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STATE FAILURE AND THE USE OF FORCE IN THE AGE OF GLOBAL TERROR

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Abstract: The expansion of U.S. counterterrorist operations throughout the world coincides with a growing sense among some U.S. policymakers that so-called "failed states" pose grave threats to international security. The governments of failed states have weakened to the point that they can no longer provide public goods, such as territorial integrity, economic infrastructure, and physical security. U.S. defense strategists suspect that the lawlessness of failed states may do more to undermine security in the United States than direct confrontation by hostile governments. Denying terrorists the sanctuary they seek in failed states may become a central feature in the war on terror, and it is likely that the United States will use preemptive force against suspected terrorists inside a state that is incapable of policing itself. This Note examines the legality of using preemptive military force against suspected terrorists located in failed states.

INTRODUCTION

On March 19, 2003, armed U.S. commandos snatched up a suspected al Qaeda terrorist in Mogadishu, Somalia and transported him out of the country for questioning. The commandos conducted their raid without assistance from any government authority in Somalia. The United States' decision to intervene unilaterally was no doubt influenced by the fact that since 1992 Somalia has lacked a central government capable of providing the most basic services to its people, much less mounting assaults against sophisticated terrorist groups within its borders.

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1 Adrian Blomfield, U.S. Snatches Terror Suspect in Somalia, DAILY TELEGRAPH (London), Mar. 20, 2003, at 17. The suspected terrorist was a Yemeni with a South African passport hiding in Somalia. Id.

2 Id.

Commando raids like the one in Somalia may become common in the U.S.-led "war on terror."4 The expansion of counterterrorist operations throughout the world coincides with a growing sense among some policymakers that so-called "failed states" pose grave threats to international security.5 Failed states, as defined by policy analysts and legal scholars, are those countries whose governments have weakened to the point that they can no longer provide public goods, such as territorial integrity, economic infrastructure, and physical security.6 U.S. defense strategists suspect that the lawlessness of failed states may do more to undermine security in the United States than direct confrontation by hostile governments.7 Unlike state sponsors of terror, failed states do not necessarily welcome terrorists; they may simply be unable to impose order and project sufficient authority within their borders to make themselves inhospitable to terrorist groups.8 Moreover, they serve as "attractive safe havens and staging grounds" for terrorist groups and, in many cases, afford terrorists easy access to valuable commodities, such as diamonds and drugs, that help fund their activities.9 Some policymakers fear that in the age of international terror, failed states pose dangers not only to themselves and their neighbors, but also to people around the globe.10

7 See National Security Strategy, supra note 5, at 10-11.
9 Rice, supra note 8.
The Bush Administration’s National Security Strategy highlights the problem of failed states. On its opening page, the report declares: “America is now threatened less by conquering states than we are by failing ones.” The report continues: “[P]overty, weak institutions, and corruption can make weak states vulnerable to terrorist networks . . . within their borders.”

Denying terrorists the sanctuary they seek in failed states may become a central feature of the war on terror. The surest method for denying havens for terrorists in failed states is to prevent and reverse state failure itself. The Bush Administration’s strategic plan pledges to “help strengthen Africa’s fragile states, help build indigenous capability to secure porous borders, and help build up the law enforcement and intelligence infrastructure to deny havens for terrorists.” Yet, strengthening weak states to the point where their weakness is no longer an “attractive nuisance” for terrorists may require a decades-long commitment of financial and humanitarian aid, technical and military assistance, and institution-building. A massive state-building effort, even with unlimited resources, would likely require years of incremental progress before it produced meaningful results. Dispatching military advisers to states whose central governments have collapsed is also unlikely to make the United States safer in the immediate future.

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11 See NATIONAL SECURITY STRATEGY, supra note 5, at 1, 10–11.
12 Id. at 1.
13 Id. at v.
14 See id. at v. 1. See generally BRIAN JENKINS, COUNTERING AL QAEDA: AN APPRECIATION OF THE SITUATION AND SUGGESTIONS FOR STRATEGY 17–21 (2002); Mallaby, supra note 8.
15 Rotberg, Failed States in a World of Terror, supra note 10; Rice, supra note 8.
16 NATIONAL SECURITY STRATEGY, supra note 5, at 10–11. It remains to be seen whether significant resources will be devoted to the long-term, non-military task of shoring up weak governments around the world (not only in Africa, but in Asia, Europe, and Latin America too) by a U.S. administration focused on short-term, military solutions. See, e.g., Marc Lacey, Somalia Talks Are Stormy, But They Still Inch Ahead, N.Y. TIMES, Jan. 19, 2003, § 1, at 8 (describing lack of U.S. engagement in the peace process in Somalia, despite concerns about instability and terrorism).
17 See generally Tom Carothers, Promoting Democracy and Fighting Terror, FOREIGN AFFAIRS, Jan.–Feb. 2003, LEXIS, News Library, Forafr File; Mallaby, supra note 8 (discussing the costs of institution-building in failed states).
18 See HENRY KISSINGER, DIPLOMACY 453–54 (1994) (describing the United States’ level of commitment to democracy-building after World War II); Mallaby, supra note 8.
In the meantime, the United States’ new security strategy emphasizes the preemptive use of military solutions to remove threats in the near term.20 This strategy has been borne out in Iraq, and it is only logical to expect that it will be applied to other perceived threats that require immediate attention.21 In the case of failed states, U.S. officials fear that terrorists can exploit states’ weaknesses and strike the United States and its allies without warning.22 Thus, it is likely that in the war on terror the United States will use preemptive force against terrorists inside states that are incapable of policing themselves.23

The United States and its allies are preparing for the use of limited military force to capture or destroy terrorist groups operating in third world countries.24 Unlike the U.S.-led military operations in Afghanistan, which combined hunting terrorists with occupation and regime change, operations against terrorist groups hiding in failed states will likely feature more limited uses of force, such as Hellfire missile strikes (perhaps launched by the CIA’s unmanned aircraft) or commando raids designed to capture or kill terrorist operatives.25 Force might also be used to secure, disarm, or destroy weapons of mass destruction in danger of falling into terrorist hands.26

In September 2002, the United States deployed 800 Special Forces personnel to Djibouti to set up a base camp for counter-terrorist opera-

20 See National Security Strategy, supra note 5, at 15.
22 See National Security Strategy, supra note 5, at 15.
23 See Thom Shanker & Eric Schmitt, U.S. Moves Commandos to Base in East Africa, N.Y. TIMES, Sept. 18, 2002, at A20 (“The Pentagon is even now drafting potential tactics for covert missions against terrorists in countries where there is no responsible local government or where the local authorities would object to American action.”).
24 See John Donnelly, Terrorism Traced to Somalia: Citing Terror Threat, U.S. Boosts Military, Intelligence in Somalia, BOSTON GLOBE, Dec. 6, 2002, at A1 (noting that “U.S. special forces have been operating inside Somalia during recent months on a variety of surveillance missions”); Mark Fineman, New Phase of War on Terror Moves to E. Africa, LA. TIMES, Dec. 21, 2002, at A1 (discussing U.S. plans to “track—and attack—terrorist suspects throughout the seven-nation region of Somalia, Yemen, Kenya, Ethiopia, Eritrea, Djibouti, and Sudan”); Shanker & Risen, supra note 4 (reporting Pentagon plans to send Special Forces to capture or kill al Qaeda members “in countries where the United States is not at open war and, in some cases, where the local government is not informed of their presence”).
25 See Donnelly, supra note 24 (describing a U.S. Predator drone attack in Yemen that killed a senior al Qaeda official and the opening of a base camp in Djibouti for U.S. special forces and CIA teams that will carry out missions throughout the Horn of Africa). See generally Priest, supra note 19, at 127–28 (describing the types of missions, including counter-terrorist assaults, carried out by special forces units).
26 See Shanker & Risen, supra note 4.
tions throughout the Middle East and the Horn of Africa. In the fall and winter of 2002, Pentagon planners were preparing for missions targeting al Qaeda terrorists "in their safe houses or as they travel the world to coordinate attacks or seek havens." These plans envision Special Operations units striking deep inside countries where the United States is not at war, and in some cases where the local government is not even informed of their presence.

This Note examines the legality of using preemptive military force against terrorists located in failed or failing states. Part I explores the combined threats of failed states and global terror. Part II discusses international law governing the use of force, noting that pre-emptive strikes against terrorists in another country are probably not legal. Part III analyzes the legal justification for the use of force against terrorists in failed states, finding that in some circumstances limited force may conform to existing international norms. It further proposes that a "failed state doctrine" should be legally justifiable in light of the challenges posed by state failure, global terrorism, and proliferation of weapons of mass destruction. Part IV concludes by noting the need for combining a short-term strategy of combatting terrorist groups with a long-term strategy of preventing and reversing state failure.

I. THE COMBINED THREATS OF FAILED STATES AND GLOBAL TERROR

A. State Failure: Why It Poses a Threat

Since September 11, 2001 many countries have implemented strict measures aimed at eliminating terrorists operating within their borders. Others, like Pakistan, the Philippines, and Indonesia, are making efforts to pursue terrorist groups in their territory with significant assistance from the United States. Failed states, in con-

27 Shanker & Schmitt, supra note 23.
28 Id.
29 Id.
30 This Note does not address the legality of assassinations or targeted killings of suspected terrorists. For more on that question, see generally Nathan Canestaro, American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo, 27 B.C. INT'L & COMP. L. REV. 1 (2003).
32 See, e.g., Back to the Jungle, THE ECONOMIST, Mar. 1, 2003, at 41 ("American troops are on their way back to the Philippines. . . . to help the Philippine army wipe out Abu Sayyaf, a gang . . . on America's list of terrorists."); The Other War, THE ECONOMIST, Mar. 8, 2003, at 24 (describing the capture by Pakistani authorities of al Qaeda suspect Khalid Sheikh Mohammed); When Local Anger Joins Global Hate, THE ECONOMIST, Oct. 19, 2002, at 23 ("Indo-
trast, may not be able to cope with terrorists operating from their territory even with outside assistance. These states lack not only the sophisticated military resources needed to combat terrorists, but also the ability to fulfill the most basic functions of a state.

The problem of failed states is not new, and, although scholars disagree on what to call failed states and how to prevent their collapse, there is general consensus about some of the causes and characteristics of them. State failure may be brought about by civil war, severe economic depression, extreme government corruption, or a combination of these and other factors. While the specific circumstances in each state are different, failed states share some common characteristics. Their governments are unable to project power within their borders. They are unable to provide the most fundamental services that make up the state’s obligations in its contract with society: first and foremost physical security, but also basic health care, education, transportation and communications infrastructure, monetary and banking systems, and a system for resolving disputes.

Sudan is often cited as a failed state. At least two million Sudanese have died since Sudan’s second civil war began in 1983, 400,000 fled to neighboring countries, and another four million have been internally displaced. In the south, where most of the fighting has taken place, the state does not provide security, communications infrastructure, medical services, or an education system. Notably, tens of thousands of women and children have been abducted and en-

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33 See generally Rice, supra note 8 (discussing the inability of failed states to control their territory).
34 See id.
36 See generally Robert I. Rotberg, Failed States, Collapsed States, Weak States: Causes and Indicators, in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR, supra note 8, at 3–10 (discussing the flawed institutions and infrastructure associated with failed states) [hereinafter Rotberg, Failed States, Collapsed States, Weak States].
37 See id. at 2 (citing the inability to deliver political goods as a distinguishing characteristic of failed states).
38 See Rotberg, Failed States in a World of Terror, supra note 10.
39 See Rotberg, Failed States, Collapsed States, Weak States, supra note 36, at 3.
40 Prunier & Gisselquist, supra note 8, at 101.
41 Id. at 103.
42 Id.
slaved in Sudan since 1983. About two and a half million Sudanese subsist on United Nations (U.N.) food aid. Meanwhile, a number of international terrorist groups, including al Qaeda, continue to use Sudan as a safe haven.

Somalia, too, is commonly considered a failed state. U.S. military officials have expressed concerns that the transitional national government in Somalia controls little territory, has poorly trained and equipped military and police forces, and has little influence in the countryside. Somalia's 3200-mile coastline is virtually unpoliced. U.S. officials have long suspected that al Qaeda is using Somalia as a safe haven or even as a staging area for terrorist activities.

Others commonly classified as failed states are Afghanistan, Angola, Burundi, the Democratic Republic of Congo (DRC), Liberia, and Sierra Leone. Categories of weak and failed states are constantly shifting. Some states, like Colombia and Indonesia, still function but are in danger of failing. U.S. policymakers are also concerned about the risk of state failure in Pakistan, Georgia, Kyrgyzstan, and Uzbekistan. Others were in danger of failing a few years ago but have managed to regain control and strengthen state institutions since then.

Until the war on terror, state failure was seen mainly as a humanitarian problem. Indeed, the populations of failed and collapsed states are the ones who suffer most from the chaos, violence, and poverty brought about by their governments' failings. Humanitarian and economic aid is in many cases an effective response to state fail-

43 Id.
44 Id.
45 U.S. STATE DEPARTMENT, supra note 8.
46 See Rotberg, Failed States in a World of Terror, supra note 10.
48 Id.
50 Rotberg, Failed States, Collapsed States, Weak States, supra note 36, at 10.
51 See Rice, supra note 8 (discussing categories of failed or failing states).
52 See Rotberg, Failed States in a World of Terror, supra note 10; Rice, supra note 8.
53 Frantz, supra note 49.
55 See Rotberg, Failed States in a World of Terror, supra note 10.
56 See id.
Yet, in the age of global terror, when terrorist groups prey on weak governments and thrive in anarchic environments to finance and plan their activities, U.S. policymakers have begun to focus on failed states as a danger both to themselves and to others in the international community.

The concerns of analysts and policymakers about failed states can be summed up in three main points. First, their lawlessness allows terrorist organizations to conduct activities without fear of capture or punishment. Failed states are too weak, distracted, and corrupt to find and eliminate terrorist groups within their borders. Second, state failure allows terrorist organizations access to resources they need to conduct their activities, including money and recruits. Failed states are often havens for criminal activities, such as drug trafficking and diamond smuggling, that terrorist groups use to finance their operations. Third, failed states offer terrorists the cover of state sovereignty. While terrorists take refuge behind the borders of a state that is, at least in principle, a sovereign nation, they avoid capture by other states, whose governments may be reluctant to cross international boundaries to catch them. At the same time, those terrorists may believe that other concerned states have little hope of cooperating with the barely functioning governments of failed states on counterterrorism operations.

57 See Rice, supra note 8.
58 See Rotberg, Failed States in a World of Terror, supra note 10.
59 See Mallaby, supra note 8; U.S. State Department, supra note 3.
60 See Rotberg, Failed States in a World of Terror, supra note 10 (discussing the inability of failed states to project power within their borders).
61 See Rice, supra note 8.
62 Id.
65 See U.S. State Department, supra note 3 (describing the lack of central government, legal system, and national security force in Somalia). The United States has worked closely with some very weak governments on counterterrorism operations. See Seymour M. Hersh, Manhunt: The Bush Administration's New Strategy in the War Against Terrorism, THE NEW YORKER, Dec. 23, 2002, LEXIS, News Library, Newyrk File (describing a joint American-Yemeni mission to kill a suspected al Qaeda member in Yemen). It has chosen not to work with some other governments. See Blomfield, supra note 1 (noting lack of cooperation on the part of the Somali transitional government in a U.S. raid to capture a suspected al Qaeda terrorist).
B. Global Terrorism: Why It Is Changing International Law

U.S. citizens live in an age of paradox.66 The United States is an unrivaled superpower among nation-states, yet its citizens are vulnerable to surprise attack by militarily unsophisticated terrorists who recognize no borders.67 President George W. Bush put state sponsors of terror on notice when he declared that "any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."68 Pakistan has stepped up efforts to arrest and extradite suspected terrorists.69 Open societies such as the United States and the European Union have increased border controls and surveillance of suspected terrorist groups.70 These measures may have made it more difficult for terrorists to thrive in countries with strong central governments and effective governance.71

Nonetheless, the United States and its allies face a formidable foe.72 Technology has empowered terrorist organizations in ways that are fundamentally new.73 First, terrorist organizations have benefitted from the revolution in information and business technology in the last decade.74 Advanced communications systems have made possible the proliferation and expansion of terrorist networks across the globe.75 Moreover, advances in communications technology make it harder to track and catch terrorists, since they can plan and execute their attacks using encrypted e-mail, cell phones, and pagers, spread out among dozens or hundreds of operatives, to conceal their activities.76

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69 See, e.g., The Other War, supra note 32, at 24.
70 See generally For Whom the Liberty Bell Tolls, supra note 31, at 18-20.
71 See generally id. (discussing the enactment and enforcement of strict antiterrorism measures).
72 See generally Jenkins, supra note 14, at 17-21 (describing the threats posed by the al Qaeda terrorist organization).
74 See id.
75 See id.
Second, terrorist groups benefit from the growing power of non-state criminal actors.\textsuperscript{77} The growth of international organized crime rings profiting from diamond smuggling, drug trafficking, forced prostitution, child slavery, and other illicit activities can also be tied to the financing of terrorist networks.\textsuperscript{78}

Third, the end of the Cold War and the proliferation of weapons of mass destruction have made possible a terrorist group armed with nuclear, biological, or chemical weapons.\textsuperscript{79} Whereas during the Cold War the possibility of mass destruction was tightly controlled by a few, mostly risk-averse states, today weapons of mass destruction may find their way into the hands of individuals whose sole purpose is to kill civilians.\textsuperscript{80} The September 11 attacks demonstrated that mass casualties are not limited to attacks with nuclear, chemical, or biological weapons.\textsuperscript{81} Nonetheless, it is clear that the attacks would have been much worse if such weapons were involved.\textsuperscript{82} A one-kiloton nuclear device—hundreds of times smaller than the bombs stockpiled by the United States and Russia—detonated in the World Trade Center complex would have likely killed everyone in Manhattan.\textsuperscript{83}

As technology has empowered networks of terrorist groups over the past decade, the aims of the groups have also changed. It used to be the conventional wisdom that terrorists wanted "a lot of people watching, not a lot of people dead."\textsuperscript{84} This seemed to be so in part because most terrorist organizations had specific political goals and political constituencies.\textsuperscript{85} They used terror as a tactic for making demands (for instance, political independence) to government authorities on behalf of a larger group of supporters.\textsuperscript{86} Too many civilian casualties would have repulsed their constituencies.\textsuperscript{87}

\textsuperscript{77} See Mallaby, \textit{supra} note 8.
\textsuperscript{78} See id. (discussing how trade in black market diamonds has benefited Lebanon's Hezbollah).
\textsuperscript{79} See generally Jessica Stern, \textit{The Ultimate Terrorists} 9 (1999).
\textsuperscript{80} See \textit{National Security Strategy}, supra note 5, at 15.
\textsuperscript{81} See Mark Huband, \textit{Terrorism Comes In from Edge of the World}, Fin. Times (London), Sept. 5, 2002, at 9 (noting the mass casualties that occurred on September 11, 2001).
\textsuperscript{82} See Stern, \textit{supra} note 79, at 1–2 (noting the devastation that a nuclear attack would cause in Manhattan).
\textsuperscript{83} See id.
\textsuperscript{84} Id. at 76 (quoting Rand Corporation analyst Brian Jenkins).
\textsuperscript{86} See id. at 345.
\textsuperscript{87} See id. at 347; Stern, \textit{supra} note 79, at 76.
Today, in contrast, it has become evident that many terrorist organizations no longer seek to avoid mass casualties in their terror attacks. In fact, as the September 11 attacks showed, groups such as al Qaeda seem intent on killing as many civilians as possible. The U.S. State Department reports that Osama bin Laden has professed that the acquisition of weapons of mass destruction is a "religious duty" and has threatened to use them against civilian populations. Al Qaeda appears to lack any type of political agenda aside from killing civilians, and its supporters are radicalized individuals who are emboldened, not repulsed, by civilian deaths.

The individual terrorist operatives have also changed. Today, many terrorist missions are accomplished by young men (and in some cases women) who know they will never reap the rewards of their work (except perhaps in an afterlife promised by their leaders). In Israel, suicide bombing has become the norm. Suicide missions also appear to be acceptable to al Qaeda operatives, such as the September 11 hijackers and later would-be terrorists, including convicted "shoebomber," Richard Reid, who in December 2001 tried to blow up an airplane by detonating explosives hidden in his sneakers.
II. THE USE OF FORCE AND STATE ATTRIBUTION

A. The U.N. and Self-Defense

States attempt to justify preemptive missile strikes or commando raids against terrorists as an act of self-defense.95 The self-defense argument in the war on terror is an appeal to common sense: the United States acts now to prevent terrorists from striking later.96 Yet, in most cases preemptive force against terrorists violates the U.N. Charter.97 Article 2(4) of the Charter outlaws all use of force "against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."98 Since the decision to use military force is more often the product of a calculation of national interest, not legal analysis, many states seek to justify their military actions as an exercise of their inherent right of self-defense under Article 51—the only exception to Article 2(4) contained in the Charter.99 Article 51 permits self-defense "if an armed attack occurs."100 That clause has been interpreted to contain two limiting factors: force may be used only in response to (1) an armed attack that (2) has already occurred.101 Article 51 offers dubious justification for counterterrorist operations in most cases and is practically useless in supporting the use of force against terrorists in failed states.102

The "armed attack" element of Article 51 poses two problems. First, the term is not clearly defined.103 Armies crossing borders and bombs dropping into the territory of another state no doubt constitute an armed attack.104 Article 51 does not clearly state whether covert action, intervention in support of rebels, and support for terrorist

95 See generally Bonafede, supra note 64, at 171–81.
96 See National Security Strategy, supra note 5, at 15.
97 U.N. Charter art. 2, para. 4.
98 Id.
99 See U.N. Charter art. 51. Given the difficulties associated with obtaining U.N. Security Council authorization for their military action, states have more often justified their use of force as an exercise of their right of self-defense under Article 51 of the U.N. Charter. See Bonafede, supra note 64, at 171–81.
100 U.N. Charter art. 51.
101 See id.
103 See id. at 541.
actions are equivalent to an armed attack. In *Nicaragua v. United States*, the International Court of Justice (ICJ) found that where the intervening state sent in "armed bands, groups, irregulars, or mercenaries" whose acts were as serious as those committed by regular armed forces, the intervention would amount to an armed attack and therefore justify a forceful response.

The second problem with the armed attack element of Article 51 is state attribution. Even if a terrorist act against the United States could be considered an armed attack for the purposes of Article 51, it would still have to be attributed to a particular state to justify the use of force against that state. The standard for state attribution is high; mere tolerance of terrorists on a state's soil is not enough to trigger state responsibility. In the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia held that the acts of the Bosnian Serb army could be imputed to Serbia as long as Serbia exercised "overall control" over the Bosnian Serb forces. In 2001, the U.N. International Law Commission (ILC) issued new guidelines on state attribution, finding that conduct by a group "acting on the instructions of, or under the direction and control of" a state could be attributed to that state, and that conduct by a group "exercising elements of governmental authority in the absence or default of the official authorities" could be likewise be attributed to a state.

Some have argued that a new norm for defining an armed attack emerged suddenly after the September 11 terrorist acts in the United States. In October 2001, when the U.S. ambassador to the U.N. reported to the Security Council on the beginning of U.S. military action in Afghanistan, he labeled the terrorist acts "armed attacks that were carried out against the United States" that justified a U.S. re-

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105 See *id.* at 740.
107 See Glennon, *supra* note 102, at 543 (suggesting the need for substantial involvement on the part of the host state for the attribution requirement to be met).
108 See *id.*
109 See *id.*
sponse under Article 51. 113 Concerning state attribution, the United States argued that Taliban support for al Qaeda meant essentially that Afghanistan had launched an armed attack against the United States, which justified a U.S. response under Article 51. 114 The U.S. ambassador’s letter to the U.N. claimed that “the attacks on 11 September 2001 and the ongoing threat to the United States... posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation.” 115 Neither the Security Council nor the General Assembly adopted any resolutions condemning the launch of military operations against the Taliban and al Qaeda, which suggests tacit approval of the United States’ characterization of the terrorist acts and its use of force in Afghanistan. 116

The second limiting factor in Article 51 is the requirement that an armed attack must have already occurred. 117 Past practice concerning preemptive force, even after the establishment of the U.N. Charter, is inconclusive. 118 On the one hand, the United States and many Western nations did not reject Israel’s contention that its six-day pre-emptive war against Egypt, Syria, and Jordan was an act of self-defense. 119 On the other hand, U.N. Security Council members, including the United States, condemned Israel’s 1981 bombing of the Osirak nuclear reactor in Iraq, which Israeli leaders claimed was to be used to produce material for nuclear weapons that could threaten Israel. 120

B. Article 51 and Failed States

Article 51 may have justified the use of force in Afghanistan, where the links between the September 11 terror attacks, al Qaeda terrorists, and their Taliban sponsors were clear. 121 It does not, however, justify the use of military force against terrorists hiding in failed

114 Id.
115 Id.
117 U.N. CHARTER art. 51.
118 See generally Arend, supra note 104, at 743 (noting that the goal of eliminating weapons of mass destruction may not justify preemptive use of force).
120 Arend, supra note 104, at 743–44.
121 See Letter from Representative of the U.S., supra note 113.
states whose governments do not sponsor terrorism. In contrast to state sponsors of terrorism, many failed states cannot be held liable for the actions of terrorists within their borders because of their inability to control non-state actors on their territory. These failed states are unable to issue instructions or control the operations of terrorists within their borders. The threat of armed attack posed by those terrorists cannot be attributed to the failed states. Thus, military intervention in failed states to capture or kill terrorists cannot be justified as self-defense under Article 51.

C. Limited Force and Article 2(4)

Preemptive strikes against terrorists in failed states may not be justified under Article 51, but that does not necessarily mean that they are illegal under the U.N. Charter. Article 51 appears to be an exception to the Charter’s ban on certain uses of military force. If strikes against terrorists in failed states fall outside the ban on the use of force, then the requirements of Article 51 need not apply.

As noted above, Article 2(4) of the U.N. Charter outlaws the use of force “against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.” In the context of the war on terror, it may be argued that a limited use of force targeting a terrorist organization on another state’s territory would not violate that state’s territorial integrity or political independence and thus would not contradict Article 2(4). Such use of limited force, so the argument goes, “is not directed against the persons or property of the ‘host’ country, is not designed to gain or hold territory, and does not seek to overthrow or otherwise influence the

123 See id.
124 See, e.g., Rice, supra note 8; U.S. State Department, supra note 3 (stating that because “Somalia has no national government at present . . . [e]conomic sanctions were applied [directly to the terrorist group] Al-Itihad”).
125 See ILC Report, supra note 111 (a terrorist threat coming from a failed state does not meet the state attribution requirements in Article 8 of the Draft Articles included in the Report).
126 See U.N. Charter art. 51; Glennon, supra note 102, at 543–45.
127 See Koh, supra note 122, at 28 (citing the need to rethink Article 2(4) in the case of preventing terrorist attacks).
128 See U.N. Charter art. 51.
129 See id.; Travailio, supra note 119, at 166.
130 U.N. Charter art. 2, para. 4.
131 See Travailio, supra note 119, at 166.
nature of the host government” and therefore would not be proscribed by Article 2(4).132 Moreover, eliminating the threat of terrorism is consistent with the principles of the U.N.133 Numerous General Assembly Resolutions and Conventions have condemned terrorism as a practice.134 For instance, Security Council Resolutions 1368 and 1373 of September 2001 reaffirmed that terrorist acts constitute “threats to international peace and security” and resolved that states should take all necessary steps to prevent terrorist acts.135

Yet, when applied to most states, this argument seems flawed. One scholar has noted that “most uses of force, no matter how brief, limited, or transitory, do violate a state’s territorial integrity.”136 Even a limited, temporary, targeted operation to eliminate a terrorist threat, when it crosses international borders, may in fact constitute a violation of the territorial integrity or political independence of the “host” state.137 The right to control entry into a state goes to the heart of territorial integrity and has its roots in the very notion of state sovereignty.138 Surely, infiltration of a state’s borders by armed commandos would deny that state the right to regulate who enters and who stays on its territory.139 If political independence includes the right to decide, without outside interference, how to conduct one’s affairs within one’s own borders, then the destruction wrought by missile strikes or the violence resulting from commando raids should also violate political independence.140

Furthermore, regardless of the U.N.’s condemnation of terrorism as a tactic, the U.N. Charter is construed to prevent unilateral use of

132 Id. at 167.
133 Id.
134 Id.
136 Travaglio, supra note 119, at 169 (quoting Rosalyn Higgins, Problems & Process: International Law and How We Use It 240 (1994)).
137 Travaglio, supra note 119, at 169.
138 See Chae Chan Ping v. United States, 130 U.S. 581, 603-04, 609 (1889) (finding that “jurisdiction over its own territory ... is an incident of every independent nation” and “the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of these sovereign powers delegated by the Constitution, the right to its exercise ... cannot be ... restrained on behalf of any one”).
139 See, e.g., U.N. SCOR, 15th Sess., 865th mtg., at 4, U.N. Doc. S/4349 (1960) (resolving that the incursion of Israeli agents into Argentina to capture war criminal Adolf Eichmann was a “violation of the sovereignty of the Argentine Republic”).
force that crosses international borders and intervention into another state’s domestic affairs.\textsuperscript{141} In particular, Article 2(7) prohibits intervention “in matters which are essentially within the domestic jurisdiction of any state.”\textsuperscript{142} This language may bar even use of limited force as inconsistent with the “Purposes of the United Nations.”\textsuperscript{143}

It seems likely that the preemptive use of force against terrorists in most countries would be a violation of those countries’ sovereignty;\textsuperscript{144} however, failed states do not share the characteristics of most states.\textsuperscript{145} Furthermore, the extreme danger posed by international terrorists calls for new thinking about sovereignty.\textsuperscript{146}

\section*{III. When Is Force Justified?}

\subsection*{A. Territorial Integrity and Political Independence of Failed States}

It may be argued that the use of limited military force to strike terrorists in failed states does not violate Article 2 of the U.N. Charter.\textsuperscript{147} A limited use of force would not violate a failed state’s territorial integrity because a failed state by definition does not exercise meaningful control over its borders or territory.\textsuperscript{148} Likewise, such force would not be a violation of a failed state’s political independence since no functioning political decision-making process exists.\textsuperscript{149} Moreover, the limited nature of the use of force would mitigate the effects on the state’s independence and territorial integrity.\textsuperscript{150} For one thing, such uses of force would be highly specific, of limited duration, against defined terrorist targets, and with minimal impact on the state and its population.\textsuperscript{151} For an-

\begin{footnotesize}

\textsuperscript{142} U.N. CHARTER art. 2, para. 7.

\textsuperscript{143} See id.

\textsuperscript{144} See Travalio, supra note 119, at 169.

\textsuperscript{145} See Rotberg, \textit{Failed States, Collapsed States}, Weak States, supra note 36, at 2.

\textsuperscript{146} See Koh, supra note 122, at 28; Travalio, supra note 119, at 165 (noting the inapplicability of current interpretations of Article 2(4) to the use of force to prevent terrorist attacks).

\textsuperscript{147} See Travalio, supra note 119, at 166.

\textsuperscript{148} See id.; Rice, supra note 8 (defining failed states as “countries in which the central government does not exert effective control over, nor is it able to deliver vital services to, significant parts of its own territory due to conflict, ineffective governance or state collapse”).

\textsuperscript{149} See id.

\textsuperscript{150} See Travalio, supra note 119, at 166.

\textsuperscript{151} See Shanker & Risen, supra note 4.
\end{footnotesize}
other, the armed forces carrying out the counterterrorist raids would be fulfilling a function the failed state would be obligated to perform, if it were able to do so.\textsuperscript{152}

This proposition also suffers from conceptual and practical difficulties. State failure has no legal meaning under international law.\textsuperscript{153} States have legal personality that outlives any one regime or government, and their status cannot be terminated by other states.\textsuperscript{154} Moreover, the criteria for statehood are interpreted quite flexibly.\textsuperscript{155} As presented in the 1933 Convention on the Rights and Duties of States, they include a permanent population, a defined territory, a government, and the capacity to enter into relations with the other states.\textsuperscript{156} Traditionally, lack of a standing army, ill-defined borders, and military occupation have not deprived states of statehood, and, thus far, no state has contended that countries such as Sudan or Somalia, where the central government has collapsed, are no longer states.\textsuperscript{157}

Moreover, the risks of a policy justifying use of force against suspected terrorists in failed states are great. First is the danger of creating a customary rule of international law that allows states to invade their neighbors whenever they deem that "state failure" has occurred.\textsuperscript{158} The potential for abuse could create, as some scholars have argued, a "legion of loopholes" in the U.N. Charter.\textsuperscript{159} For example, Russia has threatened to strike suspected Chechen terrorists hiding in neighboring Georgia, also citing self-defense under Article 51.\textsuperscript{160} Though not a failed state, Georgia is a weak state that has suffered from years of civil war; its government struggles to control its territory.\textsuperscript{161} With this in mind, President Vladimir Putin has written to U.N. Secretary General Kofi Annan, claiming that Georgian passivity toward Chechen fighters on its territory violates U.N. Security Council resolutions.\textsuperscript{162}

\begin{itemize}
\item \textsuperscript{152} See Bonafede, supra note 64, at 194 n.219.
\item \textsuperscript{154} See id.
\item \textsuperscript{155} See id.
\item \textsuperscript{156} Id. at 414.
\item \textsuperscript{157} Id. at 435.
\item \textsuperscript{158} See Nowrot & Schabacker, supra note 141, at 339.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} See Putin's Georgia Play, BOSTON GLOBE, Sept. 16, 2002, at A14
\item \textsuperscript{161} Rice, supra note 8.
\item \textsuperscript{162} See Stephen Sestanovich, Putin Has His Own Candidate for I.'s...emption, N.Y. TIMES, Oct. 6, 2002, § 4, at 14.
\end{itemize}
Russia's top military leader asserted in 2002 that the Georgian president was no different from the Taliban. If Russia's rhetoric were to become reality, there would be little to stop invading states from invoking a "failed state doctrine" whenever they wished, simply by declaring that their victim had been unable to control the "terrorist groups" within its borders.

Second, and more important, is the possibility of civilian casualties, even where targets are narrowly limited to known terrorist operatives. Mistakes happen in the fog of war, despite the extensive precautions that highly skilled and disciplined forces may take, as operations in Afghanistan have demonstrated.

Finally, there is something troubling about a foreign policy that values U.S. security—and U.S. lives—so much more highly than the lives of ordinary Somalis, Sudanese, or other inhabitants of designated failed states. Dispatching commandos or launching missile strikes to capture or kill suspected terrorists, while ignoring the plight of the sick, starving, and war-ravaged people next door seems callous and, in the long term, irresponsible. U.S. citizens may reasonably ask what values their government is protecting if it spends millions to kill a suspected terrorist who may or may not threaten their lives, while refusing to devote more resources to alleviating the immediate suffering of those who have no choice but to live in countries whose governments have col-

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163 See id.
164 See id.
165 See Travacio, supra note 119, at 173.
166 See, e.g., Afghanistan’s Civilian Casualties, N.Y. Times, Feb. 13, 2002, at A30; see also Hersh, supra note 65 (describing a joint U.S.-Yemeni counterterrorism operation in Yemen where an attack on a group of Bedouins traveling in the desert incorrectly identified by U.S. intelligence as al Qaeda members was called off at the last moment when a Yemeni official discovered the mistake).
lapsed. This is particularly so in states, such as Somalia and Haiti, where U.S. foreign policy may have contributed to state collapse.

B. Toward a Doctrine of Counterterrorist Intervention in Failed States

The nature of global terrorist groups such as al Qaeda presents a growing challenge to the international system of sovereign nation-states. When terrorists hide behind the borders of nonfunctioning states, they avoid detection and capture by other states whose citizens they target. Despite the risks associated with it, a “failed state doctrine” may be appropriate if the dangers it poses are properly limited. As the discussion above illustrates, identification of failed states should be strictly controlled.

Since identification is inherently political—state failure being in the eye of the beholder—failed states should be designated as such only by a resolution of the U.N. Security Council. Security Council members could weigh the totality of the circumstances in a given state, considering the absence or presence of traditional factors that determine statehood, such as defined territory, the capacity to enter into relations with other states, an identifiable population, as well as an ability to stand on its own. The Security Council’s experience with authorizing peacekeeping missions in post-conflict areas could provide a useful precedent for such a consideration.

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171 See generally Jenkins, supra note 14, at 17–21 (describing the unique nature of the al Qaeda terrorist organization).

172 See Bonafede, supra note 64, at 90.


174 See Nowrot & Schabacker, supra note 141, at 339.

175 Veto power in the U.N. Security Council should rule out politically-motivated, illegitimate designation of certain states as a pretext for invasion. The United States, for instance, would likely veto a Russian proposal to designate its neighbor Georgia as a failed state. See Sestanovich, supra note 162. Alternatively, another permanent member of the Security Council could have political motivations to veto a U.S. proposal to designate Somalia or Sudan as a failed state.

176 See Grant, supra note 153, at 438.

177 Indeed, Somalia’s collapse in 1992 was recognized in Security Council Resolutions 794 and 814, which authorized the unsuccessful “Operation Restore Hope” mission. Walter S. Clarke & Robert Gosende, Somalia: Can a Collapsed State Reconstitute Itself?, in State Failure and State Weakness in a Time of Terror, supra note 8, at 142.
of state failure would be followed by a concentrated U.N.-led program to rebuild state structures and provide interim humanitarian relief. 178 This practice would also follow the precedent established by other U.N.-authorized peacekeeping and humanitarian operations. 179

States intending to use limited military force against terrorists in failed states should meet a high standard in showing that their actions are justified by the failed state’s inability to rid itself of terrorist groups. 180 Specifically, the intervening state should show evidence of the presence in the failed state of known international terrorists whose activities present the substantial likelihood that another state’s population will be harmed in an act of terrorism. 181 When that standard is met, the Security Council should authorize limited use of force by the intervening state or states against those terrorists. 182 An intervening state that cannot meet that standard will have violated Article 2(4) of the U.N. Charter. 183

Of course, even if such military action does not violate Article 2(4), it still must conform to customary international law, including the law on anticipatory self-defense. 184 The Bush Administration has argued that a customary right of anticipatory self-defense supersedes the U.N. Charter. 185 The basis in international law for this customary right is the 160-year-old Caroline case, which involved a preemptory British attack against insurgents operating from the U.S. side of the border with Canada. 186 The British attacked the Caroline, a ship used by the insurgents that was located on the U.S. side of the border. 187 The U.S. Secretary of State, Daniel Webster, in a letter to the British Minister, asserted that the use of force in self-defense should be lim-

180 See, e.g., ILC Report, supra note 111, at 49 (discussing “necessity” doctrine allowing states to act to “safeguard an essential interest against a grave and imminent peril”).
181 See id.
182 See id.
183 See discussion of U.N. CHARTER art. 2, para. 4, supra notes 127–30 and accompanying text.
184 See Bonafede, supra note 64, at 165 (discussing the Caroline case as customary international law).
185 NATIONAL SECURITY STRATEGY, supra note 5, at 15 (“For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”).
186 See Bonafede, supra note 64, at 166.
187 See id.
itted to cases in which the necessity is "instant, overwhelming, leaving no choice of means, and no moment of deliberation."\textsuperscript{188} Thus, the rule developed from the \textit{Caroline} case included two preconditions for preemptive force: that it be necessary to eliminate a threat, and that the threat be imminent.\textsuperscript{189} A failed state doctrine must not contradict the principles of the \textit{Caroline} case—namely, that preemptive force may be used only when it is necessary to thwart an imminent attack.\textsuperscript{190} Moreover, it must be proportionate to the terrorist threat posed.\textsuperscript{191}

In some cases, the threat posed by a terrorist group will be so grave that it is necessary to take action immediately, without revealing evidence publicly beforehand.\textsuperscript{192} For instance, in cases where the intervening state has reason to believe the terrorist groups in question possess weapons of mass destruction, and are prepared to use them, the risk of inaction may greatly outweigh the costs of action.\textsuperscript{193} Thus, in such cases, the intervening state should have to show that the "host" state was unable to deal with the weapons of mass destruction and not necessarily prove that it was a failed state.\textsuperscript{194}

\textbf{Conclusion}

U.S. policymakers are focusing needed attention on the dangers state failure poses to international security in a time of global terrorism. The lawlessness and disorder that result from state failure make failed states attractive safe havens for terrorist groups. The United States is planning operations targeting al Qaeda terrorists located in various states around the world. Yet preemptive use of military force, even against terrorists, probably contravenes the U.N. Charter because it violates the territorial integrity and political independence of the states where the terrorists are located. A close reading of the U.N. Charter, however, suggests that the use of limited force against terrorists in failed states may not violate the Charter when state failure prevents a state from maintaining its territorial integrity or exercising political independence.

\textsuperscript{188} See Travalio, \textit{supra} note 119, at 162.
\textsuperscript{189} See id.
\textsuperscript{190} See Bonafede, \textit{supra} note 64, at 166.
\textsuperscript{191} See id.
\textsuperscript{192} See Shanker & Risen, \textit{supra} note 4.
\textsuperscript{193} See Koh, \textit{supra} note 122, at 28 (suggesting that intervention to prevent crimes against humanity, including massive terrorist attacks, would outweigh the costs of violating another state's sovereignty).
\textsuperscript{194} See id.
States that are the targets of terrorist attacks should be able to use preemptive military force against terrorist groups in failed states, where the collapse of security institutions makes fighting terrorists impossible. The use of limited military force in such circumstances may prevent terrorist attacks and make the world safer. As such, it is a necessary short-term strategy. Yet, the United States and its allies should not lose sight of the underlying problems that make state failure a threat to international security. Only by engaging in the difficult and costly business of institution-building can the United States prevent and reverse state failure and deny terrorists safe haven in the long term.