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Worth A Pound Of Cure? An Empirical Assessment Of The Bush Doctrine And Preventive Military Action

Paul F. Diehl

Shyam Kulkarni

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Paul F. Diehl and Shyam Kulkarni[1]

ABSTRACT

The Bush Doctrine, or the proposal that allows the use of military force preventively to address prospective attack from terrorists or involving weapons of mass destruction, has been debated from various normative and legal vantage points. In this article, we introduce the new evaluative criterion that such military action must also produce the desired outcomes of defeating opponents and preventing future attacks. We test the efficacy of preventive military actions over the last two centuries. We conclude that using military force in a preventive fashion provides very limited, if any value, to states that employ this strategy. At best, there is less than an even chance of victory in such circumstances and this requires a full-scale war. The utility of preventive strikes diminishes tremendously in attacks short of war, and indeed the minimal success rate (around

[1] Paul F. Diehl is the Henning Larsen Professor of Political Science and Professor of Law at the University of Illinois at Urbana-Champaign. Shyam Kulkarni is a Ph.D. Candidate in Political Science at the University of Illinois at Urbana-Champaign. The authors would like to thank Lesley Wexler, Tom Ginsburg, Charlotte Ku, Alexander Balas, and the faculty at the University of Illinois Program in Law, Behavior, and Social Sciences for their comments and suggestions.

10%) is no better than using coercive diplomacy by merely threatening force rather than actually using it. Preventive actions also did not significantly delay the appearance of new security threats and indeed such actions produce the conditions that enhance the maintenance of international rivalries, rather than contributing to their resolution. Finally, available evidence suggests that preventive strikes are not well-suited to terrorist threats, and states might be reluctant to employ them in any case. Studies of retaliation to terrorist attacks find little value to the former, with no long term deterrent effects.

I. INTRODUCTION

The United States' invasion of the Republic of Iraq ("Iraq") in March 2003 was not in response to an armed attack or any particular military action by the Saddam Hussein ("Hussein") regime against the U.S. or its allies. Neither was such an attack imminent nor were any human lives in danger at the time. Yet, the United States justified its actions, in part, by reference to international law in what has become known as the Bush Doctrine,[2] which is a "claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that is not yet operational and hence is not yet *directly* threatening, but which, if permitted to mature, could be neutralized only at a high, possibly unacceptable, cost."[3] The U.S. or Israel could also use such a

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[2] NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 9, 14 (2002), *available at* http://merln.ndu.edu/whitepapers/USnss2002.pdf (last visited Nov. 25, 2010). The idea of preventive military actions or "anticipatory self-defense" predates Bush Administration policy and action, although its prominence is more recent. For a brief history, see Chapter 1 of ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 153-57 (2007). Note also that anticipatory self-defense is not necessarily the only law based justification with respect to the invasion of Iraq. The United States and others might have cited the Iraqi violation of the cease-fire agreement part of UN Resolution 687; *see* Yoram Dinstein, Remarks, *Self-Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L. L. PROC.147, 149 (2003).

[3] W. Michael Reisman, Remarks, *Self Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L. L. PROC. 142, 143 (2003).

justification in any strike against Iranian nuclear facilities,[4] or for preventive strike targeting terrorist training bases or groups that post a threat to national security.[5]

Even after the fall of the Hussein regime in Iraq, the Bush Doctrine remains the subject of considerable debate. Among critics of U.S. foreign policy, the Bush Doctrine is little more than a veiled justification for building a U.S. empire and a dangerous precedent by which powerful states could subjugate the weak.[6] Among legal scholars, the debates are less polemical and much more focused on how preventive uses of force can fit into existing international legal conceptions of self-defense.[7] Other analysts assume more of an advocacy position, noting the deficiencies of the international legal regime and advocating that the Bush Doctrine, or some variation of it, should be incorporated into legal canon.[8]

Amidst all the controversy and competing positions, one notable evaluation criterion has been lacking: does the Bush Doctrine actually work in practice? That is, does it achieve its desired ends? One might argue - philosophically or morally - in favor or against the Bush Doctrine, but its appropriateness as a legal principle depends fundamentally on its efficacy. If using military force preventively does not remove threats or deter future challenges, then the case for its legal recognition is largely rendered moot. Any time a new legal rule is proposed, there is significant uncertainty as to its outcomes, including those that are unintended. One way to evaluate

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[4] *See* Christian M. Henderson, *The 2006 National Security Strategy of the United States: The Pre-Emptive Use of Force and the Persistent Advocate*, 15 TULSA J. COMP. & INT'L L. 1, 4, 8 (2007).

[5] *See* Thomas Hunter, *Targeted Killing: Self-Defense, Preemption, and the War on Terrorism*, OPERATIONAL STUDIES (Nov. 26, 2010), http://www.operationalstudies.com/mootw/Targeted%20Killing%20Research%20PaperOS.pdf.

[6] Michael Cox, *Empire, Imperialism, and the Bush Doctrine*, 30 REV. INT'L STUD. 585, 603 (2004).

[7] *See, e.g.*, Thomas R. Anderson, *Legitimizing the New Imminence: Bridging the Gap Between Just War and the Bush Doctrine*, 8 GEO. J.L. & PUB. POL'Y 261, 293 (2010).

[8] *See, e.g.*, Robert J. Delahunty & John Yoo, *The George W. Bush Administration: A Retrospective: The "Bush Doctrine": Can Preventive War Be Justified*, 32 HARV. J.L. & PUB. POL'Y 843, 865 (2009) (concluding that the Bush Doctrine "fell within the broad traditions of American strategic thought" and stating that a legal position always forbiting preventative war would be incoherent).

such proposals is to collect and analyze available empirical evidence about its effects. Indeed, the evaluation standard of practical utility has been adopted in assessing other legal controversies involving the use of force.[9] Implicitly, commentators seem to assume that the Bush Doctrine is effective, or at least that effectiveness is a relevant consideration, given that failure of other alternatives, many of them diplomatic, must occur before preventive military force is justified; such "last resort" standards in the face of failed alternatives only carry validity if the final actions achieve what the alternatives could not.[10] Fortunately, in the case of the Bush Doctrine, some empirical evidence is available to evaluate such claims and assumptions.

In this article, we provide the first empirical assessment of the viability of the Bush Doctrine as a strategy for meeting threats to international security. We do so by examining the record of states launching military actions - do they win the wars that they start? When military action is short of war, are they successful in those ventures? Does such military action deter or prevent future military challenges from the targeted opponent? Does the military action end the long-term threat of the targeted state? Does the frequency of terrorist actions decrease following the employment of military force? Based on these analyses, we can determine whether actions permitted by the Bush Doctrine are successful and thereby whether there might be grounds for justifying such actions as part of international law.

We begin our analysis with an overview of the traditional principles underlying international law and the use of force, specifically self-defense and standards outlined by the United Nations. We then move to an articulation of the Bush Doctrine and the rationale underlying its purpose, where we will also identify evidence that might indicate its effectiveness and thereby set the stage for the empirical analysis of international conflict since 1816.

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[9] *See* John C. Yoo & Jide Nzelibe, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2524 (2006). For a dissenting view, see Paul F. Diehl & Tom Ginsburg, Essay, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239, 1255 (2006).

[10] *See, e.g.*, Delahunty & Yoo, *supra* note 8, at 864.

II. TRADITIONAL CONCEPTIONS OF THE INTERNATIONAL LAW OF FORCE

Provisions for *jus ad bello* have a long tradition in philosophical writings and customary law.[11] In modern times, the United Nations Charter ("Charter") has been the fundamental starting point for defining when and how states might use military force. The primary goal of the Charter was to create a system, based in part on law, which would prevent the recurrence of the devastating wars that characterized the first half of the twentieth century. Nevertheless, the Charter provisions on the use of force drew heavily on historical tradition. Fundamental to these rules was Article 2, Paragraph 4, which states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[12] Such a prohibition places a presumption against military action, and thus any permitted uses of force have to be exceptions to this limitation.

The primary exception to the prohibition against military force is the long-recognized right of self-defense. Nevertheless, as Christine Gray notes, "[t]he law on self-defence is the subject of the most fundamental disagreement between states and between writers."[13] Still, states, similar to individuals, have the right to respond to attacks by using military force themselves under some conditions. This right is reflected in Article 51 of the Charter:

> 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. Measures taken by Members in the

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[11] This refers to the law that regulates the conditions under which states can use military force or go to war, as opposed to *jus in bello*, which deals with the rules involving the conduct of war such as those involving protection of civilians and prisoners of war.

[12] U.N. Charter art. 2, para. 4.

[13] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 114 (Malcom Evans & Phoebe Okowa eds., 3rd ed. 2008).

> exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security[14]

This provision recognizes the right of collective as well as individual self-defense with provisions for regional security organizations.[15]

The reference to an "inherent right" to self-defense reflects its natural law origins and suggestive that such a right cannot be completely abrogated by subsequent agreements or practice. Nevertheless, Charter provisions and related rules regard the right of self-defense as limited. Indeed, the trend in international law has been toward greater restrictions on the use of force in general.[16] First, the Charter requires that an "armed attack" occur before a state can respond with military force on its own.[17] In this formulation, "anticipatory" self-defense in the face of yet unrealized threat is insufficient justification for military action.[18] Second, the right to take military action is temporary, until the Security Council takes action, presumably consistent with the collective security provisions outlined in Chapter VII.[19] Third, is the implicit restriction of proportionality, in which states can take only actions necessary to repel an attack and must not use military force in excess of the original attack.[20] Finally, self-defense is conceptualized as a right for states and in response to attack from other states; non-state actors are not accorded rights or obligations in this state-centric conception.

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[14] U.N. Charter art. 51.
[15] *Id.*
[16] *See, e.g.*, MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE "GLOBAL WAR ON TERROR" 6, 12 (2007).
[17] U.N. Charter, art. 51.
[18] In particular, such actions are not permitted with respect to terrorism. *See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005–2006 I.C.J.Y.B. 229.
[19] U.N. Charter art. 51.
[20] *See* JUDITH GARDHAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES 10 (James Crawford et al. eds., 2004).

There is some doubt that the traditional Charter restrictions were reflected in practice early on and were even less prevalent as the Cold War developed.[21] Except for self-defense, there were a number of modifications or caveats to the general prohibition against military force. The one with the longest historical legacy was the right of reprisal, which relates to the Biblical provision of "an eye for an eye." Military reprisals were permitted when there was an initial violation of international law and an unsatisfied demand, provided that the response was proportional to the original offense.[22] Although such actions would seem to be prohibited by Charter law, there is some evidence that such rights continued to be recognized in customary law after World War II.[23]

Beyond reprisals, the Definition of Aggression, adopted by the United Nations General Assembly in a 1975 resolution, sought to define unacceptable uses of military force.[24] Yet it also carved out exceptions to the Charter prohibitions for struggles in pursuit of national self-determination, anti-racist actions, and efforts at freedom from colonial domination:

> Nothing in this Definition...could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination:

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[21] *See* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM (1993).

[22] *Naulilaa Arbitration* (*Germany* v. *Portugal*), 2 Int. Arb. Awards 1013 (July 31, 1928).

[23] *See* Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 425-27 (1969).

[24] *See* Review Conference of the Rome Statute of the International Criminal Court, Kampala, May 31-June 11, 2010, *Resolution RC/Res.6: The Crime of Aggression,* RC/9/11 (June 11, 2010) ("'[A]ct of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.").

> nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.[25]

Of course, this resolution does not have the force of treaty law, and Western objections to the above-quoted provision suggest that it does not qualify as instant customary law either; unanimity or near unanimity is required for such designation.[24] Beyond these qualifications, efforts have been made to carve out room for the use of military forces in pursuit of other objectives valued by the international community. Such objectives include those that fall under the rubric of protecting democracy,[26] humanitarian intervention,[27] and the "responsibility to protect,"[28] to name a few of the most prominent attempts. Nevertheless, most of these provisions are not yet accepted law, or at the very least, are subject to considerable debate.

The UN Charter does not permit the kind of preventive military action envisioned in the Bush Doctrine. The standard interpretation of the Charter is that self-defense is permissible only if an actual armed attack occurs,[29] with no room for a looser standard.[30]

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[25] Definition of Aggression, G.A. Res. 3314 (XXIX), Art. 7, U.N. Doc.A/RES/9890 (Dec. 14, 1974).

[26] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 85 (1992) ("The international community long has asserted ... a right of all states to take ... military action to enforce aspects of the democratic entitlement... .").

[27] THOMAS G. WEISS, HUMANITARIAN INTERVENTION: IDEAS IN ACTION 11, 52 (2007) ("Of course military intervention may be undertaken for humanitarian motives... .").

[28] Christopher C. Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 720 (2007) (defining the responsibility to prevent and stating that it may require military action); *see also* Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFFAIRS 615, 623 (2008) (stating that states acknowledge they have a responsibility to protect their citizens and that the Security council is ready to use non-consensual force).

[29] Note that this also includes sending irregular forces to fight an opponent in addition to traditional military invasions and the like. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J 14 (June 27).

Whatever the legal status of the various exceptions noted above, none give legitimacy to the Bush Doctrine. For such preventive actions to be legal, provisions for anticipatory self-defense, or action prior to an actual attack, must be allowed.

Anticipatory self-defense is permitted under another set of criteria, but has questionable legal standing: the criteria outlined in the *Caroline* affair.[31] The *Caroline* affair occurred in 1837 and involved a ship preparing to transport men and materials to rebellious forces in Canada.[32] British forces seized and burned the vessel in American waters.[33] The United States protested these actions and U.S. Secretary of State, Daniel Webster, laid out a famous set of conditions before preemptory military actions were permitted, specifically, the "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation."[34] This declaration has been widely cited and repeated over the last two centuries, but it is not clear that customary practice has given it weight as international law. Indeed, anticipatory self-defense has been only rarely cited by states as justification for military action.[35]

Furthermore, the *Caroline* criteria are not sufficient to legitimize the kinds of actions envisioned under the Bush Doctrine; the former is designed to address preemptive strikes, whereas the latter envisions circumstances of preventive war. Although the terms preemption and prevention are used interchangeably in legal and political discourse, they are quite distinct when applied to uses of military force.[36] Preemption involves taking action when an attack

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[30] *See* Yoram Dinstein, *supra* note 2, at 148; *but see* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), *supra* note 29 (Schwebel, J., dissenting).

[31] TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 80-121 (Hunter Miller ed., Government Printing Office Vol. 4) (1934), *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.

[32] *Id.*

[33] *Id.*

[34] *Id.* at Enclosure 1.

[35] Gray, *supra* note 13, at 160-61, 163-64.

[36] Jack S. Levy, Research Note, *Declining Power and the Preventive Motivation for War*, 40 WORLD POLITICS 82, 89-91 (1987); Jack S. Levy, *Preventive War: Concepts and Propositions*, 37 INT'L INTERACTIONS 87, 88. *See also* Reisman, *supra* note 3, at 143 (making similar points between anticipatory self-defense and preemptive self-defense).

from an opponent is imminent, defined generally in terms of hours or days, such as when an enemy's troops are massing near the border. The logic is based on a tactical advantage, in that if a war is going to occur anyway, striking the first blow might allow the initiating party to be more successful, rather than responding to an attack that would compromise its ability to engage in self-defense. In contrast, as noted in the next section, the Bush Doctrine is preventive in character, allowing military force against a longer-term threat (not when an attack is immediate) and designed to eliminate future threats or challenges to national security, as well as undesirable outcomes from an attack.[37] In this way, it is a strategic rather than a tactical decision in the military sense. Thus, a strike against Iranian nuclear facilities is not concordant with *Caroline* provisions for anticipatory self-defense, given that a nuclear capable Iran, much less a nuclear attack from the state, is at best a few years away.[38]

Although some controversy exists over the exact requirements for the use of military force in *jus ad bello*, the Bush Doctrine represents a significant step beyond what has been proposed as exceptions or qualifications to the Charter's requirements for self-defense. The consensus opinion is that, as currently configured, the Bush Doctrine is a violation of international law.[39]

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[37] *See infra* Part III.

[38] *See generally Iran's Nuclear Program,* N.Y. TIMES (Sep. 7, 2010), http://www.nytimes.com/info/iran-nuclear-program/ (last visited Dec. 1, 2010).

[39] O'Connell, *supra* note 16, at 15; *see* Michael J. Glennon, Remarks, *Self Defense in an Age of Terrorism*, 97 AM SOC'Y INT'L. L. PROC 150, 150-51 (2003). *But see* Benjamin Langille, Comment, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001,* 26 B.C. INT'L & COMP. L. REV. 145, 146 (2003); Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense,* 72 UMKC L. REV. 123, 184-85 (2003).

III. THE BUSH DOCTRINE

Although the purported right of states to take preventive action has been labeled with the name of President George W. Bush, there is a longer history to such claims in the U.S. and beyond.[40] President Bush's immediate predecessors each presented policies consistent with the Bush Doctrine.[41] Yet, the Bush Doctrine itself dates to the aftermath of the September 11th (9/11) attacks in 2001. Rather than a fully articulated set of legal principles, the Bush Doctrine is better understood as a claim that the offensive use of military force is legitimate, both politically and legally, when faced with certain kinds of threats - specifically, with respect to terrorism and to rogue states pursuing weapons of mass destruction. Such justification took place in the context of specific threats against the U.S., but as a result, the assertions took the form of general American policies.

In light of the 9/11 attacks, the U.S. developed a policy in its September 2002 National Security Strategy that "our best defense is a good offense" and that the U.S. will act prior to any attack if necessary: "we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."[42] Less than six months later, then President George W. Bush expanded the potential targets of preventive actions to include dictatorial regimes that were pursuing weapons of mass destruction, specifically Iraq.[43]

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[40] W. Michael Reisman & Andrea Armstrong, *Centennial Essay: The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526-27 (2003) (summarizing recent history in regards to what has become known as "preemptive self-defense").

[41] *See* generally Alan Dowd, *Obama: The Bush Doctrine 2.0*, WORLD POL. REV. (Mar. 31, 2010), http://www.worldpoliticsreview.com/articles/5359/obama-the-bush-doctrine-2-0 (last visited Nov. 28, 2010) (stating that President Obama has yet to release publicly his own national security strategy so it is unclear whether he will repudiate the Bush Doctrine as suggested during his presidential campaign or merely adopt with his own modifications).

[42] National Security Council, *supra* note 2, at part III.

[43] George W. Bush, President of the U.S., 2003 State of the Union Address (Jan. 28, 2003), *available at* http://www.johnstonsarchive.net/policy/bushstun2003.html (last visited Nov. 29, 2010).

> Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.[44]

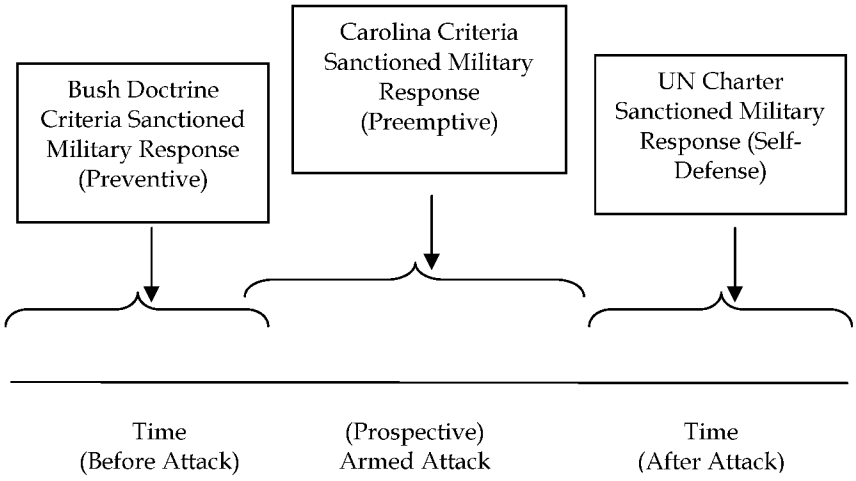

Figure 1: The Timing of Action: UN Charter, *Caroline* Criteria, and the Bush Doctrine

The major difference between the Bush Doctrine and other rules concerning the use of force revolve around the timing of the action in relation to the occurrence of a prospective attack. Figure 1 summarizes the differences between the Charter rules, the *Caroline* criteria (or preemptive strikes), and the Bush Doctrine (or preventive strikes). Charter provisions allow military actions only after an actual attack has occurred. Presumably, self-defense is permissible immediately after the attack has occurred, but this right is not unlimited in time. States may take action only for as long as necessary to repel an invader or until the threat has been removed. Except in extended wars, which are increasingly rare over time, this

[44] *Id.*

is generally a short period extending no more than year or two.[45] There are also set criteria to determine the timing of action in practice. The *Caroline* criteria permit military action only immediately *before* an attack occurs, as soon as indications are that such an attack is imminent. Although an exact point cannot be determined, one might presume that the window is quite narrow; it could be as little as hours and no longer than days or a week. The *Caroline* standard does not preclude defensive actions once a war has begun, so it would seem that military action could continue as long as necessary, similar to the Charter rules.[46]

The Bush Doctrine and preventive actions are much less precise in specifying the time for action. Defensive strikes occur before an attack occurs, but this could be weeks or years before a prospective attack and there is no explicit benchmark on how likely the military attack would have to be before a preventive action is justified.[47] Power transition theorists note that China will surpass the United States in material capabilities sometime in the middle 21st century and such a transition point has been associated with a major power war initiated by the rising state in the past.[48] Taking this as a cue, preventive action could extend back 40 years from the possible attack as well as any time up to the actual attack. The purpose of Bush Doctrine actions is to foreclose an attack, and therefore, there is no need to take defensive actions later as is the case with Charter or *Caroline* based actions.

U.S. policy has not specified conditions under which preventive strikes would be permitted nor ancillary rules associated with their use, although presumably other laws of war (e.g., *jus in*

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[45] Kevin Wang & James Lee Ray, *Beginners and Winners: The Fate of Initiators of Interstate Wars Involving Great Powers Since 1495*, 38 INT'L STUD. Q. 139, 151 (1994).

[46] O'Connell, *supra* note 16, at 17-18; *see also* Michael Skopets, *Comment, Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defence in International Law, 55 AM. U. L. REV.* 767, 768 (2006).

[47] O'Connell, *supra* note 16, at 39.

[48] Douglas Lemke & Ronald L. Tammen, *Power Transition Theory and the Rise of China*, 29 INT'L INTERACTIONS, 269, 270 (2003). *See* Ronald Tammen & Jacek Kugler, *Power Transition and China-US Conflicts*, 1 CHINESE J. OF INT'L POL. 35 (2006); *see* STEVE CHAN, CHINA, THE U.S., AND POWER-TRANSITION THEORY: A CRITIQUE (2008).

bello protections for civilians) would remain operative. In translating the Bush Doctrine into legal provisions, commentators have offered a series of recommendations. Robert Delahunty and John Yoo[49] outline a series of conditions under which preventive war might be justified: (1) an announced grievance; (2) motivation to protects own or allies' citizens; (3) some coalition of support; (4) following the failure of peaceful means; and (5) proportional force.[50] The first four conditions are relatively straightforward, but it is not clear how one would calculate proportionality given that no attack has occurred and any estimate of what damage an attack *might* precipitate is highly speculative.[51] Such conditions, however, still leave the decision to use force largely in the hands of states themselves.

Other scholars place greater restrictions on the use of force prior to an armed attack and might require certification of outside authorities. Lucy Martinez puts a burden of proof on the state initiating force, adds the condition of imminence (which essentially restricts anticipatory self-defense to preemptive strikes, excluding preventive ones), and requires recourse to the Security Council for all but the most immediate threats.[52] Even more restrictive, Thomas Anderson suggests an "International Court of Threat Assessment," a subsidiary of the Security Council, to adjudicate anticipatory self-defense claims.[53]

The legal rationale underlying the Bush Doctrine arises from the changing character of warfare over time and the inadequacy of Charter-based law to deal with these circumstances. Traditional rules on the use of force have concentrated on states as the exclusive actors, with individuals or groups only relevant as subjects of legal protection in the use of those forces. Yet, in the last several decades, non-state actors such as armed militias and terrorist groups have undertaken military operations. Identifying responsible actors and their use of force is different than conventional military attack, and the standard rules do not seem to apply. Terrorist attacks tend to be

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[49] These are scholarly opinions of the individuals written after official government service and hence do not represent official U.S. policy.
[50] *See* Delahunty & Yoo, *supra* note 8.
[51] O'Connell, *supra* note 16, at 39.
[52] Martinez, *supra* note 39, at 186-87.
[53] Anderson, *supra* note 7, at 263, 285.

single-shot events such that conventional self-defense responses are not operative; there is no ongoing invasion or attack against which one can respond. In such circumstances, laws of state responsibility dictate that the victim state file a claim against the state where the attack originated or against secondary state supporters of those perpetrating the acts. Yet states are not responsible for actions of terrorist groups unless the former exercise "effective control" over the latter.[54] Most often, however, states do not support or have control over the groups operating within its borders. In the case of a failed state, there might be no legitimate authority against whom a claim might be directed. Furthermore, this presumes that the geographic origin of the terrorist attack can even be determined; in fact, the planning, financial support, and execution might involve multiple states and not at all be transparent.[55] Furthermore, groups do not have legal status to have a claim directed against them directly, even if in the unlikely event that they might be so inclined to honor such legal responsibilities. The deterrent effect from traditional self-defense may not be applicable or credible against non-state actors and therefore they are not likely to be restrained in their actions; preventive action is said to be necessary when deterrence will not work.[56]

In addition, Charter-based self-defense provisions are inadequate in cases of attack using weapons of mass destruction. A nuclear attack could conceivably wipe out a target state's military forces or government structures, such that the ability to launch self-defense actions are precluded. As W. Michael Reisman explains:

> The introduction of vastly more destructive and rapidly delivered weapons began to undercut the

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[54] Rep. of the Int'l Law Comm'n, 53d sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001); Derek Jinks, Remarks, *Self Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L L. PROC. 144, 145-46 (2003).

[55] *But see* Richard N. Gardner, *Neither Bush nor the "Jurisprudes,"* 97 AM. J. INT'L L. 585, 588 (2003) (holding a contrary view on the adequacy of state responsibility law).

[56] Olumide K. Obayemi, *Legal Standards Governing Pre-emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the U.N. Charter and General International Law*, 12 ANN. SURV. INT'L & COMP. L. 19, 23-24 (2006).

> cogency of that [UN Charter] legal regime. The reason was simple: a meaningful self-defense could be irretrievably lost if an adversary with much more destructive weapons and poised to attack had to initiate (in effect, accomplish) its attack before a right of self-defense came into operation.[57]

In the case of geographically small states such as Israel, a large portion of society would be destroyed following a nuclear attack.[58] The magnitude of the harm is said to be so great that waiting for an attack is an unreasonable requirement; similar logic is used in local state law concerning battered women and Battered Women's Syndrome.[59] Most analogous, however, is the precautionary principle, one most notably applied in environmental law.[60] According to this principle, the mere prospect of significant harm - especially whose magnitude is great and effects are irreversible - is sufficient justification for government action. Uncertainty, or the probability of an event occurring, must be weighed against the magnitude of the harm; when catastrophic harm is possible (e.g., effects of global warming), then the presumption is tilted in favor of action rather than inaction. Such logic has even been directly applied to the Bush Doctrine; political figures have used rhetoric consistent with the

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[57] Reisman, *supra* note 3 at 142.

[58] Matthew Fuhrmann & Sarah Kreps, *Targeting Nuclear Programs in War and Peace: A Quantitative Empirical Analysis, 1941-2000*, 54 J. CONFLICT RESOL.831, 833, 853 (2010) (states are willing to accept substantial costs and potential international condemnation in order to eliminate the threat).

[59] *See* Michael Skopets, Comment, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 756 (2006) (linking battered woman's defense to state self-defense). *But see, e.g.,* Onder Bakircioglu, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 IND. INT'L & COMP. L. REV. 1, 31 (2009) (arguing that in the case of international relations, there is no systematic abuse that causes mental conditions, unlike in a domestic abuse case).

[60] James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 2 (1991);*See* CASS SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 61 (2005).

precautionary principle in justifying preventive strikes,[61] and scholars have looked at terrorism and nuclear war in the context of catastrophic risk.[62]

In seeking to address catastrophic risks, the proportionality requirement for use of force is more easily determined and satisfied. Any military action to destroy weapons of mass destruction would presumably have fewer negative consequences (e.g., less destruction, fewer lives lost) than an attack using those weapons. Thus, preventive strikes would not produce a disproportionate action, but indeed lead to more limited use of force than would otherwise be the case. This is certainly one of the bases for Israeli strikes against Iraqi (1981) and Syrian (2007) nuclear facilities, respectively.[63]

Critics of the Bush Doctrine cite its imprecision and the lack of clear standards for its application. The Bush Doctrine would create a right that nominally is open to all, but a *de facto* one that would be exercised primarily only by those with the military capabilities to do so - the most powerful states in the international system.[64] Only major power states would generally have the intelligence capabilities to detect specific long-term threats, and only those same states would be able to launch effective preventive military action. In addition, allowing further uses of military force opens up the possibility that some states, including the U.S., might exploit the Bush Doctrine, using it as a justification for a range of military actions.[65]

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[61] *See* Jessica Stern & Jonathan B. Wiener, *Precaution Against Terrorism*, 9 J. RISK RES. 393, 395 (2006).

[62] Gary Ackerman & William Potter, *Catastrophic Nuclear Terrorism: A Preventable Risk*, *in* GLOBAL CATASTROPHIC RISK (Nick Bostrom & Milan Cirkovic eds., 2008); *see generally* RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE (2004); Matthew C. Waxman, *The Use of Force Against States that* Might *Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1, 8-9 (2009).

[63] *See* Malfrid Braut-Hegghammer, *Revisiting Osirak: Preventive Attacks and Nuclear Proliferation Risks*, 36 INT'L SEC. 101, 132 (2001), for information about Israel's strike on Iraq; *see also* Leonard S. Spector & Avner Cohen, *Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime* (2008), http://mail.gees.org/documentos/Documen-03079.pdf, for information about Israel's strike on Syria.

[64] O'Connell, *supra* note 16, at 39.

[65] MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 50, 56 (Stephen Macedo ed., 2008).

There have been various arguments constructed for regarding the Bush Doctrine as accepted international law. These involve rationales based on instant custom,[66] *jus cogens*,[67] and *opinionecessitatis*.[68] Nevertheless, there is little indication that the Bush Doctrine is accepted law or practice. No state has explicitly adopted this position, and few states seem willing to express over support for it.[69] As noted above, the Bush Doctrine is contrary to the Charter and even to the *Caroline* criteria.[70] State practice with respect to anticipatory self-defense has been so rare as to indicate that new custom has not been established,[71] nor have the conditions that would make it established international law been fulfilled.[72]

As its legal status is, at best, uncertain, there are even more unanswered questions about the effectiveness of the Bush Doctrine. What would be evidence that the Bush Doctrine achieved its goals of removing threats? With respect to preventing terrorist threats, it is difficult to identify objective indicators. In seeking to detect the proverbial "dogs that do not bark," one would need to gauge whether military strikes deterred or prevented terrorist acts that would have happened otherwise. Of course, it is all but impossible to resolve that counterfactual: how can one determine whether a terrorist attack would have occurred had it not been for the military action? In a related fashion, if one were to employ the avoidance of catastrophic events, such as nuclear war or a massive terrorist attack, the net result would almost always be a positive assessment given the absence of the former and the rarity of the latter; it would also be

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[66] Langille, *supra* note 39, at 149-51.

[67] David B. Rivkin, Jr., Lee, A. Casey & Mark Wendell DeLaquil, *War, International Law, And Sovereignty: Reevaluating the Rules of the Game in a New Century Preemption and Law in the Twenty First Century*, 5 CHI. J. INT'L L. 467, 476 (2005) (*Jus Congens* refers to preemptory norms of international law that reflects the highest values of the international community and from whom no derogation is permitted).

[68] *See* Henderson, *supra* note 4 (*Opinionecessitatis* means that the action involved is necessary or unavoidable).

[69] *See* Reisman & Armstrong, *supra* note 40, 537.

[70] *See supra* pp. 11-13.

[71] David A. Sadoff, Article, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523, 572 (2009).

[72] Joel R. Paul, *The Bush Doctrine: Making or Breaking Customary International Law?*, 27 HASTINGS INT'L & COMP. L. REV. 457, 461 (2004).

very difficult to tie such "successes" to any military action, as opposed to other factors. Further complicating things is the rarity of Bush Doctrine actions or those explicitly justified along those lines. Indeed, even preemptive wars, which are more restrictive than preventive actions and include the condition of imminent threat, do not often occur.[73]

Despite these limitations, there are observable behaviors that can be used to assess the viability of preventive uses of force. One can look broadly at the success rate of uses of military force by the state that first undertook militarized actions in any confrontation; success can be considered both in short and long-term perspective. With respect to full-scale wars, the Bush Doctrine suggests that the initiator of such wars should be victorious; that is, if a state uses military force first, it must win in order to justify its actions.[74] Whether fighting the "war on terrorism" or against Taliban forces in Afghanistan, U.S. political and military leaders have repeatedly used the words "victory" or "win" to describe their preferred outcomes, although it is not always clear what these terms signify in those contexts.[75] Yet, wars are only a subset of military actions and a relatively small subset at that. One might argue that an effective military action is one where the objectives are achieved without the conflict escalating to full-scale war. That is, preventive action that defeats an opponent without the costs (i.e., time, lives, and resources) of war is clearly preferable to successful war initiation. Thus, one can look at the success rates of states that initiate military force, even when such actions do not lead to war; an example would be a bombing raid against an opponent's military or territorial bases.

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[73] Dan Reiter, *Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen*, 20 INT'L SEC. 5, 6 (1995).

[74] Scholars arguing for a more relaxed standard for preventive military action often justify the desirability of such actions on results that could only emerge from victory. *See, e.g.*, Delahunty & Yoo, *supra* note 8, at 847 ("intervening powers would also be deploying force to counteract a threat of violence - a threat that would be large in scale"); *But see*, Henderson, *supra* note 4, at 5; Anderson, *supra* note 7 at 265 (arguing an effort that is not victorious is unlikely to have this result.).

[75] *See generally* Philip H. Gordon, *Can the War on Terror Be Won? How to Fight the Right War*, FOREIGN AFF., Nov.-Dec. 2007, available at http://www.foreignaffairs. com/articles/63009/philip-h-gordon/can-the-war-on-terror-be-won.

In making the assessments above, there can be a simple determination of what percentage of military actions result in victory. Yet, a more nuanced assessment would include a comparative analysis with actions that fall short of military force. Is initiating military force superior to merely threatening it or other alternative actions? Many justifications of the Bush Doctrine assume that this is the case or at least that military force is appropriate when lesser actions have failed.[76] A comparison of success rates between actual uses of military force and merely threats can provide insight into this claim.

The above tests of Bush Doctrine effectiveness deal with the ability of military force to produce desirable outcomes in the short-term. This is important, but part of the purpose of using military force is to forestall future challenges or attacks from opponents. Thus, another measure of Bush Doctrine effectiveness is its ability to deter or delay future attacks against the state that used military force first. To do this, one can look at whether such attack occurred in a period following the preventive action or whether any actions were delayed relative to some baseline predicated on past behavior. In the specific case of terrorism, an assessment can be made when comparing attacks following the preventive action against the baseline rate of attacks prior to the action; this allows one to consider the effect of degrading extant terrorist capability as well as deterring further actions. This gives us some clues as to the long-term efficacy of uses of force.

Finally, any empirical evaluation of the Bush Doctrine should address the validity of the criticisms directed at it. One cannot evaluate how states can potentially use the right to use force in the future directly. Yet, there can be reference to patterns of behavior in the past to project how anticipatory self-defense might be used. The Bush Doctrine has been criticized as a tool available largely or exclusively to powerful states.[77] Thus, one can examine previous initiations of war and military force both for their frequency and

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[76] *See, e.g.*, Delahunty & Yoo, *supra* note 8, at 846; Gardner, *supra* note 55, at 589; Obayemi, *supra* note 56, at 19-20; *see generally* Rosana Vatanparast, *International Law Versus The Preemptive Use of Force: Racing to Confront the Specter of a Nuclear Iran*, 31 HASTINGS INT'L & COMP. L. REV. 783 (2008).

[77] O'Connell, *supra* note 16, at 39; Paul, *supra* note 72, at 458.

success rates with respect to the status of the states carrying out those actions. Specifically, do major powers initiate military force more often than weaker states, and are they more successful in those efforts? If so, this would give some indication that instituting the Bush Doctrine as international law would primarily benefit one group of states, even as it would be a right available to all.[78]

IV. THE EMPIRICAL EFFICACY OF THE BUSH DOCTRINE

In order to assess the effect that a more permissive standard for preventive military strikes would have, we examine the broad historical record. We employ data on international conflict events from the Correlates of War Project (the "COW Project"), encompassing the most expansive and detailed data collections used by scholars of international relations.[79] The first step is to consider the success rate of states that initiated wars. We turn to the Militarized Interstate Dispute (MID) data set, which records all instances in which at least one state displayed, threatened, or used military force against another state over the period 1816 to 2001.[80] We are initially concerned with a subset of those disputes, namely full-scale wars.[81] The state designated as the initiator is the one that first takes military action; for our purposes, this akin to a preventive strike as the state involved hopes that the result will be an outcome in its favor. Outcomes of disputes and wars are classified into four categories with reference to whether the initiator achieved its goals or not: (1) victory; (2) losses; (3) stalemates; and (4) compromises.[82] Only the

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[78] Of course, it could be argued that preventive strikes launched by major powers could have some spillover benefits to other states, especially those allied with the initiators of the strikes.

[79] CORRELATES OF WAR, http://www.correlatesofwar.org/ (last visited Nov. 27, 2010).

[80] *See* Faten Ghoson et. al., *The MID3 Data Set, 1993-2001: Procedures, Coding, Rules, and Description*, 21 CONFLICT MGMT. & PEACE SCI. 133 (2004).

[81] CORRELATES OF WAR, *supra* note 79 (The COW Project identifies and codes these as disputes with one thousand or more battle-related fatalities); *See also* MEREDITH REID SARKEES & FRANK WHELON WAYMAN, RESORT TO WAR: A DATA GUIDE TO INTER-STATE, EXTRA-STATE, INTRA-STATE, AND NON-STATE WARS, 1816-2007 (2010).

[82] There are nine potential outcomes specified in the MIDs dataset; victories for each side, yields by each side, stalemates, compromises, releases, unclear outcomes, and

first category can clearly be labeled a success for the Bush Doctrine and similar military acts. For example, the U.S. invasion of Grenada in 1983 led to the successful overthrow of the Cuban-backed government on that island.[83]

Table 1 below displays the outcomes that initiators have experienced in all wars. Several patterns emerge from the results. Advocates of the Bush Doctrine will note that victory for the initiator is the most frequent individual outcome, but this result is slightly worse than the flip of a coin as all other outcomes combined are more likely (>50%). Notably, war initiators lose more than a third of the time, suggesting that preventive military action might actually leave a state clearly worse off than had no action been taken.[84] Even a stalemate might be considered a failure given the high costs of war and that the initiator is no better off than when the war started.

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the joining of an ongoing war. Because releases pertain to the release of a fishing boat these cases were dropped from our analysis; the seizure of a fishing boat, is not in and of itself the type of situation consistent with a preventive strike. Similarly, wars coded as "joins ongoing war" were also removed from our analysis, as these are not new conflicts. Finally, the categories of victories and yields were compressed, such that victories by the initiator and yields by the recipient were coded as victories for the initiator while victories by the recipient and yields by the initiator were coded as losses for the initiator. Stalemates and unclear outcomes were combined to indicate no clear winner in the confrontation. Cases with a missing value for initiator or outcome were also dropped.

[83] *See generally* Gary Williams, *Prelude to an Intervention: Grenada 1983*, J. LATIN AM. STUD., 1997, for more on the U.S. invasion of Grenada.

[84] *See, e.g.*, Wang & Lee Ray, *supra* note 49, at 150. Of course, it is impossible to compare what would have happened if the initiator had not launched an attack and the target state had struck first.

Outcome for Initiator	*Number of Wars*	*Relative Frequency*
Victories	49	47.1%
Losses	36	34.6%
Stalemate	16	15.4%
Compromise	3	2.9%
Total	104	100%

Table 1 – Outcomes of Wars

The vast majority of military actions do not end in full-scale war, and arguably an effective military strike would ideally achieve the goals of the initiator without the need for escalation to intense and protracted fighting (e.g., Israeli strike on the Osirak nuclear reactor in Iraq – 1981).[85] In Table 2, we consider only disputes that involved the actual use of military force (beyond threats and displays of military force), but did not escalate to full-scale war.

Outcome for Initiator	*Number of Disputes*	*Relative Frequency*
Victories	161	10.8%
Losses	108	7.2%
Stalemate	1,126	75.3%
Compromise	100	6.7%
Total	1,495	100%

Table 2 – Outcomes of Disputes Involving the Use of Force, Short of War

When the use of force is short of war, the chances of a victory for the initiator go down substantially; barely more than 10% of the military actions result in success. Losing the dispute is also unlikely, with the most likely outcome being stalemate (more than three-quarters of the cases). Thus, a state that initiates military force is most likely to be faced with the *status quo ante*, less any political,

[85] Of a total of 1495 disputes in the Correlates of War dataset, only 104 of them were full-scale wars. *See* Table 1 and Table 2, *supra* part IV.

diplomatic, or other costs attendant to being the aggressor in the dispute.

A third cut at the same dispute data examines whether actually using military force is necessary to achieve desirable outcomes. Although the UN Charter prohibits "the threat as well as the use of force,"[86] the Bush Doctrine explicitly deals only with military threats that are actually executed. Would allowing or encouraging states to threaten military force be just as effective, without the risks of escalation or the costs of military strikes and wars? Table 3 examines the efficacy of threats or displays (e.g., sending a warship to a disputed area or mobilizing forces) in militarized disputes. There is nearly an identical pattern to those cases in which force was used: decisive outcomes are rare and results that favor neither side are overwhelmingly the most probable outcome. Thus, states apparently gain little by moving from mere threat or display of force to actually taking limited military action.[87]

Outcome for Initiator	*Number of Disputes*	*Relative Frequency*
Victories	111	12.97%
Losses	73	8.53%
Stalemate	620	72.42%
Compromise	52	6.07%
Total	856	100%

Table 3 – Outcomes of Disputes Involving Threats or Displays of Force

In general, the previous three analyses indicate several things about benefits of initiating military force to achieve certain policy goals. First, states that use military force first, and therefore not in self-defense, are more likely to win than lose. However, this is misleading as evidence in support of the Bush Doctrine as the likelihood of victory is only slightly greater than defeat under any scenario. Second, except for full-scale wars, in which decisive outcomes are more likely, the results of military actions produce

[86] U.N. Charter art. 2, para. 4.

[87] *See* Mary Caprioli & Peter Trumbore, *First Use of Violent Force in Militarized Interstate Disputes, 1980-2001*, 43 J. PEACE RES. 741, 747-48 (2006).

scenarios in which neither side is able to achieve its goals (stalemates). Unless a state is willing to go to war with an opponent, the purported benefits claimed by Bush Doctrine devotees will not be realized. Even for major military enterprises, positive results are far from assured, and any benefits must be weighed against the loss of lives and other costs.

It is very difficult to assess the political or diplomatic costs of preventive military action as they are diffuse, multi-dimensional, and are often not apparent in the immediate aftermath of the action. Nevertheless, the cost measured in human lives is more readily available in the short run. Readers are no doubt familiar with the figures on U.S. casualties (almost 4,500 dead as of September 2010)[88] from actions in Iraq, not to mention the large number of Iraq civilians who died as a result of the invasion.[89] Yet, this case is really an anomaly when viewed in broader historical context, even as such exceptions are often very important events. Over 80% of militarized disputes involve no fatalities for either the initiator or target states.[90] Furthermore, the belief that the target state will suffer more than the state launching the preventive action is not borne out by the data; there is virtually no difference between the casualties suffered by initiators and target states on average.[91] Thus, there is a low likelihood of bearing costs in military lives when using preventive military action. Yet as we noted above, the likelihood of achieving desired results only becomes significant when there is a full-scale war, and our analysis here indicates that battle deaths tend to be

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[88] *iCasulties: Operation Iraqi Freedom and Operation Enduring Freedom Casualties*, ICASUALTIES.ORG, http://icasualties.org/ (last visited Nov 28, 2010).

[89] The exact numbers are the subject of considerable dispute, with estimates varying wildly. *Compare* Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, 364 THE LANCET 1857, 1861 (2004) (proposing that over 100,000 people have died since the war began in 2003), *with* Michael Spagat et al., *Estimating War Deaths: An Arena of Contestation*, 53 J. CONFLICT RESOL. 934-36 (2009) (arguing that death estimates from the Iraq war have been highly criticized, comparing the estimate 601,000 deaths reported by Lancet, a U.K. medical journal, and the estimate provided by the World Health Organization, who suggested there had been a total of 151,000 deaths).

[90] Ghoson, *supra* note 80, at 150.

[91] *See* Table 3, *supra* part IV.

more equally shared between winner and loser, even as the achievement of political goals might be less symmetrical.

A. Advantages for Major Powers?

The above analyses indicate that actions consistent with the Bush Doctrine do not often yield their intended results. Yet, an analysis focusing on all states misses the fact that more concrete results may be discovered when considering only a subset of actors; the major power states. Advocates of the Bush Doctrine are most concerned with the utility for preventive action for the United States.[92] Critics of the doctrine have a similar concern, but from a different normative perspective. They are concerned that any right to anticipatory self-defense will be *de facto* available only to a subset of powerful states, which may use it against weaker states to pursue narrow national interests in contravention to the interests of the international community.[93] Indeed, some of those suggesting a more permissive standard of preemption argue that these actions can only be legitimate if sanctioned by the United Nations Security Council; they believe that in practice, only major powers would make use of the Bush doctrine should it become codified.[94]

Is preventive military action only an option available to the rich and powerful? We conducted the same analyses as those above, but focused only on disputes involving major powers as designated by the COW Project.[95] We noted earlier that many states, including weaker ones, initiate military force; this shows that a resort to coercion simply not in the purview of the most powerful states in the system. Yet we also know that major power states are dispro-

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[92] *See, e.g.*, Delahunty & Yoo, *supra* note 8, at 844.

[93] *See, e.g.*, Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 390 (2004).

[94] *Compare* Anderson, *supra* note 7, at 266-67, 285 (arguing that the Bust doctrine is extremely vague and ambiguous, and would require a separate tribunal to advise states considering prophylactic self-defense), *with* DOYLE, *supra* note 65.

[95] CORRELATES OF WAR PROJECT, STATE SYSTEM MEMBERSHIP LIST, v2008.1, *available at* http://www.correlatesofwar.org/ (the list of major powers varies by historical era and includes as few as five (e.g., in the 1950s – US, Soviet Union, China, UK, and France) and as many as nine (before World War I) states since 1816).

portionately involved in militarized conflict, because of their broad and far-flung interests as well as their ability to project military force across great distances.[96] Because the Bush Doctrine, as is true of any claim for self-defense, is often juxtaposed as a choice of "attack" or "be attacked," we examine the comparative outcomes of those scenarios for major powers involved in wars .[97]

Outcome for Major Power	*As Initiators*	*As Targets*
Victories	30 (63.83%)	4 (33.33%)
Losses	12 (25.53%)	6 (50%)
Stalemate	4 (8.51%)	2 (16.66%)
Compromise	1 (2.13%)	0 (0%)
Total	47 (100%)	12 (100%)

Table 4 – Outcomes for Major Powers in Wars

There is some clear evidence that in the face of certain war, major powers enjoy an advantage in taking the initiative; they are more likely to win a war (just under two-thirds of the cases) than any other outcome, and when they are attacked, their chances of winning a war is drastically reduced (indeed, they are most likely to lose a war). It is perhaps not surprising that major powers recognize this disparity in outcomes and therefore have initiated 47 of the 59 wars involving major powers from 1816 to 2001.[98]

When the sample shifts to include only disputes involving military force short of war or merely threats/displays of force, the advantage for major power significantly dissipates. The likelihood of major power victory ultimately shrinks to only 17% of the cases and is barely better than the success rate than when the major power is the target of attack. Stalemates are by far the most common outcome, whether major powers took the first military action or not.

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[96] *See* Ghoson et al., *supra* note 80.

[97] *See infra* Table 4.

[98] This suggests "selection effects" in that major powers choose (a) to fight wars in which there is strong expectation of victory, and (b) choose to initiate such wars when the expectation is that war is inevitable.

The analyses above were completed under conditions in which the Bush Doctrine was illegal. A defender of the proposed rule might argue that if preventive action were legalized, states taking such action would be more likely to have other states (allies) join them, and in turn, it would increase the success rates.[99] Thus, we empirically considered whether states initiating military force were more successful when allies joined their side as compared to purely unilateral actions.[100] There is limited merit to the proposition. One the one hand, victory in disputes does increase when supported by allies, to slightly over 20% in all disputes, up from a little over 12% noted above. Yet losing also increases proportionally,[101] and stalemates remain the most common outcome (still a majority of cases). Although one cannot know exactly whether allied support would be more common or not if the Bush Doctrine were legal, the empirical record does not suggest that its effectiveness would increase substantially.

B. Longer Term Efficacy

Preventive military actions are not merely designed to achieve short term success, but also to limit future security threats. Thus, we also evaluated the ability of military action to delay future challenges. We would expect that only decisive outcomes (victories for one side or the other) would have such an effect, as stalemates do not resolve issues and a number of studies have shown that such outcomes actually increase the likelihood of future conflict and in a shorter period of time.[102] Accordingly, we looked at the elapsed time from the end of a militarized dispute to the beginning of a new dispute between the same states; the longer the time period after a

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[99] We thank the faculty at the University of Illinois Program in Law, Behavior, and Social Sciences for bringing up this argument.

[100] Allies joined the initiating states in only 8% of the dispute cases.

[101] Increasing the likelihood of losing in the presence of allied support is probably a "selection effect;" that is, other states sometimes come to the support of friends when the task is difficult and there is a significant chance of failure.

[102] Joseph Grieco, *Repetitive Military Challenges and Recurrent International Conflicts, 1918-1994*, 45 INT'L STUD. Q. 295, 307-10 (2001); Paul Senese & Stephen L. Quackenbush, *Sowing the Seeds of Conflict: The Effect of Dispute Settlements on Durations of Peace*, 65 J. POL. 696, 703-07 (2003).

military action, the better the action was able to prevent or deter security challenges.[103]

Conflicts with decisive outcomes[104] reoccurred on average every 8.8 years, while conflicts with non-decisive outcomes reoccurred more often, every 7.1 years. Although this difference was statistically significant, the effect was substantively small. Additionally, this positive effect has to be weighed against the probability of new wars emerging as a result of a more permissive standard for preventive action under the Bush Doctrine; if new wars are more likely to occur as a result of states launching preventive strikes, then the positive effect of decisive outcomes might be counterbalanced by the negative effect of more wars among new pairs of states. One must also recognize that decisive outcomes are still in the minority of outcomes for most kinds of military action.

Military action is frequently not merely designed to put off longer-term threats, but end them altogether. Thus, there should also be concern with how efficacious military actions are in terminating long-term security threats. Here we can look to the extensive research on international rivalries and long-standing militarized competitions between the same pairs of states (e.g., India-Pakistan, Israel and her Arab neighbors). How do military actions and their outcomes influence the continuation or termination of rivalries? If such actions can end rivalries, and the accompanying security threats, then there is merit to the Bush Doctrine, even if the immediate impacts do not meet expectations.

Research on international rivalries typically looks at an event (e.g., a military confrontation) and its outcome (e.g., victory) and compares the likelihood that a rivalry will terminate under those circumstances as opposed to controlled conditions. Based on this research, there are a number of clear patterns in rivalry dynamics.[105]

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[103] After a generation has passed, it is unlikely for additional "peace years" to have been caused by the settlement of the previous conflict. Accordingly, we placed a maximum of 20 years on the number of peace years after a conflict. Additionally, final disputes between a pair of states that happened more recently than 1981 were dropped, since we did not have an actual value on how long these countries had remained at peace.

[104] Victories and losses are decisive and all others are coded as indecisive.

[105] *See* Gary Goertz et al., *Maintenance Processes in International Rivalries*, 49 J. OF CONFLICT RES. 742 (2005).

Military confrontations that end in stalemates only extend rivalries, and repeated attempts to solve rivalries with coercion have the consequence of locking-in hostile patterns and policies, making rivalries more difficult to end later on. Thus, the model outcome for preventive uses of force noted above - stalemate - does not eliminate threats in the long run, but prolongs them. Even decisive outcomes in wars are not effective mechanisms for ending rivalries. Most rivalries do not end with one side defeating the other, but rather wars tend to be scattered across the beginning, middle, and ends of rivalry life cycles. In many rivalries, a loss in war incites the loser to continue the conflict. For example, repeated defeats in wars (1948, 1956, 1967) only emboldened Arab states to continue their rivalry with Israel; the consequences of those wars (occupied territory and refugees) are the centerpieces of the ongoing Arab-Israeli conflict to this day.[106]

Generally, rivalries do not end with the successful use of force for one side or another. There often needs to be some major change in the international environment or in one of the rivals. For example, when there is a regime change in one of the rivals, such that the two enemies are both democracies, rivalries are more likely to end and states are no longer threats to one another.[107] Nevertheless, this is not necessarily an immediate effect as disputatious behavior might continue in the absence of full democratic consolidation[108] or even increase in the short run until the joint democracy effects are felt.[109] Furthermore, there are few cases in which military intervention by the United States or other liberal powers has fostered democracy in targeted states.[110] Thus, military actions are not the mechanism to precipitate the conditions for rivalry termination.

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[106] MICHAEL N. BARNETT, DIALOGUES IN ARAB POLITICS (1998).

[107] Paul R. Hensel et al., *The Democratic Peace and Rivalries* 62 J. OF POL. 1173, 1176 (2000); Brandon C. Prins & Ursula E. Daxecker, *Committed to Peace: Liberal Institutions and the Termination of Rivalry*, 38 BRIT. J. POL. SCI. 17, 41-42 (2007).

[108] *See* Paul F. Diehl et al., Theoretical Specifications of Enduring Rivalries: Applications to the India-Pakistan Case, *in* THE INDIA-PAKISTAN CONFLICT: AN ENDURING RIVALRY 27 (T.V. Paul ed., 2005).

[109] EDWARD D. MANSFIELD & JACK SNYDER, ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR (2005).

[110] Jeffrey Pickering & Mark Peceny, *Forcing Democracy at Gunpoint*, 50 INT'L STUD. Q. 539, 552 (2006).

More likely, the path to rivalry termination and ultimately friendly relations is achieved through diplomacy. In his seminal study of twenty enemy relationships that evolved into friendships, Charles Kupchan inductively sees the end of rivalries as a process involving a series of steps.[111] In the first stage, there is a conciliatory gesture ("unilateral accommodation") rather than a provocative military action.[112] The second stage involves reciprocal and positive responses ("reciprocal restraint") to such overtures by the other rival, often leaving the most difficult issues for later negotiation.[113] Diplomacy takes over, and there are a series of gestures and actions over a period of years that reinforce the march toward peaceful relations. Any disputes are resolved peacefully, without jeopardizing overall relations. There is a shift from diplomats to the general public in the third stage.[114] Cooperation extends to all sorts of political, economic, and social realms ("societal integration").[115] The fourth and final phase ("generation of new narratives and identities") involves an attitudinal transformation in the rival states in which peoples come to identify themselves as friends, rather than enemies.[116]

Overall, preventive and related military action tends to produce extremely limited results in delaying future military threats from opponents, and then only in a few instances is a decisive outcome achieved. More problematic is that Bush Doctrine actions tend to prolong rivalries and reinforce hostility. The conditions associated with ending rivalries, and therefore long-term security threats, are not achieved by military force, but are actually the opposite of such actions.

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[111] CHARLES A. KUPCHAN, HOW ENEMIES BECOME FRIENDS: THE SOURCES OF STABLE PEACE 6 (2010).
[112] *Id.*
[113] *Id.*
[114] *See id.*
[115] *Id.*
[116] *Id.*

C. What About Terrorism?

The previous analyses focused exclusively on the application of the Bush Doctrine against other states. The interstate focus is in many ways justifiable as states are the primary actors in the international legal system, and many of the precedents that would emerge from the adoption of the Bush Doctrine would apply to states. In addition, despite initial rhetoric targeted at terrorists, in his own application of the Doctrine, President Bush's focus moved from terrorist groups to countries that harbored terrorists, and to countries that are seeking to acquire weapons of mass destruction.[117] State sponsors also play important roles in facilitating terrorism.[118] Thus, a focus on state-to-state interaction is warranted, even when the prevailing threat involves potential terrorist action.

Although interstate behavior is worth examining for the purpose of consideration of an emerging Bush Doctrine, the rationale for its adoption would be considerably stronger if it could be demonstrated that such a doctrine would have the effect of reducing global terrorism as well. Unfortunately, unlike the analyses conducted above, an examination of the effectiveness of military actions on terrorist strikes is considerably more difficult. The Bush Doctrine is designed to prevent or deter certain actions, and evaluating effectiveness is predicated on identifiable targets and observable behavior.[119] Unlike enemy states, there is no comprehensive and publicly available list of terrorist groups that might be labeled as potential aggressors. The desire of denying publicity to such groups along with various diplomatic incentives to carry out actions covertly means that preventive actions are not transparent to outside analysts. Thus, it is very difficult to assess the utility of past actions that might have been designed to prevent or deter terrorist acts. The ability to target the leaders of individual terrorist groups may be a better option. The legality of such targeted

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[117] Cameron G. Thies & Leigh A. Galatas, *Assessing the Bush Doctrine*, *in* THE GLOBAL WAR ON TERRORISM: ASSESSING THE AMERICAN RESPONSE 79, 87 (John Davis ed., 2004).

[118] Tyler Cowen, *Terrorism As Theater: Analysis and Policy Implications*, 128 PUB. CHOICE 233, 242-43 (2006).

[119] *See* Part IV.

assassinations are open for discussion and the ease of using drone aircrafts does not obviate the legal impediments.[120]

Even with identifiable groups, the precise military targets needed for preventive action are not often present with Bush Doctrine initiatives. Strikes against states can be directed at overt capabilities (e.g., nuclear reactors, air fields), and these are largely transparent. Yet there is often no equivalent for terrorist groups. Terrorist training camps are a preferred target; beyond those facilities, there are only a few hard targets suitable for military raids. Terrorists operate covertly and often without identifiable geographic locations. Such groups also deliberately operate in populated areas, such that any strikes will almost inevitably lead to civilian casualties. Thus, there is considerable doubt as to whether preventive military actions are well-suited to combating prospective terrorist attacks. Furthermore, the difficulty the U.S. experienced with its efforts to kill Osama Bin Laden and other top Al Qaeda officials suggests that such goals are not easily accomplished. Regardless, it is unclear whether terrorist acts would decrease as a result of any such efforts.

It is also difficult to observe the success of any preventive actions. By definition, success for Bush Doctrine actions involves the *absence* of terrorist acts. Yet this presumes that groups would have launched an attack had the potential victim not taken preventive action. This is all but impossible to prove, and thus we are unable to assess claims by former Vice-President Richard Cheney that the success of the U.S.'s war on terror is indicated by the absence of any terrorist attack on U.S. soil since September 11th, 2001. Deterrence is a notoriously difficult thing to measure quantitatively even in state-to-state relations,[121] and the hurdles are even more difficult when considering obscure actors such as terrorist groups.

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[120] *See generally* Mary Ellen O'Connell, *The International Law of Drones*, INSIGHTS (The Am. Soc'y of Int'l Law, Washington, D.C.), Nov. 12, 2010 (discussing the international legal issues related to innovation and use of attack drones).

[121] *Compare* Richard Ned Lebow & Janice Gross Stein, *Rational Deterrence Theory: I Think, Therefore I Deter*, 41 WORLD POL. 208, 224 (1989) (arguing that deterrence theory is a poor predictor of critical cases of strategic behavior and an equally poor guide to policy), *with* Paul Huth & Bruce Russett, *Testing Deterrence Theory: Rigor Makes a Difference*, 42 WORLD POL. 466 (1990) (arguing that many of the supposed issues with deterrence theory stems from methodological errors and faulty understanding of scientific methods, and not the actual theory).

At best, we can detect failed terrorism attempts by considering the number and types of foiled terrorist plots, such as those directed at Times Square in New York City in 2010.[122] Such attempts reveal the success of other counter-terrorist actions rather than preventive ones. Indeed, the fact that groups or individuals tried and failed to carry out terrorist actions, and got as far as they did, suggests that they were not prevented or deterred by any military actions. Yet even failures do not necessarily provide suitable evidence against the Bush Doctrine or any preventive action. Attribution of an attack to a specific group that was targeted for preventive military action is necessary to make a conclusion that such action was ineffective. Yet, not all attacks can be directly linked to particular groups, and there are some strong incentives for terrorists to hide their responsibility for attacks. All this is not to say that terrorists cannot be deterred, but only that this is difficult to evaluate when considering the use of force. Indeed, there is evidence that deterrence is possible with respect to terrorists,[123] most likely by limiting benefits (e.g., target hardening and other protective actions) from terrorist acts. Less coercive strategies are likely to be more effective and less resource intensive than those associated with military strikes.[124]

Although data-based assessment is not open to us for assessing the impact of Bush Doctrine actions against terrorists, we might infer some conclusions based on the effectiveness of retaliatory raids against terrorists.[125] Admittedly, retaliation is *post hoc* and occurs after an attack has occurred, rather than in response to impending harm. Such actions are not only designed to punish groups or states supporting terrorist actions, but there is the hope

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[122] Al Baker & William K. Rashbaum, *Police Find Car Bomb in Times Square*, THE NEW YORK TIMES (May 1, 2010), http://www.nytimes.com/2010/05/02/nyregion/02timessquare.html?pagewanted=all

[123] Robert F. Trager & Dessislava P. Zagorcheva, *Deterring Terrorism: It Can Be Done*, 30 INT'L SEC. 87, 88 (2006) (rejecting the idea that deterrence of terrorism is not possible, arguing that many terrorists can be deterred from actions that harm targeted states by, among other things, holding their political goals at risk, as oppose to their life or liberty).

[124] *See id.* at 120-22.

[125] The legality of such retaliatory action is subject to a different analysis, even as inferences about their effects might be applicable here.

that military strikes will disable terrorist capabilities for future acts or deter such acts because of the costs imposed by the strikes. Fortunately, there is scholarly literature (see some samples below) on the effects of retaliatory raids on subsequent terrorist activities. These studies are a mixture of game-theory analyses; single or multiple case studies; and statistical analyses that compare the frequency of terrorist attacks before and after retaliatory raids. Despite this methodological diversity, there is consensus among them that such military actions are not necessarily a useful tool of counter-terrorism efforts.

For example, even if preventive military action against terrorists in other states were legal, the incentives that states would have to use this technique would not change. Preventing military action in the future is a "public good" because the benefits of retaliation (no terrorist attacks) are open to all and are not exclusive to the state launching the retaliatory action. States historically underprovide such public goods because of the free-rider problem where many states will wait for others to take the military and diplomatic risks accompanying preventive military strikes and still enjoy the favorable outcomes.[126] Thus, one might anticipate that preventive strikes will not occur as frequently as might be required (assuming effectiveness). Furthermore, from studies of free-riding with respect to military actions and defense burdens, we can also anticipate that major power states would be those most likely to exercise actions in order to provide for the public good,[127] illustrating another instance in which the Bush Doctrine would be exercised primarily by a narrow set of states.

Although there might be an under provision of why retaliation raids are rarely used, the real question is: do they actually deter future attacks? Cynthia Lum and her colleagues conducted a systematic meta-analysis of all counter-terrorism research on the

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[126] Daniel G. Arce M. & Todd Sandler, *Counterterrorism: A Game-Theoretic Analysis*, 49 J. OF CONFLICT RESOL. 183, 186, 191 (2005); Dwight R. Lee, *Free Riding and Paid Riding in the Fight Against Terrorism*, 78 AM. ECON. REV. 22, 25 (1988).

[127] John R. Oneal & Paul F. Diehl, *The Theory of Collective Action and NATO Defense Burdens: New Empirical Tests*, 47 POL. RES. Q. 373, 374-75, 378 (1994).

effectiveness of various techniques, such as airport screenings.[128] Included in that review was an assessment of military retaliation, and they concluded:

> Military retaliations can increase terrorism in the short run and, over the long run, may not affect terrorism at all. . . . While military retaliations may be seen as justified for reasons other than the prevention and deterrence of future terrorism (for example as punishment or detection of offenders), the costs of such interventions may not only be monetary but actually lead to a short-term increase in these events. At the same time, military interventions are an example of how some strategies might vary dramatically in terms of short-run versus long-run effects.[129]

The unintended consequence of actually increasing terrorist attacks stems from the effect of the military action on such groups. Although some training bases and other capabilities might be reduced in the short-term, military attacks can also have the negative effect of enhancing terrorist recruitment, as individuals join such groups in reaction to the preventive actions.[130]Sang-Whan Choi reaches similar conclusions in his study of U.S. military intervention

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[128] *See* Cynthia Lum, Leslie W. Kennedy & Alison Sherley, *Are Counter-Terrorism Strategies Effective? The Results of the Campbell Systematic Review on Counter-Terrorism Research*, 2 J. EXPERIMENTAL CRIMINOLOGY 489, 490-93 (2006) (discussing the need for further support of counter-terrorism efforts in the U.S.); *see also* Bryan Brophy-Baermann & John A. C. Conybeare, *Retaliating Against Terrorism: Rational Expectations and the Optimality of Rules Versus Discretion*, 38 AM. J. POL. SCI. 196, 202-08 (1994) (discussing the policies of retaliation against terrorist and the need to increase responding to terrorism).

[129] Cynthia Lum et al., *supra* note 128, at 510.

[130] *See* B. Peter Rosendorff & Todd Sandler, *Too Much of a Good Thing? The Proactive Response Dilemma*, 48 J. CONFLICT RESOL. 657, 659 (2004) (analyzing the response of targets to proactive activity); *see also* Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, 97 AM. POL. SCI. REV. 343, 344, 356 (2003); Trager & Zagorcheva, *supra* note 123, at 105-6.

(more extensive than merely strikes) over the period 1970-2005.[131] He also found that such military action subsequently precipitated *more* terrorist attacks than in prior periods;[132] and that there may be some value in limiting future attacks against the U.S only when terrorist or rebel groups are the specific targets.[133]

Not only are preventive military attacks counter-productive with respect to terrorism, other superior alternatives are available.[134] Empirical evidence suggests that options such as strengthening the rule of law in target countries,[135] the provision of foreign aid, and support for education are effective means to prevent terrorism.[136] These actions undermine potential support for terrorists by redressing the various conditions, including poverty, that are breeding grounds for terrorist group formation and expansion; there are even conditions under which negotiation with terrorists might be a viable strategy.[137] In contrast to preventive strikes, foreign aid and education support are already legal under international law and provide positive externalities for the international system as a whole.[138] Economic means are also likely to be much less expensive forms of counter-terrorism, especially when the curtailment of civil liberties, and the costs of related spending are taken into account.[139] Improved homeland defenses may also be more effective means of providing counter-terrorist than preventive strikes. This is especially

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[131] *See* Seung-Whan Choi, *Does U.S. Military Intervention Reduce or Increase Terrorism?* 24 (Am. Pol. Sci. Ass'n Annual Meeting, Working Paper, 2011), *available at* http://ssrn.com/abstract=1900375 (analyzing the connection between United States military intervention efforts and terrorist attacks).

[132] *Id.*

[133] *See id.*

[134] *See* Cynthia Lum et al., *supra* note 128, at 502, 508.

[135] Seung-Whan Choi, *Fighting Terrorism Through the Rule of Law?*, 54 J. CONFLICT RESOL., 940, 941 (2010).

[136] *See* Jean-Paul Azam & Véronique Thelen, *The Roles of Foreign Aid and Education in the War On Terror,* 135 PUB. CHOICE, 375, 386-89 (2008).

[137] KAREN A. FESTE, TERMINATE TERRORISM: FRAMING, GAMING, AND NEGOTIATING CONFLICTS49 (2010).

[138] *See generally* Paul Collier & David Dollar, *Can the World Cut Poverty in Half?: How Policy Reform and Effective Aid Can Meet International Development Goals*, 29 WORLD DEV. 1787-1802 (2001).

[139] William A. Niskanen, *The Several Costs of Responding to the Threat of Terrorism*, 128 PUB. CHOICE 351, 352-53 (2006).

true because, even as the effects of increased homeland security are unambiguous,[140] a perceived sense of military occupation or targeting is seen as a strong correlate to the use of suicide tactics.[141] Gary Ackerman and William Potter offer an extensive list of recommendations to forestall catastrophic nuclear terrorism; several are noted above and they add a series of others, including securing nuclear materials.[142] Most importantly for our purposes, none of the suggestions involve preventive military action as advocated by the Bush Doctrine.

V. CONCLUSION

International legal rules on the use of military force have been notoriously slow to reflect changes in contemporary security threats and modern warfare. Yet, beyond evaluating whether proposed modifications meet the normative test reflecting the values of the international community, we have suggested that any new rules meet an empirical test: that the rules achieve the purposes for which they were designed. Assuming that empirical evidence can be assembled, this is a useful rule of thumb for any potential new rule of law. It is especially appropriate for international law concerning the use of military force. Such decisions cannot be left to the discretion of policy makers as they might be in other areas of policy. Uses of military force are unique in their high costs in lives and property, as well as their risks of escalation; these factors have been the primary motivating force for the creation of legal rules severely limiting their use. Presumption should be against modifying legal rules to permit greater uses of forces, unless clear benefits can be demonstrated. The proposed norm that states could use military force proactively to meet threats that were not immediate or imminent was applied to the Bush Doctrine in this Article.

Our general conclusion is that the Bush Doctrine fails to pass the empirical test. Using military force in a preventive fashion provides very limited, if any value, to states that employ this

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[140] Curtis S. Signorino & Ahmer Tarar, *A Unified Theory and Test of Extended Intermediate Deterrence*, 50 AM. J. POL. SCI. 586, 597 (2006).
[141] Pape, *supra* note 130, at 357.
[142] Ackerman & Potter, *supra* note 62, at 437-41.

strategy. At best, there is a small chance of victory in such circumstances, and this requires a full-scale war. The utility of preventive strikes diminishes tremendously in attacks short of war, and indeed the minimal success rate (around 10%) is no better than using coercive diplomacy by merely threatening force rather than actually using it. The success rate improves somewhat for major power states, but not enough to justify the use of force, or perhaps to overcome the establishment of a right that only a limited set of actors can exercise.

Positive longer-term effects of Bush Doctrine actions were also not apparent. Preventive actions did not significantly delay the appearance of new security threats and indeed such actions produce the conditions that enhance the maintenance of international rivalries, rather than contributing to their resolution. Finally, available evidence suggests that preventive strikes are not well-suited to terrorist threats, and states might be reluctant to employ them in any case. Studies of retaliation to terrorist attacks find little value to the former, with no long-term deterrent effects.

The limitation of the Bush Doctrine in achieving its objectives is only one element of the balance ledger on the desirability of encompassing it under the international law umbrella. Although this article has concentrated on effectiveness, the viability of the Bush Doctrine must also account for the costs of any military action, and these are highly scenario-dependent. We did not address, but one must certainly consider, a range of other costs associated with military action. These include the financial costs associated with the maintenance of specialized military weapons and forces, as well as the actual expenditures associated with preventive military actions; a single, quick strike against a terrorist training base might involve minimal resources, whereas a protracted war is obviously much more costly.

Beyond a conventional cost-benefit analysis, one should also consider further attendant and often unintended consequences that follow from preventive military action. Above we noted that retaliatory raids in the name of anti-terrorism actually increased terrorist attacks in the short-term and might enhance terrorist recruitment efforts. Yet there might be other effects that result from preventive strikes, especially those that fail to achieve their prime

objective. Jessica Stern and Jonathan Wiener list several undesirable consequences that have occurred after the United States launched the invasion of Iraq to counter purported weapons of mass destruction there.[143] These included distracting the United States from greater threats posed by Al Qaeda, Iran, Afghanistan, and North Korea respectively. The Iraq war has also reduced U.S. Army recruiting rates, created political divisions among NATO allies, and has risked producing an "under-reaction" when real threats arise in the future.[144] Most seriously, the use of preventive force by the United States might encourage other states to launch preventive military actions.[145] Of course, the net effect might or might not serve American interests, but American installations and personnel could be the targets of such action.[146]

The Bush Doctrine applied broadly is unlikely to produce outcomes that serve its central purposes. Yet, one can construct scenarios in which the application of the Bush Doctrine is desirable and effective, and indeed there is empirical evidence of that; most would likely agree that the Israeli strike against emerging Syrian nuclear capabilities in 2007 enhanced security in the region with minimal costs. Is it possible to encourage the Bush Doctrine in those circumstances, while preventing its use in the overwhelming majority of circumstances when it would be ineffective or when its use might be exploited? Incorporating the Bush Doctrine into international law is probably not the answer because when rules of the use of military force become more permissive, states are more likely to use such force.[147] Thus, expanding the use of military actions is likely to produce more failures.

Paradoxically, one could argue that keeping the Bush Doctrine *illegal* might lead to desirable ends. With respect to torture, Eric Posner and Adrian Vermeule argue that the practice should be

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[143] Stern & Wiener, *supra* note 61, at 433-34.
[144] *Id.*
[145] *Id.*
[146] *See id.*
[147] Benjamin Appel, *The Politics of Self-Defense: The Role of International Law on the Use of Force in International Crises*, (Am. Pol. Sci. Ass'n Annual Meeting, Working Paper 2010).

kept illegal, but permitted under some circumstances.[148] By doing so, the illegality will discourage the use of torture, except under extreme circumstances when it might have utility and be used as a last resort. In a similar vein, Jacob Cogan introduces the notion of "operational noncompliance," in which violations of international law serve an important purpose: "[N]oncompliance . . . keeps a partially effective system . . . operational by . . . bridging the enforcement gap created by inadequate community mechanisms of control."[149]

Putting these together, one might argue that the Bush Doctrine should remain illegal, but infrequently practiced, as it would serve the needs of international law when traditional legal mechanisms for dealing with terrorism and weapons of mass destruction are ineffective. The problem with this approach is that there is an underlying assumption that the practice (here preventive military action) is effective.[150] Yet we know from the empirical analysis in this article that the effectiveness of the Bush Doctrine is extremely limited, and therefore preventive military actions do not seem to be good candidates for operational noncompliance mechanisms. Furthermore, there is no way to ensure that the actual and limited uses of the illegal preventive military action will be the ones that are part of the small subset of effective actions.

In the end, legalizing the Bush Doctrine is not likely to produce the intended outcomes because of the considerable risks of producing undesirable consequences. Keeping the Bush Doctrine illegal seems to be the most sensible strategy, and even then, preventive military action does not appear to serve legal or other purposes when actors decide to violate established legal rules by launching military strikes.

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[148] Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV., 671, 707 (2006).

[149] Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L., 191 (2006).

[150] Indeed, Cogan, *id.* at 208-09, lists a number of requirements for operational noncompliance mechanisms (e.g., necessity, precision), but effectiveness in achieving the original purpose is not one of them, indicating that effectiveness is assumed, and the logic of his argument is consistent with that interpretation.