CORRESPONDENCE

TO THE EDITORS IN CHIEF:

In their masterful centennial essay, *The Past and Future of the Claim of Preemptive Self-Defense* (100 AJIL 525 (2006)), Michael Reisman and Andrea Armstrong observe that the claim of preemptive self-defense, particularly if applied unilaterally, poses a challenge to the international legal order. It may be instructive to note what Nuremberg judges had to say on that subject sixty years ago. The judgment of the International Military Tribunal of September 30, 1946, declared:

> It was further argued that Germany alone could decide . . . whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But, whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.
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> It was contended for the defendants that the attack upon the U.S.S.R. was justified because the Soviet Union was contemplating an attack upon Germany and making preparations to that end. It is impossible to believe that this view was ever honestly entertained.
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> . . . It was plain aggression.

The IMT judgment was reinforced in the dozen subsequent trials at Nuremberg headed by General Telford Taylor, who later became a professor at Columbia Law School. In the *Einsatzgruppen* trial, after careful consideration of the contention that it was necessary to defend Germany against a presumed attack by the Soviet Union, the three U.S. judges rejected the arguments of putative self-defense against Jews advanced by the defendants on the grounds that Jews were "known" to be sympathetic to Bolsheviks and had to be totally exterminated.

Justice Robert M. Jackson, chief architect of the Nuremberg trials and chief prosecutor for the United States before the International Military Tribunal, considered the condemnation of aggressive war as the greatest achievement of his life. Telford Taylor felt the same way. "We must never forget," said Jackson in his opening statement on November 21, 1945, "that the record on which we judge these defendants today is the record on which history will judge us tomorrow."

The *Journal* essay quotes the *National Security Strategy of the United States* announced by the White House in September 2002, which states: "[W]e will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists . . . " (100 AJIL at 530). A claim of legal entitlement by one nation to exercise preemptive self-defense, as your authors note, may encourage others to assert the same right. The world legal order is teetering on the brink of an abyss. International lawyers should try harder to define not merely terrorism, but also aggression and the proper functioning of the Security Council as envisaged by the UN Charter. It might reassure others if the United States would end its campaign against the new permanent International Criminal Court in The Hague, which is based on the Nuremberg principles and the search for a more humane and peaceful world under law.

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