A FUTURE CHALLENGES ESSAY

Self-Defense and the Limits of WMD Intelligence

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I. Introduction

The 2003 invasion of Iraq exposed challenges in accurately assessing a state's weapons of mass destruction (WMD) capabilities, and seemed to validate the concerns of those who oppose a broad right of preemptive self-defense. The United States and Britain justified their invasion of Iraq by citing prior U.N. Security Council resolutions and Iraq's material breaches of its duties under them.[1] But the aftermath has left open an important international legal question: assuming authority for preemptive self-defense exists in some circumstances, how certain should a state have to be in its assessment that another hostile state has or is acquiring WMD to justify the use of preemptive force?[2] The question is crucial as the international community confronts and deliberates about future challenges, including Iran's alleged nuclear program.[3] As massively destructive technologies and know-how continue to spread, international standoffs are likely to continue—be they with Iran or North Korea or other states. Policymakers aiming to disarm an opponent believed to be holding or building WMD will continue to face uncertainty about the true extent and nature of an adversary's alleged WMD programs.

During the 2008 presidential campaign, then-candidate Barack Obama stated: "Sometimes, the preventive use of force may be necessary, but rarely. The experience of Iraq underscores that often, perceived threats are not as real [as] they may seem, and our intelligence may be imperfect. But, when our intelligence is good and defensible we should not rule out the use of force."[4] This chapter examines ways of assessing legally whether that intelligence is sufficiently good and defensible.

The problem of imperfect intelligence about adversary capabilities is hardly new. As political scientist Robert Jervis observes: "Much of the history of international politics can be written in terms of intelligence failures, starting with the report in the Bible that the spies that Moses sent to the Land of Israel overestimated the strength of the enemies to be found there."[5] But the special challenges of suspected WMD arsenals have prompted calls from several directions for the international legal regime to adapt to the strategic context of WMD proliferation.

The current use-of-force debate involves several camps. The first, which I term the "unilateralist school"—most notably represented by the administration of former President George W. Bush—defends unilateral decisions to use self-defensive force in the face of perceived WMD threats, even in the face of substantial uncertainty as to the timing and maturation of the threat.[6] The second, which I term the "strict constructionist school"—those who read the U.N. Charter's self-defense provision most narrowly—holds that states cannot resort to force absent U.N. Security Council authorization unless attacked first, except perhaps in very narrow circumstances where a specifically identified attack is "imminent." Both schools share a belief that the proliferation of WMD poses new challenges for international use-of-force rules, but they draw opposite conclusions. The unilateralists believe the instantaneity and destructiveness of WMD threats mean states can no longer be expected to wait for the U.N. Security Council to deliberate or for imminent threats to manifest clearly. Strict constructionists believe that the spread of WMD raises the danger of too lenient a standard for precautionary use of force because relaxing the standard may open the door to masked aggression, spur more states to pursue WMD as deterrents, or create security instabilities.

Within this polarized debate exists a third view, which I develop further and defend. The objective "reasonable necessity" school holds that the use of force against another state believed to pose a WMD threat is justified when a reasonable state would conclude a WMD threat is sufficiently likely and severe that forceful measures are necessary. Whereas both the strict constructionists and the unilateralists emphasize the question of who—or which international actors—decides when conditions warranting force are satisfied, the reasonable necessity school emphasizes the substantive standards that should govern.

This chapter examines how these competing legal approaches deal with unavoidable limitations with respect to alleged WMD capabilities and programs, especially nuclear ones, though the "schools" to which I refer are actually segments of a spectrum, not so neatly separable and with much nuanced variation within them. The focus of this chapter is states, not terrorist groups, though some of the insights are applicable in that context as well.

In the past, a key issue for international legal doctrine was assessing whether an adversary state *intended* to attack. Military capabilities could often be assumed or assessed with a relatively high level of certainty, but the community of states needed rules or processes for adjudicating whether uncertain intentions warranted forceful preemptive or anticipatory responses. Of course, the problem of accurately assessing adversary intentions remains as well, and those intentions continue to form critical components of any use-of-force legal analysis.[7] Moreover, the dual military-civilian uses of many potentially destructive technologies makes it even harder to divorce an analysis of hostile capabilities from the intentions that might lie behind them. Thus contemporary crises involving hostile states that are seeking WMD pose questions of both intention and capability, and often the mere crossing (or perceived crossing) of

the WMD capability threshold has dire and sudden security and stability consequences. This chapter argues that a sound legal doctrinal approach must be able to operate effectively in that "capability uncertainty" environment.

In terms of legal approaches, the current debate fits a familiar pattern. The unilateralist school generally deals with uncertainty over capability with a subjective, or self-determined standard: the state contemplating the use of force to head off a WMD threat must believe in good faith that the use of force is necessary to forestall it. This school accepts as inevitable that states must and will make critical decisions amid substantial uncertainty. The strict constructionist school generally emphasizes process in dealing with capability uncertainty. It argues that because accurately discerning a state's capability is difficult, the international community should rely on collective decisionmaking, based as much as possible on assessments by multilateral bodies like the U.N. Security Council and the International Atomic Energy Agency (IAEA) to determine the existence and magnitude of threats. The reasonable necessity school proposes flexible yet objective criteria to guide decisionmaking about military force, usually through a combination of state practice and international institutional adjudication.

This chapter explains how an objective reasonable necessity approach to WMD capability assessments can serve long-term peace and security objectives and, more specifically, how the law governing use of force might evolve to guide capability assessments. A reasonable necessity approach, combined with an objective standard of assessing WMD capability and operating as a narrow legal alternative to formal U.N. Security Council authorization, can best balance and allocate competing risks in an environment of significant capability uncertainty. However, U.N. Security Council-driven processes and an objective necessity approach are not mutually exclusive. They can be combined in reciprocally reinforcing ways. Moreover, the substantive evidentiary issues forced to the surface through objective reasonableness analysis are critical to managing some of the dangers of operating outside explicit U.N. Security Council authority, and are critical to the effective operation of the legal processes that the strict constructionists advocate.

II. Use of Force Doctrine and Weapons of Mass Destruction

The basic policy behind international self-defense doctrine is to promote global order by permitting states sufficient leeway to respond to expected security threats—including taking steps to protect themselves prior to an actual attack—while not creating an exception so broad to the baseline prohibition of force that it swallows the rule, or is used pretextually to mask aggression.[8] As the influential eighteenth-century Swiss diplomat and legal scholar Emmerich de Vattel explained, "We must . . . have good grounds to think ourselves threatened by [another power], before we can lawfully have recourse to arms. Now power alone does not threaten an injury—it must be accompanied by the will. . . ." However, "[w]hen once a state has given proofs of

injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of suspicion to her neighbours, whose duty it is to stand on their guard against her."[9]

Because the policy involves predicting future actions by an expected aggressor, application of anticipatory self-defense doctrine, or what more broadly could be called "precautionary self-defense" doctrines (as explained below), risks false positives and false negatives.[10] "The problem with recourse to anticipatory self-defense," observed the great international law scholar Thomas Franck, "is its ambiguity. In the right circumstances, it can be a prescient measure that, at low cost, extinguishes the fuse of a powder-keg. In the wrong circumstances, it can cause the very calamity it anticipates."[11] Precautionary self-defense rules aim to calibrate the right balance of risks among false positives and false negatives.

The classic formulation of anticipatory self-defense doctrine remains that articulated in 1841 by Secretary of State Daniel Webster, who argued that a right of anticipatory self-defense arises only when there is a necessity of self-defense that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation"—criteria that have been widely subsumed into the concept of "imminence."[12] To the majority of scholars, the existence of an imminent threat defines a narrow category of the inherent right of self-defense, which U.N. Charter Article 51 recognizes as an exception to the general prohibition on the use of force (the other legal justification for force is authorization by the U.N. Security Council).

This imminence requirement helps ensure that a defender exhaust other, non-forcible means, and reduces the likelihood of erroneous judgments, insofar as waiting until the point at which an attack is about to occur helps expose an adversary's true intentions. An imminence requirement therefore helps distinguish an adversary's general attitude of hostility from a maturated intention to attack.

The proliferation of WMD complicates the anticipatory self-defense debate, however, by frustrating aspects of the traditional imminence formulation and raising the stakes in the event of an error. Especially in the hands of a hostile state, WMD capabilities can pose threats that are very different from the class of threats out of which the imminence requirement grew. Traditional imminence depends heavily on a temporal restriction, in which force is only permitted "during the last window of opportunity."[13] The technological nature of WMD and their delivery can make it impossible to discern this "last window" period, limiting the extent to which the imminence requirement can be used to reduce uncertainty about a WMD-armed adversary's true intentions. In a conventional context, a state's decision to attack in order to achieve a major effect usually (though certainly not always) was accompanied by a mobilization of forces large enough to be perceptible. A WMD attack could become imminent merely with the crystallization of the aggressor's intent.[14] The lack of an intentions-signaling mobilization period, combined with these weapons' catastrophic potential and the limits of protective

means after an attack has commenced, severely restricts the opportunities for self-defense afforded by the traditional concept of imminence.

Indeed, the dangers of WMD possession become "imminent" not only immediately prior to an attack, but often before a hostile state even completes its WMD development. Mere possession can create serious security dangers, by acting as a shield for other forms of aggression and destabilizing regional security balances.[15] WMD-armed states may be increasingly tempted to employ conventional or asymmetric force to achieve goals, including supporting terrorism or insurgencies, under a deterrent umbrella. All this effectively shifts a substantial portion of contemporary security risks outside the ambit of traditional imminence, and so diminishes the self-defensive value of the principle.

One might immediately object that loosening the imminence requirement conflates several distinct legal and strategic concepts: anticipatory, preemptive, and preventive force. Indeed this is deliberate, and I use the inclusive term "precautionary self-defense" to denote the broad range of decisions to use force to forestall expected dangers before an actual attack. Because WMD often can be used without warning, it is difficult to distinguish clearly between "distant" and "imminent" threats, and so between prevention and preemption. Moreover, all three legal approaches I compare below implicitly contemplate the possibility of the preemptive or preventive use of force (i.e. prior to the point of imminent attack). Their difference is in how they seek to legally regulate the accompanying decisionmaking, and even more specifically, to measure a component of the necessary legal conditions: by demanding process versus good faith versus reasonableness in reaching judgments.

Strategic context is critical to evaluating this debate, however, and a lesson of the past few decades—one displayed dramatically in recent years—is that information about an adversary or rogue state's WMD capability is often highly uncertain or incomplete and that intelligence assessments of these capabilities often carry large probabilities of error. Accordingly, one of the principal challenges facing national security decisionmakers will likely not be what to do about a hostile adversary that has WMD, but what to do about a hostile adversary that *might* have WMD.

The most obvious examples of this problem are the intelligence assessments preceding the invasion of Iraq in 2003 and the dogged uncertainty that surrounds Iran's nuclear programs, as well as the details and extent of North Korea's. However, prior history is replete with examples of states both overestimating and underestimating WMD capabilities.[16] Israel's 1981 assessment that Iraq was very close to achieving an operational nuclear arsenal prompted Israel to bomb Osiraq in Iraq. Contemporary and later analyses viewed that as overestimation.[17] Following the 1991 Persian Gulf War, the United States and the international community more broadly discovered that they had vastly *underestimated* Iraq's progress toward a nuclear weapon capability.[18]

In 1998, the United States government was caught off guard by India's test of a nuclear weapon.[19]

After the invasion of Iraq, the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (WMD Commission) concluded that the U.S. and international ability to detect and accurately assess WMD capabilities are, and will remain, limited.[20] Another major study concluded that "[i]n the Iraqi case, arguably the three best intelligence services in the world—those of the United States, Great Britain, and Israel—proved tragically unequal to the task" of providing accurate intelligence on emerging threats.[21]

The problem of capability uncertainty is unlikely to abate in the foreseeable future, and it may intensify.[22] The dual-use nature of many WMD technologies and the diffuse, closely-guarded structure of WMD programs pose a formidable challenge for monitoring and appraisal efforts. Inspection and verification mechanisms suffer from a number of impairments, ranging from dependence on the compliance of potential proliferators to inadequate technological resources to limited mandates. The most capable national intelligence services are hampered by a number of systemic deficiencies, the correction of which is likely to be a slow and difficult process. Moreover, even the best reforms are heavily limited in their ability to eliminate all information gaps and erroneous predications.

The Iraq experience also highlights the ability of suspect regimes to take steps—like foiling inspections—to hide evidence of WMD or dual-use capabilities, deliberately disrupting other states' and international organizations' ability to make accurate capability assessments. Furthermore, suspect regimes may posture (including by rejecting inspections) to *exaggerate* their WMD capacity in the eyes of regional rivals.[23]

As a result, we can no longer expect the same certainty reflected in then-U.S. Ambassador to the U.N. Adlai Stevenson's October 1962 presentation to both the U.N. Security Council and a live television audience of "incontrovertible" photographic evidence of Soviet missiles being assembled in Cuba. Instead, we are more likely to see shades of inconclusiveness, like that of former Secretary of State Colin Powell when he presented to the U.N. Security Council forty years later circumstantial evidence suggesting Iraq was likely—though not certain—to have a WMD arsenal.

As mentioned earlier, this issue of "capability uncertainty" is a recently exacerbated challenge for anticipatory or precautionary self-defense doctrine, because in an era of conventional warfare among states, an adversary's first-strike capability could often be assumed or assessed with high confidence. True, the history of modern conventional warfare is also rife with examples of intelligence gaps concerning adversary capabilities and resultant strategic surprises.[24] But contemporary WMD capability uncertainty greatly complicates strategic planning and induces insecurity not only because of the

magnitude of doubt—what is the probability that a state has or is about to have WMD?—but because that state's crossing the WMD threshold has the potential to so radically alter the balance of power.[25]

Before proceeding, it is important to note this chapter's analytic assumption of hostile intentions of a given state believed to be acquiring WMD. While the threat posed by a WMD-armed or WMD-arming state is a composite of its intentions and its capabilities, this chapter focuses on the capability assessment variable. To this end, I assume a requisite assessment of hostile or destabilizing intentions, i.e. that if the suspect state had WMD it would wield them in hostile ways. To be very clear: I am not arguing that the mere possession or pursuit of WMD is sufficient legal cause for precautionary force. In the end, this assumption highlights the difficulty of ever truly analytically de-linking intentions and capability, but it helps bring into focus the special legal challenges posed by limited WMD intelligence.

III. Three Approaches

International law helps regulate uses of force in ways that both guide decisionmaking and enhance its legitimacy: by permitting the beneficial use of force and constraining its harmful use, and by channeling key international actors' opinion according to consistent principles and processes. The uncertainty of intelligence about WMD capabilities means that good faith convictions among some decisionmakers may look like reckless misjudgments to others. The strict constructionist view, the unilateralist view, and the reasonable necessity view each offer different solutions to this problem, rooted in different assumptions about international relations and the impact of WMD proliferation on national and international security.

While the stakes may be uniquely high in contemplating force against WMD threats, the problem of accurately assessing a factual premise that is key to adjudicating legal authority is a very common one. Three approaches to judging disputed issues of fact, are common throughout domestic and international law, and they correspond to the three major schools of precautionary self-defense: process (strict constructionist view), subjective standards (unilateralist view), and objective standards (reasonable necessity view). Consider, as an example, possible legal approaches to determining a police officer's authority to search a home for criminal activity: one based on obtaining authorization from a magistrate, or process; one based on the officer's state of mind and purposes, or subjective standards; and one based on guidelines for a reasonable officer in that position, or objective standards. All three promise to effectively calibrate the appropriate level of force in the international system (allowing enough force to deal effectively with genuine threats but not so much as to threaten peace and stability), and to do so consistent with a normative vision of authoritative legal rules.

The Strict Constructionist School: The strict constructionist view holds that the threat of WMD strengthens the need to interpret anticipatory self-defense requirements narrowly. It retains a strict imminence requirement for anticipatory self-defense and, absent an

imminent or actual armed attack, makes the U.N. Security Council sole arbiter of the legality of other uses of force.[26] Compared to alternative views, strict constructionists weigh the harms of false positives (uses of force in self-defense that were not actually necessary) as relatively high. As the U.N. High-level Panel on Threats, Challenges and Change argued, "[I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted."[27] Of particular concern to advocates of the strict constructionist view is the risk of "pretextual" false positives, or states' representing a use of force as justified by legitimate considerations when in fact it is rooted in impermissible motivations.[28]

The strict constructionist view generally assumes a model of state behavior that is highly responsive to multilateral process, international organizations, and legal norms; and that holds out great hope for stability through international cooperation and consensus building. The strict constructionist view also reflects skepticism of military force and intervention, and a predisposition to non-violent methods of conflict resolution. Accordingly, holders of this view also have high confidence in the capacity of the U.N. Security Council to resolve crises.[29] As the U.N. High-level Panel noted in response to concerns about the restrictiveness of the strict constructionist view: "if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to."[30]

As to the problem of capability uncertainty—at the heart of this chapter—the strict constructionist view relies heavily on a *process* approach for judging threats capabilities, including factual premises such as state capability. Under the strict constructionist view, the U.N. Security Council is the multilateral body charged with making the capability assessments incident to determining the existence of threats to international peace and security sufficient to justify the use of military force.[31] These capability assessments are in turn informed by a number of auxiliary multilateral processes, both from within the U.N. system and from interlocking and subsidiary treaties and multilateral organizations. For example, the Board of Governors of the International Atomic Energy Agency, in the course of verifying its safeguards and the obligations imposed by overlapping treaties such as the Non-Proliferation Treaty and the Additional Protocol, reports any determinations of non-compliance to the U.N. Security Council, which can then take a range of actions, including mandating further procedures by the IAEA.[32]

Some argue that these multilateral processes have deliberative advantages that increase decisionmaking accuracy by reducing the risks of error inherent in unilateral assessments of proliferators' capabilities. Under this view, U.N. Security Council deliberation will facilitate information exchanges that improve capability appraisals and temper states' tendency to "worst-case" their estimations—both worthy aims.[33]

Others emphasize the importance of legitimacy in reaching joint, common assessments of threats through multilateral processes.[34] This legitimacy facilitates international cooperation on non-proliferation by reducing proliferators' options for evasion and promoting the coalescence of international public opinion.

Beyond any legitimacy or deliberative advantages of the U.N. Security Council assessment process, there is a broader argument rooted in the strict constructionists' understanding of the underlying purpose of use-of-force law and how international actors operate within it. For strict constructionists—always wary of the unilateral application of legal standards—one danger of capability uncertainty is that states will attempt to exploit this ambiguity to justify impermissible uses of force. This reasoning is also consistent with the strict constructionists' relatively greater concern with false positives. If false positives are more dangerous than false negatives, and capability uncertainty increases the risk of both, a sensible approach to the problem of capability uncertainty might focus on mitigating the heightened problem of false positives through procedural checks.

One must question, however, whether this approach also effectively handles the danger of false negatives—especially in a world of capability uncertainty. At the time of the U.N. Charter's inception, states could discern imminent threats more easily, particularly because these threats were often accompanied by an observable large-scale mobilization of conventional forces.[35] Since the ability to respond to an imminent threat now offers much more limited protection and U.N. Security Council authorization to use force is the only other recourse under the strict constructionist view, the U.N. Security Council assumes a proportionally expanded role in making the capability assessments that can support self-defensive action.

The U.N. Security Council voting system has a structural inclination towards underestimation of threats and weighting false positives more strongly than false negatives, because its voting rules effectively require a threatened state to present evidence that satisfies the Permanent-5 member with the highest evidentiary standards.[36] Even under ideal assumptions of good faith voting based on collective interests, it is questionable whether the most exacting epistemic standards employed by a Permanent-5 member represent the appropriate evidentiary threshold for calibrating the use of force under capability uncertainty, unless the danger of false positives truly dwarfs the danger of false negatives. Historically, this assumption of voting based on collective rather than narrow national interest has proven at best suspect; the evidentiary standards used by the most demanding Permanent-5 member to evaluate potentially threatening capabilities may owe their rigor to considerations unrelated to the goal of accurately discerning the existence of a threat, such as the expected benefits of its bilateral relationship with the threatening state, especially as relations with other Security Council powers erode. The U.N. Security Council's standardless and secluded decisionmaking makes "policing" this kind of behavior nearly impossible.

In practice, these structural features tend to restrict the range of capability evidence that will be germane to a U.N. Security Council authorization of force. Given the predominance of the Permanent-5 member with the highest evidentiary threshold and the absence of coordinating standards, the conclusions of multilateral auxiliary processes (like IAEA reports) will tend to become the *de facto* basis for U.N. Security Council capability assessments.[37] But this heavy reliance on auxiliary processes for assessing capabilities can create counterproductive incentives for proliferators to confound and otherwise "game" these processes, preventing the satisfaction of a legal condition precedent to the use of precautionary self-defensive force.

As to the legitimacy advantages of the strict constructionist approach, a countervailing concern is the divergence between how threatened states and the U.N. Security Council assess threats under capability uncertainty, which in turn is rooted in the different interests of threatened states and strict constructionists. If a state strongly believes it faces an actual WMD threat and has formed this belief through a reliable evidentiary assessment, but is unable to obtain the U.N. Security Council's blessing to use force, its leaders are unlikely to accept inaction as a sacrifice necessary to prevent future false positives and preserve the norm of non-intervention. This problem is aggravated by the absence of transparent criteria to guide the U.N. Security Council's threat assessments. Strict constructionists hope these concerns can be mitigated through improved procedures and greater political commitment toward their collective use by powerful states. But the recent practice of states suggests there is a long way to go before states can place their precautionary security largely in the hands of collective decisionmaking bodies.

The Unilateralist School: The unilateralist view offers an alternative approach, based on the belief that in a world of proliferating WMD, states have a right to use self-defensive force against some states that have, or will soon have, WMD capabilities—even absent identifiable plans for imminent attack.[38] This view jettisons the traditional imminence requirement on the grounds that in the context of WMD, responsible states cannot wait until specific and immediate threats materialize. Unilateralists seek to expand self-defensive latitude against non-imminent WMD threats because they believe a narrower rule skews risk too much against false positives; the risk of false negatives (failing to use self-defensive force in the face of potential danger) is too great in the WMD context.[39] As then-National Security Advisor Condoleezza Rice explained in the context of Iraq and Iraqi President Saddam Hussein's alleged nuclear weapons program, "The problem here is that there will always be some uncertainty about how quickly he can acquire nuclear weapons. But we don't [want] the smoking gun to be a mushroom cloud."[40]

The unilateralist view emphasizes individual states as the key unit of analysis, making security decisions based on self-centered calculations of relative power in a largely anarchic international system. Just as strict constructionists are suspicious of military action, unilateralists do not fully trust international law and organizations.

While strict constructionists focus on process, unilateralists rely on a *subjective* standard for judging WMD capabilities and threats: does a state in good faith perceive sufficient threat of WMD attack from an adversary state? This standard allows states to rely on their own independent judgments about the capabilities and threats posed by others and accepts uncertainty and ambiguity as an inherent feature of intelligence. As the Bush administration's 2006 National Security Strategy document stated: "There will always be some uncertainty about the status of hidden programs."[41] To unilateralists, threat assessments made by multilateral bodies like the U.N. carry an unacceptable risk of underestimation, given the relatively greater weight they assign to false negatives in the WMD context.

However, the unilateralists' central problem in calibrating the use of force under capability uncertainty lies in their failure to differentiate reliable and unreliable epistemic approaches to assessing potential threats. Thus they fail to create counter-pressure to "worst-case" analysis. Even leaving aside the prospect of pretextual capability appraisals, the most worrisome type of unreliable approach involves treating high-impact threats as cause for military action, even when there is little evidence indicating the threat will be realized, or when the available evidence suggests a very low probability of occurrence.[42] It is dangerous and destabilizing for states to predicate high-risk military action on low probabilities or on thin evidence of a threat. Wars are notoriously fraught with unintended consequences, and military actions designed to counter dubious threats risk creating more dangers than they eliminate.

The problem is not that the use of a subjective standard always leads to hypersensitive threat assessments and unwarranted military actions, but that a subjective standard sanctions this kind of decisionmaking and places it on equal legal footing with more robust assessments, instead of creating moderating counter-pressure through use-of-force regulation. If one purpose of a legal framework in this area is to discourage the use of irresponsible epistemic processes under uncertain conditions and to reward the responsible, a system that fails to first distinguish between the two falls short.

The unilateralist view also suffers from a legitimacy problem: its subjective standard is not anchored to rules or assessments reached through widely-respected or agreed-upon procedures. Thus unilateral capability assessments carry important practical disadvantages, including the possibility that any use of force based on them is less likely to garner international support that may be important to the success of the intervention. "[S]tronger agreed factual predicates will help generate support for action and strengthen legitimacy."[43] These critiques of the unilateralist view naturally strengthen calls for stronger process. But they also raise the question of whether objective standards can remedy problems of untethered subjectivity without exclusive reliance on procedural stringency.

The Reasonable Necessity School: A third approach—and the one I favor—uses a "reasonable necessity" standard to regulate the use of force against WMD threats.

This approach embraces multilateral-process solutions when possible, but also favors objective standards for judging resort to force outside the U.N. Security Council system.[44] While the use of force would remain justified when the conditions of customary anticipatory self-defense are met, this approach attempts to build upon the logic underlying that doctrine. It seeks to adapt use-of-force rules to the unique challenges of WMD threats and proliferation, while maintaining fidelity to the imminence requirement's core purposes of allowing the use of force only when other options have been exhausted and when waiting poses an unacceptable risk that the window of opportunity to eradicate the threat will close. These criteria are all judged by objective standards of reasonableness. Whereas some unilateralists are distrustful of the U.N. Charter system, reasonable necessity proponents generally seek to preserve it, by articulating standards to guide U.N. Security Council deliberations or assertions of self-defense (as protected by Article 51).[45]

By analyzing the issue through the perspective of a responsible threatened state, the reasonable necessity approach acknowledges that a state's threat perceptions will likely have more decisional weight than its commitment to international norms in cases where the two conflict. The reasonable necessity approach attempts to reduce this conflict by bringing the law and the state's situation more closely in line, making use-of-force regulation more context-sensitive. At the same time, like the strict constructionist view, it affirms the potential of law to guide state behavior and places a similar premium on legitimacy in decisionmaking and uses of force.

In doing so, the reasonable necessity school uses an *objective* standard for judging WMD capabilities and threats: Would a reasonably cautious state have acted in self-defense on the basis of the available evidence and its epistemic strength? In assessing reasonableness, this view seeks to identify factors that a reasonable state would consider in evaluating a potential threat under capability uncertainty.

Reasonable necessity advocates calibrate the risks of false positives and false negatives differently than do the strict constructionists and unilateralists. The latter two strike their balance primarily through the location of decisional authority (in the U.N. Security Council and in individual states, respectively), giving comparatively little attention to the substance of the internal logic through which those decisional authorities reach judgments. In a reasonable necessity system, that logic is paramount. Capability assessments guided by objective criteria and evidentiary rules are the core of this approach, and their particular configuration will be the principal determinant of how the risks of different errors are balanced. Instead of assigning capability assessments to an entity in the expectation that its incentives and characteristics will produce judgments that approximate the desired balance of risks, a reasonable necessity regime conducts this balancing largely through the substantive criteria themselves.

Scholar and former senior U.N. official Michael Doyle, for example, proposes evaluating military action against threats along four dimensions: the lethality of the threat, the

likelihood it will materialize, the legitimacy of the proposed action (determined by reference to traditional just-war principles), and the legality of both the target state's domestic and international behavior and the threatened state's response. For Doyle, the U.N. Security Council would remain the preferred but non-exclusive means of response, and he therefore requires exhaustion of U.N. Security Council remedies prior to unilateral application, as well as national and international reporting of the legal analysis.[46] Former State Department Legal Adviser Abraham Sofaer offers a variant, proposing four factors for use in establishing the reasonableness of resort to force in a given circumstance: the magnitude of the threat, its probability of occurring, the exhaustion of peaceful alternatives, and consistency with the underlying purposes of the U.N. Charter.[47] Neither Doyle nor Sofaer would deny the influence of decisional authority on outcomes, but as a method for optimizing the balance of risks, that is secondary to the substantive criteria and epistemic analysis those authorities are tasked with applying.

This approach to managing false positives and false negatives should enhance the transparency of the balancing process through articulation and application of standards, allowing for feedback as law evolves to deal effectively with evolving threats and conditions. Under the unilateralist and strict constructionist views, institutional mechanisms mediate between the desired balance of risks and their actualization, often leaving the connection between the policy objective and the outcome unclear. In contrast, reasonable necessity entails ascribing policy interests to various factors and applying them in a given context of contemplated force.[48]

As for legitimacy, the reasonable necessity view holds promise in terms of both its anchoring to widely acknowledged and agreed-upon standards and its ability to induce consensual compliance by conforming to decisionmaking criteria that motivate states in national security crises. The vitality of the law governing precautionary self-defense depends upon the ability of this law to adapt to contemporary challenges like capability uncertainty in a manner that decisionmakers and security professionals perceive as sensible. For this task, an objective standard is promising, because it directly addresses the same judgments these actors are forced to make and assesses them in recognizable terms.[49] Moreover, as discussed further below, there are a range of opportunities for a reasonable necessity regime to work in tandem with the U.N. Security Council and other institutional processes, especially in clarifying the legitimate policy priorities that guide objective standards.

Strict constructionists are quick to object that in practice, the reasonable necessity approach collapses into the unilateralist approach, at least when applied outside of the U.N. Security Council. Thus, strict constructionists argue, their approach offers the only viable framework to stave off the unconstrained use of force by states because bright-line triggers of legal authorization are needed to avoid devolution and manipulation of objective standards into unreliable, subjective judgments.[50]

A related objection is that in practice, objective standards tend to slide toward unilateral subjectivity because the reasonable necessity approach lacks clear decisional authority: from where are the reasonableness standards derived and by whom and where are they applied? Strict constructionists say the U.N. Security Council is obviously the legal decisional authority; unilateralists see the individual state as the legal decisional authority. They both question the legal decisional authority for articulating and applying objective standards under the reasonable necessity approach.

Furthermore, one might raise concern that international use-of-force doctrine ought to be concerned not merely with the *balance* of false positives and negatives but with the *distribution* of their harms: that is, on which parties do the consequences of underestimation or overestimation of threats fall in decisions about the use of force? If a state like the United States used force to disarm or prevent the WMD-arming of a regional power, that might be viewed as a way of externalizing the United States' own security risks onto, for example, smaller states in that region. Those states must also contend with resulting instability and humanitarian consequences, let alone the risk of assessment error borne by the perceived-hostile state. Any state facing security threats, but especially a superpower or hegemonic one, is likely to shift risk elsewhere and to heavily discount the risk borne by others.[51] Law should play a role in checking or regulating those tendencies.

One problem with these objections is that, as Abraham Sofaer explains, "[S]tates prepared to use force in bad faith are undeterred by restrictive legal rules."[52] This problem afflicts the strict constructionist approach as well as any regulatory scheme that depends on decentralized international enforcement, even if it includes centralized adjudication. In the absence of powerful centralized enforcement, any international legal regime will have to operate under these limitations, and it remains unproven whether inflexible, bright-line rules are better suited to the task, especially when critical facts remain subject to debate among key international actors. Moreover, the principal targets of use-of-force rules include not only actors determined to disregard international law or wedded to faulty capability assessments. In these cases, each of the three approaches is likely to fare poorly in constraining uses of force. Use-of-force rules should also be geared to those who may be susceptible to their pull and designed to maximize the scope of their influence.[53]

Like much of international law, effective articulation, application, and enforcement of reasonable necessity standards are largely decentralized.[54] Legal claims are then evaluated through expressions of states and, increasingly, through international organizations and non-governmental actors, including scholars and other opinion-shapers. Former State Department Legal Adviser and international law scholar Abram Chayes makes a similar point when he explains that "the requirement of justification suffuses the basic process of choice. There is a continuous feedback between the knowledge that the government will be called upon to justify its action

and the kind of action that can be chosen."[55] While legality is not merely about winning public support, it does depend heavily on the ability to defend actions in terms of generalized principles. "[B]ecause of the very prominence of legal standards as criteria for public accounting," Chayes continues, "failure to justify on these grounds or an inadequate legal defence may compromise the justification exercise over-all."[56] It is this public accounting that the reasonable necessity standards aim to improve.

All of this is not to suggest that objective reasonableness standards and use of process to manage capability uncertainty are mutually exclusive. Quite the contrary: there are many opportunities for symbiosis.

For all their limitations, multilateral inspections regimes should remain an integral part of an overall system for managing and reducing capability uncertainty, as they are a key mechanism for acquiring at least one important factor: forensic evidence. Instead of obviating these auxiliary processes, a reasonable necessity approach should supplement them with a broader array of evidentiary tools; its objection to the strict constructionist view is simply directed at over-reliance on exclusive decisionmaking procedures and a correspondingly narrow class of evidence. As explored in the next section, these additional tools can serve to reinforce a process regime by partially foreclosing responses that exploit limitations of inspections and eliminate the incentive to cultivate uncertainty for strategic purposes.

In a similar fashion, regulating force through objective standards should not be seen as incompatible with the U.N. Security Council system, and could be complementary. Under almost any objective reasonableness regime, the U.N. Security Council is likely to remain the most desirable source of authorization, and the uses of force it sanctions will remain per se or presumptively reasonable. Operating in parallel, objective standards would have significant potential for reciprocal reinforcement. In addition, exposing the U.N. Security Council to this sort of "healthy competition" would help push its members to deploy their votes and vetoes on the basis of persuasive reasoning rather than institutional prerogative. This is also a promising mechanism for inducing deliberative use of transparent criteria in the U.N. Security Council. If faced with a competing assessment that is particular to and organized by reference to objective standards, both the Council and its individual members would be pressured to clarify the basis for their decisions and explain why they reached a different conclusion. This process of bringing the capability judgments of U.N. Security Council decisions to the surface and forcing a substantive debate about evidentiary standards is an important step to improving the way use-of-force rules operate under capability uncertainty.

There may be other ways to adapt the legal processes central to the strict constructionist view in ways that both support and constrain a reasonable necessity approach to force. Michael Doyle, for example, proposes that if a state bypasses the Security Council in resorting to preemptive or preventive force, it ought to submit a public report after the fact to the Security Council, which would then investigate the justifiability of the action

subject to a majority vote without vetoes.[57] Thomas Franck proposes that the Security Council might pre-authorize remedial actions, including the use of force in the event of a state's non-compliance with certain conditions, and it might agree to treat determination of non-compliance as a procedural issue not subject to veto by permanent members.[58] Political scientists Allen Buchanan and Robert Keohane propose several models for improving accountability for uses of force. These include Security Council-appointed impartial bodies to determine whether an intervener's *ex ante* justification is confirmed *ex post* and to assess penalties for improper judgments, or the adoption of such mechanisms by a separate coalition of democratic states that would judge the legitimacy of uses of force outside the Security Council.[59] These proposals share a goal not only of creating a more policy-appropriate balance and distribution of risk but also, through deliberative and adjudicative processes, of exposing and subjecting to external scrutiny the specific substantive strands of use-of-force legal analysis. In the case of WMD crises, a key strand would remain assessment of a perceived-hostile state's WMD capability amid likely factual uncertainty. Bearing in mind the possible utility of these sorts of processes, the following section explores how the content of that assessment might be filled.

IV. Evidentiary Principles and Precautionary Self-Defense

The analysis above points to the need for reasonable necessity proponents to address epistemic or evidentiary questions: In a world in which complete clarity or consensus regarding states' WMD capabilities is impossible, how *should* states or collective security institutions judge capabilities?[60] There is a remarkable absence of well-established international law analogous to domestic law of "evidence," even though the legality or illegality of uses of force often turns on disputed facts.[61] An examination of evidentiary logic points again toward symbioses between the objective reasonableness approach and a process approach to regulating force.

One way to assess reasonable certainty would be to set a specific standard or burden of proof. In other words, rather than thinking about what level of confidence is sufficient on a case by case basis, international law could include a generally-applicable threshold that balances the relevant interests across the set of cases—analogous, for example, to the "clear and convincing" standard in domestic law.[62] However, any minimum threshold must recognize that both intent and capability are critical to an overall threat assessment, and that as the certainty of hostile intent increases, precautionary action might be justified despite high doubt about capability. The challenging issue then becomes one of setting a threshold for sufficient evidence. That calibration depends on weighing the relative risks of false positives and false negatives, and on assumptions about states' intent. Because these factors are all in flux, it is hard to develop a single, fixed standard. Moreover, returning to the central issue of this chapter: What types of evidence or judgments should be weighed in the assessment of the likelihood a state has or will soon have a WMD capability?

To the extent it is available, forensic evidence of WMD programs is universally recognized as legitimate, especially if it withstands public scrutiny. Some scholars therefore advocate a requirement that evidence be made public. They argue that widespread scrutiny of evidence generally improves its quality, through debate and refutation, and enhances its legitimacy.[63] A broader point here is that states should be obliged to take reasonable steps to validate their assessments, and their systems for generating assessments should be scrutinized to ensure they exercise "due diligence." However, one practical problem with this approach is that key information often cannot be disclosed publicly without compromising critical intelligence sources and methods. A second, more important limitation is that forensic evidence alone will rarely be conclusive. Significant parts of a public case will likely need to be inferential, relying on reasoned deduction. This raises the question: What types of inferences are appropriate?

Absent incontrovertible forensic evidence, states are likely to base their WMD capability assessments on what lawyers might term "propensity" evidence—a regime's past conduct, decisionmaking, or strategic calculus that shows an inclination towards acquiring WMD. A critical question for any legal mode of capability assessment, but especially for the reasonable necessity approach, is when and how heavily to credit propensity inferences. Not for lack of effort, political scientists have been unable to ascertain the accuracy of these types of inferences.[64] Yet given the given the dual-use nature of many components of WMD programs, some reliance on the inferred motivations of states may be unavoidable in interpreting forensic data points.

In addition, the difficulty of collecting forensic evidence—suspect states may refuse to allow international inspections or may withhold a full accounting of their suspicious activities—makes it likely that reasoned inferences will come into play from a strategic perspective, if not a legal one, in appraising WMD capabilities. When and how should negative inferences drawn from deliberate failure to disclose information form part of a reasonable assessment? Put another way, and returning to the issue of distribution of risk, under what circumstances should the risk of erroneous assessment, and so some burden of persuasion, be shifted onto the alleged proliferator? It is common in domestic law to place the burden of proof on the party with best access to information, the one that can provide it at least cost, or the one that hides or destroys information.

The notion of shifting some burden of persuasion—and with it some of the responsibility for false positives—seems especially appropriate in cases where a regime deliberately tries to mislead regional or global rivals into thinking its WMD arsenal is more advanced than it really is. In the case of Iraq, Saddam's interference with inspectors was probably driven in part by his desire to project power domestically and regionally by fostering the perception he had WMD to hide.[65] The Iranian regime may currently be exaggerating its enrichment capabilities in order to create a perception that its nuclear development progress is irreversible.[66] This does not suggest that, when combined with a requisite assessment of hostile intentions, a regime's "boasting" should be sufficient evidence of

capability to justify the use of force. Rather, it is a factor that ought to help guide assessments of reasonableness with respect to the capability factor in a use-of-force legal equation. Despite the cautionary lesson of misjudging Iraq's WMD, applying such a principle to WMD capability assessments as part of a reasonableness self-defense analysis might still promote accuracy in the long term if states understand that their own intransigence may shift the burden of proof against them.

There are some clear dangers to this burden-shifting approach. It may undermine incentives for states to sign on to non-proliferation regimes in the first place, or deter Security Council members from imposing additional inspections or disclosure requirements out of fear those requirements would later be cited in justifying force. More generally, any use-of-force regulatory regime needs to be considered within a broader international legal context, including its overlap and interaction with the non-proliferation regulatory regime. Although the frequency with which precautionary force is used to combat WMD proliferation will and should almost certainly remain very low, the basis on which it is authorized will influence other states' behavior.

Thus reliance on evidentiary principles ought to reflect a judgment as to whether WMD proliferation is best combated with coercive threats of military force, engagement through international arms control regimes, or a combination thereof. Working through the evidentiary issues raised above will help to reveal these policy questions lying just below the surface of use-of-force debates. The question of whether to infer propensity, for example, turns on judgments about what conditions or behavior by "bad" states should diminish the benefit of doubt normally accorded to "good" states about activities that could signal WMD development.[67] The burden-shifting question turns on judgments about how best to promote adherence to the non-proliferation regime, a complex matter of international diplomatic strategy.

The reasonable necessity approach helps bring these issues into focus, by demanding analysis of the substantive criteria that should guide legal uses of force. In a world of capability uncertainty, these include factual judgment criteria. The same policy questions, however, still percolate beneath the surface in the strict constructionist view. Even if one ultimately agrees with the strict constructionists' approach to regulating force, the questions prompted by the reasonable necessity inquiry should produce better-informed collective decisionmaking.

V. Conclusion

Given the threats the world community faces, international legal rules on the use of force should be adapted to handle emergent and inescapable intelligence gaps and uncertainties about adversary states' WMD capabilities. A reasonable necessity approach to the use of force against WMD threats—and with it an objective standard of assessing WMD capability—operating as a narrow alternative to formal U.N. Security Council authorization, can best balance and distribute the major, competing risks. However, the process-oriented approach of the strict constructionist school and the

more fluid standards of the reasonable necessity school are not mutually exclusive; they can operate in tandem to reinforce each other. Enabling them do so effectively requires greater attention to "evidentiary" issues, which themselves reflect underlying policy judgments that international legal discourse must address.

Notes

1 William H. Taft IV and Todd F. Buchwald, "Future Implications of the Iraq Conflict: Preemption, Iraq, and International Law," *American Journal of International Law*, vol. 97 (2005), p. 557.

2 A more detailed account of many issues and arguments of this chapter appeared in Matthew C. Waxman, "The Use of Force Against States that *Might* Have WMD," *Michigan Journal of International Law* (2009), vol. 31, p. 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511837.

3 Siobhan Gorman and Jay Solomon, "U.S. Considers a New Assessment of Iran Threat," *The Wall Street Journal*, Oct. 19, 2009, p. A10; Scott Shane, "In Dispute With Iran, Path to Iraq Is in Spotlight," *The New York Times,* Sept. 29, 2009, p. A1.

4 In 2008, the American Society of International Law conducted a presidential candidate survey, and this quotation is taken from then-Senator Barack Obama's response, available at http://www.asil.org/obamasurvey.cfm.

5 Robert Jervis, "Reports, Politics, and Intelligence Failures: The Case of Iraq," *The Journal of Strategic Studies*, vol. 3, no. 1 (Feb. 2006), p. 10.

6 The White House, National Security Strategy of the United States of America (Sept. 2002), p. 15.

7 On the difficulties of assessing adversary intentions, see Jack S. Levy, "Misperception and the Causes of War: Theoretical Linkages and Analytic Problems, *World Politics*, vol. 36 (1983), p. 76.

8 Thomas M. Franck, *Recourse to Force* (Cambridge, Eng.: Cambridge University Press, 2002), p. 107.

9 Emmerich de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct ad Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Book III, § 44 (1758).

10 Political scientists often discuss the problem of uncertain intentions of other states in terms of the "security dilemma." See Robert Jervis, "Cooperation Under the Security Dilemma," *World Politics*, vol. 30, no. 2 (1978), p. 167.

11 Franck, p. 107.

12 Webster introduced this formulation in an exchange with his British counterparts, after British forces attacked the schooner *Caroline* in U.S. territory because they expected it to ferry supplies across the border to Canada to aid rebels fighting British rule. Letter from U.S. Secretary of State Daniel Webster to Lord Ashburton, British Plenipotentiary, Aug. 6, 1842, in John Bassett Moore, *A Digest of International Law*, vol. 2, §217 (1906), p. 412.

13 Michael N. Schmitt, "Counter-Terrorism and the Use of Force in International Law," *Israel Yearbook on Human Rights*, vol. 32 (2002), pp. 53, 110.

14 Walter B. Slocombe, "Force, Pre-emption and Legitimacy," *Survival*, vol. 45 (2003), pp. 117, 125; Terence Taylor, "The End of Imminence?" *The Washington Quarterly*, vol. 27 (2004), pp. 57, 66. Of course there were exceptions to the perceptibility of major conventional attacks, such as Pearl Harbor.

15 Richard K. Betts, "Universal Deterrence or Conceptual Collapse? Liberal Pessimism and Utopian Realism," in Victor A. Utgoff, ed., *The Coming Crisis: Nuclear Proliferation, U.S. Interests, and World Order* (Cambridge, Mass.: The Belfer Center for Science and International Affairs, John F. Kennedy School of Government, Harvard University, 2000).

16 In 1981, Israel launched preemptive strikes on Iraq's Osiraq nuclear facility, alleging that Iraq was very close to achieving an operational nuclear arsenal—a claim refuted by after-the-fact analyses. Richard K. Betts, "The Osirak Fallacy," *The National Interest*, Spring 2006, p. 22. Following the 1991 Persian Gulf War, the United States and the international community more broadly discovered that they had vastly underestimated Iraq's progress toward a nuclear weapon capability. David A. Kay, "Denial and Deception Practices of WMD Proliferators: Iraq and Beyond," *The Washington Quarterly*, vol. 18, (Winter 1995), p. 85.

17 Betts, "The Osirak Fallacy," p. 22.

18 Kay, "Denial and Deception Practices," p. 85.

19 See Strobe Talbott, *Engaging India: Diplomacy, Democracy, and the Bomb* (Washington, D.C.: The Brookings Institution, 2004), pp. 2–3.

20 The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction ("WMD Commission"), Report to the President of the United States, pp. 3, 51, 517 (2005), available at http://govinfo.library.unt.edu/wmd/report/wmd_report.pdf.

21 Joseph Cirincione et al., "WMD in Iraq: Evidence and Implications," Carnegie Endowment for International Peace Report, (January 2004), available at http://www.carnegieendowment.org/files/Iraq3FullText.pdf (accessed on Oct. 5, 2009).

22 WMD Commission, pp. 3, 517.

23 Ibid., p. 148.

24 Richard K. Betts, "Analysis, War, and Decision: Why Intelligence Failures Are Inevitable," *World Politics*, vol. 31 (1978), p. 61.

25 For a historical sweep of the nuclear weapons capability uncertainty problem, see Jeffrey Richelson, *Spying on the Bomb: American Nuclear Intelligence from Nazi Germany to Iran and North Korea*, (New York: W.W. Norton & Co., 2007). For a forward-looking study of the problem of "capability surprise," see "Capability Surprise," Report of the Defense Science Board, (Washington, D.C.: Office of the Undersecretary of Defense for Acquisition, Technology, and Logistics, September 2009).

26 See, for example, the Netherlands Advisory Committee on Issues of Public International Law, Pre-emptive Action (July 2004), p. 20, available at www.aiv-advies.nl/ContentSuite/upload/aiv/doc/nr36eng(1).pdf.

27 "A More Secure World: Our Shared Responsibility," Report of the High-Level Panel on Threats, Challenges and Change, ¶¶ 190–91, U.N. Doc. A/59/565 (Dec. 2, 2004), available at http://www.un.org/secureworld/report.pdf.

28 Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium," *American Journal of International Law,* vol. 100 (2006), pp. 95–96; Jules Lobel, "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan," *Yale Journal of International Law*, vol. 24 (1999), pp. 537, 557; Louis Henkin, "The Use of Force: Law and U.S. Policy," in Louis Henkin et al., eds., *Right v. Might: International Law and the Use of Force* (New York: Council on Foreign Relations, 1991), pp. 37, 47.

29 See, for example, Mary Ellen O'Connell and Maria Alevras-Chen, "The Ban on the Bomb—and Bombing: Iran, the U.S., and the International Law of Self-Defense," *Syracuse Law Review*, vol. 57 (2007), p. 497.

30 U.N. High Level Panel, ¶¶ 189–90.

31 U.N. Charter, Articles 39 and 42.

32 Statute of the International Atomic Energy Agency, art. XII.C, Oct. 23, 1956, (1957).

33 Thomas H. Lee, "International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today," *Law and Contemporary Problems*, vol. 67 (Autumn 2004), pp. 147, 165; Allen S. Weiner, "The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?" *Stanford Law Review*, vol. 59 (2006), pp. 415, 428.

34 Jutta Brunnée, "The Security Council and Self-Defence: Which Way to Global Security?" in Niels Blokker and Nico Schrijver, eds., *The Security Council and the Use of Force: Theory and Reality—A Need for Change?* (Leiden, Netherlands: Brill Academic Publishing, 2005), pp. 107, 112; Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton, N.J.: Princeton University Press, 2007). Especially in the developing world, however, the Security Council's legitimacy has come under increasing challenge. Kofi Annan, "Strengthening of the United Nations: An Agenda for Further Change," Report of the U.N. Secretary General, ¶ 20, U.N. Doc. A/57/387 (Sept. 9, 2002), available at http://www.un.org/events/action2/A.57.0387.pdf.

35 Alex J. Bellamy, "Pre-empting Terror," in Alex J. Bellamy et al. eds., *Security and the War on Terror* (New York: Routledge, 2008), pp. 104, 114. This is not to deny the possibility of achieving tactical or strategic surprise in conventional conflicts. However, instances of successful surprise in conventional conflicts usually are caused not by an absence of perceptible, objective indicators of an attack, but by the target's subjective errors in discerning and interpreting these signals. Ephraim Kam, *Surprise Attack: The Victim's Perspective* (Cambridge, Mass.: Harvard University Press, 1988) p. 37. In contrast, WMD threats are characterized by a near-complete absence of perceptible, objective indicators of an imminent attack. Bruce G. Blair, *The Logic of Accidental Nuclear War* (Washington, D.C.: Brookings Institution Press, 1993), pp. 171–73.

36 James M. Acton, "The Problem with Nuclear Mind Reading," *Survival*, vol. 51 (Feb.-Mar. 2009), pp. 119, 123–24. For a specific example of this phenomenon in practice, see Steven R. Weisman, "UN Must Take Action over Iran, Rice Says; Tough Words May Not Persuade Russia, *International Herald Tribune*, April 28, 2006, p. 5.

37 For one, auxiliary processes like inspections tend to deal in types of evidence that are less speculative and more physical and scientific, such as traces of highly-enriched uranium and secret documentation of weapons programs. In addition, this evidence's origination or compilation in a widely-endorsed, multilateral process confers to it substantial credibility and legitimacy, such that a disbelieving state may find itself on the wrong side of overwhelming consensus.

38 David B. Rivkin, Jr. et al., "Preemption and Law in the Twenty-First Century," *Chicago Journal of International Law,* vol. 5, no. 2 (Winter 2005), p. 467; John Yoo, "International Law and the War in Iraq," *American Journal of International Law,* vol. 97, no. 3 (July 2003), p. 563.

39 See Michael J. Glennon, "The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law & Public Policy*, vol. 25, no. 2 (Spring 2002), pp. 539, 552–53.

40 Condoleezza Rice, National Security Advisor to the President, interview on CNN Late Edition, Sept. 8, 2002, transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html).

41 The White House, National Security Strategy of the United States of America (Sept. 2002), p. 23.

42 One prominent example is the "one-percent doctrine" ascribed to former Vice President Dick Cheney, whereby he states, "With a low-probability, high-impact event like this . . . [i]f there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response." Quoted in Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York: Simon & Schuster, 2006), pp. 61–62.

43 James B. Steinberg, "Weapons of Mass Destruction and the Use of Force," in Ivo H. Daalder, ed., *Beyond Preemption: Force and Legitimacy in a Changing World* (Washington, D.C.: The Brookings Institution, 2007), pp. 1, 19, 36.

44 Within this school is a sub-debate: whether reasonable necessity should be applied to authorize force in advance of intervention (justification) versus to excuse force after an intervention (mitigation). This chapter does not treat this sub-debate in detail. See George P. Fletcher and Jens David Ohlin, *Defending Humanity: When Force Is Justified and Why* (New York: Oxford University Press, 2008), pp. 107–28.

45 For an analysis showing that this view is quite prevalent as a matter of state practice, see W. Michael Reisman and Andrea Armstrong, "The Past and Future of the Claim of Preemptive Self-Defense," *American Journal of International Law*, vol. 100 (2006), p. 525.

46 Michael Doyle, *Striking First: Preemption and Prevention in International Conflict* (Princeton, N.J.: Princeton University Press, 2008), pp. 46–62.

47 Abraham D. Sofaer, "On the Necessity of Pre-emption," *European Journal of International Law*, vol. 14 (2003), p. 220.

48 Myers S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven, Conn.: Yale University Press, 1961), p. 218; W. Michael Reisman, "Assessing Claims to Revise the Laws of War,: *American Journal of International Law*, vol. 97 (2003), p. 82.

49 Abraham D. Sofaer, "International Law and Kosovo," *Stanford Journal of International Law*, vol. 36 (2000), pp. 1, 16.

50 Harold Hongju Koh, "Comment," in Doyle, *Striking First*, pp. 112–114; Michael Bothe, "Terrorism and the Legality of Pre-Emptive Force," *European Journal of International Law*, vol. 14 (2003), p. 227.

51 Many of these issues are discussed in Robert Jervis, "Understanding the Bush Doctrine," *Political Science Quarterly*, vol. 118, no. 3 (2003), p. 365; Jack Snyder, "Imperial Temptations," *The National Interest*, vol. 71 (Spring 2003), p. 29.

52 Sofaer, "On the Necessity of Pre-emption," p. 225.

53 Ibid.

54 Reisman, "Assessing Claims."

55 Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974) p. 103.

56 Ibid., pp. 103–04.

57 Doyle, *Striking First,* p. 62.

58 Thomas M. Franck, "Inspections and Their Enforcement: A Modest Proposal," *American Journal of International Law*, vol. 96 (Oct. 2002), p. 899.

59 Allen Buchanan and Robert Keohane, "The Preventive Use of Force: A Cosmopolitan Institutional Proposal," *Ethics and International Affairs*, vol. 18, no. 1 (2004), pp. 1–22.

60 A more detailed account of these issues is contained in Waxman, "The Use of Force," pp. 57–77.

61 Lobel, "The Use of Force," pp. 537, 538. See also Mary Ellen O'Connell, "Evidence of Terror," *Journal of Conflict and Security Law*, vol. 7 (2002), pp. 19, 21.

62 Some have suggested, for example, that anticipatory uses of force ought to require "clear and convincing" evidence of a coming attack. See Mary Ellen O'Connell, "Lawful Self-Defense to Terrorism," *University of Pittsburg*

Law Review, vol. 63 (2002), pp. 889–993. Others would impose a higher requirement, tantamount to an American criminal justice standard of "beyond a reasonable doubt."

63 Fletcher and Ohlin, *Defending Humanity*, p. 169; Jonathan I. Charney, "The Use of Force Against Terrorism and International Law," *American Journal of International Law*, vol. 95 (2001), pp. 835, 836; Lobel, "The Use of Force," p. 547.

64 William C. Potter and Gaukhar Mukhatzhanova, "Divining Nuclear Intentions: A Review Essay," *International Security*, vol. 33 (Summer 2008), p. 139; Scott D. Sagan, "Why Do States Build Nuclear Weapons?: Three Models in Search of a Bomb," *International Security*, vol. 21 (Winter 1996–97), p. 54.

65 WMD Commission, p. 153.

66 David E. Sanger and William J. Broad, "Allies' Clocks Tick Differently on Iran," *The New York Times*, March 15, 2009, p. WK1.

67 Lee, "International Law," pp. 158–66.

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