

# NEW IMMINENCE IN THE TIME OF OBAMA: THE IMPACT OF TARGETED KILLINGS ON THE LAW OF SELF-DEFENSE

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*President Barack Obama's authorization to use unmanned aerial vehicles, or drones, to lethally incapacitate persons he believes constitute a threat to the U.S. has become a hallmark of his Administration. Consider that President Obama oversaw fifty-three drone missile attacks during his first year in office, which is more than the total number of similar strikes carried out during the eight years of President George W. Bush's two terms. The Obama Administration justifies its use of force as self-defense in anticipation of an inevitable attack whose time and place is uncertain. While international law recognizes the legitimacy of a narrow definition of anticipatory self-defense, the Obama Administration's targeted killing practice redefines the traditional meaning of imminence by relaxing its temporal standards. The Obama Administration purports that modern day warfare, characterized by adversarial nonstate actors coupled with access to devastating weaponry, makes the traditional meaning of imminence inappropriate and anachronistic in dealing with these particular threats. Its contention reflects similar concerns raised by United States Administrations dating back to Ronald Reagan in the mid-eighties. Indeed, the United States has steadily shifted the meaning of imminence for nearly three decades in its response to terrorist threats, not least of which during the George W. Bush Administration, which explicitly*

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*declared a “War on Terror.” More broadly, the definitional shift of imminence implicates the regulation of the use of force by states. The concept of “new imminence” is highly susceptible to abuse because it can neither be externally regulated nor restrained. To mitigate the risks posed by new imminence, states must either affirm and/or establish an oversight mechanism of the use of force. Alternatively, states could preserve the traditional law of self-defense and insist that other states adopt a political, as opposed to a legal, framework to respond to terrorist threats.*

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## INTRODUCTION

Every Tuesday, President Barack Obama meets with 100 of his top national security advisers in the White House.<sup>1</sup> Together, they flip through slides, one at a time, showing images of men alleged to be members of those nonstate forces considered to be at war with the United States since 2001.<sup>2</sup> The President discusses the threat that each man poses to national security with his advisers. If President Obama concludes that a man is not an imminent threat (yet), he moves on to the next slide. If, alternatively, the President deems the subject an imminent threat, he approves the subject's targeted killing—thus authorizing Central Intelligence Agency and Department of Defense personnel to track the subject's movements and, when the most opportune moment presents itself, to fire a precision-strike missile from an unmanned aerial vehicle to take him out.<sup>3</sup> Significantly, the killing could happen up to two years after the person is identified as an imminent threat.<sup>4</sup>

According to a Department of Justice White Paper<sup>5</sup> leaked in early February 2013, the Obama Administration justifies its use of force as self-defense in anticipation of an inevitable attack whose time and place is uncertain.<sup>6</sup> It is

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1. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

2. *Id.*; see also Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 14 (2001) (codified at 50 U.S.C. § 1541 (2006)).

3. See Becker & Shane, *supra* note 1.

4. See *id.*; see also Martin Chulov & Paul Harris, *Anwar al-Awlaki, al-Qaida Cleric and Top US Target, Killed in Yemen*, THE GUARDIAN (Sept. 30, 2011), <http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-killed-yemen>.

5. U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 3 (2011) [hereinafter WHITE PAPER] ("Any operation of the sort discussed here would be conducted in a foreign country against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States. A use of force under such circumstances would be justified as an act of national self-defense. In addition, such a person would be within the core of individuals against whom Congress has authorized the use of necessary and appropriate force.").

6. The Administration does not adopt a black letter rule to answer the question regarding its use of force. Instead, as demonstrated by the speeches given by Administration officials, the Administration mixes its reference to assassinations with assertions that its use of force is legitimate during warfare. Were this strictly an armed conflict governed by the laws of war, imminence would be an irrelevant category. Compare, e.g., Eric Holder, Attorney Gen. of the U.S., Statement at Northwestern University School of Law (March 5, 2012) ("Assassinations are unlawful killings . . . the U.S. government's use of lethal force in self-defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful — and therefore would not violate the Executive Order banning assassination or criminal statutes."), with, e.g., John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Address at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012) ("As a matter of international law, the United States is in an armed conflict with al-Qa'ida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense.").

worth mentioning that the appropriate legal regime under which to evaluate the Obama Administration's targeted killing policy is not as obvious as this text would suggest. To the contrary, the Administration invokes both ongoing hostilities, regulated by *jus in bello*, as well as the law of self-defense, regulated by *jus ad bellum*, to justify its practice. However, imminence is one element of the law of self-defense and has no bearing upon the lawfulness of a target where there is an existing armed conflict.<sup>7</sup> Instead, in ongoing hostilities, the legality of a target is a status-based assessment that distinguishes combatants from civilians. Unless he surrenders, is injured, or is otherwise *hors de combat*, a combatant can be killed regardless of activity.<sup>8</sup> In contrast, a civilian retains his immunity unless he directly participates in hostilities, which is subject to a wholly distinct legal

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Consider Legal Adviser Harold Koh's 2010 address to the American Society of International Law, where he explained that the Administration's targeting practices are legal and rife with historical precedent as demonstrated by the killing of Admiral Isokoru Yamamoto, a commander of the Japanese forces in the attack on Pearl Harbor who was targeted in mid-flight during World War II. Harold Hongju Koh, Legal Advisor, Dep't of State, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010). Unlike al Qaeda and its associated forces, however, Yamamoto was easily identified and distinguished as a member of a uniformed military force at war with the United States. This distinction cannot be underestimated. Its critical nature has mired the United States in battles with its own judiciary, which delineates the Executive's detention authority. See *Boumediene v. Bush*, 553 U.S. 723, 747 (2008). Guantanamo Bay detainees now have access to federal courts to challenge the government's authority to detain them; Yamamoto, had our Nation's forces captured him, would have been considered a prisoner of war.

"[W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat." Koh, *supra*. Did the United States conduct an individual assessment of Yamamoto's threat to U.S. interests before it targeted him? According to news reports, the United States targeted Yamamoto because of his significance to overall military advantage, not because of any particular threat he posed. See Joe Holley, *Besby Frank Holmes; WWII Fighter Pilot*, WASH. POST, July 27, 2006, at B07 (Yamamoto was considered a mastermind of the Pearl Harbor attack and "the most brilliant tactician Japan had ever known"). The planned ambush of Yamamoto on the battlefield is well within the bounds of legality and legitimacy of the laws of armed conflict, which sanction the killing of persons based on their status, as opposed to their conduct.

7. See Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 829, 898 (2010) ("[T]he international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law and the *jus ad bellum*."); accord Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 77, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

8. See e.g., INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 40 (2006).

analysis.<sup>9</sup> Accordingly, during an armed conflict, the targeted killing analysis should scrutinize the conflict's geographic scope and the composition of the belligerent enemy, namely: Who constitutes al Qaeda and its associated forces? If confusion exists as to whether a civilian is indeed a combatant, it is necessary to assess whether he is a direct participant in hostilities, not whether he poses an imminent threat.<sup>10</sup> The White Paper suggests that if a civilian poses an imminent threat, he is consequently a direct participant in hostilities.<sup>11</sup> This approach confuses the applicable law. The problem with the White Paper, generally, is that it fails to provide an adequate legal analysis for targeted killings under either the theory of ongoing hostilities or the law of self-defense, something the Administration admittedly says it did not set out to do.<sup>12</sup> Although the Administration's failure to provide a more robust framework may merit scrutiny in itself, this Article will only deal with the Administration's claims that targeted killings are lawful acts of self-defense. In particular, it will examine the Administration's claims regarding imminence.

Significant controversy surrounds the legitimacy of anticipatory self-defense in international law.<sup>13</sup> The consensus view, which rejects an expansive view of such legitimacy, recognizes narrow exceptions to its prohibition in cases where political alternatives are obsolete.<sup>14</sup> The Obama Administration's targeted

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9. NILS MELZER, INT'L COMM. FOR THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 5 (2009).

10. *Id.* at 70–71, 80.

11. WHITE PAPER *supra* note 5 at 8 (“[W]here the al-Qa’ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member’s involvement in al-Qa’ida’s continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.”).

12. *Id.* at 1, 16 (“[T]his paper does not attempt to determine the minimum requirements necessary to render such an operation lawful, nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances.”).

13. *See infra* Part I and accompanying text.

14. MICHAEL WALZER, JUST AND UNJUST WARS 74 (1977) (arguing that anticipatory self-defense is permissible but must be severely limited); *see also* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 173–75 (James Brown Scott ed., Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646) (“The danger . . . must be immediate and imminent in point of time . . . But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived . . . [I]f a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambush, or that he is putting poison in our way . . . I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided.”); LOUIS HENKIN, HOW NATIONS BEHAVE 143–44 (2d ed. 1979) (arguing that anticipatory self-defense is only permissible where political alternatives are obsolete); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 554 (2002). Furthermore, some scholars believe Article 51 makes anticipatory self-defense illegal in all cases. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 278–79 (1963).

killing practice far exceeds this narrow exception and redefines the traditional meaning of imminence by relaxing its temporal standards, thereby permitting the use of preventive force. According to the law of self-defense in both customary law and U.N. Charter law, imminence refers to the lack of time for deliberation or the absence of other pacific means to avert a threat.<sup>15</sup> In contrast, the Obama Administration purports that modern-day warfare, characterized by adversarial nonstate actors coupled with access to devastating weaponry, makes the traditional meaning of imminence inappropriate and anachronistic in dealing with these particular threats.<sup>16</sup> Whereas states could historically anticipate attacks, today, nonstate actors like “al-Qaeda do[] not follow a traditional command structure, wear uniforms, carry . . . arms openly, or mass . . . troops at the borders of the nations it attacks.”<sup>17</sup> Accordingly, the Administration urges acceptance of a “more flexible understanding of imminence” that takes into account the “modern-day capabilities, techniques, and technological innovations of terrorist organizations.”<sup>18</sup>

Notwithstanding the reference to modern-day warfare and the advancement of weapons technologies, the concerns raised by the Obama Administration about nontraditional threats are similar to those raised by previous Administrations, dating back to President Ronald Reagan in the mid-1980s.<sup>19</sup> Indeed, the United States has steadily shifted the meaning of imminence for nearly three decades in its response to terrorist threats, not least of which was during the George W. Bush Administration, which explicitly declared a “War on Terror.”<sup>20</sup> More broadly, the definitional shift of imminence implicates the regulation of the use of force by states.

Before the U.N. Charter, states retained the right to decide for themselves when to use force in self-defense.<sup>21</sup> Adherence to this subjective standard failed to limit the devastation wrought by armed force and compelled a nascent international community to regulate its use more definitively.<sup>22</sup> These states intended the law of self-defense to remedy the excessive latitude afforded to states

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15. OSCAR SCHACHTER, DEVELOPMENTS IN INTERNATIONAL LAW: INTERNATIONAL LAW IN THEORY AND PRACTICE 151 (1991) (U.S. Secretary of State Daniel Webster responds to British claims that its attack on the *Caroline* constituted self-defense and there he writes that imminence must leave no time for deliberation and no opportunity to search for alternative pacific means).

16. WHITE PAPER *supra* note 5, at 7.

17. John Brenman, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011).

18. *Id.*

19. *See infra* Parts II.A.–B.

20. 2001: *U.S. Declares War on Terror*, BBC NEWS (Sept. 12, 2001), [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/12/newsid\\_2515000/2515239.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/12/newsid_2515000/2515239.stm).

21. JAMES L. BRIERLY, THE LAW OF NATIONS 397 (Humphrey Waldock ed., 6th ed. 1963) (“Before the League [of Nations], international law was . . . entirely free both to decide and act for itself, and although the classical system knew of certain principles regulating the recourse to forcible measures short of war, their application was necessarily uncertain when each state claimed the right to be the judge of the merits of its own case.”).

22. *Id.*; *see also* SCHACHTER, *supra* note 15, at 106–34.

in their resort to arms.<sup>23</sup> The concept of new imminence<sup>24</sup> resurrects this problem because it relies upon, and is deferential to, individual state determinations of the appropriate application of self-defense. New imminence is wholly reliant on state discretion because the intelligence upon which a particular state depends is not readily available for all states to evaluate. Instead, such national security intelligence is shrouded in secrecy, thus making the use of force based upon new imminence nonjusticiable.<sup>25</sup> While this may arguably be a sincere, good-faith effort to ward off harm, it cannot be externally regulated or restrained, thus making it highly susceptible to abuse. To mitigate the risks that new imminence poses, states should either establish or affirm an oversight mechanism of the use of force. Alternatively, states should adopt a political, as opposed to a legal, framework to respond to terrorist threats.

To demonstrate that the United States, and most recently, the Obama Administration in its targeted killing practice, has advanced the concept of new imminence, and therefore the use of preventive force against nonstate actors, I begin by discussing the international law of self-defense. In particular, I examine anticipatory self-defense and the concept of imminence in customary law as well as under the U.N. Charter. I distinguish preemptive self-defense from the preventive war doctrine to show that the use of force before an armed attack is permissible where the exhaustion of nonforceful remedies has been satisfied and is objectively verifiable by other states. I trace U.S. policy beginning with the Reagan Administration to show that nonstate actors with access to weapons of mass destruction is not as novel a challenge to U.S. national security as the Obama Administration suggests. In doing so, I show that there has been a steady movement away from the traditional meaning of imminence toward new imminence, which has facilitated the use of preventive force. I then discuss how this shift is susceptible to abuse in ways that risk the ability to regulate state force as well as the international order. I conclude by suggesting two options for mitigating the identified risks: The international community can empower the U.N. Security Council, or a novel subsidiary of it, to review state use of force, or it can preserve the traditional law of self-defense and insist that states characterize their pursuit of nonstate actors under the regime of state necessity.

## I. THE REGULATION OF THE USE OF FORCE: DEFINING IMMINENCE

*Jus ad bellum*, or the justice of fighting a war, is the legal framework that regulates self-defense.<sup>26</sup> This is to be distinguished from *jus in bello*, or the

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23. See SCHACHTER, *supra* note 16, at 135.

24. In contrast to the traditional definition of imminence, new imminence is stripped of its temporal quality. The standard is supplanted by a balancing test that considers intent, capacity, and propensity. See *Infra* Part III.

25. See *infra* notes 214–15.

26. *IHL and Other Legal Regimes—jus ad bellum and jus in bello*, ICRC (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>; see also Justin Desautels-Stein, *The Judge and the Drone*, 56 ARIZ. L. REV. 117, 167 (2014) (“Two questions in the *jus ad bellum* concern the proper way to define the language in Article 51 about ‘armed attack’ and

regulation of the way that a war should be fought, which I will not discuss here.<sup>27</sup> Two bodies of law regulate self-defense: customary international law and the U.N. Charter. Customary international law is comprised of state practice and *opinio juris*, or what states deem to be legally binding.<sup>28</sup> The customary law of self-defense well preceded the U.N. Charter framework, captured in Article 51, and legislated by states in 1945.<sup>29</sup> Imminence features in both the customary and Charter frameworks. Imminence indicates that an attack has not yet taken place but is already in motion or is otherwise inevitable. It is this temporal requirement that distinguishes the permissible use of force to avert harm (i.e., preemptive self-defense) from the impermissible use of force after an attack (i.e., reprisal) or before a threat becomes imminent (i.e., preventive attack).<sup>30</sup> Notably, I distinguish preemptive from preventive force in this article. Both fall within the framework of anticipatory self-defense, and scholars and politicians have used them interchangeably in other places.<sup>31</sup> I distinguish them in an attempt to demonstrate that state force can be used before an armed attack is complete but with significant restrictions. Below, I examine the definition of self-defense in the modern Charter system and customary international law. I then define imminence by distinguishing the preventive war doctrine from preemptive self-defense. The distinction turns on the exhaustion of all nonforceful remedies, making the use of force a measure of last resort.

#### *A. Self-Defense in International Law*

The customary definition of self-defense is comprised of three elements—necessity, proportionality, and imminence—and permits the use of force in anticipation of an attack. The Charter definition is narrow and, on its face, requires that an armed attack trigger self-defense. Scholars who argue that the Charter definition complements rather than supplants the customary one proffer that the “inherent right to self-defense,” mentioned in Article 51, includes the right to use preventive force.<sup>32</sup> This is the minority view among scholars. However, even the majority view considers a narrow exception to the use of force before an armed attack is permissible. The controversy is not whether customary and Charter law coexist; that is simplistic and obscures the more significant controversy. Rather, the question is: What did customary law permit and, therefore, what is included within the “inherent right to self-defense”? I argue that this right has been

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whether attacks on states by nonstate actors may trigger Article 51 at all.”).

27. See *supra* notes 4 and 6 and accompanying text.

28. Vienna Convention on the Law of Treaties, art. 38, May 23, 1969, 115 U.N.T.S. 333; see also Statute of the I.C.J. art. 38.1(b)–(c), June 26, 1945, 59 Stat. 1055.

29. U.N. Charter art. 51.

30. GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY* 90 (2008).

31. See Abraham D. Sofaer, *On the Necessity of Pre-Emption*, 14 *EUR. J. INT’L L.* 209, 216 n.26 (2003); John Yoo, *Using Force*, 71 *U. CHI. L. REV.* 729, 729, 735 (2004).

32. U.N. Charter art. 51.



cabined by necessity. Accordingly, imminence indicates that force is a measure of last resort, which is objectively verifiable by other states.

*1. Customary International Law*

The customary definition of self-defense is based on a nineteenth-century incident wherein British forces boarded a U.S. vessel, the *Caroline*, in U.S. territorial waters, killed several persons, set the ship on fire, and launched it over the Niagara Falls.<sup>33</sup> The British claimed that they did so in self-defense because the ship was used to transport weapons and persons to Canada in an insurrection against British forces.<sup>34</sup> In response, then-U.S. Secretary of State Daniel Webster wrote a letter to Lord Alexander Ashburton decrying the attack on the *Caroline* as illegitimate because self-defense should be confined to cases in which:

the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation . . . . [E]ven supposing the necessity of the moment authorized [British forces] to enter the territories of the United States at all, [they] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.<sup>35</sup>

This maxim, also known as the *Caroline* Doctrine, has come to be treated as the *locus classicus* of the law of self-defense.<sup>36</sup> It establishes that all defensive uses of force must meet three criteria—necessity, imminence, and proportionality—and maintains the legitimacy of anticipatory self-defense.<sup>37</sup>

Doctrinally, imminence is a temporal requirement that justifies the use of lethal force when there is no moment for deliberation, necessity requires that no lesser means of force could have averted the harm, and proportionality requires that, in all cases, the force used not exceed what is necessary to avert the threat.<sup>38</sup> The construction of the maxim suggests that an imminent threat that leaves no moment for deliberation meets the necessity criteria.<sup>39</sup> Therefore, although the *Caroline* Doctrine seems to sanction the use of force in anticipation of an attack,

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33. See SCHACHTER, *supra* note 15, at 151.

34. See *id.*; Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 529 (2003) (the *Caroline* litigation memorialized a nineteenth-century incident that involved the Mackenzie Rebellion in Canada against the British Crown).

35. LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 890–91 (1980) (quoting Secretary of State Daniel Webster).

36. *Id.* at 151.; *But see* Paust, *supra* note 14, at 535 n.6 (*Caroline* merely defined the appropriate means in response to an attack not the imminence of such attack).

37. SCHACHTER, *supra* note 15, at 150–55.

38. See *id.*

39. See OPPENHEIM'S INTERNATIONAL LAW 422 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

its invocation is cabined by the principle of necessity.<sup>40</sup> The customary definition of self-defense is broader than the U.N. Charter definition.

## 2. *The Modern Charter System*

A little more than 100 years after the *Caroline* incident, states codified the law of self-defense in the U.N. Charter.<sup>41</sup> Article 2(4), establishes that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>42</sup> The two exceptions to this prohibition are self-defense under Article 51 and military measures authorized by the U.N. Security Council.<sup>43</sup> Article 51 provides:

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.<sup>44</sup>

The Charter definition requires an armed attack to trigger the law of self-defense and therefore prohibits the use of force in anticipation of an attack (i.e., anticipatory self-defense). Some scholars have pointed out that the Charter sanctions the use of force in response to an armed attack that has not yet occurred but is, nevertheless, in irreversible motion.<sup>45</sup> Under this interpretation, the Charter framework sanctions the preemptive use of force where it serves an interceptive, rather than a preventive, function.<sup>46</sup> It assumes that an attack is already in motion,

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40. Norbert A. Schlei, *Anticipatory Self-Defense: A 1962 OLC Opinion on Lawful Alternatives for the U.S. in the Cuban Missile Crisis*, 6 GREEN BAG 2d 195, 197 (2003). (“[I]t is clear that preventive action in self-defense is warranted only where the need for it is ‘instant, overwhelming, leaving no choice of means and no moment for deliberation.’ [sic] It is thus clear that preventive action would not ordinarily be lawful . . . in the absence of evidence that their actual use for an aggressive attack was imminent.”).

41. U.N. Charter art. 51.

42. *Id.* at art. 2, para. 4.

43. *Id.* at art. 39–42.

44. *Id.* at art. 51.

45. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 172 (3d ed. 2001) (“It would be absurd to require that the defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove an immaculate conception of self-defence.”); Yoo, *supra* note 31, at 738 (“Article 51, after all, declares that the inherent right of self-defense is triggered only ‘if an armed attack occurs,’ suggesting that the attack must either be in motion or have already taken place before force can be used.”) (quoting U.N. Charter art. 51).

46. DINSTEIN, *supra* note 45 at 172; *see also* U.N. SEC’Y GEN. HIGH-LEVEL PANEL ON THREATS, CHALLENGES & CHANGE, *A MORE SECURE WORLD: OUR SHARED*

and although it has not occurred, it is certain and proximate, therefore constituting an armed attack. The majority view among scholars similarly recognizes a narrow exception for the preemptive use of force under the U.N. Charter but does not consider that an attack must be in irreversible motion. Instead, the majority view is that a state can take measures to defend itself without waiting to be attacked so long as the possibility of attack is certain and all nonforceful remedies have been exhausted.<sup>47</sup>

One argument proffers that the Charter did not supplant, but rather complemented, preexisting customary law. Commentators who support this view argue that even if the Charter did prohibit it, preventive force for defensive purposes remains legal under customary law.<sup>48</sup> They argue that Article 51's wording,<sup>49</sup> together with the Charter's *travaux préparatoires*, support this

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RESPONSIBILITY, ¶¶ 189–91, U.N. Sales No. E.05.I.5 (2004) [hereinafter A MORE SECURE WORLD] (“Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just pre-emptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)?”).

47. GROTIIUS, *supra* note 14, at 173; *see also* LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 44–46 (2d ed. 1991); HENKIN, *supra* note 14, at 143–44 (“If there were clear evidence of an attack so imminent that there was no time for political action to prevent it, the only meaningful defense for the potential victim might indeed be the pre-emptive attack and—it may be argued—the scheme of Article 2(4) together with Article 51 was not intended to bar such attack. But this argument would claim a small and special exception for the special case of the surprise nuclear attack; today, and one hopes for a time longer, it is meaningful and relevant principally only as between the Soviet Union and the United States.”); 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 276 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., William S. Hein & Co. 1995) (1688) (one can kill an aggressor before an attack but only “when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the space [within which self-defense is permitted] being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him.”).

48. Sofaer, *supra* note 31, at 212–14; *see also* Yoo, *supra* note 31, at 739 (“Article 51 . . . must be read as recognizing, but not regulating, the right of self-defense and that its meaning is to be derived from international customary law.”); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to the Counsel to the President, Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 31–32 (Oct. 23, 2002) (on file with author) (“Some even argue that an armed attack must occur across national borders before the Article 51 right is triggered. . . . Such an interpretation, however, would mean that the U.N. Charter extinguished the pre-existing right under customary international law to take reasonable anticipatory action in self-defense. There is no indication that the drafters of the U.N. Charter intended to limit the customary law in this way.”).

49. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 39, at 418 (“Article 51 of the Charter, moreover, expressly preserves the right of individual or collective self-defence against armed attack—a right which the Charter recognises as ‘inherent’ and which is based on customary international law continuing to exist alongside the law established by the Charter.”).

proposition.<sup>50</sup> The issue, however, is not whether the customary law definition is still valid, but rather what the customary law definition permits. Proponents of an excessively expansive view of anticipatory self-defense have not made a case for such a reading. Rather, they have simply insisted that the U.N. Charter definition not narrowly define the scope of self-defense.<sup>51</sup> That does not settle when the use of force is indeed permissible under the customary definition. For example, if imminence is cabined by necessity then all nonforceful remedies must be exhausted,<sup>52</sup> which limits when force could be used even if it is deemed permissible before an armed attack. This is different from preventive self-defense, which permits the use of force before pacific remedies have been exhausted and regardless of the objective certainty of an attack. I discuss preventive force at greater length below.

Without resolving this particular controversy here, and for the sake of argument, I will assume that customary international law accepts the use of force in anticipation of an attack where nonforceful remedies are obsolete. The modern U.N. Charter sanctions the use of defensive force in anticipation of an attack already in motion or otherwise certain and proximate that cannot be incapacitated by nonforceful means.<sup>53</sup> Despite this narrow acceptance of defensive forceful measures, international law has not defined imminence with absolute specificity.

### ***B. Imminence: A Measure of Last Resort***

The *Caroline* Doctrine defines imminence as “leaving no moment for deliberation” and “no choice of means.”<sup>54</sup> That definition, however, is not based on

50. BRIERLY, *supra* note 21, at 417–18, (“Committee I at San Francisco, which dealt with Article 2(4), said outright that ‘the use of arms in legitimate self-defence remains admitted and unimpaired.’ Then the records show that Article 51 was introduced into the Charter in Committee III/4 primarily for the purpose of harmonizing regional organizations for defence with the powers and responsibilities given to the Security Council for maintaining peace; and they do not indicate any conscious intention upon the Committee III/4, in including the words ‘if an armed attack occurs,’ to put outside the law forcible self-defence against unlawful acts of force not amounting to an armed attack.”).

51. See e.g., DINSTEIN, *supra* note 45, at 168 (arguing that majority position supports the view that the use of force is only legitimate as a counter force); see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 112, (Malcolm Evans & Phoebe Okowa eds., 2000) (noting that while “states which argued that self-defence was permissible only against an armed attack made this argument expressly, whereas those states who took a wider view of self-defence adopted a low profile and simply resisted the inclusion of any detailed provisions.”). Gray continues that those states that had historically supported the notion of anticipatory self-defense did not send in comments to the ILC as it worked on self-defense. Instead, they said “only that the ILC should not try to define the scope of self-defence . . .” *Id.*

52. Schlei, *supra* note 40.

53. See FLETCHER & OHLIN, *supra* note 30, at 86–87. (describing imminence as one of the six elements of self-defense, three bearing on the nature of the attack, including imminence, and three on the use of permissible force, namely, necessity, proportionality, and intention in response to an attack).

54. SCHACHTER, *supra* note 15, at 151.

customary international law, as there existed insufficient state practice to define exactly when a threat became imminent.<sup>55</sup> To the contrary, while Secretary Webster's articulation represented the desire among states to limit the use of force, it did not represent state practice and *opinio juris*.

*1. Preventive War Doctrine Versus Preemptive Self-Defense*

Classic legal scholars have defined a narrow exception for preemptive self-defense by distinguishing it from preventive attacks. The distinction between the two concepts turns on whether the imminence of the threat makes other pacific means of self-defense unavailable. The preventive war doctrine goes beyond the more expansive customary definition of self-defense, which stipulates that a threat must be overwhelming and instant and leave no room for a response or alternative means. Instead, a preventive attack seeks to avert a risk before it becomes imminent and neutralized, only then at a much higher cost.<sup>56</sup>

Hugo Grotius<sup>57</sup> considered the use of force to prevent a growing power—which may one day become an imminent threat—from developing its power an “intolerable doctrine” because it contravened the notion of equity between states.<sup>58</sup> Grotius insisted that a threat must be “immediate and certain” and not “merely assumed” to trigger the legitimate use of force in self-defense.<sup>59</sup> In the case where a state can become a source of danger if allowed to become powerful, Grotius believed the would-be victim state could only resort to “counter-fortification” activities on its own land “and other similar remedies [but] not to force of arms.”<sup>60</sup> Professor Oscar Schachter adds that the *Caroline* Doctrine should be read “as a rule of restraint, not a license to wage preventive war.”<sup>61</sup> This distinction is illustrated by two examples of Israel's use of force against Egypt and Iraq.

International lawyers cite the Six-Day War of 1967 as a preemptive war based on anticipatory self-defense.<sup>62</sup> These commentators point to Egypt's naval blockade, mobilization of forces, and expulsion of a U.N. security force from its border with Israel as evidence of an imminent danger.<sup>63</sup> The international community therefore regarded Israel's attack on Egypt as legitimate self-defense in anticipation of an attack.<sup>64</sup> Though cited as the quintessential example of

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55. *Id.*; see also Thomas R. Anderson, *Legitimizing the New Imminence: Bridging the Gap Between the Just War and the Bush Doctrine*, 8 GEO. J.L. & PUB. POL'Y 261, 275 (2010) (“[N]either custom nor *opinio juris* existed before the U.N. Charter's establishment in sufficient volume to define exactly what that customary international law is regarding prophylactic self-defense.”).

56. ONDER BAKIRCIÖGLU, *SELF-DEFENCE IN INTERNATIONAL AND CRIMINAL LAW: THE DOCTRINE OF IMMINENCE* 165 (2011).

57. GROTIUS, *supra* note 14, at 173–75.

58. *See id.* at 224–25.

59. Anderson, *supra* note 55, at 270 (quoting GROTIUS, *supra* note 14, at 173).

60. *Id.* at 270–71 (quoting GROTIUS, *supra* note 14, at 549).

61. SCHACHTER, *supra* note 15, at 152.

62. *See* Anderson, *supra* note 55, at 264.

63. *Id.*

64. *See id.*

anticipatory self-defense, several scholars argue that it is more accurate to describe Egyptian mobilization as an armed attack in motion.<sup>65</sup> Israel's use of force therefore falls squarely within the bounds of Article 51.<sup>66</sup> In both interpretations, the attack is certain and proximate, rather than merely speculative.

In contrast, the international community responded to Israel's bombing of an Iraqi nuclear reactor in 1981 with stern rebuke.<sup>67</sup> Israel struck and destroyed the Osirak nuclear reactor in Iraq when it was close to operational but before it was complete.<sup>68</sup> Israel justified its attack as a measure of self-defense because of Iraq's demonstrated hostility in previous wars coupled with its denial of Israel's right to exist.<sup>69</sup> Israel argued that if Iraq developed its nuclear plant, it would strike Israel, thereby justifying Israel's destruction of the plant. In response to its self-defense argument, the Security Council unanimously "condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."<sup>70</sup> During the debates on this topic, several delegates referred to the *Caroline* Doctrine as the appropriate formulation of anticipatory self-defense—namely, that a threat leaves "no moment for deliberation," and "no choice of means."<sup>71</sup> The Reagan Administration endorsed the resolution because Israel failed to consider other options and explained that its vote was "based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute."<sup>72</sup> Unlike its attack on Egypt, Israel's attack on Iraq was based on a speculative assumption and the failure to exhaust nonforceful remedies. Together, the two examples suggest that a threat of an imminent attack precludes other pacificist means to thwart an attack, thereby making the use of force a measure of last resort.

In its adjudication of self-defense in *Nicaragua v. United States*, the International Court of Justice (ICJ) came to a similar conclusion. While it did not comment on the trigger to an armed attack because the parties did not raise the issue,<sup>73</sup> the Court held that U.S. actions against Nicaragua were unnecessary

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65. *But see* DINSTEIN, *supra* note 45, at 173; GRAY, *supra* note 51, at 112–13 (arguing that despite its characterization as the quintessential example of anticipatory self-defense, Israel launched the Six-Day-War in response to an armed attack); *see also* Jeremy Hammond, *Israel's Attack on Egypt in June '67 Was Not 'Preemptive,'* FOREIGN POL'Y J. (July 4, 2010), <http://www.foreignpolicyjournal.com/2010/07/04/israels-attack-on-egypt-in-june-67-was-not-preemptive/>.

66. DINSTEIN, *supra* note 45, at 173.

67. *See* U.N. SCOR, 36th Sess., 2288th mtg. at 102, U.N. Doc. S/PV.2288 (June 19, 1981).

68. Yoo, *supra* note 31, at 765.

69. Schmitt, *supra* note 34, at 546.

70. U.N. SCOR, 36th Sess., 2288th mtg. at n.163, U.N. Doc. S/PV.2288 (June 19, 1981).

71. *See* SCHACHTER, *supra* note 15, at 152.

72. Yoo, *supra* note 31, at 765 (quoting a statement by the Representative at the United Nations (Kirkpatrick) before the U.N. Security Council (June 19, 1981), in American Foreign Policy Current Documents 1981, 689, 690 (Dep't of State 1984)).

73. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, 194 (June 27) ("In view of the circumstances in which the dispute has

because it had other peaceful means at its disposal to eliminate the danger posed to the Salvadorian government.<sup>74</sup> Therefore, it suggested that to be necessary, the force used must be of last resort.<sup>75</sup> The majority view among legal scholars supports this reading and hold that use of force is justified only where the threat is imminent and no other nonforceful means are available.<sup>76</sup>

In *Gabcikovo–Nagymaros Project*, the ICJ explained that the “realization of . . . peril, however far off it may be, is not thereby any less certain or inevitable.”<sup>77</sup> Law professor John Yoo, a former Department of Justice Office of Legal Counsel attorney, argues that this finding supports the use of preventive force against terrorist threats whose attacks are inevitable but whose time and place are uncertain.<sup>78</sup> His analysis suffers from poor analogy. In its decision, the ICJ referred to inevitable environmental devastation that could not be remedied. Yoo attempts to justify the use of force against nonstate actors based on the assumption that an attack by them is similarly inevitable. However, this assumes too much, as the availability of nonforceful means, or the lack thereof, to incapacitate a terrorist threat is not so decisively clear. This raises another definitional challenge: What standard controls the determination of the use of force as a measure of final resort?

## 2. Self-Defense Must Be Justiciable in Law

Sir Hersch Lauterpacht, among the classic scholars of international law, has proffered that a claim of self-defense cannot be accepted in law unless it is subject to objective scrutiny.<sup>79</sup> Otherwise, a self-defense claim is contradictory for basing its legitimacy on legal principles but simultaneously dissociating it from regulation by law.<sup>80</sup> In his treatise, *The Law of Nations*, J.L. Brierly argues that subordinating the legal duties to what states believe is necessary for their national security would destroy the rule of law, “for it makes all obligations to obey the law

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arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue.”).

74. See JAMES A. GREEN, *THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW* 79–80 (2009).

75. *Id.* at 80; see also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 290, 310 (June 27) (Schwebel, J., dissenting).

76. See *id.*; see also GROTIUS, *supra* note 14; see also HENKIN, *supra* note 14, at, 143–44 (anticipatory self-defense is only permissible in cases where political alternatives are obsolete).

77. *Case Concerning the Gabcikovo–Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7, 42 (Sept. 25).

78. Yoo, *supra* note 31, at 752–53.

79. SCHACHTER, *supra* note 15, at 136 (“Such a claim is self-contradictory inasmuch as it purports to be based on legal right and at the same time it dissociates itself from regulation and evaluation of the law.”) (internal quotation and citation omitted).

80. *Id.* at 137 (Oscar Schachter highlights that “states could not have it both ways: if they did not accept the principle of justiciability, the legal dimension of self-defense would disappear and with it the regulation of force by law.”).

merely conditional; and there is hardly an act of lawlessness which it might not be claimed to excuse.”<sup>81</sup> The need to keep self-defense within strict confines of law is necessary to prevent the illegal use of force by states.

Consider that the war criminals and states from the Second World War pleaded self-defense at the Nuremberg and Tokyo Tribunals. The Nuremberg Tribunal retorted by asserting that Germany, in this particular instance, exceeded the parameters laid out by the *Caroline* Doctrine and rejected its plea.<sup>82</sup> Moreover, the risk posed to the international order by permitting states to decide for themselves what constitutes self-defense is extreme and among the primary motivations for the regulation of self-defense.<sup>83</sup> Therefore, even the resort to anticipatory self-defense based upon the imminence of an attack, and not the more obvious actual armed attack, must be subject to public scrutiny.

Absent evidence available for public or in camera review, neither the U.N. Security Council nor the community of nations can assess the legitimacy of state force. Providing such an assessment is necessary to “limit the number of mistakes that might happen and limit the need to even resort to mistaken beliefs as an excuse.”<sup>84</sup> The U.N. Charter mandates external assessment of state use of force and requires that measures taken in self-defense be reported to the Security Council.<sup>85</sup> If a veto is used to prevent the Council from intervening, the powers of judgment and control can be transferred to the Assembly under the Uniting for Peace Resolution.<sup>86</sup> According to *Oppenheim’s International Law*, refusal to submit to an impartial determination of self-defense “may be *prima facie* evidence of a violation of international law under the guise of action in self-defense.”<sup>87</sup> This underscores the significance of available evidence that can be subject to scrutiny.

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81. BRIERLY, *supra* note 21, at 404.

82. *Id.* at 407–08 (“It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.”).

83. *Id.* at 397 (“Before the League [of Nations], international law was . . . entirely free both to decide and act for itself, and although the classical system knew of certain principles regulating the recourse to forcible measures short of war, their application was necessarily uncertain when each state claimed the right to be the judge of the merits of its own case.”).

84. FLETCHER & OHLIN, *supra* note 30, at 174.

85. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 39, at 423.

86. BRIERLY, *supra* note 21, at 416. Most significantly, the Uniting for Peace Resolution gives the General Assembly authority to make recommendations with implications for global peace and security when the U.N. Security Council is unable to act. The General Assembly does not have enforcement authority, making the efficacy of this resolution questionable. Uniting for Peace, G.A. Res. 377 A (V), U.N. Doc. A/RES/377 (V) (Nov. 3, 1950).

87. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 39, at 422–23.



In 2004 the United Nations considered how member states should respond to threats that are not objectively imminent, but considered real by them.<sup>88</sup> In those instances, the High-Level Panel on Threats, Challenges, and Change concluded that the first measure of recourse is referral to the U.N. Security Council.<sup>89</sup> If the Security Council fails to avert the threat by nonforceful remedies, “there will be, by definition, time to pursue other strategies,” including military options.<sup>90</sup> This finding reiterates the prohibition of preventive force by affirming that a state must demonstrate that neither the Security Council nor alternative action will be successful in deterring the threat.<sup>91</sup>

These rigorous standards regulating states’ use of force have arguably been complicated by technological developments and modern warfare characterized by the participation of nonstate actors. Whereas, historically, an attack could be incontrovertibly imminent when troops amassed at the border, the participation of nonstate actors coupled with technological advancements in warfare increase the likelihood of surreptitious attacks. In response to these changing circumstances, the United States has steadily shifted the traditional regulation of the use of force as well as the traditional meaning of imminence. The following section will discuss this historical development and demonstrate how the Obama Administration’s policy of targeted killings perpetuates the redefinition of imminence most starkly pronounced by the Bush Administration.

## II. U.S. PRACTICE AND SELF-DEFENSE: HISTORICAL DEVELOPMENT OF THE “NEW IMMINENCE”

A closer look at U.S. practice reveals three related trends. The first is that nearly two decades before the advent of the War on Terror, the United States insisted that determinations of the necessity of defense are reserved to the defending states alone. The second is that the United States has defined its use of force against nonstate actors as self-defense well before the U.N. Security Council accepted that attacks by nonstate actors, imputable to a state, rise to the level of an “armed attack” under Article 51 of the U.N. Charter.<sup>92</sup> Finally, since the al Qaeda attacks on U.S. soil, the United States has explicitly argued that nontraditional combat necessitates a different definition of imminence than that applicable in more traditional conflicts. It argues that whereas an imminent threat in traditional combat is verifiable by other states, the nonstate actor can strike with little or no notice in modern warfare. Therefore, the would-be victim state has the right to target those threats that have demonstrated a propensity to attack, intent to strike again, and the capacity to do so. These trends are discussed below.

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88. See U.N. Secretary-General, Note by the Secretary-General, ¶ 1, U.N. Doc. A/59/565 (Dec. 2, 2004).

89. A MORE SECURE WORLD, *supra* note 46, at ¶ 190.

90. *Id.*

91. See Schmitt, *supra* note 34, at 531.

92. Compare S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (applying the right of self-defense under the U.N. Charter to terrorist attacks), with S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 28, 2001).

*A. Nicaragua v. United States of America: The United States Reserves the Right to Determine the Necessity of Defense (1984)*

During the Nuremberg Trials, the United States supported the notion that defensive action should be subject to investigation and adjudication in international law.<sup>93</sup> However, by 1984, in its appearance before the ICJ in *Nicaragua v. United States*, the United States argued that not all claims of self-defense are justiciable.<sup>94</sup> Whereas both the customary and Charter definitions of self-defense necessitate the demonstration of the use of force as a measure of last resort,<sup>95</sup> U.S. counsel argued that due to the ongoing nature of the conflict, the United States could not reveal the information that underscored its right to use force because revealing it would threaten its security interests.<sup>96</sup> It thereafter withdrew its acceptance of the ICJ's compulsory jurisdiction.<sup>97</sup> The State Department Legal Adviser at the time explained that the court could not assess its use of force in self-defense insofar as it concerned U.S. national security. Instead, he argued, such decisions should be left to the exclusive jurisdiction of the U.S. Congress and the President.<sup>98</sup> Judge Schwebel endorsed this position in his dissenting opinion, particularly where he commented that:

The Court is not in a position to subpoena the files of the Central Intelligence Agency and the White House—or the files of the Nicaraguan Government, not to speak of the files of the Government of Cuba and of other supporters of the subversion of El Salvador. It is one thing for the Nuremberg Tribunal “ultimately” (to use its term) to have arrived at a judgment of necessity after the fact and having before it as part of the evidence offered by the prosecution the captured files of the defendant. It is another for this Court to reach a confident judgment on the policies—and motives—of the States immediately concerned, the more so when not only is one Party absent and, in any event, unwilling, for security reasons, to reveal information it treats as secret . . . .<sup>99</sup>

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93. SCHACHTER, *supra* note 15, at 137. In 1946, the International Military Tribunal in Nuremberg considered whether each State must be the judge of its necessity of defense. *Id.* The Tribunal rejected this argument and argued that “whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately subject to investigation or adjudication if international law is ever to be enforced.” *Id.* (citation omitted). The United States agreed with these views. *Id.*

94. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 34 (June 27).

95. Schmitt, *supra* note 34, at 531 n.60 (quoting DINSTEIN, *supra* note 45, at 220).

96. *Nicaragua*, 1986 I.C.J. at 294–95 (Schwebel, J., dissenting).

97. See SCHACHTER, *supra* note 15, at 137.

98. *U.S. Decision to Withdraw from the International Court of Justice: Hearing Before the Subcomm. on Human Rights and International Organizations of the H. Comm. on Foreign Affairs*, 99th Cong., 30 (1985) (statement of Abraham D. Sofaer, Legal Advisor, Dep't of State) (“Such matters . . . are the ultimate responsibilities assigned by our Constitution to the President and the Congress.”).

99. *Nicaragua* 1986 I.C.J. at 294–95 (Schwebel, J., dissenting).

The rejection of external authority to assess the legal justification of self-defense, however, contradicts the notion of regulating self-defense in law.<sup>100</sup> By its own admission, the United States was more receptive of Security Council review of its defensive actions for two reasons.<sup>101</sup> First, unlike the ICJ, the Security Council is a political body. Second, as a veto-holding member of the Security Council, the United States remains a final arbiter of its own use of force.<sup>102</sup>

***B. Reagan Administration Strikes Libya in Response to Its Support for Terrorist Acts (1986)***

In December 1985, nonstate actors with significant links to Libya hijacked two airplanes and killed several passengers, including five Americans, at Rome and Vienna airports.<sup>103</sup> Libyan President Muammar al Qaddafi hailed the hijackers as “heroes.”<sup>104</sup> According to then-State Department Legal Adviser Abraham Sofaer, the Reagan Administration imposed all possible sanctions upon Libya and threatened to use force if those measures proved insufficient.<sup>105</sup> Secretary of Defense George P. Shultz elaborated that attacks that are imputable to states amount to “armed aggression against the other state under international law.”<sup>106</sup> This marked a move away from the United States’s historical position, which denied the applicability of the laws of armed conflict to threats posed by nonstate actors.<sup>107</sup> It had previously held that such application would afford undue moral parity and legitimacy to unregulated violence by nonstate actors.<sup>108</sup>

In April 1986, the United States intercepted information from the Libyan Government to the Libyan People’s Bureau ordering an attack on Americans.<sup>109</sup> Efforts to thwart the attack were unsuccessful, and on April 5, 1986, nonstate actors bombed a German discotheque frequented by U.S. military personnel, killing an American soldier and a Turkish woman and injuring 200 others.<sup>110</sup> U.S. intelligence indicated that Libya had plans for future attacks. Sofaer explained “the

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100. SCHACHTER, *supra* note 15, at 138 (“That statement can be read as rejecting any ‘external’ authority to judge the legitimacy of American defense measures, a position that would contradict the idea of self-defense as a right defined by law.”).

101. See *Nicaragua*, 1986 I.C.J. at 288–89 (Schwebel, J., dissenting).

102. *Id.*

103. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 103 (1989).

104. *Id.*

105. *Id.* at 104.

106. George P. Shultz, U.S. Sec’y of State, *Low-Intensity Warfare: The Challenge of Ambiguity*, Address Before the Low-Intensity Warfare Conference at the National Defense University (Jan. 15, 1986), in DEP’T ST. BULL., Mar. 1986, at 15, 17.

107. See Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, 44 SURVIVAL: GLOBAL POL. & STRATEGY, no. 1, 2002, at 7, 12–13.

108. *Id.*

109. Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 1 (2008).

110. *Id.*

case for holding Libya responsible for the Berlin disco bombing and for a pattern of other prior and planned terrorist attacks was very strong.”<sup>111</sup>

Ten days later, the United States launched Operation El Dorado Canyon and bombed terrorist and government facilities in Libya, including Gadafi’s residence.<sup>112</sup> The international community responded critically and condemned the attack as a violation of international law and the U.N. Charter.<sup>113</sup> Notwithstanding international censure, Secretary Shultz argued that the United States must adopt a new policy of “active defense.”<sup>114</sup> Shultz explained that “passive defense,” or the legitimate use of force in response to an armed attack, does not adequately respond to terrorist threats and that the United States should aim to “prevent and deter future terrorist attacks.”<sup>115</sup> Despite its affirmative claims to the right of preventive force, President Reagan permitted the disclosure of U.S. intelligence to support the attack on Libya.<sup>116</sup>

***C. Clinton Administration Strikes Afghanistan and Sudan in Retaliation for Embassy Bombings (1998)***

In 1998, the Clinton Administration attacked targets in Sudan and Afghanistan in retaliation for terrorist attacks against U.S. embassies in Tanzania and Kenya that killed 81 people, including six Americans.<sup>117</sup> President Clinton described the attack as self-defense against imminent terrorist plots<sup>118</sup> and explained that there was “compelling evidence that further attacks were planned by a network of Islamist terrorists.”<sup>119</sup> Clinton attributed the bombings to al Qaeda, which he said was also responsible for the deaths of American and other peacekeepers in Somalia, the bombing of an Egyptian embassy in Pakistan, the murder of German tourists in Egypt, as well as assassination plots against the Pope and the Egyptian president.<sup>120</sup> Clinton thus established that al Qaeda had demonstrated a history of violence, intent to do so again (i.e., compelling evidence of future attacks), and the capacity to do so as demonstrated by the bombing of the East African embassies.

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111. Sofaer, *supra* note 103, at 104.

112. Schmitt, *supra* note 109, at 1.

113. G.A. Res. 41/38, ¶ 1, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

114. Hon. George P. Schultz, U.S. Sec’y of State, Terrorism and the Modern World, The Sherr Lecture 1984, Address Before the Park Avenue Synagogue, New York, N.Y. (Oct. 25, 1984).

115. *Id.*

116. Sofaer, *supra* note 103, at 104–05.

117. CNN, *U.S. Missiles Pound Targets in Afghanistan, Sudan* (Aug. 21, 1998), <http://www.cnn.com/US/9808/20/us.strikes.02/>; Gary Younge & Lucy Hannan, *Carnage at the East African Embassies*, THE GUARDIAN (Aug. 8, 1998), <http://www.guardian.co.uk/theguardian/2009/aug/07/from-the-archive-east-africa>.

118. James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES (Aug. 21, 1998), <http://partners.nytimes.com/library/world/africa/082198attack-us.html>.

119. BBC NEWS, *World: Africa, Clinton Defends Military Strikes*, BBC ONLINE NETWORK (Aug. 20, 1998, 10:02 PM), <http://news.bbc.co.uk/2/hi/africa/155252.stm>.

120. *Id.*

According to Secretary of Defense William Cohen, the U.S. intelligence community obtained intelligence regarding an al-Qaeda conference in Afghanistan. The United States believed that the transnational network was going to use this conference to prepare for future attacks on U.S. interests.<sup>121</sup> The United States also claimed that it had obtained physical evidence outside the al Shifa facility in Sudan that supported its concerns about the pharmaceutical factory's contribution to al Qaeda. The United States believed that the facility could produce chemical weapons that al-Qaeda could exploit.<sup>122</sup> Secretary Cohen explained "[w]ith actionable intelligence in hand, President Clinton made the decision to attack the al-Qaeda leadership conference with the intent to kill as many participants as possible . . . . Simultaneously with the attack on the al-Qaeda leadership conference, [the United States] would attack and destroy the al Shifa facility."<sup>123</sup>

Although the Clinton Administration denied that Osama bin Laden was the target of the attack on Afghanistan, Secretary Cohen explained that "[t]o the extent that he or his organization have declared war upon the United States or our interests, then he certainly is engaged in an act of war."<sup>124</sup> This resonates with Secretary Shultz's characterization of violence posed by nonstate actors as constituting acts of war and justifying a military response.<sup>125</sup> President Clinton responded that he preferred to use force, rather than diplomacy and law, because Osama bin Laden represented an imminent threat whose intent was to wage war against all Americans.<sup>126</sup> Nonetheless, according to the Clinton Administration's own admissions, the links it made between al Qaeda and the embassy bombings were based on intelligence networks and not the information the FBI gathered at the bombing sites.<sup>127</sup> Lack of incontrovertible evidence, coupled with failure to exercise pacific measures, raises doubts about whether the use of force was a measure of last resort in this instance. Consider also that the concerns regarding the al Shifa facility were speculative at best: The Clinton Administration suspected that the facility had the potential to provide chemical weapons to al Qaeda, but the Administration had not proven that this was actually the case. Notably, the private owners of the al Shifa facility claimed that it was a pharmaceutical factory with no

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121. William S. Cohen, Sec'y of Def., Statement to the National Commission on Terrorist Attacks Upon the United States 9 (Mar. 23, 2004) (transcript on file with the University of North Texas Libraries).

122. *Id.*

123. *Id.*

124. James Bennett, *U.S. Cruise Missile Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES (Aug. 21, 1998), <http://partners.nytimes.com/library/world/africa/082198attack-us.html>.

125. Shultz, *supra* note 114 at 10 ("We now recognize that terrorism is being used by our adversaries as a modern tool of warfare. It is no aberration. We can expect more terrorism directed at our strategic interests around the world in the years ahead. To combat it, we must be willing to use military force.").

126. Bennett, *supra* note 124.

127. *Id.*

association to chemical weapons and brought suit against the United States in U.S. federal court for damages.<sup>128</sup>

The attacks, named Operation Infinite Reach, angered both the Afghan and Sudanese governments. The Clinton Administration did not seek approval from, or cooperation with, either sovereign in its bombing operation, inciting fierce condemnation from both governments. It also did not share plans of its attacks with any states beside Great Britain beforehand. Clinton responded to criticism without remorse, emphasizing that “[c]ountries that persistently host terrorists have no right to be safe havens.”<sup>129</sup> The Clinton Administration’s lack of cooperation with Afghanistan and Sudan, coupled with its nonconsultation with the U.N. Security Council, evidences a failure to exhaust all nonforceful remedies.

***D. Bush Administration Response to 9/11: The National Security Strategy and Iraq (2002–2008)***

The shift that steadily began in the Reagan and Clinton Administrations culminated in George W. Bush’s Administration. During its eight-year tenure, the Bush Administration, with U.N. Security Council endorsement, waged war upon nonstate actors. It also explicitly adopted a doctrine of preventive war, thereby suggesting the irrelevance of imminence in the law of self-defense.

On September 11, 2001, 19 al Qaeda operatives hijacked four civilian airplanes and flew them into the World Trade Center, the Pentagon, and a Pennsylvania field.<sup>130</sup> President Bush characterized the strike on the World Trade Center and the Pentagon as an “armed attack,” thereby meeting the threshold of the U.N. Charter definition of self-defense sanctioning the use of force.<sup>131</sup> The U.N. Security Council held that because the attack was imputable to a state, it indeed constituted an armed attack. Accordingly, it passed Resolutions 1368 and 1373, which deemed the attacks an international threat to peace and security warranting the inherent right to individual and collective self-defense.<sup>132</sup> Two weeks after al-

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128. *El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578, 581 (D.C. Cir. 2009), *reh’g en banc granted, judgment vacated*, 330 F. App’x 200 (D.C. Cir. 2009), *aff’d*, 607 F.3d 836 (D.C. Cir. 2010) (en banc) (recognizing that the issue presented a nonjusticiable political question).

129. Bennet, *supra* note 124.

130. *America Remembers Sept. 11 Attacks 11 Years Later*, CBS NEWS (Sept. 11, 2012, 7:56 PM), [http://www.cbsnews.com/8301-201\\_162-57510234/america-remembers-sept-11-attacks-11-years-later/](http://www.cbsnews.com/8301-201_162-57510234/america-remembers-sept-11-attacks-11-years-later/).

131. 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.”).

132. S.C. Res. 1368, para. 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (“Determined to combat by all means threats to international peace and security caused by

Qaeda's attack on the United States, Congress passed the Authorization for the Use of Military Force (AUMF) and authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>133</sup>

The Security Council Resolutions, together with the AUMF, sanctioned the United States's use of force against Afghanistan, which allegedly provided a safe haven for the al Qaeda network.<sup>134</sup> One year later, in September 2002, the Bush Administration released its National Security Strategy (NSS).<sup>135</sup> The NSS consisted of nine parts and outlined the United States's vision and plan for combating global terrorism and the accessibility of weapons of mass destruction.<sup>136</sup> This vision and plan, which has come to be known as the Bush Doctrine, is a justification of the preventive war doctrine and redefines imminence so radically as to suggest its irrelevance. It justifies the use of force for defensive purposes, "even if uncertainty remains as to the time and place of the enemy's attack."<sup>137</sup> The NSS addresses imminence directly where it reads:

The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

. . . .

Legal 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.

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terrorist acts; Recognizing the inherent right of individual or collective self-defense"); S.C. Res. 1373, U.N. Doc. S/RES/ 1373 (Sept. 28, 2001) (applying the right of self-defense under the U.N. Charter to terrorist attacks); *see also, e.g.*, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7.

133. Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 14 (2001) (codified at 50 U.S.C. § 1541 (2006)).

134. S.C. Res. 1368, para. 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/ 1373 (Sept. 28, 2001).

135. PRESIDENT GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002).

136. *Id.* at i ("Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us.").

137. *Id.* at 15.

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 be easily concealed, delivered covertly, and used without warning.

....

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>138</sup>

According to Professor Yoo, in the context of terrorism, the “imminence standard [of the NSS is] virtually meaningless, because there is no ready means to detect whether a terrorist attack is about to occur.”<sup>139</sup> He suggests, as does the NSS itself, that a temporal imminence requirement should be replaced by a focus on the probability of an attack coupled with the magnitude of potential harm in the future.<sup>140</sup>

The Administration applied this new standard against both state and nonstate actors. In 2002, the United States, with the support of Great Britain, made a case for war against Iraq to the U.N. The United States argued that Saddam Hussein possessed weapons of mass destruction and that his military capacity, coupled with his past rogue behavior and failure to adhere to U.N. enforcement measures, justified the use of preemptive force.<sup>141</sup> Despite the NSS's support for preventive war, the Bush Administration described an attack on Iraq as preemptive

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138. *Id.*

139. Yoo, *supra* note 31, at 750. Professor Yoo also articulated four factors that justify self-defense: the probability of an attack; the likelihood of that probability increasing over time, making the window of opportunity of the essence; the availability and efficacy of diplomatic alternatives; and the magnitude of the harm posed by the threat. *Id.* at 775.

140. *Id.* at 730 (“I argue that a more flexible standard should govern the use of force in self-defense, one that focuses less on temporal imminence and more on the magnitude of potential harm and the probability of an attack.”); *see also* BUSH, *supra* note 135, at 15 (“The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.”); Anderson, *supra* note 55, at 265–67.

141. *See* President George W. Bush, State of the Union Address (Jan. 29, 2002) (“Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax and nerve gas and nuclear weapons for over a decade. This is a regime that has already used poison gas to murder thousands of its own citizens, leaving the bodies of mothers huddled over their dead children. This is a regime that agreed to international inspections then kicked out the inspectors. This is a regime that has something to hide from the civilized world. States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.”).



self-defense based on the probability of an attack by Hussein and the magnitude of potential harm (assuming Hussein to be in possession of weapons of mass destruction).

Despite a lack of U.N. authorization for the use of force or support from other states beside Great Britain, the United States launched its military campaign against Iraq on March 19, 2003.<sup>142</sup> The President authorized the strike after military officials advised that he could lose the “target of opportunity” if the military did not act quickly.<sup>143</sup> In a televised address delivered shortly after the start of the military campaign, President Bush said, “American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.”<sup>144</sup> The Bush Administration swiftly defeated Hussein and occupied Iraq on April 9, 2003.<sup>145</sup> The last U.S. troops withdrew from Iraq eight years later, on December 18, 2011.<sup>146</sup> No weapons of mass destruction were ever found.<sup>147</sup> The international community responded to the Bush Administration’s war on Iraq with overwhelming criticism, demonstrating a rejection of the Bush Doctrine and its conception of new imminence.<sup>148</sup>

In 2002, the Bush Administration also launched its first public targeted killing of an al Qaeda operative based on its notion of new imminence.<sup>149</sup> The Administration considered Qaed Salim Sinan al-Harethi to be the “mastermind” behind the 2000 attack on the *USS Cole* that killed 17 American servicemen.<sup>150</sup> The Bush Administration reportedly considered al-Harethi a justifiable military target on the basis of his ongoing involvement with al Qaeda<sup>151</sup> and Osama bin Laden.<sup>152</sup> It also felt that his killing was a legitimate act of preemptive self-defense

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142. *U.S. Launches Cruise Missiles at Saddam*, CNN (Mar. 20, 2003, 1:31 A.M.), [http://articles.cnn.com/2003-03-19/world/sprj.iq.main\\_1\\_coalition-forces-coalition-attack-military-action?\\_s=PM:WORLD](http://articles.cnn.com/2003-03-19/world/sprj.iq.main_1_coalition-forces-coalition-attack-military-action?_s=PM:WORLD).

143. *Id.*

144. *Id.*

145. *2003: Saddam Statue Topples with Regime*, BBC ON THIS DAY (Apr. 9, 2003), [http://news.bbc.co.uk/onthisday/hi/dates/stories/april/9/newsid\\_3502000/3502633.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/april/9/newsid_3502000/3502633.stm).

146. *Last US Troops Withdraw from Iraq*, BBC NEWS (Dec. 18, 2011), <http://www.bbc.co.uk/news/world-middle-east-16234723>.

147. *CIA’s Final Report: No WMD Found in Iraq*, NBCNEWS.COM (Apr. 25, 2005), [http://www.msnbc.msn.com/id/7634313/ns/world\\_news-mideast\\_n\\_africa/cias-final-report-no-wmd-found-iraq/#.UDkaeY6siuM](http://www.msnbc.msn.com/id/7634313/ns/world_news-mideast_n_africa/cias-final-report-no-wmd-found-iraq/#.UDkaeY6siuM) (“In his final word, the CIA’s top weapons inspector in Iraq said Monday that the hunt for weapons of mass destruction has ‘gone as far as feasible’ and has found nothing, closing an investigation into the purported programs of Saddam Hussein that were used to justify the 2003 invasion.”).

148. *Id.*

149. *Id.*

150. *Id.*

151. See Walter Pincus, *US Missiles Kill Al Qaeda Suspects*, THEAGE (Nov. 6, 2002), <http://www.theage.com.au/articles/2002/11/05/1036308311314.html?oneclick=true>.

152. *Id.*

based on his past behavior (i.e., the attack on *USS Cole*), his intent to strike again (i.e., his ongoing involvement with Osama bin Laden), and his capacity to do so (i.e., his involvement with the al Qaeda network). The Hellfire missile launched from an unmanned Predator drone struck al-Harethi's car while it was in motion in Yemen.<sup>153</sup> Five other passengers alleged to be low-level al Qaeda operatives were in the car, including one U.S. citizen.<sup>154</sup>

Notwithstanding al-Harethi's alleged threat to the United States, Donald Rumsfeld's, then-Secretary of Defense, comments indicated a preference for al-Harethi's incapacitation but did not suggest that his killing was necessary to ensure the defense of the United States or its citizens, personnel, or interests, thereby raising doubts about whether it was a measure of first or last resort.<sup>155</sup> Rumsfeld's language indicates this point was not lost on observers: Anna Lindh, then-foreign minister of Sweden, challenged the legality of the attack as constituting an extrajudicial execution.<sup>156</sup>

### *E. The Obama Administration and Targeted Killings (2008–present)*

The Obama Administration did not challenge the Bush Administration's reformulation of self-defense in international law. To the contrary, it endorsed the concept of new imminence and significantly increased the practice of targeted killings.<sup>157</sup> The Obama Administration has in its possession a legal memo justifying its targeted killing policy but has refused to make it publicly available.<sup>158</sup> It has, however, admitted to the policy<sup>159</sup> and provided faint outlines of its legal

153. *Id.*

154. Dan Herbeck, *Yemen Holds Lackawanna 6 Figure*, THE BUFFALO NEWS (Jan. 20, 2010), <http://www.buffalonews.com/city/article30813.ece>. (Kamal Derwish was associated with the Lackawanna Six as well as other al Qaeda figures. He was known to hold "edgy" lectures in his apartment in the United States.)

155. Pincus, *supra* note 151 (Secretary Rumsfeld stated "it would be a very good thing if [al-Harethi] were out of business").

156. Brian Whitaker & Oliver Burkeman, *Killing Probes the Frontiers of Robotics and Legality*, THE GUARDIAN (Nov. 5, 2002, 9:25 PM), <http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida> (arguing that "[i]f the USA is behind this with Yemen's consent, it is nevertheless a summary execution that violates human rights. If the USA has conducted the attack without Yemen's permission it is even worse. Then it is a question of unauthorized use of force").

157. Steve Watson, *Obama Moves to Conceal Drone Death Figures*, INFOWARS.COM (June 21, 2012, 10:52 AM), <http://www.infowars.com/obama-moves-to-conceal-drone-death-figures/> (noting that President Obama oversaw fifty-three drone missile attacks during his first year in office, which is more than the total number of similar strikes carried out during the eight years of President Bush's two terms).

158. Sung Un Kim, *DOJ Rejects Request for Targeted Killing Information*, JURIST (June 21, 2012, 1:59 PM), <http://jurist.org/paperchase/2012/06/doj-rejects-request-for-targeted-killing-information.php>.

159. Brennan, *supra* note 6 ("So let me say it as simply as I can. Yes, in full accordance with the law—and in order to prevent terrorist attacks on the United States and to save American lives—the United States Government conducts targeted strikes against specific al-Qa`ida terrorists, sometimes using remotely piloted aircraft, often referred to

analysis in various addresses delivered by Administration officials—including Harold Koh, the Legal Adviser to the Department of State;<sup>160</sup> Jeh Johnson, General Counsel to the Department of Defense;<sup>161</sup> John O. Brennan, Assistant to the President on Homeland Security and Counterterrorism;<sup>162</sup> and Attorney General Eric Holder.<sup>163</sup> In early February 2013, the Department of Justice leaked a White Paper summarizing the contents of the legal memo in question and provided the most robust legal analysis of the Obama Administration’s targeted killing policy to date.<sup>164</sup>

The 16-page document explores the lawfulness of killing a U.S. citizen who is a senior operational leader of al Qaeda or an associated force, on foreign soil in an area outside of active hostilities, who poses an imminent threat, and whose capture is not feasible.<sup>165</sup> The Justice Department offers a three-pronged test to determine the legality of such a lethal strike. A killing is legal if:

- 1) an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the United States; 2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and 3) the operation would be conducted in a manner consistent with applicable laws of war principles.<sup>166</sup>

The White Paper affirms the Bush Administration’s understanding that the AUMF sanctions the use of all necessary force to overcome the terrorist threat to the United States wherever that threat may emerge.<sup>167</sup> Additionally, it asserts

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publicly as drones. And I’m here today because President Obama has instructed us to be more open with the American people about these efforts.”).

160. Koh, *supra* note 6 (“[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.”).

161. See generally Jeh Charles Johnson, *National Security Law, Lawyers and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141 (2012).

162. Brennan, *supra* note 6.

163. See Holder, *supra* note 6 (“[T]here are instances where our government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force. . . . Congress has authorized [in the AUMF] the President to use all necessary and appropriate force against [al Qaeda and its associated forces]. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.”).

164. See generally WHITE PAPER, *supra* note 5.

165. *Id.* at 1.

166. *Id.*

167. See *id.*; Holder, *supra* note 6 (“We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and

that the United States can lethally incapacitate an imminent threat under the international law of self-defense.<sup>168</sup> The invocation of both legal frameworks seems confused. By invoking the law of self-defense, the United States arguably claims that it should invoke a self-defense analysis in each instance of a threat.<sup>169</sup> If so, is the Obama Administration claiming that the law of self-defense can be invoked against a nonstate actor even if its behavior is not imputed to a state?<sup>170</sup> If, instead, the Administration is claiming that the law of self-defense justified the initial use of force against Afghanistan in 2001, then such an individualized assessment is unnecessary. Alternatively, the laws of armed conflict should regulate the ongoing hostilities.<sup>171</sup> Without resolving this quandary, this Section seeks to evaluate the Administration's claim that the law of self-defense regulates targeted killings.

The Department of Justice (DOJ) explains that the traditional definition of imminence is inadequate to deal with modern terrorist threats, which do not occur once at an international border. Rather, such attacks occur sporadically over a long period of time with little to no notice of when the next attack will occur.<sup>172</sup> Consequently, al Qaeda leaders are continually planning attacks.<sup>173</sup> In light of these circumstances, adhering to the traditional definition of imminence "would not allow the United States sufficient time to defend itself," thereby necessitating a "broader concept of imminence."<sup>174</sup>

In April 2012, Brennan described the first prong of the DOJ's test set forth in the White Paper: assessing imminence.<sup>175</sup> He explained that to sanction the use of lethal force against an individual target, the "most senior officials" of the Obama Administration assess the threat posed by the individual on a case-by-case basis.<sup>176</sup> Brennan continued that if the individual is a legitimate target under the AUMF, namely, a member of al Qaeda, Taliban, or associated forces, Administration officials then consider whether or not the individual is a "significant threat."<sup>177</sup> Brennan emphasized that this is not:

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its associates have directed several attacks—fortunately unsuccessful—against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.”)

168. WHITE PAPER, *supra* note 5, at 3; *see also* Koh, *supra* note 6 (adding that “whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat”).

169. WHITE PAPER, *supra* note 5, at 1.

170. *See* Craig Martin, *Going Medieval: Targeted Killing, Self-Defense and the Jus Ad Bellum Regime*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 250 (Claire Finkelstein et al., eds., 2012).

171. *See id.* at 239.

172. WHITE PAPER, *supra* note 5, at 7.

173. *Id.*

174. *Id.*

175. Brennan, *supra* note 6.

176. *Id.*

177. *Id.*

some hypothetical threat—the mere possibility that a member of al Qaeda might try to attack [the United States] at some point in the future. A significant threat might be posed by an individual who is an operational leader of al Qaeda or one of its associated forces. Or perhaps the individual is himself an operative—in the midst of actually training for or planning to carry out attacks against U.S. interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plots and plans before they come to fruition.<sup>178</sup>

Brennan describes a “significant threat”—which is presumably a proxy for an imminent threat—as someone directly involved with a future attack on U.S. interests, the exact time and location of which is unknown.<sup>179</sup> The one limitation on the Obama Administration’s definition of an imminent threat, as deduced from this description as well as the White Paper, is that it cannot be hypothetical. While the threat is not merely assumed, it is also not necessarily in motion, as evidenced by the targeting of persons in training or in possession of unique skills. Accordingly, there is considerable time between the actual attack, which the Administration considers inevitable, and the use of lethal force. This approach undermines the traditional temporal dimension of imminence under the law of self-defense.

In a revealing *New York Times* article, Jo Becker and Scott Shane buttress the Administration’s description of the targeted killing process.<sup>180</sup> Shane and Becker write that every Tuesday, the President convenes a meeting of 100 members of the government’s national security apparatus to preside over a secret “nominations” process.<sup>181</sup> The group pores over slides of potential targets and discusses “the infeasibility of capture, the certainty of the intelligence base, the imminence of the threat.”<sup>182</sup> It can take five to six sessions to approve a name for killing.<sup>183</sup> If a suspect ceases to be imminent, his name will be removed from the list.<sup>184</sup> The article offers little insight as to the criteria—or lack thereof—for imminence, but deducing from the fact that it can take six weeks for someone to be added to the list and a similar or longer time to be removed from it, it certainly does diminish the meaning of imminence as a temporal element that leaves “no moment for deliberation.”<sup>185</sup>

The White Paper contends that under the “broader concept of imminence,” there is no need to “have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future” to make the use of

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178. *Id.*  
179. *Id.*  
180. *See* Becker & Shane, *supra* note 1.  
181. *Id.*  
182. *Id.*  
183. *Id.*  
184. *Id.*  
185. *Id.*

force appropriate.<sup>186</sup> Instead, the DOJ explains, when considering the use of force, traditional imminence should be supplanted with a probability test that balances the United States's best opportunity to successfully target the threat, the possibility of reducing collateral damage to civilians, and the likelihood of averting a future attack against American civilians.<sup>187</sup> The test assumes that the threat is always imminent because it is continuous and therefore inevitable.<sup>188</sup> Therefore, the White Paper explains, a target is killed when the United States has the best "window of opportunity" to do so.<sup>189</sup>

A little less than a year before the release of the White Paper, Attorney General Holder used the same language to describe the Administration's probability test in an address at Northwestern University.<sup>190</sup> Holder explained that because al Qaeda operatives are "continually planning attacks" against the United States, the President need not wait "until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear"—in order to launch a lethal attack.<sup>191</sup> Adherence to such a temporal requirement, he insists, "would create an unacceptably high risk" and the death of Americans as a result.<sup>192</sup> Accordingly, the Administration is concerned with assessing the best "window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States."<sup>193</sup> Unlike traditional imminence, the probability test inverts the subject of self-defense so that it is not whether or not the target is a threat in that moment, but whether that moment is the best available one for the would-be victim to strike first.

The relaxed temporal standards, together with the proposition that a probability test replace the certainty associated with traditional imminence, reflects the language that the Bush Administration put forth in the NSS. Like the Bush Administration before it, the Obama Administration advocates for an expanded

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186. WHITE PAPER, *supra* note 5, at 7.

187. *Id.* at 7–8; *see also* Brennan, *supra* note 17 ("[A] more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups, in part because threats posed by nonstate actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. After all, al Qaeda does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an 'imminent' attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.").

188. *See* WHITE PAPER, *supra* note 5, at 7.

189. *Id.* ("[T]he United States is likely to have only a limited window of opportunity with which to defend Americans in a manner that has both a high likelihood of success and sufficiently reduces the probabilities of civilian casualties.").

190. Holder, *supra* note 6.

191. *Id.*

192. *Id.*

193. *Id.*

notion of imminence in light of modern warfare characterized by untraditional combat and advanced weapons technologies.

In practice, the temporal dimension of new imminence reflects the belligerent's priorities rather than the alleged suspect's actual threat. Consider the killing of Anwar al-Awlaki. In April 2010, President Obama authorized the targeted killing of al-Awlaki, a U.S. citizen deemed to be an operative of al-Qaeda Arabian Peninsula (AQAP) in Yemen.<sup>194</sup> Eighteen months later, in September 2011, a U.S. missile struck a car that al-Awlaki was in.<sup>195</sup> The months between declaring al-Awlaki an imminent threat and his actual killing demonstrates the redefined imminence. On the one hand, new imminence is not a temporal requirement, because it does not indicate a lack of time for deliberation or a lack of time to consider other pacific means to incapacitate the threat. On the other hand, new imminence maintains its temporal quality, but instead of describing the lack of time posed by the threat, it theoretically reflects the last opportunity available to the victim to avert the threat. Notwithstanding temporality, this new definition raises significant questions regarding whether or not lethal force was indeed a measure of last resort.<sup>196</sup> Even after the fact, it has been impossible to adjudicate the temporal issue in al-Awlaki's killing because of the secrecy that shrouds the operation.<sup>197</sup>

Other cases similarly reflect the troubling questions raised by the Obama Administration's application of new imminence. In September 2009, the American military used a long-range Tomahawk cruise missile to target and kill Saleh Ali Saleh Nabhan in Somalia.<sup>198</sup> Nabhan was allegedly connected with the 1998 attacks on U.S. embassies in Kenya and Tanzania.<sup>199</sup> He was also accused of playing a role in the 2002 suicide bombing of an Israeli-owned hotel, and the

194. Becker & Shane, *supra* note 1.

195. Martin Chulov & Paul Harris, *Anwar al-Awlaki, al-Qaida Cleric and Top US Target, Killed in Yemen*, THE GUARDIAN (Sept. 30, 2011, 1:37 PM), <http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-killed-yemen>.

196. See, e.g., David Cole, *Killing Our Citizens Without Trial*, THE N.Y. REVIEW OF BOOKS (Nov. 24, 2011), [www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/](http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/) ("As American citizens we have a right to know when our own government believes it may execute us (and others) without a trial. In a democracy the state's power to take the lives of its own citizens, and indeed of any human being, must be subject to democratic deliberation and debate.").

197. See Nathan Freed Wessler, *Roundtable on Targeted Killing: The Secret Bureaucracy of Targeted Killing*, JADALIYYA (Mar. 6, 2012), [http://www.jadaliyya.com/pages/index/4566/roundtable-on-targeted-killing\\_the-secret-bureaucr](http://www.jadaliyya.com/pages/index/4566/roundtable-on-targeted-killing_the-secret-bureaucr) ("The executive branch has developed a secret bureaucracy of killing, complete with a secret government panel that identifies names of suspected terrorists, secret lists of people to be targeted for death, secret legal opinions, and secret presidential authorizations to kill. This program deserves, and requires, public oversight and debate.").

198. Barbara Starr, *Official: Missile Aimed at FBI Target in Somalia*, CNN (Mar. 3, 2008, 9:02 A.M.), [http://articles.cnn.com/2008-03-04/world/somalia.us\\_1\\_saleh-ali-saleh-nabhan-qaeda-missile-strike?\\_s=PM:WORLD](http://articles.cnn.com/2008-03-04/world/somalia.us_1_saleh-ali-saleh-nabhan-qaeda-missile-strike?_s=PM:WORLD).

199. *Id.*

unsuccessful attack on an Israeli charter jet in Mombasa, Kenya.<sup>200</sup> The FBI wanted Nabhan for questioning in regards to both incidents.<sup>201</sup> U.S. officials also identified him as a fighter with Al Shabab, an Islamist rebel group that aims to displace the Somali government, and as a chief link between al Qaeda and its East African allies.<sup>202</sup>

At the time of his killing, Nabhan was a criminal suspect and part of a rebel force in an internal conflict in Somalia; he was not posing an imminent threat to the United States in the traditional sense. His criminal past (i.e., suspected involvement in the East African embassy bombings), coupled with a propensity to attack the United States (i.e., link to al Qaeda) and his alleged capacity to do so (i.e., al Qaeda links and Al Shabab affiliation), sufficed to make him an imminent threat in the United States's redefinition of imminence. According to senior U.S. officials, the United States never seriously considered the option of trying Nabhan for his alleged crimes.<sup>203</sup> Although senior officials involved with the killing operation preferred to take Nabhan prisoner because of his high value to intelligence, they explained that Nabhan's killing "was not a decision that [they] made."<sup>204</sup> Instead, military officials had been watching him for a "long, long time" and waiting for him to be away from a high density of civilians in order to kill him.<sup>205</sup> In light of this, the U.S. military never considered it a plausible option to capture Nabhan or afford him the opportunity to surrender. Also, the fact that military officials waited for months to kill him reflects how the new imminence refers to the would-be victim's opportunity to incapacitate the threat and not the temporal urgency of the threat itself posed by the suspect. Both considerations raise considerable doubts regarding the last resort nature of the use of lethal force.

Other cases, like that of Baitullah Mehsud, raise even more questions about the necessity of force at all. Mehsud was of Pakistani origin and led a Pakistani group, Tehrik-i-Taliban Pakistan (TTP). TTP formed in 2007 primarily to challenge the existing Pakistani government and to impose Islamic law in the country.<sup>206</sup> The TTP, the Taliban's counterpart in Pakistan, is by-and-large a domestic threat. Although the United States did not deem Mehsud an imminent threat to its interests, American forces killed him with an unmanned Predator drone in August 2009.<sup>207</sup> They targeted Mehsud during a medical procedure for his

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200. *Id.*

201. *Id.*

202. Jeffrey Gettleman & Eric Schmitt, *U.S. Kills Top Qaeda Militant in Southern Somalia*, N.Y. TIMES, Sept. 15, 2009, at A1.

203. *Id.*

204. Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts*, WASH. POST (Feb. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303748.html>.

205. *Id.*

206. Hassan Abbas, *A Profile of Tehrik-i-Taliban Pakistan*, 1 CTC SENTINEL 2, 2 (Jan. 2008).

207. Pir Zubair Shah, Sabrina Tavernise & Mark Mazzett, *Taliban Leader in Pakistan is Reportedly Killed*, N.Y. TIMES, Aug. 8, 2009, at A1.



kidney ailment.<sup>208</sup> Although CIA officials initially balked at the suggestion of targeting Mehsud, Pakistani officials demanded that he be killed because of the threat he posed to their government's control of the country.<sup>209</sup> According to Shane and Becker, since Pakistan's tacit approval is necessary for the United States to conduct other targeted killings there, the rules were stretched to accomplish that political goal.<sup>210</sup> President Obama ultimately ceded to Pakistan's urging and declared Mehsud a threat to American personnel in Pakistan to justify his targeted killing.<sup>211</sup>

By the United States's own admission, Mehsud did not pose an imminent threat, even according to the Obama Administration's redefinition of imminence. Instead, available information suggests that his value to U.S. military cooperation with Pakistan necessitated the killing. Still, the President declared Mehsud a threat to American interests and justified his killing as a means of self-defense. This stretches the meaning of imminence even beyond its current reconfiguration and highlights the susceptibility to abuse to which new imminence and the legal definition of self-defense are exposed.

### III. "NEW IMMINENCE" POSES A SUBSTANTIAL RISK OF ABUSE OF THE USE OF FORCE AND THREATENS THE INTERNATIONAL ORDER

The U.S. response to threats posed by nonstate actors since the mid-1980s has steadily shifted the traditional meaning of imminence. While imminence has traditionally referred to a temporal element that indicates "no moment for deliberation" and "no choice of means," the new imminence redefines it as the probability of an attack, comprised of past violence and the intent to attack again plus the capacity to do so. Successive U.S. administrations from Reagan to Obama have justified the use of preventive force against nonstate actors because they can strike U.S. interests without warning. The Bush and Obama Administrations, in particular, have highlighted that these attacks can have an impact of devastating magnitude due to advancements in, and accessibility to, modern weapons technology. Assuming that the U.S. position on this question is sincere and valid, it remains troubling because of its acute susceptibility to abuse.

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208. *Id.*

209. Becker & Shane, *supra* note 1.

210. *Id.*; *see also* Shah et al., *supra* note 207 (stating that the United States also hoped to use this as a point of pressure to insist that Pakistan crack down on the militant networks within its borders).

211. *We Took Out Mehsud: Obama*, THE NATION (Aug. 21, 2009), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/politics/21-Aug-2009/We-took-out-Mehsud-Obama>.

*A. National Security Intelligence Is Not Available and Therefore Use of Force Is Not Justiciable in Cases of New Imminence*

Historically, individual state prerogative failed to adequately regulate the use of force<sup>212</sup> and drove a nascent community of nations to impose limits upon its exercise after both World Wars.<sup>213</sup> Those limits justified the use of force as a measure of last resort that should be verifiable by other states.<sup>214</sup> To use force legitimately, a state must show that it has exhausted all other pacific means to avert the threat.<sup>215</sup> The U.N. Charter mandates that the U.N. Security Council make this determination.<sup>216</sup> Classic scholars have suggested that failure to comply with an impartial determination of self-defense may be prima facie evidence of an illegitimate use of force.<sup>217</sup> Indeed, current regulation of self-defense in law is predicated upon its justiciability.<sup>218</sup> Accepting that a state is best suited to regulate its own use of force would risk confusing a legal right with an excuse, without the adjudicatory benefit of external review.<sup>219</sup>

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212. See Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 CAL. W. INT'L L.J. 1, 10–11 (2003) The League of Nations's earliest efforts to regulate the use of war proved inadequate. *Id.* As put by Ramirez, “[a]fter an initial success in dealing with the Graeco-Bulgarian crisis of 1925, and a less spectacular achievement in the Chaco dispute of 1928, the League witnessed the invasion of Manchuria in 1931, the Italo-Abyssinian War of 1934–[3]5, the German march into the Rhineland in 1936, into Austria in 1938, into Czechoslovakia in 1939, the Soviet Union's invasion of Finland in 1939 and, finally, the German invasion of Poland in 1939. Apart from half-hearted economic sanctions against Italy in 1935, no sanctions were ever really applied by the League. To this extent the failure of the League was due, not to the inadequacies of the Covenant, but to the apathy and reluctance of the member States to discharge their obligations.” *Id.*

213. *Id.* at 9–11; see also BRIERLY, *supra* note 21, at 397. (“Before the League [of nations], . . . international law was entirely free both to decide and act for itself, and although the classical system knew of certain principles regulating the recourse to forcible measures short of war, their application was necessarily uncertain when each state claimed the right to be the judge of the merits of its own case.”).

214. See *supra* Part I.B.

215. See Schmitt, *supra* note 109, at 15.

216. U.N. Charter art. 51 (“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.”).

217. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 39, at 422–23. According to Oppenheim's treatise of international law, refusal to submit to an impartial determination of self-defense, “may be prima facie evidence of a violation of international law under the guise of action in self-defense.” *Id.*

218. SCHACHTER, *supra* note 15, at 137 (“States could not have it both ways: if they did not accept the principle of justiciability, the legal dimension of self-defense would disappear and with it the regulation of force by law.”).

219. See BRIERLY, *supra* note 21, at 404; SCHACHTER, *supra* note 15, at 136 (memorializing Sir Hersch Lauterpacht's statement that: “Such a claim is self-contradictory

Neither the Security Council nor the international community can assess the legitimacy of state force when new imminence is invoked. Since new imminence is based on intelligence not available to other states, it relies on individual states to determine for themselves when the use of force in self-defense is legitimate. In fact, in the case of targeted killings authorized by the Obama Administration, intelligence is not even fully available to other branches of government, let alone to other states.<sup>220</sup> The Administration's opaque process has earned it the moniker of "judge, jury, and executioner."<sup>221</sup> Often, even after the use of force, this national security intelligence is still not available to the public and is therefore not justiciable at all.<sup>222</sup> Consider that in cases filed to obtain information about the killing of Anwar al-Awlaki, the Obama Administration invoked the state secrets privilege to dismiss the suit, claiming that it "cannot be litigated without risking or requiring the disclosure of classified and privileged intelligence information that must not be disclosed."<sup>223</sup>

Although national security concerns are considerable, they are not novel. In fact, the Reagan Administration made a similar argument<sup>224</sup> in *Nicaragua v.*

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inasmuch as it purports to be based on legal right and at the same time it dissociates itself from regulation and evaluation of the law").

220. Noa Yachot, *ACLU Court Filing Argues for Judicial Review of U.S. Targeted Killings of Americans*, ACLU BLOG OF RIGHTS (Feb. 6, 2013, 11:54 AM), <https://www.aclu.org/blog/national-security/aclu-court-filing-argues-judicial-review-us-targeted-killings-americans>; see also *Feinstein Statement on Intelligence Committee Oversight of Targeted Killings*, SEN. DIANNE FEINSTEIN (Feb. 13, 2013), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8> (describing the extent of the Senate Intelligence Committee's oversight of the program).

221. Editorial, *When the Government Kills*, L.A. TIMES (July 29, 2012), <http://articles.latimes.com/2012/jul/29/opinion/la-ed-drone-killings-lawsuit-20120729> ("Allowing the president of the United States to act as judge, jury and executioner for suspected terrorists, including U.S. citizens, on the basis of secret evidence is impossible to reconcile with the Constitution's guarantee that a life will not be taken without due process of law.").

222. See Ryan Devereaux, *Is Obama's Use of State Secrets Privilege the New Normal?*, THE NATION (Sept. 29, 2010), <http://www.thenation.com/article/155080/obamas-use-state-secrets-privilege-new-normal#>; Bridget Johnson, *White House Invokes State Secrets Privilege to Block Targeted Killings Suit*, THE HILL (Sept. 25, 2010, 3:25 P.M.), <http://thehill.com/blogs/blog-briefing-room/news/120907-white-house-invokes-state-secrets-privilege-to-block-lawsuit-on-targeted-killings>; Marian Wang, *Invoking 'State Secrets': Still the Status Quo?*, PROPUBLICA (Feb. 24, 2011, 11:09 A.M.), <http://www.propublica.org/blog/item/invoking-state-secrets-still-the-status-quo>; Pete Yost, *Obama Invokes 'State Secrets' Claim to Dismiss Lawsuit Against Targeting of U.S. Citizen*, HUFFINGTON POST (Sept. 25, 2010, 6:54 PM), [http://www.huffingtonpost.com/2010/09/25/obama-state-secrets\\_n\\_739114.html](http://www.huffingtonpost.com/2010/09/25/obama-state-secrets_n_739114.html).

223. Declaration and Formal Claim of State Secrets Privilege and Statutory Privileges by Leon E. Panetta, Director, C.I.A. at 3, *Al-Aulaqi v. Obama*, No. 1:10cv01469 (JDB) (D.D.C. Sept. 25, 2010), ECF No. 15-6.

224. Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.*), 1986 I.C.J. 14, 68 (June 27); Sofaer, *supra* note 103, at 105

*United States*, and the ICJ rejected its argument and held that the question of self-defense was indeed justiciable.<sup>225</sup> Although the Reagan Administration protested disclosure of national security intelligence regarding its preemptive strike on Libya, it made the evidence that Libya was planning another attack on U.S. interests widely available in order to justify its attack.<sup>226</sup> The Reagan Administration's disclosure, however, proved exceptional. Successive U.S. administrations have not been forthcoming with the intelligence upon which they rely to justify the use of force in cases of anticipatory self-defense.<sup>227</sup> Even the Reagan Administration made clear that its disclosure should "not be regarded as the standard of proof for holding States responsible for supporting terrorist groups."<sup>228</sup> In practice, the Clinton, Bush, and Obama Administrations have determined the legitimacy and necessity of such force without external review.<sup>229</sup> While these exercises of state force may have indeed been legitimate, individual state determinations of anticipatory self-defense make the susceptibility of its abuse considerably high.

The United States's 2003 invasion of Iraq is a quintessential example of this abuse. Multiple sources allege that several members of the Bush Administration spent a decade planning an attack on Iraq and used the events of September 11, 2001 to put it into action.<sup>230</sup> The Bush Administration advanced the argument in the face of threats from nonstate actors and their state sponsors; it could attack Iraq in anticipatory self-defense.<sup>231</sup> Together with weak evidence, the Administration made the case for unilateral war.<sup>232</sup> The abuse of anticipatory self-defense eschewed harsh criticism from international scholars and organizations.<sup>233</sup> In an address before the U.N. General Assembly, then-Secretary General Kofi Annan acknowledged that terrorist threats are real for all states and that to avoid unilateralism and the risk of abuse, the U.N. Security Council should reevaluate its role and consider "criteria for an early authorization of coercive measures."<sup>234</sup>

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225. *Nicaragua*, 1986 I.C.J. at 279–81; *see also* Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.*), 1984 I.C.J. 392, 429–41 (Nov. 26).

226. Sofaer, *supra* note 103, at 104-105.

227. *See supra* Part II.

228. Sofaer, *supra* note 103, at 105

229. *See supra* Part II.

230. *See* Ramirez, *supra* note 212, at 2–3; Sidney Blumenthal, *Bush Knew Saddam Had No Weapons of Mass Destruction*, SALON (Sept. 6, 2007, 4:16 AM), [http://www.salon.com/2007/09/06/bush\\_wmd/](http://www.salon.com/2007/09/06/bush_wmd/); Robert Dreyfuss & Jason Vest, *The Lie Factory*, MOTHER JONES Jan.–Feb. 2004, at 34.

231. Bush, *supra* note 141.

232. Schmitt, *supra* note 109, at 14 n.60.

233. *See* Kofi Annan, U.N. Secretary-General, Address to the U.N. General Assembly (Sept. 23, 2003). The type of force used by the United States against Iraq, "has opened the door to establishing a dangerous precedent that will result in a proliferation of the unilateral and lawless use of force, with or without justification." *Id.*; *see, e.g.* HENKIN, *supra* note 14, at 143–44; *accord* Ramirez, *supra* note 212, at 24.

234. Annan, *supra* note 233 ("The Council needs to consider how it will deal with the possibility that individual States may use force 'pre-emptively' against perceived threats. Its members may need to begin a discussion on the criteria for an early authorisation

Even under the Obama Administration, which has championed the rule of law,<sup>235</sup> the risk for abuse remains high. The lack of transparency has made room for speculation that the increase in the Obama Administration's targeted killing practice corresponds with its tough crackdown on harsh interrogation policies.<sup>236</sup> Several reports indicate that after closing CIA black sites, the Administration has chosen to kill potential detainees instead.<sup>237</sup> These accusations are bold, even inflammatory. However, because targeted killings are not reviewable, before or after the fact, these accusations cannot be dismissed outright. Legitimate questions concerning targeted killings have yet to be answered. For example, were all pacific measures exhausted before killing al-Awlaki? Are media reports that suggest that the Obama Administration did not consider capturing Nabhan true, and if so, does

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of coercive measures to address certain types of threats—for instance, terrorist groups armed with weapons of mass destruction.”).

235. Holder, *supra* note 6 (“But just as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution—and must always be consistent with statutes, court precedent, the rule of law and our founding ideals.”).

236. See Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 353 (Benjamin Wittes ed., 2009) (advocating for killing more suspects, rather than capturing them, to avoid affording them more rights once in captivity: “The political costs for any U.S. administration in taking and holding detainees are now enormous. Once in custody, detainees are likely to be accorded quasi-constitutional protections by the courts in some matters and to receive at least some version of habeas corpus. Politically, the most powerful institutional incentive today is to kill rather than capture terrorists. The intelligence losses of killing people, rather than capturing and interrogating them, are great. But since the U.S. political and legal situation has made aggressive interrogation a questionable activity anyway, there is less reason to seek to capture rather than kill. And if one intends to kill, the incentive is to do so from a standoff position, because it removes potentially messy questions of surrender.”); Becker & Shane, *supra* note 1 (“Yet the administration’s very success at killing terrorism suspects has been shadowed by a suspicion: that Mr. Obama has avoided the complications of detention by deciding, in effect, to take no prisoners alive. While scores of suspects have been killed under Mr. Obama, only one has been taken into American custody, and the president has balked at adding new prisoners to Guantánamo. ‘Their policy is to take out high-value targets, versus capturing high-value targets,’ said Senator Saxby Chambliss of Georgia, the top Republican on the intelligence committee. ‘They are not going to advertise that, but that’s what they are doing.’”); DeYoung & Warrick, *supra* note 204 (“Over a year after taking office, the administration has still failed to answer the hard questions about what to do if we have the opportunity to capture and detain a terrorist overseas, which has made our terror-fighters reluctant to capture and left our allies confused,” Sen. Christopher S. Bond (Mo.), the ranking Republican on the Senate Select Committee on Intelligence, said Friday. ‘If given a choice between killing or capturing, we would probably kill.’”); Adam Entous, *Special Report - How the White House Learned to Love the Drone*, REUTERS (May 19, 2010, 3:03 AM), <http://uk.reuters.com/article/2010/05/19/uk-pakistan-drones-idUKTRE64H5U720100519> (“‘We may have been able to capture the guy but the decision was made to kill him,’ a U.S. defence official said of the Somali operation. A factor in the decision, the official said, was uncertainty about ‘what would we do with him’ if he was captured alive.”).

237. See *supra* note 236 and accompanying text.

this undermine his killing as a measure of last resort? Was Mehsud's killing authorized as a matter of political expediency or was he indeed planning an inevitable attack on U.S. interests? In its ongoing practice, the Obama Administration is demanding that its polity and its state counterparts blindly accept its assessment of self-defense. The law of self-defense rejects this plea.

***B. Immediately Necessary Versus Imminence: Drawing on the Battered Women's Syndrome to Identify an Objective Standard of Review***

External scrutiny of the United States's use of force is necessary to eliminate the risk of its subjective justification. Even accepting that the new imminence standard is sincere and valid, the United States's assessment of a potential risk is speculative, at best, without considering the reasonableness of that belief in light of the given circumstances and/or available intelligence. Developments in U.S. criminal law help inform how the international law of self-defense can appreciate a state's subjective belief that it will be attacked without sacrificing an objective review of the evidence upon which that belief is based.

The Obama Administration articulates an immediately necessary standard when it describes imminence as the last "window of opportunity" available to the United States to avert inevitable harm.<sup>238</sup> The immediately necessary standard redefines the self-defense analysis by justifying the use of force to prevent an inevitable recurrence, as opposed to protecting oneself against imminent harm.<sup>239</sup> In U.S. domestic law, a similar redefinition of imminence is captured in the amended Model Penal Code.<sup>240</sup> The amended model penal code reflects a movement in criminal law to view the murder of abusive husbands by battered wives as justified.<sup>241</sup>

The Battered Women's Syndrome (BWS) jury instruction in a murder trial supplants an imminent standard with a reasonable one, so that women who reasonably believed they faced an imminent harm could justifiably kill their abuser even if he posed no threat in that moment.<sup>242</sup> It represents what may reasonably be

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238. WHITE PAPER, *supra* note 5, at 7; *see also* Holder, *supra* note 6 (explaining that the United States cannot wait to know precisely when an attack will be launched: So long as it has intelligence that an attack is being planned, "the window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States" must be taken into account. Because al Qaeda operatives are "continually planning attacks" against the United States, the President need not wait "until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear" in order to launch a lethal attack).

239. *See* FLETCHER & OHLIN, *supra* note 30, at 160–61.

240. *Id.* at 163 n.14. In 1962, the American Law Institute amended the Model Penal Code Section 3.04 and changed the language from an imminent standard to an immediately necessary one. The amendment sanctions lethal force when "such force is immediately necessary for the purpose of protecting [one]self against the use of unlawful force by such other person on the present occasion." *Id.*

241. *Id.* at 163–65.

242. *Id.* at 164.

the last best chance to defend oneself against the threat of future lethal harm.<sup>243</sup> Although the United States is nothing like a battered woman,<sup>244</sup> the evolution of imminence in domestic criminal jurisprudence helps to inform the appropriate standard of review in the international law of self-defense.<sup>245</sup>

The debate among U.S. state courts as well as feminist scholars turns on the appropriate standard of review for a jury instruction where a person suffering from BWS claims self-defense in a murder case.<sup>246</sup> In particular, should the

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243. *Id.* at 165.

244. The Battered Women Syndrome defense applies to those women who have endured abusive relationships. At the core of said abusive relationship is the maldistribution of power. The abusive partner wields more power and therefore retains the ability to exert control over the abused partner. In fact, the powerlessness experienced by the abused partner is what engenders a lack of other nonlethal options to escape the systematic abuse. On a global scale, we can define power as the ability to shift the balance of interests in one's favor. At a cursory and unsystematic glance, it is apparent that the United States wields unparalleled power among nations and organizations. Consider that the United States is one of the five permanent members of the U.N. Security Council. In addition, it boasts the strongest and largest economy in the world. See *The World Factbook: North America United States*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last updated Jan. 14, 2014). This is to say nothing of its military prowess relative to other nations as evidenced by its military spending as well as the ubiquitous presence of its military bases throughout the world. *The 15 Countries with the Highest Military Expenditure in 2011*, Table 4.2, in STOCKHOLM INT'L PEACE RESEARCH INST., [http://www.sipri.org/research/armaments/milex/resultoutput/milex\\_15/the-15-countries-with-the-highest-military-expenditure-in-2011-table/view](http://www.sipri.org/research/armaments/milex/resultoutput/milex_15/the-15-countries-with-the-highest-military-expenditure-in-2011-table/view) (last visited Jan. 16, 2014); see also Nick Turse, *Tomgram: Nick Turse, The Pentagon's Planet of Bases*, TOMDISPATCH.COM (Jan. 9, 2011, 5:13 PM), <http://www.tomdispatch.com/blog/175338/>. The United States's dominance makes it less susceptible to the constraints of international law, as evidenced by the lack of accountability it endured despite its 2003 war on Iraq, which has been described as an act of aggression. See Paul Waugh, *Attorney General Conceded Doubts over Legality of War*, THE INDEPENDENT, Mar. 4, 2004. In light of its considerable power, earning it its place as global superpower, the United States, unlike the battered woman, has several options at its disposal to avert what it may reasonably deem inevitable harm. This includes the use of nonlethal means to bolster national law enforcement capacity in those countries where al Qaeda has taken refuge or where nonstate actors have resorted to violent measures. The United States can also use law enforcement tactics globally to freeze funds, intercept communication, and avert attacks. These tactics have proven fruitful and have been touted as the measures used to keep America safe. The United States, in stark contrast to the battered woman, is powerful and does not suffer from a learned helplessness that clouds its judgment.

245. See Yoo, *supra* note 31, at 753–54. While the Obama Administration has invoked an immediately necessary standard, it has not invoked the BWS framework. In contrast, Professor Yoo invoked the BWS explicitly in a 2004 article to demonstrate the reasonableness of moving away from a purely temporal imminence requirement. Yoo writes that the BWS seeks to redefine imminence by using “past conduct—particularly escalating violence—to assess the probability that future harm is likely to occur.” *Id.*

246. See, e.g., *Paine v. Massie*, 339 F.3d 1194, 1199 (10th Cir. 2003) (quoting *Bechtel v. State*, 840 P.2d 1, 10 (Okla. Crim. App. 1992)) (stating that the standard in Oklahoma, as established by the OCCA, is that it must be a “reasonable belief.”); *State v.*

reasonable person standard in such cases be subjective or objective?<sup>247</sup> While both standards accept that a threat need not be traditionally imminent to merit a self-defense jury instruction, the subjective standard accepts a defendant's honest belief as sufficient,<sup>248</sup> while the objective standard requires that the honest belief be reasonable.<sup>249</sup> Though not settled, this tension still provides useful insight regarding the United States's new imminence.

A useful lesson the BWS debate offers is that a new standard can be developed to respond to the probability of harm without sacrificing objective review. Kansas state courts, for example, have developed a two-pronged test in their jury instruction in murder trials where the accused invokes the BWS.<sup>250</sup> It first uses a subjective standard to determine whether the defendant sincerely believed it was necessary to use lethal force to defend himself or herself. It then applies an objective standard to determine if that belief was reasonable, "specifically, whether a reasonable person in defendant's circumstances would have perceived self-defense as necessary."<sup>251</sup>

For example, as applied to the case of the United States's invasion of Iraq, a subjective approach would evaluate whether the Bush Administration sincerely believed that Saddam Hussein possessed weapons of mass destruction and that he planned to use them in an attack against the United States. In contrast, under an objective standard, the U.N. Security Council, or an alternative review

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Stewart, 763 P.2d 572, 573 (Kan. 1988) (finding the objective test is how a reasonably prudent battered wife would perceive the aggressor's demeanor); Jahnke v. State, 682 P.2d 991, 997 (Wyo. 1984) (rejecting the BWS self-defense); State v. Eng, No. 14015, 1994 WL 543277, at \*8 (Ohio Ct. App. Sept. 30, 1994) ("[A]dmission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification . . . It is to assist the trier of fact to determine whether the defendant acted out of an honest belief that she is in imminent danger of death or great bodily harm and that the use of such force was her only means of escape.").

247. See, e.g., V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1242 (2001).

248. See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batters*, 71 N.C. L. REV. 371, 391 (1993); see also Eng, 1994 WL 543277, at \*8 ("[A]dmission of expert testimony regarding the battered woman syndrome . . . is to assist the trier of fact to determine whether the defendant acted out of an honest belief that she is in imminent danger of death or great bodily harm and that the use of such force was her only means of escape.").

249. See, e.g., Paine, 339 F.3d at 1199 (quoting *Bechtel*, 840 P.2d at 6, 10) (The standard in Oklahoma as established by the OCCA is that it must be a reasonable belief. The defendant must "show that she had a *reasonable* belief as to the imminence of great bodily harm or death and as to the force necessary to compel it. A bare belief that one is about to suffer death or great personal injury will not, in itself, justify self-defense. There must exist *reasonable* grounds for such a belief at the time of the killing.") (citation omitted) (internal quotation marks omitted).

250. Stewart, 763 P.2d at 573.

251. *Id.* (Objective test is how a reasonably prudent battered wife would perceive the aggressor's demeanor.).



body, would first assess whether the Bush Administration's belief was sincere, and then evaluate whether or not the belief was reasonable.

As U.S. domestic courts have demonstrated, even in situations involving redefined imminence, judicial review of lethal force is necessary. The international law of self-defense intends to regulate the use of force in law; therefore, that force must meet objective criteria. Otherwise, each state would be permitted to decide for itself when the use of force is necessary without external restraint. Such a proposition would "amount to a leap into the abyss of anarchy."<sup>252</sup>

***C. Either All States Can Do It, or Only Select States Can: The Redefinition of Imminence and Self-Defense Either Violates the Principle of Reciprocity or Sanctions the Unregulated Use of Force by All States***

In addition to putting at risk the international regulation of the use of force, the United States's redefinition of imminence and legal self-defense may also violate the principle of reciprocity, thereby undermining the equality of states.<sup>253</sup> International law is based on the theory that all states are equal to one another regardless of size or power.<sup>254</sup> What is available to one nation in its defense of self should be equally available to all other nations according to the principle of reciprocity.<sup>255</sup> By consistently advancing new imminence in practice, the United States may be planting the seed for a new customary law regarding permissible use of force in anticipatory self-defense.<sup>256</sup> On the other hand, it may insist that such a right belongs only to itself and its allies, in which case the United States would undermine the equality of states.<sup>257</sup> If the United States retains an exclusive right to such a practice, it is effectively declaring that it is exercising a privilege as global superpower, and not a sovereign right that belongs to all other

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252. Jahnke v. State, 682 P.2d 991, 997 (Wyo. 1984) ("To permit capital punishment to be imposed upon the subjective conclusion of the [abused] individual that prior acts and conduct of the deceased justified the killing would amount to a leap into the abyss of anarchy.").

253. See EMER DE Vattel, THE LAW OF NATIONS 75 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) ("A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.").

254. *Id.*

255. FLETCHER & OHLIN, *supra* note 30, at 67, 75.

256. See George E. Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 55 (2009). The International Law Division of the Israeli Military Advocate General stated: "If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries . . . International law progresses through violations. We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into legal moulds. Eight years later it is in the center of the bounds of legitimacy." *Id.*

257. See U.N. Charter art. 38(b) (applying "international custom, as evidence of a general principle accepted as law" to settle disputes).

states.<sup>258</sup> Alternatively, if other states are permitted to use similar force based on the new imminence, great challenges will arise in the global regulation of the use of force.<sup>259</sup> Neither scenario bodes well for the rule of law.

Consider, for example, the case of Iran and Israel. Israel has historically applied new imminence to kill individuals in the Occupied Palestinian Territory and beyond without objection from the United States.<sup>260</sup> More recently, Israel has made known its willingness to strike Iran in order to curtail Iran's nuclear ambitions.<sup>261</sup> Amid reports that he has been trying to persuade his cabinet to support an attack on Iran,<sup>262</sup> Prime Minister Binyamin Netanyahu has made numerous public statements vaguely threatening a strike. At the opening of the 2011 Knesset winter session, Netanyahu declared that among Israel's guiding principles is that "[i]f someone comes to kill you, rise up and kill him first."<sup>263</sup> In a U.N. speech in early 2012, he warned that Iran's nuclear ambitions must be stopped "before it's too late."<sup>264</sup> Several other Israeli officials have suggested that Israel had the right and the desire to preemptively strike Iran, thereby indicating a national policy.<sup>265</sup> Such a strike would be tantamount to preventive war and raises

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258. SCHACHTER, *supra* note 15, at 140 ("It surely cannot be said that this result is perceived to be in the national interest of States generally, or, for that matter, in the interest of the most powerful States.").

259. See Richard Falk, *Roundtable on Targeted Killing: A Meditation on Reciprocity and Self-Defense in Relation to Targeted Killing*, JADALIYYA (Mar. 6, 2012), [http://www.jadaliyya.com/pages/index/4565/roundtable-on-targeted-killing\\_a-meditation-on-rec](http://www.jadaliyya.com/pages/index/4565/roundtable-on-targeted-killing_a-meditation-on-rec) ("In other words, reciprocity is not likely to shape the future of targeted killing, but rather a regime of *double standards* that resembles what exists in relation to international criminal accountability or with respect to the possession and proliferation of nuclear weaponry.").

260. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7.

261. See *Israeli PM Threatens to Strike Iran*, AL JAZEERA (July 17, 2013), <http://www.aljazeera.com/news/middleeast/2013/07/2013714214528446397.html>; see also Barak Ravid, *Netanyahu Trying to Persuade Cabinet to Support Attack on Iran*, HAARETZ (Nov. 2, 2011, 12:51 AM), <http://www.haaretz.com/print-edition/news/netanyahu-trying-to-persuade-cabinet-to-support-attack-on-iran-1.393214>.

262. Ravid, *supra* note 261.

263. *PM Netanyahu Addresses Opening of Knesset Winter Session*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Oct. 31, 2011), [http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2011/PM\\_Netanyahu\\_opening\\_Knesset\\_winter\\_session\\_31-Oct-2011.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2011/PM_Netanyahu_opening_Knesset_winter_session_31-Oct-2011.htm).

264. *Remarks by PM Benjamin Netanyahu to the U.N. General Assembly*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Sept. 23, 2011), [http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2011/Remarks\\_PM\\_Netanyahu\\_UN\\_General+\\_Assembly\\_23-Sep-2011.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2011/Remarks_PM_Netanyahu_UN_General+_Assembly_23-Sep-2011.htm).

265. See *IDF Home Front Command: Likelihood of All-out Middle East War Increasing*, HAARETZ (Sept. 5, 2011, 10:21 P.M.), <http://www.haaretz.com/news/diplomacy-defense/idf-home-front-command-likelihood-of-all-out-middle-east-war-increasing-1.382728> (IDF Major General Eyal Eisenberg remarked in a speech that "the likelihood of an all-out regional war in the Middle East is increasing."); see also Gili Cohen, *Barak: Nuclear Iran Far More Dangerous than Preemptive Israeli*

the question of whether the Obama Administration limits its new imminence to cases involving nonstate actors only, thereby distinguishing itself from the Bush Administration, which applied it to states as well. Nevertheless, it is very plausible that the United States may tolerate a preventive Israeli strike on Iran.<sup>266</sup> Would it respond with similar approbation, however, if Iran preemptively attacked Israel in self-defense based on new imminence?

Under new imminence, Iran can legitimately kill Israeli nuclear scientists in anticipatory self-defense.<sup>267</sup> Iran can demonstrate that there exists a very likely probability that Israel will strike it based upon Israel's history of violent attack (i.e., the 1982 attack on Iraq's Osirak nuclear reactor) together with its intent to strike Iran today (i.e., official Israeli statements) and a capacity to do so. Although much of its nuclear program remains shrouded in secrecy, experts have estimated that Israel has nearly 400 nuclear devices, delivery systems with ranges that reach far beyond Iran, and the ability to deliver nuclear weapons by submarine or jet fighter.<sup>268</sup> In late 2011, Israel test-fired a Jericho missile capable of reaching Iran.<sup>269</sup> Based upon the United States's redefinition of imminence, Iran can legitimately launch a preemptive strike against Israel.

Iranian targeted killings of Israeli scientists deemed critical for a nuclear attack against Iran would be destabilizing not just for Israel and a conflict-ridden Middle East, but also for the entire world. At worst, such killings have the potential to draw several other state actors into a devastating armed conflict.<sup>270</sup>

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*Strike*, HAARETZ (July 25, 2012, 10:02 PM), <http://www.haaretz.com/news/diplomacy-defense/barak-nuclear-iran-far-more-dangerous-than-preemptive-israeli-strike-1.453645>.

266. See REUTERS, *U.S.-Israeli Military Exercise to Be Smaller than First Planned*, CHI. TRIB. (Aug. 31, 2012), [http://articles.chicagotribune.com/2012-08-31/news/sns-rt-us-usa-israel-defensebre87u1dl-20120831\\_1\\_military-exercise-austere-challenge-military-personnel](http://articles.chicagotribune.com/2012-08-31/news/sns-rt-us-usa-israel-defensebre87u1dl-20120831_1_military-exercise-austere-challenge-military-personnel).

267. See Eli Lake, *Has Israel Been Killing Iran's Nuclear Scientists?*, DAILY BEAST (Jan. 13, 2012), <http://www.thedailybeast.com/articles/2012/01/13/has-israel-been-killing-iran-s-nuclear-scientists.html>; Josh Levs, *Who's Killing Iranian Nuclear Scientists?*, CNN (Jan. 11, 2012, 4:31 PM), [http://articles.cnn.com/2012-0111/middleeast/world\\_meast\\_iran-who-kills-scientists\\_1\\_iranian-nuclear-scientists-iranian-regime-natanz?\\_s=PM:MIDDLEEAST](http://articles.cnn.com/2012-0111/middleeast/world_meast_iran-who-kills-scientists_1_iranian-nuclear-scientists-iranian-regime-natanz?_s=PM:MIDDLEEAST); Ramin Mostafavi & Parisa Hafezi, *Bomb Kills Iran Nuclear Scientists As Crisis Mounts*, REUTERS (Jan. 11, 2012, 6:57 PM), <http://www.reuters.com/article/2012/01/11/us-iran-idUSTRE8090ZL20120111>.

268. Joseph Massad, *Nuclear Israel Revisited*, AL JAZEERA AM. (Nov. 10, 2011, 2:30 P.M.), <http://www.aljazeera.com/indepth/opinion/2011/11/2011111075527560230.html>.

269. See Dan Williams, *Israel Test-Fires Missile As Iran Debate Rages*, REUTERS (Nov. 2, 2011, 11:00 AM), <http://www.reuters.com/article/2011/11/02/us-israel-missile-idUSTRE7A11BR20111102>.

270. See INT'L CRISIS GP., UNCHARTED WATERS: THINKING THROUGH SYRIA'S DYNAMICS 7 (2011). The Syrian uprising is pivotal to various historical struggles in the region, which explains its protracted nature and, significantly, the undesirable nature of nearly all options on the table. In sum, it is no longer a local event. It is a regional and international event all at once. Regionally and internationally, the Syrian uprising involves the question of Palestine, the question of resistance, involving the Syria-Iran-Hezbollah axis, the question of balance of power in the region, and it involves international forces that

Additionally, unless Iran approached the U.N. Security Council to present its case and demonstrate that it had exhausted all other pacific means to avert an inevitable Israeli strike, it would undermine the U.N. Security Council's authority to maintain international peace and security.<sup>271</sup> In light of the United States's unique alliance with Israel, it would likely enter an armed conflict and use its authority in the Security Council to condemn Iran's attack.<sup>272</sup> Although such condemnation would be deserved and rightly placed, it would also illustrate a double standard that limits the use of new imminence to the United States and its allies, undermining the principle of reciprocity.<sup>273</sup>

Some scholars may argue that this consideration is misplaced if one accepts that the United States's military force is a public good.<sup>274</sup> The United States, on behalf of the international community, assesses the value of the use of force among states. Hence, the United States should be subject to a test of reasonableness and not to the law of self-defense to govern its use of force.<sup>275</sup> This framework, however, vests unwarranted trust in, and deference to, a single state to maintain global peace and security. This is especially true considering that the community of nations ordained this mandate to the U.N. Security Council and, more generally, to an international organization of states.<sup>276</sup> Presumably, a reasonableness standard is appealing to U.S. legal scholars today because of the

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are attempting to leverage their power in a changing region—including the United States, European countries, Russia, and China. *Id.*

271. See U.N. Charter art. 51.

272. See, e.g., JEREMY SHARP, CONG. RESEARCH SERV., U.S. FOREIGN AID TO ISRAEL 13–14 (2012). The United States is stockpiling an increasing number of weapons in Israel, increasing from \$100 million worth of material to nearly \$1.2 billion in recent years. *Id.* “The initial value of the U.S. material stored in Israel was set at \$100 million. It increased over time to \$800 million in 2010. In the 111th Congress, lawmakers passed P.L. 111-266, the Security Cooperation Act of 2010. Section 302 of the Act amends the Department of Defense Appropriations Act, 2005 to extend the President's authority to transfer to Israel surplus defense items that are stockpiled in Israel and intended for use as Israeli reserve stocks. This amendment reportedly will increase the value of U.S. material stored in Israel from \$800 million to \$1.2 billion.” *Id.*; REUTERS, *supra* note 266 (U.S. and Israel ran military exercises together involving the use of missile weaponry “amid reports” that Netanyahu and Ehud Barak are planning an Iran attack); see also US, *UN Condemn Attack on British Embassy in Tehran*, VOICE OF AM. NEWS (Nov. 28, 2011), <http://www.voanews.com/content/us-un-condemn-attack-on-british-embassy-in-tehran-134708828/148883.html>. The United States has used its authority in the U.N. Security Council to condemn Iran before. Last November, the United States, Britain, and the Security Council condemned an attack on a British embassy in Tehran “‘in the strongest terms’ and stress[ing] Iran’s responsibility under international protocols to protect diplomatic missions and personnel.” *Id.*

273. See Falk, *supra* note 259.

274. Yoo, *supra* note 31, at 729 (urging “an approach that weighs costs and benefits to the stability of the international system, which could be seen as an international public good currently provided by the United States . . .”); see also Robert Kagan, *Power and Weakness*, POL’Y REV. NO. 113, June 1, 2002, at 6–7.

275. See e.g., Sofaer, *supra* note 31, at 213.

276. See U.N. Charter art. 51.

United States's position as global superpower. However, would (or should) the United States adhere to this principle were China to assume the superpower reign? More realistically, did the United States adhere to this principle when European countries held that status?<sup>277</sup> Conditional observance of this principle makes it a gratuitous one and, therefore, inadequate as law. A state exercising exclusive privileges to the use of force does so in violation of reciprocity. Otherwise, it understands that its privileges belong to all. Either possibility threatens the international order or the regulation of the use of force.

#### IV. MITIGATING THE RISKS POSED BY NEW IMMINENCE

The equation for new imminence—past behavior, capacity, and intent—is missing one element to make it less susceptible to abuse: objectively establishing that force is a measure of last resort. A state can produce evidence that demonstrates that an attack is indeed certain, but if it lacks a temporal quality, then presumably there is time to exhaust other, nonforceful remedies. There are, generally, two means of mitigating the risk new imminence poses to the international order and the regulation of the use of force. Either the community of nations establishes and affirms an oversight review mechanism, or it maintains the traditional meaning of imminence and affords states other means to avert terrorist threats. Each option is discussed below.

##### *A. Establishing and/or Affirming an Oversight Review Mechanism*

The U.N. Security Council should be the site of first resort to deal with a nonimminent threat that a state perceives as real. If all nonforceful means by the state and the Security Council fail to incapacitate the threat, then, as stated by the U.N. High-Level Panel on Threats, Challenges, and Change, the military option can be revisited.<sup>278</sup> The U.N. Charter imbues the Security Council with the responsibility to “maintain or restore international peace and security.”<sup>279</sup> Article 51, in particular, mandates that a member state immediately report to the Security Council the measures it takes in exercising its right to self-defense.<sup>280</sup> In its practice of new imminence, the United States has not adhered to this mandate, thus raising concerns about the abuse of legal self-defense.<sup>281</sup> Mitigating the

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277. See Kagan, *supra* note 274. During the political dominance exercised by France, Britain, and Russia, the United States was “constantly vulnerable to imperial thrashing . . . In an anarchic world, small powers always fear they will be victims. Great powers, on the other hand, often fear rules that may constrain them more than they fear the anarchy in which their power brings security and prosperity.” *Id.*

278. A MORE SECURE WORLD, *supra* note 46, at 55.

279. U.N. Charter arts. 39–51.

280. *Id.* at art. 51 (“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.”).

281. The Obama Administration, for example, has asserted that this conflict is an ongoing conflict and it need not conduct a separate self-defense analysis in each instance of targeted killing.

susceptibility to abuse requires that states conform with Article 51's obligation when they invoke new imminence. Doing so would establish that all other nonforceful remedies have been exhausted and would return the regulation of the use of force to a collective enforcement model. Significant political sensitivities have impeded the Security Council's ability to resolve national security challenges marked by new imminence. Failing to overcome those hurdles, states should consider creating a new subsidiary body that accounts for some of those sensitivities.

To date, the Security Council's structural limitations have impeded its ability to deal with threats involving new imminence. Among the primary challenges raised by U.N. Security Council oversight is the veto power afforded to its five permanent members.<sup>282</sup> Accordingly, political considerations, economic interests, and even metacultural affinities with other states will shape determinations of self-defense.<sup>283</sup> On the other hand, these very impediments may appeal to the United States, a veto-holding member, as the politicized nature of the Security Council ensures that it can participate in the regulation of its own force. The Council's arbitrary composition, however, makes this best-case scenario unlikely. Even veto-holding member states may be wary of sharing their intelligence data, which can reveal sensitive intelligence and intelligence-gathering methodologies to nonallies.<sup>284</sup> An *ex ante* reporting requirement may further increase a state's wariness to approach the Security Council for fear that doing so would undermine its ability to act with the benefit of surprise.<sup>285</sup> These considerations may very well have underscored former Secretary General Annan's suggestion that in order to deal with modern warfare, the Security Council should reevaluate its role and consider new approaches to assessing the early authorization of coercive measures.<sup>286</sup>

In his article examining new imminence and the Bush Doctrine, Thomas R. Anderson suggests the creation of a specialized subsidiary tribunal within the Security Council, what he calls the International Court of Threat Assessment or the "ICTA."<sup>287</sup> Anderson suggests that the ICTA:

- (1) be non-adversarial, (2) be non-public in its proceedings, (3) have a large pool of impartial judges from which petitioning states may choose, (4) possess special competencies in strategic intelligence assessment, (5) offer only advisory opinions, (6) possess a widely-

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282. The five permanent members are China, France, the United Kingdom, Russia, and the United States. Each of these members has veto power. See *Current Members*, U.N. SECURITY COUNCIL, <http://www.un.org/sc/members.asp> (last visited Jan. 15, 2014).

283. Anderson, *supra* note 55, at 283.

284. *Id.* at 283–84.

285. *Id.* at 284.

286. *Id.*

287. *Id.* at 285.

accepted set of criteria for authorizing prophylactic self-defense, and (7) be a court of last resort.<sup>288</sup>

He suggests that the court conduct in camera proceedings much like the Foreign Intelligence Surveillance Court, which evaluates the adequacy of government intelligence to support issuance of a surveillance warrant.<sup>289</sup> To overcome the politicization of the tribunal, it should operate like a grand jury, where only one side will offer evidence to a panel comprised of impartial judges chosen by the petitioning states.<sup>290</sup> These judges will constitute a standing body of jurists, diverse in nationality and expertise, available to all petitioning states.<sup>291</sup> Significantly, the ICTA will only be empowered to issue Advisory Opinions. Although a nonbinding opinion may seem inadequate to regulate the use of force, absent this provision, states may prefer to take the risk of using force to avoid acting in contravention of a negative determination by the ICTA.<sup>292</sup> Alternatively, over time, the ICTA's jurisprudence could provide a body of law and practice that informs the behavior of states, thereby offering long-term benefits to the international order.<sup>293</sup>

In order to deal with the challenges raised by national intelligence, sources, and data, this tribunal would benefit from an *ex post* review process as well. The Israeli High Court of Justice's 2005 decision *Public Committee Against Torture in Israel [PCATI] v. Government of Israel*,<sup>294</sup> is helpful in this regard. There, the High Court of Justice concluded that military discretion in carrying out targeted killings is not at odds with an "objective retrospective examination."<sup>295</sup> The court held that an executive committee should be appointed to decide whether the military commander's decision to execute a targeted killing "is a decision that a reasonable military commander was permitted to make."<sup>296</sup> In the course of that evaluation, an executive committee should afford special weight to the military opinion justifying the lethal attack.<sup>297</sup> In contrast to the ICTA, the High Court's prescription was intended as a domestic, internal remedy. As such, it does not face the intrastate political sensitivities that exist within a multilateral structure. Notwithstanding this critical distinction, an *ex post* review process may alleviate some of the national security concerns rife in an *ex ante* review process. In cases where a state cannot share its data beforehand or it seeks to launch a surreptitious

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288. *Id.* at 286.

289. *Foreign Intelligence Surveillance Court*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/courts\\_special\\_fisc.html](http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html) (last visited Jan. 15, 2014).

290. Anderson, *supra* note 55, at 286–87.

291. *Id.* at 287.

292. *Id.* at 288.

293. *Cf. generally* Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337 (2004).

294. HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel*, P.D. [2005].

295. *Id.* ¶ 59.

296. *Id.* ¶ 57.

297. *Id.*

attack, it will be able to submit its evidence and reasoning to the panel after the fact. Significantly, an *ex post* review option preserves the role of the Security Council, and a collective enforcement model more generally, in regulating the use of force.

Anderson suggests a sample of authorizing criteria developed by the Chatham House, an international think tank known for facilitating confidential meetings within and among the public and private sector.<sup>298</sup> The Chatham House suggestions may be an adequate starting point, but they do not include instructions on how to evaluate evidence. To ensure an objective evaluation of available intelligence data, I would add a provision that the ICTA adhere to rules developed in U.S. domestic criminal cases involving the BWS.<sup>299</sup> Namely, the court should use a two-pronged approach in its assessments whereby it determines first whether the petitioning state's case for the use of force is sincere. If so, it should then determine whether that belief is reasonable.<sup>300</sup> As to evidentiary standards, the tribunal should consider using a beyond-a-reasonable-doubt standard to establish the exhaustion of nonforceful remedies and a clear-and-compelling standard to establish that a threat is in fact imminent.<sup>301</sup> Unlike the sensitivities surrounding whether or not a threat is imminent, it should be publicly demonstrable that all diplomatic, economic, multilateral, and law enforcement efforts have been exhausted.<sup>302</sup>

Even in light of this innovative approach and others like it, an international court may fail to adequately regulate the use of force. States may still be averse to disclosing their national security intelligence, even to a judicial panel of its choosing. Moreover, like the Security Council, political considerations will undoubtedly continue to afflict the ICTA, undermining its judicial authority.<sup>303</sup>

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298. See Anderson, *supra* note 55, at 289 (“1. The law on self-defence encompasses more than the right to use force in response to an ongoing attack . . . 2. Force may be used in self-defence only in relation to an ‘armed attack’ whether imminent or ongoing . . . 3. Force may be used in self-defence only when this is necessary to bring an attack to an end, or to avert an imminent attack. There must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack . . . 4. A state may use force in self-defence against a threatened attack only if that attack is ‘imminent’ . . . 5. The exercise of the right of self-defence must comply with the criterion of ‘proportionality’ . . . 6. Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors.”).

299. *Id.*

300. See, e.g., *State v. Stewart*, 763 P.2d 572, 573 (Kan. 1988).

301. If new imminence could be established beyond a reasonable doubt then it would be apparent to all and there would be no need for an external review. See Schmitt, *supra* note 34, at 531, 535.

302. *Id.* at 531.

303. See, e.g., Courtenay Griffiths, *The International Criminal Court Is Hurting Africa*, THE TELEGRAPH (July 3, 2012, 3:20 P.M.), <http://www.telegraph.co.uk/news/world-news/africaandindianocan/kenya/9373188/The-International-Criminal-Court-is-hurting-Africa.html>; Richard Lough, *African Union Accuses ICC Prosecutor of Bias*, REUTERS (Jan. 30, 2011, 3:59 A.M.), <http://www.reuters.com/article/2011/01/30/ozatp-africa-icc-idAFJOE70T01R20110130>.



Nevertheless, as put by Anderson, although the proposed court is not without flaws, in this case “the perfect is the enemy of the good.”<sup>304</sup> The existence of an oversight body, while not perfect, would set new criteria in international law that limits the self-regulation of the use of force, which is the greatest threat new imminence poses to the international order.

***B. Maintain the Traditional Meaning of Self-Defense and Invoke State Necessity to Avert Terrorist Threats***

The United States, among other states, may insist that any oversight of its use of force in cases that involve sensitive national security intelligence is untenable. Alternatively, states should consider preserving the traditional law of self-defense and characterizing all pursuits of nonstate actors under the regime of state necessity. In doing so, states would conform to a political, rather than a legal, framework to respond to terrorist threats. State necessity is the force majeure of international law.<sup>305</sup> It permits the contravention of state obligations when absolutely necessary.<sup>306</sup> In those cases, the exceptional circumstances preclude the wrongfulness of the act.<sup>307</sup> Unlike self-defense, where force is justified, under state necessity such force is illegal but excusable in the face of extraordinary circumstances.<sup>308</sup>

The International Law Commission (ILC), headed by Special Rapporteur Roberto Ago, codified state necessity as Article 33 of the Draft Articles on State Responsibility in 1980.<sup>309</sup> The draft articles permit states to violate their international legal duties in exceptional circumstances where three conditions are satisfied. First, an essential interest must be at stake that is beyond the control of the state.<sup>310</sup> Second, the preservation of such interest must be the only means to avert “the extremely grave and imminent peril.”<sup>311</sup> Finally, the state must balance interests and ensure that the interest preserved is more valuable than the interest

304. Anderson, *supra* note 55, at 290.

305. Special Rapporteur on State Responsibility, *Addendum to the 8th Report on State Responsibility*, 2 Y.B. Int'l L. Comm'n. 14, U.N. Doc. A/CN.4/318/ADD. 5–7 (1980) [hereinafter *Addendum to the 8th Report on State Responsibility*](Force majeure describes the situation “where unforeseen and unavoidable external circumstance, an irresistible ‘force’ beyond the control of the subject taking the action, makes it materially impossible for that subject to act in conformity with an international obligation.”).

306. *Id.* ¶ 2.

307. *Id.* ¶ 3.

308. *Id.* ¶ 14.

309. Special Rapporteur, *2d Report on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/498/Add.2 (1999) [hereinafter *2d Report on State Responsibility*]. These draft articles were adopted in the 56th Session of the General Assembly on January 28, 2002. U.N. Doc. A/RES/56/83 (2002). Note that what was Article 33 under the 1980 report has now been adopted under Article 25 in the 56th Session. *Id.*

310. *Addendum to the 8th Report on State Responsibility*, *supra* note 303, at 19–20 ¶ 13.

311. *Id.* ¶ 14.

violated.<sup>312</sup> States have invoked necessity to both violate the law (i.e., feed its population or protect the ecological order)<sup>313</sup> as well as to avoid compliance with an international obligation (i.e., noncompliance with international financial obligations or with certain acts of jurisdiction on the high seas).<sup>314</sup> In 1999, the most recent Special Rapporteur, James Crawford, published a report on state responsibility followed by a commentary in 2002.<sup>315</sup> He concluded that state practice and judicial decisions underscored the existence of state necessity and recommended maintaining the content of Article 33.<sup>316</sup> Moreover, in *Gabikovo–Nagymaros Project*, the ICJ found that state necessity as captured in Article 33 is customary law.<sup>317</sup>

State necessity has been invoked in several cases to excuse the use of force.<sup>318</sup> While some jurists argue that the U.N. Charter has made necessity obsolete in this regard,<sup>319</sup> Professor Ago and the ILC's 1980 Report on State Responsibility conclude otherwise.<sup>320</sup> Article 33 is not available when the wrongful act violates a preemptory norm, "in particular if that act involves noncompliance with the prohibition of aggression."<sup>321</sup> The 1980 ILC Report concludes that not all infringements upon a state's sovereignty amount to an act of aggression or breach an international obligation of *jus cogens*.<sup>322</sup> Necessity therefore remains available to excuse the exceptional use of force, although it cannot be invoked as a source of authority to do so.<sup>323</sup> As an excuse, it must be applied as a matter of *ex post* review.<sup>324</sup>

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312. *Id.* ¶ 15 (prescribing a balancing of interests when contemplating the standard of the state of necessity: "[T]he interest protected by the subjective right vested in the foreign state, which is to be sacrificed for the sake of an 'essential interest' of the obligated state, must obviously be inferior to that other interest.").

313. *Id.* ¶ 35. In the 1967 Torrey Canyon incident, the British government bombed a Liberian ship carrying 117,000 tons of crude oil to avoid an oil spill just outside British territorial waters. *Id.*

314. *See, e.g., id.* ¶¶ 28–31 (summarizing Greece's argument before the ICJ that failure to repay debts to a Belgian company was necessary to preserve order and social peace).

315. *2d Report on State Responsibility, supra* note 307.

316. *Id.* at 74. The ILC, furthermore, found that "on balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions" and recommended retaining the content of Article 33 (eventually Article 25). *Id.*

317. *Gabikovo-Nagymaros Project*, 1997 I.C.J. 7, at ¶ 51.

318. *See* Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT'L L. 485, 514–19 (2004).

319. *Id.* at 508.

320. *See* SCHACHTER, *supra* note 15, at 171 ("The Commission sought to meet this problem by distinguishing between aggression, conquest, and forcible annexation on the one hand and lesser acts of force such as temporary incursions and intervention to apprehend criminals or to prevent injury to people or property.").

321. *Id.*; *2d Report on State Responsibility, supra* note 307.

322. *Addendum to the 8th Report on State Responsibility, supra* note 303, at 5–7.

323. *See* Laursen, *supra* note 318, at 509 (quoting Rep. of the Int'l Law Comm'n, 32d Sess., May 5–July 25, 1980, U.N. Doc. A/35/10, GAOR, 35th Sess., Supp. No. 10

Like the use of force under the international law of self-defense, the invocation of state necessity is a measure of last resort. Under the doctrine of necessity, however, an imminent threat need not be an attack already in motion. Instead, the attack must be certain and inevitable based upon the “evidence reasonably available at the time.”<sup>325</sup> The ICJ observed that while imminence under the necessity doctrine is akin to “immediacy,” it goes far beyond a mere possibility.<sup>326</sup> The ILC explains that this temporal distance is particularly pertinent to threats to the natural environment, where immediate action should be taken to avert an inevitable outcome.<sup>327</sup>

Several scholars have endorsed the notion that state necessity can govern the use of force in response to terrorist threats.<sup>328</sup> As noted by Professor Schachter, where self-defense triggers an armed conflict between states, “the excuse of ‘necessity’ is not meant to involve States in a belligerent setting. It recognizes that threatened States may be compelled to act against hit-and-run criminals who operate across national borders but not as belligerents in an inter-State armed conflict.”<sup>329</sup> This analysis is not bound by law but rather by political considerations because it is made on a case-by-case basis by the state itself.<sup>330</sup> Invocation of state necessity should therefore be a political decision based upon moral rather than legal considerations and made only in exceptional cases.

As an ad hoc response to exceptional circumstances, necessity cannot be invoked to respond to systemic conditions. To do so would be an oxymoron.<sup>331</sup> Necessity imagines a situation where the potential harm is of significant magnitude for which there exist no other remedial measures. Not every terrorist threat is exceptional. There must be a distinction between terrorist attacks of great magnitude, like those that can be wrought by weapons of mass destruction, for example, and more conventional acts of terrorism that target a handful of

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(1980) (“It remained to consider the problem of the possible existence of conduct which, although infringing the territorial sovereignty of a State, need not necessarily be considered as an act of aggression or not, in any case, as a breach of an international obligation *ius cogens*.” Like Ago, the ILC maintained that it is for the organs charged with interpreting the U.N. Charter to determine whether the differentiation is valid.”)

324. *Id.* at 514.

325. *Id.*

326. Gabikovo-Nagyoros Project, 1997 I.C.J. 7, at ¶ 54.

327. *2d Report on State Responsibility*, *supra* note 307.

328. *See, e.g.*, David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 187–88 (2005); *see also* HENKIN, *supra* note 14; *see also* SCHACHTER, *supra* note 15, at 169–73.

329. SCHACHTER, *supra* note 15, at 172.

330. *2d Report on State Responsibility*, *supra* note 309 (How “essential” an interest is to a state will be dependent on the “totality of the conditions in which a State finds itself in a variety of specific situations; it should therefore be appraised in relation to the particular case . . . and not predetermined in the abstract.”).

331. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 230 (July 20) (Winiarski, President, dissenting) (“A systemic problem concerning a pattern of attacks would, however, appear to be at odds with this function of the necessity excuse.”).

people.<sup>332</sup> Accordingly, the United States cannot simply supplant its existing self-defense analysis with a necessity one. Instead, the United States must define the scope of its ongoing hostilities where the laws of armed conflict regulate its targeting practice. Beyond that battlefield, whose contours merit particular scrutiny, the law of peacetime must apply. In those circumstances, there are three situations that can arise, which I discuss below.

First, in cases where a nonstate actor whose acts are imputable to a state and who has initiated an attack, the United States can invoke the law of self-defense to use force against that actor and that state. Secondly, in cases where a nonstate actor poses a threat to the United States as well as the host state and the host state consents to the United States's use of force, that force shall be regulated by the laws governing the host state's internal conflict, namely, domestic criminal law or the laws governing a noninternational armed conflict.<sup>333</sup> Finally, in cases where a nonstate actor poses a nonproximate threat of significant magnitude to the United States and the host state is unwilling or unable to incapacitate the threat, the United States can invoke necessity to lethally target a threat, even in contravention of the host state's sovereignty and without evidence beyond a reasonable doubt that it was a measure of last resort. Instead, the standard is reasonableness based upon evidence readily available at the time.

Without the benefit of the factual details upon which each necessity analysis should turn, it is difficult to unpack this last example thoroughly. Indeed, necessity is always a case-by-case analysis based on the facts and circumstances particular to each instance where it is invoked. For the sake of illustration, in all cases where the United States invokes necessity to use preventive force against a nonstate actor, it must show four things. First, the United States must show its essential interest is its security from exceptional harm. Second, it must be able to demonstrate that the threat posed by the nonstate actor is immediate and inevitable. Third, the United States must also demonstrate that the interest violated (i.e., state sovereignty and the illegal use of force) is inferior to the interest preserved: protection from an attack of significant magnitude. There may be a broader collective interest at stake, such as a human rights norm. If so, the United States must be able to demonstrate that this interest is inferior to its security as well. Fourth, the United States must concede the illegality of its operation but excuse it on the basis of necessity.

Admittedly, replacing the framework of self-defense with state necessity may not curtail the use of preventive force.<sup>334</sup> In fact, invocation of an immediacy

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332. See Laursen, *supra* note 318, at 519–25 (discussing conventional and “new” terrorism).

333. Martin, *supra* note 170, at 234.

334. See ABRAHAM D. SOFAER, *THE BEST DEFENSE? LEGITIMACY & PREVENTIVE FORCE* 100–01 (2010). Necessity also finds support in the proposition that a legitimacy analysis supplement the legality of the use of force. The U.N. High-level Panel recommended a set of guidelines to determine the legitimacy of forceful measures: seriousness of the threat, proper purpose, last resort, proportional means, and balance of consequences. The Panel restricts this analysis where the use of force satisfies a traditional

standard and reliance upon evidence reasonably available at the time looks much like the United States's existing approach to the international law of self-defense in nontraditional conflict. Supplanting a self-defense analysis with the state necessity doctrine is nonetheless significant for three reasons. First, it permits the use of force in exceptional circumstances, thus curtailing the systemic invocation of self-defense currently done by the Obama Administration. Second, the doctrine ensures that the use of force to prevent, rather than to avert, harm remains illegal. Third, and conversely, invoking state necessity preserves the traditional meaning of imminence and, therefore, the law of self-defense. Such preservation should not be underestimated, because stretching imminence to an unrecognizable form arguably sanctions preventive warfare as a matter of law.

Several commentators have rightly emphasized that in the absence of a hierarchical international order with enforcement authority, the law of self-defense has hardly restrained states seeking to use force.<sup>335</sup> Thus, it is fair to question the precise value of the law of self-defense and its preservation in light of its inability to properly regulate the use of force in all instances. The imperfect nature of the law of self-defense is dispositive evidence of its futility. It would be just as shortsighted to declare that the prohibition and criminalization of murder be removed because of extraordinary murder rates. In nearly all cases where states have resorted to force, they have declared their right to do so in self-defense, as a matter of fact without regard to its meaning in law.<sup>336</sup> Far from indicating its irrelevance, the appeal to self-defense demonstrates how states have internalized the law of self-defense constraining the use of force.

The value of the international law of self-defense, imbued as it is with aspirational standards, is worth preserving. A commitment among states to refrain from the use of force is an achievement borne from the ravages of war. Indeed, sacrificing the traditional definition of self-defense would destroy “the principal advance in international law, the outlawing of war, and the prohibition of force.”<sup>337</sup> Therefore, although supplanting the framework of self-defense with state necessity may not eliminate the use of preventive force among states, it certainly makes preventive force an exceptional exercise as opposed to a permissible practice.

### CONCLUSION

The practice of targeted killings threatens to make justifiable that which international law should only consider permissible in exceptional circumstances. In its targeted killing practice, the Obama Administration has endorsed and

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legal test. Presumably, legal invocation of force confers legitimacy upon it. Abraham Sofaer comments, “[w]hile the High-level Panel may not have intended legitimacy guidelines to become an alternative to strict legality, that could be the practical result of its proposal.” *Id.* at 100. I do not think this is optimal, but the point here is that what is necessary may be legitimate despite its illegality in exceptional cases.

335. See SCHACHTER, *supra* note 15, at 184; see also Ramirez, *supra* note 212, at 17–21; Yoo, *supra* note 31, at 729–30.

336. See SCHACHTER, *supra* note 15, at 135.

337. HENKIN, *supra* note 35.

perpetuated the redefinition of imminence as articulated by previous U.S. administrations, at least since the Reagan Administration. Like its predecessors, the Obama Administration emphasizes that strict adherence to a traditional meaning of imminence would place the United States, its interests, and its citizens at considerable and unnecessary risk.

While this may very well be true, the prescription to this challenge should not abandon the regulation of the use of force by international law and order. Doing so would afford excessive latitude to each individual state, thereby exposing the law of self-defense to the risk of abuse. To balance the contemporary security concerns of states and the interests of preserving the regulation of force in international law, states should affirm the Security Council's role as the arbiter of international peace and security, or create a new subsidiary body to serve a regulatory purpose. Alternatively, states should supplant the legal framework, used to incapacitate threats from nonstate actors, with a political one. In so doing, states would deny conferring blanket legitimacy to the unregulated use of force.

These remedies aim to curtail, rather than halt, the abuse of state force. They ingrain a commitment among states in both practice and legal analysis that modern warfare does not justify any means necessary. To the contrary, existing law, multilateral mechanisms, and alternative frameworks can empower states to adequately meet the security challenges facing them without disrupting the international world order. Acceptance of new imminence by states is a regressive move away from the international regulation of force. Self-regulated use of force overlooks a slippery slope, at the bottom of which is a barren battlefield where unadulterated abuse of power prevails. Whereas the Obama Administration limits its application of new imminence to nonstate actors, the United States's still-recent invasion of Iraq illustrates that even sovereign states are not immune from the risk of illegal and illegitimate assault. States intended to curtail these risks by regulating the use of the force in law. In the face of new challenges, those achievements should not be abandoned.