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Death Star Drones: How Missile Defense Drone Technology Marks the Advent of Contingent Sovereignty

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Death Star Drones: How Missile Defense Drone Technology Marks the Advent of Contingent Sovereignty

Ben Forsgren*

Are advances in national security worth pursuing at the expense of sovereign equality? A new U.S. drone program may soon force the world to decide. Thanks to recent technological advances in unmanned aerial vehicles (UAV) and directed-energy weapons, the United States will soon have a fleet of missile-defense UAVs outfitted with advanced laser weapons designed to destroy intercontinental ballistic missiles before the missiles complete their launch phase. While these drones would significantly decrease the threat of a nuclear attack against the United States, they can only function if they are preemptively stationed in the sovereign airspace of other countries – a clear violation of current international sovereignty law. This article explains the technology of the new program, demonstrates how it violates international sovereignty law, and argues that its implementation will move the world closer to an international system of contingent sovereignty that rejects the idea of sovereign equality and subjects weaker states to the objectives of strong states.

* J. Reuben Clark Law School, J.D. Candidate 2021. Brigham Young University, B.A. 2018. This note is dedicated to my wife Kimberlee, whose selfless sacrifices and invaluable assistance have made my legal career possible. I would like to thank Professor Eric Talbot Jensen for overseeing this project and offering years of attentive mentorship and kindness. I am also grateful to the BYU Law Review editors for their careful, thorough, and helpful edits.

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INTRODUCTION

In 1977, the world watched for the first time as the sinister Death Star shot a crackling green laser into the heart of Alderaan, obliterating the planet forever.¹ This terrifying, awesome display of power forever changed pop culture and, perhaps, inadvertently planted the first seeds of the modern directed-energy missile defense program.

Although admittedly less cinematic, the basic concept of the Death Star's hovering laser attack on Alderaan has long been considered the "holy grail" of missile defense systems.² Since President Ronald Reagan's appropriately named "Star Wars" missile defense program, the United States has sought to create a defense system in which a hovering vehicle instantly identifies, targets, and destroys incoming missiles.³ Now, thanks to developments in unmanned aerial vehicle (UAV or drone) technology and directed-energy technology, the dreams of Star Wars are becoming a reality in the nascent UAV directed-energy

1. STAR WARS: EPISODE IV—A NEW HOPE (20th Century Fox 1977).

2. Alexander Begej, *Beam Us Up Donnie: The Future of Boost Phase Missile Defense*, GEO. SEC. STUD. REV. (Aug. 19, 2019), <https://georgetownsecuritystudiesreview.org/2019/08/19/beam-us-up-donnie-the-future-of-boost-phase-missile-defense/>.

3. Tim Weiner, *Lies and Rigged 'Star Wars' Test Fooled the Kremlin, and Congress*, N.Y. TIMES (Aug. 18, 1993), <https://nyti.ms/298SAcl>.

missile defense program (hereinafter UAV DMDP).⁴ However, like many of science fiction's ideas, this program does not function quite the same in the real world.

The problem with UAV DMDP is that it requires military drones to be preemptively stationed above enemy launch sites in order to defend the United States against potential missile launches.⁵ Preemptive self-defense of this nature is prohibited by the UN Charter, which only allows states to use self-defense to repel "armed attacks."⁶ If states could defend against threats that were merely perceived, then "defending" states could disregard the sovereignty of other states and use military force whenever they felt unsettled rather than when they were attacked.⁷ A regime such as this functionally violates the UN Charter's provisions on sovereign equality and self-defense by allowing strong states to disregard the sovereign rights of weaker states if they feel threatened or uncomfortable—a theoretical paradigm known as contingent sovereignty.⁸

Because UAV DMDP undeniably has a preemptive self-defense element, the United States most likely intends to use it,⁹ and international law is greatly influenced by the practices of powerful actors like the United States,¹⁰ the adoption of UAV DMDP potentially marks the beginning of a new era of contingent sovereignty.

This Note makes the following argument: UAV DMDP constitutes preemptive self-defense; preemptive self-defense is an indication of contingent sovereignty; thus, UAV DMDP is an

4. UAV DMDP is my terminology, and it refers to the overall concept rather than a single military initiative. Because the program is still developing and entails several projects, it does not yet have one all-inclusive name. Sometimes the concept is referred to as a drone Low-power Laser Demonstrator project (LPLD), but since that type of laser is not necessarily the one that will be used, the name continues to be in flux.

5. See Allison Barrie, *New Laser-Equipped Drones Will Take out Missile Threats Against the US*, FOX NEWS (Sept. 7, 2018), <https://www.foxnews.com/tech/new-laser-equipped-drones-will-take-out-missile-threats-against-the-us>.

6. U.N. Charter art. 51.

7. See U.N. Charter art. 2, ¶ 4; U.N. Charter art. 51 (requiring all states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state," unless an "armed attack occurs").

8. See Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT'L AFF. 293, 305 (2011); *infra* Section I.C.

9. See *infra* Conclusion.

10. See *infra* notes 129–130 and accompanying text.

indication of contingent sovereignty. By extension, this Note also argues that UAV DMDP and other emerging practices are pushing the world toward a new era of contingent sovereignty. Part I will explain the UAV DMDP technology, discuss international sovereignty, and introduce the concept of contingent sovereignty. Part II will explain the doctrine and development of self-defense and show how UAV DMDP constitutes unjustifiable preemptive self-defense.¹¹ The Note will conclude by discussing the implications of UAV DMDP.

Because this is a legal Note, discussions of the likely efficacy of the program, political checks mitigating the program's implementation, and possible roles of the UN Security Council in approving or opposing this program will be left to future scholarship. This Note only seeks to establish the legal problems UAV DMDP faces, demonstrate that it cannot be justified under self-defense, and explain how, if it is used, it will constitute a marked step on the path to contingent sovereignty.

I. UAV DMDP AND SOVEREIGNTY

A. *The Unmanned Aerial Vehicle Directed-Energy Missile Defense Program*

At any given time, the United States faces serious threats from nuclear inter-continental ballistic missiles (ICBMs). UAV DMDP exists to combat those threats. Currently, eight other states apart from the United States have nuclear ICBM capabilities, and half of them are hostile toward the United States in some way.¹² ICBMs are

11. Although self-defense is not the only potential legal justification for UAV DMDP, it is the strongest. See *infra* Part II.

12. See *Nuclear Weapons Worldwide*, UNION OF CONCERNED SCIENTISTS, <https://www.ucsusa.org/nuclear-weapons/worldwide> (last visited Jan. 14, 2021). The world's nuclear powers include the United States, Russia, France, China, the United Kingdom, Pakistan, India, Israel, and North Korea. Of these countries, Russia, China, Pakistan, and North Korea present security concerns, if not outright threats, to the United States. See, e.g., Jill Dougherty, *Sound the Alarm on Deadly US-Russia Nuclear Threat*, CNN (Dec. 12, 2019, 1:29 PM), <https://www.cnn.com/2019/12/12/opinions/new-start-treaty-dougherty/index.html>; Michael Mazza & Henry Sokolski, *China's Nuclear Arms Are a Riddle Wrapped in a Mystery*, FOREIGN POL'Y (Mar. 13, 2020, 3:43 PM), <https://foreignpolicy.com/2020/03/13/china-nuclear-arms-race-mystery/>; *North Korea Threatens US and S Korea with Nuclear Strikes*, BBC (Mar. 7, 2016), <https://www.bbc.com/news/world-asia-35741936>; Joshua T. White, *The Other Nuclear*

often kept on hair-trigger alert, meaning they could be launched at the United States within seconds or minutes.¹³ Once launched, ICBMs cannot be recalled for any reason, they travel at 15,000 mph (nearly 20 times the speed of sound),¹⁴ and can accurately strike a target from more than 6,000 miles away within about 30 minutes.¹⁵

Additionally, ICBMs have an almost incomprehensible destructive power and are specifically designed to frustrate defense efforts. First, modern ICBMs are outfitted with multiple nuclear warheads that combine to create the most powerful weapons on earth.¹⁶ When the first atomic weapons were dropped on Japan, they each leveled a major city and wrought generational suffering. Little Boy, dropped on Hiroshima, killed between 90,000 and 146,000 people, and Fat Man, dropped on Nagasaki, killed between 39,000 and 80,000 people.¹⁷ Today, atomic weapons are 3,000 times more powerful than Little Boy or Fat Man.¹⁸ In fact, one modern Russian ICBM has the capacity to wipe out all of France or Texas in a single blow or, with five or six strikes, destroy the entire U.S. East Coast.¹⁹

Second, defense efforts must strike ICBMs at the right time to be effective. An ICBM has three stages to its flight path: boost

Threat: America Can't Escape Its Role in the Conflict Between India and Pakistan, THE ATLANTIC (Mar. 5, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/americas-role-india-pakistan-nuclear-flashpoint/584113/>.

13. *Frequently Asked Questions About Taking Nuclear Weapons Off Hair-Trigger Alert*, UNION OF CONCERNED SCIENTISTS (Jan. 2015), <https://www.ucsusa.org/sites/default/files/attach/2015/01/Hair-Trigger%20FAQ.pdf>.

14. Different ICBMs may travel at different speeds and differ in their flight capabilities, but the most advanced missiles can travel at this velocity. See Jonathan Marcus, *Russia Deploys Avangard Hypersonic Missile System*, BBC NEWS (Dec. 27, 2019), https://www.bbc.com/news/world-europe-50927648?ns_source=facebook&ns_campaign=bbcnews&ocid=socialflow_facebook&ns_mchannel=social&fbclid=IwAR13Zu3FDTrYZXZcdj5KES_Siaq-uhQS2r0EtiaODac-A_CxvvPHJTajHGY.

15. Dave Mosher, *What Intercontinental Ballistic Missiles Are, How They Work, and Why the Entire World Fears Them*, BUS. INSIDER (July 5, 2017, 11:47 AM), <https://www.businessinsider.com/intercontinental-ballistic-missiles-science-2017-7>.

16. Barrie, *supra* note 5.

17. Tom Gillespie, *Hell on Earth: What Are Russia's Satan 2 Nuclear Missiles and Could the RS-28 Sarmat Warheads Reach the UK?*, THE SUN (Oct. 25, 2017, 12:10 PM), <https://www.thesun.co.uk/news/2066898/russias-satan-2-nuclear-missiles-rs-28-sarmat-warheads-uk/>.

18. Jay Bennett, *Here's How Much Deadlier Today's Nukes Are Compared to WWII A-Bombs*, POPULAR MECHS. (Dec. 13, 2020), <https://www.popularmechanics.com/military/a23306/nuclear-bombs-powerful-today/>.

19. Gillespie, *supra* note 17.

phase, midcourse, and terminal.²⁰ Of these three stages, only the boost phase presents a realistic opportunity to destroy the missile entirely because that is the only phase when the missile is moving as a slow, compact target that can be easily tracked and hit. Once the missile reaches the midcourse phase, countermeasures are deployed and the ICBM's several warheads separate from the missile.²¹ Then, during the terminal phase, each individual warhead becomes a moving target and advances very quickly along a unique trajectory.²² Furthermore, in a realistic nuclear strike situation, multiple ICBMs would be launched with dozens of warheads.²³ Therefore, the importance of striking these missiles while they are compact and vulnerable is critical to successful missile defense programs.

The challenge with missile defense programs is that eliminating an ICBM in boost phase is exceedingly difficult. Boost phase only lasts between one and five minutes, meaning that any defense system would have to be very close to the launchpad or fast enough to intercept the ICBM before it reaches its midcourse stage and its warheads separate.²⁴ Due to the herculean engineering tasks required to construct a defense system capable of destroying an ICBM in the first five minutes of flight, boost phase missile defense of this sort was unachievable for decades. Now, however, the first legitimate means to strike ICBMs in boost phase are emerging thanks to years of dedicated work across two disciplines: drones and directed-energy weapons.

For the purposes of this Note, a drone is an aerial, unmanned combat machine controlled by a sovereign state. The United States has been developing drones for decades. While its early models were medium-altitude vehicles used primarily for surveillance,²⁵ modern drones are designated as "hunter-killer[s]" for their

20. *Ballistic Missile Defense Challenge*, MISSILE DEF. AGENCY (Jan. 30, 2004), https://media.nti.org/pdfs/10_5.pdf.

21. Some ICBMs can carry up to ten warheads that can each hit different targets. Mosher, *supra* note 15.

22. MISSILE DEF. AGENCY, *supra* note 20.

23. Barrie, *supra* note 5.

24. *A System of Elements*, MISSILE DEF. AGENCY, <https://www.mda.mil/system/elements.html> (last updated June 16, 2020).

25. See *History of Drone Warfare*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/explainers/history-of-drone-warfare> (last visited Jan. 14, 2021).

high-altitude, long endurance capabilities that, coupled with an increased ability to carry heavy weaponry at maximum speeds, make for intimidating war machines capable of devastating strikes against American enemies.²⁶

UAV DMDP seeks to capitalize on these recent altitudinal, endurance, weight-bearing, and speed developments to create a new class of specialized missile defense drones. For UAV DMDP to work as well as the government intends, the drones must be able to fly 63,000 feet high, stay armed and ready in the strike zones for more than thirty-six hours without landing or refueling, have a cruising speed of Mach .46 (approximately 350 mph), have a travel range of 1,900 miles to a target, and be able to support laser weaponry weighing as much as 12,500 pounds.²⁷ Despite this tall technological order, these futuristic drones are projected to be operational between the years 2021 and 2023.²⁸

The directed-energy weapons are long-range weapons which damage their targets through highly focused energy forms, including laser, microwave, and particle beams.²⁹ So far, the Army, Navy, and Air Force have begun developing and testing directed energy weapons to shoot and destroy small boats, aircraft, or missiles.³⁰ Although the generators for these laser systems are often heavy and require a great deal of power, they offer significant advantages over traditional projectile weapons by offering virtually endless rounds of ammunition at much lower cost per shot.³¹ Given the speedy development and clear advantages of the directed-energy programs, Robert Afzal—a senior fellow for laser

26. Carey Dunne, *Just How Powerful Is the Reaper Drone?*, FAST CO. (July 10, 2014), <https://www.fastcompany.com/3032885/just-how-powerful-is-the-reaper-drone>.

27. Barrie, *supra* note 5.

28. *Id.*; see also Tyler Rogoway, *Missile Defense Agency Seeking a High-Flying Drone for "Airborne Laser 2.0"*, THE DRIVE (June 14, 2017), <https://www.thedrive.com/the-war-zone/11526/missile-defense-agency-looking-for-high-flying-drone-for-airborne-laser-2-0>.

29. DOUG BEASON, *THE E-BOMB 9* (2005).

30. Talal Hussein, *HEL on High Water: The Top Navy Laser Weapon Systems*, NAVAL TECH. (Jan. 30, 2020, 12:24 PM), <https://www.naval-technology.com/features/navy-laser-weapon-systems/>; Kyle Mizokami, *The U.S. Army Plans to Field the Most Powerful Laser Weapon Yet*, POPULAR MECHS. (Aug. 7, 2019), <https://www.popularmechanics.com/military/weapons/a28636854/powerful-laser-weapon/>; Andrew Liptak, *The US Air Force Successfully Tested a Laser System to Shoot Down Missiles*, THE VERGE (May 5, 2019, 10:38 AM), <https://www.theverge.com/2019/5/5/18530089/us-air-force-research-laboratory-shield-laser-weapons-system-test>.

31. Mizokami, *supra* note 30.

and sensor systems at Lockheed Martin—has concluded that “[w]e’re really at the dawn of an era of the utility of laser weapons.”³² These laser weapons, coupled with the revolutionary flight and monitoring abilities of modern drones, present the first real opportunity for a boost phase missile defense system with UAV DMDP.

UAV DMDP’s concept is simple: “Rather than play defense, . . . drones could pre-emptively patrol enemy skies [for ICBM threats].”³³ The drones, equipped with high altitude and long endurance capabilities and laser technology, would hover over another state’s ICBM launchpads at a height exceeding 60,000 feet for as long as thirty-six hours at a time.³⁴ If at any time an ICBM were launched from the territory beneath the drone, it would use its directed-energy weapon system to fire a powerful, light-speed laser at an ascending missile and destroy it during boost phase.³⁵ Such technology would provide a sense of national security and peace of mind that the United States has not felt since before the Cold War; however, achieving such security comes at the cost of violating the sovereignty of other countries.³⁶

Because UAV DMDP exists primarily for boost phase missile defense,³⁷ an anti-missile defense system must reach an ICBM during the first five minutes of its launch.³⁸ Even rocketing at their Mach .46 pace, the drones can only travel at five miles per minute—meaning that at a maximum, they could only be twenty-five miles away from the ICBM launch pad to possibly be able to target, fire, and destroy an ICBM within five minutes.

32. Philip Perry, *The US Military Will Usher in a Widespread Use of Laser Weapons in the 2020s*, BIG THINK (Mar. 21, 2017), <https://bigthink.com/philip-perry/the-us-military-plans-to-usher-in-widespread-use-of-laser-weapons-by-the-2020s>.

33. Barrie, *supra* note 5.

34. *Id.*

35. *Id.*

36. Of course, this conclusion assumes the best possible version of UAV DMDP in which the state firing an ICBM could not simply shoot down the American drone before launching its missiles. Although this Note only analyzes the legal issues associated with UAV DMDP and does not analyze its potential for success, it bears mentioning that it will likely not be easy to successfully shoot down the drones involved in the UAV DMDP program due to their advanced speed, altitude, and weapon capabilities. Additionally, the near-hegemonic influence of the United States would also likely serve as a political deterrent to shooting down the drones.

37. Barrie, *supra* note 5.

38. *See supra* note 24 and accompanying text.

The practical reality of traversing vast, near-continental territories like Russia or China to reach a missile within five minutes renders this scenario impossible. Even smaller nuclear powers like North Korea would still prove to be too large for the drones to reach the missiles in time. Accordingly, UAV DMDP can only function if it operates in another country's airspace *prior* to an ICBM launch. This is an undeniably preemptive self-defense tactic, and it conflicts with international sovereignty law.

B. International Law Concerning the Sovereignty of Airspace

International law is created primarily through treaties and custom. Although the international legal regime is fundamentally permissive rather than prohibitive,³⁹ state actions that violate preexisting treaty agreements or customs are illegal under international law.

One archetypal principle in international law, enshrined expressly both in treaties and in custom, is the idea of state sovereignty. Indeed, the first guiding principle of the UN Charter unequivocally states that the United Nations "is based on the principle of the sovereign equality of all its Members."⁴⁰ By way of definition, sovereignty refers to "the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relation with other States."⁴¹ In other words, sovereignty is the right of every country to maintain complete and exclusive control of its territory and all its domestic affairs.⁴²

In 1919, the *Paris Convention for the Regulation of Aerial Navigation* established that a state's sovereignty included "complete and exclusive" control of the airspace above

39. S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.").

40. See U.N. Charter art. 2, ¶ 1.

41. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 43 (Apr. 9) (individual opinion of Judge Alvarez).

42. See *Convention Relating to the Regulation of Aerial Navigation*, 1 J. AIR L. 94, 94 (1930).

its territory.⁴³ This idea was sustained and expanded by the *Chicago Convention on International Civil Aviation* which created the International Civil Aviation Organization (ICAO) and established the modern system for regulating civil airspace actions in the international community.⁴⁴

Later, in 1982, the *United Nations Convention on the Law of the Sea*⁴⁵ further clarified the parameters of sovereignty by declaring that states' sovereignty extended to the airspace over their territorial sea as well as their land territory.⁴⁶ This treaty therefore provided all the information needed for the horizontal limits on a state's airspace sovereignty, but it did not clarify a vertical limit.⁴⁷ To date, no other international agreement has done so either, leaving the vertical limit of a state's airspace sovereignty unsettled.⁴⁸

Although the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)*⁴⁹ established that outer space is not subject to state sovereignty like airspace is, it did not specify where outer space begins and airspace ends—making it difficult to establish the exact parameters of vertical sovereign airspace.⁵⁰ Some authorities, like the International Federation of Astronautics, have argued that the “Karman Line” that exists at 100 km is the

43. *Id.*

44. *Convention on International Civil Aviation - Doc 7300*, INT'L CIV. AVIATION ORG., <https://www.icao.int/publications/pages/doc7300.aspx> (last visited Jan. 14, 2021) (defining that the purpose of the ICAO to regulate civil airspace).

45. *United Nations Convention on the Law of the Sea*, Dec. 10, 1982, 1833 U.N.T.S. 397.

46. *Id.* at 400 (“This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.”).

47. See generally Dean N. Reinhardt, *The Vertical Limit of State Sovereignty*, 72 J. AIR L. & COM. 65 (2007) (explaining that despite numerous international treaties and scholarly suggestions, the vertical limit of state sovereignty remains unsettled).

48. *Id.* at 66 (“Because there is no agreed delineation between a state's territory and free outer space, the vertical limit of state sovereignty is unsettled and each state is left to define the limits of its vertical sovereignty. However, no state has explicitly done this.”).

49. *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, U.N.: OFF. FOR OUTER SPACE AFFS., <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html> (last visited Jan. 14, 2021).

50. See Reinhardt, *supra* note 47, at 119–20 (“For instance, the Outer Space Treaty does not define space.”).

beginning of outer space.⁵¹ Conversely, another suggestion proposes that airspace sovereignty should have a twelve nautical mile limit (just over 22 km).⁵² Regardless of these opinions and recommendations, there is no international consensus on where sovereignty-free outer space begins.

Notwithstanding the confusion over sovereignty's vertical limit, the legal analysis for UAV DMDP operations need not be especially concerned with a precise vertical sovereignty limit because the drones will only fly at around 63,000 feet (just over eighteen kilometers or just under ten nautical miles), well beneath where anyone would put the end of airspace sovereignty.⁵³ Therefore, by all accounts, UAV DMDP will necessarily operate in sovereign airspace wherever it is employed.

Collectively, these treaties stand for the legal realities that virtually all flyable airspace over sovereign territory belongs to the state that owns the territory, and that no country may legally enter the airspace of another country without permission. When state actors enter the territory of another sovereign state, the breached state's rights to self-defense under Article 51 of the UN Charter are activated. Although there can be some confusion in marginal cases over whether minor incursions fall within the UN Charter's provisions on the use of force, there is considerable scholarly consensus that "even if it is sometimes difficult to envisage them as 'attacks' in the literal sense—the parameters established in customary practice governing forcible responses to such incursions

51. *100KM Altitude Boundary for Astronautics*, FÉDÉRATION AÉRONAUTIQUE INTERNATIONALE, <https://www.fai.org/page/icare-boundary> (last updated June 21, 2004).

52. Reinhardt, *supra* note 47, at 126–27.

53. Rogoway, *supra* note 28 (The Missile Defense Agency is seeking HALE UAV with "On-station altitude of greater than 63,000 ft."). Although the language "greater than 63,000 ft" only sets an altitudinal floor and technically does not apply a vertical limit, it is well understood that it is looking for drones that are *capable* of reaching that height. High altitude drones today fly at a maximum of 60,000–65,000 feet. See Arthur Holland Michel, *High Altitude Drones*, THE CENTER FOR THE STUDY OF THE DRONE AT BARD COLLEGE (Oct. 15, 2015), <https://dronecenter.bard.edu/high-altitude-drones/> ("A high-altitude long-endurance drone is an unmanned aircraft that flies at altitudes higher than about 60,000 ft. and can remain airborne for extremely lengthy periods of time. The Northrop Grumman RQ-4 Global Hawk . . . which flies at altitudes of up to 65,000 ft. . . is currently the highest-flying and longest-endurance unmanned aircraft to see extensive use.").

are essentially the same as [armed attacks].”⁵⁴ Indeed, regarding aerial incursions specifically, history has shown countries exercise lethal force regularly to defend their skies.⁵⁵

For example, in July of 1955, an El Al Israel Airlines flight traveling from Austria to Turkey was shot down for trespassing in Bulgarian airspace, killing fifty-eight people on board.⁵⁶ Similarly, in September of 1983, Soviet fighter jets destroyed a South Korean jetliner over the Sea of Japan after it strayed off course into Soviet Union airspace, killing all 269 passengers aboard.⁵⁷ Still more examples include Israel downing a Libyan jetliner in 1973 and killing 108 people after it wandered fifty miles into Israeli airspace,⁵⁸ Yugoslavia shooting down two American planes for being in Yugoslav airspace in 1946,⁵⁹ and the famous U-2 spy plane incident in 1960 in which the Soviet Union shot down American pilot Gary Powers for flying over Soviet airspace.⁶⁰

These incidents and others,⁶¹ coupled with the foregoing treaty agreements, show that sovereign states legally need not and practically will not tolerate unsanctioned intrusions into their airspace.⁶² Such actions are consistent with a sovereign state’s right to defend its complete and exclusive control of its airspace.

54. TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 186 (2010); *see also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (5th ed. 2012); Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 123 (Bruno Simma et al., 2d ed. 2002) (arguing that even incursions not meant to take territory or do lasting harm constitute a UN Charter 2(4) violation).

55. *See generally* Farooq Hassan, *A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union*, 49 J. AIR L. & COM. 555 (1984) (providing several notable examples of states using lethal force against aerial incursions).

56. *Id.* at 568.

57. *Id.* at 555.

58. *Id.* at 569.

59. *Id.* at 570.

60. *Id.* at 582. When Powers was shot down, he was flying at over 70,000 feet, showing that states consider even high altitudes to be part of their sovereign airspace. Jason Caffrey, *Gary Powers: The U-2 Spy Pilot the US Did Not Love*, BBC NEWS (Jan. 3, 2016), <https://www.bbc.com/news/magazine-35064221>.

61. *See, e.g.*, RUYS, *supra* note 54, at 187.

62. Of course, like all international incidents, these events gave rise to diplomatic discord and claims of illegal behavior. For an in-depth analysis of these kinds of disagreements, *see* Hassan, *supra* note 55. Notwithstanding the confusion and allegations of illegal behavior surrounding these incidents, however, the legal bases for defending territorial integrity granted in the UN Charter along with the consistent use of lethal self-defense by states against unwelcome aircraft creates a pattern (if not a norm) that allows states to use lethal force to maintain control of their aerial territory.

However, an emerging theory of contingent sovereignty now contests this right.

C. The Theory of Contingent Sovereignty

Contingent sovereignty is the theory that “sovereign rights and immunities are not absolute. They depend on the observance of fundamental state obligations.”⁶³ In other words, “statehood itself is legally dependent on acceptable government behavior.”⁶⁴ While the idea of “acceptable government behavior” is not new,⁶⁵ the theory of contingent sovereignty takes it much further by positing that the consequences for violating state obligations may actually include a loss of sovereignty itself.⁶⁶ Accordingly, if a state ceases to act responsibly, then “protections of sovereignty vanish from within,” severing the state’s right to non-intervention or invasion by another state.⁶⁷ Therefore, it logically follows that two of the most important questions about contingent sovereignty are: (1) what kind of state responsibility violations will lead to a loss of sovereignty, and (2) who may determine that a state no longer deserves its full sovereignty rights?

First, there are no predetermined actions that automatically render a state’s sovereignty rights contingent;⁶⁸ however, contingent sovereignty intervention is most commonly discussed in terms of humanitarian intervention or high security concerns like

63. Stewart Patrick, Sec’y of State Pol’y Plan. Staff, Remarks to the 43rd Annual International Affairs Symposium, The Role of the U.S. Government in Humanitarian Intervention (Apr. 5, 2004), <https://2001-2009.state.gov/s/p/rem/31299.htm>.

64. Hurd, *supra* note 8, at 305. The scholar Stuart Elden first coined the term “contingent sovereignty” while discussing the loss of sovereignty norms for countries that sought to acquire weapons of mass destruction. Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. OF INT’L AFFS. 11, 14 (2006).

65. States have always had obligations, and obligations necessarily carry consequences. In fact, since the Peace of Westphalia first legitimized the international system of states in 1648, states have had to balance their endowment of power and authority with responsibility. See Eric Talbot Jensen, *Cyber Sovereignty: The Way Ahead*, 50 TEX. INT’L L. J. 275, 280 (2014). This tradition was decidedly sustained by the International Court of Justice in 1949 when it asserted in the Corfu Channel Case that “[s]overeignty confers rights upon States and imposes obligations on them.” Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 43 (Apr. 9) (individual opinion of Judge Alvarez).

66. See Hurd, *supra* note 8, at 306.

67. *Id.*

68. Indeed, it is a paradigm in conflict with the current international legal system. See U.N. Charter art. 2, ¶ 4; U.N. Charter art. 51.

terrorism or weapons of mass destruction (WMDs).⁶⁹ Because this Note focuses on the United States defending itself from missile threats, only the security concerns will be addressed.

Second, contingent sovereignty only exists when a state or states operate in a different, nonconsenting state without UN approval. If a state gives consent for intervention, there cannot be a sovereignty violation because consent itself “is a manifestation of the ‘sovereign equality’ of states,” and the fact that “a state can consent to acts otherwise contrary to its sovereignty is recognisable broadly within international law.”⁷⁰ Furthermore, any action approved by the UN does not render sovereignty contingent because nearly every state in the world has already consented to the terms of the UN Charter, which has provisions allowing it to violate state sovereignty by “tak[ing] at any time such action as it deems necessary in order to maintain or restore international peace and security.”⁷¹ Furthermore, those few states that have not consented are still bound to the terms of the Charter through customary international law.⁷² In other words, a state’s sovereignty

69. For examples of humanitarian treatment of contingent sovereignty, see Keith A. Petty, *Humanity and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT’L L. 745 (2013); Hurd, *supra* note 8, at 21; Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT’L L. 97 (2013). While much of the discussion around security-based contingent sovereignty focuses on terrorism and weapons of mass destruction, the questions of contingent sovereignty could logically extend to cover other security interests, like the emerging threats of cyber security. See generally Jensen, *supra* note 65.

70. Max Byrne, *Consent and the Use of Force: An Examination of ‘Intervention by Invitation’ as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen*, 3 J. ON USE FORCE & INT’L L. 97, 99–100 (2016).

71. U.N. Charter art. 51.

72. See Norman G. Printer, Jr., *The Use of Force Against Non-state Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. & FOREIGN AFFS. 331, 339–40 (“The use of force regime outlined [in the UN Charter] is recognized as customary international law, meaning that it is binding upon all states, even those few states that do not belong to the UN. Although it is still debated whether the Charter intended to codify customary international law as of the Charter’s inception, it is undisputed that all states are bound by the document’s norms.”). Additionally, the Restatement (Third) of Foreign Relations Law states “[i]t is generally accepted that the principles of the United Nations Charter prohibiting the use of force have the character of *jus cogens*,” which means “the international community of states” recognizes these principles “as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. K (internal citations omitted); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 94, 96–97 (June 27)

cannot be violated by an invited state's interference or by UN interference because the sovereign state has consented to such action in either case.

The inquiry into contingent sovereignty in this Note looks to UAV DMDP because it is a program that has neither been consented to by any other state nor approved by the UN Security Council. Therefore, if the United States proceeds with UAV DMDP, it will functionally decide that its security interests of nuclear defense outweigh the sovereignty rights of states capable of launching nuclear attacks—a clear example of contingent sovereignty.

D. International Acceptance of Contingent Sovereignty

UAV DMDP would arguably be the first US program to adhere to a theory of contingent sovereignty, but the idea of pursuing policies resembling contingent sovereignty has existed among prominent experts for some time. For example, according to Richard N. Haass—who is the current President of the Council on Foreign Relations, previous Director of Policy Planning in Colin Powell's State Department, and previous member of the Carter, Reagan, and George H. W. Bush administrations—sovereignty rights come with obligations that specifically prohibit states from supporting terrorism or pursuing WMDs.⁷³ In Haass's words from 2002, "sovereignty does not grant governments a blank check to do whatever they like within their own borders."⁷⁴

Additionally, Philip Zelikow, who served as the executive director of the 9/11 Commission and wrote the 2002 United States National Security Strategy, published a 1998 report describing a world order that seems to adopt the theory of contingent sovereignty.⁷⁵ In Zelikow's words:

International norms should adapt so that . . . states are obliged to reassure those who are worried and to take reasonable measures to prove they are not secretly developing weapons of mass

(Merits) (applying customary international law instead of multilateral treaties like the U.N. Charter).

73. Elden, *supra* note 64, at 15.

74. *Id.* (quoting Richard N. Haass, Dir. of the Off. of Pol'y Plan. Staff US Dep't of State, The 2002 Arthur Ross Lecture, Remarks to Foreign Policy Association: Defining U.S. Foreign Policy in a Post-Post-Cold War World (April 22, 2002)).

75. *Id.* at 14–15.

destruction. Failure to supply such proof, or prosecute the criminals living in their borders, should entitle worried nations to take all necessary actions for their self-defense.⁷⁶

These statements from Haass and Zelikow jointly propose a foreign policy that looks something like the following: if a state is worried about another state's terroristic or WMD activity, it may take "all necessary actions" for its self-defense, regardless of sovereignty considerations. Such an approach resembles the preemptive self-defense prohibited by the UN Charter—showing how preemptive self-defense may in fact be considered a manifestation of contingent sovereignty.⁷⁷

Despite the implicit support for contingent sovereignty that may exist in statements like those from Haass and Zelikow, contingent sovereignty is hardly an accepted doctrine in the international community. In a 2002 speech by former UN Secretary-General Kofi Annan regarding intervention in Iraq, Annan reaffirmed that "[a]ny State, if attacked, retains the inherent right of self-defense under Article 51 of the Charter. But beyond that, when States decide to use force to deal with broader threats to international peace and security, there is no substitute for the unique legitimacy provided by the United Nations."⁷⁸

While much has changed since 2002, the prevailing view still favors Secretary-General Annan's view over Philip Zelikow's opinion. In 2016, Secretary-General Ban Ki-moon spoke about the UN's growing focus on preventing genocide and crimes against humanity, and stated that although such efforts by the UN may feel as though they undermine state sovereignty, the United Nations' engagement with member states will be "based on cooperation, transparency[,] and respect for sovereignty," and that the UN "seeks to reinforce sovereignty, not challenge or undermine it."⁷⁹

76. *Id.* (quoting ASHTON B. CARTER, JOHN M. DEUTCH & PHILIP D. ZELIKOW, CATASTROPHIC TERRORISM: ELEMENTS OF A NATIONAL POLICY (1998)).

77. See U.N. Charter art. 2, ¶ 4; U.N. Charter art. 51.

78. Press Release, United Nations, When Force is Considered, There is No Substitute for Legitimacy Provided by United Nations, Secretary-General Says in General Assembly Address (Sept. 12, 2002), <https://www.un.org/press/en/2002/SGSM8378.doc.htm>.

79. Ban Ki-moon, UN Secretary-General, Remarks at Security Council Open Debate on Respect for the Principles and Purposes of the Charter as a Key Element for the Maintenance of International Peace and Security (Feb. 15, 2016), <https://www.un.org/sg/en/content/sg/statement/2016-02-15/secretary-generals-remarks-security-council-open-debate-respect>.

More recently, in September of 2019, the UN General Assembly spoke so extensively about sovereignty concerns that a UN press release summarized the general theme of the arguments as: “International peace and security are gravely threatened when national sovereignty, independence and territorial integrity—principles on which the United Nations was founded—are undermined and violated.”⁸⁰ From these statements and others, it would seem that the notion of contingent sovereignty has won few vocal converts in the international community.

Given the global opposition to the idea of contingent sovereignty, how can the United States justify UAV DMDP, which not only infringes upon sovereignty, but completely ignores it? After all, maintaining an indefinite military presence in another country’s airspace is an unprecedented suggestion that breaks rank with even the strongest statements favoring contingent sovereignty.

The answer is the United States can either persuasively justify UAV DMDP under the current sovereignty framework or, alternatively, completely embrace a new theory of contingent sovereignty. In other words, if UAV DMDP cannot be fully excused under the current framework, it necessarily constitutes a giant, perhaps irreversible, step toward a new paradigm of contingent sovereignty in international law.

II. SELF-DEFENSE IN INTERNATIONAL LAW

The best argument to justify UAV DMDP is self-defense. Although self-defense is not the only potential legal justification for UAV DMDP, it is the strongest. While other justifications such as consent, armed conflict, countermeasures, and necessity arguments warrant discussion as well, it is unlikely that any of these justifications would result in an outcome any different from that of self-defense. For the sake of brevity and efficiency, this Note will limit its discussion of justifications for UAV DMDP to self-defense.

Self-defense is an ancient, archetypal right of every state. When the United Nations Charter was written, it sought to advance a new world order of peaceful coexistence among equally sovereign

80. Press Release, United Nations, World Leaders Denounce Breaches of Sovereignty in Collective Efforts to Settle Conflict, Tackle Climate Change, as General Assembly Debate Continues (Sept. 25, 2019), <https://www.un.org/press/en/2019/ga12187.doc.htm>.

nation states—a mission it made clear by listing sovereign equality as its very first guiding principle in the Charter.⁸¹ However, the idea of sovereign equality had to be reconciled with the “inherent right” states already had to self-defense.⁸² The result was Article 51 of the UN Charter, which sustains the principle of sovereign equality, but emphasizes that nothing “shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”⁸³ The practical result of the reconciliation between sovereign equality and self-defense is an international system in which all states must respect one another’s sovereignty unless they are acting to repel an armed attack.

This system prompts the questions, what constitutes an armed attack, and when can self-defense be used to prevent an armed attack? The answers to these questions are still unsettled. In broad terms, these questions hinge on whether an attack is anticipatory or preemptive. For the purposes of this Note, anticipatory self-defense refers to the type of defense described by the *Caroline* standard and covered by Article 51, and preemptive self-defense is self-defense that responds to threats that are not imminent according to the *Caroline* standard.⁸⁴ Anticipatory self-defense is lawful defensive force used against an imminent armed attack whereas preemptive self-defense is unlawful defensive force used against a non-imminent threat of an armed attack.

The majority of the international community agrees that anticipatory self-defense is included in the meaning of the text of Article 51; however, preemptive force is much more likely to fall outside the meaning of the text and therefore violate the provision.⁸⁵ While some states and international lawyers argue that

81. U.N. Charter art. 2, ¶ 1.

82. U.N. Charter art. 51.

83. *Id.*

84. While there are three broadly recognized and debated types of self-defense, the terms are used by various scholars to refer to differing principles. For this Note, preemptive self-defense’s often-used other term of “preventive self-defense” will not be used. Additionally, interceptive self-defense, the third type of self-defense, will not be discussed in this Note. While interceptive self-defense could add a beneficial perspective to the discussion, it likely will not affect the overall outcome and the confines of this Note do not allot for its treatment. For treatment of interceptive self-defense, see DINSTEIN, *supra* note 54.

85. See THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 107 (2002) (“States seem willing to accept strong evidence of the imminence of an overpowering attack as tantamount to the attack itself, allowing a

preemptive self-defense should be considered legitimate, Professor Sean Murphy points out that “[t]o date, . . . no authoritative decision-maker within the international community has taken a position on whether preemptive self-defense is permissible under international law, or whether it is permissible but only under certain conditions.”⁸⁶

Accordingly, for the United States to justify UAV DMDP as self-defense, it must convincingly demonstrate that state practice in the international community has moved the standard for legitimate self-defense away from anticipatory self-defense and into the realm of preemptive self-defense. If it cannot, then UAV DMDP breaches international legal standards and represents a deviant move toward contingent sovereignty.

In modern history, there are certain events which color the discussion on imminence and provide insight into the parameters of internationally legal preemptive self-defense actions. Beginning with the foundational *Caroline* affair, this Part tracks the historical development of “imminence” in the international community, discusses how it is currently understood, and shows that UAV DMDP cannot be justified according to that understanding.

A. The Caroline Era of Anticipatory Self-Defense

Conceptual understanding of anticipatory self-defense begins with the *Caroline* test.⁸⁷ The *Caroline* test is derived from an incident between the United States and Britain during the Canadian Rebellion of 1837.⁸⁸ At that time, a newly formed, pro-Canada American force began harassing British soldiers along the Niagara River between Canada and the United States.⁸⁹ Among these forces was a steamboat called the *Caroline* which ferried supplies and reinforcements across the river to the rebels in Canada.⁹⁰

demonstrably threatened state to respond under Article 51 as if the attack had already occurred, or at least to treat such circumstances, when demonstrated, as mitigating the system’s judgment of the threatened state’s pre-emptive response.”).

86. Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 702 (2005).

87. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 741 (2004).

88. John Dever & James Dever, *Cyberwarfare: Attribution, Preemption, and National Self Defense*, 2 J. L. & CYBER WARFARE 25, 39–40 (2013).

89. *Id.*

90. *Id.* at 41.

Considering the *Caroline's* capacity to strengthen and transport the rebel forces, the British militia in Canada determined the *Caroline* should be destroyed even though it was moored in American waters.⁹¹

The British troops boarded the *Caroline*, killed two Americans, set the ship on fire, and sent it over the edge of Niagara Falls.⁹² In response to vehement American condemnation of the attack, the British justified their actions by claiming they acted in self-defense. In response, Daniel Webster, who was the Secretary of State of the United States, asserted in an official letter that self-defense against imminent attacks may only take place when there is “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁹³

From the time Secretary Webster penned his letter to the passage of the UN Charter, the *Caroline* test enjoyed rare popularity and legitimacy. Hailed as the “seminal definition”⁹⁴ of permissible use of anticipatory force and lauded for having a “mythical status”⁹⁵ as a definition of imminence, the *Caroline* test went on to be adopted by the International Military Tribunal in the Nuremberg trials and even survived the adoption of the UN Charter in 1945.⁹⁶ Truly, the *Caroline* test is a foundational doctrine of anticipatory self-defense.

Yet, despite its pioneering role in defining anticipatory self-defense, the *Caroline* test is not without controversy. The principal debate regarding the *Caroline* test today asks whether it is poorly tailored to states’ needs in an era of modern warfare, prompting some to argue that “such a parochial perspective could be

91. *Id.* at 41–42.

92. *Id.* at 42.

93. Daniel Webster, *Case of the Caroline*, 63 NILES’ NAT’L REG., Sept. 24, 1842, at 58. Webster also discussed the need for proportionality in self-defense attacks, but because this Note deals with mere neutralizing force used against WMD capable of killing millions, proportionality is not of great relevance.

94. Dever & Dever, *supra* note 88, at 47.

95. *Id.* at 48 (“Indeed, as Professor Christine Gray remarked in 2000, the *Caroline* test has attained a mythical status not only for its definition of imminence but also for its requirement that the use of force be necessary and proportional to a coming attack.”) (referencing CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105 (Oxford 2000)).

96. Yoo, *supra* note 87, at 741.

disastrous in a thermonuclear age riven by terrorist acts and rogue nation states.”⁹⁷

In response, adherents to the *Caroline* standard claim that expanding the meaning of Article 51 to meet these threats constitutes preemptive self-defense, which “would place the law on a very slippery slope, taking us back into the pre-Charter world in which nations resorted to warfare for ‘just’ causes.”⁹⁸ Before 9/11, this debate emerged prominently in two notable events: the 1981 Israeli attack on Iraq and the 1986 American attack on Libya.⁹⁹

On June 7, 1981, Israel conducted an air strike on Iraq and destroyed the construction site of a French-supplied nuclear reactor.¹⁰⁰ To justify this blatant violation of sovereignty and armed attack against Iraq, Israel invoked a self-defense argument claiming it had been concerned for several years that the nuclear program would produce weapons, and that it only attacked to prevent Iraq from using nuclear weapons against Israel.¹⁰¹ Although subsequent evidence gathered by the international community revealed that it was truly Iraq’s intention to build nuclear weapons, it remained unclear if Iraq intended to actually use them.¹⁰² Additionally, the same intelligence showed that Iraq lacked the means to create any such weapons for another twelve to eighteen months.¹⁰³

Notwithstanding the valid threat that the nuclear facility could pose to Israel, the UN Security Council unanimously adopted Resolution 487 which “strongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct,” and “[c]all[ed] upon Israel to refrain in the future from any such acts or threats thereof.”¹⁰⁴

97. Dever & Dever, *supra* note 88, at 48; see also MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 15 (Stephen Macedo ed., 2008).

98. Murphy, *supra* note 86, at 714.

99. While there are other examples which could be included in this discussion—like the 1967 Six-Day War, *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, 2003 I.C.J. Rep. 161 (May 2004), or *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27)—only the most relevant examples could be included within the limits of this Note.

100. Donald R. Rothwell, *Anticipatory Self-Defence in the Age of International Terrorism*, 24 U. QUEENSLAND L.J. 337, 343 (2005).

101. *Id.*

102. *Id.*

103. *Id.*

104. S.C. Res. 487 (June 19, 1981).

Israel's attack on Iraq demonstrates that in 1981 the international community would not tolerate a strike carried out twelve to eighteen months in advance of an attack that was not certain to occur. Although Israel sought to justify its actions through self-defense, it failed to produce any clear state practice supporting its interpretation of self-defense and could not rebut the accusations that it had acted before exhausting other peaceful means of resolving the problem.¹⁰⁵

Five years after Israel's attack on Iraq, the limits of anticipatory force were again questioned on the world stage. On April 5, 1986, a Libyan national carried out a terrorist attack on a popular nightclub in Berlin that killed two and wounded seventy-nine Americans, among other victims. Because the terrorist was presumably acting under the orders of Libya's head of state, Muammar al-Gaddafi, the United States responded ten days later by invading Libya's sovereign airspace and bombing three targets in Tripoli and two near Benghazi.¹⁰⁶

Unlike a traditional exercise of anticipatory self-defense, the United States did not claim it was repelling any kind of imminent attack. Instead, it claimed its defensive force was justified by "clear evidence that Libya [was] planning future attacks,"¹⁰⁷ and because "preemptive action against his terrorist installations will not only diminish Colonel [Gaddafi's] capacity to export terror, it will provide him with incentives . . . to alter his criminal behavior."¹⁰⁸ In other words, the United States was asserting that the doctrine of self-defense legitimized not only uses of force to repel an incoming attack but also uses of force aimed at preventing indeterminate future attacks and deterring terrorists as well.

Although this claim by the United States departed markedly from the *Caroline* test and resembled Israel's preemptive action

105. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 173 (Oxford, 4th ed., 2018).

106. Rothwell, *supra* note 100, at 344.

107. Larry M. Speakes, Principal Deputy Press Sec'y, Statement on the United States Air Strike Against Libya (Apr. 14, 1986), in RONALD REAGAN PRES'L LIBR.: PUB. PAPERS PRES. RONALD REAGAN, <https://www.reaganlibrary.gov/archives/speech/statement-principal-deputy-press-secretary-speakes-united-states-air-strike-0> (last visited Jan. 17, 2021).

108. Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986), in RONALD REAGAN PRES'L LIBR.: PUB. PAPERS PRES. RONALD REAGAN, <https://www.reaganlibrary.gov/archives/speech/address-nation-united-states-air-strike-against-libya> (last visited Jan. 17, 2021).

decried by the UN in 1981, there was not as much fallout resulting from the United States' actions. There was no Security Council resolution or International Court of Justice case condemning the act as illegal,¹⁰⁹ and thus the United States did not need to actively defend its anticipatory action by showing state practice. Consequently, the world was left with mixed precedent: the armed attack against Iraq twelve to eighteen months prior to their anticipated use of nuclear weapons was not acceptable, but an attack launched to deter Libya from unspecified future attacks did not receive the same level of condemnation.

While the world was still operating under the *Caroline* test at this time, it was arguably in Libya that the first seeds of preemptive self-defense and contingent sovereignty appear, as well as the evident disparity in self-defense justifications between world powers like the United States and lesser powers like Israel—themes that became incredibly important when the world changed forever on September 11, 2001.

B. 9/11 and Preemptive Self-Defense

The terrorist attacks of 9/11 prompted the most important developments in international self-defense law since the ratification of the UN Charter. Following the infamous attacks by the Al-Qaeda network—which destroyed the World Trade Center in New York City, collapsed the west wing of the Pentagon in Virginia, and caused the deaths of nearly 3,000 people¹¹⁰—the United States responded swiftly, causing the world to reevaluate what actions are included in the self-defense justification under Article 51.

Among the United States' responses to 9/11 was the 2002 National Security Strategy, which specifically declared the United States' view of a more expansive self-defense doctrine under international law.¹¹¹ In what has subsequently been coined as the Bush Doctrine, President George W. Bush's administration declared that the United States' right of self-defense went beyond

109. Rothwell, *supra* note 100, at 345.

110. Peter L. Bergen, *September 11 Attacks*, ENCYC. BRITANNICA (Sept. 10, 2020), <https://www.britannica.com/event/September-11-attacks>.

111. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), <https://2009-2017.state.gov/documents/organization/63562.pdf>.

anticipatory self-defense and allowed it to act preemptively against terrorists stating:

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.¹¹²

Notably, the United States specifically discussed the existing right to anticipatory self-defense but refuted the *Caroline* standard of instant and overwhelming attacks by asserting that legitimate anticipatory action may be taken “even if uncertainty remains as to the time and place of the enemy’s attack.”¹¹³ The National Security Strategy further undermined the *Caroline* test by expressly declaring the new age of rogue states and terrorists left the United States no option but to reject the limited “reactive posture” of the past¹¹⁴ and suggesting that “[i]n particular the requirement that a threat be imminent needs to be revisited.”¹¹⁵ Breaking rank with all preceding self-defense doctrines in its bald assertion of a right to

112. *Id.* at 15.

113. *Id.*

114. *Id.*

115. GRAY, *supra* note 105, at 249–50. Since then, the United States has indeed updated its definition of imminence. The United States now uses the following framework for imminence analysis:

“the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. . . . [T]he absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.” Finally, as is now increasingly recognized by the international community, the traditional conception of what constitutes an “imminent” attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.

WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 9 (2016), <https://www.refworld.org/docid/5847db914.html> (internal citations omitted).

preemptive force, the Bush Doctrine's acceptance by the international community would be immediately tested in the Iraq War.

On March 19, 2003, the United States invaded Iraq to prevent its acquisition and use of WMDs against the United States.¹¹⁶ Although it is debated whether this was the true motive, it is undisputed that there was no imminent threat from Iraq against the United States as defined by the *Caroline* test. In fact, the United States' own National Intelligence Council reported in 2002 that "Iraq . . . if left unchecked . . . probably will have a nuclear weapon during this *decade*."¹¹⁷

Given its demonstrable lack of imminence and clear deviance from earlier questions of anticipatory self-defense in international law, the Iraq war is arguably the first modern preemptive war – something that, under the UN Charter, would traditionally be considered illegal.¹¹⁸ Yet, notwithstanding these problems, the United States garnered an international coalition of forty-nine countries supporting the war effort and set an enduring example of using preemptive self-defense to justify a major and lasting invasion against another sovereign state.¹¹⁹

Since the U.S. authorized military action in Iraq, other states likewise have adopted policies which arguably support preemptive self-defense theories. For example, although Russia was critical of the Iraq invasion, its quarrel was with the application of preemptive force and not with the theory of preemptive

116. U.S. DEP'T OF STATE, WINNING THE WAR ON TERROR (2003), <https://2001-2009.state.gov/documents/organization/24172.pdf>.

117. NAT'L FOREIGN INTEL. BD., IRAQ'S CONTINUING PROGRAMS FOR WEAPONS OF MASS DESTRUCTION 5 (2002), <https://documents.theblackvault.com/documents/iraq/iraq-wmd-nie-01-2015.pdf> (emphasis added).

118. *But see* Murphy, *supra* note 86, at 730–31. ("[T]he United States did not assert that the invasion of Iraq was permissible under international law because of an evolved right of preemptive self-defense. Rather, the United States asserted that the invasion was lawful because it was authorized by the Security Council, a theory also maintained by the other members of the U.S.-led coalition. At most, it seems that some of the U.S. government's statements on the legality of the action contained cryptic references suggesting legal authority other than that emanating from Security Council resolutions, but the terms 'anticipatory self-defense' or 'preemptive self-defense' are never used. Consequently, it is no surprise that some international lawyers believe that the invasion of Iraq provides no precedent for a right of preemptive self-defense, but others assert that it does.").

119. For an explanation on why a coalition such as this is legally significant, see the discussion on international law creation through state action and *opinio juris*, *infra* Section II.C.

force generally.¹²⁰ In fact, in 2008 the Russian military Chief of Staff General Yuri Baluyevsky asserted Russia's dedication to the idea of preemptive self-defense by declaring, "We have no plans to attack anyone, but . . . to defend the sovereignty and territorial integrity of Russia and its allies, military forces will be used, including *preventively*, including with the use of nuclear weapons."¹²¹ This blatant endorsement of preemptive self-defense leaves little question on Russia's stance regarding preemptive self-defense.

Similarly, despite initially condemning the invasion of Iraq,¹²² the Indian government has also adopted preemptive approaches to self-defense. For example, in 2002 the Indian Finance Minister Jaswant Singh described India's stance on preemptive self-defense while on a trip to Washington, D.C. by stating: "Preemption or prevention is inherent in deterrence. Where there is deterrence there is preemption. The same thing is there in Article 51 of the United Nations Charter. Every nation has that right. . . . Preemption is the right of any nation to prevent injury to itself."¹²³

This theme was reiterated the next year by Foreign Minister Yashwant Sinha who declared, "[T]he international community must realize that India has a much better case to go for preemptive action against Pakistan than the US has in Iraq."¹²⁴ As early as April of 2004, the Indian government extended these ideas to its military policy by embracing the "Cold Start" doctrine—a renewed military policy that embraced a posture of "proactive deterrence" with "offensive bias."¹²⁵

Lastly, it bears mentioning that some scholars have pointed to the growing state practice of targeted drone strikes as a form of preemptive warfare.¹²⁶ While such programs may exercise lethal

120. See Kerstin Fisk & Jennifer M. Ramos, *Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm*, 15 INT'L STUDS. PERSPS. 163, 175 (2014).

121. *Id.* at 176 (emphasis added) (quoting *Russia Could Use Nuclear Weapons as Preventive Measure to Thwart Major Threat, Official Says*, ASSOCIATED PRESS (Jan. 19, 2008), <https://www.foxnews.com/story/russia-could-use-nuclear-weapons-as-preventive-measure-to-thwart-major-threat-official-says.amp>).

122. *Id.* at 172.

123. *Id.* at 173.

124. *Id.*

125. *Id.* at 173–74.

126. As Fisk and Ramos point out, the modern drone program is now able to take lethal action against ambiguous threats like suspected militants with unconfirmed identities who

preemptive force in non-consenting countries, the justification for such programs is usually based in the armed conflict doctrine rather than self-defense. For example, although the United States uses its well-known “unwilling or unable” doctrine to justify sending Reaper drones into countries which are unwilling or unable to eliminate internal terrorist threats,¹²⁷ it does so under the auspices of the war on terror—an armed conflict duly sanctioned by the U.S. Congress in the Authorization for Use of Military Force (AUMF) in 2001.¹²⁸ Therefore, these matters are beyond the scope of preemptive self-defense.

For the foregoing reasons, the Bush Doctrine, the Iraq War, Russia’s claim to a right of preemptive strikes, and India’s incorporation of preemptive self-defense into its military policy seem to indicate an emerging state practice of preemptive self-defense, or at least a standard much different from the *Caroline* test. However, on their own they do not overcome the status quo. For the United States to justify UAV DMDP under self-defense, it would have to show that under customary international law, these state practices are not new exceptions but the accepted norm. The following section explains why the United States fails in its arguments that customary international law includes these practices.

are targeted for suspicious “patterns of life.” In 2013, United States senior officials admitted that dozens of these strikes had been committed against low-ranking fighters or foot soldiers who presented no high-level threats, but “would have been future leaders” if they had been left alive. Kerstin Fisk & Jennifer M. Ramos, *Introduction: The Preventive Force Continuum, in PREVENTIVE FORCE: DRONES, TARGETED KILLING, AND THE TRANSFORMATION OF CONTEMPORARY WARFARE* 1, 9–10 (Kerstin Fisk & Jennifer M. Ramos eds., 2016).

127. Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (Sept. 23, 2014), <http://undocs.org/pdf?symbol=en/S/2014/695>. This letter is largely viewed as a watershed moment for the “unwilling or unable” doctrine; however, it was not the first instance of the idea. For example, Secretary of State John Quincy Adams once wrote to the Spanish government informing it that if it were unable to prevent cross-border incursions against America from Creeks, Seminoles, and escaped slaves in Spanish Florida, then the United States would invade and claim Florida for itself. Robert J. Delahunty & John Yoo, *The “Bush Doctrine”: Can Preventive War Be Justified?*, 32 HARV. J.L. & PUB. POL’Y 843, 851–52 (2009).

128. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001) (enacted).

C. The Current Law of Self-Defense Cannot Justify UAV DMDP

Considering the development and current state of “imminence” under international law, the United States will likely fail to justify UAV DMDP under a theory of anticipatory defense. Because UAV DMDP must operate preemptively,¹²⁹ justifying it requires the United States to show that customary international law has legitimized preemptive self-defense in accordance with Article 51. It has not.

Preliminarily, customary international law is generated by the combination of two elements: state practice and *opinio juris*. State practice refers to behaviors of sovereign states that are widespread and representative, and *opinio juris* refers to a state’s recognition that those behaviors were carried out as legal obligations. Despite state practice’s straightforward definition, it can be exceedingly difficult to establish. As one author phrased it:

Scholars have debated what kind of activity constitutes state practice and disagree on the duration and frequency of the activity that is necessary to satisfy the definition. Further, it seems practically impossible to ascertain the practices of the nearly 200 states in the international community. Thus, a survey of customary international law is often highly selective and takes into account only major powers and the most affected states. But even in this smaller focus there is no adequate and systematic method for proving the elements of custom. Consequently, international law arguments based on custom always suffer from a considerable degree of arbitrariness.¹³⁰

Likewise, while it may seem easier to establish *opinio juris* in theory, states tend to be minimalistic and guarded in public statements on controversial international legal theories which may contradict their interests later. Accordingly, explicit statements on a given state’s position on emerging norms of preemptive force will be few and far between. Given the “considerable degree of arbitrariness” in the analysis of state practice and the rarity of definitive *opinio juris* statements, it is unsurprising that there is not sufficient support for the United States to argue that preemptive self-defense has become customary international law.

129. *Supra* Part I.

130. Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT’L L. REV. 275, 276–77 (2008).

First, the world's overwhelmingly negative response to Israel preemptively attacking an Iraqi nuclear plant in 1981 clearly shows that exercising preemptive self-defense against non-imminent threats of nuclear weapons is *opposed* by state practice and the *opinio juris* of states.¹³¹ UAV DMDP is designed to prevent nuclear weapons from ever becoming threats, not respond to active or imminent nuclear threats.¹³² If undisputed intelligence showing Iraq's intent to launch a nuclear weapon at Israel was insufficient to constitute an imminent armed attack because it could not happen for twelve to eighteen months, how much less imminent is an attack against the United States that has not been threatened at all?¹³³

Second, although some select state actions and declarations following 9/11 endorse preemptive self-defense,¹³⁴ they do not amount to customary international law. The only event on a big enough scale which the United States could argue established a new norm of preemptive self-defense is the Iraq War. However, due to the divisive and limited nature of that war, it fails to establish such a custom.

The coalition in support of the invasion of Iraq in 2003 consisted of forty-nine countries.¹³⁵ This figure accounted for nearly a fourth of the members of the United Nations and included influential states like the United Kingdom, Japan, and South Korea. As the United States portrayed the coalition: "The population of Coalition countries is approximately 1.23 billion people. Coalition countries have a combined GDP of approximately \$22 trillion. Every major race, religion, ethnicity in the world is represented. The Coalition includes nations from every continent on the globe."¹³⁶

Yet, while the membership of the coalition seems to have widespread and representative elements, it does not definitively establish state practice. Notably absent from the coalition are the

131. See *supra* notes 100–105 and accompanying text; Rothwell, *supra* note 100, at 343–44.

132. See Barrie, *supra* note 5.

133. See Rothwell, *supra* note 100, at 343–44.

134. *Supra* Sections II.B–C (presenting the Bush Doctrine, Russia's claim to a right of preemptive strikes, India's incorporation of preemptive self-defense into its military policy, and preemptive strikes by Israel and the United States as evidence of countries embracing preemptive self-defense).

135. *Who are the Current Coalition Members?*, WHITE HOUSE (Mar. 27, 2003), <https://georgewbush-whitehouse.archives.gov/infocus/iraq/news/20030327-10.html>.

136. *Id.*

remaining three members of the UN Security Council—namely, France, China, and Russia.¹³⁷ These countries, along with almost the entire Arab League, the African Union, Germany, Canada, Mexico, Brazil, and several others, opposed the invasion.¹³⁸ Consequently, if it can be said that there was widespread and representative support of the invasion, it can also be said that there was widespread and representative condemnation of the invasion.

Moreover, even if there were established state practice supporting the Iraq invasion, that support would not necessarily indicate state practice in support of preemptive force. In fact, according to Claus Kreß, “the ‘coalition of the willing’ did not rely on a claim of a broadened right of anticipatory self-defence in order to justify the lawfulness of the use of force in Iraq.”¹³⁹ Additionally, some members of the coalition have explicitly stated that the rights of self-defense do not extend to preemptive self-defense.¹⁴⁰

Drawing from these examples and others, it certainly seems the current state of international law does not accept the idea of preemptive self-defense even with the Iraq War coalition. In fact, even scholars who advocate for the possibility that the law is evolving toward such acceptance concede that “there is insufficient evidence to say with certainty” that the law currently accepts such

137. See *id.*

138. See *Arab States Line Up Behind Iraq*, BBC NEWS (Mar. 25, 2003, 04:09 AM), http://news.bbc.co.uk/2/hi/middle_east/2882851.stm; *Africans Back France on Iraq*, CNN (Feb. 21, 2003, 2:49 AM), <https://www.cnn.com/2003/WORLD/europe/02/20/africa.summit/index.html>; *France and Allies Rally Against War*, BBC NEWS (Mar. 5, 2003, 7:24 PM), http://news.bbc.co.uk/2/hi/middle_east/2821145.stm; Tim Harper, *Canadians Back Chrétien on War, Poll Finds*, TORONTO STAR (Mar. 22, 2003), <https://web.archive.org/web/20110706184537/http://25461.vws.magma.ca/admin/articles/torstar-24-03-2003c.html>; Maggie Farley & Richard Boudreaux, *Mexico's Envoy to U.N. Leaves, with Defiance*, L.A. TIMES (Nov. 22, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-nov-22-fg-zinser22-story.html>; *Brazil: Iraq, U.S. Guilty of 'Disrespect'*, NEWSMAX.COM (Mar. 20, 2003), <https://archive.ph/20120904171112/http://www.newsmax.com/archives/articles/2003/3/19/211836.shtml#selection-419.0-419.41>.

139. Claus Kreß, *The State Conduct Element*, in 1 THE CRIME OF AGGRESSION: A COMMENTARY 412, 475 (Claus Kreß & Stefan Barriga eds., 2017).

140. JOINT COMMITTEE ON HUMAN RIGHTS, THE GOVERNMENT'S POLICY ON THE USE OF DRONES FOR TARGETED KILLING, 2015-16, HL 141, HC 574, at 45 (UK), <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> (“[I]nternational law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive attack against a threat that is more remote.”).

a doctrine.¹⁴¹ Consequently, the Iraq War, though fought on a preemptive theory with a broad international coalition, cannot reliably establish state practice or *opinio juris* for preemptive force. So far, nothing else can, either.

Alternatively, given the uphill battle of arguing that there is a new international custom for preemptive self-defense, the United States may instead simply argue that nuclear weapons are inherently imminent threats, and therefore any action taken against them are anticipatory, not preemptive, acts of force.

As explained in Part I, nuclear weapons arguably create an imminent and existential threat to the United States. At any moment, a nuclear ICBM is less than an hour away from destroying a landmass the size of Texas, and there is almost nothing that could stop it once launched.¹⁴² By this description, it is difficult to imagine a scenario that is more appropriately described as “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁴³ Thus, the United States could argue that violating sovereignty to prevent nuclear attacks has always been consistent with the *Caroline* standard, and that such actions have not yet taken place simply because they were historically impossible. Now that technology has allowed for boost-phase attacks on nuclear ICBMs, self-defense permits the United States to employ UAV DMDP to prevent an imminent and cataclysmic attack.

But are ICBMs really imminent threats? Does a threat warrant preemptive self-defense if it is always imminent but rarely likely? Despite the theoretical appeal of the argument that nuclear weapons present imminent threats, the reality is the world has been faced with this exact scenario for over sixty years and no attack has ever taken place. Speculatively speaking, it seems unlikely that the international community would share the view that a threat which has been (more or less) effectively managed for the better part of a century is “instant and overwhelming.” Instead, given that countries and scholars alike view even the infringement upon territorial integrity as likely constituting an “armed attack” for the

141. Ashley S. Deeks, *Taming the Doctrine of Pre-Emption*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 661, 676 (Marc Weller ed., 2015).

142. *Supra* notes 12–24 and accompanying text; Mosher, *supra* note 15; Gillespie, *supra* note 17.

143. Webster, *supra* note 93, at 58.

purposes of the UN Charter,¹⁴⁴ sending in the weaponized UAV DMDP to hold constant positions above military targets will almost certainly be viewed as a preemptive self-defense move in response to a non-imminent threat. Just as the world condemned Israel's attack on Iraq in 1981 because the attack occurred twelve to eighteen months before a threat could materialize,¹⁴⁵ or how numerous countries condemned the invasion of Iraq in 2003 for prematurely responding to a potential nuclear threat,¹⁴⁶ the United States would likely be condemned for violating the sovereignty of other states with the UAV DMDP without an active nuclear threat by those states.¹⁴⁷

For the foregoing reasons, the United States has no persuasive argument that international custom approves of preemptive attacks or that UAV DMDP responds to an imminent threat.

CONCLUSION

Because UAV DMDP cannot be justified under any accepted definition of imminence, it constitutes preemptive self-defense. And because preemptive self-defense violates international sovereignty law, UAV DMDP necessarily trades notions of traditional sovereignty for notions of contingent sovereignty. Therefore, adoption of UAV DMDP moves the world closer to a paradigm of contingent sovereignty.

By unilaterally deciding into which countries and under what circumstances it will send armed aircraft, the United States rejects the idea that every state has the same sovereign right to control its airspace. Instead, it purports that American interests supersede the sovereignty rights of countries that do not live up to America's

144. RUYS, *supra* note 54, at 185–86; Randelzhofer, *supra* note 54, at 123.

145. Rothwell, *supra* note 99, at 343–44.

146. *Supra* notes 138–139 and accompanying text.

147. I certainly do not mean to trivialize the reality of nuclear threats; rather, I only acknowledge that in light of the historical pattern of condemnation of states who have responded too quickly to actual, demonstrable nuclear threats, it is unlikely that the United States would successfully justify self-defense actions against hypothetical nuclear threats. This acknowledgment still leaves open the possibility that sufficiently high tensions with reliable intelligence indicating a nuclear strike could justify self-defense to an “armed attack” before an actual threat was issued. However, this would be a novel scenario and is, at this point, largely conjecture. The likelier scenario by far is that action taken in “self-defense” based only on concerns of the possibility of a nuclear strike would be seen as premature and constitute an illegal preemptive strike.

expectations. Whether such an approach is right or wrong is up for debate, but the world will look considerably different if this program moves it closer to a theory of contingent sovereignty.

In a contingent sovereignty world, sovereign equality and territorial integrity would no longer be fundamental components of the international order.¹⁴⁸ Instead, the states of the world would be “haunted by the continuities of a differentiated and ambiguous sovereign status that is indexed to their imperial past.”¹⁴⁹ This system would result in “the sustained violation of territorial integrity performed by hovering drones, where the terrain underneath is subjected to an on-going *de facto* form of occupation.”¹⁵⁰ In this way, contingent sovereignty is dichotomous. On the one hand, there are strong states who maintain true sovereignty because they have the power to control their borders. On the other hand, there are weak states who have only contingent sovereignty because they can only control their territory when it suits the strong states.¹⁵¹ Such a system would be antithetical to the notion of sovereign equality among states and would greatly undermine the strength and purpose of the UN Charter.

In fact, scholars need not even speculate on the consequences of moving from sovereign equality to contingent sovereignty—the consequences have been spelled out already in one of western civilization’s oldest histories. In Thucydides’ *History of the Peloponnesian War*, the Melian dialogue depicts perfectly how diplomacy works in a contingent sovereignty world.¹⁵² According to Thucydides’ account, the Melian people sought to stay neutral in the Peloponnesian war and are visited by an Athenian envoy sent to discuss their intentions.¹⁵³ Upon arrival, the Athenians informed the Melians of their disinterest in arguments invoking justice or morality, asserting that what makes something “right” is “only in

148. See Sara Kendall, *Cartographies of the Present: ‘Contingent Sovereignty’ and Territorial Integrity*, NETH. Y.B. INT’L L. 84, 88 (2016).

149. Campbell A.O. Munro, *Mapping the Vertical Battlespace: Toward a Legal Cartography of Aerial Sovereignty*, 2 LONDON REV. INT’L L. 233, 260 (2014).

150. Kendall, *supra* note 148, at 89.

151. *Id.* at 90–91.

152. See THUCYDIDES, THE MELIAN DIALOGUE: HISTORY OF THE PELOPONNESIAN WAR (431 BC).

153. *Id.*

question between equals in power, while the strong do what they can and the weak suffer what they must.”¹⁵⁴

Since the siege of Melos depicted by Thucydides centuries ago, history has repeatedly reaffirmed the Melian Dialogue’s starkest lesson on power dynamics. Only since the founding of the United Nations have powerful states been effectively constrained in the pursuit of their self-interest by principles other than “might makes right.”¹⁵⁵ Abandoning now the principles of mutual security and sovereign equality would revert the world back to its days when self-determination belonged to the strong, while the “weak suffer[ed] what they must.”¹⁵⁶

In response to these projections, critics may argue that because the United States clearly designed UAV DMDP for nuclear ICBM defense and weak states do not have nuclear ICBMs, programs like UAV DMDP do not create a contingent sovereignty world because they will target only strong states, not weak states. However, even if programs like UAV DMDP were only used against strong states and its use against strong states was tempered by rival state power, it would still be a program undeniably designed to accomplish preemptive self-defense, and preemptive self-defense is irreconcilable with the current law of international sovereignty. Neither new treaties nor strategic targeting can rescue UAV DMDP from its preemptive purpose and sovereignty-eroding effects.

Despite these and other concerns that UAV DMDP may raise, the United States will still most likely implement it as planned. First, reports already project it will be “hitting the skies in [2021] and its laser weapon blasting [by 2022].”¹⁵⁷ Second, the United States has already dedicated tens of millions of dollars to the program, awarding contracts to General Atomics Electromagnetic Systems, Lockheed Martin Space Systems, and Boeing Defense Space & Security to help develop the technology necessary for UAV

154. *Id.*

155. *See, e.g.*, G.A. Res. 68/262 (Apr. 1, 2014). Even now, the UN does not always succeed at deterring powerful states from ignoring the sovereignty of weaker states, such as Russia’s recent annexation of Crimea. *See* Fred Dews, *NATO Secretary-General: Russia’s Annexation of Crimea is Illegal and Illegitimate*, BROOKINGS (Mar. 19, 2014), <https://www.brookings.edu/blog/brookings-now/2014/03/19/nato-secretary-general-russias-annexation-of-crimea-is-illegal-and-illegitimate/>.

156. THUCYDIDES, *supra* note 152.

157. Barrie, *supra* note 5.

DMDP.¹⁵⁸ Investments such as these convey a serious intent by the United States to develop and use the technology. Third, drone technology does not exclusively belong to the United States; in fact, nearly one hundred other countries currently have military drones.¹⁵⁹ If the United States decides not to pioneer the way forward with UAV DMDP, there is a good chance that it will be subjected to the will of another country that does.

Furthermore, judging from the United States' past actions in comparable situations like Libya in 1986, the National Security Strategy in 2002, the Iraq invasion in 2003, and the Unwilling or Unable Doctrine in 2014, it seems that U.S. security interests rarely lose to sovereignty status quo interests, even in the face of widespread criticism. Most recently, the United States reaffirmed its preference for security interests over sovereignty concerns by assassinating Iran's Major General Qassem Soleimani in January of 2020.¹⁶⁰ The United States killed General Soleimani via drone strike while the General was leaving the Baghdad airport in Iraq.¹⁶¹ By way of justification, U.S. Secretary of State Mike Pompeo said that Soleimani was an "imminent threat to American lives," implying the strike was covered by self-defense.¹⁶²

By so claiming, the United States seems to argue that "imminent threats" include the very existence of military persons who have

158. Andrew Wheeler, *Inside the U.S. Missile Agency's Quest for a UAV Laser Weapon to Take Out ICBMs*, ENGINEERING.COM (Sept. 18, 2018), <https://www.engineering.com/Hardware/ArticleID/17618/Inside-the-US-Missile-Agency's-Quest-for-a-UAV-Laser-Weapon-to-Take-Out-ICBMs.aspx>; see also Lockheed Martin's Missile Defense Laser Concept Continues Toward Development, LOCKHEED MARTIN (Oct. 30, 2018), <https://news.lockheedmartin.com/news-releases?item=128605>; Arun Mathew, *Boeing Awarded Contract for Low Power Laser Demonstrator (LPLD) Phase 1 Effort*, DEFPOST.COM (Dec. 10, 2017), <https://defpost.com/boeing-awarded-contract-low-power-laser-demonstrator-lpld-phase-1-effort/>; James LaPorta, *General Atomics Awarded \$8.8M Contract for Low Power Laser Demonstrator*, UNITED PRESS INT'L (Nov. 7, 2017, 1:58 PM), <https://www.upi.com/Defense-News/2017/11/07/General-Atoms-awarded-88M-contract-for-low-power-laser-demonstrator/8501510080357/>.

159. Ryan Pickrell, *Nearly 100 Countries Have Military Drones, and It's Changing the Way the World Prepares for War*, BUS. INSIDER (Sept. 27, 2019, 3:13 PM), <https://www.businessinsider.com/world-rethinks-war-as-nearly-100-countries-field-military-drones-2019-9?>.

160. Lyse Doucet, *Qasem Soleimani: US Kills Top Iranian General in Baghdad Air Strike*, BBC NEWS (Jan. 3, 2020), <https://www.bbc.com/news/world-middle-east-50979463>.

161. *Id.*

162. Sean Illing, *An Expert on Why the Soleimani Assassination Was Almost Certainly Illegal*, VOX (Jan. 3, 2020, 1:10 PM), <https://www.vox.com/2020/1/3/21048012/iran-general-killed-qasem-soleimani-legality>.

harm the United States in the past and will likely do so again.¹⁶³ In Soleimani's case, the United States believed he constituted such an "imminent threat" that self-defense principles could justify operating military aircraft in Iraqi sovereign airspace and launching lethal attacks without authorization.¹⁶⁴ The attack on Soleimani, along with the aforementioned examples, serves as weighty evidence that modern day self-defense calculations look less and less like the *Caroline* test and more like a single-question test of contingent sovereignty: are a powerful state's objectives more important than a weaker state's sovereign rights?

The problem of the UAV DMDP is a classic problem of liberty versus security. If the United States does not implement UAV DMDP, it denies itself the "holy grail" of missile defense systems; if it does, it takes a large step toward making international sovereignty conditional upon American discretion. The former option leaves the United States vulnerable to a nuclear catastrophe; the latter undermines one of the foundational doctrines of the modern international regime. In all likelihood, the United States will implement UAV DMDP and lead the world on a steady march toward contingent sovereignty.

163. An instance such as this potentially could be justified by a theory of interceptive self-defense, but decidedly not by traditional self-defense analysis according to the *Caroline* test. For a discussion on interceptive self-defense, see YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (6th ed. 2017).

164. Doucet, *supra* note 160.