

THE "BUSH DOCTRINE": CAN PREVENTIVE WAR BE JUSTIFIED?

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Despite the Bush Administration's successes against al Qaeda,¹ we continue to live in a dangerous world. We are exposed to the risk that hostile states or terrorist groups with global reach might attack our civilian population or those of our allies using weapons of mass destruction.² In such circumstances, it might seem natural for U.S. policymakers to consider preventive war as a possible tool for countering such threats.³ In the past lead-

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1. See *The growing, and mysterious, irrelevance of al-Qaeda*, ECONOMIST, Jan. 24, 2009, at 65, available at http://www.economist.com/world/international/displaystory.cfm?story_id=12972613. One strategic analyst has recently opined that "Al Qaeda has failed in its goals. The United States has succeeded, not so much in winning the war as in preventing the Islamists from winning, and, from a geopolitical perspective, that is good enough." GEORGE FRIEDMAN, *THE NEXT 100 YEARS: A FORECAST FOR THE 21ST CENTURY* 31 (2009).

2. See *COMM'N ON THE PREVENTION OF WMD PROLIFERATION & TERRORISM, WORLD AT RISK* (2008). One of the Commission's "top priority" recommendations was that the successor to the Bush Administration "must stop the Iranian and North Korean nuclear weapons programs." *Id.* at xxii. Because of "the dynamic international environment," the Commission declined to specify exactly how that objective should be accomplished. *Id.* It did insist, however, that the United States should pursue diplomacy with Iran and North Korea "from a position of strength, emphasizing both the benefits to them of abandoning their nuclear weapons programs and the enormous costs of failing to do so. Such engagement must be backed by the credible threat of direct action in the event that diplomacy fails." *Id.* at xxii–xxiii.

3. As the Bush Administration neared its end, there appeared to be a growing recognition that preventive military action was needed to counter the threats posed by the conjunction of transnational terrorism, the greater availability of weapons of mass destruction (WMD), and the existence of "rogue" states that may be unresponsive to deterrence or other means of dissuasion. Taken together, these factors pose an unusual risk of mass killings among innocent civilian populations. See, e.g., MICHAEL W. DOYLE, *STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT* 20–23 (2008) ("[T]oday's more salient threats do not appear to be fully amenable to such traditional counter-strategies. Preven-

ers of democracies have not shied away from the prospect of preventive war. Winston Churchill, in his memoirs of the Second World War, found “no merit in [statesmen] putting off a war” when “the safety of the State, the lives and freedom of their own fellow countrymen, to whom they owe their position, make it right and imperative in the last resort.”⁴ Yet in the current climate of opinion, such thinking would be controversial—in large part, no doubt, because of the continuing disputes over the normative, strategic, and legal wisdom of what has been called the “Bush Doctrine.”

The “Bush Doctrine” refers to the position set forth in the National Security Strategy for 2002:

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

....

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’

tive responses that involve unilateral armed attack or multilateral enforcement measures may be necessary. These contravene peaceful foreign relations and range from multilateral economic sanctions through blockade to intervention and all-out armed invasion. . . . Deterrence may . . . fail to forestall some of today’s threats. It is generally understood that terrorists are difficult to deter. . . . [W]hile so called *rogue states* may be deterrable, many are only partially deterrable, or deterrable at too high a moral cost.”).

Similarly, Philip Bobbitt recently argued that

anticipatory warfare is [no longer] the result of the development of WMD or delivery systems that allow no time for diplomacy in the face of an imminent reversal of the status quo. . . . Rather it is the potential threat to civilians . . . posed by arming, with whatever weapons, groups and states openly dedicated to mass killing that has collapsed the distinction between preemption and prevention, giving rise to anticipatory war.

PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 137 (2008).

4. WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THE GATHERING STORM* 320 (1948).

choice of weapons, do not permit that option. We cannot let our enemies strike first.⁵

Even critics of the Iraq War should acknowledge that preventive war ought to remain among the strategic options available to the new Obama Administration.⁶ Reliance on the United Nations Security Council alone to combat terrorism, halt the proliferation of nuclear weapons, or intervene to prevent genocide and "ethnic cleansing" would be obvious folly.⁷ The Council has proven to be all but hapless in confronting such challenges, and, despite persistent, but unavailing, calls for reform, will remain so.⁸ The lesson of experience is that "when . . . the Great Powers and relevant local powers are in agreement . . . the elaborate charades of the Security Council . . . are unnecessary. When those powers do not agree, the U.N. is impotent."⁹ Hence, although Security Council authorization for the preventive use of force might well be desirable for policy reasons,¹⁰ dozens or even hundreds of wars have been fought during the Council's existence without its permission and in apparent contravention of U.N. Charter use-of-force rules.¹¹ To take but one conspicuous post-Cold War example: The United States and its

5. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14–15 (2002), available at <http://www.state.gov/documents/organization/15538.pdf>. For representative criticisms of the Bush Doctrine, see BOBBITT, *supra* note 3, at 433–37; DOYLE, *supra* note 3, at 25–29; JEFFREY RECORD, CATO INSTITUTE POLICY ANALYSIS NO. 519, NUCLEAR DETERRENCE, PREVENTIVE WAR, AND COUNTERPROLIFERATION 11–13, 15–21 (2004), available at <http://www.cato.org/pubs/pas/pa519.pdf>; DAN REITER, PREVENTIVE WAR AND ITS ALTERNATIVES: THE LESSONS OF HISTORY 2 (2006) ("The central conclusion of this monograph is that preventive attacks are generally ineffective, costly, unnecessary, and potentially even counterproductive tools for use in behalf of nonproliferation and counterterrorism."); and Robert Jervis, *Why the Bush Doctrine Cannot Be Sustained*, 120 POL. SCI. Q. 351 (2005).

6. See Ivo Daalder & James Steinberg, *Preventive war, a useful tool*, L.A. TIMES, Dec. 4, 2005, at M3 (Magazine), available at http://www.brookings.edu/opinions/2005/1204iraq_daalder.aspx.

7. We have recently examined the failings of the U.N. Charter system, both normatively and in terms of institutional design, in Robert J. Delahunty & John C. Yoo, *Great Power Security*, 10 CHI. J. INT'L L. (forthcoming 2009).

8. See, e.g., DOYLE, *supra* note 3, at 33–34; John C. Yoo & Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379 (2005).

9. WALTER A. MCDUGALL, PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776, at 213 (1997); Delahunty & Yoo, *supra* note 7.

10. See DOYLE, *supra* note 3, at 61.

11. See generally A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II (1997).

NATO allies fought a major war in the center of Europe in 1999 against Serbia, a Member State of the United Nations, yet they acted neither pursuant to Security Council authorization nor in individual or collective self-defense, as set forth in Article 51 of the U.N. Charter.¹²

The actual conduct of states thus calls into doubt whether Charter use-of-force rules remain legally binding,¹³ or, even assuming that they are, whether compliance with the Charter's ineffective legal norms must trump all other considerations bearing on the use of preventive force. Walter Slocombe, Deputy Secretary of Defense in the Clinton Administration, pointed out the consequences of such legal absolutism:

12. Critiques of the legality of NATO's intervention include DAVID CHANDLER, FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION 127–39, 158–66 (2006); MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO ch. 1 (2001); Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); and John C. Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 735 (2004). For a legal defense of NATO's intervention on the grounds of a limited form of a "humanitarian intervention" doctrine, see CHRISTOPHER GREENWOOD, ESSAYS ON WAR IN INTERNATIONAL LAW 593–630 (2006). See also Louis Henkin, Editorial Comments: NATO's Kosovo Intervention, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301 (2000).

Despite the vociferousness of the Bush Administration's critics, the United States's defense of the Iraq War under the U.N. Charter was more persuasive than its (virtually non-existent) legal defense of the War in Kosovo and had merit even in the eyes of outsiders to the Administration. See, e.g., Walter B. Slocombe, *Force, Pre-emption and Legitimacy*, SURVIVAL, Spring 2003, at 117, 124 ("[F]ar from ignoring international law, the United States government has advanced a sophisticated legal argument for the legitimacy of its position regarding pre-emption against rogue state WMD that is squarely based on international law principles."); see also ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 153–89 (2006) (evaluating the position of the United States); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 582–85 (2003) (same); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

13. See GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 194–223 (2004). Simpson poses the question whether NATO's 1999 intervention in Kosovo was the "foundational moment" of a project of international "regime building" in which the West sought to overthrow the U.N. Charter as the "constitution" of the world legal order and to install a regime of regional hegemonism instead. *Id.* at 194–95. For a different view, see JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 177–81 (2004).

[T]o require United Nations approval as an absolute condition of the legitimate use of military force is to say that no military action of which Russia or China (or, in principle, France, Britain, or, indeed, the US) strongly disapproves is legitimate, no matter how broadly the action is otherwise supported, or how well justified in other international legal or political terms.¹⁴

We argue that there are deep and pervasive similarities between, on the one hand, a preventive war undertaken to protect American or allied civilian populations from an emerging threat that weapons of mass destruction might be used against them and, on the other hand, a humanitarian intervention—like that in Kosovo—to protect another population from genocide, forcible deportations, or other grave human rights abuses. In both circumstances, the intervening powers would have a *protective* purpose in view. In the first case, the objective of the intervening powers would be the protection of their own people; in the second case, the objective would be the protection of another people or at-risk group. In both cases, the intervening powers would also be employing force to counteract a threat of violence—a threat that would be large in scale and gross in illegality in either context. In the first case, the threat would involve intentional mass attacks on non-combatants. In the second case, the threat would involve severe and widespread danger to basic human rights. The targeted states in both cases would have wrongfully subjected others to unacceptable harm or risk of harm—either internally, by failing to protect their citizens from genocide and other gross human rights violations, or externally, by posing security threats to the citizens of other states, whether by acquiring weapons of mass destruction themselves for aggressive purposes, or by sheltering (or failing to control) terrorists willing to use such weapons. Fundamentally, the aims of both the preventive and humanitarian interventions

14. Slocombe, *supra* note 12, at 122. Slocombe further noted that NATO's intervention in 1999 to prevent Serbia's attempted ethnic cleansing of the Albanian population of Kosovo, despite being contrary to Charter rules, "was, nonetheless, broadly regarded as legitimate, whether as a 'humanitarian intervention' or as a means of forestalling a spreading conflict in a region of Europe that has bred a host of wars in living memory." *Id.*

in question are to uphold the "strong global ethic" against the mass killing of civilians and other equally catastrophic events.¹⁵

The characteristic objections to both preventive war and humanitarian intervention are also essentially the same. According to critics, engaging in either activity will destabilize the international order by creating a dangerous precedent that will lead to further conflict, violence, and disregard for positive international law. Moreover, critics argue that the professed justifications for such activity serve all too easily to conceal some other motive. Nations bent on imperialism or hegemony will use humanitarian intervention or preventive war as a pretext for conquest or control.¹⁶ But even when these concerns are reasonable, the options provided by the U.N. Charter system to resolve them are unsatisfactory. The Charter attempts to drive the level of international violence to zero, despite the possibility that the use of force will improve global welfare by stopping human rights catastrophes or heading off rogue states that are likely to cause greater harms in the future.

Viewed in this light, preventive war, in appropriate circumstances, can be justified for reasons that are closely analogous to those usually offered to justify humanitarian intervention. The key difference is that in preventive war the intervenors protect *their own* populations, whereas in humanitarian intervention the intervenors protect *the target state's* population. Although critics of preventive war tend to be sympathetic to humanitarian intervention, the underlying logic for both uses of force is substantially the same. To be sure, even in the contemporary world, preventive war remains rooted in *self-defense*, whereas humanitarian intervention is rooted in the defense of *others*. This difference helps explain why nations, which characteristically pursue their own interests, are more inclined to wage preventive war and insufficiently inclined to engage in humanitarian intervention. Nonetheless, it cannot be an *objection* to a U.S.-led preventive war that it would aim chiefly at protecting the lives and safety of the *American* people.

15. See HUGO SLIM, *KILLING CIVILIANS: METHOD, MADNESS, AND MORALITY IN WAR* 20 (2008).

16. Concerns such as these appear to underlie the General Assembly's 2005 call for rigid adherence to the Charter's use-of-force rules. See G.A. Res. 60/1, ¶¶ 77-80, 138-139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

In this Essay, we first explain what we mean by "preventive" war, and how it is distinguishable from "preemptive" war. Then we briefly consider whether, as critics of the Bush Doctrine allege, the War in Iraq was virtually unprecedented in the nation's history or was, instead, one of several major conflicts fought by the United States that could fairly be described as preventive wars. Finally, we shall recommend certain normative guidelines and criteria for policymakers to follow in deciding whether to initiate a "preventive" war. As previously indicated, these criteria will resemble those that are often suggested for justifiable humanitarian interventions.

I. PREVENTIVE WAR AND AMERICAN DIPLOMATIC DOCTRINE

Article 51 of the United Nations Charter makes an exception to the prohibition against the use of force not compelled or authorized by the Security Council acting under Chapter VII. It permits Member States to exercise "the inherent right of individual or collective self-defense if an armed attack occurs against" them, "until the Security Council has taken the measures necessary to maintain international peace and security."¹⁷ Although the question is still disputed, this provision is widely understood to permit Member States to engage in armed self-defense, not only after they have been attacked, but also to preempt an armed attack that is "imminent." For example, most view Israel's attack on Egypt in 1967 as a legitimate act of preemptive self-defense under Article 51. On the other hand, many believe that a Member State may not lawfully act in self-defense to *prevent* an armed attack that is more remote in time. Thus, Israel's 1981 attack on the Iraqi nuclear facility at Osirak faced condemnation by the Security Council as an unlawful preventive strike.¹⁸

International lawyers commonly distinguish between "legitimate" preemptive self-defense and allegedly "illegitimate" preventive self-defense by reference to the famous nineteenth-century exchange of letters between U.S. Secretary of State Daniel Webster and British Special Minister Lord Ashburton.

17. U.N. Charter art. 51; 59 Stat. 1031, 1044-45 (1945).

18. BOBBITT, *supra* note 3, at 137; see Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 872-74, 916-20 (2007).

The Webster-Ashburton correspondence concerned a British military foray into American territory during the Canadian Rebellion of 1837, the so-called "*Caroline* incident."¹⁹ In a letter dated July 27, 1842, Webster stated that it was for the British government to justify the incursion of its forces by "show[ing] a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."²⁰ Webster's description, many contend, identifies the conditions for legitimate "preemptive" self-defense; by contrast, other allegedly defensive uses of force in anticipation of armed attacks would constitute illegitimate "preventive" strikes or wars.²¹

No doubt there is a valid and useful distinction to be made, analytically and strategically, between preemptive and preventive self-defense.²² But other recent commentators are correct in

19. The classic account of this episode is found in R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938). A superb study of the incident, the diplomatic exchange to which it gave rise, and the prevailing, but mistaken, interpretation of the legal precedent it set is given by Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325 (1999).

20. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Special Minister (July 27, 1842), in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA: 1836-46, at 449 (Hunter Miller ed., 1934), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

21. For a statement of the prevailing view, see, for example, Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 231 (2003). For a powerful argument that the prevailing view embodies a serious misunderstanding of the *Caroline* doctrine, see Kearley, *supra* note 19.

22. British military strategist Colin S. Gray explains that "[t]o preempt is to launch an attack against an attack that one has incontrovertible evidence is either actually underway or has been ordered." COLIN S. GRAY, THE IMPLICATIONS OF PREEMPTIVE AND PREVENTIVE WAR DOCTRINES: A RECONSIDERATION 9 (2007), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=789>; see also *id.* at 13 ("The most essential distinction between preemption and prevention is that the former option, uniquely, is exercised in or for a war that is certain, the timing of which has not been chosen by the preemptor. In every case, by definition, the option of preventive war, or of a preventive strike, must express a guess that war, or at least a major negative power shift, is probable in the future. The preventor has a choice."); Jack S. Levy, *Preventive War and Democratic Politics*, 52 INT'L STUD. Q. 1, 4 (2008) ("Prevention and preemption are each forms of better-now-than-latter logic, but they are responses to different threats involving different time horizons and calling for different strategic responses. Preemption involves striking now in the anticipation of an imminent adversary attack, with the aim of securing first-mover advantages. Prevention is a response to a future threat rather than an immediate threat. It is driven by the anticipation of an adverse power shift and the fear of the consequences . . ."). Legal scholars also draw a similar distinction between preemptive and preventive self-defense. See W. Mi-

questioning whether criteria imported from the *Caroline* incident still should be considered dispositive in judging the legality or legitimacy of preventive war.²³ Demanding a standard for lawful anticipatory self-defense that is all but impossible to meet makes little sense now, at least in cases when preventive action may be necessary to forestall a foreseeable, albeit not imminent, threat from a state or group that is openly committed to the mass killing of civilians.

Moreover, the standards for anticipatory action set out in Webster's 1842 letter were far more stringent than those that regularly appeared in American diplomatic doctrine and practice both before and after Webster's time. Consider, for example, Secretary of State John Quincy Adams's communication to the Spanish government on November 28, 1818. Adams's distinguished biographer, Samuel Flagg Bemis, described this as "[t]he greatest state paper of John Quincy Adams's diplomatic career."²⁴ The episode that Adams addressed arose when General Andrew Jackson, without proper authorization, invaded Spanish Florida in response to a series of attacks across the U.S. border by Creeks, Seminoles, and escaped slaves, whose activities the Spanish authorities in Florida were unable or unwilling to control.²⁵ Rather than apologize for Jackson's intervention, Adams warned the Spanish in unequivocal terms that they must take steps to suppress further cross-border incursions or face the invasion and loss of Florida to the United States.²⁶ The

chael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526 (2006).

23. See, e.g., DOYLE, *supra* note 3, at 15 ("The *Caroline* standard is too extreme [T]he principles themselves are deeply flawed. They justify reflex defensive reactions to imminent threats and nothing more. For instance, they do not leave enough time for states to protect their legitimate interests in self-defense when they still do have some 'choice of means,' albeit no peaceful ones, and some 'time to deliberate' among the dangerous choices left. Extreme *Caroline* conditions are rarely found in reality.'").

24. SAMUEL FLAGG BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY 326 (1949). The importance of Adams's letter for understanding the American grand strategy of the period has been emphasized in JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 16-17 (2004).

25. See John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 521, 527-28 (2008).

26. Adams wrote:

If, as the [Spanish] commanders both at Pensacola and St. Marks have alleged, this has been the result of their weakness rather than of their will; if they have assisted the Indians against the United States to avert their

application of Adams's doctrine to contemporary circumstances would unquestionably warrant the United States using force preventively against a failed or failing state that was unable or unwilling to take the actions necessary to suppress a terrorist group within its boundaries that was engaging in attacks upon the United States.

John Quincy Adams was by no means the only American Secretary of State to maintain that preventive war would be justifiable in some circumstances. In a 1914 address to the American Society of International Law titled *The Real Monroe Doctrine*, former Secretary of State and then-Senator Elihu Root described instances in which earlier Secretaries of State had made plain that the United States would fight a war to prevent the occupation of a part of Latin America by a European power not previously in possession of it.²⁷ Speaking for himself, Root declared,

It is well understood that the exercise of the right of self-protection may and frequently does extend beyond the limits of the territorial jurisdiction of the state exercising it. The strongest example probably would be the mobilization of an army by another Power immediately across the frontier. Every act done by the other Power may be within its own territory. Yet the country threatened by the state of facts is justified in protecting itself by immediate war. . . . [E]very sovereign state

hostilities from the province which they had not sufficient force to defend against them, it may serve in some measure to exculpate, individually, those officers; but it must carry demonstration irresistible to the Spanish government that *the right of the United States can as little compound with impotence as with perfidy*, and that Spain must immediately make her election, either to place a force in Florida adequate at once to the protection of her territory and to the fulfillment of her engagements, or cede to the United States a province, of which she retains nothing but the nominal possession, but which is, in fact, a derelict, open to the occupancy of every enemy, civilized or savage, of the United States, and serving no other earthly purpose than as a post of annoyance to them.

BEMIS, *supra* note 24, at 327.

27. See Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L L. 427 (1914). Secretary James Buchanan stated in 1848 that "[t]he highest and first duty of every independent nation is to provide for its own safety; and acting upon this principle, we should be compelled to resist the acquisition of Cuba by any powerful maritime state, with all means which Providence has placed at our command." *Id.* at 431-32. Likewise, Secretary John Clayton said in 1849 that "[t]he news of the cession of Cuba to any foreign Power would in the United States be the instant signal for war." *Id.* at 432.

[has the right] to protect itself by preventing a condition of affairs in which it will be too late to protect itself.²⁸

A succession of twentieth-century American Presidents also announced "doctrines" of preventive intervention. These included Theodore Roosevelt, Franklin Roosevelt (through Secretary of State Henry Stimson), Harry Truman, Dwight Eisenhower, Lyndon Johnson, Richard Nixon, Jimmy Carter, and Ronald Reagan. According to Philip Bobbitt, these Presidential doctrines "do not say when the U.S. will actually intervene, but rather when it will regard itself as rightfully contemplating intervention."²⁹ For example, President Theodore Roosevelt's so-called "Corollary to the Monroe Doctrine" made plain that the United States would intervene in the affairs of a Latin American nation in the event that any such nation experienced "[c]hronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society," especially if that disorder "had invited foreign aggression to the detriment of the entire body of American nations."³⁰ President John Kennedy used force in the Cuban Missile Crisis—a naval blockade of Cuba—to prevent a dramatic change in the balance of power from the presence of Soviet nuclear missiles in the Caribbean. President Lyndon Johnson announced in 1965 that "the United States would henceforth prevent by force 'a communist dictatorship' from coming to power in the Americas"; he subsequently sent 24,000 troops "to the Dominican Republic to accomplish this task in the political chaos that followed the assassination of the dictator Rafael Trujillo."³¹ President Jimmy Carter also announced a preventive doctrine by declaring that the United States "would regard any attempt by any outside force to gain control of the Persian Gulf region as an assault on the vital interests of the U.S. [to be] repelled 'by use of any means necessary'—which implied a possible resort to nuclear weapons."³²

An excessively narrow interpretation of the *Caroline* doctrine regards preemptive and preventive uses of armed force in self-

28. *Id.* at 432.

29. BOBBITT, *supra* note 3, at 431–32.

30. President Theodore Roosevelt, Message to Congress on Foreign Affairs (Dec. 6, 1904), in JOHN E. POMFRET, 12 AMERICANS SPEAK: FACSIMILES OF ORIGINAL EDITIONS SELECTED AND ANNOTATED 119–20 (1954).

31. BOBBITT, *supra* note 3, at 432.

32. *Id.*

defense quite differently. But both policymakers and legal scholars have begun to question whether the distinction should continue to carry its current normative significance. Insofar as it hinges on the criteria derived from the *Caroline* incident, the current international legal doctrine rules out forms of self-defense that are reasonable and legitimate in contemporary circumstances. Finally, the *Caroline* doctrine is inconsistent with the view, repeatedly advanced over two centuries of American diplomacy, that preventive wars or other armed interventions are legitimate in appropriate instances. In the following section, we endeavor to show that longstanding American practice supports the view that preventive war may be a legitimate strategic option.

II. PREVENTIVE WAR AND AMERICAN MILITARY PRACTICE

How common is preventive war? How often has the United States engaged in it? As a general matter, it is widely agreed that preventive wars, not just preemptive wars, have been common in world history. Professor Paul Schroeder writes that “[p]reventive wars, even risky preventive wars, are not extreme anomalies in politics They are a normal, even common, tool of statecraft, right down to our own day.”³³ Political scientist Richard Betts concurs: “[P]reventive wars . . . are common, if one looks at the rationales of those who start wars, since most countries that launch an attack without immediate provocation believe their actions are preventive.”³⁴ And military strategist Colin Gray writes that “far from being a rare and awful crime against an historical norm, preventive war is, and

33. Paul W. Schroeder, *World War I as Galloping Gertie: A Reply to Joachim Remak*, 44 J. MOD. HIST. 319, 322 (1972). This is not to say that *preventive* wars are also common. According to Dan Reiter, “preemptive wars almost never happen. Of all the interstate wars since 1816, only three are preemptive: World War I, Chinese intervention in the Korean War, and the 1967 Arab-Israeli War.” Dan Reiter, *Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen*, INT’L SECURITY, Autumn 1995, at 5, 6. Reiter distinguishes preemptive from preventive war. *See id.* at 6–7. Political scientists have observed that preventive and preemptive wars differ in several dimensions, including characteristic differences in the threat’s nearness or remoteness, its source, and the incentives for a first strike, thus rendering a theory of preemption unable to explain prevention. *See* Jack S. Levy, *Declining Power and the Preventive Motivation for War*, 40 WORLD POL. 82, 90–92 (1987).

34. Richard K. Betts, *Striking First: A History of Thankfully Lost Opportunities*, 17 ETHICS & INT’L AFF. 17, 19 (2003), available at http://www.cceia.org/resources/journal/17_1/roundtable/866.html.

has always been, so common, that its occurrence seems remarkable only to those who do not know their history."³⁵ Indeed, preventive war was widely considered to be acceptable in some circumstances, at least from the time of King Frederick the Great's 1756 invasion of Saxony³⁶ to the start of the First World War in 1914, and perhaps even up to 1941.³⁷ During the eighteenth and nineteenth centuries, leading European writers on international law acknowledged the existence of a right of preventive intervention.³⁸

Although it is widely agreed that preventive wars are common, there is far less agreement that the United States has fought such wars. One recent study describes the 2003 War in Iraq as the United States's "first preemptive [i.e., preventive] war."³⁹ A diplomatic historian asserts that the Bush Doctrine has been "widely criticized" because Iraq "did not pose a direct and imminent threat to the United States. Bush chose to overturn more than 200 years of American foreign policy."⁴⁰ The late Arthur Schlesinger, Jr., claimed nearly as much when he condemned the Iraq War as "illegitimate and immoral. For more than 200 years we have not been that kind of country."⁴¹

Other scholars, however, sharply disagree. The historian John Lewis Gaddis argues that what he broadly calls "preemption" has been a constant facet of U.S. foreign policy, leading to a long series of interventions throughout the nineteenth and twentieth

35. GRAY, *supra* note 22, at 27.

36. This invasion has been described as "the most famous preventive war in European history." M.S. ANDERSON, *EIGHTEENTH-CENTURY EUROPE: 1713-1789*, at 34 (1966).

37. See Hew Strachan, *Preemption and Prevention in Historical Perspective*, in *PRE-EMPTION: MILITARY ACTION AND MORAL JUSTIFICATION* 23, 23 (Henry Shue & David Rodin eds., 2007) (stating that Frederick's decision "was deemed to be adroit more than unethical: confronted with the possibility of a war in which the very survival of his kingdom would be at stake, Frederick had behaved prudently and wisely. The 1756 example shaped the understanding of preventive war in Europe until 1914, and probably until 1941.").

38. See EDWARD VOSE GULICK, *EUROPE'S CLASSICAL BALANCE OF POWER: A CASE HISTORY OF THE THEORY AND PRACTICE OF ONE OF THE GREAT CONCEPTS OF EUROPEAN STATECRAFT* 62-64 (1955) (citing the writings of Brougham, Vattel, and Gentz).

39. GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 948 (2008).

40. JOHN G. STOESSINGER, *WHY NATIONS GO TO WAR* 311 (2005).

41. Arthur Schlesinger, Jr., *Commentary, The Immorality of Preventive War*, *L.A. TIMES*, Aug. 15, 2002, at B15.

centuries against the Spanish Empire's possessions in the Americas and in the Latin American republics that succeeded them, including Mexico, Cuba, and Venezuela.⁴² In a fascinating study, historian Marc Trachtenberg concluded that "the sort of thinking one finds in the Bush policy documents is not to be viewed as anomalous. Under [Franklin] Roosevelt and Truman, under Eisenhower and Kennedy, and even under Clinton in the 1990s, this kind of thinking came into play in a major way."⁴³ Even more starkly, historian Hew Strachan argues that "[t]he United States has used preventive war regularly since 1945 to forestall revolutionary change. In the 1950s and 1960s, it employed military power once every eighteen months on average to overthrow a government inimical to its interests."⁴⁴ Colin Gray contends that even the Second World War—despite the Japanese first strike at Pearl Harbor—should be considered a preventive war.⁴⁵ Gray further characterizes several other major American wars as preventive, including the War in Afghanistan (2001); the Persian Gulf War (1991); the Korean War (1950); the First World War (1917); the Spanish-American War (1898); the Civil War (1861); and the many frontier wars the United States fought with Native Americans, Mexicans, Frenchmen, and Spaniards.⁴⁶

This second group of scholars has the better of the argument. Consider the Second World War. Even after the outbreak of war in Europe in 1939, President Franklin Roosevelt followed a policy that was designed to favor the anti-Axis powers in Europe and Asia and eventually bring the United States into the war on their behalf. Roosevelt urged Congress to revise or repeal the Neutrality Act, provided Great Britain with desperately needed war materiel, waged a covert war against German submarines in the North Atlantic, occupied Iceland to prevent it from falling into German hands, and tightened the economic noose on Japan, seeking to strangle its efforts to continue its

42. See GADDIS, *supra* note 24, at 16–22.

43. Marc Trachtenberg, *Preventive War and US Foreign Policy*, in PREEMPTION, *supra* note 37, at 40, 66.

44. Strachan, *supra* note 37, at 38.

45. GRAY, *supra* note 22, at 23–25.

46. *Id.* at 25–27. In light of this record, Gray correctly concludes that "the so-called Bush Doctrine is historically unremarkable, notwithstanding all the excitement that it occasioned in 2002–03." *Id.* at 27.

long war in China.⁴⁷ Almost a year before the attack on Pearl Harbor, Roosevelt warned the nation on December 29, 1940:

Never before . . . has our American civilization been in such danger as now. . . . If Great Britain goes down, the Axis powers will control the continents of Europe, Asia, Africa, Australia, and the high seas—and they will be in a position to bring enormous military and naval resources against this hemisphere. It is no exaggeration to say that all of us, in all the Americas, would be living at the point of a gun.⁴⁸

Consistent with his vision of the threat, for more than a year and a half before Pearl Harbor Roosevelt deliberately pursued a policy of economic warfare with Japan that left the Japanese with no alternative to war.⁴⁹ In short, the United States deliberately provoked and fought a war that it could have avoided with Japan, for the sake of preventing the emergence of a grave strategic threat in the Pacific.

The United States's decision to enter the First World War was also preventive in character:

Germany's announcement of its third campaign of unrestricted U-boat warfare provided the occasion, the excuse, for the

47. Marc Trachtenberg writes that the study of the United States's actions in the period before Pearl Harbor, both in Europe and in the Pacific, shows that the United States "was not a country that 'asked only to be left alone.'" Rather,

[b]y late 1941, the United States was fighting an undeclared naval war against Germany in the North Atlantic. America had in fact gone on the offensive President Roosevelt's policy by that time, as he said, was to 'wage war, but not declare it.' He would become 'more and more provocative,' he told Churchill in early August, and 'if the Germans did not like it, they could attack American forces.' He also pursued a very active policy in the Pacific at this time. . . . [that in the end left Japan] cornered. She was forced to choose between war and capitulation on the China issue, and the Pearl Harbor attack has to be understood in that context. It is thus quite clear that US policy played a major role in bringing on the war.

Trachtenberg, *supra* note 43, at 60–61; see also Delahunty, *supra* note 18, at 912–13.

48. MCDUGALL, *supra* note 9, at 150 (quoting President Franklin Roosevelt).

49. GRAY, *supra* note 22, at 23 ("[T]he United States had been waging preventive economic warfare against Imperial Japan for at least 18 months prior to Pearl Harbor. . . . U.S. measures of economic blockade left Japan with no alternative to war consistent with its sense of national honor. The oil embargo eventually would literally immobilize the Japanese Navy. So Washington confronted Tokyo with the unenviable choice between de facto complete political surrender of its ambitions in China, or war."); see also Strachan, *supra* note 37, at 23 ("For Japan itself the choices by 1941 seemed to be economic strangulation and geopolitical imprisonment on the one hand, or war on the other.").

public moral outrage that permitted President Wilson to ask for a declaration of war. However, Germany was not threatening U.S. security in any meaningful sense in 1916 or 1917 [T]he United States chose to wage a preventive war as an Associated Power of the Allies. Wilson recognized that a German-dominated Europe must constitute a serious threat to U.S. national security.⁵⁰

Two preventive wars of the nineteenth century also deserve mention: the Mexican-American War of 1848 and the Spanish-American War of 1898. Claims that the United States needed to use force in 1848 seem far-fetched. President James K. Polk deliberately forced an armed incident over the location of the border between Mexico and the United States—he ordered American troops to deploy in between a Mexican unit in disputed border territory and Mexican territory. After fighting broke out, the United States invaded Mexico, captured and occupied Mexico City, and took what is today California and the American Southwest. Today, if not at the time, it seems clear that the American use of force was designed to eliminate a competitor for influence on the continent rather than to defend the United States from Mexican attack.⁵¹ Similarly, the Spanish-American War was triggered by an explosion aboard the U.S.S. *Maine* while in Havana harbor. There was no threat of a Spanish attack upon the United States. In response, the United States took control over the Philippines and Cuba. American intentions again were preventive, in the sense that they took action to remove Spain as an obstacle to American expansion.⁵²

The practice of threatening, and occasionally waging, preventive war has very early roots in the history of the Republic. After learning in 1802 of the planned acquisition of Louisiana from Spain by Napoleonic France, President Thomas Jefferson threatened France with war—although the United States had no claim to Louisiana, and Spain's intended conveyance of the territory was unquestionably legal. Jefferson warned Napoleon that if France took position of the vital port of New Orleans, the

50. GRAY, *supra* note 22, at 25.

51. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 731–91 (2007).

52. See GRAY, *supra* note 22, at 26 (“The Spanish-American War was contrived, among other reasons, in order to prevent European colonial powers picking up the remnants of the erstwhile Spanish Empire.”).

United States would "marry" itself to the "British fleet and nation" and would use the expected return of war in Europe as the occasion to seize Louisiana by force.⁵³ Jefferson dispatched James Monroe as a special envoy to France in 1803, instructing him to purchase Louisiana from France if that were possible and to proceed to London to discuss an alliance against France if it were not.⁵⁴ Although Napoleon eventually agreed to sell Louisiana, Jefferson had plainly threatened war to prevent a dangerous strategic setback for the United States.

Jefferson also attempted to procure East and West Florida from Spain, threatening Spain with force if it refused to sell those possessions, because of his fear that those lands might be seized by Great Britain.⁵⁵ President James Madison, Jefferson's successor, carried Jefferson's policy further, ordering the military to occupy much of West Florida in 1811, incorporating that territory into the state of Louisiana in 1812, and completing the conquest of West Florida by annexing Mobile in 1813.⁵⁶ Madison also connived with the adventurer George Matthews to induce the residents of East Florida to rebel against Spain, and, in 1811, Madison obtained authorization from Congress to use force to prevent Britain or France from taking over that territory.⁵⁷ For both Jefferson and Madison, then, preventive war was plainly available—and used—as a strategic option.

The United States's "quarantine" or naval blockade of Cuba in 1962, during the presidency of John F. Kennedy, provides a particularly noteworthy example of the use of preventive action as a policy tool. Plainly, this form of armed intervention fell short of an actual invasion, capture, or occupation of Cuban territory, and it failed to yield either an air strike on the nuclear weapon sites the Soviet Union was installing in Cuba or any nuclear exchange with the Soviet Union. Nonetheless, it was an armed interference both with the Soviet navy's right to traverse international waters and with Cuba's right to allow the Soviets to build military facilities on its territory.⁵⁸

53. See HERRING, *supra* note 39, at 104.

54. *Id.* at 104–05.

55. *Id.* at 109.

56. *Id.* at 111.

57. *Id.*

58. The legality of the U.S. naval blockade, which was limited to missile-bearing Soviet ships, has been much debated. One authority opines that a so-called "pacific"

The Kennedy Administration's advisers differed over how best to defend the legality of this preventive action. The Justice Department provided the opinion that although "preventive action would not ordinarily be lawful to prevent the maintenance of a missile base, or other armaments in the absence of evidence that their actual use for an aggressive attack was imminent," the Monroe Doctrine of 1823 created a *lex specialis* for the Western Hemisphere that established "less restrictive conditions" for the United States's use of preventive force.⁵⁹ Later legal scholars have viewed the Cuban blockade as an act of anticipatory self-defense, although neither the Soviet Union nor Cuba had attacked the United States, was on the verge of attacking it, or had even publicly threatened to attack it.⁶⁰ Thus, although not triggering an actual war, Kennedy's naval blockade is rightly seen as a precedent that lends support to the Bush Doctrine.

This brief account reveals that preventive war has not been uncommon in American history—at least if a preventive war is defined as a war that stems in large part from a desire to prevent a foreseen, but not imminent, threat of particular gravity to the nation's security. Consequently, the War in Iraq was not a unique and unprecedented event in the nation's history. The American

blockade, such as the one President Kennedy ordered against Cuba, "would seem to be inconsistent with the obligations in Article 2(3) and (4) of the United Nations Charter." L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 179 (2d ed. 2000). A careful and detailed legal analysis of the episode by Quincy Wright supports that conclusion. Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 548–63 (1963). For an account that weaves together legal and strategic considerations, see D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 61–63 (1975). For the State Department Legal Adviser's perspective, see ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974).

59. Opinion of Norbert Schlei, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, *quoted in* SCOTT A. SILVERSTONE, *PREVENTIVE WAR AND AMERICAN DIPLOMACY* 121 (2007). President Kennedy apparently disapproved of the Justice Department's rationale. *Id.*

60. See Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 59 (2001) (characterizing a claim to impose a naval quarantine as anticipatory self-defense); Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506, 515 (1991) ("Although President Kennedy spoke of the United States action as one of self-defense, his State Department, in presenting the case to the Security Council, the OAS, and the public, sought to justify the American use of force in Cuba primarily under the Rio Treaty and the action of the Organization of American States pursuant to that Treaty. This legal argument is untenable. . . . The only possible legal basis for the action taken by the United States in the Cuban missile crisis was therefore its 'inherent' right of self-defense, reaffirmed by Article 51 of the Charter.").

diplomatic doctrine surveyed in Part I and the American practice canvassed here in Part II are, unsurprisingly, convergent.⁶¹

III. JUSTIFYING PREVENTIVE WAR

When, if ever, can preventive war, or other armed preventive interventions short of full-scale war, be justified? Obviously, we are not contending that preventive war is always justifiable; often it is not. Few defenders would be found today for all of the United States's preventive interventions of the past, including some of our interventions during the Cold War. Likewise, preventive wars undertaken by other great powers—China's intervention in the Korean War, for example—may also make sense strategically but hardly seem justified in other respects. Nonetheless, the Bush Doctrine, in its preventive war dimension, has strong foundations in American political and diplomatic history, as well as in international practice. The chief normative claim defended

61. We also briefly note here that two other common criticisms of the Bush Doctrine are misplaced. One of them is that democracies, or at least the United States, do not fight preventive wars. See Schlesinger, *supra* note 41. The political scientist Jack Levy has argued that this assumption, though once widely accepted, is without empirical support. Indeed, Levy shows that democratic Israel fought a preventive war against Egypt in 1956, that the United States fought a war in Iraq in 1990–91 for preventive reasons broadly accepted by the American public, and that "[t]here is no evidence that normative beliefs that a preventive strike was immoral or contrary to American democratic identity played any role" in the Clinton Administration's planning in 1994 for a possible air strike against North Korea's nuclear program. See Levy, *supra* note 22, at 18. Levy's findings plainly accord with our own.

The second criticism is that the preventive war against Iraq in 2003 is symptomatic of the policies of a "declining" hegemon, which the United States is taken to be. See, e.g., Robert A. Pape, *Empire Falls*, NAT'L INTEREST ONLINE, Jan. 22, 2009, <http://www.nationalinterest.org/Article.aspx?id=20484>. Although this is, of course, a question for international relations theorists rather than for legal scholars, we note that some empirical studies find that narrowing power differentials do not necessarily, or even usually, lead to preventive attacks. See RANDALL L. SCHWELLER, UNANSWERED THREATS: POLITICAL CONSTRAINTS ON THE BALANCE OF POWER 22–23 (2006) ("[T]he nature and success of the established powers' responses to rising powers has varied not only from one historical epoch to another but on a case-by-case basis within the same era."); Douglas Lemke, *Investigating the Preventive Motive for War*, 29 INT'L INTERACTIONS 273, 288 (2003) ("[T]he preventive motive is not statistically linked to the probability of war . . . Is war the only preventive option states might have in the face of relative decline? Almost certainly not."). In any case, the thesis that the United States is a "declining" power is itself doubtful. See WALTER RUSSELL MEAD, GOD AND GOLD: BRITAIN, AMERICA, AND THE MAKING OF THE MODERN WORLD 346–56 (2007).

below is that the current U.N. Charter use-of-force rules, at least as widely understood, are unrealistic and unworkable.

We have recently argued for a post-U.N. Charter regime of international law for regulating the use of force, including both preventive and humanitarian interventions.⁶² The overarching goal of this regime should be the maintenance of international peace and stability as a means of advancing global welfare. Under this approach, the international legal system should be designed to produce international public goods. These public goods include ensuring the safety and security of civilian populations from both internal and external threats, reducing grave human rights abuses such as genocide and ethnic cleansing, and promoting the nonproliferation of weapons of mass destruction. Unlike the U.N. Charter system, which is designed to drive the use of force by states to near zero, a reconstructed international legal system based on global welfare would seek to enable and induce states to provide the optimal level of force, thus allowing armed interventions in proper cases for the purpose of preventing catastrophic harms.

The emerging rationales, both for preventive wars intended to protect civilian populations from mass killing at the hands of rogue states or terrorist groups and for humanitarian interventions intended to forestall mass human rights abuses by governments against their own populations, are fundamentally similar. As argued above, there is a deep structural resemblance between these two forms of modern warfare, both of which in practice typically contravene the Charter's proscriptions.

Attempting to frame guidelines or criteria for evaluating proposed interventions, in light of the overarching global welfare norm, is not easy, and this Essay does not propose to provide definitive guidance of that kind. Nonetheless, five operational criteria are tentatively offered that may prove useful in evaluating whether a potential preventive war would serve global welfare. These criteria are closely modeled on similar criteria that may already be emerging in evaluating armed humanitarian interventions,⁶³ and they ultimately derive from classic *jus ad bellum* teaching. If over time the practices and

62. See Delahunty & Yoo, *supra* note 7.

63. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT § 4.16 (2001), available at <http://www.iciss.ca/report2-en.asp>.

opinions of states gradually conform to these criteria, then a new norm of international law might be said to have emerged for regulating preventive military interventions. This Essay addresses only the following two cases in which intervention against a state is contemplated. In the first, a state has publicly and credibly threatened the mass destruction of innocent civilian lives in another state (as Iran has threatened the Israeli population), or its recent conduct indicates—even in the absence of such public statements—that it poses a threat of that nature and gravity (as Iraq's pre-2003 conduct toward Iran, Kuwait, and its own Kurdish and Shi'ite populations demonstrated). In the second, a terrorist group, by its public statements or recent conduct, has threatened the mass destruction of innocent civilian lives, and operates within a state that either deliberately supports it, wrongfully neglects to counteract it, or is in a failed or failing condition and therefore unable to suppress it (as evidenced by al Qaeda's presence in Afghanistan in late 2001).

First, such a preventive war or armed intervention should only be undertaken after the prospective intervenor has announced that it is aggrieved by the wrongdoing state's (or group's) statements and conduct, has explained to other governments and the world media (as far as the security of its intelligence methods and sources permits) the nature and gravity of the threat its civilian population faces, has sought redress from the wrongdoing state or group if realistically possible, and has given its prospective target a reasonable opportunity to provide such redress.

Second, the potential intervenor must have the rightful purpose of protecting an innocent civilian population (typically, its own or an ally's) from a threat of mass killing of the kind described above or of a harm of a comparable severity and scale. The expected benefits of intervention, viewed *ex ante*, should outweigh the expected costs, measured in terms of global welfare.⁶⁴ To be sure, a potential intervenor's *stated* purpose may always disguise an improper motive. But there are various side-constraints on proposed interventions that can serve to screen out improper motives, such as a prohibition on annexing any part of the territory or exploiting any of the natural resources of the targeted state in the aftermath of a successful intervention.

64. Clearly, in this metric, the estimated total of lives saved by a preventive intervention will be a crucial element in calculating the intervention's effect on global welfare.

Third is a criterion corresponding to “rightful authority” in the classic *jus ad bellum*. Some might argue that acting in a broad coalition, whether with other great powers or smaller regional powers or both, is an important check on a pretextual use of force. If other nations reach the same judgment on a proposed intervention, it might be thought that there is less likelihood that the intervening powers seek the gain of territory or resources. Moreover, having the support of foreign allies may generate greater domestic support in a democracy for the intervention. And, of course, acting in concert with allies will likely result in more equitable distribution of the costs of the intervention. There is some truth to all these points. But requiring regional support or a great power consensus surely cannot be an absolute and inflexible prerequisite for a valid preventive intervention. Undoubtedly, the populations of the United States, Great Britain, Israel, and now India are far more exposed to transnational terrorist threats than those of other nations. The right and duty of those nations to protect their civilians from such threats cannot hinge on the willingness of comparatively unendangered states to support them. (A requirement of regional support would seem particularly absurd in the case of Israel, given that the chief dangers to its population come from or are based in several of its regional neighbors.) As the American experience in Iraq has shown, regional powers may be unable to come to a consensus concerning an outside intervention, or may even prefer to wait on the sidelines, hoping to profit from an intervention that they are unwilling to assist. In some circumstances, therefore, unilateral action by those states that are especially at risk would be justified.

Fourth, the potential intervenor should have attempted means other than the use of force to dispel the threat or should have reasonably concluded that such means would be unavailing. These alternatives include diplomacy, economic pressures or inducements, deterrence, and containment.

Fifth, the preventive use of force in the situations in question should be proportionate to the threat to which it is addressed. While the requirement of proportionality is, of course, hard to define with any real precision,⁶⁵ it was traditionally regarded as

65. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 719–34 (2008) (surveying international law relating to proportionality as a requirement of *jus ad bellum*); *id.* at 734 (noting that international law “has not as yet generated a textured, mature jurisprudence conducive to the credible weighing of a military wrong against concomitant countermeasures”).

a rule of the *jus ad bellum*, in cases both of preventive war and otherwise.⁶⁶ In the context of this Essay, proportionality requires that the preventive intervention entail no more death and destruction than is needed to eliminate the threat. Furthermore, it is at least arguable that "proportionality" requires respect for the sovereignty of the targeted state as far as effective prevention of the threat it poses permits. Thus, a preventive intervention may require an outcome as drastic as regime change (as in Iraq in 2003), but only in an extreme case where no less intrusive measures would effectively remove the threat.

CONCLUSION

This brief Essay has sought to establish three points. First, the Bush Doctrine was by no means an anomaly, as many of its critics have alleged. Rather, that Doctrine—whatever its flaws in execution may have been—fell within the broad traditions of American strategic thought. American diplomacy and military practice over the past two centuries, like those of other great powers, reveal many instances in which preventive wars or other armed interventions of a preventive kind have been contemplated, openly threatened, or actually conducted.

Second, the justifications for a preventive war fought to protect the nation's civilian population from the threat of mass killing have a deep resemblance to the justifications now commonly given, and accepted, for preventive "humanitarian" interventions. In contrast, a legal position that would forbid preventive war in all circumstances, but allow humanitarian intervention, would be incoherent.

Third, and most tentatively, a variety of tests have been suggested for making a normative judgment on the permissibility of a particular preventive war or intervention. Even if these criteria prove unsatisfactory on more sustained examination, whether because they are too lax or too restrictive, *some* tests should, and eventually will, supplant the U.N. Charter's use-of-force rules in this area.

66. See, e.g., CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 16 (2007). Separate and distinct from the *jus ad bellum* requirement of proportionality, the conduct of a belligerent in its military operations must also observe the standards of "proportionality" imposed by the *jus in bello*.

