Customary International Law and State Patterns of Cooperation in the Use of Force in Response to Terrorism

by

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Abstract: State practice and patterns of cooperation over the last 45 years have led to the development of rules of customary international law governing the use of force, in anticipatory self-defense, against terrorists and rogue state collaborators. Although the earlier general rules may have prohibited states from using force except in anticipation of an imminent attack, in more recent practice, the imminence standard has changed. States have initiated and cooperated in the use of force in self-defense to instances in which the possibility of an attack is not imminent, but merely expected. These actions are based on an assessment of the following factors: (1) the protection of nationals; (2) the probability of an attack; (3) the magnitude of potential harm; (4) the need to disrupt terrorist planning and activities; and (5) the need to eliminate safe havens. These rules have emerged with considerable cooperation from the states most actively engaged by the treat of terrorism.

Introduction

Existing international treaties, including the United Nations Charter, do not adequately address the central danger of this generation, the threat from terrorists and rogue state collaborators. Instead, controlling legal principles are developing through the conduct and patterns of cooperation of the states most actively concerned with the threat.[1] This has led to emerging norms of customary international law, which are adaptations and extensions of past norms. Some of the most important norms concern the right to use force to preempt or prevent terrorist attacks.

What Is Customary International Law?

There are two sources of public international law, treaties and customary international law. In the traditional formulation, rules of customary international law have two components.

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[1] This paper's emphasis on "patterns of cooperation" was inspired by Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, HARV. J.L. & PUB. POL'Y 539, 558 (2002).

First, they consist of widespread and uniform practices among states that have ripened into customary rules. Next, they are followed out of *opino juris*, a sense of legal obligation.

The second component of the traditional formulation is vague and elusive. Some contemporary scholars deny it exists. For example, in *The Limits of International Law*[2], Jack Goldsmith and Eric Posner conclude that imposing the requirement of a "sense of legal obligation" gets the causation wrong. A rule of customary international law reflects a behavioral regularity. But they argue that it is not the rule, motivated by *opino juris*, that gives rise to the behavioral regularity. Rather, it is the behavioral regularity, reflecting a measure of rational choice, that comes to be characterized as a rule.

Even those who believe *opino juris* exists agree that customary international law is subject to state interpretation, and does not exist apart from the way states perceive and implement it.

To become a customary rule, a practice must have the widespread but not necessarily universal support of states concerned with the matters it addresses. Interim rules become customary international law once a large enough number of states having an interest in them act in accordance with them. The assent of a state is inferred by silence, except as to consistent objectors.

Why Does It Matter?

Concern for adhering to customary international law begins with the U.S. Constitutional framework. Article 1, § 8 of the U.S. Constitution contains the only express reference to public international law, or as it was referred to by the Founders, the "Law of Nations." It gives Congress the power to "define and punish Piracies and Felonies committed on the high seas, and

[2] JACK L. GOLDSMITH and ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW ch. 1 (2005).

Offences against the Law of Nations." Article VI, cl 2, the "Supremacy Clause," explicitly mentions Treaties, but does not mention any other aspects of the Law of Nations. Rather, it refers to "the Laws of the United States which shall be made in pursuance thereof [to the Constitution]." Article III, § 3 (the "take Care clause") provides that the President shall "take Care that the Laws be faithfully executed."

Although there is debate about the precise effect of these provisions on customary international law, the following argument has often been made. The U.N. Charter is a treaty ratified by the Senate, so it is federal law under the Supremacy Clause. As described herein, a treaty may be modified by customary international law. Moreover, the Supreme Court has said that customary international law is part of U.S. law.[3] Some scholars argue that customary international law falls within the take Care clause; others disagree.

Next, many allies place great emphasis on their perceptions of international law. This is especially true of Western European allies, because within the juridicized discourse of the European Union, legal issues can drive policy conclusions.

Thus, to give abundant deference to the Constitution, and to maintain the support of allies, it is prudent to act within a framework for the use of force that is consistent with the U.N. Charter and generally accepted notions of customary international law.

The Tension In Customary International Law

There is a central tension in the concept of customary international law -- it can be created by being broken. Customary international law develops in response to particular circumstances, crises and controversies. As Justice Jackson said at the beginning of the

[3] See The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Gyot, 159 U.S. 113, 163 (1895); The Nereide 13 U.S. (9 Cranch) 388, 423 (1815).

Nuremberg Trials, ". . . every custom has its origin in some single act . . . Innovations and revisions in international law are brought about by the action of governments designed to meet a change in circumstances." [4]

In today's jargon, there is always a first move to a paradigm shift. Thus, an act that is in derogation of existing customary international law can gain acceptance and become the controlling norm in the future. If a state takes an action that modifies or contravenes international law, the rest of the world may or may not respond. If the action is praised, or at least accepted, then arguably a new rule has emerged.

Historical Antecedents to the Right of Anticipatory Self-Defense

Basic principles of anticipatory self-defense were recognized by Grotius, who wrote that self-defense is appropriate where "the deed may be anticipated . . . It is lawful to kill him who is preparing to kill." He also wrote that it is appropriate to respond to threatening behavior that is "imminent in a point of time."[5]

De Vattel agreed:

> The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict on it, and to use force . . . against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.[6]

[4] Report of June 7, 1945, from Justice Robert H. Jackson, Chief Counsel for the Prosecution of Axis War Criminals, reprinted in 39 Am. J. Int'l L. (Supp.) 178, 187 (1945).

[5] HUGO GROTIUS, 2 THE LAW OF WAR AND PEACE ch. 1 (1625).

[6] EMMERICH DE VATTEL, 2 THE LAW OF NATIONS ch. IV (1758).

The *Caroline* Standard

A more recent set of parameters for anticipatory self-defense was articulated by Secretary of State Daniel Webster, in the context of what became known as "the *Caroline* Incident."[7] In 1837, the British were crushing a rebellion in Canada. An informal militia from New York State used the steamboat *Caroline* to transport men and material to rebels in Canada. In a night raid, British captured and destroyed the steamboat in port in New York. Two militiamen were killed. One of the British officers was arrested and threatened with prosecution for murder and arson, but was subsequently released following an exchange of correspondence between Webster and British Special Minister Lord Ashburton. Webster conceded that the use of force could be justified in some circumstances as a matter of self-defense, but it "should be confined to cases in which the necessity of that self-defense is instant, overwhelming, leaving no choice of means, and no moment of deliberation," and that nothing "irresponsible or excessive" should be done.

One aspect of this incident merits special discussion. The attack took place while the ship was in port. Thus, and this is most striking, the test enunciated, and supposedly satisfied, is inconsistent with the actions taken. The British launched a deliberate, planned raid, at a time and place of their choice, against intermittent hostile acts. This is on its face inconsistent with the words "instant, overwhelming, leaving no choice of means and no moment for deliberation." To get around this, Lord Ashburton asserted that the intention was to seize the *Caroline* in British waters. However, the ship was not where it was expected to be, but rather was docked on the American side, so the British captain made a decision to forge ahead. This reflects even as the *Caroline* test was being established, the parties were interpreting it creatively.

[7] Of the many recitations of the Caroline Incident, one of the most thoughtful, nuanced and comprehensive is Louis-Philippe Rouillard, *The Caroline Case – Anticipatory Self-Defense in Contemporary International Law*, MISKOLC J. INT. L., Vol. 1, 2004, 104.

Based primarily on the test developed in the *Caroline* incident, most commentators assert that the commonly accepted conditions for the use of force in anticipatory self-defense are as follows: (1) necessity; (2) imminence; (3) proportionality; and (4) exhaustion of peaceful options. As demonstrated below, these requirements have been modified substantially by state practice, and should no longer be considered controlling.

The Kellog Standard

It is noteworthy that there is a later statement, much less frequently cited, which sets forth a far broader standard. Secretary of State Frank Kellogg addressed the American Society of International Law in 1928 on the Kellogg-Briand Pact. He said self-defense is inherent in every treaty. "Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it is competent to decide whether circumstances require recourse to war in self-defense."[8]

The U.N. Charter

In the hierarchy of international law, treaties take precedence over ordinary principles of customary international law. The United Nations Charter is a treaty, agreed to by the United States. It contains a general prohibition on the use of force in Article 2(4), which provides that "[a]ll members shall refrain in their international relations from the threat of 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."

There is an exception to the prohibition of the use of force for actions authorized by the United Nations Security Council ("U.N.S.C."). This is rarely invoked, except for after-the-fact

[8] Frank B. Kellog, *Address Before the American Society of International Law*, 22 PROC. AM. SOC'Y. INT. L. 41, 143 (Apr. 28, 1928).

peacekeeping operations. The U.N.S.C. could not bring itself to authorize force even in the cases of Kosovo, Sudan or Rwanda.

A second, vastly more meaningful exception appears in Article 51 which provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member . . .."

There are serious scholars from across the ideological spectrum who conclude that Article 51 addresses one form of self-defense, *i.e.*, in response to an armed attack, but also recognizes the general pre-existing right of self-defense in customary international law.

The International Court of Justice has never ruled directly on the interaction of customary international law and Article 51. Judge Schwebel, in the dissent in the *Nicaragua* case, is the only Judge to address the subject. He said Article 51 does not authorize force "if, and only if, an armed attack occurs," but rather there remains a more general right under customary international law.[9]

The U.N. Charter is directed toward conflicts between nations, and it does not address the threats that drafters never contemplated. This obviously includes the modern-day destructive power of non-state actors, most importantly terrorists armed with weapons of mass destruction. As a result, no meaningful definition of the right of self-defense in the context of terrorism can be made without reference to the to the actual conduct of states.

State Practice In The Last 45 Years

1962 Cuban Missile Crisis. The U.S. naval blockade was based on self-defense, but this rationale was not made public at the time. The U.N.S.C. debated, but there was no specific rejection of the concept of anticipatory self-defense. It never reached the question, even though

[9] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), Schwebel, dissenting, par. 173.

it did not authorize the blockade. Yet even states that opposed the U.S. action did not denounce it. This was the beginning of a much more elastic concept of imminence and necessity than that set by the *Caroline* test, and it was almost 45 years ago.

1976 Israeli Rescue in Entebbe, Uganda.[10] An Air France plane with 263 passengers and crew was hijacked and forced to land in Entebbe. The hijackers demanded the release of 55 pro-Palestinian terrorists, and threatened to kill the hostages. Idi Amin, dictator of Uganda, did nothing.

Israeli commandos landed, stormed the plane, and killed the highjackers. Israel claimed that international law allowed it to use force to protect its nationals in another country in which the government was unwilling or unable to do so. There was a draft resolution condemning the violation of Uganda's territorial integrity and requiring Israel to pay compensation for damages caused, but the U.N.S.C. never voted on it.

The Entebbe rescue decisively extended the right of self-defense to include the protection of nationals abroad. For example, France has used force for this purpose at least five times.[11]

1986 U.S. Bombing of Libya. The U.S. used force in response to a series of terrorist attacks, including the bombing of airline offices in Rome and Vienna, killing and injuring Americans, and the bombing of a disco in Berlin, killing and injuring 154 people, including 50 to 60 Americans. The U.S. bombed specific targets in Libya's command and control structure. The U.S. claimed it was acting in anticipatory self-defense against future attacks, consistent with

[10] With the exception of the Israeli rescue mission in Entebbe, this review will not include the actions of Israel, because they are taken in a context that is *sui generis*.

[11] MICHAEL BYERS, WAR LAW 58 (2005).

Article 51.[12] The U.S., Great Britain, France, Australia and Denmark vetoed a proposed U.N.S.C. condemnation, although General Assembly condemned the attack, 79-28 (with 33 abstentions).

This was a paradigm shift in state thinking among the allies. Past attacks were used as evidence of the likelihood of future attacks. There is no reason why intelligence reports would not have served the same purpose.

1993 U.S. Bombing of Iraqi Intelligence Service Headquarters. In response to compelling evidence that Iraq attempted to assassinate George H.W. Bush, 23 Tomahawk cruise missiles were fired at Iraq's Intelligence Service Headquarters. In the Clinton Administration, the U.S. relied on the inherent right of self-defense, invoking Article 51, even though the response was two months after the assassination attempt had been foiled. Germany and Japan expressed support. The Arab League expressed "extreme regret." The U.N.S.C. rejected the Iraqi ambassador's plea for a condemnation. The General Assembly took no action.

This extended the right of self-defense to the period following an attempted attack on nationals.

1998 U.S. Bombing of Afghanistan and Sudan. Terrorists bombed U.S. embassies in Kenya and Tanzania. Hundreds were killed, thousands were injured. The U.S. fired 79 Tomahawk cruise missiles on six terrorist training camps in Afghanistan and a facility in Sudan being used to produce chemical weapons. President Clinton expressly invoked Article 51, saying that "these strikes were intended to prevent and deter additional attacks by a clearly

[12] Ronald Reagan, Letter to the Speaker of the House of Representatives and to President Pro Tempore of the Senate on the United States Air Strike Against Libya, 1 Public Papers of the President of the United States: Ronald Reagan: 1986, 478.

identified terrorist threat."[13] Great Britain, France and Germany were all consulted before the strikes, and agreed. Each made concurring public statements immediately following the U.S. action. A few governments denounced the strikes, but most remained silent. The U.N.S.C. took no formal action, nor did the General Assembly.

This was an important development, extending the use of force to apply to countries that harbor or otherwise enable terrorists.

2001 Afghanistan. Following the terrorist attack of September 11, 2001, there was a U.N.S.C. Resolution which recognized the inherent right of self-defense in accordance with the U.N. Charter, but did not authorize the use of force. The U.S. asserted a right to self-defense, as against Afghanistan, because it allowed its territory to be used as a safe haven for al Queda. Troops were deployed by 27 states.

This was an instance of Regime Change, and it decisively extended the right of self-defense to include force against countries that willingly harbor or support terrorist groups that have already struck.

2003 Iraq. The U.S. relied on (1) an extended right of pre-emptive self-defense and (2) "implied authorization" through prior U.N.S.C. Resolutions. Great Britain and Australia relied solely on the U.N.S.C. Resolutions. Canada, France and Germany opposed to war, but left their airspace open to U.S. military aircraft. The coalition included troops from 33 states. (The coalition in the Korean War included 16 states.) As controversial as this was, it cannot be said that it found no support in past state practice.

[13] William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, in 2 Public Papers of the President of the United States: William J. Clinton: 1998, 1464.

The Real Standards

The conventional wisdom makes a distinction between two kinds of self-defense: pre-emptive, which is intended to stop an imminent attack; and preventive, which is intended to stop a possible attack. Many academics argue that the first is permissible but the second is not, because of the lack of temporal imminence.

The real standards are set not by what academics say, but what states do. As just demonstrated, in the last 45 years the prongs of the *Caroline* test, especially the temporal imminence prong, have been substantially modified.[14]

In practice, states do not focus on temporal imminence. Rather, they focus on: (1) the protection of nationals; (2) the magnitude of potential harm; (3) the probability of an attack; (4) the need to disrupt terrorist planning and activities; and (5) the need to eliminate existing or potential safe harbors in rogue states. Of these considerations, probability is the most difficult to assess, and that assessment must by necessity be based on imperfect information concerning capability and intent.

In the real world, states have acted in ways that can only be seriously understood as preventive self-defense. There has been no definitive rejection of these actions, so at a minimum, there is no controlling rule prohibiting pre-emptive or preventive self-defense.

The Effect of Subsequent State Practice on the U.N. Charter

Article 51 recognizes the inherent right of self-defense, as of the time of the U.N. Charter. But can the U.N. Charter be modified by subsequent state practice? There are several reasons why it can. First, any "inherent" right must by definition be applied on a fact-specific,

[14] *See* John C. Yoo, *Using Force*, 71 U. CHI. L. REV. (2004), available at SSRN http//ssrn.com/abstract=530022, for an extensive elaboration on the weakening of the temporal imminence standard, in favor of consideration of the magnitude of potential harm and the possibility of attack.

case-by-case basis, with no bright lines, and will inevitably evolve over time. Next is the doctrine of desuetude, which recognizes that treaties may become ineffective as a result of non-observance. A third reason is that the circumstances in place at the time the U.N. Charter was drafted do not exist. For example, Michael Glennon has identified the following factors : 1) the intended safeguard against unlawful threats of force, which was a strong U.N.S.C., with an enforcement apparatus, never materialized; 2) modern methods of intelligence collection make it unnecessary to wait for an actual attack in order to make a credible assessment of hostile intent; 3) weapons of mass destruction can make the first blow devastating; 4) terrorist organizations of global reach were simply unknown when the U.N. Charter was drafted; and 5) the end of the Cold War has reduced the risk of catalytic war resulting from the preemptive use of force.[15]

Even the venerable internationalist Professor Thomas Franck has argued that, like any foundational instrument, over time the U.N. Charter has been construed to conform to evolving state practice. He has written that the emergence of the threat of global terrorism, especially combined with the development of weapons of mass destruction by rogue states, has made it imperative that there be changes in the way the U.N. Charter is construed.[16]

Finally, and most importantly, it simply makes no sense to call something a rule of law, in a consent-based system of international law, when states do not follow it.

An example of how these dynamics have worked in another context is the use of force for humanitarian intervention, as reflected in the 1999 Bombings of Kosovo, Serbia and Montenegro. Any legal justification for the bombings has to be based on a theory outside the

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[15] Michael J. Glennon, *Preempting Terrorism -- The Case for Anticipatory Self-Defense*, THE WEEKLY STANDARD, Jan. 28, 2002, Vol. 007, No. 19.

[16] Thomas M. Franck, Preemption, *Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INT'L & COMP. L. REV. 425, 431-433.

U.N. Charter. The bombings never received U.N.S.C. authorization. Yet 19 NATO democracies, representing 780 million people, participated. Russia, China, India and 7 other countries protested, but Russia participated in the subsequent occupation, and the U.N.S.C. enacted a resolution authorizing the entry of NATO troops for the occupation.

The U.S. refused to provide any legal justification. Reportedly, when British Foreign Secretary Cook told U.S. Secretary of State Albright of problems "with our lawyers", she told him to "get new lawyers".[17] Ultimately, Great Britain and Belgium argued there was a right of humanitarian intervention. Many liberal internationalists argued that state practice can amend the U.N. Charter.

What About the Objections?

To reiterate another point made earlier, since there have been at least some objections to the state actions described above, is there really a customary rule? The response is that there will never be unanimity. Even in the academic formulation, interim rules become customary international law once a large enough number of states having an interest in them act in accordance with them. That is why this paper has emphasized patterns of cooperation among the key nations fighting terrorism, and reviewed the actions and failures to act by the U.N. Security Council. The determinative factor should be the commonality among nations that actually use or support the use force, because for the others, the issues are truly academic.

The National Security Strategy Formulations

The U.S. has made it an official policy to formally recognize the realities of state practice by announcing an "emerging threat" standard. The attack need not be imminent, or even overtly threatened, but merely expected.

[17] BYERS, *supra* note 11, at 47.

The National Security Strategy of the United States of America issued September 2002[18]

sets forth the rationale and standards as follows:

> Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.
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> * * *
>
> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat -- most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction -- weapons that can be easily concealed, delivered covertly, and used without warning.
>
> The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction.
>
> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

[18] Available at www.whitehouse.gov/nsc/nssall.html.

> The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.

The National Security Strategy of the United States of America issued March 2006[19] elaborates as follows:

> The advance of freedom and human dignity through democracy is the long-term solution to the transnational terrorism of today. To create the space and time for that long-term solution to take root, there are four steps we will take in the short term.
>
> - **Prevent attacks by terrorist networks before they occur.** A government has no higher obligation than to protect the lives and livelihoods of its citizens. The hard core of the terrorists cannot be deterred or reformed; they must be tracked down, killed, or captured. They must be cut off from the network of individuals and institutions on which they depend for support. That network must in turn be deterred, disrupted, and disabled by using a broad range of tools.
>
> - **Deny WMD to rogue states and to terrorist allies who would use them without hesitation.** Terrorists have a perverse moral code that glorifies deliberately targeting innocent civilians. Terrorists try to inflict as many casualties as possible and seek WMD to this end.
>
> - **Deny terrorist groups the support and sanctuary of rogue states.** The United States and its allies in the War on Terror make no distinction between those who commit acts of terror and those who support and harbor them, because they are equally guilty of murder. Any government that chooses to be an ally of terror, such as Syria or Iran, has chosen to be an enemy of freedom, justice, and peace. The world must hold those regimes to account.
>
> - **Deny the terrorists control of any nation that they would use as a base and launching pad for terror.** The terrorists' goal is to overthrow a rising democracy; claim a strategic country as a haven for terror; destabilize the Middle East; and strike America

[19] Available at www.whitehouse.gov/nsc/nss/2006.

> and other free nations with ever-increasing violence. This we can never allow. This is why success in Afghanistan and Iraq is vital, and why we must prevent terrorists from exploiting ungoverned areas.
>
> * * *
>
> Taking action need not involve military force. Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners. If necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.

These positions have been criticized, but they actually break little or no new ground. They are adaptations of the existing rules as applied in practice. As the history of state practice makes clear, they merely articulate the view that the U.S. retains the same right that states have always retained: the right to make their own assessments of potential risks and their own determinations of appropriate military responses.

Conclusion

Viewed objectively, there can be little disagreement about the modern-day standards for the use of force in anticipatory self-defense in response to the threat of terrorism. The real issue is in the application of the standards in particular facts and circumstances, especially in weighing the various factors. On a given set of facts and circumstances, reasonable minds might differ.

However, one thing is clear. The "imminence" standard is meaningless as against terrorists. Preparation is covert. There are no clear indications of when an attack is about to

occur. There are no troop movements, only individuals with backpacks. At best, there is only imperfect and sometimes contradictory intelligence.

As applied against threats of wide-scale destruction at the hands of terrorists with 747s or weapons of mass destruction, the *Caroline* standard makes no sense. No one really wants their government to be bound by them, and to wait until the danger is "instant, overwhelming, leaving no choice of means and no moment for deliberation." State practice and patterns of cooperation have made this abundantly clear.