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An Assessment of Jus ad Bellum Norms for the Post-Westphallan Age

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WILL THE “BUSH DOCTRINE” SURVIVE ITS PROGENITOR? AN ASSESSMENT OF JUS AD BELLUM NORMS FOR THE POST-WESTPHALIAN AGE

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Abstract: The election of President Barack Obama has generated enormous goodwill abroad. Many have come to anticipate a sharp departure from the foreign policy of President George W. Bush. There is no question that President Obama has broken with his predecessor in important ways, especially in terms of his emphasis on multilateralism and strategic dialogue. Nevertheless, he is unlikely to jettison two core principles associated with what has become known as the Bush Doctrine: state responsibility and anticipatory self-defense. This Note asks whether there is support for these principles under customary international law. It concludes that there is, and that the use of force provisions in the United Nations Charter—at least as originally interpreted in 1945—no longer accurately reflect international legal norms on the use of military force.

Introduction

“No president should ever hesitate to use force—unilaterally if necessary—to protect ourselves and our vital interests when we are attacked or imminently threatened.”1 Thus declared a leading candidate for the presidency of the United States in his first major foreign policy address.2 To “constrain rogue nations” and “penetrate terrorist networks,” he suggested, requires a “new conception of our national security,” one better suited to address the “threats we face at the dawn of the twenty-first century.”3 The candidate? Senator Barack Obama.4

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2 Id.
3 Id.
4 Id.
History has yet to judge the legacy of President George W. Bush’s foreign policy, but it is unlikely to be kind. In the years following President Bush’s first inauguration, the image of the United States became tarnished across much of the globe. Whatever goodwill the United States enjoyed following the attacks of September 11, 2001 was largely squandered by the invasion of Iraq. Domestically, the Bush administration’s once stratospheric approval numbers plummeted to historic lows. In the modern polling era, no other president has gone without majority approval for a longer period of time.

Of course, history is not written by pundits and pollsters. As Bush himself has noted, President Harry S. Truman is recognized today for the sagacity of his foreign policy, even though he polled abysmally throughout the late 1940s. Yet, despite a number of unheralded successes, the foreign policy of the Bush administration is unlikely to undergo a comparable rehabilitation. The specters of Guantánamo and Abu Ghraib will not be vanquished so easily. It is therefore all the more remarkable that since winning the White House, President Obama has refrained from rejecting two central tenets of what has become known as the “Bush Doctrine”: the principles of state responsibility and anticipatory self-defense.

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5 See Pew Global Attitudes Project (2006), http://pewglobal.org/reports/pdf/252.pdf (illustrating, for example, that favorable opinions of the United States fell between 2002 and 2006 from 61% to 30% in Indonesia, from 30% to 12% in Turkey and from 61% to 37% in Germany).

6 See id.


8 See Gary Langer, Poll: A New Low in Approval Starts Bush’s Final Year, ABC News, Jan. 15, 2008, http://i.abcnews.com/PollingUnit/Vote2008/story?id=4133095&page=1 (noting only three post-World War II presidents have ever had lower approval ratings—Jimmy Carter (28 percent), Richard Nixon (24 percent) and Harry Truman (22 percent)).

9 Kate Zernike, Bush’s Legacy vs. the 2008 Election, N.Y. Times, Jan. 14, 2008, at 44.

10 Perhaps most notable among them is the President’s Emergency Plan for AIDS Relief (PEPFAR), which has distributed life-saving medication to around 1.4 million AIDS patients in the developing world. See Joseph Loconte, Bush’s Other War, Wkly. Standard, Jan. 30, 2008, available at http://www.weeklystandard.com/Content/Public/Articles/000/000/014/668cbke.asp.


12 See id.

13 During the 2008 election, Hilary Clinton and John McCain also embraced the principles of state responsibility and anticipatory self-defense. As Matthew Yglesias noted in a December 2007 editorial, Lee Feinstein, Clinton’s top campaign national security staffer, wrote that “the biggest problem with the Bush preemption strategy may be that it does not go far enough.” Matthew Yglesias, Beyond Preemption, L.A. Times, Dec. 8, 2007, at A3. Sena-
Why is this? The answer has much to do with pragmatism, given the novel threat posed by non-state actors, such as terrorists and transnational criminal groups. Nevertheless, jus ad bellum, the law governing when it is permissible to make war, also holds explanatory value. Even though there is little support for the sort of “preventative warfare” epitomized by the 2003 invasion of Iraq, other elements of the Bush Doctrine are compatible with modern customary international law. Indeed, certain aspects of the Bush Doctrine better approximate the modern jus ad bellum than do the use of force provisions in the United Nations Charter (the Charter).

This Note begins in Part I by defining the Bush Doctrine. Part II continues by discussing how the Bush Doctrine conflicts with the use of force provisions in the Charter, specifically articles 2(4), 39 and 51. It goes on to argue that this is not dispositive on the question of whether the Bush Doctrine is legal under international law because the original meaning of the Charter no longer necessarily represents the law of war. Part III departs from the U.N. framework to analyze the principles of state responsibility and anticipatory self-defense under the lens of customary international law. Ultimately, the Note concludes that these principles do have some basis in customary international law, even if preventative warfare—an extreme form of anticipatory self-defense—does not.

14 This note defines terrorism as “the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.” Bruce Hoffman, Defining Terrorism, TERRORISM AND COUNTERTERRORISM 23 (Russell D. Howard & Reid L. Sawyer, eds., 2006).
16 Jus ad bellum is to be contrasted with jus in bello, the law of how war ought to be conducted once it has actually commenced. Michael Walzer, Just and Unjust Wars 21–22 (1977).
17 See id.
I. Background

Defining ideological movements in their infancy presents obvious challenges.\(^{19}\) History has a way of congealing slowly into recognizable norms.\(^{20}\) It took thirty years for the Monroe Doctrine to enter parlance and assume its present meaning.\(^{21}\) If the past is any guide, what is described today as the Bush Doctrine may mean something quite different years from now.\(^{22}\) Nevertheless, endeavoring to define the term is not an altogether feckless enterprise.\(^{23}\) Commentators began referring to a “Bush Doctrine” shortly after the attacks of September 11th, 2001.\(^{24}\) Over time, the term has been used in reference to three principles: state responsibility, anticipatory self-defense and the so-called “freedom agenda.”\(^{25}\)

The first of these principles to be articulated by President Bush was the principle of state responsibility, the notion that a state should be held liable for whatever happens within its borders.\(^{26}\) Addressing a joint session of Congress just a little over a week after September 11th, President Bush issued an ultimatum to the world:

Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or

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\(^{20}\) See id.

\(^{21}\) Id. (noting that although President James Monroe called for an end to European interventionism in the Americas during a speech to Congress in 1823, the term, “Monroe Doctrine” did not come into use until the 1850s).

\(^{22}\) See id.

\(^{23}\) See id.


support terrorism will be regarded by the United States as a hostile regime.27

With its implicit sanction of self-help, the Bush administration’s state responsibility principle represented a sharp departure from the law enforcement paradigm that had previously characterized U.S. foreign policy.28 Notably, the president made no distinction between states that actively choose to support terrorists and states that lack control over their territory and are therefore incapable of barring terrorists from using their land as sanctuary.29

Next came anticipatory self-defense, the principle that a nation is permitted to use force as a means of preempting attack.30 Speaking to a graduating class of West Point cadets in June 2002, President Bush declared, “our security will require all Americans . . . to be ready for preemptive action when necessary to defend our liberty and to defend our lives.”31 As he explained:

The gravest danger to freedom lies at the perilous crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology . . . occurs, even weak states and small groups could attain a catastrophic power to strike great nations.32

Although it outlined a clear rationale for anticipatory self-defense, President Bush’s West Point address did not specify when preemptive action is permissible, let alone what form it should take when exercised.33 These questions remained unanswered in the 2002 National Security Statement, which formally incorporated the principles of state responsibility and anticipatory self-defense as a matter of U.S. policy.34

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27 See id.
28 See generally Michael J. Glennon, Forging a Third Way to Fight: Bush Doctrine for Combating Terrorism Straddles Divide Between Crime and War, 24 LEGAL TIMES 38 (2001) (noting that when states were historically held “liable for injurious activities carried out by individuals within their territory,” the appropriate remedy was indemnification or sanctions, not self-help).
29 See Address to Joint Session of Congress, supra note 26.
30 See Graduation Speech at West Point, supra note 15.
31 Id.
32 Id.
33 Id.
The final principle that some commentators have associated with the Bush Doctrine is the so-called “freedom agenda,” the concept that U.S. security is enhanced by promoting democratic reform abroad.\textsuperscript{35} Drawing from Kant and Wilson, the freedom agenda is essentially a variation on the democratic peace theory, which posits that liberal democracies do not go to war with one another.\textsuperscript{36} While it found voice in the 2002 National Security Statement,\textsuperscript{37} the freedom agenda was most clearly expressed three years later when President Bush said in his second inaugural address:

The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world.\textsuperscript{38}

Putting aside the empirical matter of whether promoting democracy abroad actually does enhance U.S. security, such statements leave unanswered important questions, not least of all whether the freedom agenda should be applied to erstwhile allies.\textsuperscript{39}

So how ought we to define the Bush Doctrine? Insofar as it represents a \textit{jus ad bellum} norm, the Bush Doctrine stands for the proposition that the United States treats harboring terrorists, whether deliberately or not, as a just cause of war, and reserves the right to use preemptive force in self-defense.\textsuperscript{40} As noted above, such vague dictates leave fundamental questions unresolved.\textsuperscript{41} The freedom agenda has played an important rhetorical role in the Bush administration’s foreign policy, but it is less directly tied to the law of war.\textsuperscript{42} Although the freedom agenda was mustered as an \textit{ex post} justification for the Iraq invasion, it


\textsuperscript{38} Press Release, White House, President Sworn-In to Second Term (Jan. 20, 2005), \url{http://www.whitehouse.gov/news/releases/2005/01/20050120–1.html} [hereinafter Second Inaugural].


\textsuperscript{40} See Address to Joint Session of Congress, supra note 26; Graduation Speech at West Point, supra note 15.

\textsuperscript{41} See Address to Joint Session of Congress, supra note 26; Graduation Speech at West Point, supra note 15.

\textsuperscript{42} See Second Inaugural, supra note 38.
was never the primary rationale for invading Afghanistan or Iraq. Therefore, it is best tabled in an inquiry as to whether the Bush Doctrine is consistent with international law on the use of force.

II. Discussion

Assuming the Bush Doctrine stands for the principles of state responsibility and anticipatory self-defense, does it violate international law? There can be little question that the Bush Doctrine violates the text of the U.N. Charter. Underpinning the Charter are the twin buttresses of state sovereignty and sovereign equality. Article 2(7) precludes the U.N. from intervening in “matters which are essentially within the domestic jurisdiction of any state.” This sentiment is echoed in the Charter’s use of force provisions. Article 2(4) stipulates that member states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” There are only two exceptions. First, when the U.N. Security Council ascertains the “existence of any threat to the peace, breach of the peace, or act of aggression,” it may sanction the use of force under article 39. Second, under article 51, U.N. member states are permitted to use force in “individual or collective self-defense” if an “armed attack” has been launched against them.

Neither of these exceptions appears to accommodate the Bush Doctrine. Article 39 is inapplicable because state responsibility and anticipatory self-defense are implicitly principles of self-help. As President Bush put it succinctly in his 2004 State of the Union address, “America will never seek a permission slip to defend the security of our

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44 See id.
46 See id. art. 2(7).
47 Id.
48 See id. arts. 39 & 51.
49 Id. art. 2(4).
50 See id. arts. 39 & 51.
51 Id. art. 39.
52 Id. art. 51 (stipulating that states are permitted to use force in self-defense but only “until the Security Council has taken measures necessary to maintain international peace and security”).
53 See id. arts. 39 & 51.
country.” At first blush, article 51 seems more promising. One might argue, for example, that the term “armed attack” could be construed broadly to include imminent attacks or the provision of sanctuary to non-state armed groups operating within a given country. Nevertheless, this line of reasoning is almost certainly inconsistent with the intent of the Charter’s drafters. Moreover, it has been effectively sealed off by the International Court of Justice (ICJ). In *Nicaragua v. United States* the ICJ held that for purposes of article 51, an “armed attack” refers only to an actual large-scale invasion or bombardment directed by a state. More recently, in its *Israeli Wall Advisory Opinion* the ICJ emphasized that article 51 may be invoked only by states that are attacked by other states.

As a number of observers have noted, the real question is whether the use of force provisions in the Charter still represent international law. The answer to this question, in turn, hinges on how one interprets the Charter. Borrowing from U.S. constitutional jurisprudence it is possible to identify two broad approaches: originalism and adaptivism. Under the originalist school of thought, the Charter is a static
treaty. By ratifying the Charter, each member state consents to be bound by its use of force provisions, as these provisions were interpreted by the original drafters in 1945. Changes in historical circumstance have no effect on this obligation. To suggest otherwise by maintaining that the Charter is some sort of “living document” imposes an entirely new set of obligations upon signatory states. Doing so, originalists underscore, is fundamentally inconsistent with a voluntarist legal regime in which states are bound only insofar as they consent to be bound.

Originalists can be divided further into two camps: formal textualists and legal realists. Formal textualists limit any jus ad bellum inquiry to the text of the Charter and maintain that military action taken outside of the Charter is ultra vires and per se illegal. By contrast, legal realists argue that the use of force provisions of the Charter have fallen into desuetude, meaning that they no longer have binding legal force. Legal realists agree with formal textualists that the Charter must be read according to the intent of its drafters. Nevertheless, they posit that contrary state practice has rendered the Charter’s use of force provisions effectively meaningless. Legal realists point to the fact that despite article 2(4)’s categorical proscription on the use of force, states have used force against one another on hundreds of occasions since the Charter’s inception. Moreover, when force has been used, it has rarely been used under the auspices of article 39 or 51.

What matters most to legal realists is not what states have formally con-

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67 See id.
68 See id. at 63.
69 See id.
70 See Glennon, supra note 65, at 63.
71 In 1927 the Permanent Court of International Justice (PCIJ) set forth what has subsequently become known as the “freedom principle.” As explained by the Court: “[t]he rules of law binding upon states . . . emanate from their own free will as expressed in conventions . . . . [R]estrictions upon the independence of states therefore cannot be presumed.” Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7), quoted in Glennon, supra note 65, at 63.
72 See Glennon, supra note 65, at 101–02 (Professor Glennon does not draw this distinction explicitly, although it is suggested by his analysis).
73 See id. at 101.
74 See id. at 60–64 (noting that “[t]he idea traces to Roman law, which recognized that a statute could be rendered void by lack of enforcement over a given period”).
75 See id.
76 See id.
77 Glennon, supra note 58, at 8 (noting that between 1945 and 1989 states used armed force between 200–680 times).
78 See id.
sented to but how they actually behave. At its essence, the legal realist *jus ad bellum* conception is predicated on the notion that there can be no law without compliance. In other words, law is coercive, not aspirational.

Unlike originalists, adaptivists begin with the premise that the Charter is no ordinary treaty. Although treaties typically bind states only to the extent they consent to be bound, the Charter gave birth to the world’s preeminent international organization. As such, adaptivists argue, it is a constitutive document which should be interpreted to meet the challenges of each new age. Adaptivists emphasize that the drafters of the Charter lived in a world very different from our own. Emerging from the rubble of the Second World War, their overriding concern was to avoid the mistakes of Versailles and restrain the nations of the world from ever going to war with each other again. Today, the security landscape is dramatically different. Enabled by advances in weapons and communications technology, non-state armed groups—from heroin traffickers to Islamic jihadists—exert power across state borders in a way hitherto unimaginable. Adaptivists believe that the Charter’s use of force provisions should be read to address these new threats, even if doing so departs sharply from the original intentions of the drafters.

Which is the correct interpretative method? As in the U.S. domestic sphere, the answer is not easily settled. Originalism resonates strongly as a form of treaty interpretation, but adaptivists reject the notion that the Charter is a conventional treaty. Thus, even if originalism is correct as a matter of conventional treaty interpretation, that would hardly be dispositive. Instead of asking which interpretive

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79 See id.
80 See id.
81 See id.
82 See Glennon, *supra* note 65, at 101–02.
83 See id.
84 See id.
86 See Franck, *supra* note 85, at 45–52.
87 See Graduation Speech at West Point, *supra* note 15.
88 See id.
89 See Glennon, *supra* note 65, at 101–02.
90 See id.
91 See id.
92 See id.
method is correct, one might instead consider the implications of following each approach. In so doing, it is instructive to examine one earlier challenge to the Charter’s legitimacy: the 1999 North Atlantic Treaty Organization (NATO) operation in Kosovo.

Following the 1991 Gulf War, the United States took part in a number of peacekeeping missions abroad. Although the Security Council backed several of these humanitarian interventions, it refrained from doing so in Kosovo, even as reports spread of mounting human rights atrocities across the region. On March 24, 1999, the United States and its NATO allies commenced operations against Yugoslavia without U.N. authorization. Over the course of its eleven-week campaign, NATO flew 38,000 sorties against Serb positions throughout Yugoslavia. Russia and China, which had previously resisted any Security Council authorization for the use of force, adopted a strict textualist position and condemned the operation as a gross violation of international law. Many Western observers demurred. As one report for the Independent International Commission on Kosovo concluded, the operation may have been “illegal” under the Charter but it was still “le-

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93 See id.
96 See id. at 55–61, 103–07 (describing U.N. authorization for the U.S.-led interventions in Somalia and Haiti); see also Interventions After the Cold War, supra note 94.
97 Interventions After the Cold War, supra note 94.
99 On March 24, the Chinese Vice Foreign Minister stated, “[t]he Chinese Government opposes the use of force or the threat of the use of force in international affairs, and opposes interference in other nations’ internal affairs no matter what the excuse or by what means, and opposes any random action that circumvents the U.N. Security Council.” Glennon, supra note 65, at 28–29. One day later, the Russian-led Commonwealth of Independent States issued a statement declaring, “[t]he decision by NATO to use force against a sovereign State . . . without the participation of the Security Council, is contrary to the norms of international law.” Id.
gitimate.” The Charter, in other words, had either fallen into desuetude or evolved to permit the sort of military action its drafters had sought to proscribe.

The response to the Kosovo crisis from legal realists and adaptivists is open to criticism. Legal realists argue that NATO was free to intervene in Kosovo because the Charter’s use of force provisions had fallen into desuetude and no longer represented international law. In making this argument, however, they undermine the legitimacy of the Security Council and offer no remedy for U.N. reform short of amending the Charter or replacing it altogether—an entirely unrealistic proposition. Institutionalists who believe that the U.N. has an important role in international security cannot but find this unpalatable. Adaptivists, in turn, argue that a new “responsibility to protect” has emerged to justify humanitarian interventionism, consistent with the Charter. Adaptivists maintain that even without Security Council approval, NATO’s intervention in Kosovo was justified under a broader responsibility to protect because sovereignty is no longer absolute but “contingent” upon humane governance. Of course, the problem with this sort of consequentialist reasoning is that it conflicts sharply with the intent of the drafters, not to mention the views of many current U.N. member states.

Despite the drawbacks of legal realism and adaptivism, formal textualism is much less suited to address the security challenges of the modern age, an age in which the greatest threat to peace is intrastate conflict rather than warfare between states. As the Kosovo crisis reveals, formal textualism may offer consistency and predictability as an interpretive approach, yet it also holds the possibility of yielding normatively repugnant results. This is particularly evident in regard to the paradigm of state sovereignty. Although originally devised as a

101 KOSOVO REPORT, supra note 100.
102 See id.
103 See id.
104 See GLENNON, supra note 65, at 60–64.
105 See id. at 207–09. But see Glennon, supra note 58, at 3 (acknowledging that “[f]or a Burkean realist with any sense of institutional conservation, making the most of the United Nations is a useful project”).
106 See id.
107 See Evans & Sahnoun, supra note 85, at 99–110.
108 See id.
109 See Glennon, supra note 58, at 11–14.
111 See GLENNON, supra note 65, at 28–30.
112 See U.N. Charter, art. 2(7).
bulwark against interstate aggression, article 2(7) was invoked during the Kosovo crisis to shield the Milosevic regime as it committed atrocities against its own people.\textsuperscript{113} Even if there is “no question that Russia and China were correct in arguing that NATO’s bombing violated the Charter,” it is difficult to accept that NATO should have stood by in the face of a mounting humanitarian catastrophe.\textsuperscript{114} Likewise, it is hard to argue that the world community should not have taken action to stop genocide in Rwanda or Darfur, even if doing so would have violated the Charter’s use of force provisions.\textsuperscript{115}

There are clear parallels between humanitarian interventionism and the Bush Doctrine, at least in terms of their permissibility under the Charter.\textsuperscript{116} Like humanitarian interventionism, the principles of state responsibility and anticipatory self-defense are precluded by a formal textualist’s reading of the Charter, but not by the reading of a legal realist or an adaptavist.\textsuperscript{117} Put somewhat differently, if the Charter’s use of force provisions—as originally interpreted by the drafters—represent international law, the Bush Doctrine is clearly illegal.\textsuperscript{118} Nevertheless, if they no longer represent international law or if their meaning has somehow evolved to accommodate other \textit{jus ad bellum} norms, elements of the Bush Doctrine may well be legal.\textsuperscript{119} Assuming this is true, any inquiry into the legality of the Bush Doctrine under international law would proceed outside the text of the Charter.\textsuperscript{120}

\textbf{III. Analysis}

If the original meaning of the Charter no longer governs the doctrine of just war, what takes its place?\textsuperscript{121} One possibility is that nothing does.\textsuperscript{122} Outside of enforceable treaty obligations, generalized legal norms may simply have no place in the international security arena.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{113} See \textit{Kosovo Report, supra note 100.}
\item \textsuperscript{114} See \textit{Glennon, supra note 65, at 29.}
\item \textsuperscript{115} See \textit{Kosovo Report, supra note 100.}
\item \textsuperscript{116} See \textit{Responsibility to Protect, supra note 85} (noting that although “conceptually and practically distinct,” the issues do share common questions, “especially concerning the precautionary principles which should apply to any military action anywhere”).
\item \textsuperscript{117} See \textit{id.}
\item \textsuperscript{118} See \textit{id.}
\item \textsuperscript{119} See \textit{id.}
\item \textsuperscript{120} See \textit{Glennon, supra note 65, at 37–48.}
\item \textsuperscript{121} See \textit{id. at 60–65.}
\item \textsuperscript{122} See \textit{id. at 63.}
\item \textsuperscript{123} See \textit{id.}
\end{itemize}
Judge Rosalyn Higgins alluded to this prospect before assailing it in her dissent to the ICJ’s 1996 Nuclear Weapons Advisory Opinion. Like Ronald Dworkin’s “Judge Hercules,” Higgins suggested that there are no non-liquid, or gaps, in international law regarding the use of force. Rather than defer judgment on the legality of using or threatening to use nuclear weapons, Higgins argued that the ICJ should have expounded a legal norm, thereby confirming its existence and viability. If Higgins is mistaken and the international security arena is characterized largely by a non-liquet, the freedom principle would permit states to apply the principles of state responsibility and anticipatory self-defense at will, barring any enforceable treaty obligations to the contrary. If, on the other hand, international law still has some function in determining whether a particular conflict is justified, custom would play an important interstitial role.

In the international context, custom is defined as “a general and considered practice of states followed by them from a sense of legal obligation,” or what is commonly referred to as opinio juris. Traditionally, practice and opinio juris have been accorded equal weight in ascertaining custom. The theory is that law cannot simply mirror state practice; to be law it must have some independent coercive force because it is law. Discerning opinio juris, however, raises a significant causation problem. How can one possibly know that a state is acting in a certain way from a sense of legal obligation? How does one iso-

124 See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 66, ¶ 29 (July 8) (Higgins, J., dissenting) [hereinafter Nuclear Weapons Opinion] (arguing “[w]hat the Court has done is reach a conclusion of ‘incompatibility in general’ with humanitarian law; and then effectively pronounce a non-liquet on whether a use of nuclear weapons in self-defense when the survival of a State is at issue might still be lawful”).
125 Meaning “it is not clear,” non-liquet is a concept from Roman law indicating “an insufficiency in the law, to the conclusion that the law does not permit deciding the case one way or the other.” Glennon, supra note 65, at 63.
127 See id.
128 See id.
129 See id.
130 Restatement (Third) Foreign Relations Law § 102; see also Statute of the International Court of Justice, art. 38(b) [hereinafter ICJ Statute] (referring to “international custom, as evidence of a general practice accepted as law” as one basis for ICJ decisions).
131 See ICJ Statute art. 38(b).
132 See Glennon, supra note 65, at 56–60.
133 See Glennon, supra note 58, at 6. (noting “[t]he truth is that in most cases no one can know the principal reason that states behave as they do. Governments, like individuals, act for many reasons, some of which can barely be discerned let alone identified as ‘primary’”).
134 See id.
late other possible motivations, most importantly, self-interest? Revisions
tists maintain that practice should be weighted more heavily than
_opinio juris_ because it is far easier to measure and much less open to
subjective interpretation. Given that there is little clear evidence of
_opinio juris_ regarding the principles of state responsibility or anticipa-
tory self-defense, this seems a prudent approach in analyzing the legal-
ity of the Bush Doctrine under customary international law.

Before delving into the intricacies of custom, it is worth noting a
few general principles that have traditionally colored popular just war
conceptions. While there is no formal lexicon of customary _jus ad
bellum_ principles, Augustine’s _City of God_ is a logical starting point.
The notion of “righteous war” discussed in _City of God_ finds its source in
natural law, namely the law of Christian morality. Fundamentally,
Augustine believed that war must be “undertaken in obedience to
God.” A “man,” he wrote, “[is] blameless who carries on war on the
authority of God.” As a product of early medieval thought, _City of God_
is hardly a workable guide for confronting modern-day security chal-

Just wars, for example, are widely understood to be proportionate in
their ends and undertaken only as a last resort, after all other possible
recourses have been exhausted. A strict positivist would dismiss any
precepts predicated on natural law—whether ordained by God or oth-
erwise manifested—as “nonsense upon stilts.” At the same time, this
does not preclude what is perceived to be just from having expressive
power.

135 See id.
136 See Glennon, supra note 65, at 56–60.
137 See id.
138 See Glennon, supra note 58, at 5.
139 See id.
140 Id.
141 Id.
142 Id.
143 See Glennon, supra note 58, at 5.
144 See Walzer, supra note 16, at 58–63; see also Evans & Sahnoun, supra note 85, at
104–08 (commenting on four “precautionary principles” purportedly needed to justify
humanitarian intervention: “right intention,” “last resort,” “proportional means” and “rea-
sonable prospects” of success).
145 See Evans & Sahnoun, supra note 85, at 104–08.
146 As did the British jurist and philosopher Jeremy Bentham (1748–1832). See Amanda
Alexander, UCL Bentham Project, Bentham, Rights and Humanity: A Fight in Three
147 See id.
A. State Responsibility

As a general principle of customary international law, a state is not permitted to use its territory in a way that causes harm beyond its borders.\footnote{See Arthur K. Kuhn, The Trail Smelter Arbitration, 32 Am. J. Int’l L. 785, 785–88 (1938). See generally The Corfu Channel Case (Alb. v. U.K.), 1949 I.C.J. 4 (Apr. 9).} International environmental law has long encapsulated this principle, as exemplified by the landmark Trail Smelter Arbitration between the United States and Canada (1928–1931, 1935–1941).\footnote{Kuhn, supra note 148, at 785–88.} For years, the Consolidated Mining and Smelting Company of Trail, British Columbia emitted great clouds of sulfur dioxide southward into Washington’s Columbia River Valley, causing agricultural damage and diminishing air quality for local inhabitants.\footnote{Id.} The U.S. government objected and eventually an arbitral tribunal was assembled to consider the matter.\footnote{Id.} Over a series of deliberations, the tribunal determined that the Canadian government should pay damages to the United States and limit future sulfur omissions from the Trail smelter.\footnote{Id.} In so doing, it reasoned that a state bears responsibility for pollution that spreads beyond its borders.\footnote{Id.}

There are clear parallels to the Trail Smelter Arbitration in the security context.\footnote{See Kuhn, supra note 148, at 785–88. See generally Corfu Channel Case, 1949 I.C.J. 4.} One of the earliest cases brought before the ICJ was the Corfu Channel Case.\footnote{See generally Corfu Channel Case, 1949 I.C.J. 4.} On October 22, 1946, four British warships entered Albanian waters.\footnote{Id. at 10.} As one of the warships made its way up the Corfu Straight, a violent explosion ripped across its hull.\footnote{Id.} A second warship steamed towards the fiery hulk, only to hit another mine.\footnote{Id.} In all, forty-four British sailors died.\footnote{Id.} Although the mines had actually been laid by Germany during World War II, the ICJ concluded that “Albania [was] responsible under international law for the explosions.”\footnote{Corfu Channel Case, 1949 I.C.J. at 23.} In arriving at its decision, the Court pointed to the fact that “nothing was attempted by the Albanian authorities to prevent the disaster.”\footnote{Id.} Moreover, even if the mines had been German, “the laying of
the minefield . . . could not have been accomplished without the knowledge of the Albanian Government.” Every state, the Court emphasized, has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

Taken together, the Trail Smelter Arbitration and the Corfu Channel Case affirm the general proposition that a state has responsibility for preventing what transpires on its territory from adversely impacting other states. Of course, many questions are unresolved at this rarefied level of abstraction. In both the Trail Smelter Arbitration and the Corfu Channel Case, the principal remedy was monetary damages. Are there instances in which monetary damages would not offer adequate restitution? Canada was also required to limit its sulfur dioxide emissions, but what if it had been incapable of doing so? Should poorer countries be compelled to allocate resources for the protection of foreigners when such resources could otherwise be used to provide their own people with basic necessities? Finally, what if there is not enough time to refer a breach of state responsibility to an arbitral tribunal or the ICJ? Is a state ever entitled to act unilaterally?

The Bush Doctrine offers some answers to these questions. Although it starts from the same general proposition that states are responsible for what transpires within their borders, the Bush Doctrine departs significantly from the approach taken in the Trail Smelter Arbitration and the Corfu Channel Case. Monetary damages are not contemplated under the Bush Doctrine. Nor are institutional arbiters like the ICJ called upon to adjudicate. If a state “harbor[s] or support[s] terrorism” it is automatically “regarded by the United States as a hostile regime.” Consequently, any self-help measures deemed to be

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162 Id. at 22.
163 Id.
169 See id.
171 See id.
172 See id.
173 See Address to Joint Session of Congress, supra note 26.
174 See id.
175 See id.
176 Id.
necessary may be taken.\textsuperscript{177} The principle of state responsibility envisioned by the Bush Doctrine is essentially a form of strict liability.\textsuperscript{178} Regardless of whether they have the resources to police their borders, states are held liable for the conduct of those whom they “harbor,” even if such individuals are not being harbored by design.\textsuperscript{179}

Customary international law may support elements of this reformulation.\textsuperscript{180} Operation Enduring Freedom, the U.S.-coordinated offensive against the Taliban in Afghanistan following September 11th, is perhaps the most notable recent example of self-help undertaken pursuant to the state responsibility doctrine.\textsuperscript{181} Nevertheless, there are other examples of supporting state practice.\textsuperscript{182} The United States used force in Libya (1986)\textsuperscript{183} following an attack on a West German discotheque by Libyan militants, and in Afghanistan and the Sudan (1998)\textsuperscript{184} following the bombing of the U.S. embassies in Nairobi and Dar es Salaam. Over the past twenty years, Israel has intervened on countless occasions in Lebanon and the Palestinian Territories in response to terrorist attacks on its civilians.\textsuperscript{185} And as recently as March 2008, Colombia launched a cross-border commando raid against a Revolutionary Armed Forces of Colombia (FARC) camp in the jungles of northeastern Ecuador.\textsuperscript{186}

\textsuperscript{177} See Address to Joint Session of Congress, supra note 26.
\textsuperscript{178} See id.
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} See Derek Jinks, State Responsibility for the Acts of Private Armed Groups, 4 CHI. J. INT’L L. 83, 83–85 (2003) (noting that one way the United States justified the use of force against Afghanistan was “on the grounds that the hostile acts of Al Qaeda should be attributed to the Taliban regime”).
\textsuperscript{183} On April 5, 1986, an attack on a West German nightclub killed two American servicemen and one Turkish woman. Claiming “irrefutable evidence” linking Libya to the attack, U.S. President Ronald Reagan ordered missile strikes against Tripoli and Libya’s Benghazi region ten days later. At least 100 people died in the attacks, including Colonel Muamar Gaddafi’s adopted daughter. Id.
\textsuperscript{184} The attacks targeted “what the U.S. State Department described as a terrorist training base 100 miles south of Afghanistan’s capital, Kabul, and a factory capable of producing chemical weapons in Sudan’s capital Khartoum.” Clinton Defends Military Strikes, BBC News, Aug. 20, 1998, http://news.bbc.co.uk/2/hi/afrika/155252.stm.
\textsuperscript{186} On March 1, 2008, Colombian fighters attacked a FARC camp in Ecuador along the Chanangue River. Colombian commandos later crossed the border and entered the camp. Raul Reyes, a member of the FARC secretariat, was killed in the attacks, along with at least
Admittedly, many states flatly reject the legality of self-help measures.\footnote{187} Even so, the sheer number of times self-help has been exercised pursuant to the principle of state responsibility may render this position untenable.\footnote{188} Assuming certain forms of self-help are legitimate under international law, what would custom permit?\footnote{189} One predicate to any intervention would presumably be harm suffered by the intervener caused by forces operating within or supported by the target country.\footnote{189} As a general rule, the more proportionate and less overtly unilateral an intervention is, the more legitimacy it would likely be accorded by the international community.\footnote{181} Operation Enduring Freedom, for example, was widely accepted, given the gravity of the September 11th attacks and the fact that international institutions like the U.N. and NATO had signaled their support prior to the commencement of hostilities.\footnote{182} By contrast, the U.S. strike on Libya was roundly criticized in light of its scale and unilateral character.\footnote{182}

Another way of contemplating the state responsibility principle is to expand the notion of contingent sovereignty.\footnote{184} Proponents of humanitarian interventionism suggest that traditional concepts of sovereignty and sovereign equality originating from the Peace of Westphalia (1648) and later encapsulated in the U.N. Charter no longer characterize the international system.\footnote{185} Sovereignty, they maintain, is not absolute but rather contingent upon humane governance.\footnote{186} In much the same way, sovereignty might also be said to be contingent upon a country’s ability to control its own territory.\footnote{187} States that lack this ability

\footnote{188} See id.
\footnote{189} See Restatement (Third) Foreign Relations Law § 102; ICJ Statute, art. 38(b).
\footnote{190} See Kuhn, supra note 148, at 785–88. See generally Corfu Channel Case, 1949 I.C.J. 4.
\footnote{191} See Jinks, supra note 181, at 85–86.
\footnote{192} See id.
\footnote{194} See Evans & Sahnoun, supra note 85, at 101–02.
\footnote{195} See id.
\footnote{196} See id.
\footnote{197} See id.
could be described as having forfeited sovereignty over the ungoverned spaces within their borders.198 If other states are threatened or attacked by non-state actors operating in such areas, they may well be justified in taking military action.199

B. Anticipatory Self-Defense

The classic case of early anticipatory self-defense involving the United States took place long before the inception of the Bush Doctrine.200 In 1837 an insurrection raged across parts of British Canada.201 Suspicions grew that the Caroline, a U.S. steamship, was providing support to the rebels.202 One late December night, a band of Canadian loyalists crossed into New York and boarded the Caroline.203 After killing several U.S. nationals, they set fire to the ship and sent it crashing over Niagara Falls.204 Condemnation came swiftly from Washington, where U.S. Secretary of State Daniel Webster demanded an apology.205 Although the British were hardly contrite, Webster’s efforts did yield one nascent standard for determining the permissibility of anticipatory self-defense.206

There are two aspects to Webster’s standard: necessity and proportionality.207 First, Webster argued, for anticipatory self-defense to be justified, the “necessity of that self-defense [must be] instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”208 Simply suspecting that an attack might soon occur is not enough to demonstrate necessity.209 An attack must be imminent and there must be no other possible recourse.210 Second, Webster noted, an action taken in anticipatory self-defense must be proportionate to the threat at hand.211 In other words, to justify the destruction of the Caroline:

198 See id.
199 See Evans & Sahnoun, supra note 85, at 101–02.
201 Id.
202 Id.
203 Id.
204 Id.
205 Id.
206 Id.
207 Id.
208 Id.
209 See id.
210 See Arend, supra note 200, at 91.
211 Id.
The local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, [must not have taken action that was] unreasonable or excessive; since [an] act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.\footnote{212}

In essence, regardless of whether the attack on the \textit{Caroline} met the requirement of necessity, its impact still had to have been reasonably correlated to the nature of the initial threat.\footnote{213}

The Bush Doctrine departs significantly from the \textit{Caroline} standard.\footnote{214} In one sense, the Bush Doctrine can be understood to expand Webster’s definition of necessity broadly.\footnote{215} Whereas the \textit{Caroline} test of necessity requires an attack to be imminent before it can be preempted, the Bush Doctrine is significantly more permissive.\footnote{216} However feasible waiting until the “necessity of self-defense is instant [and] overwhelming” may have been in the nineteenth century, doing so in the twenty-first century, the Bush Doctrine posits, would be naively anachronistic.\footnote{217} After all, non-state armed groups operating at the “perilous crossroads of radicalism and technology” have the potential to exert tremendous destruction with little or no warning.\footnote{218} Yet, what becomes of the \textit{Caroline} standard’s proportionality requirement?\footnote{219} Do notions of proportionality fall out of the Bush Doctrine altogether?\footnote{220}

Another way of understanding the Bush Doctrine is to say that it effectively collapses the \textit{Caroline} standard into a modified form of cost-benefit analysis.\footnote{221} Viewed in this light, the necessity of anticipatory self-defense is determined not by some measure of imminence but rather by the risk of taking action measured against the risk of not acting.\footnote{222} Proportionality is relevant to this calculus insofar as security threats are evaluated as a function of two variables: potential impact and probability of occurrence.\footnote{223} What has made the Bush Doctrine so permissive is the

\begin{itemize}
\item \footnote{212}{Id.}
\item \footnote{213}{Id.}
\item \footnote{214}{See Graduation Speech at West Point, \textit{supra} note 15.}
\item \footnote{215}{See id.}
\item \footnote{216}{See id.}
\item \footnote{217}{See id.}
\item \footnote{218}{See id.}
\item \footnote{219}{See Graduation Speech at West Point, \textit{supra} note 15.}
\item \footnote{220}{See id.}
\item \footnote{221}{See id.}
\item \footnote{222}{See id.}
\item \footnote{223}{See id.}
\end{itemize}
heavy weight accorded to the former.\footnote{See Powell U.N. Presentation, supra note 43.} Indeed, to a large extent, the decision to invade Iraq in 2003 was driven by an emphasis on the potential impact of Iraq acquiring weapons of mass destruction (WMD) and using them, as opposed to the probability of this actually occurring.\footnote{See id.}

Customary international law may support some relaxation of the \textit{Caroline} standard.\footnote{See Franck, supra note 85, at 99–107.} Since the end of the Second World War, there have been several incidents involving anticipatory self-defense.\footnote{See id. (identifying Cuba Missile Crisis (1962–1963), Israeli-Arab War (1967) and Israeli missile strike on Iraq’s Osirak nuclear reactor (1981)).} With the possible exception of Israel’s preemptive attack on its Arab neighbors in 1967, when “[a]n orchestrated Arab assault on Israel seemed inevitable,” none of these incidents satisfies the \textit{Caroline} necessity requirement.\footnote{See id.} Moreover, to the extent that \textit{opinio juris} can be gleaned, there is evidence to suggest that states have come to accept a somewhat broader interpretation of when anticipatory self-defense is permissible.\footnote{See id.} At the very least, state practice and \textit{opinio juris} seem to indicate that waiting until an attack is actually in progress is no longer required under customary international law.\footnote{See id.} Imminence in the modern age almost certainly encompasses a somewhat broader time-frame.\footnote{See Powell U.N. Presentation, supra note 43.}

This is not to say that custom supports the Bush Doctrine vintage of anticipatory self-defense.\footnote{See id.} Whether the Bush Doctrine is interpreted to expand the \textit{Caroline} test of necessity or to replace the \textit{Caroline} standard with a modified form of cost-benefit analysis, there is little support in international legal custom for the sort of “preventative” warfare exemplified by the U.S. invasion of Iraq in 2003.\footnote{See id.} Ultimately, Iraq was invaded to prevent it from developing WMD that it might have used or transferred elsewhere.\footnote{See id.} In this sense, one analogue to the U.S. invasion of Iraq is the 1981 missile strike by Israel on Iraq’s Osirak nuclear reactor, which was also roundly condemned by the international community.\footnote{See Franck, supra note 85, at 105–06.} Although the impact of the Israeli operation was far smaller than the impact of the Iraq War, the overall objective was
the same: to prevent a dangerous potentiality from occurring at some point later in time.\textsuperscript{236} Regardless of whether such an objective is strategically prudent, it is clearly inconsistent with the longstanding just war notion that war should be undertaken only as a last resort.\textsuperscript{237}

\section*{Conclusion}

The Bush Doctrine is not illegal under international law simply because it violates the text of the U.N. Charter. Assessed from the lens of adaptivism or legal realism, the Charter’s use of force provisions—at least as understood by the original drafters—no longer represent the law of war. This is not to say that anything necessarily replaces them. The Athenians of Thucydides’ Melian Dialogue may well have put it best in musing that “the strong do what they will while the weak suffer what they must.” Law, in other words, may have no determinative role in assessing whether a state should go to war. Perhaps at a fundamental level, the decision to make war is no different from any other policy decision.

Yet, for all of its explanatory power, this approach seems overly simplistic. While state interest plays a major role—almost certainly the major role—in any decision to make war, it does not automatically follow that law has no meaning or coercive force in the international security arena. At the very least, what is perceived as being just or legal has an expressive power that cannot easily be ignored, and which may well aid in predicting state behavior. Visions of natural law contemplated by Augustine onwards provide one source of just war principles. So too, does custom, as revealed through state practice and, wherever discernable, \textit{opinio juris}.

In considering these indicia, it is clear that the principles of state responsibility and anticipatory self-defense have some basis in international law. The Bush Doctrine, while at once incorporating the two principles, also expands upon them dramatically by permitting expansive self-help in the case of the former and by effectively jettisoning the concept of necessity in the case of the latter. Modern state practice supports elements of this reformulation, particularly as regards the state responsibility principle. Nevertheless, there is little support for

\textsuperscript{236} See \textit{id}.

\textsuperscript{237} References to the Iraq War as a “war of choice” are revealing. Even assuming, \textit{ex ante}, that WMD were actually being developed in Iraq, the United States clearly had other options beyond armed intervention, no matter how imperfect those options may have been. See David Ignatius, \textit{A War of Choice, and One Who Chose It}, Wash. Post, Nov. 2, 2003, at B01.
expanding the principle of anticipatory self-defense to incorporate preventative warfare.

President Obama is unlikely to invoke the Bush Doctrine by name. At the same time, he is almost certain to take a broad reading of what is permitted under the principles of state responsibility and anticipatory self-defense, even if he flatly rejects the notion of preventative warfare. The U.S. may not always abide by the advice of its allies, but the tenor of American diplomacy will undoubtedly change. At its most effective, American diplomacy will move away from Manichean totems towards a more traditional understanding of when military action is just and appropriate.