on whether preemptive force is permissible at all under a strict interpretation of Article 51 and struggle to reconcile prohibitions on the use of force with actual state practice.

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6. U.N. CHARTER art. 2, para. 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."); U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); U.N. CHARTER art. 51 ("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 Security Council has taken measures necessary to maintain international peace and security. Measures taken by 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."), *available at* http://www.un.org/aboutun/charter/.

7. Michael J. Glennon, *Preemptive Terrorism: The Case for Anticipatory Self-Defense,* THE WKLY. STANDARD, Jan. 2002, at 3.

8. *Id.*

Customary international law requires that force, when used, "comply with three basic criteria—necessity, proportionality, and imminency."[9] In this paper, I will not discuss proportionality. I shall assume that a state adheres to this doctrine in any use of force it applies—be it preemptive or otherwise. Similarly, necessity will only be discussed within the broader concept of imminence. This article focuses, rather, on the legality of a specifically preemptive action, the concept of imminence, and its inadequacy to meet contemporary threats.

To conceptualize this issue, it is useful to think of a timeline, with the occurrence of the armed attack at the center and lines extending into the past and the future. Given this framework, the current standard of imminence requires that an anticipatory attack be close to the center of the timeline; that is, near to the time at which the actual armed attack would occur absent intervention.[10] Please keep this conceptualization in mind as we explore the history of the current standard.

A. History, Evolution and Ambiguity of the Imminent Threat Requirement

The classic definition of imminence governing the use of preemptive force is found in the famous *Caroline* incident. On December 29, 1837, approximately eighty British soldiers crossed the U.S. border into New York from Canada and seized a small steamer known as the *Caroline.*[11] Canada was a British colony, and British forces believed that rebels attempting to overthrow the Crown were using the vessel to support raids into Canada. Acting in "self-defense," the British crossed into U.S. territory, stormed the ship, set it on fire, and sent it over Niagara Falls.[12] Protesting the incident, U.S. Secretary of State Daniel Webster argued that in order to legitimately claim self-defense, the British must have had "necessity of self-defense, *instant*, overwhelming, leaving no choice of means, and *no moment of deliberation.*"[13] To those who believe preemptive self-defense is legally justifiable, this classic temporal definition still applies today.[14]

It is important to note, however, that the legality of preemptive force as a legal concept is not codified in the U.N. Charter, even though the principle has been recognized by international legal bodies as customary international law. For example, the *Caroline* standard was relied on by the International Military Tribunal at Nuremberg, by the International Court of Justice in its *Nicaragua* decision, and by the International Court of Justice in its advisory opinion on the Use of Nuclear Weapons.[15] Thus, there exists general agreement that preemptive military force is acceptable under customary international law *if the threat is imminent.*[16]

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9. Michael N. Schmitt, *Preemptive Strategies in International Law,* 24 MICH. J. INT'L L. 513, 529 (2003).

10. Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense,* 20 B.U. INT'L L.J. 413, 420 (2002).

11. *See* Schmitt, *supra* note 9, at 529.

12. *Id.* at 529.

13. *Id.* at 530.

14. *See* Magenis, *supra* note 10, at 420.

15. *See* Schmitt, *supra* note 9, at 530.

16. In class comment from Professor Ved P. Nanda, class discussion, International Law,

But this classic standard has not remained static. For example, during the Cold War, a polarized world and the threat of nuclear holocaust led to the suggestion that the traditional concept of immediacy adjust to a more liberal understanding of imminence—one that aligned with mid-twentieth century state practice.[17] In the opinion of some, it was President John F. Kennedy and the Cuban Missile Crisis in 1962 that manifested a shift in the U.S. policy of preemption.[18] The Kennedy Administration's use of a "quarantine" against Cuba was technically a blockade—arguably, a preemptive act of aggression.[19] Yet, in hindsight, the blockade was generally viewed positively by the international community as a "cautious, limited, and carefully calibrated" response.[20] Thus, as early as the 1960s, an evolution in the *Caroline* standard was evident.

The ambiguity of the imminent standard, as reflected in the inconsistent international reactions to acts of preemption, supports a call for further evolution. For example, in 1967, Israel, surrounded by opposition forces, initiated a preemptive first-strike against Egypt.[21] The United Nations did not condemn Israel's preemptive action (it only asked Israel to return the conquered territories), because Israel's use of force was deemed to be sufficiently necessary—that is, the Egyptian threat was considered to be imminent.[22] Yet in 1981, Israel performed preemptive air strikes once again, this time against an Iraqi nuclear plant.[23] Here, Israel's claims of "self-defense" fell on deaf ears. The U.N. Security Council unanimously condemned the attack, because it doubted the imminence of the threat posed by the incomplete reactor.[24] Israel's 1981 attack was viewed as being without legal basis, and the distinction between the 1967 and 1981 attacks was ostensibly reasonable. In contrast, however, consider Operation Desert Fox, a 1998 four-day British and American bombing campaign against chemical and biological weapons facilities in Iraq.[25] The potential use of, or target for, Iraq's weapons was unknown. Only speculation linked the threat to British or American interests—a chemical or biological attack was not imminent, in the traditional sense. Yet, Operation Desert Fox was not condemned by the U.N. Security Council; tacit approval was given for the preemptive use of force in order to counter a threat which was not yet demonstrated to be imminent.[26] Thus, conflicting international reactions to state practice, in seemingly analogous

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University of Denver College of Law (Jan. 2004).

17. *See* Magenis, *supra* note 10, at 423.

18. *See* Schmitt, *supra* note 9, at 545.

19. THOMAS FRANCK, RECOURSE TO FORCE (2002), *excerpted in* BARRY E. CARTER ET AL., INTERNATIONAL LAW 985 (2003).

20. *Id.*

21. Jeffrey F. Addicott, *Proposal on a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 776 (2003).

22. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 191 (1984); *see also* Ardi Imseis, On the Fourth Geneva Convention and the Occupied Palestinian Territory, 44 HARV. INT'L L.J. 65, 81 (2002).

23. *See* Schmitt, *supra* note 9, at 546

24. *Id.*

25. *See* Magenis, *supra* note 10, at 428.

26. *Id.* at 429-30.

situations, represent ambiguity in the traditional standard used to determine what constitutes an imminent threat.

B. Evolution in Weaponry

On a parallel timeline, the weapons of war have evolved. In modern warfare, a single attack can be instantaneous and devastating. As U.N. Secretary General Kofi Annan stated regarding September 11th, 2001, "it is hard to imagine how the tragedy could have been worse. Yet, the truth is that a single attack involving a nuclear or biological weapon could have killed millions."[27] It has become increasingly clear that terrorists, fueled by the desire for mass casualties and increased media attention, are more and more willing to use devastating technologies.[28]

Proliferation of nuclear materials adds to this concern. The post-Cold War disintegration of the Soviet Union, with the accompanying economic and political tribulations, created a market for WMDs and associated materials.[29] This era similarly gave rise to an increase in rogue states and transnational terrorist groups.[30] Indeed, the potential of such groups to acquire WMDs is greater now than at any other time in history.[31] The risk is profound.

Consider the capabilities of modern weapons. For example, beginning in March of 1988, the Iraqi military, using a combination of artillery and air forces, dumped chemical agents on Kurdish cities in northern Iraq.[32] Experts estimate that a combination of mustard gas, sarin, and VX nerve agents were used.[33] Tens of thousands of Kurds were "permanently blinded, sterilized, disfigured and unnaturally prone to develop cancer."[34] Human Rights Watch estimates than between 50,000 and 100,000 were killed.[35] The long term effects of the attacks may linger for generations. For example, in the Kurdish city of Halabja, abnormal births are more common than normal births.[36]

Alarmingly, detection of such virulent materials is difficult. Many chemical and biological weapons components are "dual use"—that is, they have legitimate commercial applications in addition to use in weaponry.[37] In effect, this fact decreases the ease of detection while simultaneously increasing the ease of

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27. Press Release, United Nations, Secretary-General, Addressing the Assembly on Terrorism (Oct. 1, 2001), U.N. Doc. SG/SM/7977, *available at* http://www.un.org/News/Press/docs/2001/sgsm7977.doc.htm.

28. *See* Schmitt, *supra* note 2, at 377.

29. Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 491-92 (1999).

30. *See* NAT'L SEC. COUNCIL, *supra* note 1, at. 13.

31. BARRY E. CARTER ET AL., INTERNATIONAL LAW 1125 (2003).

32. Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 158 (2002).

33. *Id.* at 158-59.

34. *Id.* at 158.

35. *Id.* at 158.

36. *Id.*

37. *See* Carter, *supra* note 31, at 1126.

acquisition. For example, in 1995 a religious sect released a chemical agent in a Tokyo subway in an attack that killed twelve people and injured thousands.[38] More disturbing, the agent (sarin gas) used in the attack was manufactured by the sect itself.[39]

Chemical agents are not the only threat. Scholars have written volumes on the problem of nuclear weapon proliferation and the increasing opportunity for terrorists groups to obtain such a uniquely destructive capability. Currently, at least nine states are known, or thought, to possess nuclear weapons, and more may obtain the capability in the future.[40] The destruction from even a small nuclear device is nothing short of catastrophic. The Director of Harvard's Belfer Center for Science and International Affairs paints the picture of what might have happened on September 11th:

> Had al-Qaeda attacked the World Trade Center . . . with a vehicle containing a nuclear device . . . [it] could create an explosive force of 10,000 to 20,000 tons of TNT, demolishing an area of about three square miles. Not only the World Trade Center, but all of Wall Street and the financial district, and the lower tip of Manhattan up to Gramercy Park would have disappeared. Hundreds of thousands of people would have died suddenly.[41]

While an actual nuclear weapon is difficult to obtain, access to basic radioactive materials could permit terrorist groups to create a "dirty bomb," in which radioactive "dust" is dispersed through a traditional explosive device.[42] Small and easy to conceal, a dirty bomb causes latent defects and cancers in exposed victims, even those safely out of the reach of the initial explosion. As a result, the attractiveness of a dirty bomb to terrorists is rooted in the bomb's ability to create a massive economic impact on the area surrounding the site of the explosion.[43] As of January 2004, experts unequivocally stated that terrorist groups possess the will to use such a weapon and that they are "doing everything they can" to acquire the materials.[44]

WMDs are not useful without the means to deliver them. However, terrorist organizations now possess delivery technologies previously available only to states. "Sensors, information processing, and precision guidance technologies" in "off-the-shelf" forms may be obtained by terrorists and those sympathetic to them for integration into their weapons systems.[45] Consider the U.S. Defense

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38. *Id.*

39. *Id.*

40. *Id* at 961.

41. Graham Allison, *Could Worse Be Yet to Come?*, THE ECONOMIST, Nov. 2001, *available at http://www.economist.com/opinion/PrinterFriendly.cfm?Story_ID=842483.*

42. Associated Press, U.S. Terror Expert Warns of Dirty Bomb, February 8, 2004, *available at* http://www.macon.com/mld/macon/7907695.htm.

43. David Rose, *Iraq's Arsenal of Terror*, VANITY FAIR, May 2002, at 124.

44. *See* Associated Press, *supra* note 42.

45. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2001, at 6, *available at* http://www.defenselink.mil/pubs/qdr2001.pdf.

Department's guiding document, Joint Vision (JV) 2020,[46] which cautions against the side-effects of globalization, warning that militarily useful technologies "such as commercial satellites, digital communications [equipment], and the public Internet" are now in the hands of those who previously could not afford them.[47] Moreover, from a defensive perspective, the information revolution and the availability of computers and related equipment make detection of illicit materials (those used to construct such weapons) more difficult.[48] This fact increases the potential for miscalculation on the part of the victim state and makes more likely a surprise attack on the part of terrorist groups.[49] As the National *Security Strategy of the United States* released in 2002 evinces, "America is menaced less by conquering states than we are by failing ones . . . less by fleets and armies than by *catastrophic technologies in the hands of the embittered few.*"[50]

C. State Practice and the Current Standard of Imminence

The nexus of terrorism and WMDs thus creates a significant threat to the very global security the U.N. Charter intended to preserve. To meet this threat, the international community has, at times, responded preemptively.

For example, consider the U.S. led invasion of Afghanistan. Little, if any, international opposition to this campaign existed.[51] Indeed, most nations believed inherently that the United States had a right to act, and many nations communicated this belief by supporting the effort through the provision of military aid. When Operation Enduring Freedom began in Afghanistan on October 7, 2001, NATO and U.N. allies from around the globe contributed.[52] French, British, Australian, Canadian, and indigenous Afghan forces fought alongside American troops, while other nations, such as Russia and China, supplied logistical or public support.[53] Several nations opened airspace, Qatar and Kuwait allowed the use of airbases to American aircraft, and NATO aircraft patrolled the skies over the United States in order to alleviate the burden on American aircraft performing domestic defense and free them for operations in Afghanistan.[54] For the first time in history, NATO invoked Article 5 of its treaty, which considers an attack against any NATO nation an attack against them all.[55] The U.N. Security Council passed Resolution 1368 strongly condemning the terrorist attack, expressing its readiness to take "all necessary steps . . . to combat all forms of terrorism" in response, and affirming the "inherent right of individual or collective self-defense" pursuant to Article 51.[56] A collective war against the Taliban and Al-Qaeda had begun; and, in

46. JOINT CHIEFS OF STAFF, JOINT VISION 2020 (2000), at 5, *available at* http:www.dtic.mil/jointvision/jvpub2.htm.

47. *Id.*

48. *See* Carter, *supra* note 31, at 1126.

49. *Id.*

50. *See* NAT'L SEC. COUNCIL, *supra* note 1, at 1.

51. *See* Carter, *supra* note 31 at 80.

52. *Id.*

53. *Id.* at 73.

54. *Id.*

55. *Id.* at 73.

56. U.N. Security Council Resolution 1368, *available at*

the name of self-defense, the international community was supportive.

But was Operation Enduring Freedom really about self-defense? Invading Afghanistan was not going to have any ameliorative or preclusive effects on the destruction caused on September 11, 2001.[57] The damage in New York, Washington, D.C., and Pennsylvania was already done. No amount of success by the international community in Afghanistan would lessen or assuage the harm.

Perhaps the invasion of Afghanistan was actually two-pronged: it was both an act of *reprisal* and an act of *preemption*—reprisal for acts which had already occurred, and preemption for acts to come.[58] Reprisal and preemption go hand in hand—indeed, they are flip sides of the same coin. Consider the permissibility of reprisals under customary international law according to the *Nauliaa* case decided by the special arbitration Tribunal established under the Treaty of Versailles.[59] The Tribunal stated, "[reprisals] seek to impose on the offending State reparations for the offense, the return to legality and *the avoidance of new offenses.*"[60] Moreover, in the famous *Nicaragua* case in 1986, the International Court of Justice "refrained from ruling that all armed reprisals are unlawful," thereby implicitly approving of reprisals in certain instances.[61]

Thus, the world's action in Afghanistan was, in part, preemptive. In addition to punishing the Taliban regime for its support of terrorism, the invasion was intended to prevent the regime and Al-Qaeda from endangering the citizens of the world in the future. Consider the impact of Operation Enduring Freedom. Far from the typical retaliatory "tit for tat" military strike, Operation Enduring Freedom was expansive—international forces invaded a foreign nation, removed its government, replaced it with one more friendly, and did this all with the approval of the "international community" and the United Nations. The world acted in retaliation for what had already been done *and* to preempt future acts of terrorism.

But why do some members of the international community condone one act of preemption (invasion of Afghanistan) and condemn others (the 2003 invasion of Iraq, arguably)? Political motivations aside, states condone preemption when the necessity of the action has been demonstrated to their satisfaction. In Afghanistan, the imminency of the threat posed by the Taliban and Al-Qaeda was incontrovertible (if not irrelevant), because the attacks of September 11th had already occurred. A similar campaign on September 10th, 2001 would likely not have received the same support. Thus, the real issue is not traditional (temporal) imminence at all, but rather necessity; *imminence being merely a measure of*

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http://www.un.org/Docs/scres/2001/sc2001.htm.

57. *See* Posteraro, *supra* note 32, at 202.

58. *See generally id.*

59. Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Recueil des Cours 455, 458-460 (1952, vol. II), *excerpted in* 12 Whiteman, Digest of International Law 148-49 (1963).

60. *Id.* at 149 (emphasis added).

61. YORAM DINSTEIN, WAR, AGRESSION AND SELF-DEFENSE (3rd ed. 2001), *excerpted in* BARRY E. CARTER ET AL., INTERNATIONAL LAW 997 (2003).

necessity. If this is true, if necessity can be demonstrated before the attack, then a nation should not be required to wait to be attacked before it can defend itself, especially if the first blow is potentially devastating.

II. ANALYSIS

A. The Sailors' Dilemma

Professor Paul H. Robinson aptly illustrates the broad problems inherent in a temporal interpretation of imminence in his *Sailor's Dilemma*. Speaking primarily of the criminal context, he presents an illustrative conceptual hypothetical:

> A slow leak is found by a crew of a seagoing vessel shortly after the ship leaves port for a long journey to a remote part of the ocean. The ship's Captain refuses to heed to the crew's pleadings to cancel the journey. The slow leak will take two days to sink the ship; thus, it poses no *immediate* risk. However, absent intervention, the leak poses a definite and certain *future* risk of sinking the ship. The dilemma: may the sailors mutiny to gain control of the ship now, while they are still close to shore and the chances of survival are high, or must the crew wait until the sinking is temporally imminent (immediate), even if waiting means they will be farther away from the shore and will have a decreased chance of survival?[62]

I contend that most rational persons would agree that, absent any special duty to obey the captain or go down with the ship, the crew should mutiny. After all, the Captain's actions are suicidal, both for himself and those under his command. This seems reasonable, since the sailors' right to self-preservation *should* outweigh the lack of immediacy. We must weigh the right to self-preservation against any margin of error in the certainty of the ship sinking. Therefore, if the future harm can be known with reasonable certainty, and waiting until that harm is immediate would increase the harm itself, one should be justified in acting early to prevent such harm. Building on Professor Robinson's model, I contend that terrorist tactics and technological advancements make a temporal standard particularly problematic in our age.

B. The "Time Gap" Problem

Why are we so concerned with the temporal element of imminence? Because, we want states to exhaust all viable non-forceful measures before resorting to the use of force. Theoretically speaking, the current standard legitimizes the use of preemptive military force only when the state being attacked has no time for anything other than the use of force.

Such a definition, however, assumes a "time gap." That is, *the difference in time between the point at which a state becomes aware of a forthcoming attack and the point at which the impact of that attack is felt.* Under the current standard, a state may use preemptive force only when this "time gap" is sufficiently small. Sufficiently small traditionally meaning the "visible mobilization of armies"[63] referred to in the introduction.

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62. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §124(f)(1) (1984).

63. *See* NAT'L SEC. COUNCIL, *supra* note 1, at 15.

But the traditional standard of imminence assumes that this "time gap" is knowable. *What if, in the age of terrorism, the "time gap" is not adequately knowable*? We know that terrorists rely on surprise and deception; the attacks of September 11th demonstrated this reality.[64] Terrorist thrive on asymmetric warfare;[65] that is, striking the enemy using weapons, and in a manner, they least expect. Thus, one reason for the inadequacy of the current temporal interpretation of imminence is that it assumes the victim-state can discern the precise point in time at which *waiting to act* becomes *waiting too long*. Additionally, the proliferation of WMDs, and the willingness of terrorists to use them, may increase the *cost of waiting* to an unacceptable level. In weighing the right to self-preservation against the margin of error in the certainty of the attack, the extent of the damage, if an attack occurs, must also be considered.

The temporal standard of imminence is rooted in the year 1837, in an age of muskets and colonial militias. The "time gap" is less knowable now, or at least exponentially smaller, than it was in 1837. Further, the consequences of an attack are exponentially greater. Thus, a new standard is needed—a new standard that accounts for the diminished "time gap" resulting from terrorism and modern weaponry, but does not sacrifice the principle of necessity.

C. Current Scholarship

The inadequacy of the current standard of imminence is acknowledged by scholars. For example, New York University's Thomas M. Franck asserts that technological transformation of weapons and delivery systems (specifically rocketry), "make obsolete" parts of the U.N. Charter's Article 51 provision.[66] He argues that new technology has blurred the line between what is and what is not an appropriate point at which to act preemptively. Consequently, requiring a state to await the initial attack before instituting countermeasures creates a *reductio ad absurdum*.[67] Inevitably, according to Franck, rational states respond by claiming a right to "anticipatory self-defense," a right, he contends, which is outside the literal interpretation of the Charter.[68] Moreover, the Charter envisioned a Security Council with a strong military police force capable of quelling disputes at its disposal; yet this never materialized.[69] Thus, in the absence of a powerful Security Council enforcer,[70] states behave rationally, in the interest of self- preservation, and exceed the delineations of the Charter. As Franck concludes, "common sense is often the best guide to international legal norms."[71]

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64. *See* Schmitt, *supra* note 2, at 383.

65. Asymmetric warfare is a military term referring to the leveraging of inferior tactical or operational ability against a stronger opponent's vulnerabilities with the aim of achieving a disproportionate effect.

66. THOMAS M. FRANCK, RECOURSE TO FORCE (2002), *excerpted in* BARRY E. CARTER ET AL., INTERNATIONAL LAW 980 (2003).

67. *Id.*

68. *Id.*

69. *Id.* at 979.

70. *Id.* at 980.

71. THOMAS FRANCK, RECOURSE TO FORCE 98 (Cambridge University Press) (2002).

Professor Michael N. Schmitt also agrees that the current standard is outmoded in a world of WMDs, terrorists, and rogue States.[72] He does not blame the Charter's framers, however, adding that they could not have foreseen the capabilities of WMDs and the willingness of terrorists to use exceptionally violent means to influence governments.[73] Schmitt does proffer a potential solution. He recommends that states be allowed to take (preemptive) defensive actions only "during the last viable window of opportunity;" that is, the point, after which a "viable defense [would be] ineffectual."[74] Of course, the tricky part is the measurement of such a point. This is addressed in the proposed definition of imminence in Part III.

The inadequacies of the current standard, and resulting state recalcitrance, were seen before the events of September 11th. Stanford University's Abraham Sofaer wrote in 1989 of his concern that "respect for traditional doctrine is undermined when States are expected to accept too high a degree of risk of substantial injury before defending themselves."[75] On the other hand, Professor Mary Ellen O'Connell argues that so long as violation of international law is "treated as a violation, and not a movement toward a new customary rule, then the old law remains viable."[76] How can we reconcile these views?

If a new and different "twenty-first century threat environment"[77] truly exists, then legal changes may be necessary. If so, other fields of law, facing similar pressures to evolve, might provide useful insight.

D. Imminence in Other Contexts

In cases of battered women who kill in self-defense, criminal defense attorneys are currently battling for a practical definition of imminence.[78] Several cases exist in which battered women have killed their abusers at a non-confrontational moment;[79] that is, at a moment in which the threat was not temporally imminent. Here, as in the national defense context, the requirement for imminence has proven problematic for claims of self-defense.[80]

The two concepts of self-defense (self-defense claimed by battered women and self-defense claimed by states) are undoubtedly highly distinguishable. Yet, they are similar insofar as both fields wrestle with the apparent inadequacy of a traditional legal theory that fails to provide justification for an act of self-defense that seems intuitively and morally acceptable.[81]

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72. *See generally* Schmitt, *supra* note 2.

73. *See* Posteraro, *supra* note 32, at 185.

74. *See* Schmitt, *supra* note 2, at 394.

75. Abraham D. Sofaer, *Terrorism, the Law, and National Defense* 126 Mil. L. Rev. 89, 97-98 (1989). Nothing is highlighted

76. MARY ELLEN O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 15 (2002).

77. *See* Schmitt, *supra* note 9, at 513.

78. Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome* 20 N. ILL. U.L. REV. 191 (2000).

79. *Id.*

80. *Id.*

81. *Id.* at 193.

In the case of a battered woman, we are uncomfortable with the law's inability to handle situations where a victim kills her batterer, seemingly justifiably, but at a non-confrontational time and place.[82] In the United States, a battered woman's self-defense claim will generally fail if the woman kills during a lull in the violence, such as while the aggressor's back is turned or when the woman has the opportunity to escape.[83] German civil law however applies a more progressive standard of imminence.[84] For example, in 1979, the German High Court (Bundersgerichtshof) held that an imminent danger *can endure prolonged periods of time.*[85] Similarly, in another case involving a false imprisonment claim, the German High Court vacated a lower court's judgment against the defendants by finding that "the perceived danger need not be immediate . . . it merely needs to be *ongoing, intermittent, or cyclical in nature.*"[86]

The German standard should not be shocking; for if imminence can endure long periods of time, and if imminence can be found in the ongoing, intermittent or cyclical nature of the threat, then one can determine with adequate certainty that the threat still exists. Thus, the threat may still be imminent, even in the absence of an immediate attack. Could a potential model for the use of force in international disputes lie in the efforts to liberalize the "imminence" requirement for battered women acting in self-defense?[87] I believe it could—if the international community concludes, as the Germans did in the above cases, that the true importance of imminence is as a *yardstick* for necessity, not a *stopwatch.*

E. What We Really Seek to Measure: Necessity

In the national defense context, an analogous situation to the battered woman killing during a lull in the violence occurs when a state acts preemptively to neutralize a threat, but does so weeks (or even months) before the aggressor's attack would have taken place. This analogy only fits if the threat is on-going, intermittent, and cyclical. Yet, as I will demonstrate, such is the case with terrorism. Striking during a lull in the violence seems intuitively justifiable in both contexts; but they are, at once, illegal under the current interpretation of imminence. I believe this paradox is rooted in confusion over the relationship between "imminence" and "necessity."

The requirement for imminence is meant to assure the necessity of an act. That is, we want nations (and battered women) to exhaust other possibilities before

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82. *Id.*

83. *See generally* Danielle R. Dubin, *A Woman's Cry for Help: Why the United States Should Apply Germany's Model fo Self-Defense for the Battered Woman* 2 ILSA J. INT'L & COMP. L. 235, 240 (1995).

84. *Id* at 257.

85. *Id* at 261. *See also* Karl Lackner, STRAFGESETZBUCH MIT ERLAUTERUNGEN §34, at 214 (Beck 18th ed. 1989) (emphasis added).

86. *See* Dubin, *supra* note 83, at 263 (emphasis added).

87. *See generally* George P. Fletcher, *How Would the Bush Administration's Claims of Self-Defense, Used as Justifications for War with Iraq, Fare Under Domestic Rules of Self-Defense?* (Sept. 10, 2002), *available at* http://writ.news.findlaw.com/commentary/20020910_fletcher.html.

resorting to "self-help."[88] For example, in the context of battered women, Professor Richard Rosen argues that imminence "has no significance independent of the notion of necessity." Rather, he views imminence as a "translator" for necessity.[89] He contends that imminence is but one component of necessity, and, when the two conflict, imminence should yield to necessity, since the "purpose of making an inquiry regarding imminence is to determine if an action was necessary."[90]

It makes sense to allow separation of the two concepts when required. One can think of cases when "self-help" is necessary, but the threat is not temporally imminent (e.g., the Sailors' Dilemma). Similarly, situations exist where the threat may be imminent (i.e., near in time), but reasonable alternative courses of action still exist that would make the use of "self-help" inappropriate, despite the nearness of the threat.

In the battered women context, the violence usually occurs in a cycle: a heating-up period, an act of violence, followed by a respite, then a repetition.[91] In other words a temporary cessation in the violence does not mean the violence is over, only that a lull or break is taking place. Thus, if the temporal element is removed, what was once viewed as a cessation of violence from a temporal perspective can now be viewed as a stage in an on-going cycle of violence. Further, the respite would have no effect on the *likelihood* of a future attack, only on the *timing* of such an attack.

Similarly, in the national defense context, terrorists groups attack using intermittent, cyclical force. Consider Al-Qaeda. In addition to the more recent September 11th, Baja and Madrid attacks, the group was involved in the 1993 World Trade Center bombing, attacks on U.S. soldiers in Somalia and Yemen in 1993, the 1998 bombings of two U.S. Embassies, the attack on the U.S.S. Cole, a failed millennium celebration attack in Jordan, and failed assassination attempts of President Clinton and the Pope.[92] Such a pattern appears to be a one single campaign of intermittent violence. Like wife batterers, terrorists harm in a cyclical fashion, with "lulls" occurring between attacks. The time and place of the next attack is unknown, however the certainty of the attack, if left unchecked, may be reasonably knowable.

Moreover, the terrorists' intentions are often expressly communicated. Consider Al-Qaeda's public communications. In 1998, Osama bin Laden announced the formation of the World Islamic Front for Jihad against the Jews and the Crusaders.[93] The inaugural announcement declared "to kill and fight Americans and their allies, whether civilian or military, is an obligation for every

88. *See* Schmitt, *supra* 9, at 530.

89. Richard A. Rosen, *On Self-Defense, Imminence, And Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993).

90. *See* Murdoch, *supra* note 78, at 193.

91. See generally LENORE E. WALKER, THE BATTERED WOMAN (1979).

92. *See* Schmitt, *supra* 9, at 535-36.

93. PETER L. BERGEN, JR., HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN 98 (2002).

Muslim who is able to do so in every country . . . abide by Allah's order by killing Americans and stealing their money anywhere, anytime, and whenever possible."[94] Taking the organization at its word, Al-Qaeda's intentions for an on-going terror campaign could hardly be clearer.

Thus, the problem faced by states who know they are on a terrorist's target list is the same problem faced by battered women who know their abuser will strike again. Should women or nations (or the ship's crew) be permitted *under law* to behave rationally and save themselves while they have the opportunity? Or, should they, as the current law would require, wait until the danger is near in time, but the chance of survival is substantially decreased? The traditional understanding of imminence creates this dilemma. In the national security context, the mire thickens with the possibility of terrorists using WMDs, since the terrorist's first strike could be debilitating. This is much like a battered woman, long abused by the fist or rod, who knows her aggressor has just acquired a gun, and possesses the will and knowledge to use it. A change in tactics and technology by the aggressor necessitates a change in how imminence should be viewed. As one writer put it, "when a theory yields results that seem counter-intuitive, then the theory itself must be examined to determine if it is the theory or our intuition that is flawed."[95] Following the German standard for cyclical violence, perhaps a liberalization of the imminent threat requirement for use of force is appropriate. But, what might such a non-temporal standard look like? And, could it be applied to aggressor states, as well as transnational terrorist organizations?

III. AN ALTERNATIVE: A NON-TEMPORAL STANDARD OF IMMINENCE

Having established that imminence is merely a component of necessity, and proof of necessity is the true aim of the self-defense doctrine, an alternative non-temporal standard must effectively account for the primary components of necessity: certainty, severity, and the unavailability of other viable options.

As such, perhaps a new definition of "imminent danger" would be more appropriate: *Imminent danger is that which will occur with certainty, as determined by the on-going, intermittent, or cyclical nature of the danger and manifested through previous acts or statements of intent. Force may be used when the value of the damage likely to be prevented is greater than the value of the damage likely to be caused, and viable non-forceful options have been exhausted, to a "beyond a reasonable doubt" standard.*

This example is merely a starting point for a non-temporal standard. While it is certainly imperfect, it represents the main components that should be included in such a standard, namely: a high degree of certainty, the weighing of the impact of the preemptive strike on the recipient state against the impact of the strike it is intended to preclude, the exhaustion of non-forceful alternatives, and a standard to be applied.

94. *Id.*

95. *See* Murdoch, *supra* note 78, at 191.

Since it may be easier to establish the cyclical, on-going nature of attacks from terrorist organizations than those of states, such a standard may only be applicable to terrorist entities. If, however, state belligerence creates a similar identifiable pattern, which satisfies the certainty requirement, it could, potentially, be applicable to states as well. In both cases, the burden of proof would be on the nation using preemptive military force. Moreover, the requirement for weighing the damage caused by a preemptive attack against that which would occur absent preemptive action is especially appropriate for terrorists who are planning the use of WMDs. In the case of a WMD attack, the damage on the victim state would be substantial. Therefore, if the potential victim-state uses force preemptively, even firm military force will be more than outweighed by the damage avoided. As a result, the new standard of imminence would permit greater latitude on the part of the state acting preemptively. However, it does so only in one element of the new standard; namely, the balancing of costs element. Thus, the possession of WMDs by one's opposition does not necessarily legitimize preemptive force; it merely tips the scales of one of the elements used to determine necessity. In so doing, the standard correctly weights the existence of WMDs by one party, without giving the other party a blank check to use force. The new standard, therefore, brings an attribute of flexibility which is absent from the traditional temporal standard of imminence.

A. Potential Problems with a Non-Temporal Standard

The first potential problem with a non-temporal standard is abuse. States may use this standard as a pretext for aggression, or gradually encroach beyond the standard's intended limits. This is particularly true with regard to the several "hot spots" around the world: China and Taiwan, N. Korea, India and Pakistan, Israel and Palestine, etc.

The risk of abuse, however, should not be cause to resist change. After all, the risk of abuse is present with any standard. For example, Nazi defendants at Nuremberg alleged they were acting in "self-defense;" they claimed that Germany attacked the Soviet Union, Norway, and Denmark for defensive reasons.[96] This claim was obviously unsuccessful, demonstrating the importance of effective checks and balances to preclude specious justifications. However, because it is less ambiguous, the components of a new, non-temporal standard of imminence actually make it less susceptible to abuse than the traditional temporal standard. Clarity, regardless of whether that clarity raises or lowers the bar for the use of force, is better than ambiguity for purposes of enforcement. The more nebulous a standard, the more potential for abuse—and the traditional standard is exceedingly nebulous. A new, non-temporal standard, consisting of the components mentioned above would be more precise than the existing standard, thus less subject to exploitation.

The second potential risk is that terrorist groups may attempt to preclude the forthcoming preemption; they may believe that they must use their WMDs or lose

96. Michael J. Glennon, *Preemptive Terrorism: The Case for Anticipatory Self-Defense*, THE WKLY. STANDARD, Jan. 2002, at 2.

them. This argument rests on the assumption that a more definite standard for preemptive military force would actually give the terrorist notice as to when states may preemptively attack, thereby encouraging the terrorists to use weapons they might not have used otherwise.[97] However, one may assume that most terrorist groups do not yet have WMDs and/or delivery methods in sufficient configurations to use them (after all, they have demonstrated the will to cause catastrophic loss of life, but we have not yet seen substantial usage of WMDs). If this is the case, then providing a clear legal framework to govern the use of preemptive military force, and doing so urgently, is even more important. A non-temporal framework would provide a legal standard by which states could preemptively strike such terrorist groups now, before the most dangerous weapons become operable.

As Brent Scowcroft and Henry Kissinger cautioned, the use of preemptive force in an unstable world is highly complicated.[98] Thus, other, reasonable objections not mentioned here certainly merit consideration. Issues such as: Who determines the likelihood of a future terrorist attack, even one based on the cyclical or intermittent nature of past behavior? If the behavior is cyclical, how many cycles must occur before a cyclical "pattern" is established? Upon whose intelligence will such decisions be made, and how accurate will they be? Although more study is certainly needed, many of these are technical issues, pertinent only after the implementation of the new standard. After all, if one is in desperate need of lifesaving surgery, it would be foolish to die on the operating table because one questioned the physician's choice of a particular scalpel. From a legal standpoint, a non-temporal standard, which is discernable, measurable, and, most importantly, adhered to, is better than the traditional temporal standard of imminence.

B. Potential Benefits of a Non-Temporal Standard

A primary benefit to this new interpretation is that the information required to satisfy the elements of this standard would simultaneously also satisfy the customary international law criteria of necessity and proportionality. For example, changing the understanding of imminence into one that does not emphasize a temporal component, but rather requires adequate evidence before striking preemptively, implicitly satisfies the necessity requirement. Furthermore, the requirement to weigh the damage done against the damage being prevented, by its nature, requires consideration of the proportionately criterion.

Second, a non-temporal standard requiring the "weighing of damages" discussed above would strengthen the legal right of smaller states. If the level of potential damage is considered in relation to a states ability to withstand that damage, and smaller states can withstand less damage than can stronger states, then smaller states are likely to benefit most from a non-temporal standard. An effects-based standard, rather than a temporal one, gives a smaller state more latitude to act preemptively to protect itself from an incapacitating blow—a risk that would be less likely to justify aggression from a stronger state. In this sense, a non-temporal standard is more equitable. The current standard does not account

97. *See* Schmitt, *supra* note 9, at 513.

98. *Id.* at 514.

for this distinction.[99]

Most importantly, an understandable and rational standard will increase state adherence to the law. International law fails when it seeks to impose rules that are out-of-sync with the way states actually behave.[100] The laws governing the use of force are particularly susceptible to abuse. For example, in the years since the U.N. Charter's formation in 1945, two-thirds of the members of the United Nations, 126 states, "fought 291 interstate conflicts in which over 22 million people were killed."[101] Moreover, the twentieth century ended with 19 nations "flagrantly violating" the United Nations' Charter in NATO's Kosovo campaign.[102] With regard to the use of force, the International Community often imposes obligations reflective of positive law, but "out-of-sync" with normative behavior. Thus, the problem lies in failing to distinguish between *lex lata* and *lex ferata*; that is, the law as it actually is, and the law as we wish it to be.

A workable standard, one in touch with actual state behavior, would make control over the use of force more successful in the twenty-first century than it was in the twentieth. If the international legal community applies a workable standard, one to which states actually adhere, then state behavior becomes more predictable. Once behavior is predictable, then the process of gradually shifting the law from where it currently is to where we would like it to be can be realized. Without adherence, there is no law; and no reduction of the ugly consequences of war—the ultimate aim of the United Nations' Charter. International jurists want adherence to a standard of law. The first step is this direction is to change the current standard of imminence.

IV. CONCLUSION AND RECOMMENDATION

Since September 11th, and the resulting "War on Terror," the concept of imminence has received renewed attention from world leaders, international lawyers, governments, and scholars.

A change is needed to adjust to the emergence of terrorism. As previously demonstrated, many scholars recognize that the current standard is flawed. A temporal standard, rooted in the nineteenth century, is simply not sufficient to account for the twenty-first century warfare, technologies, and terrorist tactics. A standard forged when the aggressor held a musket is not applicable when an aggressor holds a "dirty bomb;" the consequences are far greater.

Historically, major acts of warfare have preceded changes in the international legal system: World War I ushered in the League of Nations and the Kellogg-Briand Pact; the United Nations flowed from WWII.[103] The attacks on September 11, 2001 are of sufficient magnitude to precipitate another, albeit more subtle, change. On September 11th, terrorists killed nationals of 83 countries, including

99. *See id.* at 534.

100. *See generally* id.

101. 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. POLY. 539, 540 (2002).

102. *Id.*

103. BARRY E. CARTER ET AL., INTERNATIONAL LAW 962 (2003).

many Muslims and more Americans than on any other day in U.S. history since the civil war.[104] The attack evinced a profound change in warfare. A commensurate change in the legal standard should follow.

This change has already begun. Custom has permitted the use of preemptive force in spite of a lack of appreciable codification. *Opinio juris sive necessitates*, the expectation that a particular form of conduct will be repeated because it occurred in the past under similar circumstances, forms the foundation for customary international law.[105] The formation of such a custom, even in the case of non-temporal imminence, was evinced by the broad international support of (and participation in) Operation Enduring Freedom—a campaign that was, as demonstrated, *preemptive* in nature.

States will behave rationally. They will continue to apply preemptive force if they see it as necessary for their own survival. The United States has made public its rejection of the outdated temporal standard. President Bush, in his 2002 State of the Union Address, resolutely stated, "I will not wait on events . . . I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."[106] The new policy was repeated unequivocally in the 2004 State of the Union: "America will never seek a permission slip to defend the security of our country."[107]

Secretary-General of the United Nations, Kofi A. Annan, recently appointed a sixteen-member High-Level Panel of eminent persons with the following charter: "examin[e] the major threats and challenges the world faces in the broad field of peace and security, including economic and social issues insofar as they relate to peace and security, and mak[e] recommendations for the elements of a collective response."[108] It is my hope that the High-Level Panel will reconsider the existing legal standard for the use of preemptive military force. International law is important, and the true strength of the United Nations' Charter lies in the instrument's "capacity for adaptation through the interpretive practice of its organs and members."[109] Professor Mary Ellen O'Connell asserts that states should argue for new rules instead of ignoring the existing ones.[110] She is certainly correct: the United States, and all nations threatened by terrorism, should argue for a change in

104. *Id.* at 63.

105. In class comment from Professor Ved P. Nanda, class discussion, International Law, University of Denver College of Law (Mar. 2004)

106. President George W. Bush, 2002 State of the Union Address (Jan. 29, 2002).

107. *Id.*

108. Press Release, Secretary-General of the United Nations, Secretary-General names High-Level Panel (Apr. 11, 2003), *at* http://www.un.org/News/Press/docs/2003/sga857.doc.htm.

109. THOMAS M. FRANCK, RECOURSE TO FORCE (2002), *excerpted in* BARRY E. CARTER ET AL., INTERNATIONAL LAW 981 (2003).

110. MARY ELLEN O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 15 (2002).

the rules—beginning with the current standard of imminence. A new, non-temporal standard of imminence would improve the law by allowing states to protect themselves against terrorist attacks, while also providing the accountability and transparency desired by the international community.