

Oxford Public International Law

Part III The Prohibition of the Use of Force, Self-Defence, and Other Concepts, Ch.29 Taming the Doctrine of Pre-Emption

Ashley S. Deeks

From: The Oxford Handbook of the Use of Force in International Law
Edited By: Marc Weller

Content type: Book content
Series: Oxford Handbooks in Law
ISBN: 9780199673049

Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 01 January 2015

Subject(s):

Self-defence — Weapons of mass destruction — Armed attack — Warfare, air — Armed forces — UN Charter — Terrorism — Terrorism, financing

(p. 661) Chapter 29 Taming the Doctrine of Pre-Emption

I. Introduction

One of the most contested questions in the *jus ad bellum* is whether and when it is lawful for a state to use force unilaterally *before* it suffers an armed attack. The question took on particular salience in 2002, when the US claimed—more clearly and assertively than before—that a state could use force to forestall certain hostile acts by its adversaries.¹ Twelve years after that controversial assertion, it is well worth assessing where the debate currently stands and where it is heading.

Because states and scholars use a variety of poorly defined terms to discuss acts of self-defence in advance of an attack, Section II sorts through the terminology. Section III lays down the basic positions in the historical debate about the legality of such self-defence. Section IV turns to new pressures on self-defence brought on by new actors, new threats, and new technologies. Section V considers the future of pre-emption. It concludes that recent trends in state practice and in scholarship reveal that the timing of a state's right to use force in self-defence continues to evolve, particularly when the fact patterns implicate terrorist groups or weapons of (p. 662) mass destruction (WMD). Yet certain technological developments make it difficult to predict the degree to which this evolution will continue.

II. Terminology

States and scholars tend to use three different terms when discussing the use of force in self-defence in advance of an armed attack: anticipatory self-defence, pre-emptive self-defence, and preventive self-defence. Yet these terms defy crisp definition.² For instance, some use 'anticipatory self-defence' as a catch-all description for any self-defence that precedes an attack.³ Others use 'anticipatory self-defence' to describe only the narrowest and least-controversial form of pre-attack self-defence—that which meets the requirements set forth in the exchange of notes between the US and the UK in the wake of the *Caroline* incident.⁴ This chapter uses the terms as follows:

Anticipatory self-defence means the use of force in self-defence to halt an imminent armed attack by a state or a non-state actor. This approach adheres to the *Caroline* principle that a state may respond to an attack before it is completed, but only where the need to respond is 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'⁵ Although the potential victim state has not yet suffered a completed armed attack, it perceives the attack to be temporally imminent—as when the enemy is about to launch missiles towards the victim state.

Pre-emptive self-defence means the use of force in self-defence to halt a particular tangible course of action that the potential victim state perceives will shortly evolve into an armed attack against it.⁶ The potential attack appears more distant in time than an attack forestalled by anticipatory self-defence, but the potential victim state (p. 663) has good reasons to believe that the attack is likely, is near at hand, and, if it takes place, will result in significant harm.

Preventive self-defence means the use of force in self-defence to halt a serious future threat of an armed attack, without clarity about when or where that attack may emerge.⁷ Its advocates focus on the quantum of the threat to be avoided and the difficulty in ascertaining precisely when and how that threat will manifest itself as an armed attack. A state's use of force may also be viewed as preventive when it purports to respond to a state's or group's threatening behaviour in the absence of credible evidence that the state or group has the capacity and intent to attack.

These terms describe uses of force on a temporal continuum, with anticipatory self-defence closest to the full manifestation of the armed attack and preventive self-defence the furthest away. Anticipatory self-defence requires a state to be virtually certain about the time, place, author, and fact of the future attack; preventive self-defence requires no such certainty about those factors.

III. Representative Positions in the Debate

States, international organizations, and scholars hold a wide range of views on when international law permits a state to use force unilaterally before it has suffered an armed attack.⁸ Many international actors express comfort with the legality of anticipatory self-defence, with some states and scholars defending pre-emptive self-defence. The view that a state must wait to suffer an armed attack before being able to respond forcibly now appears to be a minority view,⁹ as does the view that preventive self-defence is lawful. The following discussion articulates the arguments in favour of distinct positions on the temporal continuum.

Before describing key positions in the debate, it is worth identifying a larger point about the nature of self-defence. To some extent, all uses of force in self-defence (p. 664) response to a completed armed attack have an anticipatory element in them. That is, for force to be 'necessary', the victim state must anticipate that the attacker has the capacity and intent to strike again.¹⁰ The difference is plain between self-defence after and in advance of an attack: in the former situation, the attacker has already demonstrated an intent and willingness to attack. Nevertheless, self-defence in response to a completed armed attack contains a predictive element similar to that of anticipatory and pre-emptive self-defence.

A. Requirement of an Armed Attack

One school of thought holds that a state may not use force in self-defence unless and until it suffers an armed attack.¹¹ Those who defend this view cite the plain language of Article 51 of the UN Charter, which states, 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs*...'¹² By their reading, the right to self-defence does not exist if an armed attack has not yet occurred. Adherents to this view include Ian Brownlie,¹³ Louis Henkin,¹⁴ and Philip Jessup.¹⁵ Policies underlying this position include a concern about replacing a bright-line rule with a hazy one;¹⁶ a fear of minimizing the importance of resorting to the Security Council to adjudicate threats to international peace and security before those threats materialize; and a desire maximally to enforce the comprehensive prohibition on interstate uses of force in Article 2(4) of the UN Charter. Further, a rule that allows a state to use force in advance of an armed attack may lead states to pre-empt each other's pre-emptive acts of self-defence.¹⁷ Yet even scholars such as Brownlie concede that in some circumstances a potential victim (p. 665) state may respond with force to apparently offensive operations that have not yet resulted in an attack.¹⁸

B. Anticipatory Self-Defence

Others find it legally and strategically untenable to require a state to suffer an armed attack before it may respond, and believe that international law allows a state to resort to force in anticipatory self-defence.¹⁹ Members of this school argue that Article 51 specifically preserves the 'inherent' right of self-defence, which they interpret to mean the right as it existed before states drafted the Charter.²⁰ That right embraced the rule captured most clearly in the famous *Caroline* incident of 1837: a state may use force in anticipation of an imminent armed attack. The international military tribunals at Nuremberg and Tokyo cited the *Caroline* test, which this group sees as evidence that the right of anticipatory self-defence clearly existed pre-Charter.²¹

Several states have invoked anticipatory self-defence to justify their own uses of force or that of other states.²² A number of scholars identify Israel's use of force against Egypt in 1967—where Israel attacked Egypt's air force after Egypt massed its forces on the Israeli border and closed the Straits of Tiran—as a classic example of anticipatory self-defence.²³ Israel came under little criticism in the UN Security Council or General Assembly for its actions.²⁴ Several UN-related reports also (p. 666) embrace this approach to self-defence. In 2004, for instance, the Secretary-General's High-Level Panel on Threats, Challenges and Change stated, '[A] threatened State, according to long established international law, can take military action as long as the threatened

attack is *imminent*, no other means would deflect it and the action is proportionate.²⁵

Those who embrace anticipatory self-defence but reject pre-emptive self-defence reveal a commitment to limit self-defence only to situations in which the forthcoming armed attack is both very close at hand and virtually certain. This stems from a desire to cabin the 'slippery slope' of pre-attack self-defence while acknowledging the reality that no state, given the means, would stand by to suffer a first blow.²⁶ As Matthew Waxman explains, 'Requiring that a specific attack be about to occur helps ensure that a defender exhaust other, non-forcible means, and it reduces the likelihood of mistakes, insofar as waiting until that point is more likely to expose an adversary's true intentions.'²⁷

C. Pre-Emptive Self-Defence

Increasingly, some states and scholars argue that the *Caroline* requirements are too restrictive. Michael Doyle points out that there is virtually no historical use of force that meets those rigorous factors.²⁸ In general, this group seeks to redefine and expand the 'imminence' requirement to deal with new threats.²⁹ Instead of forcing a state to wait until the attack is underway, or about to commence, this school deems lawful a response that takes place in the last window of opportunity in which a state may act effectively to defend itself against an entity that has both the intent and capacity to attack.³⁰ This might mean that a state may attack a WMD storage facility (p. 667) in another state where it has concrete intelligence that the latter state is about to transfer nuclear weapons to a terrorist group. In contrast, it would not be lawful for the state to attack that facility if it only had generalized concerns that the other state someday may transfer WMD to those terrorists.³¹

At the same time, this school demands a significant level of certainty about the risk of the incoming attack and a short time horizon in which the threat will materialize. For those who deem pre-emptive self-defence lawful, drawing a credible line between pre-emptive self-defence and (unlawful) preventive self-defence is a challenge, implicating questions about what types of intelligence should be required and what degree of confidence a state must have about the accuracy of that intelligence. Section IV discusses how scholars have proposed to cabin the potential misuse of pre-emptive self-defence.

A number of states defend the lawfulness of pre-emptive self-defence. Indeed, some of their statements might be read to support preventive self-defence, a concept discussed in the following section. Most famously, in 2002 the US produced a National Security Strategy that clearly argued for the propriety of pre-emptive self-defence.³² The document stated, 'If 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 materialise. This is the principle and logic of pre-emption.'³³ Australia, Japan, and the UK have also defended their right to use force in certain situations to prevent terrorist or WMD threats from materializing.³⁴ Japan, for example, has publicly contemplated using pre-emptive force against North Korea if it has strong evidence that North Korea is planning a missile attack against it.³⁵ In 2012, Russia suggested that it was prepared to use 'pre-emptive force' (p. 668) against missile-defence sites in Poland, though its statements provided no detail about the precise type of threat it believed would trigger that right.³⁶

D. Preventive Self-Defence

It is uncontroverted that preventive use of force is lawful when the UN Security Council authorizes it. The Security Council clearly may allow states to take forcible measures against a 'threat to the peace'.³⁷ The High-Level Panel Report reflected this understanding when it rejected arguments for unilateral acts of preventive self-defence but stated, '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 authorise such action if it chooses to.³⁸ In this view, the Council serves as a 'jurying or adjudicative process' through which to assess claims that another state's actions pose a threat to international peace and security.³⁹

Unilateral use of force in preventive self-defence is far more controversial than Council-authorized preventive uses of force. Yet it has its supporters. First, the US position is often characterized as favouring preventive self-defence; the US has articulated a right to use force in the face of perceived threats posed by WMD 'even if uncertainty remains as to the time and place of the enemy's attack.'⁴⁰ The US view is driven by a concern that restricting state action until the threat of attack looms large may mean foregoing the opportunity to respond to the attack at all—an unacceptable outcome when that threat involves terrorists, WMD, or both. Secondly, several scholars accept preventive (and other) uses of force because they see the UN Charter as defunct.⁴¹

Those who support anticipatory or pre-emptive self-defence but reject preventive self-defence believe that '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...to be accepted.'⁴² One reason Israel's attack on (p. 669) the Osirak reactor in Iraq in 1981 was roundly criticized was because it appeared preventive. That is, states did not believe that Iraq's nuclear programme had ripened into a tangible threat to use force, let alone a threat of imminent attack.⁴³

Parsing different legal views on the use of force in self-defence before an attack transpires helps to identify key areas of disagreement. Some disagreement flows from the imprecise use of language. Further, various players start with distinct pre-existing moral commitments: some seek to limit—to the greatest extent possible—the use of force in the international community, while others give relative priority to a state's security.⁴⁴ These actors also possess different intelligence about the threats and evaluate the evidence differently. Other disagreement may stem from the dearth of actual practice in this area. Given a relatively narrow range of fact patterns, it is harder to compile systematic state responses to different situations or to ascertain whether and how the law is evolving.⁴⁵ Finally, the various schools take distinct methodological approaches, including by paying more or less attention to treaty language and different types of state practice.⁴⁶ In short, wide substantive and rhetorical disagreement remains about the lawfulness of using force in situations other than manifestly imminent attacks.

IV. New Pressures on the Law

Three geopolitical and technological developments place additional pressure on the legal framework. First, the spread of WMD (particularly nuclear) technology to rogue states raises concerns about how those states may use those weapons and whether the states may proliferate the technology.⁴⁷ Secondly, the methods of transnational (p. 670) terrorist groups bent on conducting spectacular attacks means that the traditional military signals forecasting an imminent attack often will be absent. Thirdly, there is a looming possibility that cyber tools may be used to conduct armed attacks. Given the speed and complexity of cyber attacks, requiring a state to wait until there is 'no moment for deliberation'⁴⁸ before responding with force increasingly looks like a requirement that a state should stand by and suffer an attack. These developments place new pressures on the doctrine of pre-attack self-defence because of the nature of the threat and the quantum of harm that would result from an attack; the probable stealth of delivery; and the speed at which attack could arrive once launched. This section explores the impact of these new threats on the law and the limited state practice in responding to these developments.

A. WMD

Certain scholars and states deem it imperative to update the self-defence concept of imminence in response to efforts by rogue states (and potentially non-state actors) to acquire WMD.⁴⁹ Indeed, the self-defence posture in the 2002 US National Security Strategy appears to have been driven by

concerns about the use of WMD against the US. It states, 'Our immediate focus will be those terrorist organisations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors.'⁵⁰ Adversaries with WMD may be 'able to strike with little or no notice' and, once they have initiated a WMD attack, 'the targeted state is likely have limited options for protecting its population.'⁵¹ In this view, WMD capabilities produce a very different type of threat than that posed by conventional weapons—that is, from the type of threat from which the *Caroline* test emerged.⁵² Sir Christopher Greenwood believes that a WMD attack 'can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded' because of the extreme risk to a state forced to wait until the attack takes place and the impossibility of affording that state's population any effective protection after the attack has been launched.⁵³ That said, in most cases the potential victim state will face significant uncertainty both about the potential aggressor state's capacity and its intent to use (p. 671) WMD.⁵⁴ Thus, the cost of failing to pre-empt an attack that uses WMD is extremely high, but it is particularly hard to predict their use accurately.

One recent example of state practice causes us to consider whether states are changing their views on the legality of pre-emptive self-defence, at least in the WMD context. On 6 September 2007, Israel bombed an industrial facility near al Kibar, Syria.⁵⁵ The CIA later identified the target as a nearly complete nuclear reactor, likely built with North Korean assistance to produce plutonium. As Leonard Spector and Avner Cohen put it, 'What was particularly notable about this attack was what occurred afterward: the near total lack of international comment or criticism of Israel's actions. The lack of reaction contrasted starkly to the international outcry that followed Israel's preventive strike in 1981 that destroyed Iraq's Osiraq reactor.'⁵⁶ Yet it was clear that the presence of the Syrian reactor hardly met the *Caroline* factors: Syria was some time away from producing fissile material for nuclear weapons and further from producing the weapons themselves.⁵⁷ Only if Israel's use of force met the *Caroline* test would there be a clear explanation for the lack of an international reaction.

Several factual differences between the Osiraq and al Kibar bombings may explain the radically different reactions to them. Iraq, which was building its facilities publicly, allowed the International Atomic Energy Agency (IAEA) to visit those facilities. Syria, out of favour with the international community, was building the reactor secretly with the aid of another disfavoured state.⁵⁸ Shortly after the Syrian bombing, the CIA provided a 12-minute video and an extensive briefing, making a strong case that the target was a North Korean-built reactor designed to produce weapons-usable plutonium (unlike Iraq's in 1981, which could have been used for peaceful purposes).⁵⁹ The IAEA later discovered uranium particles at the site.⁶⁰ Yet the different facts do not seem to entirely account for dramatically different state reactions.

One hypothesis is that the threat of WMD in the hands of states with a track record of unpredictable behaviour has caused states to shift their views of the propriety of pre-emptive self-defence against such a threat.⁶¹ A single example of (p. 672) state practice cannot prove such a shift; only time (and future cases of pre-emptive self-defence) can do so. Nevertheless, there appears to be a growing recognition that the threat posed by WMD is distinctive in ways that affect how states analyse pre-emptive self-defence.

B. Terrorist Groups

A second development is the rise of hostile terrorist groups that operate across state borders. Assuming that non-state actors can commit armed attacks that trigger a state's right to self-defence,⁶² the attacks that these non-state actors commit also challenge notions of imminence.⁶³ Terrorist attacks inherently rely on unpredictability, stealth, and concealment. Greenwood writes: 'it is far more difficult to determine the time scale within which a threat of attack by terrorist means would materialise than it is with threats posed by, for example, regular armed forces.'⁶⁴ Secondly, many terrorist groups exist exclusively to conduct violent attacks on states and civil society; there is little question that they intend to undertake attacks when they have the means to do so.⁶⁵ Finally,

efforts by terrorist groups to obtain WMD technology are particularly problematic because, unlike with states, these groups are very hard to deter.⁶⁶ Relatedly, because states often deem it unpalatable or fruitless to negotiate with terrorist groups, the requirement that states exhaust other avenues (eg diplomacy or sanctions) before resorting to force fits imperfectly into the traditional doctrine. In short, terrorist organizations (such as Al Qaeda and Hezbollah) have proved their ability to conduct extensive attacks against states across sovereign borders, and their tactics and goals suggest a strong need—in certain circumstances—to use force against those groups before they initiate an armed attack.

(p. 673) C. Cyber

Scholars have started to consider seriously whether and what type of cyber attack may rise to the level of an armed attack that triggers a state's right of self-defence.⁶⁷ They have spent less time examining when that right is triggered temporally. If cyber attacks can constitute armed attacks, this raises at least two questions relevant to pre-attack self-defence. First, how should one determine when an attack has been initiated, in a world in which a bad actor can plant delayed-release time bombs or logic bombs in another actor's computer system?⁶⁸ Secondly, when a cyber attack can hit its target in less than a second and when it may be impossible to determine in advance what level of damage an attack will inflict, does it make sense to require a state to refrain from responding to anything other than a threat of an 'imminent' attack, or even to act only in the 'last clear window' before an attack? These questions are compounded by the more general questions raised by cyber weapons: how to attribute attacks; where the line falls between 'active defence' and offence; how to gauge proportionality; and whether ideas of sovereignty limit how a state may respond to attacks that pass through neutral territory. Each of these developments challenges the traditional understanding of imminence. When the threat of an armed attack comes from entities that possess WMD, a state may be unable to respond if it waits for the armed attack to become 'imminent' in the *Caroline* sense. With terrorist groups, a state will often have little indication that the group is about to initiate an attack. And for cyber weapons, not only may a state not be aware that its opponent has initiated an attack, but there will also rarely be a 'build up' phase to put the state on notice that an armed attack is temporally imminent.

D. Guiding the Pre-Emptive Application of Force

In response to these three developments, some states and scholars have articulated dissatisfaction with a legal rule that prevents a state from acting until an attack is virtually upon it. Then-senior White House official John Brennan recently asserted that both the US and other states increasingly recognize that:

a more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. ...[A]n increasing number of our international counterterrorism partners have begun to recognise that the traditional conception of what constitutes an 'imminent' attack should be broadened in (p. 674) light of the modern-day capabilities, techniques, and technological innovations of terrorist organisations.⁶⁹

States have not yet set forth in greater detail how they would redefine 'imminence' to meet today's threats.

Yet even those who argue for increased flexibility recognize the need to cabin it. Scholars have done more work than states in this regard: some scholars have proffered factors for states to use when assessing whether they may lawfully use force in advance of an armed attack. Michael Doyle, for instance, would require states to assess four factors before using force: the lethality of the threat the potential victim state would suffer; the likelihood that the threatened attack will

materialize; the legitimacy of the victim state's proposed action (assessed using just war principles); and the legality of the target state's domestic and international behaviour and the victim state's response.⁷⁰ Doyle would require the potential victim state to attempt to resort to the Security Council, but would not deem authorization necessary.⁷¹ Abraham Sofaer offers four comparable factors or steps that a potential victim state would need to consider or undertake: the magnitude of the threat faced by that state; the probability that the threatened attack will occur; the exhaustion of peaceful alternatives; and the consistency of that state's action with the purposes underlying the UN Charter.⁷²

Christopher Greenwood would revisit conventional understandings of imminence, arguing that a state assessing imminence today may take into account the gravity and method of delivery of the threat.⁷³ He would also demand evidence that the state (or non-state actor) possesses weapons and intends to use them.⁷⁴ Likewise, a Chatham House project on the use of force in international law states that, in interpreting the criterion of imminence in the face of current threats, 'reference may be made to the gravity of the attack, the capability of the attacker, and the nature of the threat, for example if the attack is likely to come without warning.'⁷⁵

(p. 675) In sum, virtually every scholar who offers factors to limit pre-emptive self-defence considers the nature and quantum of the threat at issue; the harm that would likely result from an attack; the urgency and specificity of the particular threat; and whether the state contemplating action has exhausted viable alternatives—in particular, resort to the Security Council. Yet the real problem in this area of the law may lie not in achieving agreement on basic principles, but in applying those principles to real-world facts: how serious and realistic is a particular threat of an armed attack, and what constitutes a reasonable response to that threat.⁷⁶ The way out of the endless debate may turn more on wider disclosures of intelligence by the state using force (of the type that took place after Israel's attack on the Syrian nuclear facility) and less on the law.

Those who object to pre-attack force reject any and all factors that would guide a state's reliance on pre-emptive self-defence. Rather than establish malleable factors such as those just discussed, some critics would prefer instead that a state that acts before suffering an armed attack asks forgiveness afterwards, based on the claimed rightness of its cause.⁷⁷ Others question whether such factors really would impose limits on a state determined to act.⁷⁸ In any case, the recent work on pre-emption suggests some level of consensus by those scholars about what alignment of factors renders pre-emptive force lawful and legitimate.

V. Taming Pre-Emption?

The title of this chapter invites an antecedent question: does pre-emption need to be tamed? There is a good argument that the doctrine of pre-emption has more bark than bite. States have only infrequently relied on anticipatory or pre-emptive self-defence to justify legally their uses of force.⁷⁹ The US, for instance, defended its (p. 676) invasion of Iraq in 2003 on the basis of several UN Security Council resolutions, not pre-emptive self-defence.⁸⁰ The US missile strikes in Afghanistan and Sudan in 1998 against suspected Al Qaeda targets arguably constituted self-defence in response to a previous armed attack. The US legal basis for contemporary drone strikes against members of Al Qaeda and associated forces in Yemen, Pakistan, and Somalia is that they are discrete military operations in the context of an ongoing armed conflict.⁸¹ There clearly have been cases in which anticipatory self-defence is either the best or the only explanation for a state's action—for instance, Israel's bombing of the Egyptian air force in 1967 or its strike on the Osirak reactor in 1981. But these cases are infrequent. Additionally, the backlash against the highly controversial US invasion of Iraq—which many viewed as an exercise in pre-emptive (or preventive) self-defence—may have led US officials to adopt a cautious posture towards future military activity that relies on such a legal justification.

Why, then, do states continue to press for the legal acceptance of pre-emptive self-defence, if they rarely intend to rely on it and incur political costs in doing so? One reason may be that states

favouring pre-emption believe that the argument itself serves as a deterrent: it signals to other states that they should be very cautious about undertaking actions that could credibly be construed as pre-cursors to an armed attack. Another reason may be strategic: repeated public assertions about the need for a robust doctrine of pre-emption may make the invocation of narrower claims of anticipatory self-defence more palatable.⁸² A third reason—the one most worrying to those concerned about pre-emption—is that states believe they will need to rely on such a legal justification in the fast-approaching future, given the technological developments discussed previously. In this view, these public defences of pre-emption lay the groundwork for probable uses of force to come. In short, it is easy to overstate the importance of periodic state claims about the lawfulness of pre-emption, but states are far from abandoning those claims.

As a substantive matter, *has* the international doctrine of self-defence evolved to embrace uses of force that take place in situations further removed from ‘imminent’ attacks on the temporal continuum? Possibly, though there is insufficient evidence to say with certainty. Sean Murphy suggests that 11 September 2001 may have marked a turning point in how states view defensive uses of force. He notes: ‘there appear to be significant historical periods where global politics have dramatically influenced the way states think about uses of force, whether it be the bipolar confrontation of the Cold War...or the post-September 11 period in which we now find (p. 677) ourselves.’⁸³ Michael Schmitt has argued: ‘ultimately, law must be construed in the context in which it is to be applied if it is to remain relevant; and in the twenty-first century security environment, insistence on a *passé* restrictive application of international legal principles to strategies of preemption would quickly impel States at risk to ignore them.’⁸⁴ Even scholars who are sympathetic to narrow readings of self-defence suggest that we are seeing a trend towards increased tolerance of certain pre-attack uses of force, particularly where the force is intended to suppress terrorist acts or the proliferation of WMD.⁸⁵

Wherever the law stands now, current technological changes virtually guarantee that the law will not stand still for long. Some technological developments seem poised to drive the concept of imminence even further from its roots in the *Caroline* test. The speed and stealth of incoming cyber attacks, for example, suggest that the ‘last window of opportunity’ to act may necessarily be far removed from certainty about an impending attack in order for self-defence to remain meaningful. Other developments pull in the other direction. The ability of satellites and drones to hover for days or weeks over targets and acquire detailed imagery of WMD facilities, for instance, may vastly improve a potential victim state’s capacity to gauge correctly its opponent’s capacity and intent.⁸⁶ That intelligence collection capacity may also diminish the danger of waiting until the last possible moment to act, at least in some cases. Advancing cyber technologies may endow states with a wider range of responses that fall below the level of force, allowing those states to avoid the self-defence debate entirely. The international community is likely to hold high expectations that any state using force in advance of an attack will share the intelligence that led the state to act pre-emptively (such as the CIA did after Israel’s al Kibar strike). This expectation will put pressure on such states not to act in the absence of such intelligence.

(p. 678) VI. Conclusion

Pre-emptive self-defence remains one of the most hotly contested principles in the *jus ad bellum*. In some ways, the stakes are high: the further international law moves (or is viewed by powerful states as moving) away from *Caroline*-type principles, the more likely we are to see objectively unnecessary uses of force that could destabilize the international regime. In other ways, the stakes are manageable: there are few historical instances of pre-emptive self-defence, and the clear trend in scholarship is to offer critical limiting factors, many of which states would likely accept as relevant to their pre-attack actions today. The speed with which relevant technologies are developing—and the physical speed of action that those technologies allow—ensure that future conversations about pre-emption will implicate issues beyond our current collective imagination.

Footnotes:

- 1** National Security Council, *The National Security Strategy of the United States of America* (2002). The 2010 National Security Strategy does not discuss use of force in advance of an attack. National Security Council, *The National Security Strategy of the United States of America* (2010), 21.
- 2** See Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, al Qaida, and Iraq' (2003) 4 *San Diego Journal International Law Journal* 7, 9 (describing terminological confusion). See also Yoram Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge: Cambridge University Press, 2001), 172 ('interceptive self-defense'); Matthew Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction' (2009) 31 *Michigan Journal of International Law* 7 ('precautionary self-defense').
- 3** Michael Doyle, *Striking First: Preemption and Prevention in International Conflict* (Princeton, NJ: Princeton University Press, 2008), 5.
- 4** Sean Murphy, 'The Doctrine of Preemptive Self-Defense' (2005) 50 *Villanova Law Review* 699, 703.
- 5** Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, British Plenipotentiary (6 Aug 1842), quoted in John Bassett Moore, *A Digest of International Law*, vol 2 (Princeton, NJ: Princeton University Press, 1906), § 217, at 412.
- 6** See Murphy, 'The Doctrine of Preemptive Self-Defense', 704.
- 7** US National Security Strategy, 1 (asserting a right to take defensive action 'even if uncertainty exists as to the time and place of the enemy attack'); Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 13 ('Prevention refers to the use of force to avoid an emerging state of affairs in which a threat would be more likely or increasingly dire').
- 8** The International Court of Justice (ICJ) has declined to opine on the lawfulness of a 'response to the imminent threat of armed attack'. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, ICJ Rep 1986, 14, 102–6.
- 9** See eg Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All', A/59/2005, para 124 ('Imminent threats are fully covered by Article 51 ... Lawyers have long recognized that this covers an imminent attack as well as one that has already happened').
- 10** Murphy, 'The Doctrine of Preemptive Self-Defense', 735 ('there is an idea, embedded within standard notions of self-defence, that a state, having been attacked, may ward off future similar attacks through the defensive action. Granted, the likelihood of future attacks is much more apparent when an attack already has occurred, but nevertheless the defensive response focuses on preventing future attacks, not simply repulsing the prior attack').
- 11** See Murphy, 'The Doctrine of Preemptive Self-Defense', 706 (terming this the 'strict constructionist' view).
- 12** UN Charter, Art 51 (emphasis added).
- 13** Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 278.
- 14** Louis Henkin, *International Law: Politics, Values and Functions* (Leiden: Martinus Nijhoff, 1990), 156.
- 15** Philip Jessup, *A Modern Law of Nations* (Hamden, CT: Archon Books, 1968), 166.
- 16** An actual armed attack is 'clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication.' Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), 142. See also Brownlie, *International Law and the Use of Force by States*, 259 (noting difficulty in assessing the certainty of a forthcoming attack and the

intention of another government).

17 Doyle, *Striking First*, 26 ('Unless all states agree on what constitutes a specific threat...every state will be preempting every other state's preventive strikes').

18 See Brownlie, *International Law and the Use of Force by States*, 368 ('Thus a naval force of a state which had stated its intention to attack, approaching territorial waters, might be regarded as offensive and intercepted on the high seas').

19 See eg Derek W. Bowett, 'The Use of Force for the Protection of Nationals Abroad' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Leiden: Martinus Nijhoff, 1986), 40; Dinstein, *War, Aggression and Self-Defence*, 191 ('It would be absurd to require that the defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove the immaculate conception of self-defense'); Greenwood, 'International Law and the Pre-Emptive Use of Force', 14–15 (listing Franck, Waldock, Fitzmaurice, Bowett, Schwebel, Jennings, Watts, and Higgins as supporting anticipatory self-defence).

20 Murphy, 'The Doctrine of Preemptive Self-Defense', 711.

21 International Military Tribunal (Nuremberg), Judgment and Sentences (1947) 41 *American Journal of International Law* 172, 205; 'International Military Tribunal at Tokyo (1948)' in Leon Friedman (ed), *The Law of War: A Documentary History*, vol 2 (London: Random House, 1972), 1029, 1157–9.

22 This includes the UK, Israel, and the US. See eg 'Statement by the UK Government about the 1986 U.S. attack on Libya' (1986) 57 *British Yearbook of International Law* 494, 639–41; Thomas Franck, *Recourse to Force* (Cambridge: Cambridge University Press, 2004), 103 (arguing that Israel's 'words and actions [in striking Egypt's airfields in 1967] clearly asserted a right to anticipatory self-defence against imminent armed attack').

23 Dinstein, *War, Aggression and Self-Defence*, 173; William O'Brien, *The Conduct of Just and Limited War* (Westport, CT: Greenwood Publishing, 1981), 133. Others cite the Dutch declaration of war against Japan on 8 Dec 1941 (before any attack had occurred against the Dutch West Indies) as an example of anticipatory self-defence, given that the Japanese planned to attack those islands on that date. Brownlie, *International Law and the Use of Force by States*, 258.

24 Rosalyn Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force' in Cassese, *The Current Legal Regulation of the Use of Force*, 443.

25 High-Level Panel on Threats, Challenges and Change, 'A More Secure World' (2004), 63, para 188 (emphasis in original).

26 Mary Ellen O'Connell, 'The Myth of Pre-Emptive Self-Defence' (2002) 8 *American Society of International Law Task Force* ('based on the practice of states...as well as simple logic, international lawyers generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming').

27 Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 8.

28 Doyle, *Striking First*, 14–15 (noting that extreme *Caroline*-type conditions are rarely found in reality). See also Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force' in Cassese, *The Current Legal Regulation of the Use of Force*, 442; Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 76–9.

29 See eg John Brennan, 'Strengthening Our Security By Adhering to Our Values and Laws', Remarks at Harvard Law School, 16 Sept 2011; High-Level Panel, 'A More Secure World', para 189 (accepting 'pre-emptive' self-defence as lawful defence against 'an imminent or proximate threat', but rejecting preventive self-defence, defined as action against a non-imminent or non-proximate threat).

30 Michael Schmitt, 'Responding to Transnational Terrorism Under the *Jus Ad Bellum*: A Normative Framework' (2008) 56 *Naval Law Review* 1, 21; Kalliopi Chainoglou, *Reconceptualising the Law of*

Self-Defence (Brussels: Ant. N. Sakkoulas, 2008), 334–5.

31 Schmitt, 'Responding to Transnational Terrorism Under the *Jus Ad Bellum*: A Normative Framework', 21.

32 2002 US National Security Strategy, 15. Several scholars characterize this argument as one in support of preventive—not merely pre-emptive—self-defence. Doyle, *Striking First*, 25; Ivo Daalder and James Steinberg, 'The Future of Preemption' (Winter 2005) *American Interest* 1 fn 1.

33 2002 US National Security Strategy, 15.

34 'PM warns of continuing global terror threat', 10 Downing Street, 5 Mar 2004 ('Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically I am not saying that every situation leads to military action. But we surely have a duty and a right to prevent the threat materialising'); Phil Mercer, 'Tensions Rise Over Australia's Pre-Emptive Strike Policy Ahead of ASEAN Summit', *Epoch Times*, 26 Nov 2004 ('[Then Prime Minister] Howard repeatedly has said his government would attack militants overseas if they were planning to strike Australian interests and the host country refused to act...').

35 'Japan Threatens Force Against North Korea', *BBC News*, 14 Feb 2003 ('Japan has warned it would launch a pre-emptive military action against North Korea if it had firm evidence Pyongyang was planning a missile attack'); Anthony Faiola, 'In Japan, Tough Talk About Preemptive Capability', *Washington Post*, 11 July 2006 ('Japanese officials on Monday called for a debate on whether Japan should pursue military capabilities that would enable preemptive strikes at North Korean missile bases. ...The Japanese parliament has previously ruled that a preemptive strike on missiles about to be fired at Japan may fall under the definition of self-defense. In recent days, Japanese leaders have been citing such interpretations').

36 Andrew Kramer, 'Russian General Makes Threat on Missile-Defense Sites', *New York Times*, 3 May 2012.

37 See UN Charter, Arts 39, 42.

38 High-Level Panel, 'A More Secure World', para 190.

39 Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 104.

40 2002 US National Security Strategy, 15. See also UK Attorney General's speech in the House of Lords, HL Deb, 21 Apr 2004, vol 660 cols 369–72 (stating that states may act in self-defence where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack).

41 This includes Michael Glennon and Anthony Clark Arend. See Murphy, 'The Doctrine of Preemptive Self-Defense', 717–19 (describing the 'Charter-is-Dead' school).

42 High-Level Panel, 'A More Secure World', paras 189–90.

43 Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force' in Cassese, *The Current Legal Regulation of the Use of Force*, 443; Franck, *Recourse to Force*, 108; Terence Taylor, 'The End of Imminence?' (2004) 27 *Washington Quarterly* 57, 58.

44 Compare Leland Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (London: Stevens, 1949), 44–5 (arguing that Art 2(4) was designed to prevent armed conflict and allows very few exceptions to that goal), with Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 7 ('The basic policy behind international self-defense doctrine is to promote global order by permitting states sufficient leeway to respond to expected security threats while not creating an exception so broad to the baseline prohibition of force that it swallows the rule...').

45 Murphy, 'The Doctrine of Preemptive Self-Defense', 738. Murphy notes that it is not clear whether state practice is relevant here as evidence of states' interpretations of the Charter

language, or as evidence of an emerging norm of customary international law on the use of force that supersedes the Charter (at 710).

46 Murphy, 'The Doctrine of Preemptive Self-Defense', 720–1.

47 Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 9–10.

48 Letter from Daniel Webster (see n 5).

49 Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 12 (describing the 'widespread belief that legal doctrine, and the concept of imminence in particular, needs to be updated in light of contemporary threats such as the proliferation of WMD').

50 2002 US National Security Strategy, 6.

51 Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 8–9.

52 Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 11; Doyle, *Striking First*, 11–17; Greenwood, 'International Law and the Pre-Emptive Use of Force', 16

53 Greenwood, 'International Law and the Pre-Emptive Use of Force', 16.

54 Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction', 4.

55 Leonard Spector and Avner Cohen, *Israel's Airstrike on Syria's Reactor: Implications for the Non-Proliferation Regime* (Washington DC: Arms Control Association, 2008).

56 Spector and Cohen, *Israel's Airstrike on Syria's Reactor*.

57 Spector and Cohen, *Israel's Airstrike on Syria's Reactor*. See also Andrew Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?' (2011) 16 *Journal of Conflict and Security Law* 263, 268.

58 Spector and Cohen, *Israel's Airstrike on Syria's Reactor*.

59 Spector and Cohen, *Israel's Airstrike on Syria's Reactor*.

60 Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility', 264; IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2010/29.

61 Another hypothesis is that states' non-response to the al Kibar bombing reflected political support for Israel's action rather than collective acceptance that such an act was legal. Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility', 290.

62 See eg Schmitt, 'Responding to Transnational Terrorism Under the *Jus Ad Bellum*', 6–7.

63 Judith Gardam, 'A Role for Proportionality in the War on Terror' (2005) 74 *Nordic Journal of International Law* 3, 11 (conceding that the *Caroline* requirement of immediacy 'may no longer prevail in the face of the threat of terrorism' but demanding a 'distinct quantifiable threat' before a state may act); Philippe Sands, 'International Law and the Use of Force', Written Evidence to Select Committee on Foreign Affairs, (2004), para 15 (concept of imminence must be 'flexibly interpreted in an age in which technology allows great devastation to be wrought in a very short period of time').

64 Greenwood, 'International Law and the Pre-Emptive Use of Force', 16; see also Doyle, *Striking First*, 21 (noting that the rise of belligerent non-state actors makes evidence of 'active preparation' very hard to identify in time to pre-empt the threat).

65 Schmitt, 'Responding to Transnational Terrorism Under the *Jus Ad Bellum*', 10 ('Even though the timing and location of an attack may be uncertain, there is near certainty that an attack will be conducted since that is the group's very purpose').

66 Doyle, *Striking First*, 21, 93.

67 See eg Michael N. Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge: Cambridge University Press, 2013); Oona Hathaway et al, 'The Law of Cyber-

Attack' (2012) 100 *California Law Review* 817.

68 Marco Roscini, 'World Wide Warfare—*Jus ad Bellum* and the Use of Cyber Force' (2010) 14 *Max Planck Yearbook of International Law* 85, 120.

69 Remarks of John Brennan, 'Strengthening Our Security By Adhering to Our Values and Laws'. See also James Steinberg, 'Preventive Force in U.S. National Security Strategy' (2005–6) 47 *Survival* 55, 58–9 ('according to the President and his national security team, there are three reasons for a more expansive use of preventive force—the changing *nature of the actors* who threaten the United States (rogue states and terrorists vs traditional state adversaries); the *threat* (clandestine weapons programmes) and the *inadequacy of relying on collective action* through the Security Council').

70 Doyle, *Striking First*, 46.

71 Doyle, *Striking First*, 61–2. See also Ivo Daalder and James Steinberg, 'The Future of Preemption' (calling for the creation of 'coalitions of like-minded states to legitimate decision-making on the preventive use of force' where the UN or regional route has failed and noting that 'if it proves impossible to convince one's democratic peers that intervention is justified, that should in and of itself give any national leadership pause about proceeding').

72 Abraham Sofaer, 'On the Necessity of Pre-Emption' (2003) 14 *European Journal of International Law* 209, 220.

73 Greenwood, 'International Law and the Pre-Emptive Use of Force', 16.

74 Greenwood, 'International Law and the Pre-Emptive Use of Force', 16.

75 Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* (London: Chatham House, 2005). See also Schmitt, 'Responding to Transnational Terrorism Under the *Jus Ad Bellum*', 11 (accepting pre-attack self-defence 'when a terrorist group harbors both the intent and means to carry out attacks, there is no effective alternative for preventing them, and the State must act now or risk missing the opportunity to thwart the attacks').

76 Richard Tuck, 'Comment' in Doyle, *Striking First*, xxi; Greenwood, 'International Law and the Pre-Emptive Use of Force', 14 (noting that states condemned the Osirak attack on the facts, not because they rejected the concept of anticipatory self-defence); Schmitt, 'Responding to Transnational Terrorism Under the *Jus Ad Bellum*', 4 (stating that criticism of the US bombing in Sudan was driven by concern that the attack was based on faulty intelligence, not on resistance to self-defence against terrorist acts).

77 Harold Koh, 'Comment' in Doyle, *Striking First*, 117.

78 Tuck, 'Comment' in Doyle, *Striking First*, 126.

79 Doyle, *Striking First*, 17 fn 18 (noting that genuine cases of pre-emptive war have been rare); Murphy, 'The Doctrine of Preemptive Self-Defense', 710 (noting that 'strict constructionists' believe that invocations of anticipatory self-defence have been rare and that other states have resisted those invocations).

80 William Taft IV and Todd Buchwald, 'Preemption, Iraq, and International Law' (2003) 97 *American Journal of International Law* 557.

81 Remarks of John Brennan, 'Strengthening Our Security By Adhering to Our Values and Laws'.

82 Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility', 276 ('While the notion of pre-emptive force against non-imminent threats has not been accepted, a by-product of the Bush doctrine appears to be greater explicit support for the more limited right of anticipatory self-defence in relation to imminent threats').

83 Murphy, 'The Doctrine of Preemptive Self-Defense', 745.

84 Michael Schmitt, 'Pre-Emptive Strategies in International Law' (2003) 24 *Michigan Journal of International Law* 513, 546.

85 Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility', 290; Christine Gray, 'The Use of Force to Prevent the Proliferation of Nuclear Weapons' (2009) 52 *Japanese Yearbook of International Law* 101, 126.

86 See eg William Broad and Mark Mazzetti, 'Yet Another Photo of Site in Syria, Yet More Questions', *New York Times*, 27 Oct 2007 (quoting a senior US intelligence official as stating that US spy satellites had observed Syria's site for years).