

THE USE OF FORCE AGAINST STATES THAT *MIGHT* HAVE WEAPONS OF MASS DESTRUCTION

*Matthew C. Waxman**

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* Associate Professor, Columbia Law School; Adjunct Senior Fellow, Council on Foreign Relations; Member of the Hoover Institution Task Force on National Security and Law. I thank the following for their helpful comments: Kenneth Anderson, Philip Bobbitt, Daniel Byman, Robert Chesney, Elbridge Colby, Michael Doyle, Jack Goldsmith, Robert Jervis, David Kaye, Jens Ohlin, Vijay Padmanabhan, Deborah Pearlstein, Abraham Sofaer, and Peter Spiro. I also thank the following students for their excellent research assistance: Bo Simmons, David Hambrick, Johanna Skrzypczyk, and Judith Tompkins.

“It is clear to anyone willing to face reality that the only reason Saddam took the risk of refusing to submit his activities to U.N. inspectors was that he is exerting every muscle to build WMD.”

—Margaret Thatcher, June 17, 2002¹

“We have yet to see a smoking gun that would convict Tehran.”

—International Atomic Energy Agency Director
Mohammed ElBaradei, February 21, 2005²

INTRODUCTION

The Iraq war rekindled debate—debate now further inflamed in discussions of Iran and North Korea—about the legal use of force to disarm an adversary state believed to pose a threat of catastrophic attack, including with weapons of mass destruction (WMD).³ Coinciding with this debate is the stark fact that intelligence about allegedly hostile states’ WMD⁴ capabilities is and will remain limited. Assessments of WMD arsenals and programs are prone to errors of the sort exemplified by former British Prime Minister Thatcher’s comment, and often cannot be proven (or disproven) to the level of certainty invoked by International Atomic Energy Agency (IAEA) Director ElBaradei.

How should international legal doctrine on the use of force handle this intelligence problem?

One pole of the current use-of-force debate, most notably represented by the George W. Bush administration, defends unilateral decisions to use self-defensive force in the face of perceived WMD threats “even if uncertainty remains as to the time and place of the enemy’s attack” (the “unilateralist view.”)⁵ The other pole holds that states cannot resort to force absent U.N. Security Council authorization unless attacked first, except

1. Margaret Thatcher, Op-Ed., *Don't Go Wobbly*, WALL ST. J., June 17, 2002, at A18.

2. Erich Follath & Georg Mascolo, *Auch al-Qaida will die Bombe [Al-Qaida also Wants the Bomb]*, DER SPIEGEL, Feb. 21, 2005, at 116.

3. For a general discussion of the strategic issues for U.S. policy, see generally DANIEL BYMAN & MATTHEW WAXMAN, *THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT* 201–25 (2002).

4. For the purposes of this paper, I am primarily concerned with nuclear and viral-biological weapons, i.e., those capable of imposing catastrophic damage. The nature of biological weapons threats differs significantly from that of nuclear weapons, and so therefore do strategies for combating these threats. See Christopher F. Chyba, *Toward Biological Security*, 8 FOREIGN AFF. 122, 122 (2002).

5. THE WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 15 (Sept. 2002) [hereinafter NATIONAL SECURITY STRATEGY].

perhaps in very narrow circumstances where a specifically identified attack is “imminent” (the “traditional view”).⁶

These schools share a belief that the proliferation of WMD poses new challenges for international use of force rules, but they draw opposite conclusions. Those taking the unilateralist view believe that the instantaneity and destructiveness of WMD threats render traditional rules, especially an imminence requirement, too stringent.⁷ States cannot be expected to bear the risk of a first strike while the U.N. Security Council deliberates, perhaps without end. Those taking the traditional view believe that the spread of WMD raises the danger of too lenient a standard for precautionary use of force. In their view relaxing the standard opens the door to masked aggression and may spur states to pursue WMD as deterrents or may create security instabilities among them.⁸

Within this polarized debate exists a third view, which I develop further and defend: the objective “reasonable necessity” approach holds that the use of force against another state believed to pose a WMD threat is justified when a reasonable state would conclude a WMD threat is sufficiently likely and severe that forceful measures are necessary.⁹

Events since the 2003 Iraq invasion have exposed a problem for all three approaches, but especially the reasonable necessity approach: whether or not a state has a WMD arsenal, or nearly has one, often cannot be determined to a high degree of certainty. For example, U.S. intelligence assessments of all three “Axis of Evil” states’ WMD capabilities contained major errors or uncertainties. Pre-war assessments that Iraq had stockpiled chemical or biological weapons and was building a nuclear bomb proved erroneous.¹⁰ Claims that Iran is racing towards a weaponized nuclear capability have been called into question by a 2007 National Intelligence Council assessment.¹¹ Even after North Korea tested a nuclear weapon in 2006, questions remain about whether it has a plutonium program, a uranium program, or both.¹²

This Article argues that the most difficult future crises for which this legal debate is most consequential will not resemble those described by Prime Minister Thatcher or Director ElBaradei. Rather, in confronting potentially hostile and aggressive states believed to pose a WMD threat,

6. For an excellent summary of this debate, see Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005) (outlining four schools of thought, which he labels “strict-constructionist,” “imminent threat,” “qualitative threat,” and “charter-is-dead”).

7. See *infra* Part II.A.2.

8. See *infra* Part II.A.1.

9. See *infra* Part II.A.3.

10. See *infra* notes 66–69.

11. See *infra* notes 70–72.

12. See *infra* notes 73–74.

decisionmakers contemplating the use of force will face an intelligence picture that is open to reasonable debate (*contra* Thatcher) and irresolvable to high levels of certainty (*contra* ElBaradei). This paper examines how competing legal approaches deal with this epistemic problem.

If the threat of attack is a function of an adversary's intentions and its capabilities, this epistemic problem represents a conceptual and practical shift from the challenges that the anticipatory self-defense rules and the U.N. Charter were each developed to handle. In the past, the key question was generally whether an adversary *intended* to attack.¹³ Military *capabilities* could be assumed or assessed with a high level of certainty, but the community of states needed rules or processes for adjudicating whether uncertain intentions warranted forceful preemptive or anticipatory responses.¹⁴ Crises involving WMD-seeking rogue states pose uncertainty of both factors, and often the mere crossing (or perceived crossing) of the WMD capability threshold has dire and sudden security and stability consequences.¹⁵ This Article argues that a sound legal doctrinal approach must be able to operate effectively in that environment.

The unilateralist school deals with capability uncertainty with a subjective, or self-determined standard: the state contemplating the use of force to head off a WMD threat must believe in good faith that the use of force is necessary to forestall it.¹⁶ This school accepts as inevitable that states must and will make critical decisions amid substantial uncertainty. The traditional school deals with capability uncertainty with process.¹⁷ It argues that because accurately discerning a state's capability is difficult, the international community should rely on collective decisionmaking, based as much as possible on assessments by international inspection and oversight organizations like the International Atomic Energy Agency (IAEA) to determine the magnitude of threats. The reasonable necessity school proposes, usually through a combination of state practice and in-

13. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 97–108 (2002).

14. See Jack S. Levy, *Misperception and the Causes of War: Theoretical Linkages and Analytical Problems*, 36 *WORLD POL.* 76, 96 (1983) (“Statesmen have always recognized that intentions are more difficult to assess than capabilities.”).

15. One might object to the use of the term “uncertainty” here, preferring instead the term “risk.” Generally “risk” refers to situations where probabilities can be assigned to various possible outcomes, whereas “uncertainty” refers to situations where outcomes can be identified but probabilities cannot be assigned to them. See CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* 146–47 (2007). Although estimating WMD capabilities may be thought of, strictly speaking, in terms of risk, I prefer the term “uncertainty” for its other sense, connoting factual ambiguity.

16. See *infra* Part II.B.2.

17. See *infra* Part II.B.1.

ternational institutional adjudication, flexible yet objective criteria to guide decisionmaking about military force.¹⁸

This Article aims to develop more fully how an objective reasonableness approach to WMD capability assessments would work, and more generally how the law governing use of force should guide capability assessments. It begins in Part I with an analysis of the debate over the international law regulating uses of force and the way each doctrinal camp purports to operate in a world of WMD proliferation. Part II argues that a key challenge for any doctrinal approach will be inevitable uncertainty about adversaries' WMD capability, and then examines how each approach grapples with the epistemic problem of judging such capability amid informational gaps and distortions. It argues that a reasonable necessity approach to use of force against WMD threats—and with it an objective standard of assessing WMD capability—operating as a narrow exception to formal U.N. Security Council authorization, best balances competing risks in an environment of significant capability uncertainty. However, it also argues that U.N. Security Council-driven processes and an objective necessity approach are not mutually exclusive and can be combined in reciprocally reinforcing ways.

An objective necessity approach prompts the questions: what level of certainty is reasonable, and what evidentiary logic and assumptions should guide that judgment? Part III explores these questions, and reveals how evidentiary principles reflect underlying policy choices about balancing risks and combating proliferation. Even if one remains unconvinced by the objective necessity approach, the evidentiary issues raised in Part III—and forced to the surface through objective reasonableness analysis—are critical to the effective operation of the legal processes advocated by the traditional view and its strict construction of the U.N. Charter.

I. USE OF FORCE DOCTRINE AND WEAPONS OF MASS DESTRUCTION

International law on the use of force has traditionally allowed states some leeway to defend themselves without having to suffer a first blow. How much leeway is allowed is the source of much debate, and this debate has intensified as WMD proliferate. This Part charts that debate, and then adds to it the emergent reality that states contemplating the use of force are often unable to assess with great confidence whether or not an adversary truly has, or is about to acquire, a WMD arsenal.

18. See *infra* Part II.B.3.

A. Use of Force and Anticipatory Self-Defense

The international legal doctrine of anticipatory self-defense regulates the use of military force against attacks that have not yet occurred.¹⁹ The classic formulation of the doctrine was articulated by Secretary of State Daniel Webster in an 1841 exchange with his British counterparts.²⁰ British forces attacked the schooner *Caroline* in U.S. territory because they expected it to ferry supplies across the border to Canada in aid of rebels who were fighting the British rule. Webster objected, arguing that a right of anticipatory self-defense arises only when there is a necessity of self-defense that is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”²¹ To those who accept its continuing validity in the modern era, anticipatory self-defense is a narrow exception to the general U.N. Charter rule that armed force against another state is prohibited unless authorized by the U.N. Security Council or, once a state has been militarily attacked, in self-defense.²²

I say “to those who accept” the continuing validity of anticipatory self-defense because some scholars argue that the U.N. Charter deliberately overrode the rule and replaced it exclusively with collective self-defense mechanisms administered by the Security Council.²³ Article 51 of the U.N. Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²⁴ The strictest interpreters of this provision insist

19. See Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq*, in *ESSAYS ON WAR IN INTERNATIONAL LAW* 667, 672–76 (2006).

20. See MICHAEL W. DOYLE, *STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT* 11–15 (Stephen Macedo ed., 2008); FRANCK, *supra* note 13, at 97–98.

21. Letter from Daniel Webster, U.S. Sec’y of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), *quoted in* 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* § 217, at 412 (1906).

22. U.N. Charter art. 2, para. 4 (discussing use of force generally); *see also id.* art. 51 (discussing self-defense). For a discussion of minority views, *see* Murphy, *supra* note 6, at 708–10.

23. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275–76 (1963); ANTONIO CASSESE, *INTERNATIONAL LAW* 57 (2d ed. 2005); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 112 (2000); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 141–44 (1979); MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 172–79 (2008); *see also* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 171–72 (3d ed. 2001) (arguing for a more limited right of “interceptive” self-defense when an armed attack is in progress but has not yet hit, such as Japanese vessels en route to bomb Pearl Harbor).

24. U.N. Charter art. 51.

that the phrase “if an armed attack occurs” was intended to eliminate the customary right of anticipatory self-defense.²⁵

The better view, upon which this paper is based, is that the “inherent right of self-defense” to which Article 51 refers also incorporates anticipatory self-defense. The key debate concerns the conditions under which anticipatory self-defense may be invoked. The majority of scholars accept this general view, and state practice since 1945 reinforces it.²⁶

The basic policy behind international self-defense doctrine is to promote global order by permitting states sufficient leeway to respond to expected security threats while not creating an exception so broad to the baseline prohibition of force that it swallows the rule, or is used pretextually to mask aggression. Because the policy involves predicting future actions by an expected aggressor, application of the anticipatory self-defense doctrine, or what more broadly could be called the “precautionary self-defense” doctrine, risks false positives and false negatives. False positives are uses of military force in self-defense against expected attacks that would not have actually materialized. They are problematic because of their immediate destructive material and diplomatic effects, as well as their potential to escalate into a larger war or to create additional insecurity among other states. False negatives are abstentions from using self-defensive military force due to a mistaken assessment that an adversary would not attack first. They are problematic because they result in and reward preventable aggression. Anticipatory self-defense rules aim to calibrate the risk of false positives and false negatives.²⁷

The imminence requirement in traditional anticipatory self-defense doctrine can be understood as a legal device for reducing false positives, or unnecessary resorts to self-defensive force.²⁸ Requiring that a specific attack be about to occur helps ensure that a defender exhaust other, non-forcible means, and it reduces the likelihood of mistakes, insofar as

25. See, e.g., BROWNLIE, *supra* note 23, at 275–76; GRAY, *supra* note 23, at 112; see also O’CONNELL, *supra* note 23, at 172–79 (advocating a restrictive interpretation of the “armed attack”-based self-defense exception of Article 51).

26. See FRANCK, *supra* note 13, at 107–08. Any such use of force is always limited by other international legal principles, including necessity and proportionality. See Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 45 (Louis Henkin et al. eds., 1991).

27. On the purposes underlying use of force rules and their interpretation as a means of balancing false positives and negatives, see W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 83–84 (2003) (describing the International Court of Justice’s (ICJ) decision in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), as reflecting the Court’s effort to balance under-use versus over-use of military force).

28. See FRANCK, *supra* note 13, at 107 (“In the right circumstances, [anticipatory self-defense] can be a prescient measure that, at low cost, extinguishes the fuse of a power-keg. In the wrong circumstances, it can cause the very calamity it anticipates.”). See generally Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993 (2005).

waiting until that point is more likely to expose an adversary's true intentions, perhaps through visible preparations. An imminence requirement therefore helps distinguish an adversary's general attitude of hostility from a matured intention to attack.²⁹

B. "Precautionary Self-Defense" and WMD

The proliferation of WMD complicates the anticipatory self-defense debate because such technology raises the stakes of errors (of both kinds, but especially of false negatives). What sets WMD apart from other arsenals is their ability to inflict massive damage in a short period of time. An adversary with WMD may be able to strike with little or no notice, after which it may be too late to defend against the devastating impact. Moreover, a state's mere possession of WMD allows it to wield a significant threat, radically expanding its ability to intimidate other states or international actors. It is in part for these reasons that the U.N. Security Council declared in Resolution 1540 that the "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security."³⁰

1. The Security Context of WMD

The problem of applying the anticipatory self-defense doctrine in a world of WMD proliferation is not a new one, but it has been exacerbated in recent years. As Rosalyn Higgins of the International Court of Justice (ICJ) remarked about fifteen years ago, "in a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself."³¹ And thirty years before that, in President Kennedy's address to the nation during the 1962 Cuban Missile Crisis, he explained,

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.³²

29. See generally Posner & Sykes, *supra* note 28, at 1000.

30. S.C. Res. 1540, pmb1., U.N. Doc. S/RES/1540 (Apr. 28, 2004).

31. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994).

32. President John F. Kennedy, *Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba* (radio & television broadcast Oct. 22, 1962), available at <http://www.jfklibrary.org/jfk/cmc/j102262.htm> (last visited Oct. 5, 2009).

At the time Kennedy spoke, fewer than a half-dozen countries had, or were even developing, significant WMD capabilities.³³ Today, however, an estimated nine countries already have nuclear weapons.³⁴ There are at least seven other countries that have indicated an interest in nuclear weapons and are currently seeking to expand their nuclear energy programs.³⁵ Meanwhile, an estimated eighteen countries now have, or are likely to have, chemical or biological weapons capabilities,³⁶ and the capabilities of those states that are actively pursuing WMD programs will likely improve over the next decade.

Suspected WMD arsenals dramatically alter the strategic calculus of potential target states. An adversary with WMD may be able to strike with little or no notice, foreclosing the possibility of diplomacy and other methods of conflict avoidance that are usually available in the context of conventional war. Moreover, once a WMD attack is initiated, the targeted state is likely to have limited options for protecting its population and strategic assets.³⁷

Beyond the concern of an actual attack, mere possession of a WMD capability by a hostile or aggressive state poses an array of dangers to other states. The WMD capability can serve as a powerful deterrent, affording its wielder greater freedom to undertake aggressive military and diplomatic actions. WMD-armed states may be more tempted to employ conventional or asymmetric force to achieve goals given the diminished likelihood of military counteraction or unfavorable escalation.³⁸ Both the

33. See National Resources Defense Council, *Nuclear Notebook: Global Nuclear Stockpiles, 1945–2006*, 62 BULL. ATOMIC SCIENTISTS 64 (2006), available at <http://thebulletin.metapress.com/content/c4120650912x74k7/fulltext.pdf> (last visited Oct. 5, 2009).

34. See PAUL K. KERR, CRS REPORT: NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS AND MISSILES: STATUS AND TRENDS 6 (Feb. 20, 2008), available at <http://www.fas.org/sgp/crs/nuke/RL30699.pdf> (last visited Oct. 5, 2009); see also Federation of American Scientists, Status of World Nuclear Forces, <http://www.fas.org/programs/ssp/nukes/nukestatus.html> (last visited Oct. 5, 2009).

35. See COMM'N ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM, WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM 61–62 (2008) [hereinafter GRAHAM-TALENT REPORT]; Council on Foreign Relations, *Issue Brief: The Global Nuclear Nonproliferation Regime*, www.cfr.org/publication/18984/ (last visited Oct. 6, 2009).

36. See KERR, *supra* note 34, at 20.

37. Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 16 (referring to the “impossibility for [a] State to afford its population any effective protection once the attack has been launched”). This fact also underlies much of the debate on Ballistic Missile Defense. See generally BALLISTIC MISSILE DEFENSE (Ashton B. Carter & David N. Schwartz, eds., 1984); JAMES M. LINDSAY & MICHAEL E. O'HANLON, DEFENDING AMERICA: THE CASE FOR LIMITED NATIONAL MISSILE DEFENSE (2001).

38. For a discussion of what political scientists often call this “stability-instability paradox,” see Glenn H. Snyder, *The Balance of Power and the Balance of Terror*, in THE BALANCE OF POWER AND THE BALANCE OF TERROR 184 (Paul Seabury ed., 1965).

WMD threat itself and this increase in the perceived utility of other violence can be used to intimidate other states and international actors.³⁹

The “profile” of proliferating states magnifies the risk of deterrence-shielded aggression and additional proliferation once they develop WMD capabilities. These states likely violated international law throughout their development of WMD, and so are likely to feel relatively unconstrained by norms governing both proliferation and the use of force.⁴⁰ They are also quintessential “non status quo” states, in that they presumably sought their WMD capability out of dissatisfaction with the prior balance of power or international order.⁴¹

WMD possession also raises the danger of further proliferation in several ways. First, states that are threatened by this new WMD capability may attempt to acquire their own WMD as a deterrent, sparking arms races.⁴² Second, WMD development increases the risks that a state may share technology or materials with other states aspiring to attain WMD

39. See James Steinberg, *Preventive Force in US National Security Strategy*, 47 SURVIVAL 55, 60 (2005). But see Richard K. Betts, *Universal Deterrence or Conceptual Collapse? Liberal Pessimism and Utopian Realism*, in THE COMING CRISIS: NUCLEAR PROLIFERATION, U.S. INTERESTS, AND WORLD ORDER 51, 84 (Victor A. Utgoff ed., 2000) [hereinafter THE COMING CRISIS] (“Utopian realism [i.e., proliferation optimism as exemplified by Waltz] should not convince us to promote the spread of WMD, but it may hold out some hope if non-proliferation fails.”); John J. Mearsheimer, *The Case for a Ukrainian Nuclear Deterrent*, 72 FOREIGN AFF. 50, 51 (1993) (“[N]uclear proliferation sometimes promotes peace”); John J. Mearsheimer, *Why We Will Soon Miss the Cold War*, ATLANTIC MONTHLY, Aug. 1990, at 35, available at <http://www.theatlantic.com/politics/foreign/mearsh.htm> (last visited Oct. 5, 2009) (“[W]ell-managed proliferation could produce an order nearly as stable as that of the Long Peace.”); Scott Sagan et al., *A Nuclear Iran: Promoting Stability or Courting Disaster*, COLUM. J. INT. AFF., Spring-Summer 2007, at 136–38 (citing Waltz’s comments).

40. See BYMAN & WAXMAN, *supra* note 3, at 204–07; see also *infra* notes 308–311 and accompanying text (discussing these correlations and the problem of cognitive biases in threat assessment).

41. See Lawrence Freedman, *Prevention, Not Preemption*, 26 WASH. Q. 105, 112–13 (2003) (“Instead of a status quo, risk-averse adversary against whom deterrence might work, the United States now has gamblers for enemies”); Stephen M. Walt, *Containing Rogues and Renegades: Coalition Strategies and Counterproliferation*, in THE COMING CRISIS, *supra* note 39, at 191, 194–95 (“[V]irtually all analysts regard [rogue] regimes as fundamentally hostile to the United States. . . . [R]ogue states are assumed to have inherently revisionist aims, meaning that they seek to alter the status quo for reasons other than a desire to improve their own security.”). Walt thinks these assertions “should not be accepted uncritically” and gives more weight to the idea that “their aggressive behavior stems largely from insecurity rather than ideological conviction or a desire for glory or material gain,” but that a desire to obtain WMD in order to ameliorate feelings of insecurity does indicate dissatisfaction with the international balance of power. See *id.* at 196.

42. See CONG. COMM’N ON STRATEGIC POSTURE OF THE U.S., INTERIM REPORT 4 (2008), available at http://www.usip.org/files/file/strategic_posture_commission_interim_report.pdf (last visited Sept. 13, 2009) (“If Iran and North Korea proceed unchecked to build nuclear arsenals, there is a serious possibility of a cascade of proliferation following.”); INT’L SEC. ADVISORY BD., REPORT ON DISCOURAGING A CASCADE OF NUCLEAR WEAPONS STATES (2007) available at <http://belfercenter.ksg.harvard.edu/files/ISAB%20-%20Nuclear%20Cascade%20Report.pdf> (last visited Sept. 13, 2009).

capability, or could even transfer technology, materials, or weapons to non-state actors.⁴³

2. WMD and Strains on “Imminence”

The proliferation of WMD complicates the anticipatory self-defense debate by frustrating aspects of the traditional imminence formulation and raising the stakes of errors, especially false negatives.⁴⁴ Once in the hands of a hostile state, WMD capabilities can pose threats that are very different from the class of threats out of which the imminence requirement—summed up so well in the *Caroline* exchange—grew. As a result, many scholars and policymakers have expressed concern that technological changes and WMD proliferation are outstripping traditional imminence doctrine.⁴⁵

Traditional imminence depends heavily on a temporal restriction, whereby force is only permitted “during the last window of opportunity.”⁴⁶ The technological nature of WMD and their delivery can make it impossible to discern this “last chance” period, limiting the extent to which the imminence requirement can be used to reduce uncertainty about a WMD-armed adversary’s true intentions. In a conventional context, a state’s decision to attack was usually accompanied by a perceptible mobilization of forces, while a WMD threat may only become imminent with the crystallization of the aggressor’s intention to attack.⁴⁷ This

43. See William J. Broad et al., *A Tale of Nuclear Proliferation: How Pakistani Built His Network*, N.Y. TIMES, Feb. 12, 2004, at A1, available at <http://www.nytimes.com/2004/02/12/international/asia/12NUKE.html> (last visited Oct. 6, 2009); David E. Sanger & William J. Broad, *From Rogue Nuclear Programs, Web of Trails Leads to Pakistan*, N.Y. TIMES, Jan. 4, 2004, <http://www.nytimes.com/2004/01/04/international/04NUKE.html> (last visited Oct. 6, 2009).

44. See ELIZABETH WILMSHURST, CHATHAM HOUSE, PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENSE 9 (2005) (“While the possession of WMD without a hostile intent to launch an attack does not in itself give rise to a right of self-defence, the difficulty of determining intent and the catastrophic consequences of making an error will be relevant factors in any determination of ‘imminence’ . . .”).

45. See, e.g., *id.* at 8; DOYLE, *supra* note 20, at 11–17; NATIONAL SECURITY STRATEGY, *supra* note 5, at 15 (“We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”); Greenwood, *supra* note 37, at 16; Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209 (2003); Terence Taylor, *The End of Imminence?* 27 WASH. Q. 57 (2004); Condoleezza Rice, U.S. Sec’y of State, Remarks on the President’s National Security Strategy at the Waldorf-Astoria, (Oct. 1, 2002) (“[N]ew technology requires new thinking about when a threat actually becomes ‘imminent’.”); see also Murphy, *supra* note 6, at 715–17 (discussing the “qualitative threat” school of thought).

46. Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 2002 ISR. Y.B. HUM. RTS 53, 110.

47. Walter B. Slocombe, *Force, Pre-Emption and Legitimacy*, 45 SURVIVAL 117, 125 (2003) (“The traditional concept of ‘imminence’ assumed a context where the need for mobilization and other preparation meant that there was a realistic prospect of warning of an attack.”); Taylor, *supra* note 45, at 66.

vanishing of the intentions-signaling mobilization period, combined with these weapons' catastrophic potential and the limits of protective means after an attack has commenced, severely restricts the opportunities for self-defense afforded by the traditional concept of imminence.

As a related problem, the broader dangers of WMD possession become "imminent" not immediately prior to a WMD attack, but before a state's WMD program reaches a sufficient stage of development. Because these weapons can be used with little warning and are capable of causing extraordinary damage, any rational state would view their possession by a hostile actor as a matter of grave concern.⁴⁸ Additionally, mere possession can create serious collateral dangers, by acting as a shield for other forms of aggression and unfavorably altering the regional security dynamic.⁴⁹ All this effectively shifts a substantial portion of contemporary security risks outside the ambit of traditional imminence, diminishing the self-defense value of following the principle.

These types of complications for self-defense rules have generated widespread belief that legal doctrine, and the concept of imminence in particular, needs to be updated in light of contemporary threats such as the proliferation of WMD.⁵⁰ While these changes in the threat environment by themselves do not compel the conclusion that self-defense rules need to be broadened (since one may believe such an expansion would create a greater countervailing danger of abuse), a range of experts have proposed remedial loosening of the traditionally understood imminence requirement.⁵¹ In the words of one such expert,

[t]he right of anticipatory self-defence by definition presupposes a right to act while action is still possible. If waiting for "immi-

48. As Ivo Daalder observes, "the very possession of weapons of mass destruction by some countries can pose an existential threat, whether or not their actual use is truly imminent." Ivo H. Daalder, *Beyond Preemption: An Overview*, in *BEYOND PREEMPTION* 1, 8 (Ivo H. Daalder ed., 2007).

49. See Betts, *supra* note 39, at 61–62 ("Rational strategic reasons to want WMD include: to deter the use of WMD against one's own country; to redress inferiority in conventional military capabilities by threatening to escalate in retaliation against an enemy's conventional attack; and to coerce an adversary into political concessions."); Barry Posen & Andrew L. Ross, *Competing Visions for U.S. Grand Strategy*, 21 *INT'L SECURITY* 5, 25 (1996) (arguing that because democracies are extremely casualty-sensitive, the risk of a nuclear attack even from a state with a very small nuclear arsenal can alter their behavior, and might even "discourage them from coming to the assistance of a country in trouble"); Sagan et al., *supra* note 39, at 139 ("[There is a] danger of nuclear weapons promoting aggression of the state which holds them—that is, acquiring the protection of a nuclear shield which will enable the state to be more aggressive in a conventional manner.").

50. As Terence Taylor has warned, "[i]nternational law, by its inherently reactive nature, risks evolving too slowly to define the proper response to this already apparent challenge." Taylor, *supra* note 45, at 59.

51. See *supra* note 45.

nence” means waiting until it is no longer possible to act effectively, the victim is left no alternative to suffering the first blow. So interpreted, the “right” would be illusory.⁵²

3. “Precautionary Self-Defense”

One might immediately object to this previous discussion as conflating two concepts, preemptive (or anticipatory) and preventive force. Generally, preemption refers to the use of force to avert an expected attack that is about to occur.⁵³ An oft-cited example is Israel’s surprise strikes on its Arab neighbors in 1967, based on its professed belief that the Arab states were on the verge of attacking (although recent historical analysis has cast some doubt on the certainty and accuracy of those beliefs).⁵⁴ Prevention refers to the use of force to avoid an emerging state of affairs in which a threat would be more likely or increasingly dire.⁵⁵ An example is Israel’s 1981 attack on Iraq’s uncompleted Osiraq nuclear facility, based on the Israeli government’s belief that once Iraq had a nuclear weapons capability it would be in a strong position to threaten Israel.⁵⁶ The main conceptual differences between the two concepts are temporal and speculative, or how imminent and concrete a threat must be to trigger self-defense rights.⁵⁷

For the purposes of this paper, I use the inclusive term “precautionary self-defense” to denote the broad range of decisions to use force to forestall expected dangers before an actual attack. In other words, precautionary defense includes anticipatory defense (where specific attack is imminent), as well as a subset of preventive defense (where a specific attack may not be imminent but a grave security risk brought about by a hostile state’s capability development is likely).

Especially in the WMD context, the lines between anticipatory, preemptive, and preventive force tend to blur. Because WMD can often be

52. Slocombe, *supra* note 47, at 125. Walter Slocombe was the Undersecretary of Defense for Policy during the Clinton administration.

53. See RACHEL BZOSTEK, WHY NOT PREEMPT? SECURITY, LAW, NORMS, AND ANTICIPATORY MILITARY ACTIVITIES 9–23 (2008).

54. See MICHAEL B. OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 61–169 (2002).

55. See BZOSTEK, *supra* note 53, at 9–13; DOYLE, *supra* note 20, at 25.

56. See Shai Feldman, *The Bombing of Osiraq-Revisited*, 7 INT’L SECURITY 114, 114 (1982).

57. See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 74–75 (2d ed. 1992); Dan Reiter, *Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen*, 20 INT’L SECURITY 5, 6–7 (1995) (“A war is preemptive if it breaks out primarily because the attacker feels that it will itself be the target of a military attack in the short term This definition is limited to perceptions of short-term threats to national security: in contrast, the term preventive war is used for a war that begins when a state attacks because it feels that in the longer term (usually the next few years) it will be attacked or will suffer relatively increasing strategic inferiority.”).

used without warning, the temporal proximity of a threat may be impossible to determine objectively. As a result, it may become unworkable to distinguish clearly between “distant” and “imminent” threats, and so between prevention and preemption.⁵⁸

Moreover, all three legal approaches discussed implicitly contemplate the possibility of the preemptive or preventive use of force (that is, prior to the point of imminent attack).⁵⁹ Their difference is in how to regulate legally that decisionmaking, and even more specifically how to measure a component of the necessary legal conditions (by requiring process versus good faith versus reasonableness assessments). This paper does not advance a complete argument about the ultimate policy merits of preemptive and preventive uses of force, although it shows how the legal issues and policy issues are intertwined.⁶⁰ Rather, it asks: If the legal regime were to permit uses of force against a hostile state under certain circumstances, how should those circumstances be judged, in light of emergent intelligence limitations?⁶¹

Notice the important assumption of a “hostile” state. Of course, not all states—or even many states—with WMD exhibit sufficient hostile intentions to warrant forceful counter-action as a matter of law or policy. Indeed, I assume that those conditions will be quite rare. While the threat posed by a WMD-armed or WMD-arming state is a composite of its intentions and its capabilities, this paper gives a deliberately incomplete treatment of a WMD threat’s legal appraisal by attempting to isolate the

58. See PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 447–48 (2008). *But see* WILMSHURST, *supra* note 44, at 9 (“To the extent that a doctrine of ‘pre-emption’ encompasses a right to respond to threats which have not yet crystallized but which might materialise at some time in the future, such a doctrine (sometimes called ‘preventive defence’) has no basis in international law.”).

59. See The Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> (last visited Oct. 5, 2009) [hereinafter *U.N. High-Level Panel*] (taking the traditionalist view and stating that “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to”).

60. See Slocombe, *supra* note 47, at 126–28, for a prudential case against preemptive use of force to deal with WMD threats.

61. As just explained, all three regulatory modes—process, subjective standard, and objective standard—theoretically permit precautionary force under certain circumstances. In practice, we can expect the process approach virtually always to be the least permissive, and the subjective the most permissive, because as one moves from subjective to objective to process analysis, the latter will almost always include satisfaction of the former. That is, whenever a reasonable state would conclude that force is warranted (because of reasonable belief about requisite intent and capability), some single state or group of states contemplating the use of the force can also be expected to take that view in good faith. And whenever the process approach—i.e., through U.N. Security Council deliberation—would conclude that force is warranted, so too would a hypothesized reasonable state, or else it would be virtually impossible to achieve sufficient voting consensus in the Council.

capability assessment variable. To this end, I assume some requisite level of hostile or destabilizing intentions as viewed through the eyes of those states contemplating force in response.

To be very clear, I am not arguing that WMD possession or pursuit alone is ever sufficient legal cause for precautionary force. Adversary capability or capability development is a necessary but not sufficient condition of legal precautionary force. This paper focuses on the capability part of the equation, although some of the analytical principles and logic it explores could apply to intentions as well.

C. The Problem of Intelligence Limitations

A lesson of the past few decades—a lesson displayed dramatically in recent years—is that information about an adversary or rogue state's WMD capability is often murky or incomplete. Intelligence assessments can turn out to be widely off-mark. A major challenge facing national security decisionmakers will likely be not what to do about a hostile adversary that has WMD, but what to do about a hostile adversary that *might* have WMD.

The most obvious example of this problem is Iraq, although there are other examples from both before and after the 2003 invasion, and examples of both overestimating and underestimating WMD capabilities. Israel's 1981 assessment before it bombed Osirak that Iraq was very close to achieving an operational nuclear arsenal was refuted by after-the-fact analyses.⁶² Following the 1991 Gulf War, the United States and the international community more broadly discovered that they had vastly *underestimated* Iraq's progress toward a nuclear weapon capability.⁶³ In 1998 the United States government was caught off-guard by India's test of a nuclear weapon,⁶⁴ followed quickly by Pakistan's.⁶⁵

The embarrassing failure to find WMD in Iraq led to the appointment of an executive-mandated investigatory commission, the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (WMD Commission), co-chaired by former Judge Laurence Silberman and former Senator Charles Robb.⁶⁶ With regard to Iraq, the Commission concluded that the

62. See Richard K. Betts, *The Osirak Fallacy*, NAT'L INT., Spring 2006, at 22.

63. David A. Kay, *Denial and Deception Practices of WMD Proliferators: Iraq and Beyond*, 18 WASH. Q., Winter 1995, at 85.

64. See STROBE TALBOTT, *ENGAGING INDIA: DIPLOMACY, DEMOCRACY, AND THE BOMB* 2–3 (2004).

65. See Dexter Filkins, *Pakistan Explodes 5 Nuclear Devices in Response to India*, L.A. TIMES, May 29, 1998, at A1.

66. See Douglas Jehl, *Bush Sets Panel on Intelligence Before Iraq War*, N.Y. TIMES, Feb. 7, 2004, at A1.

Bush administration did not deliberately manipulate intelligence but that the intelligence system itself produced a faulty assessment.⁶⁷ More broadly, it concluded that U.S. and international capabilities to detect and accurately assess WMD capabilities are, and will remain, limited.⁶⁸ Another major study concluded that “[i]n the Iraqi case, arguably the three best intelligence services in the world—those of the United States, Great Britain, and Israel—proved tragically unequal to the task” of providing accurate intelligence on emerging threats.⁶⁹

Controversy currently surrounds Iran’s alleged nuclear weapons development program.⁷⁰ In his February 2005 State of the Union Address, President Bush declared that, “[t]oday, Iran . . . [is] pursuing nuclear weapons,” but a November 2007 National Intelligence Estimate concluded that, at the time, Iran’s enrichment program did not have a military dimension but that Iran could develop military nuclear capabilities in the near future.⁷¹ Debates continue within intelligence communities about Iran’s nuclear capabilities and ambitions, yet as IAEA Director ElBaradei reminds us, “[w]e have yet to see a smoking gun that would convict Tehran.”⁷²

Even in the case of North Korea, now a confirmed nuclear power, huge questions remain concerning the nature and scope of its WMD program.⁷³ North Korea conducted a plutonium-based nuclear test in 2006, even after which American intelligence agencies reportedly admitted

67. See THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 3, 51 (2005), available at http://govinfo.library.unt.edu/wmd/report/wmd_report.pdf (last visited Oct. 5, 2009) [hereinafter WMD COMMISSION REPORT].

68. See *id.* at 517.

69. JOSEPH CIRINCIONE ET AL., CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, WMD IN IRAQ: EVIDENCE AND IMPLICATIONS 61 (2004), available at <http://www.carnegieendowment.org/files/Iraq3FullText.pdf> (last visited Oct. 5, 2009).

70. See GRAHAM-TALENT REPORT, *supra* note 35, at 62, 63 (“[O]n September 29, 2008, IAEA Director General ElBaradei [noted that there is an] ‘. . . absence of full clarity about Iran’s past and present nuclear program.’”). This uncertainty about the status of an Iranian nuclear weapons program has been ongoing for almost a decade. *Id.* at 62.

71. See NAT’L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES (2007), available at http://www.dni.gov/press_releases/20071203_release.pdf (last visited Oct. 5, 2009).

72. Karen DeYoung & Michael D. Shear, *U.S., Allies Say Iran Has Secret Nuclear Facility*, WASH. POST, Sept. 26, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/25/AR2009092500289.html> (last visited Oct. 5, 2009) (reporting recent disclosures by the Iran); Follath & Mascolo, *supra* note 2; see also George Jahn, *Nuke Agency Says Iran Can Make Bomb*, ASSOC. PRESS, Sept. 17, 2009, available at http://news.yahoo.com/s/ap/20090917/ap_on_re_eu/eu_iran_nuclear (last visited Oct. 5, 2009) (discussing intelligence assessments of Iran’s nuclear program).

73. STAFF OF H. PERMANENT SELECT COMM. ON INTELLIGENCE, SUBCOMM. ON INTELLIGENCE POL’Y, RECOGNIZING NORTH KOREA AS A STRATEGIC THREAT: AN INTELLIGENCE CHALLENGE FOR THE UNITED STATES 5, 6 (2005), available at <http://intelligence.house.gov/Media/PDFS/NorthKoreaReport092806.pdf> (last visited Oct. 5, 2009).

serious doubts about the sophistication, competence, and even existence of a parallel North Korea's uranium enrichment program.⁷⁴

The problem of capability uncertainty is not going away anytime soon, and it may grow.⁷⁵ There are several reasons why these existing information gaps about WMD capabilities and programs will not be substantially closed. These include systemic intelligence deficiencies, inspection and verification weaknesses, the nature of modern WMD technologies, and concealment efforts by proliferators.⁷⁶

National intelligence systems are insufficient to meet expanding demands in this area.⁷⁷ While there have been a number of commissions and studies dedicated to improving intelligence related to WMD proliferation, even the most positive assessments conclude that the demands will be difficult to meet,⁷⁸ and most estimations conclude that major intelligence lapses are virtually inevitable.⁷⁹

74. See David E. Sanger & William J. Broad, *U.S. Concedes Uncertainty on Korean Uranium Effort*, N.Y. TIMES, Mar. 1, 2007, at A1 (reporting that while the intelligence community's initial assessment based on North Korea's purchase of some twenty centrifuges from Pakistan was still factually correct, nothing had taken place since the sale to further corroborate North Korea's desire to use the centrifuges to develop a vast uranium enrichment program).

75. See DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 289 (2009).

76. See *supra* notes 66–74; *infra* notes 77–97.

77. See, e.g., WMD COMMISSION REPORT, *supra* note 67, at 297–98 (“[A]gencies having responsibility for WMD terrorism are also understaffed, and the few experts that do exist are suffering from burnout.”); GRAHAM-TALENT REPORT, *supra* note 35, at 97 (“Because of attrition and hiring freezes during the 1990s, there are few midcareer analysts.”).

78. This difficulty is attributed to both the substance of the solutions, see, e.g., WMD COMMISSION REPORT, *supra* note 67, at 26 (“There is no quick fix for tradecraft problems.”), and the failure to implement some of the proposed solutions, see, e.g., GRAHAM-TALENT REPORT, *supra* note 35, at xxvi (stating that implementation has been limited to defense, intelligence, and homeland security); WMD COMMISSION REPORT, *supra* note 67, at 539.

79. See RICHARD A. POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM 44 (2006); see also Robert Jervis, *Reports, Politics, and Intelligence Failures: The Case of Iraq*, 29 J. STRATEGIC STUD. 3, 10–12 (2006) (“[I]ntelligence failures have occurred in all countries and all eras”), available at http://www.columbia.edu/cu/siwps/publication_files/Intelligence%20reform_JERVIS.pdf (last visited Oct. 5, 2009); David Kahn, *The Rise of Intelligence*, 85 FOREIGN AFF., Sept.–Oct. 2006, at 125, 134 (“[Intelligence] will never be decisive on its own.”); Paul R. Pillar, *Intelligent Design? The Unending Saga of Intelligence Reform*, 87 FOREIGN AFF., Mar.–Apr. 2008, at 138, 144 (“Betts is correct in arguing that these inherent enemies constitute an almost insurmountable obstacle and that intelligence failures are not only inevitable but natural. [As Betts notes,] ‘[t]he awful truth . . . is that the best of intelligence systems will have big failures.’”). Even the WMD Commission Report is not very optimistic about its own recommendations’ potential for success. See WMD COMMISSION REPORT, *supra* note 67, at 46 (“Stealing [WMD] secrets [through intelligence efforts] . . . is no easy task, and failure is more common than success.”); *id.* at 253 (asserting that “it is apparent . . . that the [Intelligence] Community is not well-postured to replicate” its success in detecting WMD capabilities in Libya).

International inspections regimes are similarly limited in their ability to generate certainty with regard to the existence of WMD arsenals.⁸⁰ One problem is the insufficient technical capabilities of international inspection agencies.⁸¹ Another problem, especially with respect to chemical and biological weapons, is the limited authority or mandate of international inspection regimes.⁸² Even if those issues are overcome, it has been hard for inspectors to agree on conclusions once they obtain significant findings.⁸³

Another obstacle to closing intelligence gaps about WMD capabilities and programs concerns the nature of modern WMD technology.⁸⁴ Many of the components that go into WMD are dual use (that is, able to

80. See John Hart & Vitaly Fedchenko, *WMD Inspection and Verification Regimes: Political and Technical Challenges*, in *COMBATING WEAPONS OF MASS DESTRUCTION* 95, 96 (Nathan E. Busch & Daniel H. Joyner eds., 2009) (“The fundamental challenge in carrying out any verification assessment is that, in the absence of an indisputable violation . . . uncertainty that the state is adhering to its obligations can exist.”); see also George Jahn, *UN: New Uranium Traces Found in Syria*, ABC NEWS, June 5, 2009, available at <http://abcnews.go.com/International/wireStory?id=7767362> (last visited Oct. 5, 2009) (describing the inability of the International Atomic Energy Agency (IAEA) to develop an accurate picture of Iranian or Syrian nuclear programs despite inspections).

81. See Hart & Fedchenko, *supra* note 80, at 101–08 (discussing IAEA’s technical limitations); Council on Foreign Relations, *supra* note 35 (discussing a “lack of adequate verification and enforcement mechanisms available to the IAEA”). This is especially true with regard to biological weapons inspections. Stephen Black, *UNSCOM and the Iraqi Biological Weapons Program: Implications for Arms Control*, 18 POL. & LIFE SCI. 62, 63 (1999) (noting the “technical complexities inherent to [biological weapons] arms control”).

82. For example, the IAEA has substantial authority to inspect activities related to nuclear fuel-cycle activities, but has very little capacity to inspect items and activities suggestive of weaponization in the absence of a finding of nuclear materials. Mohamed ElBaradei, Dir. Gen., IAEA, *Nuclear Non-Proliferation and Arms Control: Are We Making Progress?* 3 (Nov. 7, 2005), available at <http://www.carnegieendowment.org/static/npp/2005conference/presentations/elbaradei.pdf> (last visited Oct. 5, 2009) (“[T]he Agency’s legal authority to investigate possible parallel weaponization activity is limited, absent some nexus linking the activity to nuclear material.”); Ivo Daalder & Jan Lodal, *The Logic of Zero: Toward a World Without Nuclear Weapons*, 87 FOREIGN AFF., Nov.–Dec. 2008, at 80, 88 (explaining that the IAEA “has limited authority to inspect suspect sites”). Similar problems curtail the effectiveness of the Biological Weapons Convention, which lacks a substantive inspectorate and can only be activated through the use of “challenge inspections” that are politically sensitive and risky for a state to request. See Hart & Fedchenko, *supra* note 80, at 102.

83. See Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT’L L. 271, 302 (2007) (“[I]n 1992 the United States, Britain, and Russia undertook to ascertain BWC compliance through a series of voluntary visits to nonmilitary sites of concern under the nonbinding ‘Trilateral Framework Agreement’ . . . [but] participants could not agree on the implications of what they had observed during their visits.”).

84. Ashton Carter, *How to Counter WMDs*, 83 FOREIGN AFF., Sept.–Oct. 2004, at 72, 83 (“WMD activities are *inherently difficult* to monitor. It is comparatively easy to keep tabs on the size and disposition of armies, the numbers and types of conventional weaponry such as tanks and aircraft, and even the operational doctrines and plans of military establishments *By their nature*, in contrast, WMD concentrate destructive power in small packages and tight groups.”) (emphasis added).

serve civilian as well as military roles), which severely complicates differentiating legitimate from potentially hostile efforts.⁸⁵ Consequently, this makes “some of the weapons that would be most dangerous in the hands of terrorists or rogue nations . . . difficult to detect.”⁸⁶ According to one expert, “[t]here are very few activities, materials or equipment unambiguously associated with the manufacture of nuclear weapons, and the chances are slim that the IAEA would detect one that was.”⁸⁷ Accurate capability assessment therefore requires understanding and judging a suspect state’s intentions for how it plans to use technologies or component parts.⁸⁸

Additionally, WMD are easy to conceal—in some cases increasingly so—which adds to the difficulty in tracking them. Nuclear power facilities can be used as cover for clandestine nuclear weapons programs⁸⁹ and weapons-grade uranium can be shielded from traditional detection techniques.⁹⁰ Biological and chemical weapons are easy to hide because they can be manufactured in commercial buildings lacking suspicious signatures.⁹¹ Biological weapons in particular are easily hidden.⁹² Bioweapons labs can be concealed within routine research labs, pharmaceutical manufacturing sites, or vaccine production labs.⁹³ WMD can increasingly be produced with very little lead time, which has the effect of lowering the window of opportunity that the intelligence community has to detect them.⁹⁴

A further reason why intelligence gaps about WMD capabilities and programs cannot be closed is fairly obvious but quite relevant: “nations and terrorist groups do not easily part with their secrets—and they guard nothing more jealously than secrets related to nuclear, biological, and

85. See GRAHAM-TALENT REPORT, *supra* note 35, at 35; WMD COMMISSION REPORT, *supra* note 67, at 521.

86. WMD COMMISSION REPORT, *supra* note 67, at 4; see also GRAHAM-TALENT REPORT, *supra* note 35, at 9 (“[T]he materials and equipment needed to produce biowarfare agents also have legitimate uses in scientific research and commercial industry . . .”).

87. James M. Acton, *The Problem with Nuclear Mind Reading*, 51 SURVIVAL, Feb.–Mar. 2009, at 119, 121.

88. On the illustrative problem of uranium centrifuge technology for inspections regimes, see Houston G. Wood et al., *The Gas Centrifuge and Nuclear Weapons Proliferation*, PHYSICS TODAY, Sept. 2008, at 40.

89. See GRAHAM-TALENT REPORT, *supra* note 35, at 45.

90. See WMD COMMISSION REPORT, *supra* note 67, at 5.

91. See *id.* at 16.

92. *Id.* at 4–5; Carter, *supra* note 84, at 83.

93. GRAHAM-TALENT REPORT, *supra* note 35, at 35.

94. See BOBBITT, *supra* note 58, at 11 (“[I]t is now possible for states and terror groups to arm themselves with WMD in a small fraction of the time it has hitherto taken.”).

chemical weapons.”⁹⁵ As detection efforts are effective in one case, states adapt to confound them.⁹⁶ Moreover, actors sometimes have incentives to exaggerate the state of their WMD programs.⁹⁷

For all of these reasons, WMD capability intelligence will likely remain as it is now: highly murky and uncertain. As a result, in future crises we cannot confidently expect moments like during the 1962 Cuban Missile Crisis, when U.S. Ambassador to the United Nations Adlai Stevenson presented “incontrovertible” photographic evidence of Soviet missiles being assembled in Cuban territory to both the U.N. Security Council and a live television audience.⁹⁸ Instead, we can expect moments more like Secretary of State Colin Powell’s globally broadcast presentation before the U.N. Security Council forty years later, in which he painted a picture of Iraq’s likely WMD programs with a series of circumstantial pieces of evidence that together indicated likelihood, but far from certainty, of Saddam Hussein’s WMD arsenal.⁹⁹

As mentioned earlier, this issue of “capability uncertainty” is a relatively new challenge for anticipatory or precautionary self-defense doctrine, because in an era of conventional warfare among states, an adversary’s first strike capability could usually be assumed or assessed with high confidence. True, the history of modern conventional warfare is also replete with examples of intelligence gaps concerning adversary capabilities and resulting strategic surprises.¹⁰⁰ For example, take Germany’s unexpected ability to drive through the Ardennes forest against France in 1940, bypassing the Maginot line and defying France’s entire

95. WMD COMMISSION REPORT, *supra* note 67, at 46; *see also* POSNER, *supra* note 79, at 34 (noting that the mere existence of intelligence forces enemies to conceal their intentions and capabilities, which causes the enemy to suffer costs and delays).

96. *See* Betts, *supra* note 62, at 23 (arguing that since Iran has long been on notice that it is in the “crosshairs of American military planners,” it would be surprising if Iranian strategists “have failed to disperse and conceal important facilities in the interests of frustrating U.S. intelligence collection”).

97. *See* WMD COMMISSION REPORT, *supra* note 67, at 251 (noting that mere procurement activities should not be equated with actual technical capabilities); Jervis, *supra* note 79, at 43 (arguing that some countries have an incentive to lie about their capabilities to posture that they have a deterrent).

98. *See* Adlai Stevenson, U.S. Ambassador to the U.N., United Nations Security Council Address on Soviet Missiles in Cuba (Oct. 25, 1962), *available at* <http://www.americanrhetoric.com/speeches/adlaistevensonunitednationscuba.html> (last visited Oct. 5, 2009).

99. Colin Powell, U.S. Sec’y of State, Presentation to the U.N. Security Council on the U.S. Case Against Iraq (Feb. 6, 2003), *available at* <http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript> (last visited Oct. 5, 2009).

100. *See* Richard K. Betts, *Analysis, War, and Decision: Why Intelligence Failures Are Inevitable*, 31 *WORLD POL.* 61 (1978); Richard K. Betts, *Conventional Deterrence: Predictive Uncertainty and Policy Confidence*, 37 *WORLD POL.* 153 (1985).

pre-war defensive assumptions.¹⁰¹ But contemporary WMD capability uncertainty greatly complicates strategic planning and induces insecurity not only because of the magnitude of doubt—what is the probability that a state has or is about to have WMD?—but also because that state's crossing the WMD threshold has the potential to alter so radically the balance of power.

The central epistemic challenge at the heart of this paper is well summarized by Michael Reisman and Andrea Armstrong:

The evolution of weapons systems that are ever more rapid and destructive and that may be initiated without warning or with very narrow warning windows has been invoked as a justification for preemption. But ultimately the central issue is assessment by the risk-averse security specialists of one international actor of the intentions of another actor who has or may acquire the weapons. In an international system marked by radically different cultures, values, and, as a consequence, factual perceptions and their strategic assessments, an act of preemptive self-defense, based upon one actor's self-perceived good faith conviction, will often look like serious or hysterical misjudgment to some actors and like either cynical or self-deluded, naked aggression to others.¹⁰²

II. THREE APPROACHES

A key role for international law is regulating uses of force in ways that both constrain it appropriately and narrow the gap between what Reisman and Armstrong characterize as good faith convictions and hysterical misjudgments.¹⁰³ That is, law should guide decisionmaking and help improve the informational conditions that underlie it. Or, put another way, law should improve accuracy of decisionmaking by permitting force when its use would be beneficial, and by helping to restrain it when it would not. Further, it should enhance the legitimacy of certain decisionmaking, by channeling opinions of key actors in the international system according to general norms.

101. See ERNEST R. MAY, *STRANGE VICTORY: HITLER'S CONQUEST OF FRANCE* 347–61 (2001) (explaining that German victory resulted from superior imaginativeness in planning).

102. W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526 (2006).

103. See DOYLE, *supra* note 20, at 26–28; RICHARD N. HAASS, *WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS* 222 (2009); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 101–05 (2006).

A. WMD and the Use of Force Debate

Approaches to this problem of precautionary force and emergent WMD threats generally fall into three categories that I label the traditional view, the unilateralist view, and the reasonable necessity view. Each is rooted in different assumptions about international relations and the impact of WMD proliferation.

1. The Traditional View

The traditional view holds that the threat of WMD strengthens the need to interpret anticipatory self-defense requirements narrowly. It retains a strict imminence requirement for anticipatory self-defense and directs discretion about other uses of force, absent an armed attack, to the U.N. Security Council as sole arbiter of legality. The 2004 Report of the U.N. High-Level Panel on Threats, Challenges and Change¹⁰⁴—a report endorsed by U.N. Secretary General Kofi Annan—emphasized that “according to long established international law, [a state] can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”¹⁰⁵ “The problem arises,” it acknowledged, “where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.”¹⁰⁶ But the Panel’s solution was not to expand the scope of self-defense; instead it was to rely on the U.N. Security Council as the judge of threats to peace and security and to fashion appropriate remedies.¹⁰⁷

Compared to those holding alternative views, adherents to this view weight the harms of false positives (uses of force in self-defense that were not actually necessary) relatively high. They emphasize, for example, that WMD proliferation raises the danger of too lenient a standard for use of force in anticipatory self-defense, because it may spur states to pursue WMD as deterrents.¹⁰⁸ Of particular concern to advocates of the traditional view is the risk of “pretextual” false positives, or states representing that a use of force is justified by legitimate considerations, when in fact it is rooted in impermissible motivations.¹⁰⁹

104. *U.N. High-Level Panel*, *supra* note 59, at vii–x.

105. *Id.* ¶ 188.

106. *Id.*

107. *See id.* ¶ 190.

108. *See* Jack I. Garvey, *A New Architecture for the Non-Proliferation of Nuclear Weapons*, 12 J. CONFLICT & SECURITY L. 339, 345 (2007); Reisman & Armstrong, *supra* note 102, at 549 (noting, without rejecting, that preemptive self-defense doctrine has been used to justify North Korea’s nuclear weapons program).

109. *See* Franck, *supra* note 103, at 95–96; Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT’L L. 537, 557

This view is rooted in institutionalist or liberal-institutionalist international relations theory¹¹⁰ and dominates European international legal thought.¹¹¹ The traditional view generally assumes a model of state behavior that is highly responsive to multilateral process, international organizations, and legal norms; and that view offers great hope for stability through international cooperation and consensus-building.¹¹² The traditional view also generally reflects skepticisms of military force and intervention, and a predisposition toward non-forceful methods of conflict resolution.¹¹³

Accordingly, holders of this view also have high confidence in the capacity of the U.N. Security Council to resolve crises.¹¹⁴ It is worth quoting at length the U.N. High-Level Panel's answer to its own question whether "a State [can], without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just

(1999); see also Henkin, *supra* note 26, at 47 ("States that have used force have sometimes construed the law so as to justify their actions or have defended against charges of violation by denying or distorting the facts or mischaracterizing the circumstances.")

110. See Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 *LAW & CONTEMP. PROBS.*, Autumn 2004, at 147, 158 ("All [international relations] theorists agree that the security dilemma pertains as a descriptive matter today, but they debate its severity and the prospects for mitigation through international institutions and norms [Some] think it can be substantially reduced by international institutions; realists are skeptical of even that."). Classic works in this vein include Robert O. Keohane, *Institutional Theory and the Realist Challenge After the Cold War*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* 269 (David A. Baldwin ed., 1993); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as International Variables*, in *INTERNATIONAL REGIMES 1* (Stephen D. Krasner ed., 1983); Robert Jervis, *Cooperation Under the Security Dilemma*, 30 *WORLD POL.* 167 (1978).

111. See EUR. UNION INST. FOR SEC. STUDIES, *EUROPEAN SECURITY STRATEGY: A SECURE EUROPE IN A BETTER WORLD* (2003) (proposed by Javier Solana and adopted by heads of state and government at the European Council in Brussels), available at <http://www.iss.europa.eu/uploads/media/solanae.pdf> (last visited Oct. 6, 2009) [hereinafter *EUROPEAN SECURITY STRATEGY*]; Milagros Alvarez-Verdugo, *Comparing U.S. and E.U. Strategies Against Weapons of Mass Destruction: Some Legal Consequences*, 2005 *ANN. SURV. INT'L & COMP. L.* 119.

112. See *EUROPEAN SECURITY STRATEGY*, *supra* note 111, at 14 ("We are committed to upholding and developing international law. The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security."); Hanspeter Neuhold, *Law and Force in International Relations—European and American Positions*, 64 *HEIDELBERG J. INT'L L.* 263, 267 (2004) ("Europe attaches more importance than the American superpower to multilateralism, international organisations and international law, with a firm belief that the United Nations ought to play a strong role.")

113. See Neuhold, *supra* note 112, at 266 ("[T]he two catastrophic world wars which all European nations lost undermined the confidence in the efficacy of military force. Europeans therefore prefer comprehensive political settlements which address the root causes of internal and inter-state conflicts and favour economic and political incentives over military coercion.")

114. See, e.g., Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 *STAN. L. REV.* 415, 448–90 (2006).

pre-emptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)”:

Those who say “yes” argue that the potential harm from some threats . . . is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done . . . by acting earlier.

The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies¹¹⁵

To “those impatient with such a response,” the Panel report responds:

[T]he answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted.¹¹⁶

Professor Thomas Franck offers similar reasoning:

[A] right to act without reference to the Security Council is limited to instances of actual or imminent attack. . . . Even in the era of weapons of mass destruction, such a claim to use forceful measures in preventive self-defense must still be made to the satisfaction of the Security Council. . . . A state that believes itself threatened by the long-term hostile intentions of another, before resorting to preventive action, must demonstrate the actuality of that threat to the satisfaction of the appropriate international institution. Without some jurying or adjudicative process, the right of preventive action would otherwise become an unbridled license for all states to practice aggression.¹¹⁷

In other words, alternatives to the traditional view are likely to generate too much force in the international system.

2. The Unilateralist View

A second view—the unilateralist view—holds that in a world of proliferating WMD, states have a right of self-defensive force against some

115. See *U.N. High-Level Panel*, *supra* note 59, ¶¶ 189–90.

116. *Id.* ¶ 191.

117. Franck, *supra* note 103, at 104.

states that have, or will soon have, WMD capabilities even when no imminent plans to attack are identifiable.¹¹⁸ This view is most famously reflected in the 2002 National Security Strategy of the United States. That document proclaimed that “[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”¹¹⁹ The label “unilateralist” is not meant to suggest that force is always used by a single state acting alone; rather, it is meant to suggest that legal decisionmaking is decentralized and self-regulated by those states contemplating force.

The unilateralist view jettisons the traditional imminence requirement on the grounds that, in the context of WMD, responsible states cannot wait until specific and immediate threats materialize.¹²⁰ The unilateralist view expands self-defensive latitude against non-imminent WMD threats because, it is argued, a narrower rule skews risk too much against false positives; the risk of false negatives (failing to use self-defensive force in the face of potential danger) is too great in the WMD context.¹²¹

While commonly associated with the George W. Bush administration, this understanding of the U.S. position has roots long pre-dating his 2000 election¹²² and has support across partisan lines.¹²³ As Walter Slocombe observed in 2003, “the current US administration is by no means the first to espouse the notion that the United States has the right, even the duty, to act alone if the nation’s vital interests are at stake”¹²⁴ In

118. See, e.g., David B. Rivkin, Jr. et al., *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT’L L. 467 (2005); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563 (2003).

119. NATIONAL SECURITY STRATEGY, *supra* note 5, at 15.

120. See, e.g., *id.* at 15–16.

121. See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 552–53 (2002) (“Mistakes may be made. It is better, however, that the price of those mistakes be paid by states that so posture themselves than by innocent states asked patiently to await slaughter.”); Interview by Wolf Blitzer with Condoleezza Rice, Nat’l Sec. Advisor to the President, on CNN Late Edition (Sept. 8, 2002), available at <http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html> (last visited Oct. 5, 2009) (“The problem here is that there will always be some uncertainty about how quickly [Saddam Hussein] can acquire nuclear weapons. But we don’t [want] the smoking gun to be a mushroom cloud.”).

122. See Lobel, *supra* note 109, at 553.

123. See, e.g., Sen. John Kerry, *Presidential Debate in Coral Gables, Florida*, 40 WEEKLY COMP. PRES. DOC. 2175, 2188 (Sept. 30, 2004) (“The President always has the right . . . [of] preemptive strike No president, through all of American history, has ever ceded, and nor would I, the right to preempt in any way necessary to protect the United States of America.”).

124. Slocombe, *supra* note 47, at 119. See generally Marc Trachtenberg, *Preventive War and U.S. Foreign Policy*, 16 SECURITY STUD. 1 (2007) (arguing that preventive war thinking has long played a role in U.S. foreign policy thinking).

1994, the Clinton administration strongly considered military attacks on North Korean facilities when “faced with the highly dangerous prospect that North Korea could, within months, have five or six nuclear bombs and an active weapons program.”¹²⁵ Nevertheless, the unilateralist view gained wide attention during the Bush years because its senior officials emphasized it so forcefully and openly.¹²⁶

Whereas the traditional view is rooted in liberal-institutionalist international relations theory, the unilateralist view is rooted in realist thinking, with its emphasis on individual states as the key unit of analysis, making security decisions based on self-centered calculations of relative power in a largely anarchic international system.¹²⁷ Just as the traditional view tends to reflect a suspicion of military action, the unilateralist view carries a converse skepticism of international law and organizations. This perspective has drawn new strength and scholarly support from contemporary military interventionist thinking, characterized by strong beliefs about the efficacy of force to combat proliferation and other threats.¹²⁸

3. The Reasonable Necessity View

A third and final approach—which I favor—is the “reasonable necessity” approach to regulating the use of force against WMD threats. While embracing multilateral-process solutions when possible, this

125. ASHTON B. CARTER & WILLIAM J. PERRY, PREVENTIVE DEFENSE: A NEW SECURITY STRATEGY FOR AMERICA 128 (1999); see also William J. Perry, *Proliferation on the Peninsula: Five North Korean Nuclear Crises*, 607 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2006, at 78 (advocating a sustained effort to prevent North Korea from building a nuclear arsenal); Elaine Monaghan, *Clinton Planned Attack on Korean Nuclear Reactors*, TIMES (London), Dec. 16, 2002, at 12 (quoting Clinton as saying of the North Korean nuclear crisis in the 1990s: “We actually drew up plans to attack North Korea and to destroy their reactors and we told them we would attack unless they ended their nuclear programme.”).

126. See DOYLE, *supra* note 20, at 27.

127. See Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT’L AFF. 1, 3 (Mar. 2004) (“Realists hold that . . . [leaders] may employ force, including preemptively, if they deem it necessary for the pursuit of state interests.”); Lee, *supra* note 110, at 159 (“[W]hat we call the ‘laws of war,’ a realist might say, simply reflects principles consistent with rational state action under the security dilemma. Any preemptive war based on a subjectively reasonable perception of threat is a lawful war.”). See generally KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (offering a “neorealist” account of international relations, marked by states as unitary actors pursuing self-interest and relative power).

128. See, e.g., JOHN BOLTON, SURRENDER IS NOT AN OPTION 430–37 (2007); Eliot Cohen, *A Revolution in Warfare*, 75 FOREIGN AFF., Mar.–Apr. 1996, at 37, 45; see also Alvarez-Verdugo, *supra* note 111, at 125–27 (describing emphasis on unilateral military measures as an element of recent U.S. counter-proliferation strategy); Charles Krauthammer, Irving Kristol Lecture at the American Enterprise Institute Annual Dinner: Democratic Realism (Feb. 10, 2004), available at http://www.aei.org/docLib/20040227_book755text.pdf (last visited Oct. 5, 2009).

school favors objective standards for judging resort to force outside the U.N. Security Council system.¹²⁹

While the use of force would remain justified when the conditions of customary anticipatory self-defense are met, this school seeks to build upon the logic underlying that doctrine. It seeks to adapt use of force rules to the unique challenges of WMD threats and proliferation, while maintaining fidelity to the imminence requirement's core purposes of constraining the use of force except when other options have been exhausted and when waiting poses an unacceptable risk of losing the opportunity to eradicate the threat—all of this judged by objective standards of reasonableness.¹³⁰ Whereas some adherents to the unilateralist school seek to overturn the U.N. Charter system, reasonable necessity proponents generally seek to preserve it, by articulating standards to guide U.N. Security Council deliberations, assertions of self-defense (as protected by Article 51), or exceptions to Article 2(4)'s prohibition on the use of force.¹³¹

This school draws on a combination of realist and liberal theory. Like realism (and unilateralism), it acknowledges the limits of international norms and institutions to address threats and constrain self-defensive actions. By analyzing the issue through the perspective of a responsible threatened state, the reasonable necessity approach acknowledges that—where the two conflict—a state's threat perceptions will likely have more decisional weight than international norms or how the threat fits within a set of general legal principles. The reasonable necessity approach attempts to minimize this conflict by bringing the law and the state's situation more closely in line, making use-of-force regulation more context-sensitive.¹³² At the same time, like liberal-institutional theory (and the traditionalists), it affirms the potential role of law in guiding state behavior and places a premium on legitimacy in decisionmaking and uses of force.¹³³

Although they share these theoretical foundations and orientations, the different ways of assessing reasonable necessity can reflect various combinations of competing assumptions, policy priorities and ideological principles. These different positions within the reasonable necessity school are bound by a common sense that developments in the international system—particularly the proliferation of WMD—have

129. Within this school is a sub-debate: whether reasonable necessity should be applied to authorize force in advance of intervention (justification) versus to excuse force after an intervention (mitigation). This paper does not treat in detail this sub-debate. See GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 107–28 (2008).

130. See, e.g., Sofaer, *supra* note 45, at 213–26.

131. See *infra* notes 136–141 and accompanying text.

132. See sources cited *supra* notes 127–128.

133. See sources cited *supra* notes 110–112.

undermined the usefulness of the restrictive system contemplated by the traditional view, but that the unilateralist view is an unacceptable alternative. Further, reasonable necessity proponents share a belief that a superior system of force regulation can be developed by reference to objective indicators linked to policy objectives (accuracy, legitimacy, etc.), and the presence of which would justify a reasonable state's resort to force in a particular circumstance. Their substantive differences on questions such as the relative weight to give false positives and false negatives are reflected in the specific factors they identify and how they locate the authority to apply the analysis.¹³⁴

Abraham Sofaer, for example, offers a relatively realist scheme, proposing four factors for use in establishing the reasonableness of using force in a given circumstance: the magnitude of the threat, its probability of occurring, the exhaustion of peaceful alternatives, and consistency with the underlying purposes of the U.N. Charter.¹³⁵ All of these factors are selected for their capacity to "establish[]the legitimacy of using force under international law principles and U.N. Charter values."¹³⁶ Sofaer envisions these criteria as a framework on which individual states could rely to establish the legality of a precautionary use of force, especially in the face of WMD threats.

Closer to the liberal end of the reasonable necessity spectrum are the conditions for the use of precautionary self-defense against states advocated by the Princeton Project on National Security.¹³⁷ These include exhaustion, "overwhelming confidence" in the action's foundational intelligence and operational prospects, preparedness for the aftermath, and the clear endorsement of the U.N. Security Council or "another broadly representative multilateral body."¹³⁸ This approach's principal distinguishing characteristics include the high epistemic standard it sets for intelligence and the requirement of actual multilateral authorization, which precludes unilateral application but allows for some action outside the U.N. Security Council system. Although both characteristics have qualitative analogues in the Sofaer framework, the Princeton Project sets higher and clearer thresholds for each, reflecting relatively greater concern for false positives and appreciation of the importance of multilateral process.¹³⁹

134. See, e.g., DOYLE, *supra* note 20, at 96 ("Imperfect and incomplete as they are, the right decisions about prevention in the world we now live in will rest with democratic publics who understand that their acts will set precedents that others will follow.").

135. See Sofaer, *supra* note 45, at 220.

136. *Id.*

137. PRINCETON PROJECT ON NAT'L SEC., FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY (2006) [hereinafter PRINCETON PROJECT].

138. *Id.* at 32.

139. See *id.*

Falling somewhere between these two approaches is that of Michael Doyle, who proposes evaluating military action against non-imminent threats along four alliterative dimensions: the lethality of the threat, the likelihood of its materialization, the legitimacy of the proposed action (determined by reference to traditional just war principles), and the legality of the target state's domestic and international behavior and the threatened state's response.¹⁴⁰ Instead of requiring multilateral authorization or treating all U.N. Security Council actions as an input into a determination of reasonableness—as do the Princeton Project and Sofaer, respectively—for Doyle the U.N. Security Council would remain the preferred but non-exclusive means of response. To this end, he requires exhaustion of U.N. Security Council remedies prior to unilateral application, as well as national and international reporting of the legal analysis.¹⁴¹

When used to evaluate individual cases, a reasonable necessity approach's conclusions are shaped not just by the selection of criteria, but also by how the criteria are applied to specific facts of a case. To illustrate, compare Sofaer's and Doyle's separate analyses of the 2003 Iraq War. Sofaer found a persuasive legal case for invasion,¹⁴² while Doyle found the intervention "illegitimate, radically disproportionate, and unjustifiable."¹⁴³ Under Doyle's approach, the case for war foundered largely on the basis of a criterion his scheme shares with Sofaer's: "likelihood."¹⁴⁴ The question of capability is embedded in this factor and each approach to likelihood addressed this element with a different manner and intensity. Doyle's treatment of likelihood focused heavily on the evidentiary strength of the claims that Saddam Hussein was developing or retained a WMD capability—the very capability uncertainty issue at the heart of this paper.¹⁴⁵ Sofaer, on the other hand, devoted more attention to the regime's behavioral history and indications of its propensity to employ WMD.¹⁴⁶

140. See DOYLE, *supra* note 20, at 46.

141. See *id.* at 60–62.

142. Sofaer, *supra* note 45, at 224.

143. DOYLE, *supra* note 20, at 90–91.

144. See *id.* 90–92; Sofaer, *supra* note 45, at 221–23.

145. DOYLE, *supra* note 20, at 90–92; see also Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 604 (2003) (“[T]he danger should be imminent in that it can be identified credibly, specifically, and with a high degree of certainty.”).

146. Sofaer, *supra* note 45, at 221–23. In addition to evaluating how each of the three schools deals with the peradventure surrounding this “likelihood” component, the remainder of this paper elucidates critical subsidiary issues involved in a substantive legal analysis of capabilities under uncertainty. This clarification is especially relevant to reasonable necessity systems like Doyle's and Sofaer's, and should help ensure that different conclusions reflect different policy choices rather than confusion.

While advocating different criteria, all of these reasonable necessity examples share a concern that U.N. Security Council monopoly authority over the use of force risks under-protecting states from contemporary threats.¹⁴⁷ They also share a belief that widely accepted standards can help fill that gap in protection without damaging international legal norms prohibiting armed aggression—and that in the long term, these standards will strengthen these norms.

B. *Three Approaches to Capability Uncertainty*

While the stakes may be uniquely high in contemplating force against WMD threats, the problem of accurately assessing a factual premise key to adjudicating legal authority is a very common one. Three approaches to judging disputed issues of fact critical to a legal appraisal are widespread in the law, and they correspond to the three major schools of precautionary self-defense: the use of subjective standards, objective standards, and a process approach.¹⁴⁸

	Doctrinal Test	Approach to Capability Uncertainty
Traditional View	Absent imminent threat, force allowed only with U.N. Security Council authorization	Process
Unilateralist View	Force allowed if good faith belief in WMD threat	Subjective standard
Reasonable Necessity View	Force allowed if reasonable state would conclude that force is necessary	Objective standard

The following Sections examine and evaluate how each school of precautionary self-defense attempts to manage problems of WMD capability uncertainty. All three schools promise to calibrate effectively the appropriate level of force in the international system (allowing enough force to deal effectively with genuine threats but not so much as to pose threats to peace and stability), and to do so in a manner consistent with a

147. See, e.g., DOYLE, *supra* note 20, at 33 (“[The Security Council] has in numerous instances in the past behaved irresponsibly—failed to authorize the use of force when it was arguably justified”); PRINCETON PROJECT, *supra* note 137, at 23 (“The United Nations is failing to live up to its potential, though. Security Council resolutions are often unenforced or under-enforced.”).

148. Consider, as an example, possible legal approaches to determining a police officer’s authority to search a home for criminal activity: one based on the officer’s state of mind and purposes (subjective standards); one based on guidelines for a reasonable officer in that position (objective standards); or one based on obtaining authorization from a magistrate (process).

normative vision of authoritative legal rules. This Part therefore considers each approach especially against these common objectives, which I respectively label “accuracy” and “legitimacy.”

1. The Traditional View: A Process Approach

The traditional view relies heavily on a *process* approach for judging threats, including their factual premises such as state capability.¹⁴⁹ Under the traditional view, the U.N. Security Council is the multilateral body charged with making the capability assessments incident to determining the existence of a “threat to international peace and security” sufficient to justify the use of military force.¹⁵⁰ These capability assessments are in turn informed by a number of auxiliary multilateral processes, both from within the U.N. system and from interlocking and overlapping treaties and multilateral organizations. For example, in the course of verifying its safeguards and the obligations imposed by treaties such as the Non-Proliferation Treaty and the Additional Protocol, the Board of Governors of the International Atomic Energy Agency reports any determinations of non-compliance to the U.N. Security Council, which can then take a range of actions including mandating further actions by the IAEA.¹⁵¹ Ostensibly, these auxiliary processes will assist the U.N. Security Council in determining whether a state poses a threat sufficient to warrant authorization of precautionary force.

a. Advantages

Some argue that these multilateral processes have deliberative advantages that increase accuracy by reducing the risks of error inherent in unilateral assessments of proliferators’ capabilities. As Allen Weiner posits,

[w]ith respect to erroneous assessments, the requirements of Security Council deliberations and approval regarding the use of force to address a particular threat are likely to produce a better-informed decision, since all Security Council states, and not just the state that perceives itself to be threatened, will contribute to the assessment of the threat based on data in their possession.

149. See Franck, *supra* note 103, at 102 (“The problem, then, does not lie with formulating a norm. It lies with the process for implementing it: who, or what institution, what judge or jury, should decide whether the norm’s requisites for preemptive action have been met.”); *id.* at 105 (“The basic procedural notion of the Charter is that every nation, before taking military action, except in self-defense against an imminent or actual armed attack, must first demonstrate to its peers that . . . there exists an actual threat to the peace.”).

150. U.N. Charter arts. 39, 42.

151. Statute of the Int’l Atomic Energy Agency art. XII.C, Oct. 23, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3.

The procedural requirements of collective deliberation and information sharing among Council members thus can serve to “correct false beliefs.”¹⁵²

Under this view, U.N. Security Council deliberation will facilitate information exchanges that improve capability appraisals and temper states’ tendencies to “worst-case” their estimations—both worthy aims.

Others emphasize the importance of legitimacy in reaching joint, common assessments of threats through multilateral processes.¹⁵³ In discussing empowerment of the U.N. Security Council with a permanent inspectorate and other capability-assessment mechanisms, Jessica Tuchman Matthews explains that “[t]he effort is worth taking because no other entity, existing or imagined, commands the Security Council’s universal legitimacy”¹⁵⁴

This legitimacy can be instrumental to the success of auxiliary processes that reduce capability uncertainty. The multilateral structure and involvement of the United Nations in inspection systems such as the IAEA and UNMOVIC¹⁵⁵ increase the diplomatic pressures that can produce greater state compliance, facilitating the investigations that yielded

152. Weiner, *supra* note 114, at 428.

153. See IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* (2007); Jutta Brunnée, *The Security Council and Self-Defence: Which Way to Global Security?*, in *THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY—A NEED FOR CHANGE?* 107, 112 (Niels Blokker & Nico Schrijver eds., 2005) (“[T]he Security Council has maintained a unique ability to lend legitimacy to international action, including the use of force.”). Especially in the developing world, however, the Security Council’s legitimacy has come under increasing challenge. See Press Release, Gen. Assembly, *When Force Is Considered, There Is No Substitute for Legitimacy Provided by United Nations*, Secretary General Says in General Assembly Address, U.N. Doc. SG/SM/8378 (Sept. 12, 2002), available at <http://www.un.org/News/Press/docs/2002/SGSM8378.doc.htm> (last visited Oct. 5, 2009) (“[W]hen States decide to use force to deal with broader threats to international peace and security, there is no substitute for the unique legitimacy provided by the United Nations.”); see also The Secretary-General, *Strengthening of the United Nations: An Agenda for Further Change*, ¶ 20, U.N. Doc. A/57/387 (Sept. 9, 2002), available at <http://www.un.org/events/action2/A.57.0387.pdf> (last visited Oct. 6, 2009) (“In the eyes of much of the world, the size and composition of the Security Council appear insufficiently representative. The perceived shortcomings in the Council’s credibility contribute to a slow but steady erosion of its authority, which in turn has grave implications for international peace and security.”); Bardo Fassbender, *Pressure for Security Council Reform*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 341, 347–48 (David M. Malone ed., 2004) (noting that developing states feel that they are “grossly under-represented” on the Security Council, although there is little unanimity between the developing states as to what a better system would look like).

154. Jessica Tuchman Matthews, *WMD and the United Nations*, Keynote Speech to the International Peace Academy (Mar. 5, 2004).

155. U.N. Monitoring, Verification, & Inspection Comm’n, <http://www.unmovic.org/> (last visited Oct. 5, 2009).

the most accurate depictions of Iraq's WMD capabilities.¹⁵⁶ Even skeptics of the U.N. Security Council's efficacy therefore acknowledge the practical benefits of its legitimacy.¹⁵⁷

Beyond any legitimacy or deliberative advantages of U.N. Security Council process in assessing capabilities, there is a broader argument rooted in the traditional view's understandings of the purposes underlying use of force law and of how international actors operate within it. For supporters of the traditional view, one danger of capability uncertainty is that states will attempt to exploit this ambiguity to justify impermissible uses of force. This sort of concern with states' pretextual use of standards animates much of the broader traditional view framework.¹⁵⁸ Always wary of the unilateral application of legal standards, the traditional view worries that states' capability assessments will produce inflated estimates of the threat, often concocted as pretexts. This reasoning is also consistent with the traditional view's relatively greater concern with false positives. If false positives are more dangerous than false negatives and capability uncertainty increases the risk of both, a sensible approach to the problem of capability uncertainty might focus on mitigating the heightened problem of false positives through process checks.

b. Drawbacks

i. Accuracy Concerns

If traditionalists are especially worried about false positives, one must ask how effectively their approach handles dangers of false negatives.

156. See TREVOR FINDLAY, A STANDING UNITED NATIONS WMD VERIFICATION BODY: NECESSARY AND FEASIBLE, AN INTERIM STUDY PREPARED FOR THE COMMISSION ON WEAPONS OF MASS DESTRUCTION (2005); Fareed Zakaria, *We Had Good Intel—The UN's*, NEWSWEEK, Feb. 9, 2004, at 39.

157. See, e.g., Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFF., Jan.–Feb. 2004, at 136, 148 (observing that “[t]he unmatched legitimacy that the UN lends to Security Council actions makes it easier for member states to carry them out and harder for the targeted governments to evade them by playing political games”).

158. See Weiner, *supra* note 114, at 427 (“[T]he pre-Charter regime governing the use of force, in which states were entitled to use force unilaterally either to vindicate their legal rights or to counter perceived threats to their security, had shown itself to be susceptible to erroneous and bad-faith implementation. Because this standards-based approach had led to the overinclusive and excessive use of force, the Charter’s founders were unwilling to delegate substantial discretion to individual states to act as agents to determine the conditions under which they might on their own authority use force.”); see also BROWNLIE, *supra* note 23, at 272–75; Antonio Cassese, *Return to Westphalia?, Considerations on the Gradual Erosion of the Charter System*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 505, 516 (Antonio Cassese ed., 1986) (“[T]he risks of abuse should lead us to interpret [the self-defense provision in] Art. 51 very strictly and consider it as giving only very exceptional licence.”).

At the outset, consider how the U.N. Charter initially allocated responsibility for assessing threatening capabilities and how this allocation has shifted. At the time of the Charter's inception, states could discern imminent threats more easily, particularly because these threats were often accompanied by a large-scale mobilization of conventional forces that were often readily observable.¹⁵⁹ But due to WMD proliferation, developments in missile technology, and the expansion in capability uncertainty, "the preemptive use of force is often difficult to justify because clear evidence that a threat is imminent is rare."¹⁶⁰ Since the ability to respond to an imminent threat now offers much more limited protection and U.N. Security Council authorization to use force is the only other recourse under the traditional view, the U.N. Security Council assumes a proportionally expanded role in making the capability assessments that can support self-defensive action. The U.N. High-Level Panel "recognized that it could well be necessary for the Security Council to authorize military action in a case like Iraq. . . . [T]he trade-off for expanded substantive jurisdiction is a tighter hold than ever on multilateral process."¹⁶¹ This increased responsibility in judging capabilities exceed what was contemplated when the U.N. Security Council was designed.¹⁶²

The U.N. Security Council voting system has a structural inclination toward underestimating threats and weighing false positives more strongly than false negatives—a structural feature especially likely to come into play amid capability uncertainty. At least sixty percent of

159. See Alex J. Bellamy, *Pre-Emptying Terror*, in SECURITY AND THE WAR ON TERROR 104, 114 (Alex J. Bellamy et al. eds., 2008) (discussing the contemporary challenges to traditional self-defense doctrine, noting that "conventional wars are preceded by clear warnings, most obviously troop mobilisations and deployments . . ."). This is not to deny the possibility of achieving tactical or strategic surprise in conventional conflicts. However, instances of successful surprise in conventional conflicts usually are caused not by an absence of perceptible, objective indicators of an attack, but by the target's subjective errors in discerning and interpreting these signals. See EPHRAIM KAM, SURPRISE ATTACK: THE VICTIM'S PERSPECTIVE 37 (1988) ("Analysis of surprise attacks suggests that the intelligence community seldom fails to anticipate them owing to a lack of relevant information. In most cases the victim possesses an abundance of information indicating the imminence of the attack."). In contrast, WMD threats are characterized by a near-complete absence of perceptible, objective indicators of an imminent attack. See BRUCE G. BLAIR, THE LOGIC OF ACCIDENTAL NUCLEAR WAR 171–73 (1993).

160. See Feinstein & Slaughter, *supra* note 157, at 147.

161. Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 626 (2005).

162. This is evident from the fact, for example, that arms control inspection regimes administered through the United Nations long post-date its founding. Article 39 of the U.N. Charter states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39.

member states and no vetoes from the five permanent members (Permanent-5) are required to authorize a military action or threat, effectively demanding consensus among a diverse group of nations on a subsidiary set of capability questions, many of which may be shrouded in uncertainty or ambiguity.¹⁶³ Even leaving aside the possibility of strategic voting and vetoes, this sets a high bar for a threatened state to clear, since it must present evidence satisfying the Permanent-5 member with the highest evidentiary standards.¹⁶⁴

The evidentiary standards used by the most demanding Permanent-5 member to evaluate potentially threatening capabilities may owe their rigor to considerations unrelated to the goal of accurately discerning the existence of a threat, such as self-interest or the Permanent-5 member's relationship with the threatening state.¹⁶⁵ In the most extreme cases, a member of the Permanent-5 may wholly subordinate the issue of appraising capabilities to self-regard, because its perceived national interest would be inconsistent with an authorization of force.¹⁶⁶ But policing this kind of problem is difficult, because it is often impossible to determine clearly whether a particular outcome is due to legitimate considerations (for example, good-faith doubts about capability evidence) since the U.N. Security Council's decisionmaking is essentially without standards and much of the real deliberation takes place in private between Permanent-5 members.¹⁶⁷

All this speaks to several problems with the traditional view's approach to managing capability uncertainty. First, even under ideal assumptions of independent voting based on collective interests, it is questionable whether the most exacting epistemic standards employed by a Permanent-5 member represent the appropriate evidentiary threshold for calibrating the use of force under capability uncertainty, unless the

163. See U.N. Charter art. 27.

164. See Acton, *supra* note 87, at 123–24. For a specific example of this phenomenon in practice, see *Block on Iran Sanctions*, INT'L HERALD TRIB., Apr. 21, 2006, available at http://www.nytimes.com/2006/04/21/world/europe/21iht-russia.html?_r=1 (last visited Oct. 6, 2009).

165. See Council on Foreign Relations, *supra* note 35 (“[P]olitical calculations have caused deadlock at the Security Council, enabling nuclear rogues such as Iran to defy successive, fairly weak UN sanctions resolutions with virtual impunity.”).

166. See Ruth Wedgwood, *Unilateral Action in the UN System*, 11 EUR. J. INT'L L. 349, 351 (2000).

167. See Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 453 (2003) (“Distinguishing true reasoning or sincere communication from strategic argumentation in world politics is a challenge.”); *id.* at 438, 452 (characterizing the Security Council as a venue for “heated, unsystematic” debate that is “often”—but not always—principled, and noting that the Council “does not employ judicial criteria when it makes decisions” beyond the limitations of the charter). U.N. member states have recognized this problem as well. See Thalif Deen, *Security Council's Secretive Habits Challenged*, INTER PRESS SERVICE, Mar. 21, 2006, available at <http://www.globalpolicy.org/component/content/article/200/41252.html> (last visited Oct. 6, 2009).

danger of false positives truly dwarfs the danger of false negatives. Second, there exist virtually no standards or procedural safeguards to ensure or encourage a connection between the assessment processes that U.N. Security Council members employ and the underlying objective of determining whether sufficient evidence of a threat exists.¹⁶⁸ If just one member of the Permanent-5 imports considerations that portray doubt but are not rationally related to this policy goal, the entire process may be confounded and may risk underestimation. While “[a] procedural system that errs in the direction of underemployment of force is seen by some as desirable, as if no countervailing danger were created,”¹⁶⁹ many others—especially states facing developing WMD threats—have a substantially greater concern with false negatives and the danger of underestimation.¹⁷⁰

In practice, these structural features tend to restrict the range of capability evidence that will be germane to a U.N. Security Council authorization of force. Since the evidence establishing WMD capabilities must satisfy the Permanent-5 member with the highest evidentiary threshold, and since there is no framework in place to guide or coordinate standards across members, the conclusions of multilateral auxiliary processes (like IAEA reports) will tend to become the *de facto* and largely exclusive basis for U.N. Security Council capability assessments.¹⁷¹ This is because, for one, auxiliary processes like inspections

168. See DOYLE, *supra* note 20, at 33 (“[T]he council lacks substantively adequate standards to guide its deliberations concerning when it should authorize preventive force.”); Buchanan & Keohane, *supra* note 127, at 9 (noting in the context of humanitarian uses of force that, in the absence of substantive standards, “authorization is likely to be unprincipled” and inadequately connected to normative goals).

169. Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT’L L. 576, 577 (2003).

170. See BOBBITT, *supra* note 58, at 452 (“[T]he rule of law is eroding because the prevailing doctrines of international law are radically insufficient to regulate the efforts of states that must cope with global, networked terrorism, and with the related threats of weapons of mass destruction”); Abraham D. Sofaer, *International Security and the Use of Force*, in PROGRESS IN INTERNATIONAL LAW 541, 561 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (“[S]elf-defense is a key element in any sensible program to supplement the inadequate, collective efforts of the Security Council.”); see also Dore Gold, Op-Ed, *Iran’s Nuclear Aspirations Threaten the World*, L.A. TIMES, Aug. 6, 2009, available at <http://www.latimes.com/news/opinion/la-oe-gold6-2009aug06,0,3778030.story> (last visited Oct. 6, 2009) (arguing from Israel’s perspective the need to threaten Iran with force); David E. Sanger, *U.S. Says Iran Could Expedite Nuclear Bomb*, N.Y. TIMES, Sept. 10, 2009, at A1 (quoting Israeli intelligence official as saying about U.S. and Israeli assessments about Iran: “We’re all looking at the same set of facts. . . . We are interpreting them quite differently than the White House does.”).

171. See Acton, *supra* note 87, at 127, 130 (noting the weight multilateral bodies accord IAEA assessments and that “inconclusive” forms of evidence can affect Security Council decisionmaking on the basis of reasons apart from the merits, such as self-interest); *id.* at 135 (“If the case against future non-compliant states is put in terms of proven safeguards violations . . . it will probably result in a tougher response.”); Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L.

tend to deal in types of evidence that are less speculative and more physical and scientific, such as traces of highly-enriched uranium and technical documentation of weapons programs, an issue discussed below in Part III. In addition, this evidence's origination or compilation in a widely endorsed, multilateral process confers to it substantial credibility and legitimacy,¹⁷² such that a disbelieving state may find itself on the wrong side of overwhelming consensus. Other evidentiary indicators generally do not enjoy these advantages, and so may be incapable of generating the consensus necessary to animate a conservative Security Council.¹⁷³

But the traditional view's heavy reliance on auxiliary mechanisms for assessing capabilities can create counterproductive incentives for proliferators to confound and otherwise "game" these processes. If questions of state capability must be resolved primarily through these procedures, frustration of the procedures can enhance the security of WMD programs by preventing the satisfaction of a legal condition precedent to the use of countervailing force. This is a critical pitfall of the process approach, not just because it may lead to undesirable inaction and facilitate WMD development, but because it may increase capability uncertainty, by incentivizing obfuscation, instead of reducing it. Part III discusses some ways to address these issues, guided by analysis of objective standards.

Inspections and other investigative techniques used to inform U.N. Security Council decisionmaking provide abundant opportunities for their subjects to act strategically and heighten uncertainty. Iraq's approximately thirty-year history with international nonproliferation processes illustrates these different forms of manipulation and the pitfalls of over-reliance on process.¹⁷⁴

275, 296 (2008) (describing the Security Council's reliance on an outside, commissioned study in deciding proper standards regarding the listing and delisting of targeted individuals under the provisions of U.N. Security Council Resolution 1267).

172. See generally Nina Srinivasan Rathbun, *The Role of Legitimacy in Strengthening the Nuclear Nonproliferation Regime*, 13 NONPROLIFERATION REV. 227 (2006) (discussing the importance of legitimacy in developing and strengthening multilateral non-proliferation institutions).

173. See Acton, *supra* note 87, at 129 ("States are likely to decide upon enforcement actions on the merits of the case, rather than on the basis of self-interest, if the salient factors are those that can be reliably and accurately assessed by the IAEA.").

174. See generally David Albright, *Masters of Deception*, 54 BULL. ATOMIC SCIENTISTS, May–June 1998, at 44; Geoffrey Forden, *Intention to Deceive: Iraqi Misdirection of UN Inspectors*, JANE'S INTELLIGENCE REV., Mar. 1 2004, at 30; Khidhir Hamza, *Inside Saddam's Secret Nuclear Program*, 54 BULL. ATOMIC SCIENTISTS, Sept.–Oct. 1998, at 26; Kay, *supra* note 63, at 85; Yang Ruifu, *Biological Inspections in Iraq: Lessons for BWC Compliance and Verification*, in BEIJING ON BIOHAZARDS: CHINESE EXPERTS ON BIOWEAPONS NONPROLIFERATION ISSUES 91 (Amy E. Smithson ed., 2007); Wilhelm Unge & Hans Furustig,

As one pair of scholars put it, “[n]o other state has been so intrusively inspected and thoroughly monitored by the UN.”¹⁷⁵ Yet Iraq employed its ultimate authority over inspectors’ physical mobility to its advantage, creating tactical delays in transportation, disallowing and intimidating disfavored inspectors, and often flagrantly restricting access to facilities.¹⁷⁶ Even when inspectors were able to penetrate some of this deception and uncover sensitive materials, they often were unable to avoid alerting the Iraqi regime or prevent the ensuing large-scale destruction of evidence.¹⁷⁷ Perhaps more troubling in terms of the capability uncertainty problem were Iraq’s active deceptions, frequently in the form of interminable half-truths and strategic disclosure.¹⁷⁸ As its last exercise in manipulating uncertainty, Iraq worried in late 2002 that the indeterminacy of U.N. processes no longer provided an effective check on individual states and unsuccessfully attempted to create uncertainty by promising unrestricted access to U.N. inspectors.¹⁷⁹

Future efforts to discern capabilities through these processes are likely to confront a similarly well-practiced response. In the case of Iran, for example, in recent years “[t]he Iranians knew that as long as they could keep playing three-card monte with the inspectors, they could profit from the ambiguities about their program.”¹⁸⁰ North Korea has also been exploiting capability uncertainty to confound inspection processes over the past two decades.¹⁸¹

Unravelling Strategies of Deception and Perception in the Iraq Crisis, JANE’S INTELLIGENCE REV., May 1, 2006, at 43.

175. Unge & Furustig, *supra* note 174, at 43.

176. See, e.g., David A. Kay, Former Special Advisor to the Director of Central Intelligence on Strategy Regarding Iraqi Weapons of Mass Destruction Programs, Testimony Before the Senate Armed Services Committee 108th Cong. (Jan. 28, 2004), available at <http://www.cnn.com/2004/US/01/28/kay.transcript/> (last visited Oct. 5, 2009); Paul Lewis, *Iraqis Fire to Bar UN Inspectors; ‘We Can’t Allow This,’ Bush Says*, N.Y. TIMES, June 29, 1991, at A1.

177. See Albright, *supra* note 174, at 46.

178. These forms of deception assumed increased importance in the period after the Gulf War, when singular conditions led to an inspections regime that reduced the sovereign control retained by Iraq to historically unprecedented levels. See Jonathan B. Tucker, *Monitoring and Verification in a Non-Cooperative Environment: Lessons from the U.N. Experience in Iraq*, NONPROLIFERATION REV., Spring–Summer 1996, at 1, 2, 6. Examples include the post-1991 Gulf War investigations into Iraq’s centrifuge program, during which “Iraq told only part of the story and cleverly hid some key information within otherwise truthful revelations” and crafted disclosures to create a false perception of its actual suppliers of crucial technical assistance. See Albright, *supra* note 174, at 49–50.

179. KEVIN WOODS ET AL., IRAQI PERSPECTIVES PROJECT: A VIEW OF OPERATION IRAQI FREEDOM FROM SADDAM’S SENIOR LEADERSHIP 93 (2006), available at <http://www.jfcom.mil/newslink/storyarchive/2006/ipp.pdf> (last visited Oct. 6, 2009).

180. DAVID E. SANGER, THE INHERITANCE: THE WORLD OBAMA CONFRONTS AND THE CHALLENGES TO AMERICAN POWER 90–91 (2009); see also Jahn, *supra* note 80 (discussing recent inspection stonewalling by both Syria and Iran).

181. See SANGER, *supra* note 180, at 315–35, 339–42.

It is telling that after persistent deployment of sophisticated and intrusive fact-finding missions, the status of Iraq's WMD capabilities remained so uncertain that many of the world's sophisticated intelligence services had formed grossly inaccurate judgments.¹⁸² Besides casting doubt on the unilateralist approach, this history and eventual outcome should also caution against future over-reliance on fact-finding processes of the type especially likely to be relied upon under the traditional view. As David Kay, former chief U.N. weapons inspector, writes,

[a] deception campaign that results in bureaucratic paralysis through uncertainty or disagreements as to capabilities and intentions will often be sufficient to obtain a state's objective—it will not need to reach the higher “gold” standard of widespread belief in the deception.¹⁸³

This suggests that improvements in inspection processes and counter-deception may be of limited value or may create a false sense of security.¹⁸⁴

ii. Legitimacy Concerns

When its supporters argue that U.N. Security Council assessments of capabilities carry greater legitimacy,¹⁸⁵ they often use the term “legitimacy” as “a function of the perception of those in the community concerned that the rule . . . has come into being . . . in accordance with right process.”¹⁸⁶ But this approach to capability assessment fails to garner legitimacy in another sense: “the capacity of an international legal rule to pull those to whom it is addressed toward consensual compliance.”¹⁸⁷

The principal source of this legitimacy deficiency is the divergence between how threatened states and the U.N. Security Council assess threats under capability uncertainty, which in turn is rooted in the different interests of threatened states and adherents to the traditional view in

182. Kay, *supra* note 176; Kenneth M. Pollack, *Spies, Lies, and Weapons: What Went Wrong*, ATLANTIC MONTHLY, Jan.–Feb. 2004, at 78.

183. Kay, *supra* note 63, at 101.

184. See Hans Blix, *Developing International Law and Inducing Compliance*, 41 COLUM. J. TRANSNAT'L L. 1, 12 (2002) (“When cooperation with inspectors is limited . . . [s]uch inspection may risk lulling neighbors and the world into a false confidence Cosmetic inspection may be worse than none.”).

185. See *supra* notes 153–157 and accompanying text.

186. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L. L. 705, 711 (1988); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 118, 127 (1995).

187. Franck, *supra* note 103, at 93 (citing his earlier work, THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)).

considering assessments. If a state strongly believes it faces an actual WMD threat and has formed this belief through a reliable evidentiary assessment, but is unable to obtain the U.N. Security Council's blessing, its leaders are unlikely to accept inaction as a sacrifice necessary to prevent future false positives and preserve the norm of nonintervention. Philip Bobbitt identifies this problem when he argues that "[a]t present, the rule of law is eroding because the prevailing doctrines of international law are radically insufficient to regulate the efforts of states that must cope with global, networked terrorism, and with the related threats of weapons of mass destruction, genocide, and overwhelming civilian catastrophes."¹⁸⁸

This problem is aggravated by the absence of transparent criteria to guide the U.N. Security Council's threat assessments. The U.N. High-Level Panel recognized the legitimacy cost of standardless U.N. Security Council decisionmaking generally, arguing that, in its use of force judgments, "the Council should adopt and systematically address a set of agreed guidelines" to promote "the common perception of their legitimacy—their being made on solid evidentiary grounds, and for the right reasons."¹⁸⁹ The argument applies with equal force to the capabilities component of U.N. Security Council decisions. Crucially, when the Security Council declines to authorize the use of force against an asserted WMD threat, it may often be impossible to determine whether its judgment was based on doubt with respect to capabilities, intentions, insufficient exhaustion of non-forcible means, or some combination of concerns, and the underlying reasons for finding a deficiency in any of these areas may be even less clear. Compliance by threatened states with a rigid process is even less likely where the reasons for an adverse decision are ambiguous or suspected of being rooted in others' self-interests.¹⁹⁰

Adherents to the traditional view hope that these concerns can be mitigated through improved procedures and greater political commitment toward their collective use by powerful states. But the recent practice of states suggests there is a long way to go before states can place their precautionary security largely in the hands of collective decision-making bodies.

188. BOBBITT, *supra* note 58, at 452.

189. U.N. High-Level Panel, *supra* note 59, at 66.

190. See generally Johnstone, *supra* note 171 (discussing the "deliberative deficit" of U.N. Security Council decisionmaking, and proposing ways to remedy it).

2. The Unilateralist View: A Subjective Standards Approach

As an alternative to the traditional view, the unilateralist view relies on a *subjective* standard for judging WMD capabilities and threats.¹⁹¹ Does a state in good faith perceive sufficient threat of WMD attack from an adversary state? States may rely on their independent judgments about the capabilities and threats posed by others.

This view accepts uncertainty and ambiguity as an inherent feature of intelligence.¹⁹² In its 2006 National Security Strategy, the Bush administration reiterated that the United States would “not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack.”¹⁹³ It went on to note that “there will always be some uncertainty about the status of hidden programs.”¹⁹⁴ Donald Rumsfeld echoed this view in testimony to the Senate Armed Services Committee, cautioning against “mistak[ing] intelligence for irrefutable evidence” and bluntly telling the Committee that “intelligence will never be perfect,” while arguing that demands for unrealistic certainty in intelligence risk curtailing the flow of intelligence to decisionmakers.¹⁹⁵

a. Advantages

Under the unilateralist view, threat assessments made by multilateral bodies like the United Nations carry an unacceptable risk of underestimation, given the relatively greater weight they assign to false negatives in the WMD context.¹⁹⁶ Moreover, in keeping with its roots in realist and interventionist theory, the unilateralist view considers the factual

191. See DOYLE, *supra* note 20, at 26 (“There is another problem with allowing one state to adopt a standard that is as subjective and open-ended as the Bush administration’s identification of threats.”); Rivkin, Jr. et al., *supra* note 118, at 496 (“[T]he principle of anticipatory self-defense does not, and has never, required that the threat have been genuine—only that it be perceived to be so in good faith.”); see also BOLTON, *supra* note 128, at 438 (“Saddam’s regime itself constituted a threat to peace and our security, whether or not imminent, and that alone was a compelling justification to eliminate it.”); Kerry, *supra* note 123, at 2188 (asserting a unilateral right to determine if threats justify force); Lee, *supra* note 110, at 159 (stating that, to a realist, “[a]ny preemptive war based on a subjectively reasonable perception of threat is a lawful war”).

192. Cf. Roger D. Carstens, *Less than Perfect Intelligence: A Leader Must Decide Without All the Facts*, WASH. TIMES, Oct. 31, 2003, at A23.

193. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 23 (Mar. 2006).

194. *Id.* at 24.

195. Donald Rumsfeld, Sec’y of Defense, *Remarks on Intelligence*, Remarks before the Senate Armed Services Committee, Feb. 4, 2004, available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=92> (last visited Oct. 6, 2009).

196. See BOLTON, *supra* note 128.

appraisal of emerging threats to be inalienably committed to individual states' discretion.¹⁹⁷

In response to the criticism that this subjective standard could lead to overestimation of threatening capabilities and the unconstrained use of force, proponents of the unilateralist view sometimes point to several checks inherent in a state's decision to use anticipatory force. For one, the possibility that undetected weapons could be used in retaliation or during armed conflicts requires leaders to develop the most accurate intelligence feasible and refrain from using force unless they perceive the risks of doing so as outweighed by risks of inaction. This is the reasoning embodied in Michael Glennon's stipulation that "[a] reliable assessment of likely costs is an essential precondition to any preemptive action."¹⁹⁸

In addition, because the success of a military action may depend upon domestic and (depending on which unilateralist view advocate you ask) international support, political pressures may impose higher epistemic standards on a state's capability judgments.¹⁹⁹ In the domestic realm, Daniel Pipes explains:

I have endorsed preemption, both in the abstract and as applied to the Iraqi dictator. But in doing so, I am aware of its special difficulties: error is likely, and uncertainty is inescapable. . . . These difficulties place special responsibility on a government that preempts. It must act in as transparent a manner as possible, without guile. It must first establish the validity of its actions to its own citizenry. Second, because Americans heed so much what others think, the opinion of the targeted country's population also matters, as does the opinion of other key countries.²⁰⁰

197. See, e.g., Richard Pipes, *Defending and Advancing Freedom: A Symposium*, 120 COMMENTARY 21, 56 (2005) ("A country's security is not the subject of discussion by others. The United Nations has no inherent right to decide whether the U.S. is threatened and how it is to react to the threat. Sovereignty implies both the right and the duty to protect one's citizens."); Robert Bork, *The Limits of International Law*, NAT'L INT., Winter 1989-90, at 3; see also MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 204 (2001) ("[W]hatever its practical difficulties, states have come to employ a cost-benefit approach, rather than seek guidance from the scholastic legalist alternative, for the simple reason that they see it as relying upon reality rather than myth.").

198. Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, 7 WKLY. STANDARD, Jan. 28, 2002, at 24.

199. See Rivkin, Jr. et al., *supra* note 118, at 491 ("[D]uring the September 2004 presidential debates, Senator John Kerry declared that any American President would use preemptive strikes, if necessary. The contrast between him and President Bush was over the circumstances in which preemption could be employed.").

200. Pipes, *supra* note 197, at 54.

While there is greater disagreement among unilateralist view proponents on the relevance of international support to the success of precautionary use of force, it is generally accepted that any benefits possibly deriving from international support are contingent on the epistemic strength of the supporting capability assessments.²⁰¹ In analyzing the impact of the intelligence failures of the Iraq War, one staunch defender of the Bush Administration's preemption doctrine has observed that "[b]ecause a policy of preemption is so dependent on accurate intelligence, the international community will question the legitimacy of any future preemptive action by the United States (or any other nation)."²⁰² For repeat players like the United States, the lasting costs of false positives are immense, serving as a check on over-estimation.

In sum, the unilateralist view holds that individual states are best positioned to manage the challenges of capability uncertainty and calibrate the appropriate level of force in this context, as (i) some degree of capability uncertainty inheres in every justifiable use of force, (ii) threatened states are best qualified to balance the uncertainties because they bear the risks of both action and inaction, (iii) ceding any authority for capability appraisal to other entities creates an unacceptable risk of false negatives and impermissibly delegates fundamental state responsibilities,²⁰³ and (iv) domestic and international political pressures are sufficient checks on states' epistemic processes.

201. See SANGER, *supra* note 180, at 70–73 (discussing this perspective among Bush administration officials in the aftermath of Iraq). At a 2005 press conference, President Bush was asked whether intelligence failures in Iraq undermined the government's ability to deal with other threats, such as Iran and North Korea. He responded: "[W]here it is going to be most difficult to make the case is in the public arena. People will say, 'If we're trying to make the case on Iran, well, the intelligence failed in Iraq; therefore, how can we trust the intelligence on Iran?'" President's News Conference, 41 WKLY COMP. PRES. DOC. 1885, 1892 (Dec. 19, 2005). Bush continued: "[T]hat case of making—beginning to say to the Iranians, 'There are consequences for not behaving,' requires people to believe that the Iranian nuclear program is, to a certain extent, ongoing . . . [I]t's no question that the credibility of intelligence is necessary for good diplomacy." *Id.*

202. Larry M. Wortzel, Vice President & Dir., The Kathryn & Shelby Cullom Davis Inst. for Int'l Stud., The Heritage Found., Testimony Before the House Armed Services Committee Regarding Combating Weapons of Mass Destruction, Mar. 17, 2004, available at <http://armedservices.house.gov/comdocs/openingstatementsandpressreleases/108thcongress/04-03-17wortzel.html> (last visited Oct. 5, 2009).

203. See generally John Bolton, Under Sec'y for Arms Control & Int'l Sec., U.S. Dep't of State, Address to the 2003 National Lawyers Convention of the Federalist Society (Nov. 13, 2003), available at http://www.fed-soc.org/doclib/20070324_bolton.pdf (last visited Oct. 6, 2009).

b. Drawbacks²⁰⁴

i. Accuracy Concerns

The unilateralist view's central problem in calibrating the use of force under capability uncertainty lies in its failure to differentiate reliable and unreliable epistemic approaches to assessing potential threats. Momentarily leaving aside the prospect of pretextual capability appraisals, the most worrisome type of unreliable approach involves treating high-impact threats as cause for military action, even when there is little evidence indicating the threat will be realized or when the available evidence suggests a very low probability of occurrence. An example is the "one-percent doctrine" ascribed to former Vice President Dick Cheney, whereby he stated that "[w]ith a low-probability, high-impact event like this . . . [i]f there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response."²⁰⁵

While this type of approach might be most vividly associated with the Bush administration, there are reasons to believe state decisionmakers generally may be disposed to evaluate threats in this manner. For one, WMD threats represent some of the greatest security risks to states, and their "[c]atastrophic consequences lower the threshold at which leaders must take the unlikely seriously."²⁰⁶ Political science studies suggest that leaders' willingness to accept a risk in undertaking military action is increased when the decision is framed in terms of potential losses.²⁰⁷ And

204. I do not repeat here the legal arguments made previously, including that the text of Article 51 of the U.N. Charter could be read to restrict self-defense to cases in which an "armed attack" has occurred. *See supra* notes 23–25 and accompanying text. I focus instead here on the policy rationales behind different doctrinal approaches.

205. RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11*, at 61–62 (2006) (quoting then Vice President Dick Cheney).

206. JONATHAN RENSHON, *WHY LEADERS CHOOSE WAR: THE PSYCHOLOGY OF PREVENTION* 163 (2006). Former Prime Minister Tony Blair's public statements after the Iraq war are also telling here. For example:

Here is the crux. It is possible that even with all of this, nothing would have happened. Possible that Saddam would change his ambitions; possible he would develop the WMD but never use it; possible that the terrorists would never get their hands on WMD, whether from Iraq or elsewhere. We cannot be certain. Perhaps we would have found different ways of reducing it But do we want to take the risk? That is the judgement. And my judgement then and now is that the risk of this new global terrorism and its interaction with states or organisations or individuals proliferating WMD, is one I simply am not prepared to run.

Prime Minister Tony Blair, Speech on the Threat of Global Terrorism (Mar. 5, 2004), *available at* <http://www.number10.gov.uk/Page5461> (last visited Oct. 6, 2009).

207. *See* Jack S. Levy, *An Introduction to Prospect Theory*, 13 *POL. PSYCHOL.* 171, 171–72 (1992).

as one scholar notes in analyzing states' decisions to use anticipatory force, in the WMD context "[a]ny discussion of preventive war is *inherently framed in terms of losses*. By the time leaders have decided to consider preventive action, they have already framed the issue in terms of something bad that may happen in the future, that is, they are in the domain of losses."²⁰⁸ More generally, decisionmakers' perceptions of their primary obligation as the protectors of their nations are likely to lower their threshold for actionable certainty.²⁰⁹

It is clearly undesirable for states to predicate high-risk military action on low probabilities or on thin evidence of a threat. Wars are notoriously fraught with unintended consequences, and military actions designed to counter dubious threats risk creating more dangers than they eliminate. Cass Sunstein summarizes the general problem as follows:

In the context of national security, an aggressive response to a 1 percent threat may create a new threat, perhaps higher than 1 percent, of producing its own disaster. A preemptive war, designed to eliminate a small risk of a terrible outcome, might create larger risks of a different but also terrible outcome.²¹⁰

Among these hazardous collateral effects, the risk of a systemic increase in conflict from widespread use of a legally sanctioned "precautionary principle" is particularly worrisome.²¹¹ Describing this danger, Doyle writes that "other states will claim an equivalent right to act on their equivalently arbitrary threat suspicions, which ultimately would be an invitation to chaos Every state will be preempting every other state's preventive strikes."²¹²

Here, the problem is not that the use of a subjective standard always entails the use of a "one-percent doctrine" approach to threat assessment and anticipatory military action, but that the standard accepts this approach and places it on equal legal footing with more robust assessments, rather than creating the countervailing pressure we want from use of force regulation. Even more worrying to some, "[t]he 'subjectivation' of the standards of legal restraints on the use of force . . . is the first step on a slippery slope. The content of those standards will no longer be discernible. This loose construction of the right to unilaterally

208. RENSHON, *supra* note 206, at 146 (emphasis in original).

209. See Patrick Hubbard, *A Realist Response to Walzer's Just and Unjust Wars*, in *INTERVENTION, TERRORISM, AND TORTURE: CONTEMPORARY CHALLENGES TO JUST WAR THEORY* 59, 65 (Steven P. Lee ed., 2007) ("[L]eaders address this risk and uncertainty by focusing on their concrete, specific obligation to protect their citizens and, in effect, placing less value on their more general duty to respect the rights of enemy citizens.").

210. SUNSTEIN, *supra* note 15, at 4.

211. See MIKKEL VEDBY RASMUSSEN, *THE RISK SOCIETY AT WAR* 91–140 (2006).

212. DOYLE, *supra* note 20, at 26.

use force would undermine the very existence of the prohibition”²¹³ If one purpose of a legal framework in this area is to discourage the use of irresponsible epistemic processes under uncertainty and reward the responsible, a system that fails to distinguish first between the reliable and unreliable will not satisfy this goal.

Moreover, from the perspective of a target state, if another state’s decision to use force is not subject to any external constraints on judgments, then there remains little incentive to consent to the kind of inspections and disclosures that under another system might lower the target state’s chances of being attacked. Threats of force can complement inspection regimes and encourage compliance, but threats are more effective if compliance carries an expected security benefit that outweighs the security cost of inspections.²¹⁴ As a result, a subjective standard could undermine some promising mechanisms for reducing capability uncertainty and the destabilization it produces.

ii. Legitimacy Concerns

The unilateralist view’s subjective standard is unlikely to give the impression that a particular threat assessment or use of force is the product of “right process.”²¹⁵ Instead, it creates just the opposite impression: that a state refuses to abide by assessments reached through universally respected or pre-agreed procedures.²¹⁶ To those adhering to the traditional view, unilateral assessment and application of precautionary force strips it of legitimacy:

The problem that the invasion of Iraq has brought to the fore is not primarily one of defining or reforming a right to anticipatory, preemptive, or preventive self-defense in the era of WMDs, daunting as such a project may be. The problem is that, even if such a commonly acceptable right could be formulated, by treaty or by practice, it would be wholly illegitimate so long as some nations insisted on the right to interpret and apply the new rule unilaterally.²¹⁷

As Richard Falk notes, “[t]he doctrine of preemption, as such, is less troublesome than its unilateral application in circumstances where the

213. Public Sitting, *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. Pleadings 1, 37 (Feb. 19, 2003) (quoting the Verbatim Record of the Presentation by Michael Bothe on behalf of Iran), available at <http://www.icj-cij.org/docket/files/90/5137.pdf> (last visited Oct. 6, 2009).

214. See Blix, *supra* note 184, at 9–10; see also BYMAN & WAXMAN, *supra* note 3, at 11 (“When considering a coercer’s threat, an adversary looks at costs associated with continued resistance versus costs associated with complying with the coercer’s demands.”).

215. Franck, *supra* note 186.

216. Reisman & Armstrong, *supra* note 102, at 526.

217. Franck, *supra* note 103, at 102.

burden of persuasion as to the imminence and severity of the threat is not sustained.”²¹⁸

The lack of legitimacy associated with unilateral capability assessments carries important practical disadvantages. Most obviously, a use of force predicated on a perceived-illegitimate assessment is unlikely to garner the international support that may be important to the success of the intervention.²¹⁹ This leads some strategists to conclude that “stronger agreed factual predicates will help generate support for action and strengthen legitimacy. For many . . . anxiety about the preventive use of force and WMD [is] attributable to the debacle over the Iraq intelligence”²²⁰ This could, in turn, be addressed through more robust international processes: “Strong, ideally international, fact finding could help address the problem by strengthening both the authority and capabilities (especially of inspection and analysis) of organizations such as the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons.”²²¹

These critiques of the unilateralist view naturally strengthen calls for stronger international legal process. But they also raise the question of whether objective standards can remedy problems of untethered subjectivity without exclusive reliance on procedural stringency.

3. The Reasonable Necessity View: An Objective Standards Approach

The reasonable necessity view uses an *objective* standard for judging WMD capabilities and threats: Would a reasonably cautious state have acted in self-defense on the basis of the available evidence and its epistemic strength?²²² In assessing reasonableness, the reasonable necessity view seeks to identify factors that a reasonable state would consider in evaluating a potential threat under capability uncertainty.

The reasonable necessity view calibrates the risks of false positives and false negatives through different channels than the traditional and unilateralist views. Each of the latter strikes its balance primarily

218. Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L L. 590, 595 (2003).

219. See Hart & Fedchenko, *supra* note 80, at 112; Reisman & Armstrong, *supra* note 102, n.79; Gregory F. Treverton, *Intelligence: The Achilles Heel of the Bush Doctrine*, ARMS CONTROL TODAY, July–Aug. 2003, at 1, available at <http://www.armscontrol.org/print/1338> (last visited Oct. 6, 2009).

220. James B. Steinberg, *Weapons of Mass Destruction and the Use of Force*, in BEYOND PREEMPTION, *supra* note 48, at 19, 36 (emphasis omitted).

221. *Id.*

222. See Schmitt, *supra* note 46, at 113 (“Ultimately, an adequacy assessment will rest on the international community’s determination of whether a reasonable international actor would have acted in self-defense on the basis of the evidence in question.”).

through the location of decisional authority (in the U.N. Security Council and in individual states, respectively), giving comparatively little attention to the substance of the internal logic through which those decisional authorities reach judgments.²²³ In a reasonable necessity system, that logic is paramount. Capability assessments guided by objective criteria and evidentiary rules are the core of this approach, and their particular configuration will be the principal determinant of how the risks of different errors are balanced. Instead of assigning capability assessments to an entity in the expectation that its incentives and characteristics will produce judgments that approximate the desired balance of risks, a reasonable necessity regime conducts this balancing largely through the substantive criteria themselves. This is not to deny the influence of decisional authority on outcomes, but as a method for optimizing the balance of risks it is secondary to the substantive criteria and epistemic analysis those authorities are tasked with applying.

a. Advantages

Taking this approach to managing false positives and false negatives should help address accuracy concerns by enhancing the transparency of the balancing determination, allowing for feedback as law evolves to deal effectively with evolving threats and conditions. Under unilateralist and traditional approaches, institutional mechanisms mediate between the desired balance of risks and their actualization, often leaving the connection between the policy objective and the outcome unclear. The reasonable necessity approach hones in on the balance itself, aiming to optimize policy effectiveness in individual cases and over time. As Myres McDougal and Florentino Feliciano explained in 1961, “reasonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion.”²²⁴ Part III, below, aims to provide some of that disciplined policy ascription.²²⁵

As to legitimacy, the reasonable necessity view holds promise in both the “right process” and “compliance” senses with which Thomas Franck uses the term.²²⁶ A reasonable necessity framework encourages greater consensual compliance through its congruence with the considerations and epistemic judgments that a reasonable threatened

223. See *supra* notes 149, 191 and accompanying text.

224. MYERS S. McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 218 (1961).

225. See *infra* Part III.

226. See *supra* notes 186–187 and accompanying text.

state would employ.²²⁷ This increases the likelihood that global, policy-appropriate uses of precautionary self-defense under capability uncertainty would fit within a legal framework, and so it likely excludes fewer cases of precautionary self-defense than the traditional view's approach.²²⁸ The vitality of the law governing precautionary self-defense is dependent upon the ability of this law to adapt to contemporary challenges like capability uncertainty in a manner that decisionmakers and security professionals perceive as sensible.²²⁹ For this task, an objective standard is promising, because it directly addresses the same judgments these actors are forced to make and assesses them in recognizable terms.

At the same time, an appropriately designed reasonable necessity scheme can produce capability assessments and use of force answers that appear to result from "right process." A determination is more likely to be viewed as the product of "right process" if the standard used is oriented toward the considerations that governments use to evaluate emerging threats, and if the way in which these considerations are treated broadly tracks these states' own evaluative processes.²³⁰ Moreover, as discussed

227. Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1, 16 (2000) ("If a fact-oriented, reasonableness standard led states to explain themselves in terms of the considerations they actually take into account in making use-of-force decisions, and by which they are ultimately judged, that would itself be an improvement over their current disregard of the push-button rules. The common-lawyer approach leads decisionmakers to take seriously a legal issue that is currently considered too artificial to warrant addressing.").

228. In explaining that provision for national defense as the first imperative of international law, Michael Reisman argues:

That part of the legal regime that establishes the licit means and modes for the maintenance by each community of its national defense is necessarily a response to the common needs and common interests of politically relevant actors in the system. Their felt necessities determine the content of the law and, in its crafting, take account of a wide range of factors, such as the current and projected technology and quanta of weapons; their modes of application; geography and geostrategic implications in specific contexts; and, of course, the characteristics, objectives, and capacities of manifest and latent adversaries. When some of these factors change to the point that communities can no longer assure their defense within the ambit of inherited law, those charged with national defense inevitably demand changes in the law.

Reisman, *supra* note 27, at 82; *see also* Sofaer, *supra* note 170, at 549 ("The legal rationale for concluding that the Security Council has a monopoly on the lawful use of force grows from a mix of arguments that have thus far won the day in international legal circles, even though they have no credibility among national security professionals.").

229. *See* Sapiro, *supra* note 145, at 602 ("Today it is more likely to be foolish, if not suicidal, for a state that believed its fundamental security interests were at risk to wait until the first attack. . . . [A] document meant to be universally accepted and to remain relevant must also be flexible enough to adapt to changed circumstances.").

230. *See* Sofaer, *supra* note 227, at 16 ("[I]f the legal principles involved make sense, government decisions are far more likely to be influenced by them than if the standards purport to impose conduct alien to reality and to their decisionmaking processes.").

further below, there are a range of opportunities for a reasonable necessity regime to work in tandem with the U.N. Security Council and other institutional processes, especially in clarifying the legitimate policy priorities that guide objective standards.²³¹

b. Drawbacks

Supporters of the traditional view are quick to object to the reasonable necessity view along the following lines: In practice, the reasonable necessity view collapses into the unilateralist view, at least when applied outside of the U.N. Security Council, and so the traditional view remains the only available framework to stave off the unconstrained use of force by states.²³² For Franck,

[t]he more indeterminate a norm, the more essential the process by which, in practice, the norm can be made more specific. Rules that each member of a community is free to interpret for itself, without fear of definitive contradiction, are truly rules lacking in determinacy, for they leave each member free to assert that “the rules are whatever I say they are.” They then have no objective content whatsoever.²³³

One might be especially concerned about the slide from objective standards to subjectivity in the area of international self-defense law because there is no single “reasonable state” akin to the hypothesized “reasonable person” of many domestic law contexts.²³⁴ Vast disparities in power, wealth, prestige, interests, and political systems make it impossible to discern a single, universal standard. Instead the question becomes: How would a reasonable state in the position of the one claiming a right to use force act? That is hard to answer without delving into the complex strategic calculus of individual state decisionmaking.²³⁵

Harold Koh argues in response to Michael Doyle that “[Doyle’s proposed] standards are just too easily manipulated by those who want to use military force.”²³⁶ As a result, the unilateral application of objective reasonableness criteria will devolve into the same unreliable epistemic tendencies that the reasonable necessity view seeks to

231. See discussion *infra* Part II.B.4.

232. See Franck, *supra* note 103, at 101–05.

233. *Id.* at 102.

234. See SEYOM BROWN, *THE ILLUSION OF CONTROL: FORCE AND FOREIGN POLICY IN THE TWENTY-FIRST CENTURY* 113 (2003); FLETCHER & OHLIN, *supra* note 129, at 173–74.

235. See generally David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 *COLUM. J. TRANSNAT’L L.* 134 (2005) (discussing difficulties of judging the reasonableness of state decisionmaking, especially amid crises).

236. Harold Hongju Koh, *Comment*, in DOYLE, *supra* note 20, at 101, 112–13.

avoid.²³⁷ Koh concludes that “[i]f we want to create a meaningful default position against unwarranted use of force, in these emergency situations, we need bright-line rules.”²³⁸

Michael Bothe similarly argues that whatever the intuitive appeal of a reasonableness approach to regulating force in theory, in practice it “open[s] the door to arbitrariness and subjectivity.”²³⁹ As to the counter-risks, “[i]t may be that the risk of violation is higher if the rule is very restrictive,” and “[i]t may well be that the international community, reshaping the *opinio iuris*, will one day accept some instances of pre-emptive use of force.”²⁴⁰ But, Bothe concludes, the traditional approach “is a much safer approach to the interpretation and development of the *ius ad bellum* than loosening any real restraint by boiling it down to a rule of reason—a self-destructive mechanism for the prohibition of the use of force.”²⁴¹

These dangers are quite real, but one limitation of this objection is its uneven application of assumptions about state compliance with international law. In considering how a reasonable necessity approach would operate in a real-world situation, the traditional view assumes standards will be exploited by its users to justify aggression but fails to explain satisfactorily how the traditional view will fare better in restraining states

237.

[T]he result is that when there is even a scintilla of evidence of a looming threat, you must assume that it is a high probability; and that even if there is no evidence of even a 1 percent probability, that is not evidence of the absence of sufficient provocation to warrant attacking preemptively, and with overwhelming force. When such a collective mind-set prevails, evidence quickly gives way to hunches, intuitions, or gut instincts, with tragic consequences should those hunches prove unfounded.

Id. at 108.

238. *Id.* at 114; *see also* Henkin, *supra* note 26, at 60:

In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events.

Id.

239. Michael Bothe, *Terrorism and the Legality of Pre-Emptive Force*, 14 EUR. J. INT’L L. 227, 239 (2003).

240. *Id.*

241. *Id.*; *see also* Franck, *supra* note 103, at 102 (“The more indeterminate a norm, the more essential the process by which, in practice, the norm can be made more specific. Rules that each member of a community is free to interpret for itself . . . have no objective content whatsoever.”).

that are determined to use force aggressively.²⁴² This problem afflicts the traditional view or any regulatory scheme that depends on decentralized international enforcement, even if it includes centralized adjudication. In the absence of powerful centralized enforcement, any international legal regime will have to operate under these limitations. It remains unproven whether inflexible bright-line rules are better suited to the task,²⁴³ especially when critical facts remain subject to debate among key international actors.

The principal targets of use of force rules are not limited to actors determined to disregard international law or wedded to faulty capability assessments. In relation to these actors, each of the three approaches is likely to fare poorly in constraining uses of force. Use of force rules should also be geared to those who may be susceptible to their pull and designed to maximize the scope of their influence. A reasonable necessity approach is superior on that count, because good faith decisionmakers are likely to respect legal standards they view as rationally related to appropriate policy concerns.²⁴⁴ Or as Reisman puts it:

Until the installation of an effective world constitutive process, which will remove the need to rely upon unilateral action for the achievement of key international goals, it will be for the college of international lawyers to establish criteria for the lawfulness of the initiation and application of unilateral anticipatory and preemptive defensive actions. Their lodestar will be the legitimacy of self-defense insofar as it is implemented in accordance with the venerable policies of necessity, proportionality, and discrimination. But because the context has changed, the legal arrangements to implement these policies of international law must change as well. Legal creativity and factual realism in this area are called for in equally urgent measure, for if the effectiveness and soundness of a future international regime about the unilateral use of force remain clouded in uncertainty, the insufficiency of the inherited regime, which was designed for a context

242. As Sofaer points out, “[s]tates prepared to use force in bad faith are undeterred by restrictive legal rules.” Sofaer, *supra* note 45, at 225.

243. See Reisman, *supra* note 27, at 90 (“[T]he potential for abuse here does not derive from the power of a single state. Rather, it inheres in a legal system that continues to maintain weak central institutions and accordingly reserves to each state . . . to engage in unilateral action when necessary for its self-defense.”).

244. See Sofaer, *supra* note 45, at 225 (arguing that “[s]tatesmen acting in good faith to protect their nations do not take artificial rules seriously,” but instead “they are more likely to respect standards rationally related to concerns they recognize as appropriate”).

of weapons and adversaries that has changed forever, is certain beyond peradventure.²⁴⁵

All this speaks to the larger issue of identifying the channels through which we can expect international regulation of force to influence real-world outcomes. A further cause for concern is therefore that in practice, objective standards slide toward unilateral subjectivity because the reasonable necessity approach lacks clear decisional authority: from where are the reasonableness standards derived and by whom and where are they applied? Under the traditional view, the U.N. Security Council is obviously the legal decisional authority; under the unilateralist view, this role is played by the individual state. What is the legal decisional authority for articulating and applying objective standards under the reasonable necessity approach?

A major part of the answer is that for objective standards, like much of international law, articulation, application, and enforcement are decentralized. "International law is still largely a decentralized process, in which much lawmaking (particularly for the most innovative matters) is initiated by unilateral claim, whether explicit or behavioral."²⁴⁶ Legal claims are then evaluated through expressions of states and, increasingly, through international organizations and non-governmental actors, including scholars and other opinion shapers.²⁴⁷ From a legal process standpoint, Abram Chayes made a similar point in analyzing the Cuban Missile Crisis when he explained that "the requirement of justification suffuses the basic process of choice. There is a continuous feedback between the knowledge that the government will be called upon to justify its action and the kind of action that can be chosen."²⁴⁸ Especially "[i]n the context of international law relating to the use of military force, law is best seen as a means of predicting global reactions to a proposed use

245. Reisman, *supra* note 27, at 90.

246. *Id.* at 82.

247. See W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 17 (1992) ("By *law* we mean the expectations that politically relevant actors in a system share concerning what is the correct way of apportioning and using power, of producing and distributing particular desired values, and of shaping certain events, in particular circumstances."); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 3, 15 (W. Michael Reisman & Andrew R. Willard eds., 1988) ("If law is to be found in significant part in the application of norms to particular cases and controversies, it is plain that such applications in international politics must be sought in a much wider range of arenas than the highly formalized and structured judicial fora of domestic systems.").

248. ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 103 (1974).

of such force.”²⁴⁹ That is, “when a lawyer says that a proposed course of action would be unlawful, the lawyer is really saying that in the past, international society has decided that such an action is wrongful and, in similar circumstances, will likely do so again.”²⁵⁰ This is not to say that legality is merely about winning public support, but that it depends heavily on the ability to defend action in terms of generalized principles.²⁵¹ Chayes continues:

Some of the characteristics of law give it special importance for public justification. Because of the scope and variety of the audiences addressed, that process must proceed in terms of more or less universal and generalized criteria. . . . Legal principles also are regarded as quasi-universal or at least generally accepted. They are thus well adapted to the needs of public justification. On the other hand, because of the very prominence of legal standards as criteria for public accounting, failure to justify on these grounds or an inadequate legal defence may compromise the justification exercise over-all.²⁵²

It is this public accounting that the reasonable necessity standards aim to improve.²⁵³

4. Process and Objective Standards: Potential Symbiosis of the Traditional View and Reasonable Necessity View

All of this is not to suggest that objective reasonableness standards and use of process to manage capability uncertainty are mutually exclusive. Quite the contrary. There are a number of ways in which the two should be complementary. This Section examines the opportunities for productive interaction in two respects: an objective reasonableness framework’s relationship with “auxiliary” processes and its relationship with the U.N. Security Council system.

249. Murphy, *supra* note 6, at 704.

250. *Id.*

251. See CHAYES & CHAYES, *supra* note 186, at 118–19 (“A crucial element in the process by which international norms operate to control conduct, is that, as a matter of international practice, questionable action must be explained and justified”); see also Johnstone, *supra* note 167, at 440–41 (discussing the importance of justification processes in international relations).

252. CHAYES, *supra* note 248, at 103–04; see also CHAYES & CHAYES, *supra* note 186, at 120.

253. Although not discussed in this paper, the reasonable necessity approach would help improve similar accounting at the domestic level, with respect to presidential justification of force to the public and Congress. For a historical analysis of domestic authorizations of force based on mistaken assessments or factual uncertainty, see Lori Fisler Damrosch, *War and Uncertainty*, 114 YALE L.J. 1405 (2005).

For all their limitations, multilateral inspections regimes should remain an integral part of an overall system for managing and reducing capability uncertainty. These processes, supplemented by national intelligence, are a key mechanism for acquiring at least one important form of evidence: forensic.²⁵⁴ As such, an objective reasonableness system might benefit from not only preservation, but expansion of inspection systems and capabilities, such as the creation of a permanent U.N. inspectorate similar to UNMOVIC.²⁵⁵ Instead of obviating these auxiliary processes, a reasonable necessity approach should supplement them with a broader array of evidentiary tools; its objection to the traditional view is simply directed at over-reliance on exclusive decision-making procedures and a corresponding likely narrow class of evidence. In turn, these additional tools can serve to reinforce a process regime by partially foreclosing responses that exploit limitations of inspections. For example, as suggested above and explored in the next Part, legal burden-shifting and allocation of risks of factual judgment error through evidentiary norms can reduce the benefits of many forms of process manipulation.²⁵⁶ As a related point, a credible possibility of future military action (authorized through objective reasonableness architecture) could encourage disclosure, decrease the attractiveness of delay strategies, and eliminate the incentive to cultivate uncertainty for strategic purposes.²⁵⁷

In a similar fashion, regulating force through objective standards should not be seen as incompatible with the U.N. Security Council system, and could be complementary. Under almost any objective reasonableness regime, the U.N. Security Council is likely to remain the most desirable source of authorization and the uses of force it sanctions will remain *per se* or presumptively reasonable. Operating in parallel, there would be significant potential for reciprocal reinforcement. As Michael Doyle argues,

[t]he mere fact that unilateral action could be considered legitimate should have a responsibility-inducing effect on the Security Council. Rather than enjoying a monopoly, the council will now know that its actions are subject to the “market” of alternative judgment.²⁵⁸

Exposing the U.N. Security Council to this sort of “healthy competition” would help push its members to deploy their votes and vetoes on the basis of the persuasiveness of their reasoning, instead of their institutional

254. See *infra*, Part III.B.1.

255. See generally FINDLAY, *supra* note 156; Matthews, *supra* note 154.

256. See *supra* Part II.B.1; *infra* Part III.B.3.

257. See *id.*

258. DOYLE, *supra* note 20, at 62.

prerogative.²⁵⁹ This is also the most promising mechanism for inducing the real, deliberative use of transparent guidelines in the U.N. Security Council. If faced with a competing assessment that is particular and organized by reference to objective criteria, the Council as a whole, and in terms of its individual members, would be pressured to clarify the basis for its decisions and explain why it reached a different conclusion. This process of bringing the capability judgments of U.N. Security Council decisions to the surface and forcing a substantive debate about evidentiary standards is an important first step toward improving the way use of force rules operate under capability uncertainty.²⁶⁰

While there are opportunities for symbiosis, the objective standards versus process approaches to managing factual uncertainty remain analytically and functionally distinct, and combining them carries some risks. The reasonable necessity view and the traditional view both embrace formal legal procedures but use them for different ends. In conducting evidentiary assessments pursuant to a reasonable necessity analysis, for example, there are hazards to employing legal processes originally designed for other purposes, including over-stressing them or disincentivizing their use by raising the stakes of their outcomes.

International legal processes generally are designed to function within a broader regulatory system. IAEA inspection processes serve purposes within the larger nonproliferation regime, such as informing the actions of the U.N. Security Council and General Assembly.²⁶¹ A state's willingness to accept, endorse, or participate in these processes is likely to be at least partially dependent upon that state's acceptance or approval of the process' functional role—that is, in its acquiescence to legal consequences that might flow from compliance or noncompliance with international obligations.²⁶² Put bluntly, if we sign up for this agreement, what are we getting ourselves into down the road? Attaching additional weight to these processes by tying them to an exogenous system of force regulation can alter this calculus, making actors more reluctant to subscribe to a process with such far-reaching potential con-

259. See Buchanan & Keohane, *supra* note 127, at 20 (“[T]he democratic coalition provides an incentive for the permanent members to use the veto more responsibly and for all members of the Council to realize that they no longer enjoy an absolute monopoly on the legitimate authorization of preventive use of force.”).

260. The U.N. High-Level Panel recommends a set of substantive criteria to guide U.N. Security Council decisionmaking, but does not explain how these criteria will be enforced in practice. On ways to improve the deliberative quality of the U.N. Security Council, see, for example, Johnstone, *supra* note 171, at 303–07.

261. See *supra* notes 151, 156 and accompanying text; IAEA, *The Texts of the Agency's Agreements with the United Nations* (Oct. 30, 1959), available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc11.pdf> (last visited Oct. 6, 2009).

262. See Blix, *supra* note 184, at 9–10 (discussing difficulties in overcoming states' reluctance to commit legally to weapons inspection regimes).

sequences. For example, if the results of the inspections process (or even perceived interference with inspections) may be used to legally authorize military action, adopting objective necessity standards that draw on those findings or judgments may discourage strong demands for inspection by U.N. Security Council members or the consent of possible proliferators to inspections in the first place—undermining elements crucial to the success of the inspection regime.²⁶³

Similarly, international legal processes all carry some risk of error, but the costs of these errors are to some extent circumscribed by the process' functional role in a larger system. Linking the outcomes of a process to objective factors and evidentiary questions in a reasonable necessity system increases the potential cost of errors. Processes with deficiencies or error-probabilities that may have been undesirable but acceptable when the consequences of an erroneous output were limited by their narrow role in a larger framework may be unacceptable when the consequences include a factual conclusion that leads to the mistaken authorization (or non-authorization) of force against a state. As a result, processes that are useful in a limited role may be disfavored or abandoned by states or organizations for fear of the impact of their errors in an objective necessity analysis.

These types of potential pitfalls are concerns that should shape the selection of evidentiary factors. Problems of calibrating a legal system's evidentiary rules to manage risks of error and avoid perverse incentives are not new and should not deter us. Rather, they reveal the need to analyze more deeply how evidentiary principles could and should operate in the international legal regime.

III. NEXT STEPS: DEVELOPING EVIDENTIARY NORMS

The analysis above points to the need for reasonable necessity proponents to address epistemic or evidentiary questions. In a world in which complete clarity or consensus regarding states' WMD capabilities is impossible, how *should* states or collective security institutions judge capabilities? Furthermore, the preceding analysis suggests that even traditional view adherents, unpersuaded by the promise of objective standards, ought to consider more rigorously and systematically these evidentiary questions. The objective reasonableness analysis reveals that evidentiary principles reflect policy choices on such matters as how to balance competing risks (especially between false positives and false negatives), how to decide when sovereign equality should yield to extra

263. This issue is explored in more detail *infra* Part III.C.

suspicion of particular states, and how to best combat WMD proliferation over the long term. Even if one remains unconvinced by the reasonable necessity approach, the evidentiary questions raised in this Part are critical to effective operation of legal processes advocated by the traditional, strict constructionists of the U.N. Charter.

There exists a remarkable absence of well-established international law of evidence, even though the legality or illegality of uses of force often turns on disputed facts.²⁶⁴ By this I do not mean a set of formalized rules so much as principles developed through international legal and diplomatic discourse that can be articulated and applied across a range of cases. “Despite over one hundred years of international adjudication, and sixty years of Security Council fact-finding,” notes Mary Ellen O’Connell, “we cannot point to any well-established set of rules governing evidence in international law in general or in the case of self-defence in particular.”²⁶⁵ Jules Lobel similarly laments:

Questions involving the standards and mechanisms for assessing complicated factual inquiries are generally not accorded the same treatment given by the legal academy to the more abstract issues involved in defining relevant international law standards. Unfortunately, international incidents generally involve disputed issues of fact, and in the absence of an international judicial or other centralized fact-finding mechanism, the ad hoc manner in which nations evaluate factual claims is often decisive.²⁶⁶

This issue—what evidentiary principles should inform capability judgments—is critical to effective functioning of both an objective reasonable necessity approach and a process-oriented traditional approach, to the extent that processes include collective assessments of WMD capabilities. Moreover, an examination of evidentiary logic points again toward symbioses between the objective reasonableness and process approaches to regulating force.

A. How Much Uncertainty Is Reasonable?

One approach to reasonable certainty would begin with a specific standard or burden of proof. In other words, rather than thinking about what level of confidence is sufficient on a case-by-case basis, law could set a generally applicable threshold that balances the relevant interests

264. See Ruth Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice*, 6 *LAW & PRAC. INT’L COURTS & TRIBUNALS* 119 (2007) (discussing evidentiary issues in recent ICJ cases related to the use of force).

265. Mary Ellen O’Connell, *Evidence of Terror*, 7 *J. CONFLICT & SEC. L.* 19, 21 (2002).

266. Lobel, *supra* note 109, at 538.

across the set of cases. Some have suggested, for example, that anticipatory uses of force ought to require “clear and convincing” evidence of a coming attack.²⁶⁷ Others would impose a higher requirement, tantamount to an American criminal justice standard of “beyond a reasonable doubt.”²⁶⁸ Along those lines, although not referring to the use of force, consider ElBaradei’s statement at the beginning of this paper, in which he invoked a criminal standard to explain why he could not issue affirmative conclusions about Iran’s nuclear weapons program.²⁶⁹

The analysis above, however, cautions against simply applying a specific burden of proof from another area of law to WMD capability assessments. First, often these proposals of a specific proof standard focus predominantly on only one type of error risk: false positives (believing WMD to exist when none do). To the extent that domestic law and burdens of proof are a useful analog, the proper comparison is not to criminal trials, which are premised on unacceptability of convicting the innocent—hence, the beyond a reasonable doubt standard, which tolerates many guilty going free.²⁷⁰ The better analogy is to some types of civil litigation in which the costs of both false positives and false negatives are very high. As Justice Harlan explained in *In re Winship*, “[b]ecause the standard of proof affects the comparative frequency of these two types of erroneous outcomes [false positives and false negatives], the choice of the standard to be applied in a particular kind of

267. See Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889–90, 893 (2002); Mary Ellen O’Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT’L L. 446, 452–53 (2003) (reviewing CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2000)). Ruth Teitelbaum argues that the ICJ applied something similar to a clear and convincing evidence standard in its *Oil Platforms* and *Congo v. Uganda* judgments related to self-defense. See Teitelbaum, *supra* note 264, at 125–26.

268. The “beyond a reasonable doubt” standard for criminal conviction, held to be constitutionally required in *In re Winship*, 397 U.S. 358 (1970), reflects one possible balance of competing harms with respect to criminal suspects. As Blackstone explained, “it is better that ten guilty persons escape, than that one innocent suffer.” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 358.

269. See sources cited *supra* note 2.

270. Moreover, to the extent that the criminal analogy is appropriate, the proper analog is the criminal justification of self-defense standard, not the criminal conviction standard. In New York state, the standard for the lethal use of force in self-defense has a subjective component in addition to an objective/reasonableness component. To satisfy this subjective component, a defendant must show that he “believed that deadly force was necessary to avert the imminent use of deadly force or the commission of certain felonies.” *People v. Goetz*, 497 N.E.2d 41, 51 (N.Y. 1986). Fletcher and Ohlin write that the subjective component is imposed so that “the defendant cannot take advantage of circumstances beyond his knowledge and intention”—or, in other words, it is imposed to prevent the pretextual use of force. FLETCHER & OHLIN, *supra* note 129, at 105. They argue that “[t]he same rule should apply in the international context. . . . [In the case of Iraq, t]he claims about WMD must have been believed The relevant question, therefore, is not justification *ex post* . . . but justification *ex ante*” *Id.*

litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.²⁷¹

Consider, for example, litigation to terminate parental rights, in which a faulty factual assessment could result in needlessly breaking up a family (a false positive) or in exposing a child to abuse (a false negative).²⁷² In setting a standard of proof for these cases, the Supreme Court noted the particular importance of calibrating a standard that appropriately and effectively balanced false positives and false negatives, given the finality and irrevocability of the grave effects of this type of state action,²⁷³ and given the magnified risk of error in this type of proceeding.²⁷⁴ To this end, the Court rejected a “preponderance of the evidence” standard, noting this standard’s focus on the quantity rather than the quality of the evidence²⁷⁵ and its typical application to a class of cases reflecting a lesser societal policy concern with the outcome (as in cases where, for instance, money damages between two private parties are at stake).²⁷⁶ However, the Court also rejected a “beyond a reasonable doubt” standard, maintaining that this standard is too high in cases where a court has to decide issues difficult to “prove to a level of absolute certainty,” with the practical effect of such a high standard being the imposition of an “unreasonable barrier to state efforts” to accomplish an important state goal.²⁷⁷ The Court consequently held that the most appropriate way to balance the risk of false positives and false negatives in termination of parental rights cases, with their high stakes and their fairly substantial potential for error, was with a “clear and convincing evidence” standard, which “strikes a fair balance between the rights of the natural parents and the State’s legitimate concerns” and “adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.”²⁷⁸

271. *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring).

272. *See Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981).

273. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982).

274. *Id.* at 762–64. The Court noted four reasons for this magnified risk of error: The relevant substantive standards are “imprecise,” which “leave[s] determinations unusually open to the subjective values of the judge”; the court possesses “unusual discretion to underweigh probative facts that might favor the parent”; the state is usually a more capable adversary than the parents (for both institutional capacity and educational reasons); and parents have no double jeopardy defense in termination proceedings—the state can collect more evidence and re-initiate proceedings as many times as it wants.

275. *Santosky*, 455 U.S. at 764 (citing *In re Winship*, 397 U.S. 358, 371, n.3 (1970) (Harlan, J., concurring)).

276. *Santosky*, 455 U.S. at 754–55 (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

277. *Santosky*, 455 U.S. at 768–69.

278. *Id.* at 769.

The choice of any minimum standard of proof justifying the use of force ought to similarly be framed in terms of the risks of both too much self-defensive force and too little.²⁷⁹ It may well be that a high proof burden is nevertheless warranted; after all, the Iraq war shows all too well the potential costs of preemptive war based on mistake of fact. But the notion that we should look to domestic evidence law principles of a minimum evidentiary threshold does little to answer the critical questions of where to set that threshold, or whether to set it with a static versus an elastic standard.

The second problem with setting a single, specific proof standard is that using a standard still requires the decisionmaker to analytically disaggregate the elements of the threat, which include both capability to inflict harm (that is, the probability that a state has WMD) and intent to use it (that is, the probability of the state using that capability in an aggressive or threatening way). There is something to be said for a “clear and convincing” requirement if one believes that such a standard is calibrated to balance false positives and false negatives, but the referent of that standard should be the WMD threat—a composite of capability and intent. This suggests that the required degree of certainty about capability ought to vary with certainty about intent. The higher the likelihood that an adversary would choose to use a WMD capability if it has or gets it, the lower the necessary certainty of capability that should justify an anticipatory or preemptive strike.²⁸⁰

Recognizing that both intent and capability are critical to an overall threat assessment, and acknowledging that precautionary action might be justified under conditions of higher doubt about capability as certainty of hostile intent increases, one might nevertheless propose a minimum threshold for both components. Christopher Greenwood, for example, argues for a certainty threshold of both intent and capability: “[T]he right of self-defense will justify action only where there is sufficient evidence that the threat of attack exists. That will require evidence not only of the possession of weapons but also of an intention to use them.”²⁸¹ Such a principle is appealing, although it still returns to the difficult question of

279. See Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621, 622 (1998) (“The now conventional understanding of the burden of proof is that the level or weight of the burden of persuasion is determined by the expected utilities associated with correct and incorrect alternative decisions.”).

280. On the difficulty of assessing states’ intentions, see generally ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS* (1976); Acton, *supra* note 87, at 124–26.

281. Greenwood, *supra* note 37, at 16.

where to set the appropriate minimum for each sub-part of the “sufficient” threat.²⁸²

The point of this discussion is not to reject the idea of attaching minimum evidentiary burdens. Rather, it is to illustrate that the more challenging issue is where to set the sufficiency line. That calibration depends on weighing the relative risks of false positives and false negatives, and on assumptions about the future intent of states. One point that can be drawn from the analysis in Parts I and II of this paper is that evidentiary thresholds that might have worked well in a world of conventional threats—where capabilities could be judged with high accuracy and the costs of false negatives to peace and security were not necessarily devastating—risk exposing states to unacceptable dangers. Accordingly, they ought to be sufficiently flexible to account for the inevitable factual uncertainty and high security stakes of WMD capabilities, as well as the specific hostile policies or ambitions of the state in question.

And returning to the central issue of this paper, this still leaves the question of what sorts of evidence or judgments should be relevant to and should comprise the ultimate capability assessment: how likely is it that a state has or will soon have a WMD capability?

B. *What Type of Evidence Is Reasonable?*

Besides the standard of proof, a second epistemic issue raised by the objective reasonableness approach is what types of evidence ought to be reasonably relied upon. The analysis above shows that the most obvious and preferred type of evidence—forensic evidence of WMD capabilities or programs—will often be insufficient on its own to meet a reasonableness standard, but that drawing on process approaches to assessing capabilities helps to strengthen the utility of such evidence. This Section also explores what other types of evidentiary logic might supplement forensic information.

1. Forensic Evidence

The United States and Britain, in presenting the public case against Iraq, cited numerous sets of forensic evidence to bolster their assertions that Iraq possessed chemical and biological weapons, and that it was reconstituting its nuclear weapons capability. The forensic evidence included data from international inspections showing missing or

282. Greenwood’s use of the term “evidence” is significant for raising another idea sometimes proposed for making objectively reasonable capability assessments: a transparency requirement. *See infra* notes 296–300 and accompanying text.

unaccounted-for weapons;²⁸³ satellite imagery of ballistic missile components and WMD-related facilities;²⁸⁴ evidence that facilities previously used for WMD production had been rebuilt;²⁸⁵ and Iraq's purchase of equipment that could be used for WMD development.²⁸⁶ Several pieces of forensic evidence cited by the United States and Britain have since gained notoriety for their inaccuracy.²⁸⁷ For example, the United States relied on discredited evidence that Iraq had deployed mobile biological agent facilities²⁸⁸ and documents—later found to be forged—indicating that Iraq had purchased uranium products from Niger.²⁸⁹

Claims about forensic evidence have also featured prominently in U.S. and British public cases about Iran's nuclear weapon ambitions. Specifically, government officials have pointed to international inspectors' discovery of a fifteen-page document describing the casting and machining of enriched uranium hemispheres, which have no known use except in nuclear weapons;²⁹⁰ a laptop from Iran obtained by U.S.

283. See FOREIGN & COMMONWEALTH OFFICE, IRAQ'S WEAPONS OF MASS DESTRUCTION: THE ASSESSMENT OF THE BRITISH GOVERNMENT 16 (2002), available at http://www.fco.gov.uk/resources/en/pdf/pdf3/fco_iraqdossier (last visited Oct. 6, 2009) [hereinafter BRITISH ASSESSMENT OF IRAQ'S WMD]; see also U.N. SCOR, 58th Sess., 4701st mtg., U.N. Doc. S/PV.4701 (Jan. 1, 2003) [hereinafter Powell Remarks].

284. See President George W. Bush, Remarks by the President on Iraq (Oct. 7, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html> (last visited Oct. 6, 2009); see also Powell Remarks, *supra* note 283.

285. See Bush, *supra* note 284 (“Satellite photographs reveal that Iraq is rebuilding facilities at sites that have been part of its nuclear program in the past.”); see also BRITISH ASSESSMENT OF IRAQ'S WMD, *supra* note 283, at 20.

286. See BRITISH ASSESSMENT OF IRAQ'S WMD, *supra* note 283, at 22 (“Some dual-use equipment has also been purchased, but without monitoring by UN inspectors Iraq could have diverted it to their biological weapons programme.”); see also Powell Remarks, *supra* note 283.

287. See Sarah Lyall, *Britain Admits that Much of Its Report on Iraq Came from Magazines*, N.Y. TIMES, Feb. 8, 2003, at A9; see also Walter H. Pincus, *Report Details Errors Before War*, WASH. POST, Sept. 9, 2006, at A26.

288. SELECT COMM. ON INTELLIGENCE, U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-31, at 150 (2004) (stating the assertion was based on a source known as “Curveball” and was not bolstered by satellite imagery).

289. See S. REP. NO. 108-31, at 77–82 (2004).

290. See *United States Policy Toward Iran Next Steps: Hearing Before the H. Comm. on Int'l Relations*, 109th Cong. 26 (2006) (statement of the Hon. Robert G. Joseph, Under Sec'y for Arms Control & Int'l Sec., U.S. Dept. of State), available at <http://web.archive.org/web/20060616215047/http://www.state.gov/t/us/rm/63121.htm> (last visited Oct. 6, 2009) [hereinafter Joseph Testimony]; SUBCOMM. ON INTELLIGENCE POLICY, H. PERMANENT SELECT COMM. ON INTELLIGENCE, RECOGNIZING IRAN AS A STRATEGIC THREAT: AN INTELLIGENCE CHALLENGE FOR THE UNITED STATES (2006), available at <http://intelligence.house.gov/media/pdfs/iranreport082206v2.pdf> (last visited Oct. 6, 2009); Interview by Channel 4 News with Jack Straw, Foreign Sec'y, U.K. Foreign & Commonwealth Office (Jan. 16, 2006), available at <http://www.iranwatch.org/government/UK/uk-fco-strawinterview-011606.htm> (last visited Oct. 6, 2009); Interview by BBC 1 with Jack Straw, Foreign Sec'y, U.K. Foreign & Commonwealth Office (Apr. 9, 2006), available at <http://www.iranwatch.org/government/UK/uk-fco-straw-interview-bbc-040906.htm> (last visited Oct. 6, 2009); see also IAEA,

intelligence containing thousands of drawings including a schematic for a nuclear bomb test site, designs for a small-scale facility for uranium conversion, and drawings of modifications to Iran's ballistic missiles in ways that might accommodate a nuclear warhead;²⁹¹ design drawings showing a heavy-water reactor at Arak with enough capacity to produce plutonium for nuclear weapons;²⁹² and traces of weapons-grade uranium on centrifuges in Iran.²⁹³

To the extent it is available, one advantage of forensic evidence is that as a *type* of evidence, it is universally recognized as legitimate, especially if it withstands public scrutiny. This is one reason why the United States went before the U.N. Security Council with its photographs during the Cuban missile crisis, even though it had no chance of obtaining Council backing for any action due to certain Soviet veto.²⁹⁴ More recently, following a reported 2007 Israeli strike against an alleged nuclear weapons-related facility in Syria, the U.S. Government publicly released images and video footage to substantiate the claim that the targets were nuclear weapons-related facilities.²⁹⁵

A number of scholars argue that any evidence used to support precautionary self-defense claims should be made public and subjected to international scrutiny.²⁹⁶ Some who urge this evidentiary publicity re-

Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by the Director General, at 2, IAEA Doc. GOV/2005/87 (Nov. 18, 2005) (describing the contents of the fifteen-page document).

291. See William J. Broad & David E. Sanger, *Relying on Computer, U.S. Seeks to Prove Iran's Nuclear Aims*, N.Y. TIMES, Nov. 13, 2005, available at <http://www.nytimes.com/2005/11/13/international/middleeast/13nukes.html> (last visited Oct. 6, 2009); Dafna Linzer, *Strong Leads and Dead Ends in Nuclear Case Against Iran*, WASH. POST, Feb. 8, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/07/AR2006020702126.html> (last visited Oct. 6, 2009).

292. See *Iranian Proliferation: Implications for Terrorists, Their State Sponsors, and U.S. Counter-Proliferation Policy: Hearing Before the H. Int'l Relations Comm. Subcomm. on the Middle East and Central Asia*, 108th Cong. 108-44 (2004) (statement of John R. Bolton, Under Sec'y for Arms Control and Int'l Security), available at <http://www.foreignaffairs.house.gov/archives/108/94511.pdf> (last visited Oct. 6, 2009) [hereinafter Bolton Testimony]; Ambassador Gregory L. Schulte, U.S. Permanent Rep. to the U.N., Vienna and the IAEA, Remarks to the German United National Association, Bavarian Chapter (Feb. 7, 2007), available at <http://web.archive.org/web/20071223161539/http://www.state.gov/p/io/rls/rm/80203.htm> (last visited Oct. 6, 2009).

293. See David Gauke, Excerpts of Debate on Iran's Nuclear Programme, U.K. H. of Commons (Feb. 1, 2006), available at <http://www.iranwatch.org/government/UK/uk-commons-iran-nuclearprogramme-020106.htm> (last visited Oct. 5, 2009).

294. See CHAYES, *supra* note 248, at 84-85 (stating that the display of photographs at the United Nations "was as effective in generating support for and neutralizing opposition to the United States as any other action in the week of the crisis").

295. See David E. Sanger, *Bush Administration Releases Images to Bolster Its Claims About Syrian Reactor*, N.Y. TIMES, Apr. 25, 2008, at A6.

296. See FLETCHER & OHLIN, *supra* note 129 at 169; Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L. L. 835, 836 (2001); Lobel,

quirement believe that greater public scrutiny of evidence generally improves its quality through debate and refutation, while others emphasize the legitimacy benefits.²⁹⁷ As George Fletcher and Jens Ohlin argue,

[t]he principle of publicity is critical in a self-administering system of law. There is no court to determine the facts underlying international legal conflicts; there is no authority but the eyes of the world to assess whether the United States had sufficient evidence to warrant its claim of dangerous and deployable WMD in Iraq.²⁹⁸

An assumption underlying these arguments is usually that much of the evidentiary case about capability will be forensic evidence—that is, that there will be something to be “shown” publicly.

Those who argue for public scrutiny are undoubtedly correct that whenever possible the information relied upon to support precautionary self-defense claims should be aired publicly, preferably before the use of force. But there are several limitations of a public disclosure requirement for regulating force. One practical problem frequently raised in response is that key information often cannot be disclosed publicly without compromising critical intelligence sources and methods.²⁹⁹

A second, more important limitation, to repeat the point from earlier, is that forensic evidence alone will rarely be conclusive.³⁰⁰ Future confrontations with rogue states that might have WMD are unlikely to feature Adlai Stevenson-type moments, with overwhelming and publicly available forensic evidence to support claims about threatening capabilities. Significant parts of a public case will likely need to be inferential, relying on reasoned deduction. This raises the question: what types of inferences are appropriate?

supra note 109, at 547; *see also* WILMSHURST, *supra* note 44, at 9 (“The determination of ‘imminence’ . . . must be made in good faith and on grounds which are capable of objective assessment. Insofar as this can reasonably be achieved, the evidence should be publicly demonstrable.”).

297. FLETCHER & OHLIN, *supra* note 129, at 161, 169; *see also* Lobel, *supra* note 109, at 547, 552–55 (arguing that public disclosure of evidence on which self-defense rests is required under the U.N. Charter regime).

298. FLETCHER & OHLIN, *supra* note 129, at 169.

299. *See* Schmitt, *supra* note 46, at 113–14 (“A more reasonable standard would require disclosure to the extent practicable in the circumstances.”); Wedgwood, *supra* note 166; *see also* JOYNER, *supra* note 75, at 292 (“The intelligence which states collect on WMD threats of a nature which causes them such serious concern as to warrant a decision to use pre-emptive military force, is intelligence of the highest sensitivity, and will have been collected through means the secrecy of which the collecting state will protect at all costs. Information of this sensitivity will simply not be shared by states with a group as diverse as the Security Council, no matter who the collecting state is.”).

300. *See supra* Part I.C.

2. Propensity Inferences

One type of inference—another common element of WMD capability assessments besides forensic evidence—is what might be termed “propensity” evidence, or evidence about past conduct or a regime’s decisionmaking or strategic calculus that shows likelihood that the regime is inclined towards acquiring WMD. Especially given that assessing WMD capabilities accurately is difficult because many components of such programs could have non-military purposes, understanding the likely motivations of states may be critical to making sense of forensic data points.

In the case of Iraq, for example, the WMD Commission Report noted that “any assessment of the effect of Saddam’s political situation on his decisions about WMD in the years from 1991 to 2003 would more likely than not have resulted—and, in point of fact, did result—in the conclusion that Saddam retained his WMD programs.”³⁰¹ Looking to Iraq’s recent past behavior, the likely strategic rationale behind that behavior, and the Iraqi political situation, the intelligence community assessed that Saddam was determined to retain WMD to intimidate his neighbors and deter potential adversaries such as Iran, Israel, and the United States.³⁰² More recently, the U.S. government has made similar arguments in support of its claims about Iran’s suspected nuclear weapons program, including that Iran has a history of violating arms control treaties,³⁰³ that it publicly spurns relevant international legal commitments,³⁰⁴ and that its pattern of behavior is consistent with nuclear weapon ambitions.³⁰⁵

301. WMD COMMISSION REPORT, *supra* note 67, at 147.

302. *Id.* at 147–51.

303. See Joseph Testimony, *supra* note 290 (“For almost 20 years, Iran systematically violated its IAEA safeguards and NPT obligations.”).

304. See Bolton Testimony, *supra* note 292, at 21 (“Iranian President Mohamed Khatami declared that Iran was no longer bound by any ‘moral commitment’ to continue suspending uranium enrichment”); Sec’y of State Hillary Rodham Clinton, Interview with Harry Smith of Face the Nation, Sept. 25, 2009, available at <http://www.state.gov/secretary/rm/2009a/09/129674.htm> (last visited Oct. 19, 2009) (“I think it’s really essential that we satisfy ourselves and the international community, which has passed numerous resolutions against Iran’s program, pointing out that they are violating UN and IAEA obligations and the Non-Proliferation Treaty”).

305. See Clinton, *supra* note 304 (“This latest incident concerning the facility at Qum, it would have been disclosed were it for peaceful purposes.”); Sec’y of Defense Robert Gates Interview on CNN’s State of the Union with John King, Sept. 27, 2009, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4487> (last visited Oct. 19, 2009) (“[T]he intelligence people have no doubt that this is an illicit nuclear facility, if only because the Iranians kept it a secret. If they wanted it for peaceful nuclear purposes, there’s no reason to put it so deep underground, no reason to be deceptive about it, keep it a secret for a protracted period of time.”); Joseph Testimony, *supra* note 290 (“The secret origins, military involvement, acquisition of key technologies from a proliferation network, violation of IAEA

A critical question for any legal mode of capability assessment, but especially for the reasonable necessity approach, is when and how heavily to credit propensity inferences.

Take the suggestion made by both the U.S. and British governments that Saddam Hussein's prior use of chemical weapons against his own citizens revealed a likelihood that he still had, or was bent on reacquiring, WMD. In its public case about Iraq's WMD capability before the 2003 invasion, the British government highlighted Iraq's breaches of various international arms control conventions³⁰⁶ and emphasized that "Saddam has pursued a long-term programme of persecution of the Iraqi Kurds, including through the use of chemical weapons."³⁰⁷ In his U.N. Security Council presentation, Secretary of State Powell reminded that "Saddam Hussein has used these horrific weapons—on another country and on his own people. In fact, in the history of chemical warfare no country has had more battlefield experience with chemical weapons since the First World War than Saddam Hussein's Iraq."³⁰⁸

What is the evidentiary logic behind such statements? Skeptics may be tempted to dismiss these statements about past conduct as designed to obfuscate a lack of evidence about present capabilities. And certainly they are highly relevant to the issue of future *intent to use* WMD. Viewing them in evidentiary terms about capability, however, there are various ways in which propensity inferences could factor into assessments. Consider the following syllogisms that might support claims that Iraq had rebuilt or was rebuilding WMD:

- A state that formerly had and used WMD is likely to have them today (or seek them tomorrow) because its former use reveals its strong belief in their strategic utility.
- A state that was willing to use WMD against its own population in the past is the type of regime or has the type of leadership ideology that is likely to have or seek WMD.
- A state that commits mass atrocities against its own population deserves no benefit of the doubt, and instead should be presumed to have or seek WMD unless it assures otherwise.

safeguards, false reporting to the IAEA, and denial of IAEA requests for access to individuals and locations also belie assertions of peaceful intent.”).

306. See BRITISH ASSESSMENT OF IRAQ'S WMD, *supra* note 283, at 33–34.

307. *Id.* at 44; see also DIR. OF CENT. INTELLIGENCE, IRAQ'S WEAPONS OF MASS DESTRUCTION PROGRAM 4 (2002) (detailing Iraq's history of breaching U.N. Security Council Resolutions related to WMD dating back to 1991).

308. Powell Remarks, *supra* note 283, at 10.

- A state that previously committed mass atrocities with WMD is unlikely to be checked from pursuing WMD by international law and processes.

In considering the reasonableness of relying on any such propensity logic, one natural question to ask is how accurate the logic is likely to be. After all, it turned out to be dangerously misleading in the Iraq case: “Given Iraq’s history with WMD, its desire for regional dominance, and the weaknesses in its conventional military forces, the [Intelligence] Community did not consider the possibility that Saddam would try to achieve such intimidation and deterrence while bluffing about his possession of WMD.”³⁰⁹ Political scientists have spent decades studying this issue but there exists no consensus based on empirical data.³¹⁰ It might even be that those contemplating self-defensive force against a notorious human rights-abusing state are especially susceptible to biased assessments based on culturally skewed views of state decisionmaking.³¹¹

It would obviously be helpful to have available reliable, direct measures of motive or intent—clear indicators of a state’s state of mind—but those tend to be hard to come by in international affairs,³¹² and most proliferating states proclaim publicly and privately their *non*-military intentions. That said, as noted above there is no escaping some reliance on propensity inferences because of the limits of forensic evidence and the likelihood that many WMD-production or arsenal features appear almost indistinguishable from non-military programs without some understanding of their likely purpose.³¹³

Besides accuracy, a second question to ask is whether it is legitimate to draw propensity inferences in these situations. Seen not through the eyes of the United States but through those of weaker states—or especially those who ultimately might be the target of precautionary force—the idea that past behavior or strategic and political

309. WMD COMMISSION REPORT, *supra* note 67, at 151.

310. See William C. Potter & Gaukhar Mukhatzhanova, *Divining Nuclear Intentions: A Review Essay*, 33 INT’L SECURITY, Summer 2008, at 139; Scott D. Sagan, *Why Do States Build Nuclear Weapons?: Three Models in Search of a Bomb*, 21 INT’L SECURITY, Winter 1996–97, at 54.

311. Cf. Richard S. Bell, *Decision Theory and Due Process: A Critique of the Supreme Court’s Lawmaking for Burdens of Proof*, 78 J. CRIM. L. & CRIMINOLOGY 557, 581–82 (1987) (explaining how American evidentiary rules are sometimes structured to compensate for widespread inferential biases). On the role of cognitive biases in shaping threat perception, see Robert Jervis, *Perceiving and Coping with Threat*, in PSYCHOLOGY AND DETERRENCE 13 (1985).

312. Indeed, one problem with discerning intentions is that they may not exist (a government may be undecided) or may change. See generally JERVIS, *supra* note 280.

313. See Elbridge A. Colby, *Making Intelligence Smart*, POL’Y REV., Aug.–Sept. 2007, at 71, 78 (“It is precisely in the nexus between capabilities and intentions that the toughest intelligence challenges are to be found.”).

circumstances could give rise to presumptions of WMD development will be viewed unsympathetically. The U.N. Charter system is built, after all, upon sovereign equality.³¹⁴ In the eyes of weaker states, the United States and other nuclear powers also have not lived up to their end of the Non-Proliferation Treaty bargain, to provide civilian nuclear technology to those who want it and to work toward their own military denuclearization.³¹⁵ Yet these inferential judgments will inescapably affect assessments of threats, if not as evidence of WMD capability designs, then as evidence of hostile intentions or as reason to reduce the overall standard of proof required for defensive measures.³¹⁶

One way to address these objections is to frame propensity arguments in terms of violations of U.N. Charter norms and Security Council dictates, as well as other solid international legal norms. That is, it may be viewed as more legitimate to draw inferences based on behavior that a state has no right to engage in in the first place—such as activities prohibited by international agreements. It may seem hypocritical, even cynical, to traditional view proponents to draw negative inferences against states for violating international rules as part of an effort contemplating use of force outside the U.N. Security Council system. But it has the advantage of channeling evidentiary logic—and ultimately precedent—in terms of a common, universally respected set of expectations.³¹⁷

314. See U.N. Charter art. 2, para 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”); see also Lee, *supra* note 110, at 148 (“Sovereign equality is the concept that every sovereign state possesses the same legal rights as any other sovereign state at international law.”).

315. See Treaty on the Non-Proliferation of Nuclear Weapons art. IV, para. 2, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (“All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy.”); *id.* art. VI (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”); see also Andrew Flibbert, *After Saddam: Regional Insecurity, Weapons of Mass Destruction, and Proliferation Pressures in Postwar Iraq*, 118 POL. SCI. Q. 547, 557–58 (“[A]s a matter of political reality, probably all sovereign states question the U.S. arrogation to itself of the right to limit their possession of WMD while continuing to expand American capability and knowledge in this domain.”).

316. For an early expression of this idea, see EMMERICH DE Vattel, *THE LAW OF NATIONS* 337 bk. 3, § 44 (S & E Butler 1805) (“When once a state has given proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of suspicion to her neighbours, whose duty it is to stand on their guard against her.”).

317. See Johnstone, *supra* note 167, at 440–51.

C. Burden-Shifting and Risk Allocation

Another reason why forensic evidence alone is likely to be insufficient to establish WMD capability assessments with high certainty is because states seeking WMD may refuse to allow international inspectors or may fail to provide them with full accounting of their dual-use activities. To what extent should such refusal contribute to a conclusion that the state is hiding weapons or programs? Put another way, under what circumstances should the risk of erroneous assessment be shifted onto the alleged proliferators?³¹⁸

A major part of the U.S. and British case against Iraq turned on inferences about its refusal to allow U.N. inspectors full and unrestricted access to alleged WMD facilities. President Bush explained in his October 2002 remarks to the nation that “[t]he U.N. inspections program was met with systematic deception. The Iraqi regime bugged hotel rooms and offices of inspectors . . . they forged documents, destroyed evidence, and developed mobile weapons facilities to keep a step ahead of inspectors.”³¹⁹ The CIA in its public dossier similarly emphasized Iraq’s pattern of deception and withholding of information as evidence of WMD development.³²⁰ The United Kingdom, too, underscored “that Saddam has learnt lessons from previous weapons inspections, has identified possible weak points in the inspections process and knows how to exploit them.”³²¹ The implication of these statements was either that Iraq’s past behavior showed a likelihood that it was building WMD, or that the burden of proof as to its WMD capability ought to have been lowered on account of its prior behavior.

But, again, in the Iraq case this logic proved misleading: the refusal to submit to thorough inspection did not reflect Iraq’s possession of WMD programs but may have even been designed to avoid revealing to domestic and regional rivals that it did *not* have such programs. What is somewhat ironic in the case of Iraq (and likely other cases) is that Saddam probably *wanted* some observers—especially regional rivals—to draw a negative inference about his WMD efforts:

318. Again, Vattel considered this problem, and suggested that “[neighbor states] may come upon [a state] at the moment when she is on the point of acquiring a formidable accession of power,—may demand securities,—and, if she hesitates to give them, may prevent her designs by force of arms.” VATTEL, *supra* note 316, at bk. 3, § 44.

319. President’s Address to the Nation on Iraq from Cincinnati, Ohio, 34 WKLY COMP. PRES. DOC. 1716 (Oct. 7, 2002).

320. DIR. OF CENT. INTELLIGENCE, *supra* note 307, at 5. (“In the absence of inspectors, Baghdad’s already considerable ability to work on prohibited programs without risk of discovery has increased, and there is substantial evidence that Iraq is reconstituting prohibited programs.”).

321. BRITISH ASSESSMENT OF IRAQ’S WMD, *supra* note 283, at 19.

[I]n an attempt to project power—both domestically as well as against perceived regional threats such as Iran and Israel—Iraq chose to obfuscate whether it actually possessed WMD. As a result, the U.S. Intelligence Community—and many other intelligence services around the world—believed that Iraq continued to possess unconventional weapons in large part because Iraqis were acting as if they *did* have them.³²²

Indeed, “even when there was nothing incriminating to hide, the Iraqis did not fully cooperate with the inspectors, judging that an effective United Nations inspection process would expose Iraq’s *lack* of WMD and therefore expose its vulnerability”³²³ Many believe that Iran may currently be exaggerating its uranium enrichment capabilities in order to create a perception that its nuclear development progress is irreversible.³²⁴

When and how should negative inferences drawn from deliberate failure to disclose information form part of a reasonable assessment? Or, as a corollary, who ought to bear the risk of mistaken assessments based in part on a party’s refusal to provide accurate information?

In effect, drawing a negative inference (that is, that there is a greater probability that a state has WMD) from its intransigence in revealing information shifts some burden of persuasion onto the suspect state: absent evidence showing that it does *not* have WMD, its impairment of inspections justifies an inference that it does. Looking by analogy to evidence law in the domestic context, such burden-shifting occurs all the time. It is common throughout the law to place proof burdens on the party with best access to information, or who can provide it at the least cost.³²⁵ The evidential damage doctrine, for example, shifts the burden of persuasion to the defendant in certain circumstances when he wrongfully contributes to uncertainty about key facts, and “missing witness” instructions sometimes allow adverse inferences against parties that refuse to make available witnesses who could resolve factual disputes.³²⁶

322. WMD COMMISSION REPORT, *supra* note 67, at 148; *see also* Cent. Intelligence Agency, *Regime Strategic Intent*, in 1 COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQI WMD 34 (2004).

323. WMD COMMISSION REPORT, *supra* note 67, at 153 (emphasis added).

324. *See* David E. Sanger & William J. Broad, *Allies’ Clocks Tick Differently on Iran*, N.Y. TIMES, Mar. 15, 2009, at WK1.

325. *See generally* Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997) (using economic models to show that properly assigned burdens of proof economize the transmission of information to the court).

326. *See* ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 167–70, 240–41 (2005).

There is also some precedent for such an approach in ICJ jurisprudence.³²⁷ In the first major ICJ case applying the U.N. Charter use of force rules, the *Corfu Channel* case, the court confronted an issue of adjudicating disputed facts, over whether Albania knew or should have known of mines illegally deployed in its territorial waters.³²⁸ Although the court did not find that Albania's position as the party best situated to prove or disprove the allegation was alone sufficient to shift onto it the burden of disproof,³²⁹ the court did note that such burden-shifting might be appropriate in cases where such a party inhibits discovery.³³⁰ Moreover, it went on to explain that:

[T]he fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.³³¹

Perhaps similarly a state that refuses to disclose or permit inspectors ought bear a greater share of the risk of erroneous military intervention, since its refusal to provide information likely contributed to that error.

Probably in part due to the Iraq experience, IAEA Director Mohamed ElBaradei avoided publicly drawing a negative inference from Iran's refusal to come forward with required information: "if we do not obtain the necessary information and if we do not get immediate and full co-operation by Iran, we will not be able to verify the Iranian programme. And that is in itself a conclusion—that we are unable to verify. But it is not a positive conclusion because it casts doubt on the whole system."³³² Rather than insinuating a negative inference from Iran's intransigence, on another occasion ElBaradei has said that "unless Iran is able to provide answers to the Agency about our concerns, then we will

327. See Teitelbaum, *supra* note 264, at 129–39.

328. See *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 4 (Apr. 9).

329. See *id.* at 18.

330. See *id.*

331. *Id.*

332. Dr. Mohamed ElBaradei, Dir.-Gen., IAEA, Director General's Remarks to the IAEA Board of Governors During Its Meeting (Sept. 9, 2003), available at <http://www.iaea.org/NewsCenter/PressReleases/2003/DGIran9Sept03.pdf> (last visited Oct. 1, 2009).

continue to be in a position where we have to reserve judgment about their programme.³³³

While the Iraq errors demonstrate a need for caution in drawing adverse factual inferences based on a state's refusal to disclose information, such a principle might still promote accuracy in the long term if states then come to understand that their intransigence may shift the burden of persuasion against them. Put another way, a burden-shifting rule like this has the effect of allocating risk of error to the subject state, which has greater incentive to comply with information requests. In essence, a state that refuses to disclose or permit inspectors ought to bear a greater share of the risk of erroneous military intervention, since its refusal to provide information likely contributed to that error. Especially if one believes that deliberately feigning a WMD capability is destabilizing, shifting the burden of persuasion or shifting the allocation of error risk may create stabilizing counter-incentives.³³⁴

With regard to the legitimacy of such burden or risk-shifting, one might object that states generally ought not to be required to open their military and industrial secrets to the world, especially at gunpoint. Indeed, opening oneself to mandatory international inspections or military information requests cuts deeply into the core of sovereignty, but generally such infringements are legitimate if based on international legal obligation, especially consensual treaty-based regimes.³³⁵ Here law has a powerful role to play, and again the process orientation of the traditional view can help bolster the evidentiary logic so necessary to the functioning of objective reasonableness analysis.

Consider U.N. Security Council Resolution 1441, which contained the following provision: “[F]alse statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations”³³⁶ Most legal analysis of this provision has focused on the so-called “automaticity” debate: that is, whether by declaring a failure to disclose accurate information to be a material breach, Resolution 1441—by reference to earlier Iraq resolutions authorizing the use of force to enforce Iraq's obligations stemming from the 1991 Gulf

333. Press Release, IAEA, Director General Briefs Press on Iran/DPRK (Mar. 5, 2007), available at http://www.iaea.org/NewsCenter/News/2007/dg_iran-dprk.html (last visited Oct. 6, 2009).

334. See *supra* note 42 and accompanying text (discussing the destabilizing effects of perceived WMD threats).

335. See Blix, *supra* note 184, at 9–10.

336. S.C. Res. 1441, para. 4, U.N. Doc. S/RES/1442 (Nov. 8, 2002).

War—was automatically licensing the use force again.³³⁷ Also important, however, is the evidentiary notion this provision laid down: that informational gaps or distortions created by the suspected party will be interpreted against it.³³⁸ Such statements allowed Secretary Powell to declare in his U.N. Security Council presentation that “[t]he Council placed the burden on Iraq to comply and disarm, and not on the inspectors to find that which Iraq has gone out of its way to conceal for so long.”³³⁹ While not going so far as to say that failure to provide information would give rise to negative inferences about hidden capabilities, the marker laid down in Resolution 1441 at least helped legitimate allocation of some risk of error to the breaching party by reference to a near-universally respected mandate that overrides, by reason of the Security Council’s primacy, baseline sovereignty expectations.

The case of Iran also shows how international legal processes—the U.N. Security Council and IAEA working in tandem—can help legitimate evidentiary presumptions based on deliberate obfuscation. In that case it has occurred incrementally. In June 2003 the IAEA reported that Iran had failed to meet its Non-Proliferation Treaty obligations by failing to report on nuclear material, facilities, and activity.³⁴⁰ In its November 2003 report, the IAEA took a half-step toward shifting the burden of persuasion regarding WMD allegations to Iran. While noting that “[t]o date, there is no evidence that the previously undeclared nuclear material and activities . . . were related to a nuclear weapons programme,” it went on to state that “given Iran’s past pattern of concealment, it will take some time before the Agency is able to conclude that Iran’s nuclear programme is exclusively for peaceful purposes.”³⁴¹ In other words, a body of forensic evidence that might otherwise be assessed in favor of the subject state would not be, in light of its prior practice of concealment. By 2005, the IAEA declared that Iran’s history of concealment of nuclear activities, coupled with the IAEA’s lack of confidence in Iran’s claims of peaceful nuclear development intentions, raised issues of international peace and security appropriate for the U.N. Security Council.³⁴²

337. See Greenwood, *supra* note 37, at 33–34.

338. See Greenwood, *supra* note 19, at 690–95.

339. See Powell Remarks, *supra* note 283.

340. See IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by the Director General*, para. 32, IAEA Doc. GOV/2003/40 (June 6, 2003), available at <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf> (last visited Oct. 6, 2009).

341. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by the Director General*, para. 52, IAEA Doc. GOV/2003/75 (Nov. 11, 2003), available at <http://www.iaea.or.at/Publications/Documents/Board/2003/gov2003-75.pdf> (last visited Oct. 6, 2009).

342. See IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution Adopted on 24 September 2005*, IAEA Doc. GOV/2005/77 (Sept. 24,

Recently the Security Council referral process was used to further build international expectations of disclosure and establish the proposition that Iran's lack of cooperation posed dangerous risks to peace. In March 2006, the U.N. Security Council President called on Iran to take steps required by the IAEA's resolutions.³⁴³ Then in December 2006 the U.N. Security Council passed a resolution expressing serious concern over the outstanding issues cited in many IAEA reports and resolutions, criticizing Iran's incomplete cooperation.³⁴⁴ The March 2008 U.N. Security Council resolution criticized Iran's continued refusal to cooperate with the IAEA and outlined further steps to enforce previously authorized measures to restrict Iran's access to nuclear program materials.³⁴⁵

This chronology is typically thought of in terms of escalatory coercive pressure, tightening the sanctions noose.³⁴⁶ Another way to view it, however, is laying the legal foundation for evidentiary burden-shifting through legal process.

D. Embedded Policy Questions

There is, of course, a danger in relying heavily on legal processes to strengthen adverse inferences from non-compliance: If failure to abide strictly by the disclosure terms of Non-Proliferation Treaty or other arms control conventions is used not merely to assert a breach of legal duty but as part of an evidentiary case to justify armed attack, potential proliferators will have less incentive to sign on to them to begin with. The reliance on such inferences in one case may undermine longer-term efforts to combat proliferation, although the relative risks depend in part on to what extent arms control and non-proliferation agreements themselves should be enforced through carrots or sticks.³⁴⁷

More broadly, the use of force regulatory regime needs to be considered within a broader international legal context, including its overlap and interaction with the non-proliferation regulatory regime. Although

2005), available at <http://www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf> (last visited Oct. 6, 2009).

343. See President of the Sec. Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2006/15 (Mar. 29, 2006).

344. See S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006).

345. See S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008).

346. See generally Dennis Ross, *Iran: Talk Tough with Tehran*, NEWSWEEK, Dec. 8, 2008, at 38–39.

347. See BYMAN & WAXMAN, *supra* note 3, at 201–25; Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337 (2007); see also Chyba, *supra* note 4, at 136 (“An effective strategy for biological security will encompass nonproliferation, deterrence, and defense, but the required mix of these components will be very different from those in strategies for nuclear or even chemical weapons.”).

the frequency with which precautionary force is used to combat WMD proliferation will almost certainly remain very low, the arguments relied on to support it will influence other states' behavior. A choice among evidentiary principles ought therefore to reflect a judgment whether WMD proliferation is best combated with coercive threats of military force, engagement through international arms control regimes, or a combination thereof.

As stated at the outset of this Part, evidentiary principles of international law and use of force regulation will emerge, if at all, through a process of international legal discourse and argumentation, not a formalized statement.³⁴⁸ One value of working through the evidentiary questions posed in this Part is to reveal the policy questions lying just below the surface of use-of-force debates. The standard of proof question, for example, turns on how the relevant international actors aim to balance false positives and negatives. This is a matter of calibrating competing risks. The propensity inferences question turns on what conditions or behavior by "bad" states should diminish the benefit of the doubt normally accorded to "good" states about activities that could signal WMD development. This is a matter of conditioning sovereign equality. And the burden-shifting question turns on how best to promote adherence to the non-proliferation regime. This is a matter of international diplomatic strategy.

The reasonable necessity approach helps bring these issues into focus, by demanding analysis of the substantive criteria that should guide legal uses of force, which in a world of capability uncertainty includes factual judgment criteria. The same policy questions, however, still percolate beneath the surface in the traditional view's world. Deliberative processes like U.N. Security Council decisionmaking might force states to confront these questions, but they might not. The policy and epistemic challenges discussed in this paper are already sure to arise in the immediate term with respect to Iran and North Korea. In the longer-term, as President Obama recently explained during his European diplomatic summit, the countries will continue to pose dire transnational security predicaments.³⁴⁹ Even if one ultimately concludes that the traditional

348. See *supra* Introduction to Part IV.

349. See Michael D. Shear & Craig Whitlock, *Obama Calls for a World Without Nuclear Weapons*, WASH. POST, Apr. 5, 2009, at A1; President Barack Obama, Remarks by President Obama at Strasbourg Town Hall (Apr. 3, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-at-Strasbourg-Town-Hall/ (last visited Oct. 6, 2009) (outlining a new U.S. approach to combating proliferation, including arms control, strengthening the NPT, and international regulation of nuclear materials). In September 2009, the U.N. Security Council endorsed a U.S. resolution calling for nuclear disarmament efforts. See *UN Council Endorses Nuclear Curbs*, BBC NEWS, Sept. 24, 2009, available at <http://news.bbc.co.uk/2/hi/americas/8272396.stm> (last visited Oct. 6, 2009); David E. Sanger, *Secu-*

view approach is superior as to regulating force, the questions prompted through the reasonable necessity inquiry should produce more informed collective decisionmaking.

CONCLUSION

The purpose of this Article was to explore how international legal rules on the use of force should handle emergent and inescapable intelligence gaps and uncertainties about adversary states' WMD capabilities. It argues that a reasonable necessity approach to use of force against WMD threats—and with it an objective standard of assessing WMD capability—operating as a narrow exception to formal U.N. Security Council authorization best balances competing risks. However, it also argues that rather than viewing the process-oriented approach of the traditional view and the more fluid standards of the reasonable necessity approach as mutually exclusive, they can operate in tandem to reinforce each other. To do so effectively, greater attention must be paid to the evidentiary issues explored in Part III.