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THE 2006 NATIONAL SECURITY STRATEGY OF THE UNITED STATES: THE PRE-EMPTIVE USE OF FORCE AND THE PERSISTENT ADVOCATE

*Christian M. Henderson**

I. INTRODUCTION

On March 16, 2006, the current Bush administration in the United States released its second National Security Strategy (NSS).¹ Although the publication is a more low-key affair than its 2002 predecessor,² the 2006 NSS is not without some notable content. In particular, the 2006 NSS re-asserts the claim that the United States (and presumably other states)³ has the right to use pre-emptive force in dealing with what it perceives as a threat which may possibly come to fruition at some point in the future.⁴ Although the United States' claim of such a

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1. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (March 2006), available at <http://www.whitehouse.gov/nsc/NSS/2006/NSS2006.pdf> [hereinafter 2006 NSS].

2. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (September 2002), available at <http://www.whitehouse.gov/nsc/NSS/2002/NSS.pdf> [hereinafter 2002 NSS]; see Tom Farer, *The Bush Doctrine and the UN Charter Frame*, 37 INT'L SPECTATOR 91 (2002); see also Christine Gray, *The US National Security Strategy and the New "Bush Doctrine" of Preemptive Self-defense*, 1 CHINESE J. INT'L L. 437 (2002); Christian Henderson, *The Bush Doctrine: From Theory to Practice*, 9 J. CONFLICT & SEC. L. 3 (2004).

3. There is nothing in the NSS to suggest that the doctrine of pre-emption is restricted to use by the United States. For the proposition that "pre-emptive self-defense is only an American doctrine" see W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 90 (2003).

4. "Pre-emptive" force should be contrasted with that which is "anticipatory", that is force used in situations where there is a threat which is imminent and to be launched in the immediate future. The main difference between these types of action is the temporal nature of the threat which they are responding to. There is, however, a lack of any universally agreed terminology regarding the different modes of self-defense. The central debate surrounding the legality and legitimacy of anticipatory and pre-emptive self-defense has been presented in many other works and so will not be addressed in this short article. See Christopher Greenwood, *International Law*

right in the 2002 NSS was not unique,⁵ its significance and controversy, both politically and legally, was magnified as a result of the speculation that surrounded the Bush administration's foreign policy direction after the events of September 11, 2001.⁶

Given the events that occurred in the four years between the release of the two NSS documents, it is perhaps surprising that the Bush administration has persisted with its advocacy of what was quickly coined the "Bush doctrine".⁷ In particular, one could not have escaped the massive failures that have surrounded what may be considered the test case for such a doctrine, the use of force against Iraq, which occurred in 2003 but the consequences of which continue today.⁸ Furthermore, the UN has, on the whole, not been in favor of the adoption of such a wide unilateral right. Although (interestingly) accepting the legality of unilateral anticipatory self-defense in response to an imminent threat, the reports emanating from both the High Level Panel on Threats, Challenges and Change⁹ and the Secretary-General¹⁰ rejected the legality of the unilateral pre-emptive use of force in 2004 and 2005 respectively. The *2005 World Summit Outcome*

and the Pre-emptive Use of Force: *Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L. L. J. 7 (2003).

5. Previous United States administrations have made similar, if not as explicit, claims to pre-emption. See W. Michael Reisman and Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L. L. 525, 527-532 (2006).

6. Its significance was also heightened by the fact that the claim was made by the United States, the current sole political, economic and, most importantly, military superpower. As Reisman and Armstrong acknowledge, "[w]hen a major international actor claims a new right or its adjustment or termination, the implications for changing customary international law loom especially large, for, at every level of social organization, the making of law, much more than its institutional applications, is in great part political; doctrines of sovereign equality notwithstanding, the actions of a great power may be more generative of law than those of smaller states." *Id.* at 526; see *infra* Part III.

7. See Farer, *supra* note 2; see Gray, *supra* note 2; see Henderson, *supra* note 2.

8. It should be noted, however, that the official legal justification for Operation Iraqi Freedom provided by the United States was authorization by the Security Council. Letter from John D. Negroponte, United States Ambassador to the U.N., to the President of the Security Council (Mar. 21, 2003), U.N. Doc. S/2003/351. Nevertheless, although the doctrine of pre-emption was more of an underlying theme in the run up to Operation Iraqi Freedom than an official legal justification, it provided a good opportunity for the Bush administration to see how such a doctrine would work in practice in relation to combating a threat emanating from the alleged possession of WMD.

9. The U.N. Secretary General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 183-98, U.N. Doc. A/59/565 (Dec. 1, 2004).

10. The Secretary General, *Report of the Secretary General, In Larger Freedom: Towards Development, Security And Human Rights For All*, ¶¶ 122-26, U.N. Doc. A/59/2005 (Mar. 21, 2005).

document¹¹ did not even mention it, an indication of the ‘continuing deep divisions between states on the law on the use of force.’¹² Furthermore, the International Court of Justice (ICJ) has given no clear principled determination on the issue in either the *Wall* advisory opinion of 2004¹³ or the *DRC v Uganda* case of 2005,¹⁴ although it did make clear in the latter that “Article 51 of the Charter may justify a use of force in self-defense only within the strict confines there laid down.”¹⁵ It does not allow the use of force by a state to protect perceived security interests beyond these parameters. Other means are available to a concerned state including, in particular, recourse to the Security Council.¹⁶

By contrast, states have not been wholly averse to the theory behind unilateral pre-emptive force since the publication of the 2002 NSS. Although the Non-Aligned Movement (NAM), representing 118 states, has explicitly rejected the doctrine,¹⁷ states as varied as Australia,¹⁸ Israel,¹⁹ France,²⁰ Russia,²¹ and North Korea²² have expressed some support for the doctrine in

11. See G.A. Res. 60/1, ¶¶ 77-80, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). The World Summit took place at the U.N. headquarters in New York on September 14-16, 2005.

12. Christine Gray, *The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA*, 5 CHINESE J. INT’L L. 555, 566 (2006).

13. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (Jul. 9) [hereinafter *Wall* advisory opinion].

14. *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, 2005 I.C.J. 116 (Dec. 19).

15. *Id.* at ¶148.

16. *Id.* This statement from the ICJ very much echoed the conclusions of the High Level Panel and the Secretary-General. See Negroponte, *supra* note 8; see the U.N. Secretary General’s High Level Panel on Threats, Challenges and Change, *supra* note 9.

17. See XIV Conference of Heads of State or Government of The Non-Aligned Movement, Havana, Cuba, Sept. 16, 2006, Final Document, ¶¶ 26, 28, available at <http://www.reformtheun.org/index.php?module=uploads&func=download&fileId=1767>.

18. See Richard Beeston, *Australians Ready to Hit First Against Terrorists*, THE TIMES, Nov. 1, 2002, available at <http://www.timesonline.co.uk/tol/news/world/article820013.ece>; Neil Frankland, *Australia Supports Pre-emptive Strikes*, THE GUARDIAN (LONDON), Dec. 2, 2002, available at <http://www.guardian.co.uk/australia/story/0,,851884,00.html>.

19. Disengagement Plan of Prime Minister Ariel Sharon – Revised, ¶¶ 3(One)(3) and 3(Two)(2), May 28, 2004, available at http://www.knesset.gov.il/process/docs/DisengageSharon_eng_revised.htm.

20. Le Ministère de la Défense, *Projet de loi de programmation militaire 2003-2008*, le 11 septembre 2002 (Fr.), <http://www.defense.gouv.fr/defense/layout/set/popup/content/view/full/29831>, translated in Embassy of France in the United States, *2003-2008 Military Program Bill of Law*, <http://www.ambafrance-us.org/atoz/mindefa.pdf>.

21. Foxnews.com, *Putin: Russia Preparing Action Against Terrorists*, Sept. 17, 2004, <http://www.foxnews.com/story/0,2933,132687,00.html>.

connection with their individual security concerns.²³ The European Union, in its own *European Security Strategy*, although stressing the need for multilateralism and the UN Security Council's primary responsibility for the maintenance of international peace and security, was also open in its support for the theory behind pre-emption.²⁴

The current crisis surrounding Iran's nuclear program makes this an opportune moment to assess the Bush administration's persistent claim in the 2006 NSS to the right to use pre-emptive force. This article evaluates the claim in light of the above events, and attempts to provide a balanced account of some of the issues that arise from this, in particular the actual or potential impact upon the *jus ad bellum* (international law governing when force may be used) and its relevance in the evolving crisis concerning Iran.

II. THE THREATS IDENTIFIED IN THE 2006 NSS AND THE UNILATERAL PRE-EMPTIVE USE OF FORCE

The 2006 NSS was released nearly four and a half years after the terrorist attacks of September 11, 2001, but the impact of the tragic events of that day continue to reverberate poignantly through the core of the document. "America is at war"²⁵ are the first words of the letter by President Bush which precedes the substantive sections of the NSS. Even the 2002 NSS, released less than a year after these attacks, was less striking in this assertion.²⁶

However, the 2006 NSS is not solely a vehicle for the United States to formally re-advocate its claim to a right of unilateral pre-emptive use of force in fighting this war. In addition, the promotion of democracy is an underlying theme throughout the document. It is described as "the most effective long-term measure for conflict prevention and resolution,"²⁷ and is given greater emphasis than in the 2002 NSS.²⁸ Indeed, the 2006 NSS is a slightly moderated version of

22. *North Korean Defense Chief Warns of Pre-Emptive Attack on US*, AGENCE FRANCE-PRESS, Apr. 10, 2006, available at http://www.spacewar.com/reports/North_Korean_Defense_Chief_Warns_Of_Pre_Emptive_Attack_On_US.html.

23. This is not an exhaustive survey.

24. European Council, Common Foreign and Security Policy, *European Security Strategy*, at 7-8, Dec. 12, 2003, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/European%20Security%20Strategy.pdf

25. 2006 NSS, *supra* note 1, at i.

26. See 2002 NSS, *supra* note 2.

27. 2006 NSS, *supra* note 1, at 15.

28. The 2006 NSS is 18 pages longer than its 2002 predecessor essentially because of the increased volume of Section II: Champion Aspirations for Human Dignity.

its predecessor, with more reliance on alternatives to military measures.²⁹ Nevertheless, the claim to a right of unilateral pre-emptive use of force against threats of terrorism and weapons of mass destruction (WMD) is repeated in the recent strategy; it is this short-term measure in fighting the so-called “war” on which this paper will focus.

A. Global Terrorism

The first major threat to the United States’ national security that is identified is, unsurprisingly, that emanating from global terrorism. The 2006 NSS, like its predecessor, adopts a two-pronged strategy, stating firstly that “[t]he advance of freedom and human dignity through democracy is the long-term solution to the transnational terrorism of today.”³⁰ However, the war on terror is also described as both “a battle of ideas” and “a battle of arms,”³¹ so that the use of force is also necessary in the short-term. As the 2006 NSS re-asserts, “[i]n the short run, the fight involves using *military force and other instruments of national power*.”³² Indeed, “[t]o create the space and time for [the] long-term solution to take root, there are four steps [which are to be taken] in the short-term[.]”³³

[p]revent attacks by terrorist networks before they occur[,] . . . [d]eny WMD to rogue states and to terrorist allies who would use them without hesitation[,]³⁴ . . . [d]eny terrorist groups the support and sanctuary of rogue states[,] . . . [and] [d]eny the terrorists control of any nation that they would use as a base and launching pad for terror.

Clearly it is envisioned that, if necessary, the pre-emptive use of force may have a role in each of these steps.

B. Weapons of Mass Destruction

Instead of placing emphasis on the long-term strategy of the promotion of democracy and freedom, the NSS section on WMD focuses more on the long-term diplomatic strategy of preventing states from first producing fissile material, which is a key component to making nuclear weapons, and then proliferating such material to rogue states or terrorists.³⁵ Indeed, the NSS makes

29. Reisman & Armstrong, *supra* note 5, at 531-32. The 2006 NSS does not advocate the use of force in promoting democracy and freedom.

30. 2006 NSS, *supra* note 1, at 11.

31. *Id.* at 9.

32. *Id.* (emphasis added).

33. *Id.* at 11-12.

34. For more on the strategy to prevent WMD production and proliferation, *see infra* Part II.B.

35. 2006 NSS, *supra* note 1, at 19-21. The strategy’s first objective “requires closing a loophole in the Non-Proliferation Treaty that permits regimes to produce fissile material that can be used to make nuclear weapons under cover of a civilian nuclear program.” *Id.* at 20. The strategy’s second

clear that “[t]aking action need not involve military force. Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners.”³⁶ The emphasis on this part of the strategy is notably increased from the 2002 NSS.

Nevertheless, in combating this threat in the short-term, as in the 2002 NSS, the use of military force is not ruled out:

[i]f necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.³⁷

Similar to the 2002 NSS section on the threat of global terrorism, but in contrast to its section on WMD,³⁸ the 2006 NSS legally bases pre-emption on self-defense.³⁹ The controversy surrounding this assertion centers on the fact that, whereas Article 51 of the U.N. Charter states that the right of self-defense becomes available if an “armed attack occurs,”⁴⁰ the NSS goes beyond this so as not to “rule out the use of force before attacks occur” and, going beyond the controversial doctrine of anticipatory self-defense,⁴¹ “even if uncertainty

objective “must address the danger posed by inadequately safeguarded nuclear and radiological material worldwide [,]” and build on the success of the proliferation security initiative (PSI). *Id.* at 21. The PSI is “global effort [launched by the Bush Administration in May 2003] that aims to stop shipments of WMD, their delivery systems, and related material.” *Id.* at 18. That effort was fruitful as seventy countries have actually supported the initiative. *Id.*

36. *Id.* at 23.

37. *Id.*

38. Although, the summary of the 2002 NSS in the 2006 NSS section on WMD mentions acting “preemptively” in exercising its “inherent right of self-defense,” the United States preference is “that nonmilitary actions succeed, [as] no country should ever use preemption as a pretext for aggression.” *Id.* at 18.

39. Gray, *supra* note 12, at 563.

40. Article 51 of the U.N. Charter governs self-defense. It states that [n]othing 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” U.N. Charter art. 51. The right has been declared to also exist in customary international law. *See* *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

41. Although the legality of the doctrine of anticipatory self-defense is still controversial, and has not been determined by the ICJ, it has received a large amount of support. *See, e.g.*, the U.N. High Level Panel on Threats, Challenges and Change, *supra* note 9; *see* the Secretary General, *supra* note 10; *see also* Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L. & COMP. L.Q. 963 (2006).

remains as to the time and place of the enemy's attack." The 2006 NSS makes no reference to the requirement of imminence. This is perhaps an indication that the Bush administration has desisted in its attempt to argue that the meaning of this requirement in customary international law⁴² should be reinterpreted so as to expand its temporal nature in light of the contemporary threats of terrorism and WMD, as it had in the 2002 NSS.⁴³ However, this is more likely an accidental omission and of no real significance given that the 2006 NSS was clear in its assertion that "[t]he place of pre-emption in our national security strategy remains the same."⁴⁴ A notable difference between the 2002 and 2006 NSS documents, however, is their identification of the rogue states from which the threats of terrorism, support for terrorism, and WMD production, possession, and proliferation emanate.

C. Adjusting the Focus: The 2006 NSS and Rogue States

In President Bush's January 2002 State of the Union address, an 'axis of evil' was identified as consisting of Iraq, Iran and North Korea.⁴⁵ The 2002 NSS subsequently focused its concerns on those states. With the alleged threat from Iraq addressed through Operation Iraqi Freedom, in the 2006 NSS it now appears that concern has broadened to a tyrannical 'heptagon of hate' consisting of North Korea, Iran, Syria, Cuba, Belarus, Burma, and Zimbabwe,⁴⁶ although only North Korea,⁴⁷ Iran,⁴⁸ and Syria⁴⁹ receive any real attention.

However, given the situation in Iraq at the time of release of the 2006 NSS,⁵⁰ there was also a substantial amount of focus upon that state. In particular, in the series of justifications offered by the NSS for the situation in

42. The requirement of imminence, along with necessity and proportionality as traditionally cited as the controls on actions taken in self-defense date back to the correspondence that emanated from the *Caroline* incident of 1837. See Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Special Representative to the U.S. (July 27, 1842) available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> (providing this letter and other important primary materials of the *Caroline* case).

43. This argument was made when it was said that "[the United States] must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." 2002 NSS, *supra* note 2, at 15.

44. 2006 NSS, *supra* note 1, at 23.

45. George W. Bush, U.S. President, State of the Union Address (Jan. 29, 2002), available at <http://whitehouse.gov/news/releases/2002/01/20020129-11.html>.

46. 2006 NSS, *supra* note 1, at 3.

47. *Id.* at 19, 21, 35. North Korea is mentioned in relation to its WMD threat.

48. Iran is mentioned in relation to its support for terrorism. *Id.* at 9, 12, 38. Iran is also mentioned in relation to its WMD threat. *Id.* at 19, 20, 35.

49. *Id.* at 9, 12, 38. Syria is mentioned briefly in relation to its support for terrorism.

50. See *infra* note 157.

Iraq and the causes for it,⁵¹ it becomes immediately apparent that Iraq's pre-war possession of WMD is not one of them. In recognition of the inaccuracy of the pre-war intelligence estimates, and in a moment of rare humility, the 2006 NSS noted that United States intelligence "must improve" and it "must learn from this experience if [it is] to counter successfully the very real threat of proliferation."⁵² Nevertheless, there was "no doubt that the world is a better place for the removal of this dangerous and unpredictable tyrant,"⁵³ and the deterrent aspect of the Iraq invasion was emphasized so that other rogue states now know that "bluff, denial, and deception is a dangerous game that [they] play at their peril."⁵⁴ This 'dangerous game' is one that the NSS claims Iran is currently playing:

[t]he Iranian regime's true intentions are clearly revealed by the regime's refusal to negotiate in good faith; its refusal to come into compliance with its international obligations by providing the IAEA access to nuclear sites and resolving troubling questions; and the aggressive statements of its President calling for Israel to "be wiped off the face of the earth."⁵⁵

Furthermore, "[t]he Iranian regime sponsors terrorism; threatens Israel; seeks to thwart Middle East peace; disrupts democracy in Iraq; and denies the aspirations of its people for freedom."⁵⁶ In short, the United States "may face no greater challenge from a single country than from Iran."⁵⁷

Aside from its nuclear threat, the NSS also claims that North Korea "counterfeits our currency; traffics in narcotics and engages in other illicit activities; threatens the [Republic of Korea] with its army and its neighbors with

51. The 2006 NSS states that "Saddam Hussein's continued defiance of 16 UNSC resolutions over 12 years, combined with his record of invading neighboring countries, supporting terrorists, tyrannizing his own people, and using chemical weapons, presented a threat we could no longer ignore." 2006 NSS, *supra* note 1, at 23.

52. *Id.* at 23. The aftermath of the invasion witnessed a frenzy of publicity on the failure of the pre-war intelligence estimates after the lack of discovery of any WMD, or serious programs of, particularly after the final report published by the Iraq Survey Group on September 30, 2004. See the Comprehensive Report of the Special Advisor to the DCI [Director of Central Intelligence] on Iraq's WMD, (Sept. 30, 2004), available at https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html. Indeed, in the pursuit of improving intelligence, the United States established an investigation to examine the failures of the intelligence which was relied upon in the run up to the invasion. See Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, (Mar. 31, 2005), available at http://www.wmd.gov/report/wmd_report.pdf.

53. 2006 NSS, *supra* note 1, at 24.

54. *Id.*

55. *Id.* at 20.

56. *Id.*

57. *Id.* For more on the current stand-off between the United States and Iran, see *infra* Part IV.

its missiles; and brutalizes and starves its people.”⁵⁸ Although it was stressed in the cases of both Iran and North Korea that the long term goal is bringing freedom to the people of these two states,⁵⁹ it was also emphasized that until that time *all measures* will be taken to protect the national and economic security of the United States.⁶⁰ This is a clear reference to the short-term measure of unilateral pre-emptive self-defense as set out above in sections A and B. Having highlighted the United States’ reassertion of the claim to such a right, this paper addresses the question as to the significance of this reassertion in terms of the *jus ad bellum* framework.

III. THE CALL FOR NORMATIVE CHANGE AND CUSTOMARY INTERNATIONAL LAW FORMATION

A. *The Initial Call in the 2002 NSS*

The prohibition of the threat or use of force is of fundamental importance in the international legal system and is of both a conventional⁶¹ and customary nature.⁶² The proposition that it is *jus cogens* has been made on several

58. *Id.* at 21.

59. 2006 NSS, *supra* note 1, at 20 (discussing Iran); *see id.* at 21 (discussing North Korea).

60. *See id.* at 20 (discussing Iran); *see id.* at 21 (discussing North Korea); *see N Korea Tests Long Range Missile*, BBC NEWS, July 5, 2006, <http://news.bbc.co.uk/1/hi/world/asia-pacific/5148648.stm>; *see North Korea Claims Nuclear Test*, BBC NEWS, Oct. 9, 2006, <http://news.bbc.co.uk/1/hi/world/asia-pacific/6032525.stm> (noting that since North Korea’s nuclear status was confirmed in October 2006 when it carried out a nuclear test, any talk of an attack against it has been completely absent. That nuclear test came just a few months after it had tested long-range missiles); *see* Jonathan Watts & Julian Borger, *North Korea to Shut Down Nuclear Reactor in Arms for Energy Deal*, THE GUARDIAN, (London), Feb. 14, 2007, available at <http://www.guardian.co.uk/frontpage/story/0,,2012593,00.html> (noting that a breakthrough once again appears to have been made in the six-party talks). Iran, as the 2006 NSS makes clear, is the major current concern of the United States which will be examined in more detail in Part IV of this paper.

61. *See* U.N. Charter art. 2, para. 4 (stating that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”)

62. Statute of the International Court of Justice art. 38, para. 1(b), June 26, 1945, 59 Stat. 1055, 1060, 39 AJIL Supp. 215 (1945), (referring to “international custom, as evidence of a general practice accepted as law”); *see, e.g.*, 1986 I.C.J. 14, *supra* note 40, at 100; *see, e.g.*, North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20); International Law Association, London Conference (2000), Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, at 7, available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> (stating that customary international law consists of an objective or material element -state practice- and a “subjective element often referred to as *opinio juris*”) [hereinafter I.L.A. Report]; G. M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 81 (Martinus Nijhoff 1993).

occasions by different actors.⁶³ Thus, claims to use force in new circumstances outside of self-defense or Security Council authorization⁶⁴ inevitably face this major obstacle from the outset.

Nevertheless, the carving out of a new exception to the prohibition, or its complete abolition, is not suggested in the NSS.⁶⁵ Rather, it is claimed that, due to the contemporary threats enunciated in the NSS, the parameters of self-defense as an established exception to the prohibition, which is also of a conventional and customary nature,⁶⁶ should be widened to enable states to take effective action to combat these threats.⁶⁷ In other words, because the circumstances necessitating action in self-defense have widened, the contemporary exception of self-defense that was formulated in times when such circumstances were unforeseen must follow suit and permit action in pre-emptive self-defense to be taken.⁶⁸

63. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, UN Doc. A/Conf.39/27, 1155 U.N.T.S. 331 (stating that "a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character") [hereinafter Vienna Convention]; see, e.g. 1986 I.C.J. 14, *supra* note 40, at 90; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 490 (Oxford University Press 6th ed. 2003) (1966); YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 99-102 (Cambridge University Press 4th ed. 2005); see ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE 21-22 (Oxford University Press 1994) (Higgins rejects the idea that there exists a separate category of norms with "higher normative status." Rather, it is clear that there are certain "norms that we hold dear"); see generally ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (Oxford University Press 2006).

64. See U.N. Charter ch. VII (providing two exceptions to the prohibition of the use of force expressed in Article 2(4) of the Charter).

65. See JAMES BRIERLY, THE LAW OF NATIONS 4 (Oxford University Press 6th ed. 1963) (noting that because "[a]ny . . . act or declaration may, so far as it goes, be some evidence that a custom, and therefore that a rule of international law, does or does not exist" or is or is not emerging, the distinct elements of state practice and *opinio juris* of customary international law may be manifested in the same conduct); BROWNLIE, *supra* note 63, at 6; see also DANILENKO, *supra* note 62, at 82; for examples of the forms state practice may take, see D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 23 (Sweet and Maxwell 6th ed. 2004); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 10 (1974-75); I.L.A. Report, *supra* note 62, at 7, 14 (stating that "it is in fact often difficult or even impossible to disentangle the two elements."). The NSS can therefore be considered as evidence of both U.S. state practice and *opinio juris*. For more on the distinction between physical and verbal acts see *infra* D.II.

66. See 1986 I.C.J. 14, *supra* note 40.

67. See *supra* note 43.

68. An important and often overlooked distinction to be made in evaluating the evolution of rules of customary international law is whether a proposed change to existing custom concerns a *permissive* or an *obligatory* rule. Indeed, this distinction is one that is often overlooked in the

When the U.N. Charter was adopted in 1945, the inclusion in Article 51 of the restriction on self-defensive measures to situations where “an armed attack occurs” would appear to restrict any previously existing customary international law governing the matter under the principle of *lex posterior derogate priori*.⁶⁹ Today, the two sources of self-defense “are substantially identical because of the interaction between the Charter and customary international law, on the one hand, and the virtual universality of the UN, on the other hand.”⁷⁰ Consequently, state practice in regard to self-defense is significant for both treaty interpretation⁷¹ and customary international law formation. Indeed, “[i]n most instances, it is virtually impossible to determine for which of the two purposes state practice is pertinent.”⁷² However, if state practice was to begin to develop involving the right of pre-emptive self-defense subsequent to the adoption of the Charter, with the connected belief by states that it was either lawful or necessary,⁷³ to attempt to interpret Article 51 to incorporate this development would lead to it being bent beyond breaking-point and the development of the customary law would effectively repeal the formula for self-defense as set out in that provision.⁷⁴

literature and in the pronouncements of the ICJ. However, whereas the formation of the latter burdens states so that they are obliged to undertake a *duty*, that is to positively carry out or refrain from action, permissive rules grant a legal *right* to states to carry out action. Nevertheless, the invocation of such rights by one state may have collateral obligations for other states. Indeed, “what is permissible in the case of state A can connote an obligation on the part of state B.” I.L.A. Report, *supra* note 62, at 33 n.80. Consequently, although on the basis of the involvement of a permissive right it may consequently be thought that pre-emptive self-defense carries with it less of a burden of proof in its establishment as custom than a rule which obliges all states, this is not the case. For example, if a state was to decide to exercise this right, it would ultimately lead to the fundamental rights of another state being suspended, such as territorial integrity whilst force is being used against terrorists stationed there, and imposes obligations on states not to prevent the state from acting.

69. A later law repeals an earlier one. See BLACK’S LAW DICTIONARY 912 (6th ed. 1990).

70. Tarciscio Gazzini, *The Rules on the Use of Force at the Beginning of the XXI Century*, 11 J. CONFLICT & SECURITY L. 319, 320 (2006); but see 1986 I.C.J. 14, *supra* note 40, at 93-96.

71. See Vienna Convention, *supra* note 63, art. 31, para. (3)(b).

72. MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 48 (Palgrave 2001).

73. For more on the distinction between these two subjective elements, see *infra* note 97.

74. The fact that subsequent state practice can modify or repeal a treaty has received wide support. See, e.g., DANILENKO, *supra* note 62, at 167. For more on the relationship between treaty and customary international law, see Oscar Schachter, *Entangled Treaty and Custom*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 717 (Yoram Dinstein ed., 1989). Although one may object to this possibility on the basis that Article 103 of the U.N. Charter is clear that obligations contained in the Charter prevail over a member state’s “obligations under any other international agreement,” Article 51 is a provision which contains a *right* and not an *obligation* and is therefore unaffected by Article 103. Similarly, the

The widening of the parameters of this exception leads to an inversely proportional narrowing of the rule prohibiting force. For the modification of such a fundamental rule to occur, a fundamental event or change of circumstances would be necessary.⁷⁵ In this respect, although international terrorism is by no means a new phenomenon, the issue has been raised as to whether the events of September 11, 2001 were a "constitutional moment" for international law.⁷⁶ In certain respects such a proposition may appear accurate because, due to the aftermath of the events of this day, it can now be said with more certainty that the actions of non-state actors may amount to an armed attack giving rise to the right of self-defense.⁷⁷ However, the general acceptance of a right to use force in prevention of such attacks and against states which pose a threat of WMD is not so apparent.

An important customary international law requirement is that in the time since any proposed change to the law is made,⁷⁸ "short though it might be,"⁷⁹ the general support of other states should emerge,⁸⁰ manifested through

'international agreement' in forming new custom would in this instance be in regard to the *right* of pre-emptive self-defense.

75. In connection with the source of international law under discussion here, it has been noted that "[c]ustomary law continuously undergoes changes under the impact of changes in the international community." DANILENKO, *supra* note 62, at 123. In terms of the prohibition of the use of force as a treaty provision in Article 2(4) of the U.N. Charter, under the doctrine of *rebus sic stantibus* contained in Article 62 of the Vienna Convention on the Law of Treaties, there is a limited right of states to suspend, terminate or withdraw from a treaty where the effect of the change in circumstances is "radically to transform the extent of obligations still to be performed under the treaty." However, there is no evidence in the NSS documents that the United States is claiming such a right.

76. Murphy uses this phrase to mean "a moment in which seismic shifts in international law occurred." Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 719-20 (2005).

77. See Henderson, *supra* note 2, at 3-6; Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L COMP. L. Q. 141, 151 (2007). Although in a much criticized limiting statement, the ICJ noted in the Wall advisory opinion that "[a]rticle 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack *by one state against another state*." Wall advisory opinion, *supra* note 13, at 194 (emphasis added).

78. Harris has questioned whether such a proposed change should be seen "more as an 'offer', which other states can accept or reject." See HARRIS, *supra* note 65, at 38-39. However, the US proposal on this occasion is more of an assertion than an offer.

79. North Sea Continental Shelf, *supra* note 62; indeed, "[i]t is probably in the nature of any customary process that, being informal, it is not possible to specify precisely how much time is required for a customary rule emerge [sic]." I.L.A. Report, *supra* note 62, at 20 n.47. However, for reasons outlined below, the notion of 'instant' customary international law is rejected in connection with custom on this occasion. See *infra* D.II.

80. Because the proposed new custom would not abolish the prohibition of the use of force or carve a new exception out of it, such as the doctrine of humanitarian intervention would, it is

consistent and uniform state practice and *opinio juris*.⁸¹ Purely in terms of numbers, at the time of the release of the 2006 NSS, the United States assertion of a right to use unilateral force in pre-emption in 2002 did not appear to have gained this type of support.⁸² However, to discount the impact of the claim in the NSS on this basis alone would be to dismiss other relevant factors that should be taken into consideration in evaluating any actual change or potential evolution of customary international law.

B. The Significance of Specially Affected and Powerful States

It is a well established proposition that customary international law is not made simply by the majority and the practice of states with a particular interest in the subject matter is of great relevance.⁸³ The criterion for the formation of customary international law “is in a sense *qualitative* rather than quantitative. That is to say, it is not simply a question of how many states participate in the practice, but *which* States.”⁸⁴ As Professor Lauterpacht observed:

assuming that we are confronted here with the creation of new international law by custom, what matters is not so much the number of states participating in its creation and the length of the period within which that change takes place, as the relative importance, in any particular sphere, of states inaugurating the change.⁸⁵

This weighted significance of states with a particular interest can also be seen in the jurisprudence of the ICJ. For example, in the *North Sea Continental Shelf* cases it was noted that maritime nations have more of an impact upon the law of the sea than land-locked countries.⁸⁶ This also arose in the *Nuclear*

possible that the support required does not need to be that of “the international community of States as a whole.” Vienna Convention, *supra* note 63, at art. 53; *see* North Sea Continental Shelf, *supra* note 62. For more on the forms that support for customary international law purposes can take, *see infra* D.I and D.II.

81. *See* DANILENKO, *supra* note 62, at 94-98; *see infra* note 97.

82. This statement is proved simply by the fact that after its initial claim in 2002, the right was rejected by the Non-Aligned Movement, representing 118 states. *See supra* note 17; *see also* Christine Gray, *A Crisis of Legitimacy for the UN Collective Security System?*, 56 INT’L & COMP. L. Q. 157, 163-64 (2007). However, if the weight to be attributed to the various forms of state practice is measured in terms of its ‘cost’ to the state undertaking it, the ‘cost’ for each of these states in making such an objection in a collective form, where this is just one of many issues discussed and may involve no more than a simple vote on the final document, is possibly less than if they had gone to the effort to make their objections known on an individual basis. For more on the idea of ‘cost’ in customary international law formation, *see* MICHAEL BYERS, *CUSTOM, POWER, AND THE POWER OF RULES*, 156-57 (Cambridge University Press 1999); *see also infra* note 104.

83. HARRIS, *supra* note 65, at 37.

84. I.L.A. Report, *supra* note 62, at 26.

85. H. Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT’L L. 376, 394 (1950).

86. 1969 I.C.J. 3, *supra* note 62, at 73.

Weapons case where special attention was paid to the practice of states with nuclear weapons when considering whether their use was lawful.⁸⁷

The same reasoning can be applied to the right of pre-emptive self-defense. Determining “who is ‘specially affected’ will vary according to circumstances,”⁸⁸ but not only is the United States the self-appointed leader in the so-called ‘global war on terror,’ it can also be seen that, on the whole, the states that have accepted or shown sympathy towards the principle behind pre-emption in light of the publication of the 2002 NSS are more significant for the purposes of customary international law formation in this area⁸⁹ as they appear to be states which can be said to be “specially affected”⁹⁰ by the threat of terrorism. Furthermore, “there is no evidence that the customary law-making process necessarily requires supportive participation of virtually all ‘specially affected’ states. It appears that a new practice can acquire a widespread and representative character with the participation of just a certain *representative* number of ‘specially affected states.’”⁹¹ There is some evidence that certain states from different political, economic and legal systems⁹² and from different continents⁹³ have shown sympathy towards the principle behind pre-emption.⁹⁴

However, the position of these states as “specially affected” on this issue may not be the only relevant factor in considering their impact upon customary international law formation. For example, it has been noted that “custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their *wealth and power* or because of their special relationship with the subject-matter of the practice.”⁹⁵ Consequently, even though only a few states showed any open support towards the principle

87. *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, 1996 I.C.J. 226, 263 (Jul. 8) [hereinafter *Nuclear Weapons*].

88. I.L.A. Report, *supra* note 62, at 26.

89. See *supra* notes 18-23 and accompanying text for a non-exhaustive list of these states.

90. This term comes from the *North Sea Continental Shelf Cases*. 1969 I.C.J. 3, *supra* note 62, at 42.

91. DANLIENKO, *supra* note 62, at 95 (emphasis added).

92. That is, not just western democracies, as North Korea demonstrates. See *supra* Part I.

93. That is, from North America, Australia, Europe and Asia. See *supra* Part I.

94. The idea that a regional or special custom might develop between these states is discounted as such a custom could only arise if the use of force in pre-emption was to be invoked against those who had agreed to it.

95. MALCOM SHAW, *INTERNATIONAL LAW* 75 (Cambridge University Press 5th ed. 2003) (emphasis added); See also CHARLES DE VISSCHER, *THEORY AND REALITY OF PUBLIC INTERNATIONAL LAW* 154 (1956) (noting that “every international custom is the work of power”); Gazzini, *supra* note 70, at 327 (stating that “considerations of power and even economic bargaining are certainly not extraneous” to customary international law formation). More specifically, in terms of the power of the United States having an impact upon customary international law, see Reisman & Armstrong, *supra* note 5.

behind the right, their special interest and powerful nature perhaps contribute to a leveling of the balance.

If this appears sympathetic to the claim of the United States, this is perhaps qualified by the fact that even these states exhibited inconsistent support and did not go as far as to formally adopt pre-emptive self-defense as a legal doctrine in quite the same way as the United States did in the NSS documents.⁹⁶ This is indicative of the fact that, even amongst these states, *opinio juris* had not developed to meet the claim of the United States. Furthermore, after its express rejection by the High-Level Panel and the Secretary-General of the U.N. and the implicit rejection by the ICJ, it is unlikely that any state, even the United States, would have invoked pre-emption in justification under the basis that it *currently* possessed the legal right to act in this way, that is, *opinio juris*. Consequently, at the time of the release of the 2006 NSS it is safe to conclude that no modification of the *jus ad bellum* regime had occurred.

C. *Opinio Necessitatis*⁹⁷ and the Pre-emptive Use of Force

Although the actual impact of the 2002 NSS has been limited, this does not mean that the claim made in the document did not potentially lay the foundations for a modification in the future. Indeed, as Thirlway noted, the initial perceived necessity behind a state's claim plays a part in the modification of customary international law: if a State decides to act in a way inconsistent with a recognized rule of custom, it will no doubt have good and sufficient reason for doing so, and perhaps even for thinking that its approach should be generalized – that the rule needs to be modified consistently with its action. It will however, almost by definition, not be acting because it is convinced that there is already a new rule. The process by which customary rules change and develop thus presents theoretical difficulties; but it is a process which does occur.⁹⁸

96. For example, although John Howard, the Prime Minister of Australia has been a close ally of the United States in the war on terror and perhaps the strongest supporter of the theory behind pre-emption, no mention is made of it in Australia's defense updates on its security strategy or its national security in either 2003 or 2005 respectively. See Ministry of Defence, Australia's Security Strategy: A Defence Update 2003, Feb. 26, 2003 (Austl.), <http://www.defence.gov.au/ans2003/Report.pdf>; see also Ministry of Defence, Australia's National Security: A Defence Update 2005, Dec. 15, 2005 (Austl.), http://www.defence.gov.au/update2005/defence_update_2005.pdf.

97. This is formed from the full title of the subjective element of customary international law, *opinio juris sive necessitatis*, that is, an "opinion as to law or necessity[.]" so that rather than a state manifesting a belief that a practice is required by law (*opinio juris*) it is instead a belief that a practice is required by necessity (*opinio necessitatis*). See Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 115, 122 (Malcom D. Evans ed., Oxford University Press 2d ed. 2006).

98. *Id.* at 125. Judge Lachs, in his dissenting opinion in the North Sea Continental Shelf cases, stated

This is an implicit recognition of the importance that *opinio necessitatis* can play in the formation of customary international law; that is, although a practice is not currently regarded as lawful, it is regarded as necessary for social, economic, political or military reasons.⁹⁹ In other words, the term signifies that the acts of generators must have been carried out with the awareness, or at the very least the instinct, that they were meeting a social necessity.¹⁰⁰

It appears that since the release of the 2002 NSS, although there is an absence of *opinio juris*, there are signs amongst certain states that *opinio necessitatis* has formed as to the right of pre-emptive self-defense in combating terrorism,¹⁰¹ if not yet as to combating the threat of state development and possession of WMD. This leads to the question of the impact of the persistent advocacy of the claim in the 2006 NSS and whether this has led to a hardening of *opinio necessitatis* into *opinio juris*.¹⁰²

D. The 2006 NSS: The Fruits of Persistent Advocacy?

Whereas after the release of the 2002 NSS there was at least some notable reaction by states, this does not appear to have been the case after the release of its successor in 2006. At the time of writing since the release of the 2006 NSS, there appears to be little sign of the fruits of persistent advocacy emerging and little change in the general position of states regarding the issue of the pre-emptive use of force.¹⁰³ This is not without significance, however, as it is a well

to postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction – and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated.

See 1969 I.C.J. 3, (Dissenting Opinion of Judge Lachs) *supra* note 62, at 231.

99. ANTONIC CASSESE, *INTERNATIONAL LAW* 157-58 (Oxford University Press 2d ed. 2005).

100. Georges Scelle, *Règles générales du Droit de la Paix*, 46(IV) *Recueil des Cours* 432, 433 (1933). (“d’abord que les actes générateurs doivent avoir été accomplis avec le sentiment, ou tout au moins l’instinct, d’obéir à une nécessité sociale.”).

101. Reisman & Armstrong, *supra* note 5, at 547.

102. This is a gradual process. See DANILENKO, *supra* note 62, at 124 (stating that “[w]hile early practice in conflict with the existing rules inevitably constitutes a violation of accepted law, the deviating behavior may acquire the quality of law-changing practice if new claims *gradually* find support among states.” (Emphasis added)).

103. It should be noted that the N.A.M has reiterated its objection to the doctrine of pre-emption since the release of the 2006 NSS: “Article 51 of the UN Charter is restrictive and . . . it should not be re-written or re-interpreted” and it “[o]ppose[d] and condemn[ed] . . . the adoption of the doctrine of pre-emptive attack.” XIV Conference of Heads of State or Government of The Non-Aligned Movement, Havana, Cuba, Sept. 16, 2006, *Final Document*, ¶¶ 20(2), 22(5), available at <http://www.reformtheun.org/index.php?module=uploads&func=download&fileId=1767>. This is an example of persistent objection and is significant. However, as was mentioned above, the Havana document should not necessarily be attributed the same weight in terms of state practice and *opinio juris* as 118 separate objections by the individual states. Indeed, it is very likely that

accepted proposition that for the purposes of customary international law state practice also includes omissions¹⁰⁴ and silence.¹⁰⁵

1. The Significance of Silence

Silence by states in the face of a controversial claim can mean a number of things. It may indicate that a state is tacitly agreeing¹⁰⁶ or acquiescing in the claim,¹⁰⁷ or it may mean that it has “a simple lack of interest in the issue.”¹⁰⁸ Generally, states in support of a claim made by another state rarely openly show such support, preferring to acquiesce in the claim instead. Thirlway implicitly rejects the idea that states normally support a claim by positively championing its cause:

[i]t should not be overlooked that State practice is two-sided; one State asserts a right, either explicitly or by acting in a way that impliedly constitutes such an assertion, and the State or States affected by the claim then react either by objecting or by refraining from objection. The practice on the two sides adds up to imply a customary rule, supporting the claim if no protest is made, or excluding the claim if there is a protest. The accumulation of instances of the one kind or the other constitutes the overall practice required for establishment of a customary rule.¹⁰⁹

this numerical tally includes some states which would not have made a separate objection outside of the organization. For more on the persistent objector rule, see Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L.1 (1985). For the N.A.M.’s objection after the claim made in the 2002 NSS, see *supra* notes 16 and 82.

104. The I.L.A. Report noted that “[o]missions are perfectly capable, if they are sufficiently unambiguous, of constituting acts of State practice.” I.L.A. Report, *supra* note 62, at 36. However, states omitting to physically invoke a right with the threat or use of force as its basis can not be taken as state practice and *opinio juris* for the proposition that no right exists. The reasons why states fail to take such physical action are multifarious and, in this case, there is a fundamental rule prohibiting such conduct. As Danilenko has described, “the ascertainment of the precedential value of abstentions may create serious practical problems because it may not always be clear what is the reason behind a particular ‘negative’ practice. [] In view of the dubious nature of abstentions, there should always be positive indications that a particular course of conduct is regarded as obligatory by the members of the international community.” DANILENKO, *supra* note 62, at 86 n.35.. See also S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., (ser. A) No. 10, at 29 and 96 (Sept. 7). What is more significant here is the silence by states in the face of the claim by the United States.

105. Akehurst, *supra* note 65, at 10; SHAW, *supra* note 95, at 80 n.46.

106. BROWNIE, *supra* note 63, at 8.

107. Aust has written that “[w]hen a state that has an interest in the matter is silent, it will generally be regarded as acquiescing in the practice.” ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 7 (Cambridge University Press 2005). This implies that states that do not have an interest which remain silent are also acquiescing.

108. BROWNIE, *supra* note 63, at 8.

109. Thirlway, *supra* note 97, at 123.

Harris makes this observation in more explicit terms: “[f]or the purposes of the formation of rules of customary international law, consent is commonly indicated by state practice not in the form of positive statements or other action approving or following the practice in question, but of acquiescence.”¹¹⁰

A state may also remain silent because of factors not related to its opinion as to the legality of the claim at hand. For example, a state may remain silent because it is a close ally, recipient of aid or a trading partner with the claiming state, not because it necessarily believes the proposed custom is lawful or because it simply does not care. After the reiteration of the claim in the 2006 NSS, some states may not have taken an official position on the claim because they are not threatened by terrorism and WMD, and also would not be a target of one of the states that has shown sympathy towards the right in principle. Additionally, states that may have been more vociferous in their support of the reiteration of the doctrine may have been deterred by the colossal failures of Iraq,¹¹¹ and those who may have been more vociferous in their rejection may have been deterred because they are recipients of aid from, or trading partners with, the states that have shown sympathy to the claim.¹¹²

Consequently, *in reality* due to the multifarious reasons why states may refrain from protesting, silence cannot be equated with acquiescence, but *for the purposes of customary international law formation*, if a state remains silent and has actual and constructive knowledge of the claim being made (and given the prominence of the United States in international affairs, it is unlikely that many states would not have been aware of the claim), this will amount to acquiescence in it. Nevertheless, before such conclusions are reached as to the meaning of this reaction in connection with the current claim, the right should perhaps be invoked in practice.

2. Do Actions Speak Louder Than Words?

It is the position of some scholars that the physical acts of states contribute to the formation of customary international law rather than those of a verbal or

110. Harris, *supra* note 65, at 40. The Oxford English Dictionary definition of acquiescence is to “accept or consent to something without protest [,]” whereas MacGibbon defines it as “silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.” MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT’L L. 143 (1954). In practice, the “mode of manifesting individual *opinio juris* is not very common: customary law-making is dominated by tacit forms of acceptance expressed by supportive conduct or absence of protests.” DANILENKO, *supra* note 62, at 108.

111. See Duncan Kennedy, *Iraq: The Case for Loosing*, 31 BROOK. J. INT’L L. 667 (2006); see also text accompanying *supra* notes 51-54, and *infra* note 157.

112. See *supra* note 95.

written nature.¹¹³ However, while there are certainly circumstances where ‘talk is cheap,’¹¹⁴ this “goes more to the *weight* to be attributed to the conduct rather than to any inherent *inability* of verbal acts to contribute to the formation of customary rules.”¹¹⁵

Although it has been acknowledged that there appears to be “no inherent qualitative difference between the two sorts of acts”,¹¹⁶ there is a rebuttable presumption of a gravitational difference between them so that acts of a physical nature carry more weight than those of a verbal or written nature.¹¹⁷ The weight to be attributed to physical acts will normally involve more of a ‘cost’ to the undertaking state than conduct of a less active nature.¹¹⁸ Furthermore, while not diminishing the importance of state practice in a verbal or written form, state practice through physical action, at least by the state making the initial claim, can have the effect of solidifying the intentions of the proponent state and permits the claimed right to be seen in practice, perhaps prompting firmer reaction from other states. The reaction of other states is important in defining the acceptable elements and boundaries, if any, of the claimed right. Indeed, it is one thing for the right to be asserted in theory, but it is quite another for it to be put into practice, particularly a right with the gravity of the use of force as its basis.

Particularly relevant *dictum* to the case is Judge Reid’s dissenting opinion in the *Fisheries* case, where the following was said of state practice:

[t]his cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time. The only convincing evidence of state practice is to be found in seizures, where the coastal State asserts its sovereignty over the water in

113. See, e.g., Anthony D’Amato, *The Concept Of Custom In International Law* 88 (Cornell University Press 1971); Karol Wolfke, *Custom In Present International Law* 42 (Martinus Nijhoff 2d ed. 1993).

114. I.L.A. Report, *supra* note 62, at 13.

115. *Id.* Abstract statements of a legal position have been recognized as being of value in the jurisprudence of the ICJ and do, in many cases, hold importance. See, e.g., 1986 I.C.J. 14, *supra* note 40, at 97-109; Nuclear Weapons, *supra* note 87, at 259-61. However, as Danilenko has commented, “[a]lthough the relevance of official statements for the ascertainment of custom is thus recognized, it remains controversial what weight should be accorded to them in custom formation.” Danilenko, *supra* note 62, at 88.

116. I.L.A. Report, *supra* note 62, at 14.

117. Indeed, “despite the growing recognition of verbal forms of practice, as a source of law custom continues, as before, to be based primarily on real and concrete state practice.” Danilenko, *supra* note 62, at 91.

118. See *supra* notes 82 and 103.

question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.¹¹⁹

This is perhaps applicable in the current claim of the pre-emptive use of force. The Bush administration certainly has made extensive claims reiterating the right of pre-emptive self-defense in the two successive NSS documents, but it now perhaps needs to maintain its claim by the actual assertion of the right in practice as the only *convincing* evidence of state practice.

Given that at the present time this claimed right has not been put into practice by any state since the release of the 2002 NSS, perhaps until this occurs the silence should not be assumed simply as acquiescence.¹²⁰ Although thus far the development of *opinio necessitatis* appears to be in regard to the use of unilateral pre-emptive force in combating terrorism,¹²¹ the current situation concerning Iran's alleged production of WMD may provide the circumstances for the United States to invoke the right for the first time.¹²² Indeed, as will be discussed, the current events viewed in light of the broad framework of the claim and the attention focused upon this state in the 2006 NSS may provide the United States with the necessary trigger it has set itself for the invocation of pre-emptive self-defense.

IV. IRAN: FROM THEORY TO PRACTICE?

As noted above, the 2006 NSS was clear in its assertion that the United States faces no greater threat from a single state than that posed by Iran,¹²³ particularly its nuclear ambitions and support for terrorism. At the time of writing, Iran is continuing to push ahead with its nuclear program,¹²⁴ despite the sanctions imposed upon it by the Security Council in Resolutions 1737 and 1747, passed under Article 41 of the UN Charter on 23 December 2006 and 24

119. *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 191 (Dec. 18).

120. See Schachter, *supra* note 74, at 731.

121. See *supra* note 101.

122. The ICJ stated in the Nicaragua case that "[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule." 1986 I.C.J. 14, *supra* note 40, at 98. Conversely, it follows that if the United States was to employ pre-emptive self-defense and to appeal to that exception as stated, rather than as is normally the case simply to "self-defense," then this will have the prima facie inverse effect of weakening rather than confirming the rule.

123. See *supra* Part II. C.

124. Ian Black, *Iran Declares Nuclear Programme Irreversible*, The GUARDIAN (London), Feb. 26, 2007, at 16, available at www.guardian.co.uk/international/story/0,2021309,00.html; *Iran Insists on Nuclear Programme*, BBC NEWS, Feb. 11, 2007, <http://news.bbc.co.uk/1/hi/world/europe/6351137.stm>.

March 2007, respectively.¹²⁵ Furthermore, the United States has now publicly accused Iran of assisting Iraqi insurgents by providing them with sophisticated roadside bombs.¹²⁶ This belligerent rhetoric is similar to that witnessed in the lead up to Operation Iraqi Freedom. Consequently, it is necessary to be clear on the exact legal grounds upon which force could be used by the United States against Iran and, in particular, what part the claim to the right to use pre-emptive force might play in resolving this crisis.

A. Security Council Authorization: Express and Implied

Under the ideal of collective security, the United States could use force against Iran by Security Council authorization through the regime established by Chapter VII of the UN Charter.¹²⁷ However, this authorization is normally preceded by Security Council resolutions condemning a particular situation as a threat to,¹²⁸ or breach of,¹²⁹ international peace and security and imposing sanctions on the transgressing state or states concerned.¹³⁰ The fact that sanctions have been imposed by the Security Council against Iran shows there is concern regarding its nuclear ambitions and action, however minimal, is being taken. Yet given that only three resolutions have been passed in connection with the current crisis,¹³¹ none of which expressly determine that the situation was a threat to international peace and security and the passing of the economic sanctions in resolutions 1737 and 1747 was problematic, due primarily to Russian and Chinese sympathies with Iran, the prospect of a Security Council resolution expressly authorizing the use of force at this time appears distant, if it exists at all.¹³²

125. S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

126. *US Accuses Iran Over Iraq Bombs*, BBC NEWS, Feb. 11, 2007, http://news.bbc.co.uk/1/hi/world/middle_east/6351257.stm; Micheal Hirsch & Maziar Bahari, *Rumours of War*, NEWSWEEK, Feb. 19, 2007, at 28, 35.

127. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 252-64 (Oxford University Press 2d ed. 2004).

128. See S. C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992) (determining that “the situation in Somalia constitute[d] a threat to international peace and security” and preceded the authorizing of “all necessary means” mentioned in S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992)).

129. See S. C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990) (determining that Iraq’s invasion of Kuwait constituted “a breach of international peace and security” and preceded the authorizing of “all necessary means” mentioned in S. C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990)).

130. See S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6 1990) (preceding Security Council resolution 678 which authorized the use of “all necessary means” against Iraq in 1990).

131. S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, *supra* note 125; S.C. Res. 1747, *supra* note 125.

132. See Mary Ellen O’Connell, *The Legal Case against War with Iran*, JURIST, Feb. 13, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/02/legal-case-against-war-with-iran.php> (“The

The imposition of mere economic sanctions at the current time would also make it particularly difficult for the United States to make any sort of case for the use of force under the doctrine of implied authorization.¹³³ Nevertheless, the real test for this doctrine will be determined by future events now that the sixty day deadline in Security Council Resolution 1747 for Iran to suspend its nuclear activities has passed.¹³⁴ These events may determine whether the United States attempts an argument that it, or the international community, has been implicitly authorized to use force against Iran to ensure compliance. As one of the possible elements of such a justification, on February 22nd 2007, the Director General of the International Atomic Energy Agency issued a report which noted that rather than suspending its program, Iran was in fact expanding it.¹³⁵ Furthermore, as the events preceding the launching of Operation Allied Force in 1999 demonstrated, the fact that there has only been limited action by the Security Council on the situation may not deter the United States from claiming implied authorization if it appears that express authorization will not be provided because of one or two of the Security Council's members. Nevertheless, before the United States attempts such an argument it is perhaps likely the Security Council would at least first need to determine the situation to be a threat to international peace and security.

B. Self-Defense

If the United States were to fail to obtain the 'golden fleece' of Security Council authorization, it potentially might use force as self-defense under Article 51 of the UN Charter and customary international law. This is addressed under the traditional and currently accepted paradigm of self-defense and also under the United States' proposed expanded paradigm.

Security Council refused to authorize America's tough economic sanctions package against Iran, so there is little likelihood it would authorize a military strike.").

133. This is force used by a state or group of states where, although there has been no express authorization by the Security Council, there has been much concern expressed about a particular state or situation, for example where it has been condemned by the Security Council as a threat to international peace and security. See GRAY, *supra* note 127, at 267-70 (providing an example of this controversial doctrine as part of the justifications for Operation Allied Force against Serbia in 1999).

134. S.C. Res. 1747, *supra* note 125, para. 13, at 3.

135. Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolution 1737 (2006) in the Islamic Republic of Iran*, para. 28, at 5, IAEA Doc. Gov/2007/8, (Feb. 22, 2007), available at <http://www.iaea.org/Publications/Documents/Board/2007/gov2007-08.pdf>.

1. The Traditional Paradigm

For a right of self-defense to arise under the traditionally accepted paradigm there must be an 'armed attack'¹³⁶ or the 'imminent' prospect of one.¹³⁷ In relation to the threat posed by Iran's WMD, the concern at present is not that it actually has a weapon, but that it is in the process of producing one.¹³⁸ Consequently, no armed attack has occurred and the prospect of one occurring presently could not be classified as 'imminent' under its traditional meaning,¹³⁹ thus leading to a necessity of self-defense which is "instant, overwhelming, leaving no choice of means and no moment for deliberation".¹⁴⁰ Although Iran's nuclear aspirations may be a violation of its obligations under the Nuclear Non-Proliferation Treaty¹⁴¹ and give rise to non-forcible proportional countermeasures,¹⁴² they do not give rise to a right of self-defense.

However, this is not the end of the road as far as an action in self-defense by the United States against Iran under the traditional paradigm is concerned. Along with concern in the 2006 NSS regarding the threat posed by Iran in the ambiguity surrounding its nuclear ambitions, there is also concern over the threat posed by its support for terrorism and, in particular, Iraqi insurgents. Although Iran has denied this link,¹⁴³ if the reports are accurate then whether a right of

136. See U.N. Charter art. 51, (stipulating the requirement of an armed attack before a State can act in self-defense); 1986 I.C.J. 14, *supra* note 40, at 103 (stating that "[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 186 (Nov. 6) [hereinafter Oil Platforms] (also asserting that there must be an armed attack before the use of force in self-defense).

137. See *supra* notes 41-43.

138. See Daniel Dombey, *FT Interview: Mohamed ElBaradei*, FINANCIAL TIMES (London), Feb. 19, 2007, <http://search.ft.com/ftArticle?queryText=Ft+Interview+dombey&aje=false&id=070219008008&ct=0> (statement of the Director General of the IAEA, Mohamed ElBaradei) (stating that Iran "is at least five to ten years away" from having a nuclear bomb).

139. But see *supra* note 43 and accompanying text (the U.S. reinterpreting the word so as to expand its temporal meaning in light of the contemporary threats of terrorism and WMD, as made out in the 2002 NSS).

140. See Letter from Daniel Webster, *supra* note 42; see also Paul Reynolds, *Would an Attack on Iran Be Legal?*, BBC NEWS, May 9, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/4754009.stm.

141. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

142. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, ¶¶ 49-54, U.N. GAOR, 53d Sess., U.N. Doc. A/56/49 (Dec. 12, 2001).

143. Julian Borger *et al.*, *Ahmadinejad Puts His Faith in the "Wise People in US" to Avoid Conflict*, GUARDIAN (London), Feb. 13, 2007, available at <http://www.guardian.co.uk/iran/story/0,,2011809,00.html> (quoting a Fox News interview with the leader).

self-defense against Iran arises will depend upon the level of its involvement. If the insurgents have been sent 'by or on behalf' of Iran,¹⁴⁴ then there is a strong argument for attributing the bombings in Iraq to Iran. In terms of whether these bombings could meet the threshold necessary for an armed attack, it was noted by the ICJ that the mining of a single ship was sufficient to qualify as an armed attack bringing into play the right of self-defense.¹⁴⁵ If this is the case, then the continuous bombing on Iraqi territory causing many deaths might also be.¹⁴⁶ Under these circumstances, there would be a right for Iraq to use force against Iran in self-defense or, more likely, to declare itself the victim of an armed attack and request that the United States take action in collective self-defense.¹⁴⁷ Although U.S. soldiers may be killed by these attacks, they are in Iraq at the invitation of the Iraqi government and, therefore, "Iraq is the state with the legal authority to respond to such wrongs."¹⁴⁸ However, the reports do not lay such claims against Iran; instead, the current claim is that these weapons have been *provided* by Iran.¹⁴⁹ In these circumstances, as the *Nicaragua* case made clear, "the provision of weapons or logistical or other support" is not sufficient to

144. See 1986 I.C.J. 14 *supra* note 40, at 103-04. This is the "effective control" test established by the ICJ in *Nicaragua* and endorsed in Article 8 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001). However, the "effective control" test has been the subject of criticism by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case where, although the threshold of "effective control" was maintained for a single private individual or a group that is not militarily organized, control by a state over subordinate armed forces or military or paramilitary units may be of an "overall" character, that is, rather than the issuing of specific orders or its direction of each operation, the state has a role in "organising, coordinating or planning the military actions of the military group in addition to financing, training and equipping or providing operational support to that group." See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, ¶ 137, (July 15, 1999). Consequently, the responsibility of Iran may depend on the extent of the insurgent's military organization. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 595 (Feb. 26), *available at* <http://www.icj-cij.org/docket/files/91/7349.pdf>.

145. 2003 I.C.J. 161, *supra* note 136, at 171.

146. Nevertheless, the ICJ notes in *Nicaragua* that a use of force had to reach a certain threshold or gravity before a right of self-defense becomes available. See 1986 I.C.J. 14, *supra* note 40, at 101. However, there have been arguments that this notion can not be seen in practice and the customary international law requirements of necessity and proportionality govern the response of a state to a prior use of force. DINSTEIN, *supra* note 63, at 194-95; see HIGGINS, *supra* note 63, at 251 (posing the following question: "[i]s the question of *level* of violence by irregular forces not really an issue of *proportionality*, rather than a question of determining what is an 'armed attack'?""); see also TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 133, 138 (Manchester University Press 2005).

147. These requirements were stipulated in the ICJ case concerning military and paramilitary activities in and against *Nicaragua*. 1986 I.C.J. 14, *supra* note 40, at 103-04.

148. O'Connell, *supra* note 132.

149. See *supra* note 126.

qualify as an armed attack¹⁵⁰ and may rather give rise to countermeasures by Iraq.¹⁵¹

Furthermore, there is also the issue of the threats made against Israel by Iran, as noted in the 2006 NSS.¹⁵² It is of course arguable that claiming that Israel should be “wiped off the face of the earth” is more than saber-rattling and amounts to a specific threat towards a state, which violates the prohibition of the threat of force under Article 2(4) of the UN Charter, providing a right to invoke countermeasures against Iran in response. But this is as far as it goes. In the absence of Israel claiming that it was the victim of an ‘armed attack’, or one that is real and imminent, and requesting assistance in collective self-defense, no force could be used by the United States to invoke this as a justification.

2. The Expanded Paradigm: Pre-Emptive Self-defense

At the present time, the United States is left with no options to use force against Iran except perhaps through the invocation of its claimed right of unilateral pre-emptive self-defense as reasserted in its 2006 NSS. The crisis over Iran may be the defining moment for this claim. In regard to Iraq, the United States did not ultimately have to rely on the doctrine of pre-emption as it argued that the use of force was justified on the basis of Security Council authorization.¹⁵³ By contrast, the situation unfolding between the United States and Iran holds the prospect of the United States invoking the doctrine in the absence of another legal leg to stand on.¹⁵⁴ A ‘pure’ invocation of pre-emptive self-defense by the United States in such a high-stakes situation would be telling.

The pre-emptive sections of the 2006 NSS, given their focus on Iran, provide the United States with the opportunity to either practice what it preaches or have its failure to take action highlight the dichotomy between theory and practice. To adopt the language of the 2006 NSS, even though “uncertainty remains as to the time and place” of an attack by Iran, “the consequences of an attack with WMD are potentially so devastating” that the “principle and logic of pre-emption” dictates that the United States “cannot stand idly by as grave

150. 1986 I.C.J. 14, *supra* note 40, at 103-04.

151. *See* G.A. Res. 56/83, *supra* note 142. However, if recent reports are accurate, then the diplomatic channel may be being explored by the United States in relation to Iran’s alleged support for the insurgency in Iraq. *See also* Suzanne Goldenberg, *US Invites Iran and Syria to Talks on Iraq in Reversal of Bush Policy*, GUARDIAN (London), Feb. 28 2007, available at <http://www.guardian.co.uk/Iraq/Story/0,,2023016,00.html>.

152. 2006 NSS, *supra* note 1, at 20.

153. *See supra* text accompanying note 8.

154. In regard to an invocation in connection with Iran’s WMD threat, *see* Suzanne Goldenberg, *US Accused of Drawing Up Plan to Bomb Iran*, GUARDIAN (London), Feb. 26, 2007, available at <http://www.guardian.co.uk/iran/story/0,,2021434,00.html>.

dangers materialize.”¹⁵⁵ The 2006 NSS claims that it was Saddam Hussein’s underlying “refusal to remove the ambiguity that he created” regarding Iraq’s WMD capability that “forced the United States and its allies to act,”¹⁵⁶ rather than it simply not complying with Security Council resolutions. In this respect, if the situation is viewed through the lens of the 2006 NSS, this ambiguity can now be clearly seen in connection with Iran’s nuclear ambitions.

Given the failures of the Iraq conflict, it is unlikely there will be a regime change by force in the foreseeable future,¹⁵⁷ as this will be affected more by the non-forcible strategy of the promotion of democracy.¹⁵⁸ However, this does not mean pre-emptive force of a more limited nature will not be used. If such a use of force was carried out successfully, perhaps involving a limited military strike targeting only nuclear reactors that would eliminate the threat once and for all, causing minimal collateral damage in the process, and with a limited response by Iran with no significant increase in tension in the Middle East, it is possible the doctrine would gain some additional support and legitimacy in connection with the prevention of production of WMD to match some of the existing *opinio necessitatis* in regard to terrorism. As the ICJ stated in the *Nicaragua* case, “[r]eliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend towards modification of customary international law.”¹⁵⁹ If the United States carried out a successful strike against Iran and justified it as pre-emption, although the success of this strike would not determine its legality, it may increase the chances of other states sharing in principle the novel right, increasing the chances of the incident tending towards a modification of customary international law. However, this

155. 2006 NSS, *supra* note 1, at 23.

156. *Id.* at 24.

157. Kennedy, *supra* note 111, at 679. The argument that Operation Iraqi Freedom provided a disincentive to invoking the doctrine for such purposes is furthered by glancing at the events that have occurred, and are occurring, in the aftermath of such a regime change. The necessary post-invasion plan is an area which has been highlighted as seriously flawed. Nearly four years after the invasion, there is open violence on an unprecedented scale which is on the brink of, if not already in the midst of, civil war between the Shia and Sunni sections of the population. This has led to massive Iraqi civilian and coalition military casualties. At least at the time of writing, there appears to be no end in sight for the violence that has gripped Iraq. Indeed, the worst suicide bombing of the war occurred on Saturday, February 3rd, 2007 claiming the lives of 135 in a Shia market. See Peter Beaumont, 135 *Die in Bombing as “Civil War” Grips Iraq*, OBSERVER (London), Feb. 4, 2007, available at <http://observer.guardian.co.uk/world/story/0,,2005490,00.html>. More importantly for the Bush administration, there appears no foreseeable prospect of withdrawal of its troops. This has hit the Bush administration hard and in particular on the domestic front where the pressure on the Bush administration has been intense in recent times.

158. See *supra* Part II.

159. 1986 I.C.J. 14, *supra* note 40, at 108-09.

perhaps remains solely within the realms of possibility and not reality. With the logistical difficulties of carrying out such a strike and with threats emanating from Iranian President Ahmadinejad that any state that attacks it will be “severely punished,”¹⁶⁰ a successful limited military strike of Iran’s nuclear installations along these lines appears unlikely. This diminishes the potential of the Iran crisis being the benchmark for the United States’ claim of a right to pre-emptive self-defense.

V. CONCLUSION

Overall, the United States’ claim to the right of unilateral pre-emptive force in the 2006 NSS is much the same as that made in 2002, albeit with a change in focus of the rogue states identified. In terms of contributing to the establishment of the doctrine of pre-emption as a legal right, the 2006 NSS appears to offer no more than its predecessor. If by persistently advocating the right of pre-emption in the 2006 NSS the United States was attempting to move the debate closer to establishing this as a firm legal right in the *jus ad bellum* available to all states in international law, it has missed an opportunity. If this was the serious intention of the United States, then it would have been wise to have at least made an attempt to include more detail on the contours of the claimed right, in particular what will trigger its invocation, how the requirement of proportionality will be met (given that “in the absence of clear evidence as to the nature and scope of a particular threat the requirement that any response be proportionate is necessarily difficult to apply”¹⁶¹), and how force would be employed against non-state actors in its fight against terrorism. In short, if the United States intended that by its persistent advocacy the doctrine be considered more seriously it should have expanded the boundaries of the debate by beginning to solidify how the legal doctrine might operate in practice.

However, the nebulous nature of the claim may have been intentional. It is possible that the doctrine of pre-emption was included again in the 2006 NSS not because the Bush administration seriously intended for it to be a legal proposition, or that it could work in practice, given that its finer details were not (or could not be) presented in the NSS. Rather, it may have been reasserted as a deterrent to the rogue states and terrorists identified in the 2006 NSS or in the realization that its absence from the second NSS of the Bush administration would be seen as a sign of weakness in the eyes of its adversaries and as recognition that it had simply gotten it wrong. An admission of failure of this nature is simply not something that the Bush administration would do lightly.

160. See Borger, *supra* note 143.

161. Gray, *supra* note 2, at 448.

Ultimately, however, it may not matter what the initial intention behind the claim was if states adopt it into their practice.¹⁶² Although it is not possible to conclude that there is firm *opinio juris* connected with the right, there is evidence of state practice demonstrating *opinio necessitatis* amongst some specially affected states in connection with its use for combating terrorism. However, if the doctrine is to have any possibility of gaining wider acceptance and progress into customary international law, it needs first to be seen as a doctrine which could work in practice. So far, since the release of the 2002 NSS, this has not been the case. Although officially justified on the basis of Security Council authorization, the failures connected with Operation Iraqi Freedom, countering an alleged threat of WMD possession by regime change, have not boosted the chances of acceptance by other states. Additionally, although the prospect of the doctrine's invocation in respect of Iran's WMD production is possible, the prospect of a successful limited strike seems bleak.

Whilst the 2006 NSS appears to keep the door open as to the doctrine making its mark on the *jus ad bellum*, it should not be forgotten that it also appears to open the door further to diplomatic options playing a role in resolving the identified threats. Although diplomacy has more limited prospects of success in connection with the threat posed by non-state terrorism, given the lack of reciprocity between the actors, this tool has proved to be effective in the battle against WMD production, possession and proliferation by states, for example in South Africa, Libya and, most recently, North Korea.¹⁶³ Given the 2006 NSS report's increased interest in combating the identified threats using non-military measures, there is hope yet that the present crisis in Iran, and those that arise in the future, will be resolved peacefully.

162. Akehurst has made the point that "[i]t is not necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other States." Akehurst, *supra* note 65. Reisman and Armstrong make a similar claim: "In the grip of mimetic effects . . . the actual policy of the United States becomes less important than the policy that continues to be imputed to it." Reisman & Armstrong, *supra* note 5, at 549. Also, "it is not so much a question of what a state really believes (which is often undiscoverable, especially since a State is a composite entity involving many persons with possibly different beliefs), but rather a matter of what it *says* it believes, or what can reasonably be implied from its conduct. In other words, it is a matter of what it *claims*."

I.L.A. Report, *supra* note 62, at 33.

163. See text accompanying *supra* note 60.