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#### The affirmative is a form of lawfare which maps out legal zones of violence. Their securitizing language cements an epistemologically suspect juridical warfare which naturalizes preemptive violence

John MORRISSEY, Lecturer in Political and Cultural Geography, National University of Ireland, 11 [“Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror,” *Geopolitics*, 16:280–305, 2011]

Foucault’s envisioning of a more governmentalised and securitized modernity, framed by a ubiquitous architecture of security, speaks on various levels to the contemporary US military’s efforts in the war on terror, but I want to mention three specifically, which I draw upon through the course of the paper. First, in the long war in the Middle East and Central Asia, the US military actively seeks to legally facilitate both the ‘circulation’ and ‘conduct’ of a target population: its own troops. This may not be commonly recognized in biopolitical critiques of the war on terror but, as will be seen later, the Judge Advocate General Corps has long been proactive in a ‘juridical’ form of warfare, or lawfare, that sees US troops as ‘technical-biopolitical’ objects of management whose ‘operational capabilities’ on the ground must be legally enabled. Second, as I have explored elsewhere, the US military’s ‘grand strategy of security’ in the war on terror – which includes a broad spectrum of tactics and technologies of security, including juridical techniques – has been relentlessly justified by a power/knowledge assemblage in Washington that has successfully scripted a neoliberal political economy argument for its global forward presence.19 Securitizing economic volatility and threat and regulating a neoliberal world order for the good of the global economy are powerful discursive touchstones registered perennially on multiple forums in Washington – from the Pentagon to the war colleges, from IR and Strategic Studies policy institutes to the House and Senate Armed Services Committees – and the endgame is the legitimisation of the military’s geopolitical and biopolitical technologies of power overseas.20 Finally, Foucault’s conceptualisation of a ‘society of security’ is marked by an urge to ‘govern by contingency’, to ‘anticipate the aleatory’, to ‘allow for the evental’.21 It is a ‘security society’ in which the very language of security is promissory, therapeutic and appealing to liberal improvement. The lawfare of the contemporary US military is precisely orientated to plan for the ‘evental’, to anticipate a series of future events in its various ‘security zones’ – what the Pentagon terms ‘Areas of Responsibility’ or ‘AORs’ (see Figure 1).22 These AORs equate, in effect, to what Foucault calls “spaces of security”, comprising “a series of possible events” that must be securitized by inserting both “the temporal” and “the uncertain”.23 And it is through preemptive juridical securitization ‘beyond the battlefield’ that the US military anticipates and enables the necessary biopolitical modalities of power and management on the ground for any future interventionary action.

AORs AND THE ‘MILIEU’ OF SECURITY

For CENTCOM Commander General David Petraeus, and the other five US regional commanders across the globe, the ‘population’ of primary concern in their respective AORs is the US military personnel deployed therein. For Petraeus and his fellow commanders, US ground troops present perhaps less a collection of “juridical-political” subjects and more what Foucault calls “technical-political” objects of “management and government”.25 In effect, they are tasked with governing “spaces of security” in which “a series of uncertain elements” can unfold in what Foucault terms the “milieu”.26 What is at stake in the ‘milieu’ is “the problem of circulation and causality”, which must be anticipated and planned for in terms of “a series of possible events” that need to “be regulated within a multivalent and transformable framework”.27 And the “technical problem” posed by the eighteenth-century town planners Foucault has in mind is precisely the same technical problem of space, population and regulation that US military strategists and Judge Advocate General Corps (JAG) personnel have in the twenty-first century.

For US military JAGs, their endeavours to legally securitize the AORs of their regional commanders are ultimately orientated to “fabricate, organize, and plan a milieu” even before ground troops are deployed (as in the case of the first action in the war on terror, which I return to later: the negotiation by CENTCOM JAGs of a Status of Forces Agreement with Uzbekistan in early October 2001).28 JAGs play a key role in legally conditioning the battlefield, in regulating the circulation of troops, in optimising their operational capacities, and in sanctioning the privilege to kill. The JAG’s milieu is a “field of intervention”, in other words, in which they are seeking to “affect, precisely, a population”.29 To this end, securing the aleatory or the uncertain is key. As Michael Dillon argues, central to the securing of populations are the “sciences of the aleatory or the contingent” in which the “government of population” is achieved by the sciences of “statistics and probability”.30 As he points out elsewhere, you “cannot secure anything unless you know what it is”, and therefore securitization demands that “people, territory, and things are transformed into epistemic objects”.31 And in planning the milieu of US ground forces overseas, JAGs translate regional AORs into legally enabled grids upon which US military operations take place. This is part of the production of what Matt Hannah terms “mappable landscapes of expectation”;32 and to this end, the aleatory is anticipated by planning for the ‘evental’ in the promissory language of securitization.

The ontology of the ‘event’ has recently garnered wide academic engagement. Randy Martin, for example, has underlined the eventual discursive underpinnings of US military strategy in the war on terror; highlighting how the risk of future events results in ‘preemption’ being the tactic of their securitization.33 Naomi Klein has laid bare the powerful event-based logic of ‘disaster capitalism’;34 while others have pointed out how an ascendant ‘logic of premediation’, in which the future is already anticipated and “mediated”, is a marked feature of the “post-9/11 cultural landscape”.35 But it was Foucault who first cited the import of the ‘evental’ in the realm of biopolitics. He points to the “anti-scarcity system” of seventeenth-century Europe as an early exemplar of a new ‘evental’ biopolitics in which “an event that could take place” is prevented before it “becomes a reality”.36 To this end, the figure of ‘population’ becomes both an ‘object’, “on which and towards which mechanisms are directed in order to have a particular effect on it”, but also a ‘subject’, “called upon to conduct itself in such and such a fashion”.37 Echoing Foucault, David Nally usefully argues that the emergence of the “era of bio-power” was facilitated by “the ability of ‘government’ to seize, manage and control individual bodies and whole populations”.38 And this is part of Michael Dillon’s argument about the “very operational heart of the security dispositif of the biopolitics of security”, which seeks to ‘strategize’, ‘secure’, ‘regulate’ and ‘manipulate’ the “circulation of species life”.39 For the US military, it is exactly the circulation and regulation of life that is central to its tactics of lawfare to juridically secure the necessary legal geographies and biopolitics of its overseas ground presence.

#### This biopolitical calculation justifies extinction in the name of saving human life.

Dillon 96—Michael, University of Lancaster [October 4, 1996, “Politics of Security: Towards a Political Philosophy of Continental Thought”]

The way of sharpening and focusing this thought into a precise question is first provided, however, by referring back to Foucault; for whom Heidegger was the philosopher. Of all recent thinkers, Foucault was amongst the most committed to the task of writing the history of the present in the light of the history of philosophy as metaphysics. 4 That is why, when first thinking about the prominence of security in modern politics, I first found Foucault’s mode of questioning so stimulating. There was, it seemed to me, a parallel to be drawn between what he saw the technology of disciplinary power/knowledge doing to the body and what the principle of security does to politics.

What truths about the human condition, he therefore prompted me to ask, are thought to be secreted in security? What work does securing security do for and upon us? What power-effects issue out of the regimes of truth of security? If the truth of security compels us to secure security, why, how and where is that grounding compulsion grounded? How was it that seeking security became such an insistent and relentless (inter)national preoccupation for humankind? What sort of project is the pursuit of security, and how does it relate to other modern human concerns and enterprises, such as seeking freedom and knowledge through representative-calculative thought, technology and subjectification? Above all, how are we to account—amongst all the manifest contradictions of our current (inter)national systems of security: which incarcerate rather than liberate; radically endanger rather than make safe; and engender fear rather than create assurance—for that terminal paradox of our modern (inter)national politics of security which Foucault captured so well in the quotation that heads this chapter. 5 A terminal paradox which not only subverts its own predicate of security, most spectacularly by rendering the future of terrestrial existence conditional on the strategies and calculations of its hybrid regime of sovereignty and governmentality, but which also seems to furnish a new predicate of global life, a new experience in the context of which the political has to be recovered and to which it must then address itself: the globalisation of politics of security in the global extension of nihilism and technology, and the advent of the real prospect of human species extinction.

#### Norm-setting for the legitimate use of force reflects colonial dominance by Western states. Non-western forms of warfare, identity, and authority are granted no standing.

Jeremy BLACK History @ Exeter 5 [“War and international relations: a military-historical perspective on force and legitimacy” *Review of Int’l Studies* 31 p. 128-131]

In response in both cases, these anti-methods are presented by critics as unacceptable and illegal, and indeed unheroic, and thus the legitimacy of the cause with which they are linked is denied. This can be seen in the treatment of terrorism, but also, more generally, in practices, real or alleged, of eroding the distinctions between ‘civilian’ and ‘military’. An instance of this was provided by allegations that military targets, such as missile-launchers, were located by Serbia in 1999 and Iraq in 2003 in civilian areas, and, in the latter case, by the employment of irregulars who did not wear uniform. As much of the legitimacy of the modern Western practice of force, and the legalisation of Western high-technology warfare,7 is held to rest on drawing a distinction between military and civilian, these moves affected both the character of Western warmaking, especially in the case of the ease of target acquisition, and its apparent legitimacy. Attacks on ‘civilian’ targets indeed became a basic text in public debate concerned about the morality of Western interventions and the nature of Western warmaking. This problem challenged pro-interventionist governments in their attempts to influence domestic and international opinion, as doing so in part rested on the argument that there was a distinction between the legitimate use of force directed against the military (and government targets), and usage that was illegitimate, whether by states, such as Iraq gassing Kurdish civilians, or by terrorist movements.8 There was a parallel here with weapons of mass destruction, with conflicting views on which powers could legitimately possess them. Legitimacy in this case was a response to perceptions of governmental systems and strategic cultures; and the imprecision of the concept of the rogue state does not satisfactorily address the issue.9 Instead, the ability of the world’s strongest power to propose the concept and define its application was seen by many as a challenge both to the sovereignty of states and to international norms. This will become a more serious problem as the rise of China and India leads to a decline in America’s relative strength. The notion of the morality of military usage as depending in part on the uneasy relationship between the doctrine of target allocation and acquisition, and the technology permitting the successful practice of this doctrine, is an instance of the way in which theories of force and legitimacy move in a problematic relationship with shifts in military capability and also in the type of wars being undertaken. This was not the sole instance of this process. To return to the point made at the outset, the nature of the military power wielded by the US (as well as the assumptions underlying its use) is crucial to modern discussion of force and legitimacy across at least much of the world. The historical perspective In historical terms, there is a marked and unprecedented contrast today between the distribution of military force and the notion of sovereign equality in international relations. There have been major powers before, but only the Western European maritime states – Portugal, Spain, The Netherlands, France and Britain – could even seek a global range, and, prior to that of Britain in the nineteenth century, the naval strength of these states was not matched by a land capability capable of competing with those of the leading military powers in the most populous part of the world: South and East Asia, nor, indeed, with an ability to expand into Africa beyond coastal enclaves. The success of the Western European powers in the Americas and at sea off India, did not mean that there was an equivalent success elsewhere, and this suggests that aggregate military capacity is a concept that has to be employed with care.10 East and South-East Asian powers, particularly China, were, in turn, not involved in an international system that directly encompassed the Western maritime states. In some respects, there was a curious coexistence as, from the 1630s, Spanish, Russian and Dutch military powers were all present in East Asian waters, but, in practice, this did not lead to the creation of a new system. The Europeans were insufficiently strong to challenge the East Asian powers seriously, and local advances were repelled by the most powerful, China: in the seventeenth century, the Dutch being driven from the Pescadore Islands and Taiwan, and the Russians from the Amur Valley,11 while the English in Bombay were forced to propitiate the Mughal Emperor; and were also unable to sustain their position in Tangier. The assumptions generally summarised as strategic culture also played a major role, as, despite their strength, none of the local powers sought to contest the European position in the Western Pacific: the Spaniards spread their control in the Philippines, and, from there, to the Mariana and Caroline Islands, and the Russians in north-east Asia and, across the North Pacific, to the Aleutians and Alaska. This was not challenged by China; nor Japan or Korea, both of which were weaker states. The absence of any such conflict ensured that relations between East Asian and Western European powers did not develop and become important, let alone normative, in the context of warfare or international relations. Instead, although trade with China was important for the West, there was scant development in such norms. The same was true of relations between the Mughal empire in India and European coastal positions in the sixteenth and seventeenth centuries, and also in South-East Asia, where major, aggressive states, such as Burma and Thailand in the eighteenth century, were able to operate with little reference to Western power (and indeed are largely ignored in Western historiography).12 This is a reminder of the late onset of modernity, understood in terms both of Western dominance, specifically of readily-evident superior Western military capability, and of Western international norms; although this definition of modernity is questionable, and increasingly so, as Asian states become more powerful. This late onset of modernity clashes with the conventional interpretation of the international order that traces an early establishment of the acceptance of sovereignty in a multipolar system, an establishment usually dated to the Peace of Westphalia of 1648.13 However appropriate for Europe, and that can be debated, this approach has far less meaning on the global level. The idea of such a system and of the associated norms outlined in Europe were of little relevance elsewhere until Western power expanded, and then they were not on offer to much of the world, or only on terms dictated by Western interests. This was true not only of such norms but also of conventions about international practices such as the definition of frontiers, or rights to free trade, or responses to what was presented as piracy.14 The question of frontiers was an aspect of the employment of the Western matrix of knowledge in ordering the world on Western terms and in Western interests. Force and legitimacy were brought together, for example, in the drawing of straight frontier and administration lines on maps, without regard to ethnic, linguistic, religious, economic and political alignments and practices, let alone drainage patterns, landforms and biological provinces. This was a statement of political control, judged by the West as legitimate and necessary in Western terms,15 and employed in order to deny all other existing indigenous practices, which were seen either as illegitimate, or, in light of a notion of rights that drew on social-Darwinianism, as less legitimate. The global military situation, specifically the Western ability to defeat and dictate to land powers, had changed in the nineteenth century, especially with the British defeat of the Marathas in India in 1803–6 and 1817–18, and, subsequently, with the defeats inflicted on China in 1839–42 and 1860, and with the Western overawing of Japan in 1853–4. In terms of the age, the speed and articulation offered British power by technological developments (especially, from mid-century, the steamship and the telegraph), by knowledge systems (particularly the accurate charting and mapping of coastal waters),16 and by organisational methods (notably the coaling stations on which the Royal Navy came to rely), all provided an hitherto unsurpassed global range and reach.17 Within this now globalised world, force and force projection came to define both the dominant (yet still contested) definition of legitimacy, and its application. Indeed, the capacity to direct the latter proved crucial to the development of the practice of legitimacy as related to its impact on non-Western states.

#### It’s try or die—this new colonialism dehumanizes populations resulting in unending violence

Batur 7 [Pinar, PhD @ UT-Austin – Prof. of Sociology @ Vassar, *The Heart of Violence: Global Racism, War, and Genocide*, Handbook of The Sociology of Racial and Ethnic Relations, eds. Vera and Feagin, p. 441-3]

War and genocide are horrid, and taking them for granted is inhuman. In the 21st century, our problem is not only seeing them as natural and inevitable, but even worse: not seeing, not noticing, but ignoring them. Such act and thought, fueled by global racism, reveal that racial inequality has advanced from the establishment of racial hierarchy and institutionalization of segregation, to the confinement and exclusion, and elimination, of those considered inferior through genocide. In this trajectory, global racism manifests genocide. But this is not inevitable. This article, by examining global racism, explores the new terms of exclusion and the path to permanent war and genocide, to examine the integrality of genocide to the frame-work of global antiracist confrontation. GLOBAL RACISM IN THE AGE OF “CULTURE WARS” Racist legitimization of inequality has changed from presupposed biological inferiority to assumed cultural inadequacy. This defines the new terms of impossibility of coexistence, much less equality. The Jim Crow racism of biological inferiority is now being replaced with a new and modern racism (Baker 1981; Ansell 1997) with “culture war” as the key to justify difference, hierarchy, and oppression. The ideology of “culture war” is becoming embedded in institutions, defining the workings of organizations, and is now defended by individuals who argue that they are not racist, but are not blind to the inherent differences between African-Americans/Arabs/Chinese, or whomever, and “us.” “Us” as a concept defines the power of a group to distinguish itself and to assign a superior value to its institutions, revealing certainty that **affinity with “them” will be harmful to its existence** (Hunter 1991; Buchanan 2002). How can we conceptualize this shift to examine what has changed over the past century and what has remained the same in a racist society? Joe Feagin examines this question with a theory of systemic racism to explore societal complexity of interconnected elements for longevity and adaptability of racism. He sees that systemic racism persists due to a “white racial frame,” defining and maintaining an “organized set of racialized ideas, stereotypes, emotions, and inclinations to discriminate” (Feagin 2006: 25). The white racial frame arranges the routine operation of racist institutions, which enables social and economic repro-duction and amendment of racial privilege. It is this frame that defines the political and economic bases of cultural and historical legitimization. While the white racial frame is one of the components of systemic racism, it is attached to other terms of racial oppression to forge systemic coherency. It has altered over time from slavery to segregation to racial oppression and now frames “culture war,” or “clash of civilizations,” to legitimate the racist oppression of domination, exclusion, war, and genocide. The concept of “culture war” emerged to define opposing ideas in America regarding privacy, censorship, citizenship rights, and secularism, but it has been globalized through conflicts over immigration, nuclear power, and the “war on terrorism.” Its discourse and action articulate to flood the racial space of systemic racism. Racism is a process of defining and building communities and societies based on racial-ized hierarchy of power. The expansion of capitalism cast new formulas of divisions and oppositions, fostering inequality even while integrating all previous forms of oppressive hierarchical arrangements as long as they bolstered the need to maintain the structure and form of capitalist arrangements (Batur-VanderLippe 1996). In this context, the white racial frame, defining the terms of racist systems of oppression, enabled the globalization of racial space through the articulation of capitalism (Du Bois 1942; Winant 1994). The key to understanding this expansion is comprehension of the synergistic relationship between racist systems of oppression and the capitalist system of exploitation. Taken separately, these two systems would be unable to create such oppression independently. However, the synergy between them is devastating. In the age of industrial capitalism, this synergy manifested itself imperialism and colonialism. In the age of advanced capitalism, it is war and genocide. The capitalist system, by enabling and maintaining the connection between everyday life and the global, buttresses the processes of racial oppression, and synergy between racial oppression and capitalist exploitation begets violence. Etienne Balibar points out that the connection between everyday life and the global is established through thought, making global racism a way of thinking, enabling connections of “words with objects and words with images in order to create concepts” (Balibar 1994: 200). Yet, global racism is not only an articulation of thought, but also a way of knowing and acting, framed by both everyday and global experiences. Synergy between capitalism and racism as systems of oppression enables this perpetuation and destruction on the global level. As capitalism expanded and adapted to the particularities of spatial and temporal variables, global racism became part of its legitimization and accommodation, first in terms of colonialist arrangements. In colonized and colonizing lands, global racism has been perpetuated through racial ideologies and discriminatory practices under capitalism by the creation and recreation of connections among memory, knowledge, institutions, and construction of the future in thought and action. What makes racism global are the bridges connecting the particularities of everyday racist experiences to the universality of racist concepts and actions, maintained globally by myriad forms of prejudice, discrimination, and violence (Balibar and Wallerstein 1991; Batur 1999, 2006). Under colonialism, colonizing and colonized societies were antagonistic opposites. Since colonizing society portrayed the colonized “other,” as the adversary and challenger of the “the ideal self,” not only identification but also segregation and containment were essential to racist policies. The terms of exclusion were set by the institutions that fostered and maintained segregation, but the intensity of exclusion, and redundancy, became more apparent in the age of advanced capitalism, as an extension of post-colonial discipline. The exclusionary measures when tested led to war, and genocide. Although, more often than not, genocide was perpetuated and fostered by the post-colonial institutions, rather than colonizing forces, the colonial identification of the “inferior other” led to segregation, then exclusion, then war and genocide. Violence glued them together into seamless continuity. Violence is integral to understanding global racism. Fanon (1963), in exploring colonial oppression, discusses how divisions created or reinforced by colonialism guarantee the perpetuation, and escalation, of violence for both the colonizer and colonized. Racial differentiations, cemented through the colonial relationship, are integral to the aggregation of violence during and after colonialism: “Manichaeism [division of the universe into opposites of good and evil] goes to its logical conclusion and dehumanizes” (Fanon 1963:42). Within this dehumanizing framework, Fanon argues that the violence resulting from the destruction of everyday life, sense of self and imagination under colonialism continues to infest the post-colonial existence by integrating colonized land into the violent destruction of a new “geography of hunger” and exploitation (Fanon 1963: 96). The “geography of hunger” marks the context and space in which oppression and exploitation continue. The historical maps drawn by colonialism now demarcate the boundaries of post-colonial arrangements. The white racial frame restructures this space to fit the imagery of symbolic racism, modifying it to fit the television screen, or making the evidence of the necessity of the politics of exclusion, and the violence of war and genocide, palatable enough for the front page of newspapers, spread out next to the morning breakfast cereal. Two examples of this “geography of hunger and exploitation” are Iraq and New Orleans.

#### Alternative—Challenge to *conceptual* framework of national security. Only our alternative displaces the source of executive overreach. Legal restraint without conceptual change is futile.

Aziz RANA Law at Cornell 11 [“Who Decides on Security?” Cornell Law Faculty Working Papers, Paper 87, http://scholarship.law.cornell.edu/clsops\_papers/87 p. 45-51]

The prevalence of these continuities between Frankfurter’s vision and contemporary judicial arguments raise serious concerns with today’s conceptual framework. Certainly, Frankfurter’s role during World War II in defending and promoting a number of infamous judicial decisions highlights the potential abuses embedded in a legal discourse premised on the specially-situated knowledge of executive officials and military personnel. As the example of Japanese internment dramatizes, too strong an assumption of expert understanding can easily allow elite prejudices—and with it state violence—to run rampant and unconstrained. For the present, it hints at an obvious question: How skeptical should we be of current assertions of expertise and, indeed, of the dominant security framework itself? One claim, repeated especially in the wake of September 11, has been that regardless of normative legitimacy, the prevailing security concept—with its account of unique knowledge, insulation, and hierarchy—is simply an unavoidable consequence of existing global dangers. Even if Herring and Frankfurter may have been wrong in principle about their answer to the question “who decides in matters of security?” they nevertheless were right to believe that complexity and endemic threat make it impossible to defend the old Lockean sensibility. In the final pages of the article, I explore this basic question of the degree to which objective conditions justify the conceptual shifts and offer some initial reflections on what might be required to limit the government’s expansive security powers. VI. CONCLUSION: THE OPENNESS OF THREATS The ideological transformation in the meaning of security has helped to generate a massive and largely secret infrastructure of overlapping executive agencies, all tasked with gathering information and keeping the country safe from perceived threats. In 2010, The Washington Post produced a series of articles outlining the buildings, personnel, and companies that make up this hidden national security apparatus. According to journalists Dana Priest and William Arkin, there exist “some 1271 government organizations and 1931 private companies” across 10,000 locations in the United States, all working on “counterterrorism, homeland security, and intelligence.”180 This apparatus is especially concentrated in the Washington, D.C. area, which amounts to “the capital of an alternative geography of the United States.”181 Employed by these hidden agencies and bureaucratic entities are some 854,000 people (approximately 1.5 times as many people as live in Washington itself) who hold topsecret clearances.182 As Priest and Arkin make clear, the most elite of those with such clearance are highly trained experts, ranging from scientists and economists to regional specialists. “To do what it does, the NSA relies on the largest number of mathematicians in the world. It needs linguists and technology experts, as well as cryptologists, known as ‘crippies.’”183 These professionals cluster together in neighborhoods that are among the wealthiest in the country—six of the ten richest counties in the United States according to Census Bureau data.184 As the executive of Howard County, Virginia, one such community, declared, “These are some of the most brilliant people in the world. . . . They demand good schools and a high quality of life.”185 School excellence is particularly important, as education holds the key to sustaining elevated professional and financial status across generations. In fact, some schools are even “adopting a curriculum . . . that will teach students as young as 10 what kind of lifestyle it takes to get a security clearance and what kind of behavior would disqualify them.”186 The implicit aim of this curriculum is to ensure that the children of NSA mathematicians and Defense Department linguists can one day succeed their parents on the job. In effect, what Priest and Arkin detail is a striking illustration of how security has transformed from a matter of ordinary judgment into one of elite skill. They also underscore how this transformation is bound to a related set of developments regarding social privilege and status—developments that would have been welcome to Frankfurter but deeply disillusioning to Brownson, Lincoln, and Taney. Such changes highlight how one’s professional standing increasingly drives who has a right to make key institutional choices. Lost in the process, however, is the longstanding belief that issues of war and peace are fundamentally a domain of common care, marked by democratic intelligence and shared responsibility. Despite such democratic concerns, a large part of what makes today’s dominant security concept so compelling are two purportedly objective sociological claims about the nature of modern threat. As these claims undergird the current security concept, by way of a conclusion I would like to assess them more directly and, in the process, indicate what they suggest about the prospects for any future reform. The first claim is that global interdependence means that the U.S. faces near continuous threats from abroad. Just as Pearl Harbor presented a physical attack on the homeland justifying a revised framework, the American position in the world since has been one of permanent insecurity in the face of new, equally objective dangers. Although today these threats no longer come from menacing totalitarian regimes like Nazi Germany or the Soviet Union, they nonetheless create of world of chaos and instability in which American domestic peace is imperiled by decentralized terrorists and aggressive rogue states.187 Second, and relatedly, the objective complexity of modern threats makes it impossible for ordinary citizens to comprehend fully the causes and likely consequences of existing dangers. Thus, the best response is the further entrenchment of Herring’s national security state, with the U.S. permanently mobilized militarily to gather intelligence and to combat enemies wherever they strike—at home or abroad. Accordingly, modern legal and political institutions that privilege executive authority and insulated decisionmaking are simply the necessary consequence of these externally generated crises. Regardless of these trade-offs, the security benefits of an empowered presidency (one armed with countless secret and public agencies as well as with a truly global military footprint)188 greatly outweigh the costs. Yet, although these sociological views have become commonplace, the conclusions that Americans should draw about security requirements are not nearly as clear cut as the conventional wisdom assumes. In particular, a closer examination of contemporary arguments about endemic danger suggests that such claims are not objective empirical judgments but rather are socially complex and politically infused interpretations. Indeed, the openness of existing circumstances to multiple interpretations of threat implies that the presumptive need for secrecy and centralization is not self-evident. And as underscored by high profile failures in expert assessment, claims to security expertise are themselves riddled with ideological presuppositions and subjective biases. All this indicates that the gulf between elite knowledge and lay incomprehension in matters of security may be far less extensive than is ordinarily thought. It also means that the question of who decides—and with it the issue of how democratic or insular our institutions should be—remains open as well. Clearly technological changes, from airpower to biological and chemical weapons, have shifted the nature of America’s position in the world and its potential vulnerability. As has been widely remarked for nearly a century, the oceans alone cannot guarantee our permanent safety. Yet, in truth they never fully ensured domestic tranquility. The nineteenth century was one of near continuous violence, especially with indigenous communities fighting to protect their territory from expansionist settlers.189 But even if technological shifts make doomsday scenarios more chilling than those faced by Hamilton, Jefferson, or Taney, the mere existence of these scenarios tells us little about their likelihood or how best to address them. Indeed, these latter security judgments are inevitably permeated with subjective political assessments, assessments that carry with them preexisting ideological points of view—such as regarding how much risk constitutional societies should accept or how interventionist states should be in foreign policy. In fact, from its emergence in the 1930s and 1940s, supporters of the modern security concept have—at times unwittingly—reaffirmed the political rather than purely objective nature of interpreting external threats. In particular, commentators have repeatedly noted the link between the idea of insecurity and America’s post-World War II position of global primacy, one which today has only expanded following the Cold War. In 1961, none other than Senator James William Fulbright declared, in terms reminiscent of Herring and Frankfurter, that security imperatives meant that “our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the 18th century,” was no longer “adequate” for the “20th- century nation.”190 For Fulbright, the driving impetus behind the need to jettison antiquated constitutional practices was the importance of sustaining the country’s “preeminen[ce] in political and military power.”191 Fulbright held that greater executive action and war-making capacities were essential precisely because the United States found itself “burdened with all the enormous responsibilities that accompany such power.”192 According to Fulbright, the United States had both a right and a duty to suppress those forms of chaos and disorder that existed at the edges of American authority. Thus, rather than being purely objective, the American condition of permanent danger was itself deeply tied to political calculations about the importance of global primacy. What generated the condition of continual crisis was not only technological change, but also the belief that the United States’ own ‘national security’ rested on the successful projection of power into the internal affairs of foreign states. The key point is that regardless of whether one agrees with such an underlying project, the value of this project is ultimately an open political question. This suggests that whether distant crises should be viewed as generating insecurity at home is similarly as much an interpretative judgment as an empirically verifiable conclusion.193 To appreciate the open nature of security determinations, one need only look at the presentation of terrorism as a principal and overriding danger facing the country. According to the State Department’s Annual Country Reports on Terrorism, in 2009 “[t]here were just 25 U.S. noncombatant fatalities from terrorism worldwide” (sixteen abroad and nine at home).194 While the fear of a terrorist attack is a legitimate concern, these numbers—which have been consistent in recent years—place the gravity of the threat in perspective. Rather than a condition of endemic danger—requiring everincreasing secrecy and centralization—such facts are perfectly consistent with a reading that Americans do not face an existential crisis (one presumably comparable to Pearl Harbor) and actually enjoy relative security. Indeed, the disconnect between numbers and resources expended, especially in a time of profound economic insecurity, highlights the political choice of policymakers and citizens to persist in interpreting foreign events through a World War II and early Cold War lens of permanent threat. In fact, the continuous alteration of basic constitutional values to fit ‘national security’ aims highlights just how entrenched Herring’s old vision of security as pre-political and foundational has become, regardless of whether other interpretations of the present moment may be equally compelling. It also underscores a telling and often ignored point about the nature of modern security expertise, particularly as reproduced by the United States’ massive intelligence infrastructure. To the extent that political assumptions—like the centrality of global primacy or the view that instability abroad necessarily implicates security at home—shape the interpretative approach of executive officials, what passes as objective security expertise is itself intertwined with contested claims about how to view external actors and their motivations. This means that while modern conditions may well be complex, the conclusions of the presumed experts may not be systematically less liable to subjective bias than judgments made by ordinary citizens based on publicly available information. It further underscores that the question of who decides cannot be foreclosed in advance by simply asserting deference to elite knowledge. If anything, one can argue that the presumptive gulf between elite awareness and suspect mass opinion has generated its own very dramatic political and legal pathologies. In recent years, the country has witnessed a variety of security crises built on the basic failure of ‘expertise.’195 At present, part of what obscures this fact is the very culture of secret information sustained by the modern security concept. Today, it is commonplace for government officials to leak security material about terrorism or external threat to newspapers as a method of shaping the public debate.196 These ‘open’ secrets allow greater public access to elite information and embody a central and routine instrument for incorporating mass voice into state decision-making. But this mode of popular involvement comes at a key cost. Secret information is generally treated as worthy of a higher status than information already present in the public realm—the shared collective information through which ordinary citizens reach conclusions about emergency and defense. Yet, oftentimes, as with the lead up to the Iraq War in 2003, although the actual content of this secret information is flawed,197 its status as secret masks these problems and allows policymakers to cloak their positions in added authority. This reality highlights the importance of approaching security information with far greater collective skepticism; it also means that security judgments may be more ‘Hobbesian’—marked fundamentally by epistemological uncertainty as opposed to verifiable fact—than policymakers admit. If both objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this mean for reform efforts that seek to recalibrate the relationship between liberty and security? Above all, it indicates that the central problem with the procedural solutions offered by constitutional scholars—emphasizing new statutory frameworks or greater judicial assertiveness—is that they mistake a question of politics for one of law. In other words, such scholars ignore the extent to which governing practices are the product of background political judgments about threat, democratic knowledge, professional expertise, and the necessity for insulated decision-making. To the extent that Americans are convinced that they face continuous danger from hidden and potentially limitless assailants—danger too complex for the average citizen to comprehend independently—it is inevitable that institutions (regardless of legal reform initiatives) will operate to centralize power in those hands presumed to enjoy military and security expertise. Thus, any systematic effort to challenge the current framing of the relationship between security and liberty must begin by challenging the underlying assumptions about knowledge and security upon which legal and political arrangements rest. Without a sustained and public debate about the validity of security expertise, its supporting institutions, and the broader legitimacy of secret information, there can be no substantive shift in our constitutional politics. The problem at present, however, is that no popular base exists to raise these questions. Unless such a base emerges, we can expect our prevailing security arrangements to become ever more entrenched.

### 1NC Legal Regimes Advantage

#### They don’t solve their Blank evidence --- the affirmative stops the U.S. from using self-defense justifications inside of combat zones, but doesn’t stop the corollary issue of armed conflict justifications being used OUTSIDE of combat zones.

Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, 2012, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, http://www.wmitchell.edu/lawreview/Volume38/documents/11.BlankFINAL.pdf

For the past several years, the United States has relied on both armed conflict and self-defense as legal justifications for targeted strikes outside of the zone of active combat in Afghanistan. A host of interesting questions arise from both the use of targeted strikes and the expansive U.S. justifications for such strikes, including the use of force in self-defense against non-state actors, the use of force across state boundaries, the nature and content of state consent to such operations, the use of targeted killing as a lawful and effective counterterrorism measure, and others.7 Furthermore, each of the justifications—armed conflict and self-defense—raises its own challenging questions regarding the appropriate application of the law and the parameters of the legal paradigm at issue. For example, if the existence of an armed conflict is the justification for certain targeted strikes, the immediate follow-on questions include the determination of a legitimate target within an armed conflict with a terrorist group and the geography of the battlefield. Within the self-defense paradigm, key questions include the very contours of the right to use force in self-defense against individuals and the implementation of the concepts of necessity and imminence, among many others. However, equally fundamental questions arise from the use of both justifications at the same time, without careful distinction delimiting the boundaries between when one applies and when the other applies. From the perspective of the policymaker, the use of both justifications without further distinction surely offers greater flexibility and potential for action in a range of circumstances.8 To the extent such flexibility does not impact the implementation of the relevant law or hinder the development and enforcement of that law in the future, it may well be an acceptable goal. In the case of targeted strikes in the current international environment of armed conflict and counterterrorism operations occurring at the same time, however, the mixing of legal justifications raises significant concerns about both current implementation and future development of the law. One overarching concern is the conflation in general of jus ad bellum and jus in bello. The former is the law governing the resort to force—sometimes called the law of self-defense—and the latter is the law regulating the conduct of hostilities and the protection of persons in conflict—generally called the law of war, the law of armed conflict, or international humanitarian law. International law reinforces a strict separation between the two bodies of law, ensuring that all parties have the same obligations and rights during armed conflict to ensure that all persons and property benefit from the protection of the laws of war. For example, the Nuremberg Tribunal repeatedly held that Germany’s crime of aggression neither rendered all German acts unlawful nor prevented German soldiers from benefitting from the protections of the jus in bello.9 More recently, the Special Court for Sierra Leone refused to reduce the sentences of Civil Defense Forces fighters on the grounds that they fought in a “legitimate war” to protect the government against the rebels.10 The basic principle that the rights and obligations of jus in bello apply regardless of the justness or unjustness of the overall military operation thus remains firmly entrenched. Indeed, if the cause at arms influenced a state’s obligation to abide by the laws regulating the means and methods of warfare and requiring protection of civilians and persons hors de combat, states would justify all departures from jus in bello with reference to the purported justness of their cause. The result: an invitation to unregulated warfare.11

#### This is magnified by the ambiguity of what constitutes a “zone of conflict” --- if the U.S. continues to re-interpret that phrase broadly to include places such as Somalia or Yemen, then conflation problems will still exist.

Wood 13—David Wood has been a journalist since 1970, a staff correspondent successively for Time Magazine, the Los Angeles Times, Newhouse News Service, The Baltimore Sun and Politics Daily [February 14, 2013, http://www.huffingtonpost.com/2013/02/14/drone-attacks-legal-debate\_n\_2687980.html?utm\_hp\_ref=david-wood]

Yemen was different. The White House was not sending tens of thousands of troops, and there was no solemn Oval Office speech summoning the nation to battle there. However, though few knew it at the time, earlier that year Yemen had been officially designated as a "combat zone" making the killings legal, at least in the eyes of the CIA and the White House of George W. Bush.

But ever since that first "non-battlefield" drone strike, generals and legal scholars, pundits and politicians have argued passionately about what, exactly, constitutes an armed conflict, or a war zone, or a battlefield, and what is outside armed conflict.

The distinction matters. "Inside an armed conflict, you are allowed to kill people without warning. Outside, you are not," says Notre Dame law professor Mary Ellen O'Connell, a specialist in international laws of war and conflict. "That makes it pretty important to know whether you're on a battlefield or not."

And not just if you're standing on a battlefield. As difficult as it is to pin down the law of armed conflict, "it's really important to raise these questions, because we've been lulled since 9/11 into the sense that our government has the ability to decide through its intelligence agencies who is a bad guy and to kill him and the people around him," O'Connell told The Huffington Post. "I don't want to see them drag the law down and lose the world as a place in which the law is held as a high standard."

Difficult questions about international law are boiling up because of the Obama administration's accelerating use of armed drones against what it says are suspected terrorists in Pakistan, Yemen and Somalia, and potentially elsewhere as well.

In his State of the Union address Tuesday, President Obama seemingly acknowledged the growing public unease about the program's troubling secrecy and whether the strikes are justified and legal. He would, he promised, be "even more transparent" about how the strikes comply with the law.

That vague wording promises that the bitter disagreements over what the law says, and how it applies, are only going to get more heated.

"I don't think we are ever going to have a precise answer," says Laurie R. Blank, director of the International Humanitarian Law Center at Emory University School of Law and the author of several books on war and international law. In the long history of warfare, there have been clear-cut cases where existing law applies, mostly when two governments are at war in a geographically defined area.

"But the nature of the world today is that it makes it difficult to put war into neat and tidy packages," Blank says.

War and the law have come a long way from that muddy day in October almost 600 years ago when British infantry and archers memorably clashed with French knights near the Normandy village of Maisoncelles. It was a modest, neatly-defined battle, or armed conflict: the belligerents were drawn up at either end of a small wheat field; the bristling battle lines were barely 1,000 yards apart, and when the carnage was over in a few hours, a pair of professional referees declared British King Henry V the winner and named the battle Agincourt, after a nearby castle.

By contrast, many of today's conflicts range over time and space, and belligerents morph from terrorist to civilian to warrior. Do a few suicide bombings in Islamabad define a war zone? Does the taking of hostages at an Algerian gas plant constitute an international armed conflict? Does a skyjacking plot conceived in Afghanistan and planned in Germany, which kills 3,000 people in New York and Washington, create legal war zones or armed conflicts in all four places? What if one of the plotters is hiding in Cleveland?

How far does the concept of self-defense go? Can someone just declare an area to be a free-fire "battlefield"? If the United States is at war with terrorists, and there are terrorists inside the United States, can they be targeted with armed drones? If a Taliban sneaks across the Afghan border with Iran, can the U.S. target him there? And is Iran then justified under the U.N. rule of self defense to plant a terrorist bomb in Times Square?

Could an al Qaeda terrorist protect himself by becoming an American citizen?

These are among the questions that remain for the Obama White House to clear up. But there are no simple answers.

The administration has argued, for instance, that in some places like Paris, or Cleveland, the police can handle an al Qaeda suspect as a matter of law enforcement. But when a terrorist is operating in a place like Yemen, where the government "is unable or unwilling to suppress the threat," the president has the authority to order a strike, according to the Department of Justice white paper on the legal basis for drone attacks, which surfaced last week.

That explanation -- that killing is okay in a "weak" state -- hardly quieted the debate on Capitol Hill.

If geography doesn't settle the matter of what is an armed conflict, what does? The International Committee of the Red Cross, the independent, neutral organization which oversees the 1949 Geneva Conventions and associated international humanitarian law, recognizes two types of armed conflict: international conflict, between two nations, and "non-international conflict," involving a state and an armed group, or two armed groups -- basically everything else but international conflict.

According to the ICRC, to qualify as a non-international armed conflict, the fighting must be protracted and intense. As it is, for example, in Afghanistan.

Given that the fighting between the United States and anyone in Yemen is neither protracted nor intense -- but rather consists of sporadic drone attacks and other targeted killings -- it would seem that the U.S. drone attacks in Yemen do not qualify and thus are illegal.

That's the argument advanced by O'Connell, and it was noted and abruptly dismissed by the Obama lawyers who wrote the white paper. Their argument was not that the fighting was protracted and intense. They argued that the law doesn't apply.

"There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict," the anonymous authors of the white paper wrote.

This back-and-forth argument, about whether a conflict can be defined by its battle space or intensity, is irrelevant, says Geoffrey Corn, a career Army officer who served as the senior Army advisor on the law of war. A conflict ought to be defined by the threat, he told The Huffington Post.

"Trying to define the military hot zone is inconsistent with military logic, with the history of warfare and inconsistent with the laws of armed conflict," said Corn, who teaches at South Texas College of Law, in Houston. "Plus, it invests your opponent with the perverse incentive to conduct operations from some place not involved in the struggle, in order to gain immunity." In other words, to skip across the border into sanctuary.

According to Corn, the idea of a geographical battle zone was dismissed in 1982, when the Argentine cruiser Belgrano was sunk by British forces during the Falklands War. While the Argentines claimed the attack was a war crime because the cruiser was not in the Falklands exclusion zone and had in fact turned away from the British fleet, London asserted it was legal because once Britain and Argentina engaged in hostilities, any target was fair game, no matter where.

#### Blank says that uncertainty over the geographic definition of “zones of conflict” also undermines legal regimes.

Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, 2012, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, http://www.wmitchell.edu/lawreview/Volume38/documents/11.BlankFINAL.pdf

The distinct differences between the targeting regimes in armed conflict and in self-defense and who can be targeted in which circumstances makes understanding the differentiation between the two paradigms essential to lawful conduct in both situations. The United States has launched targeted strikes in Afghanistan, Pakistan, Yemen, Somalia, and Syria during the past several years. The broad geographic range of the strike locations has produced significant questions—as yet mostly unanswered— and debate regarding the parameters of the conflict with al Qaeda. 67 The U.S. armed conflict with al Qaeda and other terrorist groups has focused on Afghanistan and the border regions of Pakistan, but the United States has launched an extensive campaign of targeted strikes in Yemen and some strikes in Somalia in the past year as well. In the early days of the conflict, the United States seemed to trumpet the notion of a global battlefield, in which the conflict with al Qaeda extended to every corner of the world. 68 Others have argued that conflict, even one with a transnational terrorist group, can only take place in limited, defined geographic areas. 69 At present, the United States has stepped back from the notion of a global battlefield, although there is little guidance to determine precisely what factors influence the parameters of the zone of combat in the conflict with al Qaeda. 70 Traditionally, the law of neutrality provided the guiding framework for the parameters of the battlespace in an international armed conflict. When two or more states are fighting and certain other states remain neutral, the line between the two forms the divider between the application of the laws of war and the law of neutrality. 71 The law of neutrality is based on the fundamental principle that neutral territory is inviolable 72 and focuses on three main goals: (1) contain the spread of hostilities, particularly by keeping down the number of participants; (2) define the legal rights of parties and nonparties to the conflict; and (3) limit the impact of war on nonparticipants, especially with regard to commerce. 73 In this way, neutrality law leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons, but must refrain from any operations on neutral territory. In essence, the battlespace in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states. 74 The language of the Geneva Conventions tracks this concept fairly closely. Common Article 2, which sets forth the definition of international armed conflict, states that such conflict occurs in “all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties.” 75 In Common Article 3, noninternational armed conflicts include conflicts between a state and non-state armed groups that are “occurring in the territory of one of the High Contracting Parties.” 76 Both of these formulations tie the location of the armed conflict directly to the territory of one or more belligerent parties. The neutrality framework as a geographic parameter is left wanting in today’s conflicts with terrorist groups, however. First, as a formal matter, the law of neutrality technically only applies in cases of international armed conflict. 77 Even analogizing to the situations we face today is highly problematic, however, because today’s conflicts not only pit states against non-state actors, but because those actors and groups often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. As state and non-state actors have often shifted unpredictably and irregularly between acts characteristic of wartime and those characteristic of not-wartime[, t]he unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries. 78 Simply locating terrorist groups and operatives does not therefore identify the parameters of the battlefield—the fact that the United States and other states use a combination of military operations and law enforcement measures to combat terrorism blurs the lines one might look for in defining the battlefield. In many situations, “the fight against transnational jihadi groups . . . largely takes place away from any recognizable battlefield.” 79 Second, a look at U.S. jurisprudence in the past and today demonstrates a clear break between the framework applied in past wars and the views courts are taking today. U.S. courts during World War I viewed “the port of New York [as] within the field of active [military] operations.” 80 Similarly, a 1942 decision upholding the lawfulness of an order evacuating JapaneseAmericans to a military area stated plainly that the field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive. 81 In each of those cases, the United States was a belligerent in an international armed conflict; the law of neutrality mandated that U.S. territory was belligerent territory and therefore part of the battlefield or combat zone. The courts take a decidedly different view in today’s conflicts, however, consistently referring to the United States as “outside a zone of combat,” 82 “distant from a zone of combat,” 83 or not within any “active [or formal] theater of war,” 84 even while recognizing the novel geographic nature of the conflict. Even more recently, in Al Maqaleh v. Gates, both the District Court and the Court of Appeals distinguished between Afghanistan, “a theater of active military combat,” 85 and other areas (including the United States), which are described as “far removed from any battlefield.” 86 In a traditional belligerency-neutrality framework, one would expect to see U.S. territory viewed as part of the battlefield; the fact that courts consistently trend the other way highlights both the difference in approach and the uncertainty involved in defining today’s conflicts.

#### They also don’t solve Martin --- this card says that the very idea of an “armed conflict” with Al Qaeda is problematic, because the geographic scope of that conflict is hard to define.

Craig Martin, Associate Professor of Law at Washburn University School of Law, 2011, GOING MEDIEVAL: TARGETED KILLING, SELFDEFENSE AND THE JUS AD BELLUM REGIME, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1956141

The United States has been engaging in this practice of using drone-mounted missile systems to kill targeted individuals since at least 2002.98 An increasing number of countries are developing drone capabilities, and other countries have employed different methods of targeted killing that constitute a use of force under jus ad bellum.99 The evidence suggests that the United States intends to continue and indeed expand the program, and there is a growing body of scholarly literature that either defends the policy’s legality, or advocates adjustment in international law to permit such action. There is, therefore, a real prospect that the practice could become more widespread, and that customary international law could begin to shift to reflect the principles implicit in the U.S. justification andin accordance with the rationales developed to support it**.** Some of the implications of such an adjustment in the jus ad bellum regime are obvious from the foregoing analysis. As discussed, there would be a rejection of the narrow principle of self-defense in favor of something much closer to the Grotian concept of defensive war, encompassing punitive measures in response to past attacks and preventative uses of force to halt the development of future threats. The current conditions for a legitimate use of force in self-defense, namely the occurrence or imminence of an armed attack, necessity, and proportionality, would be significantly diluted or abandoned. Not only the doctrine of self-defense, but other aspects of the collective security system would be relaxed as well. Harkening back to Grotian notions of law enforcement constituting a just cause for war, the adjusted jus ad bellum regime would potentially permit the unilateral use of force against and within states for the purpose of attacking NSAs as such, in effect to enforce international law in jurisdictions that were incapable of doing so themselves.100 This would not only further undermine the concept of self-defense, but would undermine the exclusive jurisdiction that the U.N. Security Council currently has to authorize the use of force for purposes of “law enforcement” under Chapter VII of the Charter. Thus, both of the exceptions to the Article 2(4) prohibition on the use of force would be expanded. In addition, however, the targeted killing policy threatens to create other holes in the jus ad bellum regime. This less obvious injury would arise from changes that would be similarly required of the IHL regime, and the resulting modifications to the fundamental relationship between the two regimes. These changes could lead to a complete severance of the remaining connection between the two regimes. Indeed, Ken Anderson, a scholar who has testified more than once on this subject before the U.S. Congress,101 has advocated just such a position, suggesting that the United States should assert that its use of force against other states in the process of targeted killings, while justified by the right to self-defense, does not rise to such a level that it would trigger the existence of an international armed conflict or the operation of IHL principles.102 If customary international law evolved along such lines, reverting to gradations in the types of use of force, the change would destroy the unity of the system comprised of the jus ad bellum and IHL regimes, and there would be legal “black holes” in which states could use force without being subject to the limitations and conditions imposed by the IHL regime. The structure of Harold Koh’s two-pronged justification similarly implies a severance of this relationship between jus ad bellum and IHL, albeit in a different and even more troubling way. His policy justification consists of two apparently independent and alternative arguments—that the United States is in an armed conflict with Al Qaeda and associated groups; and that the actions are justified as an exercise of self-defense. The suggestion seems to be that the United States is entitled on either basis to use armed force not just against the individuals targeted, but also against states in which the terrorist members are located. In other words, the first prong of the argument is that the use of force against another sovereign state, for the purposes of targeting Al Qaeda members, is justified by the existence of an armed conflict with Al Qaeda. If this is indeed what is intended by the policy justification, it represents an extraordinary move**,** not just because it purports to create a new category of armed conflict (that is, a “transnational” armed conflict without geographic limitation),103 but because it also suggests that there need be no jus ad bellum justification at all for a use of force against another state. Rather, the implication of Koh’s rationale is that the existence of an armed conflict under IHL can by itself provide grounds for exemption from the prohibition against the threat or use of force under the jus ad bellum regime. This interpretation of the justifications cannot be pressed too far on the basis of the language of Mr. Koh’s speech alone, which he hastened to explain at the time was not a legal opinion.104 The two justifications could be explained as being supplementary rather than independent and alternative in nature. But the conduct of the United States in the prosecution of the policy would appear to confirm that it is based on these two independent justifications.105 The strikes against groups and states unrelated to the 9/11 attacks could be explained in part by the novel idea that force can be used against NSAs as such, wherever they may be situated. But even assuming some sort of strict liability for states in which guilty NSAs are found, that explanation still does not entirely account for the failure to tie the use of force against the different groups to specific armed attacks launched by each such group. This suggests that the United States is also relying quite independently on the argument that it is engaged in an armed conflict with all of these groups, and that the existence of such an armed conflict provides an independent justification for the use of force against the states in which the groups may be operating. While the initial use of force in jus ad bellum terms is currently understood to bring into existence an international armed conflict and trigger the operation of IHL, the changes suggested by the policy would turn this on its head, by permitting the alleged existence of a “transnational” armed conflict to justify the initial use of force against third states. Whereas the two regimes currently operate as two components of an overall legal system relating to war, with one regime governing the use of force and the other the conduct of hostilities in the resulting armed conflict, the move attempted by the U.S. policy would terminate these independent but inter-related roles within a single system, and expand the role and scope of IHL to essentially replace aspects of the jus ad bellum regime. This would not only radically erode the jus ad bellum regime’s control over the state use of force, but it could potentially undermine the core idea that war, or in more modern terms the use of force and armed conflict, constitutes a legal state that triggers the operation of special laws that govern the various aspects of the phenomenon. There is a risk of return to a pre-Grotian perspective in which “war” was simply a term used to describe certain kinds of organized violence, rather than constituting a legal institution characterized by a coherent system of laws designed to govern and constrain all aspects of its operation. There is a tendency in the U.S. approach to the so-called “global war on terror” to cherry-pick principles of the laws of war and to apply them in ways and in circumstances that are inconsistent with the very criteria within that legal system that determine when and how it is to operate. This reflects a certain disdain for the idea that the laws of war constitute an internally coherent system of law.106 In short, the advocated changes to the jus ad bellum regime and to the relationship between it and the IHL regime, and thus to the laws of war system as a whole,107 would constitute marked departures from the trajectory the system has been on during its development over the past century, and would be a repudiation of deliberate decisions that were made in creating the U.N. system after the Second World War.108 The premise of my argument is not that any return to past principles is inherently regressive. A rejection of recent innovations in favor of certain past practices might be attractive to some in the face of new transnational threats. The argument here is not even to deny the idea that the international law system may have to adapt to respond to the transnational terrorist threat. The point, rather, is that the kind of changes to the international law system that are implicit in the targeted killing policy, and which are advocated by its supporters, would serve to radically reduce the limitations and constraints on the use of force by states against states. The modern principles that are being abandoned were created for the purpose of limiting the use of force and thus reducing the incidence of armed conflict among nations. The rejection of those ideas and a return to older concepts relating to the law of war would restore aspects of a system in which war was a legitimate tool of statecraft, and international armed conflict was thus far more frequent and widespread.109 The entire debate on targeted killing is so narrowly focused on the particular problems posed by transnational terrorist threats, and how to manipulate the legal limitations that tend to frustrate some of the desired policy choices, that there is insufficient reflection on the broader context, and the consequences that proposed changes to the legal constraints would have on the wider legal system of which they are a part. It may serve the immediate requirements of the American government, in order to legitimize the killing of AQAP members in Yemen, to expand the concept of self-defense, and to suggest that states can use force on the basis of a putative “transnational” armed conflict with NSAs. The problem is that the jus ad bellum regime applies to all state use of force, and it is not being adjusted in some tailored way to deal with terrorism alone. If the doctrine of self-defense is expanded to include preventative and punitive elements, it will be so expanded for all jus ad bellum purposes. The expanded doctrine of self-defense will not only justify the use of force to kill individual terrorists alleged to be plotting future attacks, but to strike the military facilities of states suspected of preparing for future aggression. If the threshold for use of force against states “harboring” NSAs is significantly reduced, the gap between state responsibility and the criteria for use of force will be reduced for all purposes. If the relationship between jus ad bellum and IHL is severed or altered, so as to create justifications for the use of force that are entirely independent of the jus ad bellum regime, then states will be entitled to use force against other states under the pretext of self-proclaimed armed conflict with NSAs generally. We may think about each of these innovations as being related specifically to operations against terrorist groups that have been responsible for heinous attacks, and applied to states that have proven uniquely unwilling or unable to take the actions necessary to deal with the terrorists operating within their territory. But no clear criteria or qualifications are in fact tied to the modifications that are being advanced by the targeted killing policy. Relaxing the current legal constraints on the use of force and introducing new but poorly defined standards, will open up opportunities for states to use force against other states for reasons that have nothing to do with anti-terrorist objectives. Along the lines that Jeremy Waldron argues in chapter 4 in this volume,110 more careful thought ought to be given to the general norms that we are at risk of developing in the interest of justifying the very specific targeted killing policy. Ultimately, war between nations is a far greater threat, and is a potential source of so much more human suffering than the danger posed by transnational terrorism. This is not to trivialize the risks that terrorism represents, particularly in an age when Al Qaeda and others have sought nuclear weapons. But we must be careful not to undermine the system designed to constrain the use of force and reduce the incidence of international armed conflict, in order to address a threat that is much less serious in the grand scheme of things.

#### Their Goodman impact does not apply --- it references conflation of the two regimes, but the impact argument is that escalation is more likely when state leaders use security-based instead of humanitarian justifications for conflict. Nothing about the plan prevents the U.S. from using security-based justifications for launching strikes on terrorists. In fact, it requires the U.S. to do the opposite by using self-defense justifications for strikes outside of zones.

#### Also, this article drops HUGE alt cause bombs on this whole advantage.

Ryan Goodman, Anne and Joel Ehrenkranz Professor of Law, New York University School of Law, December 2009, CONTROLLING THE RECOURSE TO WAR BY MODIFYING JUS IN BELLO, Yearbook of International Humanitarian Law / Volume 12

Historically, **the greatest challenge to the separation principle** has been rooted in a normative proposition that parties fighting for a just cause should benefit from a relaxed application of jus in bello rules that might hinder their ability to win the war or repel an attack.10 A new challenge to the separation principle emerges from a different ambition. It suggests in some circumstances heightening jus in bello rules for states fighting for certain just causes. Notably, an erosion of the line in the former case helped set the stage for the latter. That is, **the source of a major challenge to the separation** of jus ad bellum and jus in bello was, quite surprisingly, the International Court of Justice. And the Court’s position lent support to other threats to the regime.

In the Nuclear Weapons Advisory Opinion, the ICJ cast doubt on the separation principle. The Court concluded that the threat or use of nuclear weapons ‘would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law’.11 The Court then stated that it ‘cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’.12 In other words, the Court left open the possibility that jus in bello rules would be relaxed when a state acts to defend itself from an existential military threat – to protect sovereign interests that the international community accepts as a core foundation of the global legal order. When a state resorts to force for other – less privileged or less valued – purposes, a higher level of jus in bello applies.13

Once such considerations can affect the application of jus in bello, other modifications become possible. At least that was the lesson the Independent International Kosovo Commission, which reviewed NATO’s intervention in 1999, took from the ICJ opinion.14 The Kosovo Commission considered, among other matters, NATO’s potential responsibility for environmental damage caused by weapons containing depleted uranium. The Office of the Prosecutor for the ICTY had previously concluded that NATO’s use of these weapons was not prohibited by international law. By way of analogy, the ICTY Prosecutor invoked the Nuclear Weapons Advisory Opinion for the proposition that ‘even in the case of nuclear warheads and other weapons of mass-destruction ... it is difficult to argue that the prohibition of their use is in all cases absolute’.15 The Kosovo Commission repudiated that assessment: ‘[The ICTY Prosecutor] reinforces its conclusion more questionably by suggesting that the ICJ was unable to agree that even nuclear weapons were unconditionally prohibited ... What makes this reasoning questionable is that the ICJ ... limited such use to extreme circumstances of self-defense.’16 Encouraged by this distinction, the Kosovo Commission proceeded to analyze the use of depleted uranium in the context of a humanitarian intervention. The Commission suggested not only that the extreme circumstances of self- defense reduced fundamental legal restraints on weaponry, but that the circumstance of humanitarian intervention raised the restrictions above the baseline.

**It is difficult to underestimate the importance of such responses to NATO’s military campaign in Kosovo – a defining moment for the law and practice of humanitarian intervention**. Other commentators have examined this case but focused on the traditional threat to the separation principle – the argument that interveners pursuing a just cause should benefit from a relaxed application of jus in bello rules.17 And the Kosovo Commission is best known for reviewing the jus ad bellum question and, in particular, concluding that NATO’s bypassing the Security Council was ‘illegal, yet legitimate’.18 Notwithstanding those other parts of the Commission’s analysis, its conclusion linking jus in bello and jus ad bellum constituted an independent challenge to the existing legal order. Indeed, the report extends its approach well beyond the limited question of uranium tipped weapons. The Commission asserted as a general matter: ‘There must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations. This applies to all aspects of the military operation, including any post cease-fire occupation.’19 An influential report by Amnesty International on Kosovo also called on NATO members to elevate their international obligations by agreeing to application of ‘the highest standards of international humanitarian law’.20 And the Kosovo Commission seized on that suggestion as well.21 In scrutinizing specific allegations of jus in bello violations – such as the use of cluster bombs and public access to military information – the Commission explicitly applied more austere rules than the standard IHL regime.22 The Commission also employed terms – such as ‘strict military necessity’23 rather than ‘military necessity’ – which presumably reflected the decision to elevate jus in bello requirements.

Notably, a similar line of analysis was pursued by the then-Federal Republic of Yugoslavia (FRY) in proceedings it brought against NATO members before the ICJ. The argument in the written memorial for the FRY and in Professor Ian Brownlie’s oral presentation merged jus ad bellum with jus in bello rules, though in a more subtle manner. First, they suggested that battlefield conduct could negate the ability of intervening states to claim they were acting under a humanitarian exception to the use of force regime.24 Second, they suggested that the legality of battlefield conduct should be assessed according to the humanitarian objective of the military mission. And that formula effectively ratcheted up protections for civilians.25

The framework adopted by the Kosovo Commission has evidently been incorporated into one of the most significant recent developments in the use of force regime – the responsibility to protect doctrine. In December 2001, the International Commission on Intervention and State Sovereignty (ICISS) issued its report, The Responsibility to Protect. The report promotes the use of force to protect people from atrocities. It sets forth the core concepts of the responsibility to protect and serves as the key reference point for understanding the foundation of the norm. The report, in the main, promulgates guidelines for determining when such military actions are justified. The report’s merger of jus ad bellum and jus in bello has not, however, been fully appreciated.

The architects of the project on the responsibility to protect adopted an approach that reflects the Kosovo Commission’s framework. Under the heading of ‘Proportional Means,’ the ICISS report states:

‘The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question. The means have to be commensurate with the ends, and in line with the magnitude of the original provocation. ... ... It should go without saying that all the rules of international humanitarian law should be strictly observed in these situations. Indeed, since military intervention involves a form of military action significantly more narrowly focused and targeted than all out warfighting, an argument can be made that even higher standards should apply in these cases.’26

The ICISS report introduces a classification of ‘military interventions for human protection purposes’ as distinct from ‘traditional warfighting’.27 In accord with the proposition that even higher standards should apply to the former, the ICISS states that ‘in the context of an intervention for human protection purposes, it will be virtually impossible ... to make maximum use of the full and devastating power of modern weapons’,28 and that ‘[p]roportionality in this context ... should lead to restraint in the use of destructive power of modern weaponry’.29 These standards are potentially so constraining that the ICISS finds it necessary to note that ‘[p]roportionality should ... not have the effect of paralyzing the military forces on the ground, or trap them into a purely reactive mode denying them the opportunity to seize the initiative when this may be needed’.30

The thrust of these positions, especially the general approach advanced by the International Kosovo Commission and the ICISS, has the potential to be broadly applied. First, the use of force for humanitarian purposes can involve a wide spectrum of coercive measures. Historical examples include actions well short of regime change, such as forcible relief operations (e.g., air drops),31 emergency evacuations,32 and safe havens.33 Second, there is no obvious reason why the alteration of jus in bello rules would be limited to actions that lack Security Council authorization. The purported changes would presumably apply to humanitarian intervention approved by the Security Council, as well as to humanitarian interventions in accord with the African Union Charter and ECOWAS Protocol. Indeed, the Kosovo Commission and ICISS expressly applied their approach to such contexts as well.34 In addition, the logic of their analysis may also apply to military force by invitation of a state in an internal war.35

#### They don’t solve Barnes --- a) he says Congress needs to re-authorize military force, otherwise the president will have to rely on asserting self-defense, which would undermine the IHL regime; and b) the problem is not that U.S. legal rationales aren’t clearly specified, it’s that they aren’t convincing.

Beau Barnes, J.D., Boston University School of Law, Spring 2012, REAUTHORIZING THE “WAR ON TERROR”: THE LEGAL AND POLICY IMPLICATIONS OF THE AUMF’S COMING OBSOLESCENCE, https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/b7396120928e9d5e85257a700042abb5/$FILE/By%20Beau%20D.%20Barnes.pdf

Therefore, the more likely result is that the Executive Branch, grappling with the absence of explicit legal authority for a critical policy, would need to make increasingly strained legal arguments to support its actions.121 Thus, the Obama Administration will soon be forced to rationalize ongoing operations under existing legal authorities, which, I argue below, will have significant harmful consequences for the United States. Indeed, the administration faces a Catch-22—its efforts to destroy Al Qaeda as a functioning organization will lead directly to the vitiation of the AUMF. The administration is “starting with a result and finding the legal and policy justifications for it,” which often leads to poor policy formulation.122 Potential legal rationales would perforce rest on exceedingly strained legal arguments based on the AUMF itself, the President’s Commander in Chief powers, or the international law of selfdefense.123 Besides the inherent damage to U.S. credibility attendant to unconvincing legal rationales, each alternative option would prove legally fragile, destabilizing to the international political order, or both. 1. Effect on Domestic Law and Policy Congress’s failure to reauthorize military force would lead to bad domestic law and even worse national security policy. First, a legal rationale based on the AUMF itself will increasingly be difficult to sustain. Fewer and fewer terrorists will have any plausible connection to the September 11 attacks or Al Qaeda, and arguments for finding those connections are already logically attenuated. The definition of those individuals who may lawfully be targeted and detained could be expanded incrementally from the current definition, defining more and more groups as Al Qaeda’s “co-belligerents” and “associated forces.”124 But this approach, apart from its obvious logical weakness, would likely be rejected by the courts at some point.125 The policy of the United States should not be to continue to rely on the September 18, 2001, AUMF. Second, basing U.S. counterterrorism efforts on the President’s constitutional authority as Commander in Chief is **legally unstable**, and therefore unsound national security policy, because a combination of legal difficulties and political considerations make it unlikely that such a rationale could be sustained. This type of strategy would likely run afoul of the courts and risk destabilizing judicial intervention,126 because the Supreme Court has shown a willingness to step in and assert a more proactive role to strike down excessive claims of presidential authority.127 Politically, using an overly robust theory of the Commander in Chief’s powers to justify counterterrorism efforts would, ultimately, be difficult to sustain. President Obama, who ran for office in large part on the promise of repudiating the excesses of the Bush Administration, and indeed any president, would likely face political pressure to reject the claims of executive authority made “politically toxic” by the writings of John Yoo.128 Because of the likely judicial resistance and political difficulties, claiming increased executive authority to prosecute the armed conflict against Al Qaeda would prove a specious and ultimately futile legal strategy. Simply put, forcing the Supreme Court to intervene and overrule the Executive’s national security policy is anathema to good public policy. In such a world, U.S. national security policy would lack stability—confounding cooperation with allies and hindering negotiations with adversaries. There are, of course, many situations where the president’s position as Commander in Chief provides entirely uncontroversial authority for military actions against terrorists. In 1998, President Clinton ordered cruise missile strikes against Al Qaeda-related targets in Afghanistan and Sudan in response to the embassy bombings in Kenya and Tanzania. In 1986, President Reagan ordered air strikes against Libyan targets after U.S. intelligence linked the bombing of a Berlin discotheque to Libyan operatives.129 Executive authority to launch these operations without congressional approval was not seriously questioned, and no congressional approval was sought.130 To be sure, many of the targeted killing operations carried out today fall squarely within the precedent of past practice supplied by these and other valid exercises of presidential authority. Notwithstanding disagreement about the scope of Congress’s and the president’s “war powers,” few would disagree with the proposition that the president needs no authorization to act in selfdefense on behalf of the country. However, it is equally clear that not all terrorists pose such a threat to the United States, and thus the on terror,”137 further distancing counterterrorism operations from democratic oversight would exacerbate this problem.138 Indeed, congressional oversight of covert operations—which, presumably, operates with full information—is already considered insufficient by many.139 By operating entirely on a covert basis, “the Executive can initiate more conflict than the public might otherwise [be] willing to support.”140 In a world without a valid AUMF, the United States could base its continued worldwide counterterrorism operations on various alternative domestic legal authorities. All of these alternative bases, however, carry with them significant costs—detrimental to U.S. security and democracy. The foreign and national security policy of the United States should rest on “a comprehensive legal regime to support its actions, one that [has] the blessings of Congress and to which a court would defer as the collective judgment of the American political system about a novel set of problems.”141 Only then can the President’s efforts be sustained and legitimate. 2. Effect on the International Law of Self-Defense A failure to reauthorize military force would lead to significant negative consequences on the international level as well. Denying the Executive Branch the authority to carry out military operations in the armed conflict against Al Qaeda would force the President to find authorization elsewhere, most likely in the international law of self defense—the jus ad bellum.142 Finding sufficient legal authority for the United States’s ongoing counterterrorism operations in the international law of self-defense, however, is problematic for several reasons. As a preliminary matter, relying on this rationale usurps Congress’s role in regulating the contours of U.S. foreign and national security policy. If the Executive Branch can assert “self-defense against a continuing threat” to target and detain terrorists worldwide, it will almost always be able to find such a threat.143 Indeed, the Obama Administration’s broad understanding of the concept of “imminence” illustrates the danger of allowing the executive to rely on a self-defense authorization alone.144 This approach also would inevitably lead to dangerous “slippery slopes.” Once the President authorizes a targeted killing of an individual who does not pose an imminent threat in the strict law enforcement sense of “imminence,”145 there are few potential targets that would be off-limits to the Executive Branch. Overly malleable concepts are not the proper bases for the consistent use of military force in a democracy. Although the Obama Administration has disclaimed this manner of broad authority because the AUMF “does not authorize military force against anyone the Executive labels a ‘terrorist,’”146 relying solely on the international law of self defense would likely lead to precisely such a result.The slippery slope problem, however, is not just limited to the United States’s military actions and the issue of domestic control. The creation of international norms is an iterative process, one to which the United States makes significant contributions. Because of this outsized influence, the United States should not claim international legal rights that it is not prepared to see proliferate around the globe. Scholars have observed that the Obama Administration’s “expansive and open-ended interpretation of the right to self-defence threatens to destroy the prohibition on the use of armed force . . . .”147 Indeed, “[i]f other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.”148 Encouraging the proliferation of an expansive law of international self-defense would not only be harmful to U.S. national security and global stability, but it would also directly contravene the Obama Administration’s national security policy, sapping U.S. credibility. The Administration’s National Security Strategy emphasizes U.S. “moral leadership,” basing its approach to U.S. security in large part on “pursu[ing] a rules-based international system that can advance our own interests by serving mutual interests.”149 Defense Department General Counsel Jeh Johnson has argued that “[a]gainst an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge.”150 Cognizant of the risk of establishing unwise international legal norms, Johnson argued that the United States “must not make [legal authority] up to suit the moment.”151 The Obama Administration’s global counterterrorism strategy is to “adher[e] to a stricter interpretation of the rule of law as an essential part of the wider strategy” of “turning the page on the past [and rooting] counterterrorism efforts within a more durable, legal foundation.”152 Widely accepted legal arguments also facilitate cooperation from U.S. allies, especially from the United States’ European allies, who have been wary of expansive U.S. legal interpretations.153 Moreover, U.S. strategy vis-à-vis China focuses on binding that nation to international norms as it gains power in East Asia.154 The United States is an international “standard-bearer” that “sets norms that are mimicked by others,”155 and the Obama Administration acknowledges that its drone strikes act in a quasi-precedential fashion.156 Risking the obsolescence of the AUMF would force the United States into an “aggressive interpretation” of international legal authority,157 not just discrediting its own rationale, but facilitating that rationale’s destabilizing adoption by nations around the world.158

#### This whole scenario about “expansive self-defense” makes ZERO sense in the context of the plan. Their evidence says that the U.S. is broadly interpreting the “imminent threat” standard to include preventive strikes against more temporally distant threats. The aff does ACTUAL NOTHING in relation to the immanence standard. The only thing the plan does is prevent the U.S. from using self-defense justification in an active zone of conflict. Their Fisk and Slager impact cards, however, are NOT about conflation of self-defense/armed conflict, but instead about EXPANSION of self-defense doctrines being dangerous.

#### Fisk and Ramos say Iraq already created the norm of preventive-self defense, not drones; AND the aff doesn’t stop the U.S. from using preventive self-defense as a justification for drones anyway.

Fisk & Ramos 13 (Kerstin Fisk --- PhD in Political Science focusing on interstate war @ Claremont Graduate University, Jennifer M. Ramos-- PhD in Polisci and Professor @ Loyola Marymount focusing on norms and foreign policy, including drone warfare and preventative use of force, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm” 15 APR 2013, International Studies Perspectives (2013), 1–23)

Conclusion

Preventive self-defense entails waging a war or an attack by choice, in order to prevent a suspected enemy from changing the status quo in an unfavorable direction. Prevention is acting in anticipation of a suspected latent threat that might fully emerge someday. One might rightfully point out that preventive strikes are nothing new—the Iraq War is simply a more recent example in a long history of the preventive use of force. The strategic theorist Colin Gray (2007:27), for example, argues that “far from being a rare and awful crime against an historical norm, preventive war is, and has always been, so common, that its occurrence seems remarkable only to those who do not know their history.” Prevention may be common throughout history, but this does not change the fact that it became increasingly difficult to justify after World War II, as the international community developed a core set of normative principles to guide state behavior, including war as a last resort. The threshold for war was set high, imposing a stringent standard for states acting in self-defense. Gray concedes that there has been a “slow and erratic, but nevertheless genuine, growth of a global norm that regards the resort to war as an extraordinary and even desperate measure” and that the Iraq war set a “dangerous precedent” (44). Although our cases do not provide a definitive answer for whether a preventive self-defense norm is diffusing, they do provide some initial evidence that states are re-orienting their military and strategic doctrines toward offense. In addition, these states have all either acquired or developed unmanned aerial vehicles for the purposes of reconnaissance, surveillance, and/or precision targeting. Thus, the results of our plausibility probe provide some evidence that the global norm regarding the use of force as a last resort is waning, and that **a preventive self-defense norm is emerging and cascading following the example set by the U**nited **S**tates. At the same time, there is variation among our cases in the extent to which they apply the strategy of self-defense. China, for example, has limited their adaption of this strategy to targeted killings, while Russia has declared their strategy to include the possibility of a preventive nuclear war. Yet, the preventive self-defense strategy is not just for powerful actors. Lesser powers may choose to adopt it as well, though perhaps only implementing the strategy against actors with equal or lesser power. Research in this vein would compliment our analyses herein. With the proliferation of technology in a globalized world, it seems only a matter of time before countries that do not have drone technology are in the minority. While preventive self-defense strategies and drones are not inherently linked, current rhetoric and practice do tie them together. Though it is likely far into the future**, it is all the more important to consider the final stage of norm evolution—internalization—for this particular norm**. While scholars tend to think of norms as “good,” this one is not so clear-cut. If the preventive self-defense norm is taken for granted, integrated into practice without further consideration, it inherently changes the functioning of international relations. And unmanned aerial vehicles, by reducing the costs of war, make claims of preventive self-defense more palatable to the public. Yet **a global norm of preventive self-defense is likely to be** destabilizing**,** leading to more war **in the international system**, not less. It clearly violates notions of just war principles—jus ad bellum. **The U**nited **S**tates **has set a dangerous precedent, and by continuing its preventive strike policy it continues to provide other states with the justification to do the same.**

#### No internal link between drones and SCS --- their Fisk evidence talks about Chinese aggression in the SCS, then in a later paragraph mentions Chinese use of drones in self-defense on its borders. The affirmative, in that part, strategically highlights out, “against terrorists.” Full context shows the card is saying China uses the drone precedent against Uighurs, etc --- NOT in the SCS.

Fisk & Ramos 13 (Kerstin Fisk --- PhD in Political Science focusing on interstate war @ Claremont Graduate University, Jennifer M. Ramos PhD in Polisci and Professor @ Loyola Marymount focusing on norms and foreign policy, including drone warfare and preventative use of force, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm” 15 APR 2013, International Studies Perspectives (2013), 1–23)

China

Though scholars debate the strategic culture of China, the dominant view has been one that emphasizes the defensive nature of Chinese military strategy (for an alternative view, see Johnston 1995; Feng 2007; Silverstone 2009). In this view, China prefers diplomacy over the use of force to achieve its objectives, and is more focused on defending against aggressors than acting as one. Seemingly consistent with this view, in 2003, China publically declared its position against states seeking to legitimize preventive self-defense. From China's perspective, the US-led war in Iraq was an example of America's hegemonic lust for power (Silverstone 2009). It was an act of aggression that violated the international norm that China holds dear—the norm of sovereignty. **However, the country's position on this may be evolving**, or at least **contingent on its own geo-political interests**. In 2005, the People's Congress of China passed an anti-secession law, clearly with an eye toward Taiwan. This law includes language that allows “non-peaceful means” in the case that reunification goals are not achieved (Reisman and Armstrong 2006). This suggests that China leaves open the possibility of some kind of military action to thwart Taiwan's formal secession—a preventive move. Still, China considers the Taiwan “problem” a domestic issue, thus the anti-secession law is not compelling evidence that China is buying into the norm of preventive self-defense.

Indeed, a year later (in 2006), China released a national defense report that articulates a strategy of “active defense” for the twenty-first century, in which China moves to an offensive defensive strategy (Yang 2008). Within this report, China declares a policy that prohibits the first use of nuclear weapons “at any time and under any circumstances.” This is consistent with its general orientation against preventive strikes, though it only specifies this idea with regard to nuclear weapons, and may leave the door open to a first use strategy with other types of weapons, but it is not clear from the report. China is likely to be tested in several key areas beyond the Taiwan situation mentioned earlier.71 **China is quite aggressive regarding its claims to territories in the South China Sea**. One of the most hotly disputed assertions is its sovereignty over the Spratly Islands and areas close to the Philippine island of Palawan, which is contested by the Philippines among other countries (Beckman 2012). With Chinese Premier Wen Jiabao's recent statement regarding the necessity of possessing a military that could win “local wars under information age conditions,” it is not surprising that **states in the region are on edge**.72 Last October, **Chinese news reported that states with which China has territorial disputes should “mentally prepare for the** sounds of cannons.”73

Beyond the territorial disputes, also consider the recent terrorist attacks within China and their connection to Pakistan and Afghanistan. The East Turkistan Islamic Movement (ETIM) is responsible for several deadly attacks in the Chinese province of Xinjiang, driving Chinese officials to “go all out to counter the violence” that originates from both ETIM terrorist training camps in Pakistan and remote areas in Xinjiang.74 The significance of these threats to China is reflected in its continuing military modernization efforts, including increasing defense spending by more than 11%.75 Amid investment in aircraft carriers and stealth fighter jets, **China is focused on the development of drone technology, hoping to rival that of the U**nited **S**tates.76 Such technology would likely be used in preventive self-defense against terrorists along China's borders.77 Reports suggest that after seeing the critical use of drones by the United States in its engagements abroad, **China has prioritized drone technology acquisition and production**. 78 In sum, these developments in Chinese defense strategy point to a quite offensive posture—one consistent with a commitment to a norm of preventive use of force (though not as clear-cut as in the India and Russia cases).

In each of the cases under review, **the military has shifted in its orientation from defense to offense**. In India, for example, where UAV development is further along compared to the other cases, there have been notable changes in defense strategy. The strategies in all four cases are tied to a concurrent trend toward states’ acquiring unmanned systems, or drones for precision strikes and real-time surveillance. Political and military elites have demonstrated a desire to successfully harness sophisticated new RMA technology, after having observed US success in this area.

Alongside our analysis of state rhetoric, **these changes in strategies** and high-tech tactical weaponry **suggest the diffusion of a preventive use of force norm** across cases, though to varying degrees, depending on their geostrategic interests. India is largely focused on fighting terrorism abroad, whereas Russia's main terrorist concern is within its own borders. China is concerned about terrorism from domestic and foreign sources. Thus, India is more compelled to espouse the norm of preventive self-defense as a legitimate norm governing international state behavior than Russia. China's commitment to such a norm is evolving, perhaps somewhere in between that of Russia and India. Unlike the cases of India, Russia, and China, Germany's military modernization and interest in drones stems largely from pressure from the United States to take on a larger, global role in promoting security and stability, particularly within NATO. In 2008, for example, US Secretary of Defense Robert Gates scolded “defensive players” who “sometimes…have to focus on offense.”79 At the time, Germany had troops in Afghanistan—but they were located in the safest part of the country (the north) while the United States, Canada and Britain fought in the volatile south. Directing his criticism toward Germany in particular, Gates stated, “In NATO, some allies ought not to have the luxury of opting only for stability and civilian operations, thus forcing other allies to bear a disproportionate share of the fighting and dying.”79 As stated above, one of the ways in which norm entrepreneurs promote norms is by invoking a state's reputation or “international image.” This has certainly been the case with Germany, which took on a direct role in combat operations in Afghanistan in 2009—by borrowing American drones.

Taken together, though, in terms of their position on the idea of preventive self-defense, our findings suggest two similarities. First, **in all** four **cases** reviewed here, leaders invoked the US example to justify their actions. Particularly in India, similarities to 9/11 were drawn in an effort to legitimize moves toward offensive strategies. Second, asymmetric tactics are not only a tool of the weak, but also of stronger states**. We found a strong correlation between strategies of preventive self-defense and the acquisition of drone technology. Because of their precision-strike capability, drones are an obvious choice for states committed to preventive self-defense.**

#### Their Wittner evidence only cites alternate causalities to conflict --- nothing in this evidence is about drones, it’s about why increasing U.S. defense presence in Asia will trigger tension with China. They obviously don’t solve that.

Wittner 11 (Lawrence S. Wittner, Emeritus Professor of History at the State University of New York/Albany, Wittner is the author of eight books, the editor or co-editor of another four, and the author of over 250 published articles and book reviews. From 1984 to 1987, he edited Peace & Change, a journal of peace research., 11/28/2011, "Is a Nuclear War With China Possible?", [www.huntingtonnews.net/14446](http://www.huntingtonnews.net/14446))

While nuclear weapons exist, there remains a danger that they will be used. After all, for centuries national conflicts have led to wars, with nations employing their deadliest weapons. The current deterioration of U.S. relations with China might end up providing us with yet another example of this phenomenon. The gathering tension between the United States and China is clear enough. Disturbed by China’s growing economic and military strength, the U.S. government recently challenged China’s claims in the South China Sea, increased the U.S. military presence in Australia, and deepened U.S. military ties with other nations in the Pacific region. According to Secretary of State Hillary Clinton, the United States was “asserting our own position as a Pacific power.” But need this lead to nuclear war? Not necessarily. And yet, there are signs that it could. After all, both the United States and China possess large numbers of nuclear weapons. The U.S. government threatened to attack China with nuclear weapons during the Korean War and, later, during the conflict over the future of China’s offshore islands, Quemoy and Matsu. In the midst of the latter confrontation, President Dwight Eisenhower declared publicly, and chillingly, that U.S. nuclear weapons would “be used just exactly as you would use a bullet or anything else.” Of course, China didn’t have nuclear weapons then. Now that it does, perhaps the behavior of national leaders will be more temperate. But the loose nuclear threats of U.S. and Soviet government officials during the Cold War, when both nations had vast nuclear arsenals, should convince us that, even as the military ante is raised, nuclear saber-rattling persists. Some pundits argue that nuclear weapons prevent wars between nuclear-armed nations; and, admittedly, there haven’t been very many—at least not yet. But the Kargil War of 1999, between nuclear-armed India and nuclear-armed Pakistan, should convince us that such wars can occur. Indeed, in that case, the conflict almost slipped into a nuclear war. Pakistan’s foreign secretary threatened that, if the war escalated, his country felt free to use “any weapon” in its arsenal. During the conflict, Pakistan did move nuclear weapons toward its border, while India, it is claimed, readied its own nuclear missiles for an attack on Pakistan. At the least, though, don’t nuclear weapons deter a nuclear attack? Do they? Obviously, NATO leaders didn’t feel deterred, for, throughout the Cold War, NATO’s strategy was to respond to a Soviet conventional military attack on Western Europe by launching a Western nuclear attack on the nuclear-armed Soviet Union. Furthermore, if U.S. government officials really believed that nuclear deterrence worked, they would not have resorted to championing “Star Wars” and its modern variant, national missile defense. Why are these vastly expensive—and probably unworkable—military defense systems needed if other nuclear powers are deterred from attacking by U.S. nuclear might? Of course, the bottom line for those Americans convinced that nuclear weapons safeguard them from a Chinese nuclear attack might be that the U.S. nuclear arsenal is far greater than its Chinese counterpart. Today, it is estimated that the U.S. government possesses over five thousand nuclear warheads, while the Chinese government has a total inventory of roughly three hundred. Moreover, only about forty of these Chinese nuclear weapons can reach the United States. Surely the United States would “win” any nuclear war with China. But what would that “victory” entail? A nuclear attack by China would immediately slaughter at least 10 million Americans in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. The Chinese death toll in a nuclear war would be far higher. Both nations would be reduced to smoldering, radioactive wastelands. Also, radioactive debris sent aloft by the nuclear explosions would blot out the sun and bring on a “nuclear winter” around the globe—destroying agriculture, creating worldwide famine, and generating chaos and destruction.

#### The affirmative’s discourse surrounding China constitutes China as a foreign other to protect American identity. The K is prior—their discourse is part and parcel of the affirmative’s policy.

Turner 13—Oliver Turner is a Research Associate at the Brooks World Poverty Institute at the University of Manchester. He is the author of *American Images of China: Identity, Power, Policy* (Routledge, forthcoming) [“‘Threatening’ China and US security: the international politics of identity,” Review of International Studies, FirstView Articles, pp 1-22, Cambridge University Press 2013]

In his analysis of the China Threat Theory Chengxin Pan argues that the ‘threat’ is an imagined construction of American observers.15 Pan does not deny the importance of the PRC's capabilities but asserts that they appear threatening from understandings about the United States itself. ‘[T]here is no such thing as “Chinese reality” that can automatically speak for itself’, Pan argues. ‘[T]o fully understand the US “China threat” argument, it is essential to recognize its autobiographical nature’.16 The geographical territory of China, then, is not separate from or external to, American representations of it. Rather, it is actively constitutive of those representations.17

The analysis which follows demonstrates that China ‘threats’ to the United States have to some extent always been established and perpetuated through representation and discourse. Michel Foucault described discourse as ‘the general domain of all statements’, constituting either a group of individual statements or a regulated practice which accounts for a number of statements.18 American discourse of China can therefore be manifest as disparate and single statements about that country or as collectives of related statements such as the China Threat Theory. Ultimately, American representations of China are discursive constructions of truths or realities about its existence.

The article draws in part from the work of David Campbell who suggests that dangers in the international realm are invariably threats to understandings about the self. ‘The mere existence of an alternative mode of being’, argues Campbell, ‘the presence of which exemplifies that different identities are possible … is sometimes enough to produce the understanding of a threat.’19 As a result, interpretations of global danger can be traced to the processes by which states are made foreign from one another through discourses of separation and difference.20 In this analysis it is demonstrated that particular American discourses have historically made the US foreign from China. Case study one for example demonstrates that nineteenth-century racial discourses of non-white immigrant Chinese separated China from a United States largely defined by its presumed Caucasian foundations. In case study two we see that Cold War ideological discourses of communism distanced the PRC from the democratic-capitalist US. These types of discourses are shown to have constituted a ‘specific sort of boundary producing political performance’.21

Across the history of Sino-US relations then when ‘dangers’ from China have emerged, they have always been perceived through the lens of American identity. In consequence, they have always existed as dangers to that identity. In this analysis it is argued that a key purpose of depicting China as a threat has been to protect components of American identity (primarily racial and ideological) deemed most fundamental to its being. As such, representations of a threatening China have most commonly been advanced by, and served the interests of, those who support actions to defend that identity. The case study analyses which follow reveal that this has included politicians and policymaking circles, such as those within the administration of President Harry Truman which implemented the Cold War containment of the PRC. It also exposes the complicity of other societal individuals and institutions including elements of the late nineteenth-century American media which supported restrictions against Chinese immigration to the western United States.

It is demonstrated that, twice before, this discursive process of separating China from the United States has resulted in a crisis of American identity. Crises of identity occur when the existing order is considered in danger of rupture. The prevailing authority is seen to be weakened and rhetoric over how to reassert the ‘natural’ identity intensifies.22 Case studies one and two expose how such crises have previously emerged. These moments were characterised by perceived attacks upon core assumptions about what the United States was understood to be: fundamentally white in the late nineteenth century and democratic-capitalist in the early Cold War. Case study three shows that while today's China ‘threat’ to US security is yet to generate such a crisis, we must learn from those of the past to help avoid the types of consequences they have previously facilitated.

As Director Clapper unwittingly confirmed then the capabilities and intentions of a ‘rising’ China are only part of the story. International relations are driven by forces both material and ideational and the processes by which China is made foreign from, and potentially dangerous to, the United States are inseparable from the enactment of US China policy. This is because, to reaffirm, American discourses of China have never been produced objectively or in the absence of purpose or intent. Their dissemination is a performance of power, however seemingly innocent or benign.23 This is not to claim causal linkages between representation and foreign policy. Rather, it is to reveal the specific historical conditions within which policies have occurred, through an analysis of the political history of the production of truth.24

Accordingly, this analysis shifts from a concern with ‘why’ to ‘how’ questions. ‘Why’ questions assume that particular practices can happen by taking for granted the identities of the actors involved.25 They assume, for instance, the availability of a range of policy options in Washington from the self-evident existence of a China threat. ‘How’ questions investigate the production of identity and the processes which ensure that particular practices can be enacted while others are precluded.26 In this analysis they are concerned with how and why China ‘threats’ have come to exist, who has been responsible for their production and how those socially constructed dangers have established the necessary realities within which particular US foreign policies could legitimately be advanced.

US China policy, however, must not be narrowly conceived as a ‘bridge’ between two states.27 In fact, it works on behalf of societal discourses about China to reassert the understandings of difference upon which it relies.28 Rather than a final manifestation of representational processes, then, US China policy itself works to construct China's identity as well as that of the United States. As the case study analyses show, it perpetuates discursive difference through the rhetoric and actions (governmental acts, speeches, etc.) by which it is advanced and the reproduction of a China ‘threat’ continues. In such a way it constitutes the international ‘inscription of foreignness’, protecting American values and identity when seemingly threatened by that of China.29 As Hixson asserts, ‘[f]oreign policy plays a profoundly significant role in the process of creating, affirming and disciplining conceptions of national identity’, and the United States has always been especially dependent upon representational practices for understandings about its identity.30

In sum, this article advances three principal arguments. First, throughout history ‘threats’ from China towards the United States have never been explicable in terms of material forces alone. They have in part been fantasised, socially constructed products of American discourse. The physical contours of Sino-American relations have been given meaning by processes of representation so that China has repeatedly been made threatening no matter its intentions. Second, representations of China ‘threats’ have always been key to the enactment and justification of US foreign policies formulated in response. Specifically, they have framed the boundaries of political possibility so that certain policies could be enabled while potential alternatives could be discarded. Third, US China policies themselves have reaffirmed discourses of foreignness and the identities of both China and the United States, functioning to protect the American identity from which the ‘threats’ have been produced.

#### China’s pursuing peace

**Baruah 12/6**/13 - Research Assistant @ Observer Research Foundation, Delhi [Darshana M. Baruah, “A New Phase In China-ASEAN Relations? – Analysis,” Eurasia Review, December 6, 2013, pg. http://www.eurasiareview.com/06122013-new-phase-china-asean-relations-analysis/

The growing lack of trust and aggressive assertions over their respective claims has affected China’s relations with ASEAN members. China’s relationship with Vietnam and the Philippines quickly deteriorated owing to the dispute. These nations found themselves turning to non-claimant actors for support against China. Additionally, Beijing was immensely irked by the US ‘rebalance’ to Asia which is being welcomed by many of the ASEAN nations. China perceives American presence in the region as a ‘containment’ policy against it. While Washington and Manila renewed their Mutual Defence Treaty – seeking American support in a possible conflict with Beijing, Hanoi invited India to continue investing in Vietnam and stay put in the disputed oil blocks in the SCS. These developments antagonised Beijing further as it continues to oppose the involvement of a non-claimant actor in the regional dispute.

Against this backdrop, Beijing seems to be trying to mend ties with its disgruntled ASEAN neighbours in the recent months. China’s top two leaders set out on a tour to ease the tension amongst the claimants. President Xi Jinping and Premier Li Keqiang visited five nations and attended the Asia Pacific Economic Cooperation (APEC) CEO Summit and the East Asia Summit (EAS) respectively – two top level forums to discuss economic and security issues of the region. While President Obama cancelled his Asia tour, the two leaders spoke on maritime and economic cooperation emphasising on a regional integration. Beijing took this opportunity to improve ties with the neighbours and put forth its views and concerns about security in the region. The absence of the American President set the stage for Chinese dominance at the APEC and the EAS. Premier Li Keqiang followed up the tour with the China-ASEAN Summit 2013 revealing Beijing’s new strategy for China-ASEAN relations. Marking the 10 year anniversary of the China-ASEAN partnership, the Premier put forward the 2+7 cooperation framework for both sides. The visit to a great extent helped overcome the ongoing difficult stage between China and its ASEAN neighbours.

Mending ties with the neighbours

President Xi Jinping reached Jakarta on November 2, beginning a tour to further Beijing’s relationship with some of the ASEAN members. Xi delivered a speech at the Indonesian House of Representatives, becoming the first foreign head of a state to do so. During the visit, Beijing and Jakarta elevated their bilateral relationship to a ‘comprehensive strategic partnership’. China expressed that both sides should exchange views on Asia-Pacific economic situation and “join hands pushing forward China-ASEAN cooperation”. Indonesian Vice President Boediono noted that “Xi Jinping’s current visit will undoubtedly push forward bilateral cooperation in all fields to better promote the development of the two countries”.

Continuing the tour, Xi then travelled to Malaysia on October 3, 2013. The Chinese leader met with Malaysian leaders to discuss and further the China-Malaysia bilateral relationship. Xi met with Malaysian Prime Minister Najib Razak and upgraded Beijing’s relationship with Malaysia to a ‘comprehensive strategic partnership’. Xi raised a few proposals on bilateral cooperation stressing on regional economic integration. The Malaysian side too committed in developing their relationship further. The Malaysian Prime Minister stated that “Malaysia is ready to strengthen exchanges and cooperation with China in the fields of military-to-military exchanges, sci-tech, law enforcement, education, tourism, people-to-people and cultural exchanges. The Malaysian side fully supports China’s proposal to prepare for the establishment of Asian Infrastructure Investment Bank and is ready to consider participating”.

Beijing has maintained the need for a regional integration. It is necessary for China to sustain good relations with the other Asian nations to keep the issues at a regional level, so as to leave no scope for a non regional power to interfere. It is interesting to note that the new leadership is more engaging with their neighbours and with the global community at large. Since assuming Presidency in China on March 14, 2013, Xi has travelled to countries in Africa, Latin America, Central Asia and to America.

China is sceptical of the US pivot and has opposed Washington’s call for peace and security on the issue of the SCS. It was necessary for Beijing to improve its deteriorating ties with the ASEAN nations in order to push for a successful regional integration. Visiting these countries during a difficult time in their bilateral relationship helped reduce the tension and animosity to a great extent.

Premier Li Keqiang’s speech at the eighth East Asia Summit (2013) echoed Xi Jinping’s call for a regional integration. The premier also encouraged the leaders of the region to enhance mutual trust amongst themselves to maintain regional peace and stability. Speaking on the issue of the SCS, Li reiterated Beijing’s stance on guaranteed freedom of navigation through SCS and urged the nations to resolve the dispute through bilateral negotiations///

and discussions. Opposing the Philippines move to approach the UN arbitration court, Li noted that “Unilateral referral of the bilateral disputes to international arbitration runs counter to the DOC, [as] agreed by China and ASEAN countries”. Philippines have been very vocal about its dispute with China and have sought American support on the issue. China refused to cooperate with Manila on the UN arbitration process. Beijing maintains that disputes should be resolved only at a bilateral level.

This was also Li’s state visit to Brunei. During the course of the visit, China and Brunei decided to strengthen Maritime Cooperation to promote joint development. Li then continued the tour by visiting Thailand on October 11 and Vietnam on October 13. Calling to further strengthen Sino-Thai relations, Li said that the two countries “have been good brothers since ancient times”. He emphasised on taking the Sino-Thai comprehensive strategic partnership to a new level by enjoying the “opportunities generated by each other’s development”. Addressing the National Assembly of Thailand, Li stressed on further close relations between the nations by calling for closer bilateral cooperation in all aspects. He said that “Sino-Thai relations have gone beyond the scope of bilateral relations” and the two nations should open a new page for China-Thailand friendship. Thai leaders reciprocated Beijing’s sentiments with a standing ovation at the end of the speech.

Li’s visit to Vietnam is an important development in China-ASEAN relations. Ties between Beijing and Hanoi soured due the disputes in the SCS. Hanoi and Manila have been explicitly expressing their disappointment with Beijing over the issue. The visit at the level of the Premier with a message for cooperation and friendship greatly reduced the tensions between the two nations. Both nations signed a series of cooperation documents and agreements. Underlining the importance of the visit, Li stated that “During my current visit, I reached new consensus with Viennese leaders on deepening China-Vietnam relations and the two countries also signed a series of cooperation documents and agreements. Hope both sides will, bearing the big picture, work together to effectively implement the consensus. Especially pushing forward maritime, onshore and financial cooperation… [And] show to the two peoples, neighbouring countries and the world that China and Vietnam absolutely have the ability and wisdom to overcome difficulties….China is ready to work with Vietnam to forge ahead in the overall direction of bilateral relations in order to promote greater development of China-Vietnam comprehensive strategic cooperative partnership”.

China’s maritime dispute in SCS and the East China Sea (ECS) has affected SE Asia’s regional dynamics. As Washington increases its presence in the region while strengthening its ties with Japan and the Philippines, it is important for China to maintain good relations with its ASEAN neighbours. Responding to the ‘contain China’ policy, Beijing set out to boost its relation with the ASEAN members.

China’s relationship with the Philippines and Japan continues to turn sour over the maritime disputes. Japanese Prime Minister Shinzo Abe has made an effort to maintain and further Japan’s bilateral relations with the ASEAN nations. Since taking office in December 2012, Abe has visited all 10 ASEAN nations. As Japan looks to win support amongst the SE Asian countries, Beijing must be careful in its bilateral relationship with ASEAN. Recently, as Typhoon Haiyan ravaged Philippines, international aid for the country poured in by and large. However, China is being criticised for the ‘stingy’ aid offered to its neighbour on the aftermath of the typhoon. Beijing’s actions raised concerns regarding China as a friendly neighbour at a time of distress, with the international media calling China’s aid as “measly” and “insulting”.

Beijing has made a start in extending a message of friendship and cooperation to some of the ASEAN members. China’s renewed engagement with the Southeast Asian neighbours seems to be a policy of the new leadership. However, it must follow up on these successful visits by its efforts and actions in cooperating on the troubled areas. For now, maintaining good relations with the member nations of ASEAN seems to be Beijing’s new strategy to ease tensions in the SCS.

## \*\*\* 2NC

### 2NC—K Prior

#### Framing war powers restrictions as a *means* to achieve greater national security quashes political alternatives to unilateral war-fighting.

Francisco J. CONTRERAS Prf. Philosophy of Law @ Seville AND Ignacio de la RASILLA Ph.D. candidate in international law, Graduate Institute of International Studies, Geneva 8 “On War as Law and Law as War” Leiden Journal of International Law Vol. 21 Issue 3 p. 779-780 [**Gender paraphrased]**

War’s ubiquity, its discontinuity, and the blurring of its outline are not without psychological and moral consequences in the military: ‘Experts have long observed that when warfare itself seems to have no clear beginning or end, no clear battlefield, no clear enemy, military discipline, as well as morale, breaks down’ (p. 119). This dispiriting confusion that affects soldiers also concerns the international lawyer, who sees the old rules of jus belli evaporate and be replaced by much vaguer ‘standards’. The last pages of Of War and Law convey, in fact, a clear feeling of defeat or loss, showing the demoralization of the international lawyer who still tries to take the law of war seriously: ‘How can ethical absolutes and instrumental calculations be made to lie down peacefully together? How can one know what to do, how to judge, whom to denounce?’ (p. 117). The former categorical imperatives (‘thou shalt not bomb cities’, ‘thou shalt not execute prisoners’, etc.) give way to an elastic and blurred logic of more and less, within which instrumental might triumphs definitively over the ethical (p. 132).89 As the new flexible ‘standards’ seem more susceptible to strategic exploitation and modulation than do the old strict rules, the various actors will play with the labels of jus belli—now definitively versatile—according to their strategic needs: Ending conflict, calling it occupation, calling it sovereignty—then opening hostilities, calling it a police action, suspending the judicial requirements of policing, declaring a state of emergency, a zone of insurgency—all these are also tactics in the conflict. . . . All these assertions take the form of factual or legal assessments, but we should also understand them as arguments, at once messages and weapons. (p. 122)90 Kennedy reiterates a new aspect of the ‘weaponization of the law’: the legal qualification of facts appears as a means of conveying messages to the enemy and to public opinion alike, because in the age of immediate media coverage, wars are fought as much in the press and opinion polls as they are on the battlefield. The skilled handling of jus belli categories will benefit one side and prejudice the other (p. 127);91 as the coinage of the very term ‘lawfare’ seems to reflect, the legal battle has already become an extension of the military one (p. 126).92 In cataloguing some of the dark sides of the law of war, Kennedy also stresses how the legal debate tends to smother and displace discussions which would probably be more appropriate and necessary. Thus the controversy about the impending intervention in Iraq, which developed basically within the discursive domain of the law of war, largely deprived lawyers of participating in an in-depth discussion on the neo-conservative project of a ‘great Middle East’—more democratic and Western-friendly and less prone to tyranny and terrorism—the feasibility of ‘regime change’, an adequate means of fostering democracy in the region, and so on: We never needed to ask, how should regimes in the Middle East . . . be changed? Is Iraq the place to start? Is military intervention the way to do it? . . .Had our debates not been framed by the laws of war, we might well have found other solutions, escaped the limited choices of UN sanctions, humanitarian aid, and war, thought outside the box. (p. 163) 6. CONCLUSIONS Those familiar with the author’s previous works93 will certainly have already identified the Derridean streak in Kennedy’s thought in the underlying claim that every discourse generates dark zones and silences or represses certain aspects, renders the formulation of certain questions impossible (a Foucauldian streak in the author could be suspected as well: every discourse—be it administrative, legal, medical, or psychiatric—implies simultaneously ‘knowledge’ and ‘power’; each discourse amounts somehow to a system of domination, insofar as it defines ‘conditions of admission’ into the realm of the legally valid, the ‘sane society’, etc.).94 In the picture resulting from the application of this analytical framework to the domain of the use of force, international lawyers and humanitarian professionals appear gagged, restricted by the language they try to utter effectively to themselves and others. As if the legal language had imposed on them its own logic, it now speaks through their voices and what is, evidently, once again, the Marxian-structuralist idea of cultural products gaining a life of their own and turning against their own creators. Kennedy, however, does not stop at noting that jurists have become ‘spoken’ by their language amidst a dramatically changing war scenario. More disquietingly, he stresses the evident corollary of the previous proposition: the evaporation of a sense of individual moral responsibility: [A]ll these formulations, encouraged by the language of law, displace human responsibility for the death and suffering of war onto others . . . . In all these ways, we step back from the terrible responsibility and freedom that comes with the discretion to kill. . . .Violence and injury have lost their author and their judge as soldiers, humanitarians, and statesmen [statespeople] have come to assess the legitimacy of violence in a common legal and bureaucratic vernacular. (pp. 168–9) While depersonalization and a lack of sense of personal responsibility are evidently also favoured by external structural factors, among which is the bureaucratic political complexity of modern states themselves (p. 17),96 Kennedy stresses that the language of international law would thus trivialize and conceal the gravity of decisions: In all these ways, we step back from the terrible responsibility and freedom that comes with the discretion to kill. . . . The problem is loss of the human experience of responsible freedom and free decision—of discretion to kill and let live. (p. 170)

#### Debating the rhetorical *frame* for war-fighting decisions is the only way to address the source of war-fighting abuses.

Jeremy ENGELS Communications @ Penn St. AND William SAAS PhD Candidate Comm. @ Penn ST. 13 [“On Acquiescence and Ends-Less War: An Inquiry into the New War Rhetoric” *Quarterly Journal of Speech* 99 (2) p. 230-231]

The **framing** of public discussion facilitates acquiescence in contemporary wartime: thus, both the grounds on which war has been **justified** and the ends toward which war is **adjusted** are **bracketed** and hence made infandous. The rhetorics of acquiescence bury the grounds for war under nearly impermeable layers of political presentism and keep the ends of war in a state of **perpetual flux** so that they cannot be **challenged**. Specific details of the war effort are excised from the public realm through the rhetorical maneuver of ‘‘occultatio,’’ and the authors of such violence\*the president, his administration, and the broader national security establishment\*use a wide range of techniques to displace their own responsibility in the orchestration of war.28 Freed from the need to cultivate assent, acquiescent rhetorics take the form of a status update: hence, President Obama’s March 28, 2011 speech on Libya, framed as an ‘‘update’’ to Americans ten days after the bombs of ‘‘Operation Odyssey Dawn’’ had begun to fall. Such post facto discourse is a new norm: Americans are called to acquiesce to decisions already made and actions already taken. The Obama Administration has obscured the very definition of ‘‘war’’ with euphemisms like ‘‘limited kinetic action.’’ The original obfuscation, the ‘‘war on terror,’’ is a perpetually shifting, ends-less conflict that denies the very status of war. How do you dissent from something that seems so overwhelming, so inexorable? It’s hard to hit a perpetually shifting target. Moreover, as the government has become increasingly secretive about the details of war, crucial information is kept from citizens\*or its revelation is branded ‘‘treason,’’ as in the WikiLeaks case\*making it much more challenging to dissent. Furthermore, government surveillance of citizens cows citizens into quietism. So what’s the point of dissent? After all, this, too, will pass. Thus even the most critical citizens come to rest in peace with war. The confidence game of the new war rhetoric is one of perpetually shifting ends. In this ‘‘post-9/11’’ paradigm of war rhetoric, citizens are rarely asked to harness their civic energy to support the war effort, but instead are called to passively cede their wills to a greater Logos, the machinery of ends-less war. President Obama has embodied the dramatic role of wartime caretaker more adeptly than his predecessor, repeatedly exhorting citizens to ‘‘look forward’’ rather than to examine the historical grounds upon which the present state of ends-less war was founded and institutionalized.29 All the while, that forward horizon is constantly being reshaped\*from retribution, to prevention, to disarmament, to democratization, to intervention, and so on, as needed. What Max Weber called ‘‘charisma of office’’\*the phenomenon whereby extraordinary political power is passed on between charismatically inflected leaders\*is here cast in bold relief: until and unless the grounds of the new war rhetoric are meaningfully represented and unapologetically challenged, ends-less war can only continue unabated.30 War rhetoric is a mode of display that aims to dispose audiences to certain ways and states of being in the world. This, in turn, is the essence of the new war rhetoric: authorities tell us, don’t worry, we’ve got this, just go about your everyday business, go to the mall, and take a vacation. What we are calling acquiescent rhetorics aim to disempower citizens by cultivating passivity and numbness. Acquiescent rhetorics facilitate war by shutting down inquiry and deliberation and, as such, are anathema to rhetoric’s nobler, democratic ends. Rhetorical scholars thus have an important job to do.We must bring the objective violence of war out into the open so that all affected by war can meaningfully question the grounds, means, and ends of battle.We can do this by describing, and demobilizing, the rhetorics used to promote acquiescence. In sum, we believe that by making the seemingly uncontestable contestable, rhetorical critics can and should begin to invent a pedagogy that would reactivate an acquiescent public by creating space for talk where we have previously been content to remain silent.

### AT: Donahue

#### The context of the article proves this. Donahue thinks the reason we need these skills to get tight government jobs enforcing the patriot act and working for the CIA. We’re a K of the need for those jobs. We impact turn this education.

Donohue 13 [2013 Nation al Security Pedagogy: The Role of Simulations, Associate Professor of Law, Georgetown Law, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2172&context=facpub>]

A. Growing Demand for National Security Lawyers

The government drives the growth of national security law, and since mid-20th century, federal emphasis on this area has grown. Indeed, many scholars credit the 1947 National Security Act as marking the creation of the so-called “national security state”— one that continued to expand following the Cold War. 12 The post-9/11 era has, if anything, witnessed even greater acceleration in the construction and reach of national security institutions and authorities. This growth owes as much to ever-broader understandings of what constitutes a threat to U.S. national security as to military engagement overseas.13 An increased demand for legal expertise has emerged, resulting, at a federal level, in both more national security lawyers and more lawyers practicing national security law. Private industry has kept pace. 1. More Federal National Security Lawyers Consider first the institutional growth that has created new jobs for attorneys who work in the field. The demand for national security-savvy attorneys within the Executive Branch has soared, as virtually every department has become swept up in the intense focus on U.S. national security. The formation of the Department of Homeland Security provides perhaps the most dramatic example: in January 2003 it consolidated 22 agencies under one, new organizational structure.14 It has since has grown to more than 200,000 employees, making it the third largest Cabinet department. The Office of the General Counsel alone comprises more than 1,750 attorneys located at headquarters and the department’s operating components.15 To facilitate its strength in this area, DHS created an Honors Attorney Program, in the course of which national security attorneys are provided with two years’ employment in six-month rotations throughout DHS—with the aim of eventually working for the department.16 DHS is not alone in the creation of new positions. In March 2006 the USA PATRIOT Reauthorization and Improvement Act gave birth to DOJ’s National Security Division (“NSD”).17 NSD houses a Counterterrorism Section, a Counterespionage Section, an Office of Intelligence, an Office of Justice for Victims of Overseas Terrorism, a Law and Policy Office, and an Executive Office. From FY 2008 through FY 2013, the division allocated funding for 236 attorneys per year.18 Other components of DOJ have similarly created new positions for national security lawyers. In FY 2013 the department requested a total of $4 billion to support its national security program, whose contours includes critical counterterrorism and counterintelligence programs, as well as increases related to DOJ’s intelligence gathering and surveillance capabilities (such as the Comprehensive National Cybersecurity Initiative, the High-Value Detainee Interrogation Group, the Joint Terrorism Task Forces, and the Weapons of Mass Destruction/Render Safe Program). 19 A significant amount of this total is funneled to attorney functions. Since FY 2001, for instance, the FBI has expanded the Legal Attaché Program by more than 40%.20 DOJ has budgeted for the number of national security agents and attorneys (combined) at the FBI for FY 2013 to exceed 4,800, with nearly 1,800 more positions lodged in other DOJ components. 21 (These positions are in addition to the 236 dedicated attorneys at NSD.22) DoD as a whole boasts more than 10,000 full and part-time military and civilian attorneys.23 Further breakdown of the military and civilian sectors shows a steady expansion. The number of Active Army (AA) JAG Corps (JAGC) attorneys, for instance, has steadily increased. In 1999, the AA JAGCs numbered 1,426. By 2005, this number had increased to 1,603, with TJAG reporting a total of 1,897 by the end of FY2011.24 In addition to the more than 400 new positions that marked the previous decade, TJAG reported a total of 98 warrant officers, 561 civilian attorneys, and 1,942 enlisted paralegals supporting operations worldwide in 2011, with the RC Judge Advocate General’s Corps at the close of FY2011 numbering 1849 and the attorney strength of the Army National Guard at the end of FY2010 at 822.25 Reorganization of the Intelligence Community has brought further demand. The Intelligence Reform and Terrorism Prevention Act of 2004 created the Director of National Intelligence.26 ODNI conducts oversight of the Intelligence Community’s (“IC”) programs and operations.27 As noted by ODNI’s Office of the Inspector General, resolving major legal issues presents one of the five most critical management challenges for the agency.28 The WMD Commission Report similarly recognized the legal challenges faced by the IC and called for more lawyers to address the problem. 29 Indeed, all IC members have an increased need to address the myriad legal issues that arise. The CIA’s office of General Counsel, for instance, regularly interacts with the other IC agencies, the White House, the National Security Council, and the Departments of Defense, State, Justice, Treasury, Commerce, and Homeland Security. The types of legal issues addressed involve, inter alia, civil and criminal litigation, foreign intelligence and counterintelligence activities, counterterrorism, counternarcotics, nonproliferation and arms control, personnel and security matters, and the like.30 Further institutional changes, such as the 2001 creation of the Homeland Security Council, have increased the number of positions available, even as a number of departments, such as State, Treasury, and Health and Human Services, have increasingly built up their national security components.31 These changes mean two things: first, as discussed above, there are more national security attorney positions available at the federal level. Second, as addressed below, those attorneys who are already working in these agencies are practicing more national security law.

### Util

#### Overreliance on utility principles to justify executive detention power turns the lesser evil into the greater by obliterating restraints on the conduct of war – balancing legal checks and balances with security is necessary to create optimal outcomes for both

Richard Ashby Wilson 5, the Gladstein Distinguished Chair of Human Rights and Director of the Human Rights Institute at the University of Connecticut, Human Rights in the War on Terror, p. 19-21

Michael Ignatieff’s ‘lesser evil’ ethics and overreliance on a consequentialist ethics place him much closer to the anti-rights philosophical tradition of utilitarianism than the liberal tradition of human rights. Philosophically and politically, utilitarian consequentialism is about as far from an ethics of human rights as one can travel, and this is borne out in the DOJ memo’s dramatic bolstering of executive power and the sweeping away of the rights of prisoners of war. Jonathan Raban might have a point in suggesting that Ignatieff has become the ‘in-house philosopher’ of the ‘terror warriors’ (2005: 22). Lesser evil reasoning makes a virtue out of lowering accepted standards and surrendering safeguards on individual liberties. In the hands of government officials, it enables unrestrained presidential authority and a disregard for long-standing restraints on the conduct of war. Anyone remotely familiar with the history of twentieth-century Latin America will also be accustomed to ‘lesser evil’ excuses for human rights abuses, given their pervasiveness in the National Security Doctrine of numerous military dictatorships. Ignatieff is aware that a lesser evil ethics can take us down a slippery slope: ‘If a war on terror may require lesser evils, what will keep them from slowly becoming the greater evil? The only answer is democracy itself . . . The system of checks and balances and the division of powers assume the possibility of venality or incapacity in one institution or the other’ (2004: 10-11). This argument now seems rather credulous. Evidence gathered from Abu Ghraib, Guantanamo Bay and U.S. prisons in Afghanistan suggests that torture, the keeping of ‘ghost detainees’ and other violations of the Geneva Conventions were endemic within the system of military custody. By the time government officials weakly diverted blame to by denouncing a few low-ranking ‘bad apples’ in the 272nd Military Police Company, the damage had already been done, to the prisoners and to America’s standing in Iraq and the world. Even if the connection between a lesser evil ethics and a disregard for prisoners’ human rights is coincidental rather than intrinsic, lesser evil advocates have been wildly overconfident about the probity of government and the ability of democratic institutions to monitor closely the boundary between coercion and torture. The evidence points to the contrary view; that the executive branch, at the very least, fostered a legal setting in which prisoner abuse could flourish and excluded any congressional oversight. The monitoring procedures that were in place did not prevent such abuse from becoming widespread and symptomatic. The ‘lesser evil’ moral calculus that simplifies difficult decision making in an ‘age of terrorism’ is a little more complicated for others, and the DOJ memo should have at least demonstrated an awareness that the standard necessity defence case has been challenged comprehensively in jurisprudence and moral philosophy. In the 1970s, the late philosopher Bernard Williams carried out a critique of utilitarianism’s philosophy of the law so devastating that he concluded ‘the simple-mindedness of utilitarianism disqualifies it totally…the day cannot be far off in which we hear no more of it’ (1973: 150). Alas, this was the only part of Williams’ critique that was wide of the mark, since utilitarianism will probably always appeal to those longing for greater executive power. Williams examines a scenario analogous to the necessity defence cases found in the DOJ memo. He considers the case of a man, Jim, who is dropped into a South American village where he is the guest of honor. There, a soldier, Pedro, presents him with the dilemma of intentionally killing one man and saving another nineteen souls, whom Pedro was about to execute. Williams finds the utilitarian answer, that obviously Jim should kill one man to save nineteen, inadequate on a number of grounds. Generally stated, Williams’ position is that utilitarianism ignores individual integrity in its quest for the general good and it neglects the point that each of us are morally responsible for what we do, not what others do. Jim is responsible for his own actions and his not killing one man is not causal to Pedro’s subsequent killing of twenty. To advise Jim to torture or kill the one to save the many is to treat Jim as an impersonal and empty channel for effects in the world, or in Williams’ words, as a janitor of a system of values whose role is not to think or feel, but just to mop up the moral mess. The utilitarian perspective portrays an anxiety about the long-term psychological effects on the agent, say, a person’s feelings or remorse for an act of murder, as self-indulgent. It ignores the life projects to which Jim is committed, and his obligations to friends and family to act in a certain way It treats these commitments as irrational and of no consequence in its moral calculus of the greater good. In this critique, utilitarianism, of the kind that has characterized the legal counsel to President Bush in the ‘war on terror’, ignores individual moral agency and strips human life of what makes it worthwhile. Seeing persons as ends in themselves and not as means to other ends corresponds with a Kantian defence of human rights and liberal democracy more generally. In the struggle against Islamist terrorists, we are well advised to temper our desire for good consequences (which can seldom be predicted in advance) with an equal concern with intentions and integrity of motives. Consequences matter and integrity and good intentions are not in themselves sufficient. Yet developing an approach that is not overreliant on consequentialism and which foregrounds human agency, motivations and intentions could provide enduring grounds for defending human rights in the present climate. It could better equip us with the fundamental ethical principles to go about recombining human rights and security, and work through more carefully which suspensions of ordinary domestic laws and international rule of law are defensible, and which are not.

#### Slippery slope—kill 10 for 100, 100 for 1000, 1000 for a million. No end point. Also presumes we value all human life equally which national security state doesn’t do

### 2NC—Impact

#### The impact is permanent warfare---security and fear-driven politics create the enabling conditions for executive overreach and violence which means it’s try or die and we turn the case

Vivienne Jabri 6, Director of the Centre for International Relations and Senior Lecturer at the Department of War Studies, King’s College London, War, Security and the Liberal State, Security Dialogue, 37;47

LATE MODERN TRANSFORMATIONS are often conceived in terms of the sociopolitical and economic manifestations of change emergent from a globalized arena. What is less apparent is how late modernity as a distinct era has impacted upon our conceptions of the social sphere, our lived experience, and our reflections upon the discourses and institutions that form the taken-for-granted backdrop of the known and the knowable. The paradigmatic certainties of modernity – the state, citizenship, democratic space, humanity’s infinite capacity for progress, the defeat of dogma and the culmination of modernity’s apotheosis in the free-wheeling market place – have in the late modern era come face to face with uncertainty, unpre- dictability and the gradual erosion of the modern belief that we could indeed simply move on, assisted by science and technology, towards a condition where instrumental rationality would become the linchpin of government and human interaction irrespective of difference. Progress came to be associated with peace, and both were constitutively linked to the universal, the global, the human, and therefore the cosmopolitan. What shatters such illusions is the recollection of the 20th century as the ‘age of extremes’ (Hobsbawm, 1995), and the 21st as the age of the ever-present condition of war. While we might prefer a forgetting of things past, a therapeutic anamnesis that manages to reconfigure history, it is perhaps the continuities with the past that act as antidote to such righteous comforts.

How, then, do we begin to conceptualize war in conditions where distinctions disappear, where war is conceived, or indeed articulated in political discourse, in terms of peace and security, so that the political is somehow banished in the name of governmentalizing practices whose purview knows no bounds, whose remit is precisely the banishment of limits, of boundaries and distinctions. Boundaries, however, do not disappear. Rather, they become manifest in every instance of violence, every instance of control, every instance of practices targeted against a constructed other, the enemy within and without, the all-pervasive presence, the defences against which come to form the legitimizing tool of war.

Any scholarly take on the present juncture of history, any analysis of the dynamics of the present, must somehow render the narrative in measured tones, taking all factors into account, lest the narrator is accused of exaggeration at best and particular political affiliations at worst. When the late modern condition of the West, of the European arena, is one of camps, one of the detention of groups of people irrespective of their individual needs as migrants, one of the incarceration without due process of suspects, one of overwhelming police powers to stop, search and detain, one of indefinite detention in locations beyond law, one of invasion and occupation, then language itself is challenged in its efforts to contain the description of what is. The critical scholarly take on the present is then precisely to reveal the conditions of possibility in relation to how we got here, to unravel the enabling dynamics that led to the disappearance of distinctions between war and criminality, war and peace, war and security. When such distinctions disappear, impunity is the result, accountability shifts beyond sight, and violence comes to form the linchpin of control. We can reveal the operations of violence, but far more critical is the revelation of power and how power operates in the present. As the article argues, such an exploration raises fundamental questions relating to the relationship of power and violence, and their mutual interconnection in the complex interstices of disrupted time and space locations. Power and violence are hence separable analytical categories, separable practices; they are at the same time connected in ways that work on populations and on bodies – with violence often targeted against the latter so that the former are reigned in, governed. Where Michel Foucault sought, in his later writings, to distinguish between power and violence, to reveal the subtle workings of power, now, in the present, this article will venture, perhaps the distinction is no longer viable when we witness the indistinctions I highlight above

The article provides an analysis of the place of war in late modern politics. In particular, it concentrates on the implications of war for our conceptions of the liberty–security problematique in the context of the modern liberal state. The first section of the article argues the case for the figure of war as analyser of the present. The second section of the article reveals the con- ditions of possibility for a distinctly late modern mode of war and its imbri- cations in politics. The final section of the article concentrates on the political implications of the primacy of war in late modernity, and in particular on possibilities of dissent and articulations of political agency. The aim through- out is to provide the theoretical and conceptual tools that might begin to meet the challenges of the present and to open an agenda of research that concentrates on the politics of the present, the capacities or otherwise of contestation and accountability, and the institutional locations wherein such political agency might emerge.

The Figure of War and the Spectre of Security

The so-called war against terrorism is constructed as a global war, transcend- ing space and seemingly defiant of international conventions. It is dis- tinguished from previous global wars, including the first and the second world wars, in that the latter two have, in historiography, always been analysed as interstate confrontations, albeit ones that at certain times and in particular locations peripherally involved non-state militias. Such distinc- tions from the old, of course, will be subject to future historical narratives on the present confrontation and its various parameters. What is of interest in the present discussion is the distinctly global aspect of this war, for it is the globality1 of the war against terrorism that renders it particularly relevant and pertinent to investigations that are primarily interested in the relation- ship between war and politics, war and the political processes defining the modern state. The initial premise of the present article is that war, rather than being confined to its own time and space, permeates the normality of the political process, has, in other words, a defining influence on elements con- sidered to be constitutive of liberal democratic politics, including executive answerability, legislative scrutiny, a public sphere of discourse and inter- action, equal citizenship under the law and, to follow liberal thinkers such as Habermas, political legitimacy based on free and equal communicative practices underpinning social solidarity (Habermas, 1997). War disrupts these elements and is a time of crisis and emergency. A war that has a permanence to it clearly normalizes the exceptional, inscribing emergency into the daily routines of social and political life. While the elements of war – conflict, social fragmentation, exclusion – may run silently through the assemblages of control in liberal society (Deleuze, 1986), nevertheless the persistent iteration of war into politics brings these practices to the fore, and with them a call for a rethinking of war’s relationship to politics.

The distinctly global spatiality of this war suggests particular challenges that have direct impact on the liberal state, its obligations towards its citizenry, and the extent to which it is implicated in undermining its own political institutions. It would, however, be a mistake to assume that the practices involved in this global war are in any way anathema to the liberal state. The analysis provided here would argue that while it is crucial to acknowledge the transformative impact of the war against terrorism, it is equally as important to appreciate the continuities in social and political life that are the enabling conditions of this global war, forming its conditions of possibility. These enabling conditions are not just present or apparent at global level, but incorporate local practices that are deep-rooted and institu- tionalized. The mutually reinforcing relationship between global and local conditions renders this particular war distinctly all-pervasive, and poten- tially, in terms of implications, far more threatening to the spaces available for political contestation and dissent.

Contemporary global politics is dominated by what might be called a ‘matrix of war’2 constituted by a series of transnational practices that vari- ously target states, communities and individuals. These practices involve states as agents, bureaucracies of states and supranational organizations, quasi-official and private organizations recruited in the service of a global machine that is highly militarized and hence led by the United States, but that nevertheless incorporates within its workings various alliances that are always in flux. The crucial element in understanding the matrix of war is the notion of ‘practice’, for this captures the idea that any practice is not just situated in a system of enablements and constraints, but is itself constitutive of structural continuities, both discursive and institutional. As Paul Veyne (1997: 157) writes in relation to Foucault’s use of the term, ‘practice is not an agency (like the Freudian id) or a prime mover (like the relation of produc- tion), and moreover for Foucault, there is no agency nor any prime mover’. It is in this recursive sense that practices (of violence, exclusion, intimidation, control and so on) become structurated in the routines of institutions as well as lived experience (Jabri, 1996). To label the contemporary global war as a ‘war against terrorism’ confers upon these practices a certain legitimacy, suggesting that they are geared towards the elimination of a direct threat. While the threat of violence perpetrated by clandestine networks against civilians is all too real and requires state responses, many of these responses appear to assume a wide remit of operations – so wide that anyone interested in the liberties associated with the democratic state, or indeed the rights of individuals and communities, is called upon to unravel the implications of such practices.

When security becomes the overwhelming imperative of the democratic state, its legitimization is achieved both through a discourse of ‘balance’ between security and liberty and in terms of the ‘protection’ of liberty.3 The implications of the juxtaposition of security and liberty may be investigated either in terms of a discourse of ‘securitization’ (the power of speech acts to construct a threat juxtaposed with the power of professionals precisely to so construct)4 or, as argued in this article, in terms of a discourse of war. The grammars involved are closely related, and yet that of the latter is, para- doxically, the critical grammar, the grammar that highlights the workings of power and their imbrications with violence. What is missing from the securitization literature is an analytic of war, and it is this analytic that I want to foreground in this article.

The practices that I highlight above seem at first hand to constitute differ- ent response mechanisms in the face of what is deemed to be an emergency situation in the aftermath of the events of 11 September 2001. The invasion and occupation of Iraq, the incarceration without due process of prisoners in camps from Afghanistan to Guantánamo and other places as yet un- identified, the use of torture against detainees, extra-judicial assassination, the detention and deportation – again without due process – of foreign nationals deemed a threat, increasing restrictions on refugees, their confine- ment in camps and detention centres, the construction of the movement of peoples in security terms, and restrictions on civil liberties through domestic legislation in the UK, the USA and other European states are all represented in political discourse as necessary security measures geared towards the protection of society. All are at the same time institutional measures targeted against a particular other as enemy and source of danger.

It could be argued that the above practices remain unrelated and must hence be subject to different modes of analysis. To begin with, these practices involve different agents and are framed around different issues. Afghanistan and Iraq may be described as situations of war, and the incarceration of refugees as encompassing practices of security. However, what links these elements is not so much that they constitute a constructed taxonomy of dif- ferentiated practices. Rather, what links them is the element of antagonism directed against distinct and particular others. Such a perspective suggests that the politics of security, including the production of fear and a whole array of exclusionary measures, comes to service practices that constitute war and locates the discourse of war at the heart of politics, not just domes- tically, but, more crucially in the present context, globally. The implications for the late modern state and the distinctly liberal state are monumental, for a perpetual war on a global scale has implications for political structures and political agency, for our conceptions of citizenship and the role of the state in meeting the claims of its citizens,5 and for the workings of a public sphere that is increasingly global and hence increasingly multicultural.

The matrix of war is centrally constituted around the element of antago- nism, having an association with existential threat: the idea that the continued presence of the other constitutes a danger not just to the well-being of society but to its continued existence in the form familiar to its members, hence the relative ease with which European politicians speak of migrants of particular origins as forming a threat to the ‘idea of Europe’ and its Christian origins.6 Herein lies a discourse of cultural and racial exclusion based on a certain fear of the other. While the war against specific clandestine organiza- tions7 involves operations on both sides that may be conceptualized as a classical war of attrition, what I am referring to as the matrix of war is far more complex, for here we have a set of diffuse practices, violence, disci- plinarity and control that at one and same time target the other typified in cultural and racial terms and instantiate a wider remit of operations that impact upon society as a whole.

The practices of warfare taking place in the immediate aftermath of 11 September 2001 combine with societal processes, reflected in media representations and in the wider public sphere, where increasingly the source of threat, indeed the source of terror, is perceived as the cultural other, and specifically the other associated variously with Islam, the Middle East and South Asia. There is, then, a particularity to what Agamben (1995, 2004) calls the ‘state of exception’, a state not so much generalized and generalizable, but one that is experienced differently by different sectors of the global population. It is precisely this differential experience of the exception that draws attention to practices as diverse as the formulation of interrogation techniques by military intelligence in the Pentagon, to the recent provisions of counter-terrorism measures in the UK,8 to the legitimizing discourses surrounding the invasion of Iraq. All are practices that draw upon a discourse of legitimization based on prevention and pre-emption. Enemies constructed in the discourses of war are hence always potential, always abstract even when identified, and, in being so, always drawn widely and, in consequence, communally. There is, hence, a ‘profile’ to the state of exception and its experience. Practices that profile particular communities, including the citizens of European states, create particular challenges to the self-understanding of the liberal democratic state and its capacity, in the 21st century, to deal with difference.

While a number of measures undertaken in the name of security, such as proposals for the introduction of identity cards in the UK or increasing surveillance of financial transactions in the USA, might encompass the population as a whole, the politics of exception is marked by racial and cul- tural signification. Those targeted by exceptional measures are members of particular racial and cultural communities. The assumed threat that under- pins the measures highlighted above is one that is now openly associated variously with Islam as an ideology, Islam as a mode of religious identi- fication, Islam as a distinct mode of lifestyle and practice, and Islam as a particular brand associated with particular organizations that espouse some form of a return to an Islamic Caliphate. When practices are informed by a discourse of antagonism, no distinctions are made between these various forms of individual and communal identification. When communal profiling takes place, the distinction between, for example, the choice of a particular lifestyle and the choice of a particular organization disappears, and diversity within the profiled community is sacrificed in the name of some ‘pre- cautionary’ practice that targets all in the name of security.9 The practices and language of antagonism, when racially and culturally inscribed, place the onus of guilt onto the entire community so identified, so that its indi- vidual members can no longer simply be citizens of a secular, multicultural state, but are constituted in discourse as particular citizens, subjected to particular and hence exceptional practices. When the Minister of State for the UK Home Office states that members of the Muslim community should expect to be stopped by the police, she is simply expressing the condition of the present, which is that the Muslim community is particularly vulnerable to state scrutiny and invasive measures that do not apply to the rest of the citizenry.10 We know, too, that a distinctly racial profiling is taking place, so that those who are physically profiled are subjected to exceptional measures.

Even as the so-called war against terrorism recognizes no boundaries as limits to its practices – indeed, many of its practices occur at transnational, often indefinable, spaces – what is crucial to understand, however, is that this does not mean that boundaries are no longer constructed or that they do not impinge on the sphere of the political. The paradox of the current context is that while the war against terrorism in all its manifestations assumes a boundless arena, borders and boundaries are at the heart of its operations. The point to stress is that these boundaries and the exclusionist practices that sustain them are not coterminous with those of the state; rather, they could be said to be located and perpetually constructed upon the corporeality of those constructed as enemies, as threats to security. It is indeed the corporeal removal of such subjects that lies at the heart of what are constructed as counter-terrorist measures, typified in practices of direct war, in the use of torture, in extra-judicial incarceration and in judicially sanctioned detention. We might, then, ask if such measures constitute violence or relations of power, where, following Foucault, we assume that the former acts upon bodies with a view to injury, while the latter acts upon the actions of subjects and assumes, as Deleuze (1986: 70–93) suggests, a relation of forces and hence a subject who can act. What I want to argue here is that violence is imbricated in relations of power, is a mode of control, a technology of governmentality. When the population of Iraq is targeted through aerial bombardment, the consequence goes beyond injury and seeks the pacifica- tion of the Middle East as a political region.

When legislative and bureaucratic measures are put in place in the name of security, those targeted are categories of population. At the same time, the war against terrorism and the security discourses utilized in its legitimiza- tion are conducted and constructed in terms that imply the defence or protection of populations. One option is to limit policing, military and intel- ligence efforts through the targeting of particular organizations. However, it is the limitless construction of the war against terrorism, its targeting of particular racial and cultural communities, that is the source of the challenge presented to the liberal democratic state. In conditions constructed in terms of emergency, war permeates discourses on politics, so that these come to be subject to the restraints and imperatives of war and practices constituted in terms of the demands of security against an existential threat. The implications for liberal democratic politics and our conceptions of the modern state and its institutions are far-reaching,11 for the liberal democratic polity that considers itself in a state of perpetual war is also a state that is in a permanent state of mobilization, where every aspect of public life is geared towards combat against potential enemies, internal and external.

One of the most significant lessons we learn from Michel Foucault’s writ- ings is that war, or ‘the distant roar of battle’ (Foucault, 1977: 308), is never quite so distant from liberal governmentality. Conceived in Foucaultian terms, war and counter-terrorist measures come to be seen not as discontinuity from liberal government, but as emergent from the enabling conditions that liberal government and the modern state has historically set in place. On reading Foucault’s renditions on the emergence of the disciplinary society, what we see is the continuation of war in society and not, as in Hobbes and elsewhere in the history of thought, the idea that wars happen at the outskirts of society and its civil order. The disciplinary society is not simply an accumulation of institutional and bureaucratic procedures that permeate the everyday and the routine; rather, it has running through its interstices the constitutive elements of war as continuity, including confrontation, struggle and the corporeal removal of those deemed enemies of society. In Society Must Be Defended (Foucault, 2003) and the first volume of the History of Sexuality (Foucault, 1998), we see reference to the discursive and institutional continuities that structurate war in society. Reference to the ‘distant roar of battle’ suggests confrontation and struggle; it suggests the ever-present construction of threat accrued to the particular other; it suggests the immediacy of threat and the construction of fear of the enemy; and ultimately it calls for the corporeal removal of the enemy as source of threat. The analytic of war also encompasses the techniques of the military and their presence in the social sphere – in particular, the control and regulation of bodies, timed pre- cision and instrumentality that turn a war machine into an active and live killing machine. In the matrix of war, there is hence the level of discourse and the level of institutional practices; both are mutually implicating and mutually enabling. There is also the level of bodies and the level of population. In Foucault’s (1998: 152) terms: ‘the biological and the historical are not con- secutive to one another . . . but are bound together in an increasingly com- plex fashion in accordance with the development of the modern technologies of power that take life as their objective’.

What the above suggests is the idea of war as a continuity in social and political life. The matrix of war suggests both discursive and institutional practices, technologies that target bodies and populations, enacted in a complex array of locations. The critical moment of this form of analysis is to point out that war is not simply an isolated occurrence taking place as some form of interruption to an existing peaceful order. Rather, this peaceful order is imbricated with the elements of war, present as continuities in social and political life, elements that are deeply rooted and enabling of the actuality of war in its traditional battlefield sense. This implies a continuity of sorts between the disciplinary, the carceral and the violent manifestations of government.

### ALT—Anti-Subordination Framing

#### We should frame the question of executive power in terms of racialized harm and otherization. Refusing accommodation with values of the security state is a *precondition* for preventing racialized hierarchy.

Gil GOTT Int’l Studies @ DePaul 5 “The Devil We Know: Racial Subordination and National Security Law” Villanova Law Review, Vol. 50, Iss. 4, p. 1075-1076

Anti-subordinationist principles require taking more complete account of how enemy groups are racialized, and how they come to be constructed as outsiders and the kinds of harms that may befall them as such. Group-based status harms include those that have been inscribed in law and effectuated through state action, and those that arise within civil society, through social structures, institutions, culture and habitus. Familiarity with the processes of racialization is a necessary precondition for appreciating and remedying such injuries. Applying anti-subordinationist thinking to national security law and policy does not require arguing that only race-based effects matter, but does require affording significant analytical and normative weight to the problems of such status harms. Racial injuries require racial remedies. Foregrounding anti-subordinationist principles in national security law and policy analysis departs significantly from traditional approaches in the field. Nonetheless, arguments based in history, political theory and pragmatism suggest that such a fundamental departure is warranted. Historically, emergency-induced "states of exception" 6 that have suspended legal protections against governmental abuses have tended to be identitybased in conception and implementation. 7 Viewed from the perspective of critical political theory, the constellation of current "security threats" rests on the epochal co-production of identity-based and market-driven global political antagonisms, referred to somewhat obliquely as civilization clashes or perhaps more forthrightly as American imperialism. Pragmatically, it makes no sense to fight terrorism by alienating millions of Muslim, Arab and South Asian residents in the United States and hundreds of millions more abroad through abusive treatment and double standards operative in identity-based repression at home and in selective, preemptive U.S. militarism abroad. Such double standards undermine the democratic legitimacy of the United States both in its internal affairs and in its assertions of global leadership. Indeed, there seems to be no shortage of perspectives from which liberal legal institutions would be enjoined from embracing a philosophy of political decisionism precisely at the interface of law and security, an anomic frontier along which are likely to arise identity-based regimes of exception and evolving race-based forms of subordination. Part I analyzes accommodationist approaches that variously incorporate security-inflected logic in truncating the regulative role law plays in national security contexts. I will seek to understand the accommodationist thrust of these interventions in light of the authors' operative assumptions regarding the proper array of interests and exigencies to be balanced. I will argue that the interests of demonized "enemy groups" facing racebased status harm-Muslims, Arabs and South Asians in the United States-are ineffectively engaged through accommodationist frameworks. The decisionist impulse of these analyses, that is, the tendency to acquiesce in the outcomes of non-substantively constrained statist and/or majoritarian political process, results from an incomplete grasp of the racialization processes. In short, more race consciousness is needed in national security law and policy in order to cement substantive commitments and procedural safeguards against historical and ongoing racebased subordination through the racialization of "security threats."

### AT: Peace Now

#### The historical record proves.

Gray 11—John Gray is a Canadian journalist and author whose work includes Paul Martin: The Power of Ambition, a biography with an emphasis on Martin's lifelong quest to be Prime Minister. A former journalist with the Ottawa Citizen, Gray also had many roles in 20 years of work for The Globe and Mail, including writer, editor, foreign correspondent, and Ottawa bureau chief. He won three National Newspaper Awards [September 21, 2011, “Delusions of Peace,” Prospect, http://www.prospectmagazine.co.uk/magazine/john-gray-steven-pinker-violence-review/]

“Today we take it for granted that war happens in smaller, poorer and more backward countries,” Steven Pinker writes in his new book, The Better Angels of Our Nature: the Decline of Violence in History and Its Causes. The celebrated Harvard professor of psychology is discussing what he calls “the Long Peace”: the period since the end of the second world war in which “the great powers, and developed states in general, have stopped waging war on one another.” As a result of “this blessed state of affairs,” he notes, “two entire categories of war—the imperial war to acquire colonies, and the colonial war to keep them—no longer exist.” Now and then there have been minor conflicts. “To be sure, [the super-powers] occasionally fought each other’s smaller allies and stoked proxy wars among their client states.” But these episodes do not diminish Pinker’s enthusiasm about the Long Peace. Chronic warfare is only to be expected in backward parts of the world. “Tribal, civil, private, slave-raiding, imperial, and colonial wars have inflamed the territories of the developing world for millennia.” In more civilised zones, war has all but disappeared. There is nothing inevitable in the process; major wars could break out again, even among the great powers. But the change in human affairs that has occurred is fundamental. “An underlying shift that supports predictions about the future,” the Long Peace points to a world in which violence is in steady decline.

A sceptical reader might wonder whether the outbreak of peace in developed countries and endemic conflict in less fortunate lands might not be somehow connected. Was the immense violence that ravaged southeast Asia after 1945 a result of immemorial backwardness in the region? Or was a subtle and refined civilisation wrecked by world war and the aftermath of decades of neo-colonial conflict—as Norman Lewis intimated would happen in his prophetic account of his travels in the region, A Dragon Apparent (1951)? It is true that the second world war was followed by over 40 years of peace in North America and Europe—even if for the eastern half of the continent it was a peace that rested on Soviet conquest. But there was no peace between the powers that had emerged as rivals from the global conflict.

In much the same way that rich societies exported their pollution to developing countries, the societies of the highly-developed world exported their conflicts. They were at war with one another the entire time—not only in Indo-China but in other parts of Asia, the Middle East, Africa and Latin America. The Korean war, the Chinese invasion of Tibet, British counter-insurgency warfare in Malaya and Kenya, the abortive Franco-British invasion of Suez, the Angolan civil war, decades of civil war in the Congo and Guatemala, the Six Day War, the Soviet invasion of Hungary in 1956 and of Czechoslovakia in 1968, the Iran-Iraq war and the Soviet-Afghan war—these are only some of the armed conflicts through which the great powers pursued their rivalries while avoiding direct war with each other. When the end of the Cold War removed the Soviet Union from the scene, war did not end. It continued in the first Gulf war, the Balkan wars, Chechnya, the Iraq war and in Afghanistan and Kashmir, among other conflicts. Taken together these conflicts add up to a formidable sum of violence. For Pinker they are minor, peripheral and hardly worth mentioning. The real story, for him, is the outbreak of peace in advanced societies, a shift that augurs an unprecedented transformation in human affairs.

### Perm

#### The permutation is a tactic to legitimize the violence of the law—codifying status-quo policy sanitizes expanding state violence—their appeal to juridical legitimation results in malleable legal conventions that are ultimately meaningless

John MORRISSEY, Lecturer in Political and Cultural Geography, National University of Ireland, 11 [“Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror,” *Geopolitics*, 16:280–305, 2011]

JURIDICAL WARFARE: FORWARD DEPLOYMENT BEYOND THE BATTLEFIELD

Nearly two centuries ago, Prussian military strategist, Carl von Clausewitz, observed how war is merely a “continuation of political commerce” by “other means”.70 Today, the lawfare of the US military is a continuation of war by legal means. Indeed, for US Deputy Judge Advocate General, Major General Charles Dunlap, it “has become a key aspect of modern war”.71 For Dunlap and his colleagues in the JAG corps, the law is a “force multiplier”, as Harvard legal scholar, David Kennedy, explains: it “structures logistics, command, and control”; it “legitimates, and facilitates” violence; it “privileges killing”; it identifies legal “openings that can be made to seem persuasive”, promissory, necessary and indeed therapeutic; and, of course, it is “a communication tool” too because defining the battlefield is not only a matter of “privileging killing”, it is also a “rhetorical claim”.72 Viewed in this way, the law can be seen to in fact “contribute to the proliferation of violence rather than to its containment”, as Eyal Weizman has instructively shown in the case of recent Israeli lawfare in Gaza.73

In the US wars in Iraq, Afghanistan and broader war on terror, the Department of Defense has actively sought to legalise its use of biopolitical violence against all those deemed a threat. Harvey Rishikof, the former Chair of the Department of National Security Strategy at the National War College in Washington, recently underlined ‘juridical warfare’ (his preferred designation over ‘lawfare’) as a pivotal “legal instrument” for insurgents in the asymmetric war on terror.74 For Rishikof and his contemporaries, juridical warfare is always understood to mean the legal strategies of the weak ‘against’ the United States; it is never acknowledged as a legal strategy ‘of’ the United States. However, juridical warfare has been a proactive component of US military strategy overseas for some time, and since the September 11 attacks in New York and Washington in 2001, a renewed focus on juridical warfare has occurred, with the JAG Corps playing a central role in reforming, prioritising and mobilising the law as an active player in the war on terror.75

Deputy Judge Advocate General, Major General Charles Dunlap, recently outlined some of the key concerns facing his corps and the broader US military; foremost of which is the imposing of unnecessary legal restraints on forward-deployed military personnel.76 For Dunlap, imposing legal restraints on the battlefield as a “matter of policy” merely “play[s] into the hands of those who would use [international law] to wage lawfare against us”.77 Dunlap’s counter-strategy is simply “adhering to the rule of law”, which “understands that sometimes the legitimate pursuit of military objectives will foreseeably – and inevitably – cause the death of noncombatants”; indeed, he implores that “this tenet of international law be thoroughly understood”.78 But ‘the’ rule of international law that Dunlap has in mind is merely a selective and suitably enabling set of malleable legal conventions that legitimate the unleashing of military violence.79 As David Kennedy illuminates so brilliantly in Of War and Law:

We need to remember what it means to say that compliance with international law “legitimates.” It means, of course, that killing, maiming, humiliating, wounding people is legally privileged, authorized, permitted, and justified.80

The recent ‘special issue on juridical warfare’ in the US military’s flagship journal, Joint Force Quarterly, brought together a range of leading judge advocates, specialists in military law, and former legal counsels to the Chairman of the Joint Chiefs of Staff. All contributions addressed the question of “which international conventions govern the confinement and interrogation of terrorists and how”.81 The use of the term ‘terrorists’ instead of suspects sets the tone for the ensuing debate: in an impatient defence of ‘detention’, Colonel James Terry bemoans the “limitations inherent in the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006” (which he underlines only address detainees at the US Naval Base at Guantanamo) and asserts that “requirements inherent in the war on terror will likely warrant expansion of habeas corpus limitations”;82 considering ‘rendition’, Colonel Kevin Cieply asks the shocking question “is rendition simply recourse to the beast at a necessary time”;83 Colonel Peter Cullen argues for the necessity of the “role of targeted killing in the campaign against terror”;84 Commander Brian Hoyt contends that it is “time to reexamine U.S. policy on the [international criminal] court, and it should be done through a strategic lens”;85 while Colonel James Terry furnishes an additional concluding essay with the stunningly instructive title ‘The International Criminal Court: A Concept Whose Time Has Not Come’.86 These rather chilling commentaries attest to one central concern of the JAG Corps and the broader military-political executive at the Pentagon: that enemies must not be allowed to exploit “real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting American military power”.87 And such thinking is entirely consistent with the defining National Defense Strategy of the Bush administration, which signalled the means to win the war on terror as follows: “We will defeat adversaries at the time, place, and in the manner of our choosing”.88

If US warfare in the war on terror is evidently underscored by a ‘manner of our choosing’ preference – both at the Pentagon and in the battlefield – this in turn prompts an especially proactive ‘juridical warfare’ that must be simultaneously pursued to legally capacitate, regulate and maximise any, and all, military operations. The 2005 National Defense Strategy underlined the challenge thus:

Many of the current legal arrangements that govern overseas posture date from an earlier era. Today, challenges are more diverse and complex, our prospective contingencies are more widely dispersed, and our international partners are more numerous. International agreements relevant to our posture must reflect these circumstances and support greater operational flexibility.89

It went on to underline its consequent key juridical tactic and what I argue is a critical weapon in the US military-legal arsenal in the war on terror: the securing of ‘Status of Forces Agreements’ – to “provide legal protections” against “transfers of U.S. personnel to the International Criminal Court”.90

## \*\*\* 1NR

### China

#### Finishing card—China’s pursuing peace

**Baruah 12/6**/13 - Research Assistant @ Observer Research Foundation, Delhi [Darshana M. Baruah, “A New Phase In China-ASEAN Relations? – Analysis,” Eurasia Review, December 6, 2013, pg. http://www.eurasiareview.com/06122013-new-phase-china-asean-relations-analysis/

The growing lack of trust and aggressive assertions over their respective claims has affected China’s relations with ASEAN members. China’s relationship with Vietnam and the Philippines quickly deteriorated owing to the dispute. These nations found themselves turning to non-claimant actors for support against China. Additionally, Beijing was immensely irked by the US ‘rebalance’ to Asia which is being welcomed by many of the ASEAN nations. China perceives American presence in the region as a ‘containment’ policy against it. While Washington and Manila renewed their Mutual Defence Treaty – seeking American support in a possible conflict with Beijing, Hanoi invited India to continue investing in Vietnam and stay put in the disputed oil blocks in the SCS. These developments antagonised Beijing further as it continues to oppose the involvement of a non-claimant actor in the regional dispute.

Against this backdrop, Beijing seems to be trying to mend ties with its disgruntled ASEAN neighbours in the recent months. China’s top two leaders set out on a tour to ease the tension amongst the claimants. President Xi Jinping and Premier Li Keqiang visited five nations and attended the Asia Pacific Economic Cooperation (APEC) CEO Summit and the East Asia Summit (EAS) respectively – two top level forums to discuss economic and security issues of the region. While President Obama cancelled his Asia tour, the two leaders spoke on maritime and economic cooperation emphasising on a regional integration. Beijing took this opportunity to improve ties with the neighbours and put forth its views and concerns about security in the region. The absence of the American President set the stage for Chinese dominance at the APEC and the EAS. Premier Li Keqiang followed up the tour with the China-ASEAN Summit 2013 revealing Beijing’s new strategy for China-ASEAN relations. Marking the 10 year anniversary of the China-ASEAN partnership, the Premier put forward the 2+7 cooperation framework for both sides. The visit to a great extent helped overcome the ongoing difficult stage between China and its ASEAN neighbours.

Mending ties with the neighbours

President Xi Jinping reached Jakarta on November 2, beginning a tour to further Beijing’s relationship with some of the ASEAN members. Xi delivered a speech at the Indonesian House of Representatives, becoming the first foreign head of a state to do so. During the visit, Beijing and Jakarta elevated their bilateral relationship to a ‘comprehensive strategic partnership’. China expressed that both sides should exchange views on Asia-Pacific economic situation and “join hands pushing forward China-ASEAN cooperation”. Indonesian Vice President Boediono noted that “Xi Jinping’s current visit will undoubtedly push forward bilateral cooperation in all fields to better promote the development of the two countries”.

Continuing the tour, Xi then travelled to Malaysia on October 3, 2013. The Chinese leader met with Malaysian leaders to discuss and further the China-Malaysia bilateral relationship. Xi met with Malaysian Prime Minister Najib Razak and upgraded Beijing’s relationship with Malaysia to a ‘comprehensive strategic partnership’. Xi raised a few proposals on bilateral cooperation stressing on regional economic integration. The Malaysian side too committed in developing their relationship further. The Malaysian Prime Minister stated that “Malaysia is ready to strengthen exchanges and cooperation with China in the fields of military-to-military exchanges, sci-tech, law enforcement, education, tourism, people-to-people and cultural exchanges. The Malaysian side fully supports China’s proposal to prepare for the establishment of Asian Infrastructure Investment Bank and is ready to consider participating”.

Beijing has maintained the need for a regional integration. It is necessary for China to sustain good relations with the other Asian nations to keep the issues at a regional level, so as to leave no scope for a non regional power to interfere. It is interesting to note that the new leadership is more engaging with their neighbours and with the global community at large. Since assuming Presidency in China on March 14, 2013, Xi has travelled to countries in Africa, Latin America, Central Asia and to America.

China is sceptical of the US pivot and has opposed Washington’s call for peace and security on the issue of the SCS. It was necessary for Beijing to improve its deteriorating ties with the ASEAN nations in order to push for a successful regional integration. Visiting these countries during a difficult time in their bilateral relationship helped reduce the tension and animosity to a great extent.

Premier Li Keqiang’s speech at the eighth East Asia Summit (2013) echoed Xi Jinping’s call for a regional integration. The premier also encouraged the leaders of the region to enhance mutual trust amongst themselves to maintain regional peace and stability. Speaking on the issue of the SCS, Li reiterated Beijing’s stance on guaranteed freedom of navigation through SCS and urged the nations to resolve the dispute through bilateral negotiations and discussions. Opposing the Philippines move to approach the UN arbitration court, Li noted that “Unilateral referral of the bilateral disputes to international arbitration runs counter to the DOC, [as] agreed by China and ASEAN countries”. Philippines have been very vocal about its dispute with China and have sought American support on the issue. China refused to cooperate with Manila on the UN arbitration process. Beijing maintains that disputes should be resolved only at a bilateral level.

This was also Li’s state visit to Brunei. During the course of the visit, China and Brunei decided to strengthen Maritime Cooperation to promote joint development. Li then continued the tour by visiting Thailand on October 11 and Vietnam on October 13. Calling to further strengthen Sino-Thai relations, Li said that the two countries “have been good brothers since ancient times”. He emphasised on taking the Sino-Thai comprehensive strategic partnership to a new level by enjoying the “opportunities generated by each other’s development”. Addressing the National Assembly of Thailand, Li stressed on further close relations between the nations by calling for closer bilateral cooperation in all aspects. He said that “Sino-Thai relations have gone beyond the scope of bilateral relations” and the two nations should open a new page for China-Thailand friendship. Thai leaders reciprocated Beijing’s sentiments with a standing ovation at the end of the speech.

Li’s visit to Vietnam is an important development in China-ASEAN relations. Ties between Beijing and Hanoi soured due the disputes in the SCS. Hanoi and Manila have been explicitly expressing their disappointment with Beijing over the issue. The visit at the level of the Premier with a message for cooperation and friendship greatly reduced the tensions between the two nations. Both nations signed a series of cooperation documents and agreements. Underlining the importance of the visit, Li stated that “During my current visit, I reached new consensus with Viennese leaders on deepening China-Vietnam relations and the two countries also signed a series of cooperation documents and agreements. Hope both sides will, bearing the big picture, work together to effectively implement the consensus. Especially pushing forward maritime, onshore and financial cooperation… [And] show to the two peoples, neighbouring countries and the world that China and Vietnam absolutely have the ability and wisdom to overcome difficulties….China is ready to work with Vietnam to forge ahead in the overall direction of bilateral relations in order to promote greater development of China-Vietnam comprehensive strategic cooperative partnership”.

China’s maritime dispute in SCS and the East China Sea (ECS) has affected SE Asia’s regional dynamics. As Washington increases its presence in the region while strengthening its ties with Japan and the Philippines, it is important for China to maintain good relations with its ASEAN neighbours. Responding to the ‘contain China’ policy, Beijing set out to boost its relation with the ASEAN members.

China’s relationship with the Philippines and Japan continues to turn sour over the maritime disputes. Japanese Prime Minister Shinzo Abe has made an effort to maintain and further Japan’s bilateral relations with the ASEAN nations. Since taking office in December 2012, Abe has visited all 10 ASEAN nations. As Japan looks to win support amongst the SE Asian countries, Beijing must be careful in its bilateral relationship with ASEAN. Recently, as Typhoon Haiyan ravaged Philippines, international aid for the country poured in by and large. However, China is being criticised for the ‘stingy’ aid offered to its neighbour on the aftermath of the typhoon. Beijing’s actions raised concerns regarding China as a friendly neighbour at a time of distress, with the international media calling China’s aid as “measly” and “insulting”.

Beijing has made a start in extending a message of friendship and cooperation to some of the ASEAN members. China’s renewed engagement with the Southeast Asian neighbours seems to be a policy of the new leadership. However, it must follow up on these successful visits by its efforts and actions in cooperating on the troubled areas. For now, maintaining good relations with the member nations of ASEAN seems to be Beijing’s new strategy to ease tensions in the SCS.

#### Their Wittner evidence only cites alternate causalities to conflict --- nothing in this evidence is about drones, it’s about why increasing U.S. defense presence in Asia will trigger tension with China. They obviously don’t solve that.

Wittner 11 (Lawrence S. Wittner, Emeritus Professor of History at the State University of New York/Albany, Wittner is the author of eight books, the editor or co-editor of another four, and the author of over 250 published articles and book reviews. From 1984 to 1987, he edited Peace & Change, a journal of peace research., 11/28/2011, "Is a Nuclear War With China Possible?", [www.huntingtonnews.net/14446](http://www.huntingtonnews.net/14446))

While nuclear weapons exist, there remains a danger that they will be used. After all, for centuries national conflicts have led to wars, with nations employing their deadliest weapons. The current deterioration of U.S. relations with China might end up providing us with yet another example of this phenomenon. The gathering tension between the United States and China is clear enough. Disturbed by China’s growing economic and military strength, the U.S. government recently challenged China’s claims in the South China Sea, increased the U.S. military presence in Australia, and deepened U.S. military ties with other nations in the Pacific region. According to Secretary of State Hillary Clinton, the United States was “asserting our own position as a Pacific power.” But need this lead to nuclear war? Not necessarily. And yet, there are signs that it could. After all, both the United States and China possess large numbers of nuclear weapons. The U.S. government threatened to attack China with nuclear weapons during the Korean War and, later, during the conflict over the future of China’s offshore islands, Quemoy and Matsu. In the midst of the latter confrontation, President Dwight Eisenhower declared publicly, and chillingly, that U.S. nuclear weapons would “be used just exactly as you would use a bullet or anything else.” Of course, China didn’t have nuclear weapons then. Now that it does, perhaps the behavior of national leaders will be more temperate. But the loose nuclear threats of U.S. and Soviet government officials during the Cold War, when both nations had vast nuclear arsenals, should convince us that, even as the military ante is raised, nuclear saber-rattling persists. Some pundits argue that nuclear weapons prevent wars between nuclear-armed nations; and, admittedly, there haven’t been very many—at least not yet. But the Kargil War of 1999, between nuclear-armed India and nuclear-armed Pakistan, should convince us that such wars can occur. Indeed, in that case, the conflict almost slipped into a nuclear war. Pakistan’s foreign secretary threatened that, if the war escalated, his country felt free to use “any weapon” in its arsenal. During the conflict, Pakistan did move nuclear weapons toward its border, while India, it is claimed, readied its own nuclear missiles for an attack on Pakistan. At the least, though, don’t nuclear weapons deter a nuclear attack? Do they? Obviously, NATO leaders didn’t feel deterred, for, throughout the Cold War, NATO’s strategy was to respond to a Soviet conventional military attack on Western Europe by launching a Western nuclear attack on the nuclear-armed Soviet Union. Furthermore, if U.S. government officials really believed that nuclear deterrence worked, they would not have resorted to championing “Star Wars” and its modern variant, national missile defense. Why are these vastly expensive—and probably unworkable—military defense systems needed if other nuclear powers are deterred from attacking by U.S. nuclear might? Of course, the bottom line for those Americans convinced that nuclear weapons safeguard them from a Chinese nuclear attack might be that the U.S. nuclear arsenal is far greater than its Chinese counterpart. Today, it is estimated that the U.S. government possesses over five thousand nuclear warheads, while the Chinese government has a total inventory of roughly three hundred. Moreover, only about forty of these Chinese nuclear weapons can reach the United States. Surely the United States would “win” any nuclear war with China. But what would that “victory” entail? A nuclear attack by China would immediately slaughter at least 10 million Americans in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. The Chinese death toll in a nuclear war would be far higher. Both nations would be reduced to smoldering, radioactive wastelands. Also, radioactive debris sent aloft by the nuclear explosions would blot out the sun and bring on a “nuclear winter” around the globe—destroying agriculture, creating worldwide famine, and generating chaos and destruction.

### AT: Terror Add on

#### Terrorism as a brand is failing

* 10 years after 9/11 we killed Bin Laden
* Insider documents show Al-Qaeda as an organization is failing
* Dodging drones, lack of funds, need for porn are the biggest threats for terrorists
* Americans are delusional and terror threats are near non-existent security experts exaggerate on every level

Mueller and Stewart 12—John Mueller is Senior Research Scientist at the Mershon Center for International Security Studies and Adjunct Professor in the Department of Political Science, both at Ohio State University, and Senior Fellow at the Cato Institute in Washington, D.C. AND Mark G. Stewart is Australian Research Council Professorial Fellow and Professor and Director at the Centre for Infrastructure Performance and Reliability at the University of Newcastle in Australia [July 2012, “The Terrorism Delusion America’s Overwrought Response to September 11”, http://www.cato.org/sites/cato.org/files/articles/mueller-isec-july-2012.pdf]

Finally, on May 1, 2012, nearly ten years after the September 2001 terrorist attacks, the most costly and determined manhunt in history culminated in Pakistan when a team of U.S. Navy Seals killed Osama bin Laden, a chief author of the attacks and one of history’s most storied and cartooned villains. Taken away with bin Laden’s bullet-shattered body were written documents and masses of information stored on five computers, ten hard drives, and one hundred or more thumb drives, DVDs, and CD-ROMs. This, it was promised, represented a “treasure trove” of information about al-Qaida—“the mother lode,” said one U.S. official eagerly—that might contain plans for pending attacks.4 Poring through the material with great dispatch, however, a task force soon discovered that al-Qaida’s members were primarily occupied with dodging drone missile attacks, complaining about the lack of funds, and watching a lot of pornography.5 Although bin Laden has been exposed mostly as a thing of smoke and mirrors, and although there has been no terrorist destruction that remotely rivals that inflicted on September 11, the terrorism/counterterrorism saga persists determinedly, doggedly, and anticlimactically onward, and the initial alarmed perspective has been internalized. In the process, suggests Glenn Carle, a twenty-three-year veteran of the Central Intelligence Agency where he was deputy national intelligence officer for transnational threats, Americans have become “victims of delusion,” displaying a quality defined as “a persistent false belief in the face of strong contradictory evidence.”6 This condition shows no sign of abating as trillions of dollars have been expended and tens of thousands of lives have been snuffed out in distant wars in a frantic, ill-conceived effort to react to an event that, however tragic and dramatic in the first instance, should have been seen, at least after a few years had passed, to be of limited significance. This article is a set of ruminations on the post–September 11 years of delusion. It refiects, first, on the exaggerations of the threat presented by terrorism and then on the distortions of perspective these exaggerations have inspired— distortions that have in turn inspired a determined and expensive quest to ferret out, and even to create, the nearly nonexistent. It also supplies a quantitative assessment of the costs of the terrorism delusion and concludes with ae discussion of how anxieties about terrorism persist despite exceedingly limited evidence that much fear is justified. Delusions about the Terrorist “Adversary” People such as Giuliani and a whole raft of “security experts” have massively exaggerated the capacities and the dangers presented by what they have often called “the universal adversary” both in its domestic and in its international form.

#### No nuclear terrorism—no capability nor intent reject their alarmism

* Many reasons to doubt both the capability and interest of terrorists getting nuclear devices
* Dangers of a loose nuke from Russia is far over-stated
* Even if a terrorist group got a nuclear weapon using it would be very difficult
* Terrorists and connections between rogue states is exaggerates
* Iran and North Korea are not going to give terrorists nukes because their arsenals are small
* What can go wrong will go wrong—multiple intensifying and compounding probability make terrorist failure inevitable
* Their evidence uses worst case scenarios which is alarmist and false
* Insider documents within Al-Qaeda show they don’t want nuclear weapons and prefer convention weapons
* Their evidence about them wanting nukes is wrong the 90s and out of date
* Even if they did want a nuke it was only to deter a U.S. invasion

Gavin 10—Francis J. Gavin is Tom Slick Professor of International Affairs and Director of the Robert S. Strauss Center for International Security and Law, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin [International Security, Vol. 34, No. 3 (Winter 2009/10), pp. 7–37, the President and Fellows of Harvard College and the Massachusetts Institute of Technology, “Same As It Ever Was Nuclear Alarmism, Proliferation, and the Cold War”, http://www.mitpressjournals.org/doi/pdf/10.1162/isec.2010.34.3.7]

Nuclear Terrorism. The possibility of a terrorist nuclear attack on the United States is widely believed to be a grave, even apocalyptic, threat and a likely possibility, a belief supported by numerous statements by public officials. Since the collapse of the Soviet Union, “the inevitability of the spread of nuclear terrorism” and of a “successful terrorist attack” have been taken for granted.48 Coherent policies to reduce the risk of a nonstate actor using nuclear weapons clearly need to be developed. In particular, the rise of the Abdul Qadeer Khan nuclear technology network should give pause.49 But again, the news is not as grim as nuclear alarmists would suggest. Much has already been done to secure the supply of nuclear materials, and relatively simple steps can produce further improvements. Moreover, there are reasons to doubt both the capabilities and even the interest many terrorist groups have in detonating a nuclear device on U.S. soil. As Adam Garfinkle writes, “The threat of nuclear terrorism is very remote.”50 Experts disagree on whether nonstate actors have the scientific, engineering, financial, natural resource, security, and logistical capacities to build a nuclear bomb from scratch. According to terrorism expert Robin Frost, the danger of a “nuclear black market” and loose nukes from Russia may be overstated. Even if a terrorist group did acquire a nuclear weapon, delivering and detonating it against a U.S. target would present tremendous technical and logistical difficulties.51 Finally, the feared nexus between terrorists and rogue regimes may be exaggerated. As nuclear proliferation expert Joseph Cirincione argues, states such as Iran and North Korea are “not the most likely sources for terrorists since their stockpiles, if any, are small and exceedingly precious, and hence well-guarded.”52 Chubin states that there “is no reason to believe that Iran today, any more than Sadaam Hussein earlier, would transfer WMD [weapons of mass destruction] technology to terrorist groups like al-Qaida or Hezbollah.”53 Even if a terrorist group were to acquire a nuclear device, expert Michael Levi demonstrates that effective planning can prevent catastrophe: for nuclear terrorists, what “can go wrong might go wrong, and when it comes to nuclear terrorism, a broader, integrated defense, just like controls at the source of weapons and materials, can multiply, intensify, and compound the possibilities of terrorist failure, possibly driving terrorist groups to reject nuclear terrorism altogether.” Warning of the danger of a terrorist acquiring a nuclear weapon, most analyses are based on the inaccurate image of an “infallible tenfoot-tall enemy.” This type of alarmism, writes Levi, impedes the development of thoughtful strategies that could deter, prevent, or mitigate a terrorist attack: “Worst-case estimates have their place, but the possible failure-averse, conservative, resource-limited five-foot-tall nuclear terrorist, who is subject not only to the laws of physics but also to Murphy’s law of nuclear terrorism, needs to become just as central to our evaluations of strategies.”54 A recent study contends that al-Qaida’s interest in acquiring and using nuclear weapons may be overstated. Anne Stenersen, a terrorism expert, claims that “looking at statements and activities at various levels within the al-Qaida network, it becomes clear that the network’s interest in using unconventional means is in fact much lower than commonly thought.”55 She further states that “CBRN [chemical, biological, radiological, and nuclear] weapons do not play a central part in al-Qaida’s strategy.”56 In the 1990s, members of al-Qaida debated whether to obtain a nuclear device. Those in favor sought the weapons primarily to deter a U.S. attack on al-Qaida’s bases in Afghanistan. This assessment reveals an organization at odds with that laid out by nuclear alarmists of terrorists obsessed with using nuclear weapons against the United States regardless of the consequences. Stenersen asserts, “Although there have been various reports stating that al-Qaida attempted to buy nuclear material in the nineties, and possibly recruited skilled scientists, it appears that al-Qaida central have not dedicated a lot of time or effort to developing a high-end CBRN capability.... Al-Qaida central never had a coherent strategy to obtain CBRN: instead, its members were divided on the issue, and there was an awareness that militarily effective weapons were extremely difficult to obtain.”57 Most terrorist groups “assess nuclear terrorism through the lens of their political goals and may judge that it does not advance their interests.”58 As Frost has written, “The risk of nuclear terrorism, especially true nuclear terrorism employing bombs powered by nuclear fission, is overstated, and that popular wisdom on the topic is significantly fiawed.”59

### AT: Israel Strikes Add on

#### Their Slager Iran-Israel impact is terrible. It does not say that Israel is LIKELY to use preventive self-defense to attack Iran; just that they theoretically could. While they’ve done some creative highlighting, the first paragraph doesn’t say “tension will lead to war,” it says, “events have raised speculation about whether or not tension will lead to war.” Later parts then conclude that non-military avenues are working, even if there is some bellicose rhetoric.

Slager 12 (Katherine, J.D. Candidate 2013, University of North Carolina School of Law, “Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran's Nuclear Program” Fall, 2012, 38 N.C.J. Int'l L. & Com. Reg. 267)

I. Introduction

World War III **is an event the world universally wishes to avoid**. n3 **Threats of preemptive strikes**, retaliations, **and nuclear weapons development bring speculation to the foreground about whether tensions today between Israel and Iran might result in an escalation of hostilities leading to a third World War**. n4 Iran has long professed hatred for the Jewish state, n5 and, according to the International Atomic Energy Agency (IAEA), may be developing nuclear weapons. n6 Israeli leaders say that if necessary, they will preemptively strike Iran to prevent it from developing nuclear attack capability. n7

[\*269] While a strike might forestall a nuclear Iran, at least for the time being, the international community may not view this preemptive measure as legal or legitimate. **Using force in** self-defense must be subject to clear boundaries **in order to prevent rampant violence**. While war is never desired, "a legal war is more human than an illegal war." n8 But the rules of using force must be generally known and accepted in order to be effective. n9 This comment attempts to clarify the field of international law regarding use of force in anticipatory self-defense, and recommends that clear standards be widely established to better guide both nations considering such use of force and the international community, which must respond to this use of force.

This comment assesses the legality of a potential Israeli preemptive strike against Iran's nuclear program. There is no recognized and accepted analytical framework to assess this legality. n10 Therefore, this comment employs two methods of analysis and considers them both: first, it will employ the time-tested analytical methodology of analogy by comparing the state of the current Israeli-Iran conflict to incidents of anticipatory self-defense. Second, it will apply an analytical framework, proposed by David A. Sadoff, that offers a clear, practicable standard to govern evaluation of anticipatory use of force. n11 Part I discusses [\*270] the backdrop of international law regarding the use of force in self-defense. Part II defines the terms used and discusses both the traditional and proposed analytical frameworks used to assess the legality of anticipatory acts of self-defense. Part III describes and analyzes generally recognized incidents of anticipatory self-defense. Part IV assesses the current situation between Israel and Iran using analogies to past incidents and Sadoff's proposed analytical framework. Part V concludes that while the traditional framework under customary international law would condemn an Israeli strike, a clearer standard encompassing legitimacy as well as legality would better guide the international community in evaluating anticipatory uses of force in the modern era. II. International Law and the Use of Force in Self-Defense Self-defense has been described as "nature's eldest law." n12 Today, this right to self-defense has been codified in Article 51 of the U.N. Charter. n13 In order to analyze the legality of an Israeli preemptive strike on Iran's nuclear program, it is first necessary to understand the state of international law concerning the use of force in preemptive or anticipatory self-defense. A. The Road to Modern International Law and the Use of Force Before aspiring to describe the modern intricacies of international law, it is helpful to first understand the origins of international law and regulation of the use of force between nations. Person to person, community to community, and state to state, the use of force is a salient aspect of humankind's history. n14 As one scholar puts it, "force has been a consistent feature of the global system since the beginning of time." n15 War has been so prevalent in human history that it has been considered a "perennial [\*271] fact of life ... tantamount to ... plague or flood or fire." n16 It would "appear every once in a while, leave death and devastation in its wake, and temporarily pass away to return at a later date." n17 Over time, the need to restrict and regulate wars between nations developed, and war assumed a "legal status." n18 The attempt to restrict is first characterized by the "just war-unjust war" dichotomy of Ancient Greece and Ancient Rome, n19 which classical jurists and scholars of the sixteenth and seventeenth centuries advanced with their writings. n20 By the nineteenth century, however, this dichotomy was abandoned. n21 The accepted view of this period was that international law had nothing to do with attempting to distinguish just and unjust wars. n22 War was viewed as "a right inherent in sovereignty itself." n23 Through the nineteenth century, there was a widespread acceptance of a sovereign nation's right to go to war. n24 Perhaps in reaction to this widespread acceptance, bilateral treaties between nations began to arise at the end of the nineteenth century. n25 These treaties were formed to create contractual obligations between states to not go to war with each other. n26 Bilateral treaties eventually led to the creation of multilateral [\*272] treaties in an effort to "curtail somewhat the freedom of war in general international law." n27 After a few multilateral attempts to restrict inter-state use of force, n28 war finally became "illegal in principle" in 1928 with the General Treaty for Renunciation of War as an Instrument of National Policy (otherwise known as the Kellogg-Briand Pact). n29 Though flawed, the Kellogg-Briand Pact was a "watershed date in the history of the legal regulation of the use of inter-state force." n30 These early developments in establishing the illegality of war led to the Charter of the United Nations, signed in 1945 in San Francisco. n31 In response to the Second World War, the United Nations was created "to establish a universal international organization charged with the management of international conflict." n32 Delegates of forty-nine states were determined "to save succeeding generations from the scourge of war." n33 To this end, Article 2(4) of the U.N. Charter proscribes both the use and threat of force. n34 Two major exceptions exist, however, to this general prohibition against use of force. n35 Nations may use force [\*273] if they are acting either in individual or collective self-defense or if force has been authorized by the U.N. Security Council. n36 B. Self-Defense Even before the creation of the U.N. Charter, self-defense has been historically recognized as an inherent right of both individuals and sovereign nations. n37 As one scholar notes, self-defense "has long been founded on the simple notion that every rational being ... must conclude that it is permissible to defend himself when his life is threatened with immediate danger." n38 In addition to an individual's right to self-defense, the right of nations to use force in self-defense has also traditionally been recognized. n39 The right of a nation to defend its sovereignty is "embedded" in the "fundamental right of states to survival." n40 This being the case, there is no dispute over the legality of a state defending itself against attacks on its sovereignty. n41 What remains unsettled in modern legal scholarship, however, is when a nation [\*274] may invoke this right. n42 Traditionally, self-defense may only be used when necessary to repel an "overt armed attack," and is impermissible as a form of retaliation. n43 The notion behind self-defense in anticipation of an armed attack, however, is that "states faced with a perceived immediate attack cannot be expected to await the attack like "sitting ducks' but should be allowed to take the appropriate measures for their defense." n44 1. Customary International Law Under customary international law, nations may use force in anticipatory self-defense in order to "thwart discernible impending attacks." n45 The established doctrine arises from an incident known as the "Caroline incident." n46 In 1837, the United States and Great Britain were at peace and Canada was under British colonial rule. n47 However, factions of Canadians were engaged in an "armed insurrection" against the British. n48 The Caroline, a privately-owned American steamship owned and operated by Americans, was used to transport men and supplies across the Niagara River to support the Canadian rebels. n49 On the night of December 29, 1837, British soldiers seized the Caroline while it was docked on the American side of the river, dragged the boat into the current, set it afire, and let it loose to drift over the Niagara Falls. n50 Two Americans were killed in the incident. n51 In response, a series of letters were exchanged between Henry [\*275] Fox, the British Minister in Washington, and the U.S. Secretary of State. n52 The British claimed that the destruction of the Caroline was justified as "necessity of self-defense and self-preservation." n53 The response of Secretary of State Daniel Webster has become immortalized as the factors necessary to justify an act of self-defense. n54 Webster stated that the act would not be justifiable unless the British could show: necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It will be for it to [show], also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. n55 This response has become known as the Caroline doctrine, and asserts that for a use of force in anticipatory self-defense to be justified, it must be necessary, proportionate, and in response to an imminent threat of armed attack where no other means of redress are available. n56 These factors have become generally accepted and incorporated into customary international law. n57 [\*276] 2. The U.N. Charter and Article 51 The Charter of the United Nations was adopted in 1945. n58 As discussed above, Article 2(4) of the Charter prohibits the use of force between nations, except in the case of two major exceptions. First, Article 51 articulates a nation's right to use force in self-defense. n59 Second, Chapter VII of the Charter allows the use of force "as may be necessary to maintain or restore international peace and security" under authorization of the U.N. Security Council. n60 This analysis focuses on Article 51, as it is "the focal point" in discussing the permissibility of self-defense. n61 Under Article 51 of the Charter, a nation has the right to use force in individual or collective self-defense. n62 The Article 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 [\*277] order to maintain or restore international peace and security. n63 While "the right of self-defence pursuant to the U.N. Charter has its origins in customary international law," Article 51 appears to limit uses of force in self-defense only to situations where an "armed attack" has occurred. n64 As Professor Dinstein succinctly observes, this limitation presents a "material difference in the range of operation of the right [of self-defense] between these two sources [of international law]." n65 Many scholars have very divergent views on the implications of this difference. 3. The Debate The debate surrounding the legality of anticipatory defense in modern international law is extensive and seemingly unlimited. Scholars can generally be divided into two camps: restrictionist and expansionist. n66 First, however, it is necessary to clarify the terminology used in the debate on self-defense. n67 While a plethora of scholars seem to offer as many definitions and distinctions as there are authors, n68 this article will use the terminology as categorized by David Sadoff. n69 First, there are two general types of self-defense: reactive and non-reactive. n70 Reactive strikes occur "when a State responds to an attack after it [\*278] has occurred." n71 Non-reactive strikes, otherwise referred to as "defensive first strikes," occur "when a State takes military action before being hit." n72 Defensive first strikes can be further sub-divided into three categories: interceptive, anticipatory, and preemptive. n73 These three categories can be viewed as the rough points on a spectrum of "real or perceived timing of the threat posed by an aggressor State." n74 Interceptive self-defense encompasses the most immediate threats, while preemptive encompasses the least immediate. n75 Interceptive self-defense, as first articulated by Professor Dinstein, "takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way." n76 This refers to scenarios with the shortest amount of time between the self-defensive act and the perceived threat. n77 As Sir Humphrey Waldock describes, "where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier." n78 Dinstein asserts that not only is interceptive self-defense legitimate under customary international law, it is also legitimate under Article 51. n79 Anticipatory self-defense, by contrast, is "the use of force in [\*279] "anticipation' of an attack when a State has manifested its capability and intent to attack imminently." n80 The Caroline doctrine is generally considered to reflect assertions of anticipatory self-defense. n81 This refers to scenarios where an attack may be imminent but not yet underway. n82 The temporal definition of what constitutes "imminence" is not well-established or even well-articulated. n83 Many scholars assert that Article 51 of the U.N. Charter recognizes anticipatory self-defense through its preservation of states' "inherent right of ... self-defense." n84 Preemptive self-defense, which is used in this comment to encompass the concept of "preventive" self-defense, n85 refers to the use of force "to quell any possibility of future attack by another state, even where there is no reason to believe that an attack is planned and where no prior attack has occurred." n86 This scenario refers to defensive first strikes that are temporally the most removed from the perceived threat. n87 While the majority of [\*280] scholars reject the legality of preemptive self-defense under international law, n88 it has been argued that use of preemptive force may still be legitimate. n89 The restrictionist and expansivist schools of interpreting the legality of self-defense focus their debate on the "middle-ground" of defensive first-strikes, that of anticipatory self-defense. Professor Ronzitti aligns the two camps in terms of a geographical divergence. n90 The restrictionist camp is referred to as the "continental doctrine," while the expansivist doctrine is attributed to common law countries and Israel. n91 The question that divides the two camps is "whether the words "if an armed attack occurs' introduces ... a rigid test of legitimate self-defense." n92 The restrictionist camp asserts that "self-defense [can] lawfully be exercised only if the State is the object of an actual attack." n93 Under this view, "use of force under the Charter is expressly limited to situations where an armed attack has already commenced or occurred." n94 The restrictionist camp recognizes the right to use force in anticipatory self-defense under customary international law, but asserts that the adoption of the Charter in 1945 limited "the scope of that right." n95 As Professor Dinstein emphasizes, "the use of the phrase "armed attack' in Article 51 is [\*281] not inadvertent ... [it] is deliberately restrictive." n96 Dinstein concludes that "self-defence consistent with Article 51 implies resort to counter-force ... in reaction to the use of force by the other party." n97 By contrast, the expansivist camp asserts that "the right of self-defence can be exercised not only when the State has been the object of an armed attack but also when the attack is imminent." n98 Three reasons have been cited to support this theory. First, expansivists cite that the actual reading of "if an armed attack occurs" does not necessarily mean "after an armed attack has occurred." n99 Professor Waldock elaborates that this "goes beyond the necessary meaning of the words," and cites the French text: "dans un cas ou un Membre des Nations Unies est l'objet d'une agression armee." n100 Second, expansivists note that the Article 51's preservation of the "inherent right" of self-defense was "a comparatively late addition to the Charter, for most States initially assumed that "the right of self-defense was inherent in the proposals and did not need explicit mention in the Charter.'" n101 Lastly, and most persuasively, the expansivist camp notes that Article 51 preserves the "inherent right" of self-defense. n102 D. W. Bowettt remarks that "the reference to an "inherent' right suggests something of the philosophy of natural law." n103 Professor Dinstein himself points out that "the right of self-defence pursuant to the U.N. Charter has its origins in customary international law." n104 As customary international law permits an act of [\*282] anticipatory self-defence "when the threat of an armed attack is "imminent'," n105 it is therefore "not implausible to interpret article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter." n106 As Professor Shah articulates, "the intention of article 51 seems to be to make anticipatory self-defence a statutory right, not to limit it," n107 strongly evidenced by "the inclusion of the word "inherent' and the absence of any objection to it by states." n108 With such a dispute over the ambiguity of Article 51, many scholars would turn to the International Court of Justice (ICJ) for a judicial ruling on whether anticipatory self-defense is legal under Article 51. n109 Yet the ICJ has not ruled on the matter. In Nicaragua v. United States, n110 while the ICJ "based its decision on the norms of customary international law concerning self-defence as a sequel to an armed attack," the Court explicitly refrained from pronouncing a judgment on the legality of anticipatory self-defense. n111 Without a judicial pronouncement on the matter, [\*283] scholars will continue to battle over the legality of anticipatory self-defense. 4. The State of the Law and Implications Today, there is no accepted state of international law regarding the use of force as anticipatory self-defense against an imminent armed attack. n112 However, as numerous scholars have noted, the world has changed in many significant ways since the drafting of the U.N. Charter in 1945. n113 At that time, drafters were primarily concerned with "overt acts of conventional aggression." n114 Since 1945, however, most conflicts have been in the form of civil conflicts, covert actions, or acts of terrorism. n115 The "ever-present threat of the use of nuclear and other weapons of mass destruction" is changing our traditional notions of warfare. n116 While nuclear weapons physically existed at the time the U.N. Charter was drafted, "the delegates at San Francisco knew nothing of the nature and effects of nuclear weapons" and thus "could not have addressed the threat, proliferation, and potential use of these weapons of mass destruction." n117 One delegate specifically referred to the Charter as a "pre-atomic age charter." n118 Many scholars of the expansivist view point out this seemingly obvious observation: "no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence." n119 The ICJ itself, in its advisory opinion in the Nuclear [\*284] Weapons Case, n120 recognizes the "right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake." n121 It seems that there is room for a preemptive use of force under the U.N. Charter if and only if a state's very survival is at stake. Lastly, one could argue against even considering the legality of using preemptive force. n122 Abraham Sofaer notes that despite the "illegality" of using force for "preventive purposes," states have engaged in such force in over 100 instances since the signing of the U.N. Charter in 1945. n123 He argues that rather than being concerned over the legality of a preemptive use of force, states should be concerned over the legitimacy of such an act. n124 Sofaer advocates adopting a proposal from the 2004 report of the Secretary General's High-Level Panel on Threats, Challenges and Change: n125 the U.N. Security Council should "adopt and systematically address a set of agreed guidelines, going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be." n126 According to Sofaer, the benefits of "using legitimacy as a guide ... would allow states to take into account a broader range of considerations than current international law typically dictates." n127 [\*285] The state of the law concerning the legality of using force in preemptive or anticipatory self-defense is convoluted, to say the least. However, this does not mean that it is impossible to evaluate the legality of an Israel preemptive attack on the Iranian nuclear program. III. The Legality of Anticipatory Self-Defense and Preemptive Force Though the state of modern international law is unclear, there are many arguments to support the legality of using force in anticipatory self-defense. Under the Caroline doctrine of customary international law, n128 the traditional framework to evaluate use of force in anticipatory self-defense addresses three elements: necessity, proportionality, and imminence of a threat such that no other recourse is available. n129 Alternative frameworks have also been proposed to expand the customary Caroline framework. n130 Using both the traditional and alternative analytical frameworks to analyze several modern incidents where the use of anticipatory self-defense was evidenced or claimed, it is possible to evaluate the legality of a potential Israeli strike on Iran's nuclear reactor. A. Framework under Customary International Law Regardless of legality under strict interpretation of Article 51 of the U.N. Charter, n131 the Caroline-based elements of necessity, proportionality, and imminence must be fulfilled for an anticipatory use of force to be legal under customary international law. n132 While some commentators include imminence in their analysis of necessity, n133 most commentators include imminence as [\*286] a separate element. n134 1. Necessity and Proportionality The principles of necessity and proportionality are "part of the basic core of self-defence [upon which] all states agree." n135 The requirements of necessity and proportionality in self-defense are not expressly included in the U.N. Charter, but rather, are tenets of customary international law that have been reaffirmed by the ICJ in the Nicaragua case and in the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. n136 As Gray succinctly describes, the "basic, uncontroversial principles" of necessity and proportionality are that self-defense "must not be retaliatory or punitive; the aim should be to halt and repel an attack." n137 Necessity and proportionality "constitute a minimum test" that is determinative of the legality of using force in self-defense. n138 Thus, if a nation's use of force is lacking in either necessity or proportionality, the use of force is not justified under the doctrine of self-defense, and may in fact be unlawfully retaliatory or punitive. n139 [\*287] Necessity, by itself, is not a controversial proposition. n140 States need to demonstrate that "such forceful action was necessary to defend itself against an impending attack." n141 However, applying necessity to a particular scenario "calls for assessments of intentions and conditions bearing upon the likelihood of attack." n142 The nature of necessity is that it is often interposed with the "imminence" factor. n143 One scholar explains the logical relation between necessity and legal use of force in self-defense by describing necessity to mean that "there must have been no other feasible means of dealing with a particular threat." n144 Notably, this means that "force should not be considered necessary until peaceful measures have been found wanting." n145 As this comment assesses a preemptive strike in defense of a potential nuclear attack, the element of necessity - as separate from an analysis of imminence - will primarily address whether "peaceful measures" are still available to Israel. Proportionality assesses the appropriateness of a nation's action in response to a perceived threat. n146 Thus, an ex ante analysis of proportionality is not immediately relevant when attempting to predict the legality of a future act of self-defense. However, as proportionality is an integral component to the legality of inter-state uses of force, understanding the role proportionality plays in lawful acts of anticipatory self-defense is still pertinent to this comment's analysis. The requirement of proportionality means that "acts done in self-defense must not exceed in manner or aim the necessity provoking them." n147 Another scholar notes that "a forcible response must be limited to removing that threat, and cannot extend beyond this defensive [\*288] objective to encompass the pursuit of broader offensive or strategic goals." n148 An act in self-defense that exceeds the bare minimum necessary to respond to the threat risks becoming a retaliatory act, and thus unlawful under customary international law. n149 Simply put, a nation's "counter-attack" must not amount to a reprisal for the purpose of revenge or as a penalty. n150 Proportionality is also relevant to the theoretical implications of anticipatory self-defense. In its pure form, proportionality dictates that "harm returned should not exceed harm received." n151 Inherent in this concept is that an attack as deterrence is actually at odds with this precept of proportionality, as the purpose of an attack meant to deter is that "the greater the disproportionality, the greater the chance of avoiding harm to either party by avoiding conflict altogether." n152 Thus, the element of proportionality serves as the essential limit on the acts that nations may engage in when using force in anticipatory self-defense. For the purposes of this comment's analysis, "necessity" is limited to assessing whether Israel has exhausted all available peaceful means n153 and "proportionality" is limited to exploring the limits of any acts Israel would be permitted to take in defending itself against a nuclear strike. 2. Imminence Imminence is "the most problematic variable of anticipatory self-defense ... that has no precise definition in international law." n154 However, the importance that imminence plays in the legitimacy of using force in anticipatory self-defense is clear. As one scholar recognizes: It is important that the right of self-defense should not freely [\*289] allow the use of force in anticipation of an attack or in response to a threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear ... that defensive action is essential for self-preservation. n155 Illustrating its role in customary international law, the absence of imminence was indeed determinative when the International Military Tribunals at Nuremberg applied the Caroline test following World War II, rejecting Germany's proffered justification that their "invasion of Norway had been an act of anticipatory self-defense." n156 Today, however, the doctrinal debate surrounding the legality of states using force in anticipatory self-defense stems primarily from the varying definitions and meanings of "imminence." n157 Thus, imminence becomes the most essential factor to define when determining whether a use of force in self-defense is permissible, n158 and is therefore the primary question in analyzing whether Israel would be presently justified to strike Iran's nuclear program. The notion of imminence in customary international law reaches back to the Caroline incident. n159 Under the Caroline doctrine, "an attack must be apparent in certain terms, and the impending harm must be of such an immediate nature that instant armed force is the only way to ward off the blow." n160 This standard for imminence focuses on the temporal aspect and is strictly measured. n161 An imminent attack, strictly measured, is one that is "just about to occur or, in other words, when "an attack is in evidence.'" n162 Scholars have suggested that the imminence of an attack can rise to such urgency that use of force in anticipatory self-defense would fall within the stricture of Article 51. n163 [\*290] Many scholars are now arguing that a relevant measurement of imminence, however, should no longer be strictly temporal. n164 The strict requirement is out of touch with "the realities of modern military conditions." n165 The nature of imminence has been affected in two significant ways since the development of the Caroline doctrine. n166 First, the "gravity of the threat" has changed significantly. n167 Today we face nuclear weapons and other weapons of mass destruction that have the capacity to destroy a nation before it ever has a chance to defend itself. n168 This is vastly different from the "cross-border raids conducted by men armed only with rifles" that were the predominant form of international uses of force at the time of the Caroline incident. n169 Second, the method of delivering an attack has changed. n170 With increased rapidity of an attack reaching its target once launched, it is now "far more difficult to determine the time scale within which a threat of attack ... would materialize." n171 Within this framework, Professor Greenwood asserts that in order to justify the existence of an "imminent threat," there must be sufficient evidence that "the threat of attack exists ... [requiring] evidence not only of the possession of weapons but also of an intention to use them." n172 Customary international law is, by its very nature, an important groundwork for establishing the bounds on inter-state actions. n173 Nevertheless, it has many shortcomings as a framework [\*291] to assess the legality of using force in self-defense. While strict interpretation of the U.N. Charter's restriction on using force in self-defense is often too restrictive, n174 customary international law suffers from being too vague to serve as a guide for state actors. n175 Additionally, it may be "out of sync" with the realities of a state's reasoning and behavior when facing threats to their very survival. n176 Thus, scholars began to look for, or propose, alternatives. B. Alternative Framework The scholarly landscape concerned with anticipatory self-defense is consumed with widespread disagreement, from expansivist-restrictionist doctrinal dichotomies n177 to inconsistent definitions of prevention, preemption, anticipatory self-defense, n178 and the very factors of necessity, proportionality and imminence n179 that are essential to this vast doctrinal theory of international law. However, there is one observation on which all scholars can perhaps agree: at present, the international arena does not have a practicable framework to consistently evaluate the legality or legitimacy of a nation's use of force in anticipatory self-defense. As a result, several scholars have proffered a variety of proposals to compensate for the vagueness of customary international law and the unrealistic restrictiveness of the U.N. Charter in assessing anticipatory self-defense. Though several proposals have been offered by numerous scholars, n180 this comment limits its [\*292] consideration to the framework proposed by David Sadoff, which focuses its proposal specifically to assessing use of force in anticipatory, rather than preventive, self-defense. 1. David Sadoff, "Striking a Sensible Balance" Sadoff proposes an alternative legal framework to assess the legality of "proactive defense," which encompasses interceptive, anticipatory and preemptive self-defense. n181 His analysis, while derived from customary international law, seeks to expand on this doctrine to produce a "clear, practicable legal standard to govern the use of first strikes." n182 The substantive components of the proposed framework include (1) properly gauging the threat, (2) exhausting peaceful alternatives, and (3) taking responsive action. n183 As the second and third components tend to follow the same considerations as under a traditional customary international law analysis, this comment describes only the first component in depth. In order to gauge the threat of attack, Sadoff proposes analyzing the (i) nature and scale, (ii) likelihood, and (iii) timing of the threat. n184 With a state gauging the threat of attack, Sadoff calls for establishing an evidentiary standard to "address[] the nature, quality, and reliability of a state's information about the underlying facts and circumstances that have led it to decide to act against a given threat." n185 He proposes that the evidentiary standard requires a state to show "with clear and compelling evidence the existence of a serious and urgent need with respect to [\*293] a given threat." n186 The first two prongs of a state's assessment using Sadoff's framework appear to go to the necessity element of the Caroline doctrine. When assessing the nature and scale of a potential attack, a state will need to consider (1) "the character and magnitude" of the threatened attack (including (a) the type of weapons the enemy may use, (b) the size of an army, or (c) whether it would be an invasion or an isolated attack); (2) whether or not there would be warning; (3) what the likely targets of an attack would be; and (4) what the impact of an attack would be on the state's capacity to defend itself. n187 In assessing the likelihood of an attack, Sadoff explains that a state would assess the probability of whether the attack would in fact occur if there were no "proactive defense" measures taken. n188 The analysis by the target state would be subjective, in that it considers the state-actor's perceptions of the "intent and capabilities of the presumed aggressor state." n189 The author recommends using an "operational assessment" of likelihood (e.g., when the attacking state's "decision to attack has become "effectively irrevocable'"), rather than a probability-based assessment (e.g., ""reasonable certainty' or "highly probable'"). n190 An operational-based standard would be a higher threshold than a probability-based standard, so that defensive actions are [\*294] appropriate when the question of attack is not if an attack will occur, but when - "the uncertainty lies in whether the attack will occur sooner rather than later." n191 Such a high threshold would surely satisfy the "necessity" prong of the Caroline doctrine. n192 An assessment of "timing" is an important consideration because it addresses the urgency of a potential defensive action. n193 This factor appears to go to the imminence prong of the Caroline doctrine. Sadoff advocates mandating a "last window of opportunity" approach in the timing analysis, meaning that a defensive action would be appropriate when "a present danger ... is known and ... [when] any additional delay in acting would "seriously compromise security.'" n194 He advocates this approach over requiring "temporal imminence" because "the underlying rationale of the imminence requirement is to ensure military action is truly necessary." n195 Sadoff brings a "realist" approach to the matter of assessing when using force in anticipatory self-defense would be appropriate. n196 He appropriately notes that the standards currently employed under customary international law and the Caroline doctrine are "too limited in scope to be of general use" and lack the details needed for utility purposes. n197 Furthermore, his suggested framework provides numerous questions and factors that would provide practical guidance to nations considering using [\*295] force in "proactive defense." n198 This guidance would also enable the international community to consistently evaluate the legitimacy of a nation's use of force. n199 As Sadoff remarks, this would enable third parties to "cast their military and diplomatic support accordingly behind the state whose conduct more closely conformed to international law." n200 2. Considering Legitimacy Legitimacy is vital to the success of any legal order. n201 In the present context, legitimacy refers to the "the anticipated reaction of the relevant international community to a State's decision to use force." n202 In 2004, the U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change n203 observed that "the effectiveness of the global collective security system ... depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy." n204 The panel notes that if either "common global understanding" or "acceptance" of when use of force is both legal and legitimate is lacking, the result will be a weaker international legal order. n205 In realist terms, however, legitimacy and legality are often separate considerations. n206 An act that is considered legitimate [\*296] may not always be deemed legal, and an act that is legal may not always be considered legitimate. n207 Legitimacy differs from legality on several points. First, legitimacy is established by the "actual views and values of states and other relevant parties" rather than by the academic or professional opinions of international legal scholars on the meaning of the U.N. Charter. n208 Second, legitimacy differs from legality in that it is usually a "relative judgment, rather than a definitively positive or negative one." n209 The very nature of legitimacy is that it turns on numerous factors, rather than requiring that "certain standards be met" as with legality. n210 Third, an assessment of legitimacy should consider not only the views of other nation states, but the views of non-state entities such as international agencies, non-governmental groups, the press and the public. n211 The U.N. High-Level Panel, however, has demonstrated a recognition of the vital importance of legitimacy by citing five criteria that the Security Council should always address when deciding whether to authorize or endorse the use of force: (1) "seriousness of threat," (2) "proper purpose," (3) "last resort," (4) "proportional means," and (5) "balance of consequences." n212 For the first criterion, "seriousness of threat," the question to pose is, "Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force?" n213 Inquiry regarding "proper purpose" begs the question "Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question?" n214 "Last resort" is relatively straight-forward, and asks whether "every non- [\*297] military option for meeting the threat in question [has] been explored, with reasonable grounds for believing that other measures will not succeed." n215 This criterion can be viewed as synonymous with an analysis of "necessity." n216 "Proportional means" predictably refers to proportionality: "Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?" n217 The final criterion recommended by the Panel, "balance of consequences," goes to the heart of the legitimacy inquiry. n218 The Panel illustrates this inquiry by posing whether "there [is] a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction." n219 This is essentially the age-old question, "Will the proposed action do more harm than good?" n220 Sofaer recommends that when answering this question, one "should go beyond the immediate, physical effects of a particular action and take into account the long-term, ethical consequences." n221 The Caroline doctrine has been a pillar in the development of customary international law's analysis of anticipatory self-defense. However, widespread debate on the relationship between this doctrine and Article 51 of the U.N. Charter has created a vague understanding of what constitutes the strict bounds of legality when using force in self-defense. While alternative frameworks effectively address the doctrinal weaknesses of the Caroline doctrine and customary international law, understanding [\*298] international reactions to past incidents of anticipatory self-defense is essential. Analysis of these incidents will illustrate the bounds of legality and legitimacy within the international community and provide insight on how an alternative framework would be applied to future incidents. IV. Anticipatory Self-Defense: Examples and Incidents Without a clear legal framework to guide an evaluation of using force in anticipatory self-defense, modern day incidents of "non-reactive force" used in anticipatory self-defense are crucial to answering two essential questions: First, are there instances in which the use of anticipatory self-defense would be recognized as legitimate, and secondly, where would the line be drawn to distinguish acceptable and unacceptable uses of force? Four examples of nations using force in anticipatory self-defense have been generally recognized and analyzed as such since the adoption of the U.N. Charter. n222 These examples shed light on the current acceptance or rejection of the doctrine of anticipatory self-defense and provide a baseline to examine whether the current situation between Israel and Iran might give rise to a legitimate use of anticipatory self-defense. A. 1962 Cuban Missile Crisis In 1962, the U.S.S.R. sent "over 100 shiploads of armaments" [\*299] to Cuba, which included numerous launch missile sites. n223 The United States responded by creating a naval quarantine around Cuba, so that all ships going to Cuba would be inspected and no ships with weapons would be allowed to pass through. n224 In the course of the quarantine, no ships tried to get around the quarantine, no ships were seized, and only one ship was boarded without incident. n225 One day after announcing the quarantine, the United States asked for and received regional support from the Organization of American States (OAS). n226 The United States did not seek to justify the act on the basis of Article 51. n227 Nor did the United States claim that the U.S.S.R.'s posturing with Cuba's cooperation was unlawful. n228 Instead, the United States relied on Article 52 to justify its actions, citing its use of "regional arrangements ... relating to the maintenance of international peace and security." n229 International reactions to the legality of the quarantine reflected "ideological lines," with Chile, China, France, Ireland, the United Kingdom, and Venezuela supporting the quarantine, and Ghana, Romania, the Soviet Union, and Egypt opposing it. n230 As this incident involved a non-reactive use of force, a brief Caroline analysis is relevant. n231 The element of necessity may have been present, as the gravity of the threat (proximity of nuclear missiles) was immense. n232 Nevertheless, all peaceful measures may not have been exhausted. The proportionality element seems to be met, in that almost no force was actually used. n233 Satisfying the imminence requirement is more difficult because it is not clear that using force was the only way "to ward [\*300] off the blow." n234 The possession of weapons and a clear intention to use them, at least as a threat against the United States, however, were clearly present. n235 Regarding the reaction of the international community, "very few [states] ... relied on a strict interpretation of Articles 2(4), 51, and 53." n236 Thus, even though this incident does not suggest either "clear acceptance or rejection" of anticipatory self-defense, it demonstrates that in 1962, states were not interpreting the U.N. Charter in a clearly "restrictive" way. n237 B. 1967 Six Day War n238 Scholars have described the Six Day War between Israel and Egypt as a "classic case of military preemption." n239 In 1967, tensions were rising between Israel and its Arab neighbors. n240 Leading up to the incident of June 5, 1967, five overt acts indicated that Egypt would launch an attack on Israel. n241 First, Egypt mobilized troops along Israel's Sinai border "to an unprecedented extent." n242 Second, Egypt began cementing ties with Jordan, Syria and Iraq. n243 Third, the Egyptian president ordered U.N. Emergency Force troops to leave Sinai, where they had been deployed as a buffer between Egypt and Israel. n244 Fourth, Egypt imposed a blockade of the Straits of Tiran, a waterway vital to Israeli shipping. n245 Lastly, the Egyptian [\*301] president proclaimed that in any war with Israel, Egypt's goal would be "the destruction of the Jewish state." n246 The final result of this buildup was that on June 5, Israel launched a "surprise" air attack on Egypt's forces that resulted in a "decisive victory" in a matter of days. n247 In the ensuing period, Israel first claimed that Egypt had made the first move. n248 Shortly thereafter, however, this argument lost weight and Israel made the alternative claim that the blockade represented an "act of war" and the deployments of troops appeared to be an imminent attack. n249 Thus, though Israel's attack on Egypt was an act of anticipatory self-defense in substance, Israel did not rely on this doctrine to justify its actions. n250 International reaction was generally supportive of Israel, though some states viewed the incident as an act of aggression by Israel. n251 Despite the fact that the "primary facts" demonstrated a clear example of anticipatory self-defense, n252 no state cited the principle [\*302] of anticipatory self-defense in its support. n253 In a Caroline analysis of this incident, necessity, proportionality and imminence all appear to be present. For the necessity requirement, Israel was facing the possibility of invasion, as evidenced by the amassing of the troops along its Sinai border. n254 The proportionality of the response also seems appropriate, as the duration of the armed engagement was only six days and the attack was limited to Egypt's military forces. n255 Furthermore, the mobilization of troops, the blockade, the removal of U.N. troops, and the accompanying threatening remarks by the Egyptian president all strongly indicate the imminence of an invasion. Though there was a lack of consensus in the international community regarding the legitimacy of anticipatory self-defense, Israel's actions were widely viewed as legitimate when the customary international law elements of necessity, proportionality and imminence were all present. n256 C. 1981 Israeli Attack on Osirak n257 Nuclear Reactor The Osirak incident has been described as an example of "preemptive" force. n258 In early 1981, Iraq was constructing a nuclear reactor near Baghdad, "code-named Osirak." n259 Israel viewed the Osirak reactor as "a threat to Israel's survival." n260 The type of reactor used and the type of fuel purchased could both be [\*303] used in weapons manufacture. n261 Additionally, Israel noticed that Iraq was buying more uranium than it would need for scientific research. n262 Iraqi leaders were expressing "vehement hostility" to Israel. n263 This last factor was augmented by the history of three wars between Israel and Iraq and the fact that Iraq continued to deny Israel's legal existence. n264 Lastly, the nature of the threat and Israel's vulnerability to an initial strike were factors in Israel's decision to act. n265 On June 7, 1981, Israel attacked and destroyed the Iraqi nuclear reactor. n266 Israel said it acted to "remove a nuclear threat to its existence." n267 To justify its actions, Israel claimed anticipatory self-defense. n268 Though citing scholars' expansive interpretation of Article 51, Israel was unable to cite any examples of state practice of anticipatory self-defense. n269 The U.N. Security Council, while not reaching a consensus on the matter of anticipatory self-defense, did unanimously condemn the act as a "clear violation" of the U.N. Charter and "the norms of international conduct." n270 Individual states had varied reactions to Israel's actions. Some states agreed with the doctrine of anticipatory defense, but condemned the incident for lack of imminence: there was no "instant and overwhelming need for self-defense." n271 Other states simply rejected the principle of anticipatory self-defense. n272 The United States condemned the incident, citing the fact that peaceful means were not pursued, given that the International Atomic Energy Agency (IAEA) did not have evidence that the reactor would be used to develop [\*304] nuclear weapons. n273 Under a Caroline analysis, it can be argued that both necessity and proportionality were present. The possibility of nuclear armament and the state of hostilities between Israel and Iraq suggest there could have been a grave threat to Israel, satisfying the necessity prong of the Caroline doctrine. The action taken, a targeted destruction of the "threat" (the nuclear reactor), seems to meet the proportionality requirement. n274 Imminence, however, was clearly not present. n275 The threat to Israel had not been "of such an immediate nature that instant armed force [was] the only way to ward off the blow." n276 From this incident, we have a possible recognition of the principle of anticipatory self-defense, though it was not in fact viewed to be present here. n277 D. 2007 Israeli Attack on a Syrian Nuclear Facility In the early hours of September 6, 2007, Israeli jets launched an attack on an undisclosed target near Al-Kibar in north-eastern Syria. n278 While the Syrian government has never admitted it, the general consensus of the international community is that the target of the attack was a secret Syrian nuclear reactor, and that it was destroyed in the attack. n279 The first official intelligence report regarding the target was released by the United States in April 2008. n280 This report stated that there was evidence as early as spring 2007 that the Syrian target "was a nearly completed nuclear reactor intended to produce plutonium for a weapons programme." n281 The report also indicated that the complex was [\*305] "weeks and possibly months from operational capacity." n282 To support the intelligence conclusions of the United States, IAEA investigators did discover plutonium particles at the Al-Kibar site. n283 The IAEA all but officially concluded that the Al-Kibar site was a nuclear reactor when the IAEA Director General Yukiya Amono "explicitly confirmed" that the destroyed facility was "a nuclear reactor under construction." n284 Interestingly, Syria's immediate reaction to the attack was rather muted. On September 9, 2007, Syria registered an official complaint with the U.N. Security Council and General Assembly, asserting only that "Israel had committed a breach of the airspace of the Syrian Arab Republic." n285 The complaint also asserted that during the attack, Israel "dropped some munitions but without managing to cause any human casualties or material damage." n286 [\*306] More interestingly, the international reaction to the incident was also muted. Israel itself, while eventually admitting that they were responsible for the attack, n287 did not provide any legal justifications for the attack. n288 While the United States issued "tentative support" for the attack, no states other than Syria condemned the incident. n289 Professor Garwood-Gowers asserts that even under the customary international law doctrine of anticipatory self-defense, this attack on Syria is clearly unlawful under current international law by failing to meet the requirements of necessity and imminence. n290 Specifically, he cites Israel's failure to "exhaust peaceful means of resolving its concerns over Syria's nuclear intentions" through either the IAEA or the U.N. Security Council. n291 In analyzing this incident, Garwood-Gowers seeks to evaluate whether the state of modern international law regarding the use of preventive force has changed. n292 "If the international community's response ... indicates general acceptance of a new practice or interpretation, then it can be said that a change to customary international law has taken place." n293 Garwood-Gowers explains that any "significant opposition" would be enough to disrupt any [\*307] display of "general acceptance," indicating that international law remains unchanged. n294 He concludes that while there is still no "general acceptance" sufficient to mark a shift in international law, the incident does reflect a shift in state practice that "indicates a broader lack of concern over the legality of relatively minor uses of force." n295 The muted reaction by the international community may demonstrate that even though such an attack may be illegal under current international law, it may be that the international community does not view the incident as illegitimate. These incidents do not clearly demonstrate that using of force in anticipatory self-defense is definitively legal, or even legitimate, under modern international law. Yet they provide guidance as to what situations do and do not warrant use of non-reactive force in the eyes of this same international community. n296 The Six Day War strongly suggests that there are situations in which "non-reactive" uses of force would be widely seen as legitimate. n297 Overt preparations for attack, as in the Cuban Missile Crisis and the Six Day War, appear to warrant acts bordering on "unlawful" under the restrictive interpretation of Article 2(4)'s prohibition on the use of force. n298 These situations are thus more likely to warrant acceptance of using force in anticipatory self-defense. Nevertheless, overt hostility with the mere possibility of nuclear weapon development, such as in the Osirak incident, n299 does not appear to automatically warrant the use of force. These various incidents thus provide real world examples of what the international community would consider necessary, proportionate, and imminent. The most controversial element seems to be imminence. These incidents provide the baseline to which the three prongs of the Caroline doctrine can be applied in evaluating whether the present conflict between Israel and Iran constitutes such imminence as would justify a preemptive strike. [\*308] V. Today: Israel and Iran A. History While it may be hard to believe in today's era of hostility and threat, history reveals that Israel and Iran have not always been enemies. In World War II, Iranian diplomats helped save "thousands of Jews" from the Holocaust. n300 Iran was one of the first Muslim nations to establish economic and trade ties with Israel. n301 Indeed, Iran has a long history of "Jews [being] welcome members of Iranian society." n302 The two states were allies for a period spanning almost three decades, united by the common "enemy" of Sunni Arabs. n303 The friendly economic ties between the two nations changed in 1979 with Iran's Islamic Revolution. n304 The Ayatollah that ousted the Shah in the revolution preached strong anti-Israeli rhetoric, setting the stage for the severe decline of Iran-Israel relations in modern Iran. n305 This history of cooperation is a far cry from today's state of affairs, where Iran proclaims a strong anti-Israeli stance. Iran's support of Hamas and Hezbollah, two militant groups that seek the destruction of Israel, exemplifies the current view of Iran towards Israel and has often been cited by Israel in their reasons to need to take defensive measures against Iran. n306 B. Current Events For Iran to be a threat to Israel, it has to have both the capability to attack Israel with nuclear weapons and the intention to do so. n307

[\*309]

1. Capability: Iran's Nuclear Development

Towards the end of 2011 and into the early part of 2012, world tensions concerning Iran's nuclear program mounted quite dramatically. n308 Iran's nuclear program has been a controversial issue since the program's "re-birth" in the 1990s. n309 Though Iran is a signatory to the Nuclear Non-Proliferation Treaty, n310 members of the international community have long been suspicious of the purposes underlying Iran's clandestine nuclear research. n311 Many worry that Iran is seeking to develop nuclear weapons. n312 Yet Iran has consistently asserted that its nuclear program is purely for peaceful purposes. n313

The most recent round of mounting tensions was marked by a November 2011 IAEA report n314 indicating Iran may be "carrying out activities relevant to the development of a nuclear device." n315 The report was "the harshest judgment that United Nations weapons inspectors had ever issued" against Iran's program. n316 It reports that Iran is employing a variety of "research, development and testing activities ... that would be useful in designing a nuclear weapon." n317 It does not, however, provide an estimate on [\*310] how long it will be before Iran develops nuclear weapons. n318 Yet should Iran enrich its uranium to 90%, it would have enough enriched uranium for four nuclear weapons. n319 A separate report estimates that Iran could develop nuclear weapons in sixty-two days or less. n320

Following the release of the November IAEA report, the United States and Europe began a series of economic sanctions intending to derail Iran's nuclear development. n321 The sanctions target both Iran's access to foreign banks and financial institutions, as well as companies involved in Iran's nuclear, oil, and petrochemical industries. n322 These sanctions appear to have an effect on Iran's economy. n323 Iranian leaders, in response to the strains on the economy resulting from the sanctions, have been making public statements encouraging "Iranian self-reliance and resentment toward the West." n324 Iran also threatened to close the Strait of Hormuz, "a vital artery for transporting about one-fifth of the world's oil supply." n325 Some commentators believe that these "aggressive gestures" may demonstrate that Iranian leaders are responding "frantically, and with increasing unpredictability" to the sanctions. n326

In February 2012, the IAEA released another report. n327 This [\*311] report indicates Iran may not be cooperating sufficiently with IAEA, as Iran refused to grant the IAEA inspectors access to one of their nuclear sites and dismissed IAEA's November concerns because "Iran considered them to be based on unfounded allegations." n328 Most significantly, however, the report shows a dramatic increase in Iran's production of enriched uranium: a nearly 50% increase in Iran's stockpile since the IAEA's November report. n329 Iran already has enough enriched uranium to build four nuclear weapons, should it attempt to build them. n330 The report concludes by stating that the IAEA "is unable ... to conclude that all nuclear material in Iran is in peaceful activities" and "continues to have serious concerns regarding possible military dimensions to Iran's nuclear programme." n331

The summer of **2012 saw an increase in concerns over the volatility of the Israel-Iran situation**. An August 2012 IAEA report revealed that Iran has indeed completed installation of three-quarters of the centrifuges it would need to develop "nuclear fuel" in a deep underground site. n332 Further, Iran has "cleansed" a site that IAEA inspectors suspect was used to conduct "explosive experiments that could be relevant to the production of a nuclear weapon" - such a cleanup impedes the ability of IAEA inspectors to determine what work exactly had been conducted at the site. n333 These IAEA concerns have culminated in an official IAEA resolution, passed on September 13, 2012, that rebukes Iran for the continued development of its nuclear program. n334 The jump in enriched uranium production, coupled with Iran's [\*312] lack of transparency, quite rightly exacerbates international concern about "Iran's march toward nuclear-weapons capability." n335 2. Intention: Iran-Israel Tensions For almost twenty years, **Israel has asserted that Iran poses** an "existential threat" **to Israel**. n336 In 2005, President Mahmoud Ahmadinejad, at a conference entitled "The World without Zionism," made the following statement: Our dear Imam [Ayatollah Ruhollah Khomeini] said that the occupying regime must be wiped off the map and this was a very wise statement. We cannot compromise over the issue of Palestine. Is it possible to create a new front in the heart of an old front. This would be a defeat and whoever accepts the legitimacy of [Israel] has in fact, signed the defeat of the Islamic world. n337 It should be noted, however, that shortly after this speech was posted, it was removed from its original website and Iran's foreign ministry "insisted [Iran] had no intention of attacking Israel." n338 Yet the President himself insisted that his remarks were "just." n339 Ayatollah Khomeini, Iran's supreme religious leader, referred to Israel as a "cancerous tumor." n340 One scholar noted in 1996 that "Israel faces serious and unprecedented danger from Iran" stemming from "that revolutionary Islamic regime's ... unalterable commitment to destruction of the Jewish State." n341 **In Israel, top officials are openly considering** conducting **a** [\*313] preemptive strike **on Iran's nuclear program**. n342 In early November, Israel simulated a "mass-casualty attack," which prompted speculations that Israel was simulating an attack on Iran. n343 In the past, Israeli Prime Minister Benjamin **Netanyahu has asserted** that if the United States does not prevent Iran from acquiring nuclear weapons, "**Israel may be forced to attack Iran's nuclear facilities itself**." n344 More recently, Prime Minister Netanyahu and Ehud Barak, Israel's defense minister, have publicly supported an Israeli preemptive strike against Iran's nuclear program. n345 Barak has outlined three questions that Israel would have to answer in the affirmative to order to preemptively strike Iran: 1. Does Israel have the ability to cause severe damage to Iran's nuclear sites and bring about a major delay in the Iranian nuclear project? And can the military and the Israeli people withstand the inevitable counterattack? 2. Does Israel have overt or tacit support, particularly from America, for carrying out an attack? 3. Have all other possibilities for the containment of Iran's nuclear threat been exhausted, bringing Israel to the point of last resort? If so, is this the last opportunity for an attack? n346 [\*314] While Israeli leaders assert that there is no deadline to make the final decision of whether to strike and assure the public that such a decision is not imminent, Barak warned in January 2012 that "no more than one year remains to stop Iran from obtaining nuclear weaponry." n347 If Israel is to conduct a preemptive strike to take out Iran's nuclear program, they must do so before "Iran's accumulated know-how, raw materials, experience and equipment ... will be such that an attack could not derail the nuclear project." n348 This point in the Iranian nuclear program, when the program enters its "immunity zone," may be reached as early as the fall of 2012. n349 In response to these threats of preemptive strike, **Iran has in turn made threats of its own**. n350 The day after the IAEA released its February report, which indicated extensive developments in Iran's nuclear program, n351 Iran stated that any Israeli attacks on Iranian nuclear installations "will undoubtedly lead to the collapse of the [Zionist] regime." n352 **Iran has threatened retaliation through its long-range missile program**. n353 In November, **Iran also asserted it would attack NATO bases in Turkey if either Israel or the U**nited **S**tates **launched an attack against Iran**. n354 Overall, it appears that Iran does not presently have the capability to employ nuclear weapons, but the prospect of attaining this capability is growing increasingly - and worryingly - likely. Iran's intention to use these weapons against Israel is not definite or transparent, but it is still a possibility. n355 Strikingly, **the clearest Iranian threats against Israel are** seen primarily **in the context of warning Israel of the possibility of** [\*315] **retaliation against an Israeli preemptive strike**. n356 It is in this convoluted history of threat-and-reaction that it is necessary to anticipate whether an Israeli preemptive strike on Iran's nuclear program would be legal or legitimate under modern international law.

C. Analysis

Under a restrictive interpretation of the U.N. Charter, Israel would not be justified in attacking Iran's nuclear program because Iran has not yet conducted an "armed attack." n357 Yet most authorities agree that Israel would be justified in a preemptive strike against Iran if the imminence of an Iranian attack were "clear." n358 An analysis under customary international law's Caroline doctrine provides the foundation to determine whether the possibility of an Iranian nuclear attack on Israel is sufficiently imminent to justify an Israeli preemptive strike. However, as discussed in Part II.A, the present analytical framework under customary international law is vague and difficult to apply. n359 To supplement the traditional Caroline analysis, this comment will also apply the analytical framework proposed by David Sadoff, which offers clear factors to guide an analysis of whether an Israeli preemptive strike would be acceptable under modern international law. n360

1. Customary International Law

The Caroline doctrine, which underlies the customary international law analysis of anticipatory self-defense, has three prongs: necessity, proportionality, and imminence. n361 Assessing the necessity and proportionality prongs of the Caroline doctrine is straightforward for the purposes of this comment. Necessity requires that an action be "necessary to defend ... against an impending attack" and occur only after peaceful measures have [\*316] been exhausted. n362 Successfully defending against a nuclear attack requires, by its very nature, a preemptive strike because an attack would decimate a nation instantly. n363 In addition, it might be argued that peaceful measures have been exhausted if Iran continues its present course of action: non-cooperation with U.N. inspectors and apparent development of nuclear weapons, in contravention of the Non-Proliferation Treaty n364 and in spite of the international pressure of multilateral economic sanctions. Thus, for the purposes of this comment, a preemptive strike to deter the threat of nuclear attack would meet the "necessity" requirement of the Caroline doctrine.

Proportionality requires that action should not exceed what is minimally necessary to respond to a threat. n365 It would be in Israel's diplomatic interests to respond with only the minimum required to avert the threat of nuclear attack. A preemptive strike that neutralizes Iran's nuclear program and does not exceed the immediate threat to Israel to pursue "broader offensive or strategic goals" would satisfy the requirement of proportionality. n366

With the assumption that an Israeli preemptive strike would meet both the necessity and proportionality prongs of a customary international law analysis, this comment focuses on whether the threat posed by Iran is sufficiently imminent to allow an Israeli preemptive strike. As imminence is implicitly fact-based, this comment will compare the present situation to the two incidents that provide the most guidance on whether an act of anticipatory self-defense is justified: the 1967 Six Day War, in which Israel was considered justified in its defensive actions, n367 and the 1981 Israeli attack on Osirak, which was uniformly condemned. n368

As discussed in Part III.B, several threats were present in the [\*317] period leading up to the Six Day War that support the conclusion that the threat of an Egyptian armed attack on Israel was "imminent:" (1) Egypt's troops were mobilized at Israel's border, (2) Egypt was forming military ties with Israel's enemies, (3) Egypt ordered the removal of the U.N. troops who were present for conflict-diffusing purposes, (4) Egypt invoked a blockade on Israel's trade, and (5) the leader of Egypt proclaimed a goal of "destroying" Israel. As Israel's strike on Egypt's troops was generally considered to be legitimate by the international community, it is these factors, taken together, that seem to meet the "imminence" requirement of customary international law.

Israel, taken in the light most favorable to an argument for legitimacy, may face two of these Six Day War factors in the present situation with Iran. First, it is widely reported that Iranian leaders believe that Israel should be "wiped off the map." n369 This is somewhat similar to the threats by Egypt's leader that preceded the Six Day War. n370 However, other than a few well-publicized statements from public leaders, there does not appear to be any further corroborations of an intention to attack Israel. n371

Developing nuclear weapons, because of their first-strike capabilities, may be tantamount to a mobilization of troops. With nuclear capability, Iran would be able to attack Israel as swiftly as if it had a legion of troops on Israel's border. However, the mobilization of troops in the Six Day War was a threat that was unique to Israel, due to the geographical nature of the region. n372 Comparatively, there is no strong tie between Iran's nuclear program and Israel that would indicate that such a "mobilization," if it were to be considered such, would be specifically targeting Israel. The only tie that could conceivably serve as such a link is Iran's professed hatred of the Jewish state. n373 However, the remaining three factors from the Six Day War - developing [\*318] regional military ties, a blockade, and the removal of U.N. troops - are not present. The absence of these factors indicates that the threat currently posed by Iran only moderately resembles the threat posed by Egypt preceding the Six Day War.

The present situation between Israel and Iran more closely resembles Israel's attack on the Osirak reactor in 1981, which was widely regarded as an unacceptable use of force under customary international law. n374 Several factors that were considered to be insufficient to justify an act of anticipatory self-defense are present here: the development of nuclear weapons and the attendant risk of a nuclear first strike; IAEA reports indicating that Iran's nuclear program are quite possibly directed towards the development of nuclear weapons; and a high production of enriched uranium that could be intended for use in nuclear weapons. n375 However, the IAEA reports and the vast quantities of enriched uranium indicate that there may an even stronger argument for an "imminent attack" by Iran today.

The presence of these factors, without more, does not rise to the "imminence" seen in the Six Day War. First, two factors articulated by Professor Greenwood are not definitively present: n376 possession of weapons and an intention to use these weapons. The IAEA has not reported that Iran actually has, or will soon have, nuclear weapons; it merely suggests that there may be military dimensions to the nuclear program. n377 Second, though it seems clear that Iranian leaders would prefer that Israel not exist, this does not necessarily equate to an "intention" to use nuclear weapons - should they come into Iran's possession - against the Israeli state.

While Israel may have a stronger argument for imminence today than it did in 1981, the present situation bears much stronger resemblance to the 1981 Osirak incident, where imminence was clearly not found, than to the 1967 Six Day War. As the Iranian threat against Israel does not rise to the imminence required by the Caroline doctrine, an Israeli preemptive strike against Iran would not be legal under customary international law.

[\*319]

2. Sadoff's Framework

The analytical framework proposed by David Sadoff offers an analysis of anticipatory self-defense that is significanltly less vague than analysis available under customary international law. The first component of Sadoff's framework, properly gauging the threat, is precisely the task undertaken by this comment. Sadoff's framework breaks down this component in a way that reflects and clarifies the "imminence" analysis of the Caroline doctrine. This framework analyzes the factors of (a) the nature and scale, (b) the likelihood, and (c) the timing of the threat to determine whether a threat would be sufficiently imminent to justify an act of anticipatory self-defense. n378

First, assessing the nature and scale of an Iranian nuclear attack is fairly straightforward. Israel fears facing the threat of "first strike" nuclear attack, which would leave little or no time for Israel to respond defensively once launched. n379 Israel would likely receive little to no warning of a nuclear launch. Such an attack could decimate the entirety of the Israeli state. The nature and scale of the threat is likely the gravest threat imaginable.

The "likelihood" of the attack, however, is much more ambiguous. First, the statements by Iranian leaders that demonstrate a desire to see Israel "wiped off the map," n380 though troubling, do not seem to effectively constitute a "public expression" of a "will to attack." n381 The intent of the attacker here is couched in public rhetoric. Though there are strong ideological tensions embodied in Israeli-Arab conflict that engulf the entirety of the Middle East. n382 There is little doubt that Iranian leaders would be happy to have a world without the Israeli state, this does not indicate a clear intention to launch an attack. Second, Iran does not presently have the capacity to mount the attack. n383 Though Iran is possibly on the path to achieving this capacity, n384 it [\*320] is not synonymous with being on the path to actually using nuclear weapons against Israel. There does not seem to be any certainty that a nuclear attack on Israel will occur. Thus, the present situation is not a matter of when, but of if. n385 Third, Sadoff's framework considers the international community's reaction to a nuclear attack on Israel. n386 Such a reaction would be extremely condemnatory, and would likely deter such an attack. Though Iran expresses strong anti-Israel sentiments, it has not outwardly expressed any intention to attack and does not presently have the capacity to attack.

The third factor in gauging the threat, timing, is interspersed with the likelihood factor. Sadoff suggests similar questions for the assessment of these two components. n387 This seems appropriate. If an attack is not very likely to occur, then it is moot to consider whether the timing of an attack is sufficiently immediate to justify a pre-emptive strike.

3. Considerations

Under the analyses of both the customary international law and Sadoff's frameworks, an Israeli preemptive strike on Iran would be neither legitimate nor legal. The legality afforded by the Caroline doctrine is restricted to situations where the threat of attack is imminent and the use of force employed to defend is necessary and proportionate to the threat posed. n388 Though a threat of nuclear attack would be very serious, such a threat from Iran is not presently imminent. Yet if a nuclear threat were to become "imminent" under the Caroline doctrine or "likely" under the Sadoff framework, using preemptive force to deter an attack would be justified.

Also significant to the Caroline doctrine's approach is that there are more options available to Israel than just using force. First, Israel has the option of appealing to the U.N. Security [\*321] Council, which may authorize the preemptive use of force through its Chapter VII authority. n389 Second, **the use of diplomatic pressure and international sanctions by Israel's allies** n390 **has not been exhausted, and may yet** prove successful **in subduing Iran as a nuclear threat**. **The evidence that the economic sanctions are having an effect on Ira**n, though sparking worry in some due to concerns the leaders may be acting more erratically, n391 **is actually a strong indicator that** alternatives to using force are working. VI. Conclusion There are several problems in the traditional customary international law framework of analyzing necessity, proportionality, and imminence to evaluate uses of force in anticipatory self-defense. First, the rules that govern use of force must be generally known. n392 The expansivist-restrictionist doctrinal debate concerning the strict legality of anticipatory self-defense under Article 51 creates ambiguity inunderstandings of the law. This ambiguity **undermines the ability of the international community to reach consensus in condemning or endorsing uses of force in anticipation of an armed attack**. Yet the solution cannot be found in choosing one side over the other. On one hand, adopting the restrictivist approach to Article 51 of the U.N. Charter and precluding the legality of using force in any instance not first preceded by an "armed attack" would leave nations vulnerable to first strikes that threaten state survival. n393 On the other hand, **adopting** the expansivist approach can leave too much room for using force in self-defense **where there is no actual imminence of a threatened attack**. n394

[\*322] Second, the rules that govern use of force must be generally accepted. The current legal framework is unsuited to the realities of modern warfare, where weapons of mass destruction carry first-strike capabilities that leave no opportunity for self-defense. Modern international law must have the flexibility to recognize the right of a state to use preemptive force when it is the only defense available against an attack threatening the state's very existence. Without this flexibility, the legal order loses legitimacy. Without general acceptance of the laws that should bind, these laws lose their normative and prescriptive value. n395

Expansive overhaul of the modern international legal order is not the solution. Customary international law is established by the general practices of states, which in turn generates a collective sense of legal obligation. n396 If changes to modern international law occur too quickly and in too high a degree, it will be even more difficult for laws to be generally known. Another risk is that any large overhaul may favor the large, powerful states at the expense of states with less influence. n397 The solution should be incremental changes to the existing legal framework. This would allow the law to retain its normative value that would favor all states as equal entities under the law. Incremental changes would also allow the law to develop at a pace with which international consensus can keep up.

Incorporating legitimacy into modern international law is a priority. Legitimacy ensures the general acceptance necessary to sustain a legal order. The criteria suggested by the U.N. High-Level Panel on Threats, Challenges and Change is a good starting point. n398 The Panel encourages the U.N. Security Council to address these criteria when deciding whether to authorize or endorse the use of military force in anticipatory self-defense. n399 However, the U.N. should affirmatively endorse consideration of these criteria to member-states and to intergovernmental [\*323] organizations charged with moderating international use of force. n400 In addition, modern law should formally incorporate consideration of the normative views of both state actors and non-state actors, including the nongovernmental organizations and the press.

Furthermore, the international community needs predictability and transparency in modern international law to assure legitimacy. A clear, practicable framework for the evaluation of uses of force must be adopted. The framework proposed by David Sadoff would be a good candidate. His proposal incorporates the traditional Caroline model of analysis while also including a mode of assessment of modern day considerations, such as nuclear threats. n401 The framework lists numerous factors to consider when gauging the severity of a threat. Factors such as these will help create a clear method to evaluate use of force, which will result in predictability and transparency in future evaluations.

Under both traditional and alternative analyses, Israel would not be **presently justified** to preemptively strike Iran's nuclear program. Under the customary international law analysis, Israel would not be justified because the threat is not yet imminent: Iran has not demonstrated a clear intent to attack Israel and does not yet have the capability to carry out a nuclear attack. Under Sadoff's proposed framework, Israel would not be justified for many of the same reasons: there is not a sufficient likelihood that an attack would occur. There is room**, however,** for Israel to justify a preemptive strike **under the "preventive" self-defense approach, in which a preemptive strike may occur though the threat is more temporally removed.** n402 This demonstrates the danger inherent in adopting such an approach, which discounts the importance of anticipatory force being used only as a "last resort." An approach that strays too far from existing modern law norms runs the risk of endorsing actions that would be widely viewed as illegitimate. n403 [\*324] An additional consideration is that under a legitimacy argument, the danger that a nuclear Iran poses to global peace and security may be enough to justify a preemptive strike in order to ensure global security. Many nations have indeed spoken out against Iran's development of nuclear weapons. By several accounts, a nuclear-capable Iran would be a serious threat to the entire Middle East region and the world. n404 For example, Algerian ministers claim that once Iran achieves nuclear capability, they will share the technology with "its fellow Muslim nations." n405 **However**, this danger should not be addressed by the unilateral assessment of a paternalistic nation, such as the United States. If the threat Iran poses to global security warrants a preemptive strike, then multilateral action by the U.N. Security Council should be taken. n406 In conclusion, though it is tempting to simply "rewrite the rules" to adapt the traditional international laws to address modern day threats, **doing so would disrupt the international legal order.** **Deficiencies in the modern legal framework should be addressed** incrementally, **with** a priority given to **incorporating legitimacy and creating clear, practicable standards to evaluate use of force in anticipatory self-defense**. Such a framework would clarify the [\*325] present illegitimacy and illegality of an Israeli strike on Iran's nuclear program. Wide recognition of the illegitimacy of a strike would lead to international condemnation, thus foiling the trigger that would lead the world into World War III.